Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 3449/17

BEFORE:	R. Nairn: Vice-Chair
HEARING:	October 31, 2017 at London Oral
DATE OF DECISION:	December 21, 2017
NEUTRAL CITATION:	2017 ONWSIAT 3977
DECISIONS UNDER APPEAL:	WSIB ARO decisions dated September 30, 2013 and December 16, 2015

APPEARANCES:

For the worker:	S. Emeny, Paralegal
For the employer:	N. R., Company Personnel
Interpreter:	Not applicable

REASONS

(i) Introduction

[1] At the time of the accident under consideration here, the worker was employed as a sales associate in the accident employer's retail store. Born in 1959, the worker started with the employer in approximately 2004.

[2] On February 27, 2009 the worker injured his left knee when he fell while working on a store display. He was taken by ambulance to a nearby hospital for medical treatment. The Health Professional's Report (Form 8) of March 3, 2009 (completed by family physician Dr. J. Hostetler) provided a diagnosis of "L knee strain-possible meniscal ligament tear".

[3] As noted in Memo #2 of March 5, 2009 the WSIB (the "Board") recognized the worker's left knee injury as compensable and he was granted Loss of Earnings ("LOE") benefits.

[4] In Memo #33 of July 24, 2009 the Board agreed to expand entitlement in this claim to include the worker's right foot. In that memo the Board adjudicator noted that "since [the worker] is compensating with his right foot for his left knee injury, it appears that entitlement to the foot is in order as a second area of injury". The adjudicator concluded that "funding of the orthotics on a one time only basis appears to be in order, noting that this will assist the worker in remaining at work".

[5] On March 10, 2010 the worker had surgery performed on his left knee by Dr. R. Litchfield. The post-operative diagnosis was "previous ACL tear with healing to PCL, posterior horn medial meniscal tear, posterior horn lateral meniscal tear". Dr. Litchfield performed a "left knee arthroscopy, arthroscopic partial medial meniscectomy, partial lateral meniscectomy". The surgery was recognized as part of the worker's entitlement in this claim. In his operative report Dr. Litchfield had noted that the worker "sustained an injury to his left knee. Unfortunately, this has been complicated by chronic regional pain syndrome". As indicated in the decision on appeal, the Board accepted the diagnosis of Chronic Regional Pain Syndrome ("CRPS") as compensable.

[6] In June 2011 the worker was granted an 18% Non-Economic Loss ("NEL") award for his compensable left knee condition diagnosed as "knee torn ACL, medial and lateral menisci, CRPS". The 18% award was reduced to 16% after taking into account a prior 11% NEL award granted for a right shoulder impairment under another claim.

[7] Subsequently, the worker began to experience pain and discomfort in other areas of his body and specifically his low back, left hip, right foot and right leg. He asked that the Board recognize that these secondary conditions were related to his compensable injuries however, in a decision dated June 19, 2012 a Case Manager denied that request noting that "There is no medical diagnosis to accept entitlement for the worker's low back, hip and right leg complaints. The medical documentation indicates the worker has "pain" and no clear diagnosis [is] identified".

[8] The worker also requested that the Board grant him entitlement for a psychotraumatic condition i.e. depression which he claimed was related to his compensable accident and its sequelae. In Memo #146 of December 5, 2012 a Case Manager considered this issue but denied entitlement noting that "the accident history was not traumatic nor was the medical treatment/recovery. Worker did develop CRPS, and pain is a component of this diagnosis and

has received a NEL". The Case Manager later issued a decision dated December 11, 2012 confirming that the worker had no psychotraumatic entitlement under this claim.

[9] In the interim, the worker had returned to work with the accident employer performing accommodated duties on a part time basis. On November 28, 2012 he claimed to have suffered a recurrence/deterioration in his compensable injuries requiring him to lay off work. He asked for full LOE benefits subsequent to November 28, 2012 as well as a NEL redetermination of his left knee condition. In a decision dated February 1, 2013, a Case Manager denied the worker's request and concluded:

> [The worker] has claimed a recurrence on November 28, 2012. The Emergency Room Report notes that the worker did have back pain, left leg pain with the diagnosis of radiculopathy. There are no objective findings that supported that the worker was not capable of continuing with the modified work with the accident employer. The employer has been accommodating him regarding the hours he works, four shifts six hours each per week, and has the ability to sit/stand as needed.
>
> Full loss of earnings (LOE) benefits has not been accepted noting the suitable modified work.
>
> [The worker] continues to receive the partial loss of earnings as outlined in the letter of Dec 13, 2012.
>
> In your letter of January 22, 2013, you requested that a NEL re-assessment be considered noting this worker has continued to deteriorate, also requesting that a return to work specialist review [the worker's] position. Please be advised that the medical documentation does not support a significant deterioration, it is noted in particular that the pain complaints has been accepted in the diagnosis of the complex regional pain syndrome in which he is in receipt of a 14 per cent NEL award.

[10] In the decision of December 11, 2012 the Case Manager had concluded that the worker would be entitled to partial LOE benefits calculated on his ability to work 24 hours a week i.e. six hours a day for four days.

[11] The worker disagreed with a number of the decisions made by the Board's operating level including the decision to deny entitlement to the low back, left hip, right leg and CRPS beyond the left leg as secondary conditions. The worker objected to the Board's refusal to recognize that he had a permanent impairment of these areas as well as his right foot. The worker also objected to the denial of entitlement to a NEL redetermination for his left knee and objected to the conclusion that he was not entitled to full LOE benefits beyond November 28, 2012 as the modified duties offered by the accident employer remained suitable. These issues were eventually referred to an Appeals Resolution Officer ("ARO") and in a decision dated September 30, 2013 the ARO granted the worker's appeal in part.

[12] The ARO granted the worker entitlement to a psychotraumatic condition i.e. major depressive disorder and adjustment disorder. The ARO returned the issue of the level and duration of benefits flowing from that conclusion to the operating area for further adjudication.

[13] The ARO also granted the worker entitlement to full LOE benefits from November 28, 2012 to January 16, 2013 concluding that "the temporary exacerbation suffered on November 28, 2012 resolved by the time the worker was reassessed by Dr. Hostetler on January 16, 2013". The ARO concluded however, that the worker was not entitled to full LOE benefits after that date accepting "that the modified work and average of 24 hours per week remained suitable for the worker's compensable left leg injuries suffered in this claim".

[14] The ARO denied the worker's request for secondary entitlement to the low back, left hip and right leg concluding:

> However, as is noted by the Case Manager throughout the claim file, there have been no formal diagnoses given to any of these three areas for a determination on compatibility to be made. While the medical reports make references to the worker's pain complaints affecting the back, hip and right leg, the ongoing, consistent diagnosis throughout the claim file continues to be chronic regional pain syndrome affecting the left leg. I note that it is common for this condition to cause referral pain to other areas of the body, which is consistent with the worker's complaints however the area of injury and diagnosed condition continues to remain limited to the left knee/leg.
>
> As such, I find that there is no evidence upon which to grant secondary entitlement to the low back, left hip or right leg in this claim. The appeal on this issue is denied.

[15] The ARO denied the worker entitlement for a NEL assessment for his right foot concluding:

> As was noted earlier in this decision, entitlement was initially granted to the right foot in July 2009 as a secondary condition related to over use of the right foot to compensate for the left knee injury.
>
> (...)
>
> Noting that the original condition affecting the big toe appears to have resolved, there is no basis to support entitlement to a permanent impairment assessment for the right foot.

[16] The ARO concluded that the worker did not have entitlement for a NEL assessment for CRPS and concluded:

> The worker representative has requested that entitlement to CRPS be extended to include "all parts of the body affected" by the condition. However, as has already been noted, there is no entitlement to secondary areas of injury in this claim. The CRPS affecting the left knee has been included in the NEL rating of 18 percent already granted in this claim. This diagnosis has remained consistent throughout the file. As such, there is no basis to include further assessments for CRPS.

[17] The ARO denied the worker entitlement to a NEL redetermination for his left knee condition concluding that there was "no objective evidence of a permanent and significant worsening of the compensable left knee condition to warrant entitlement to a NEL redetermination at this time".

[18] In June 2014 the worker was granted a 15% NEL award for his psychotraumatic condition diagnosed as "major depressive disorder & adjustment disorder". The "combination" of this award with the previous awards left him with a NEL award under this claim of 27%.

[19] In approximately April 2014 the worker requested assistance from the Board in purchasing a scooter to assist in his ambulation. He also requested funding for trigger point injections, especially to his right foot. In a decision dated April 28, 2014 a Board Nurse Consultant denied the worker's request concluding:

> Policy guideline 17-06-03 and 17-06-02 of the *Workplace Safety and Insurance Act* Workers indicates scooters can be considered if a worker is severely impaired. Injured workers are considered severely impaired if their disabilities/impairments are
>
> - permanent and have been rated for either permanent disability (PD) benefits totaling at least 100%, or non-economic loss (NEL) benefits totaling at least 60%

Decision:

I am unable to approve funding for Scooter as it does not fit within the criteria guidelines for severely impaired of at least 60% Non-Economic Loss (NEL) award.

As there is no entitlement for the right foot, there is no funding for the trigger point injections.

[20] The worker objected to the decision of the Nurse Consultant and these issues were eventually referred to another ARO. In a decision dated December 16, 2015 the ARO granted the worker's appeal in part. The ARO denied the worker entitlement for the scooter concluding:

(...)

Though I acknowledge the worker's mobility is increased with the use of a scooter; in order to consider entitlement that a scooter must do more than enhance or improve lifestyle. It must also be necessary as a result of the compensable injury. The worker's primary barrier to mobility is pain associated with the diagnosis of CRPS; however, the worker's non compensable issues may also be contributing to his pain and reduced mobility. I find no evidence of the worker having instability in the compensable left knee. The worker is able to ambulate safely with crutches based on the most recent occupational therapist's report from October 25, 2013. Since this date, there has been no medical report provided by an occupational therapist, physiotherapist or physician which provides details of the worker's current functional abilities.

[21] With respect to the issue of trigger point injections, the ARO concluded that the worker was entitled to trigger point injections in the left leg and left hip, but not the right foot. The ARO concluded:

It appears from the above reports that the worker has been primarily receiving trigger point injections in the left leg which has been of benefit to him. These injections are allowable as they are related to the worker's compensable left leg injury and CRPS. I find insufficient evidence that the injections provided for the right foot pain are related to the worker's compensable CRPS rather than the diagnosed hallux limitus and hammer toe problems. For this reason, trigger point injections.to the right foot are denied. The ongoing need for trigger point injections for the left leg and hip will be left to the determination of the Operating Area.

(ii) Issues on appeal

[22] The issues to be determined in this case are:

1. Whether the worker's entitlement in this claim ought to be expanded to include his low back, left hip, right leg and/or CRPS;

2. Whether the worker has permanent impairments of his low back, left hip, right leg, right foot and/or CRPS;

3. Whether the worker is entitled to a redetermination of the 18% NEL award granted for his left knee condition;

4. Whether the worker is entitled to full LOE benefits beyond January 16, 2013;

5. Whether the worker ought to be granted reimbursement of the costs associated with purchasing a scooter and;

6. Whether the worker is entitled to trigger point injections in his right foot.

[23] In her submissions, Ms. Emeny indicated that her primary position was that the worker's entitlement ought to be expanded to include CRPS covering the symptoms in his low back, left hip, right leg and foot. She took the position that the worker ought to be granted full LOE benefits from January 16, 2013 because the modified duties were no longer suitable given the nature of the symptoms he was experiencing.

(iii) The worker's testimony

[24] Under questioning from his representative the worker testified that at the time of the compensable accident, he had been with the accident employer for about 10 years. He was working as a sales associate in their men's clothing store. His regular duties involved selling clothing to customers, assisting with shipping and receiving and setting up displays.

[25] The worker described the mechanics of the accident on February 27, 2009 and indicated that he injured his left knee when he slipped off a table that he had been standing on to work on a display. He was taken by ambulance to a nearby hospital where further testing was conducted. He was released from the hospital the same day after undergoing x-rays and a CT scan. A removable cast was placed on his left knee.

[26] Later, the worker went to see his family doctor, Dr. Hostetler, who made arrangements for him to see an orthopaedic surgeon, Dr. Litchfield. The worker was also referred to Dr. Watson at a pain clinic.

[27] The worker testified that Dr. Litchfield decided to delay the worker's left knee surgery until March 2010 in order to give the worker an opportunity to reduce the level of pain he was experiencing. He testified that Dr. Watson diagnosed him with CRPS. He has continued to receive treatments from Dr. Watson ever since which includes Lidocaine infusions and trigger point injections.

[28] The worker confirmed that Dr. Litchfield operated on his left knee on March 10, 2010. He testified that his level of pain increased after that surgery and has never been the same since. He was provided with some opioid medication to help deal with his pain but it never seemed to have much of an effect.

[29] Following his compensable accident the worker never returned to his pre-accident duties. He was given modified work by the accident employer at reduced hours. Initially, he worked three hours a day and he was eventually able to increase his work day to about five hours. He did not perform any of the heavier work of his pre-accident job such as setting up displays or helping with shipping and receiving. He still had to stand through much of his work day however, as he would assist customers who were purchasing clothing. When possible, he would either lean up against tables or sit in a chair. The worker testified that even the walk from the parking lot into the mall where the store was located was difficult as he would have to rest two or three times both entering and leaving the workplace.

[30] The worker testified that he was able to perform these modified duties, with difficulty, up until November 27, 2012. There were frequently days however, when he would get home and be in so much pain that his wife would have to help him undress. He testified that there was no particular incident that occurred on November 27, 2012 but his pain increased to the point that his wife suggested he go to the hospital, rather than to work.

[31] The worker testified that not long after he started performing the modified duties, he began to experience pain in the left side of his low back and left hip as well as his right leg and right foot. He related the right foot pain to placing more weight on that area because of his left-sided problems. He attributed his low back and left hip problems to the alteration of his gait. His family physician, Dr. Hostetler, had indicated that his additional problems were "due to the way you walk".

[32] The worker was initially provided with opiate medication after November 27, 2012 but he stopped taking it not long after because it was affecting his personality and this led to difficulties in his marriage. He continues to experience pain in his left hip, low back, left knee and right foot. It has been explained to him that these symptoms are the result of CRPS.

[33] The pain and discomfort which the worker experiences have left him requiring the use of crutches, a shower chair, commode and grab bars in his shower. His wife is always close by when he bathes or showers. He was also given a scooter by a friend because of the difficulty he was having getting around. The worker testified that his use of the scooter has increased and if he did not have it, it would be very difficult for him to leave his home. With his crutches, he would be able to walk no more than 50 or 75 metres. He and his wife had to sell their three story home and move into a single level dwelling because of his difficulties with ambulation. Stairs were particularly problematic.

[34] The worker testified that he has college training as a PSW and had previously worked in that field. He had to stop however, when he sustained a right shoulder injury. Before that, he had worked as a caretaker. The worker has not looked for work since November 2012 and does not believe he would be capable of any type of employment. He sleeps very poorly due to his ongoing pain and discomfort and the difficulty in finding a comfortable position. He continues to take medication for his depression. He is limited to 10 minutes of standing. His wife performs most of the heavy chores around the home. He is no longer able to partake in his pre-accident hobbies of biking, canoeing or running. He has also had to adjust to the way he interacts with his grandchildren. His injuries have affected his relationship with his wife.

(iv) Analysis

[35] Since this worker was injured in 2009, the applicable legislation is the *Workplace Safety and Insurance Act, 1997* (the "WSIA").

(a) Entitlement for the low back/left hip/right leg/CRPS and right foot

[36] Pursuant to section 126 of the WSIA the Tribunal is required to apply applicable Board policy. In this case the Board has notified the Tribunal that one of the policies that applies to this appeal is *Operational Policy Manual* Document No. 15-05-01 entitled "Resulting From Work-Related Disability/Impairment". This policy provides that "workers sustaining secondary conditions that are causally linked to the work-related injury will derive benefits to compensate for the further aggravation of the work-related impairment or for new injuries".

[37] In this case the Board has accepted that the worker injured his left knee in the compensable accident of 2009 and it has also been accepted that he went on to develop CRPS in relation to those injuries. The Board has also recognized that the worker has a permanent impairment resulting from both his torn ACL, medial and lateral menisci as well as the CRPS.

[38] In his testimony at this hearing the worker indicated that following his left knee injury he went on to develop symptoms of pain and discomfort in his left low back, left hip, right leg and right foot. The ARO denied the worker entitlement for these secondary conditions noting that there had been "no formal diagnoses given to any of these three areas". The ARO was of the view that the only "consistent diagnosis throughout the claim file" was that of CRPS affecting the left leg. Having had the opportunity to consider all the evidence before me however, I find that I am led to a different conclusion. My review of the evidence satisfies me that the symptoms the worker is experiencing in his low back, left hip, right leg and right foot are, more likely than not, consistent with the diagnosis of CRPS, the same condition which the Board has acknowledged was present in the worker's left leg. Reviewing all of the evidence before me, I find, on a balance of probabilities, that the worker's compensable accident made a significant contribution to the development of CRPS in his low back, left hip, right leg and right foot. In reaching that conclusion, I have taken particular note of the following:

- There is no evidence of substance before me suggesting that the worker had any problems with his low back, left hip or right leg prior to the compensable accident.
- In a report dated January 5, 2012, Dr. J. Watson (anesthesiology and perioperative medicine) indicated in part:

  > As you are aware, (the worker) suffered an injury to his left leg, and as a result developed complex regional pain syndrome. He has been working diligently with physiotherapy, home therapy and has been on a graduated return to work, now up to about six hours per day. In other words, he is trying hard. Unfortunately (the worker) has developed further complications secondary to his left leg complaint, namely low back and hip pain as well as pain in his right leg. These are typical sequelae of the sort of injury that he has suffered and the fact that he has developed Complex Regional Pain Syndrome secondary to his injury. The alteration in gait, as a result of the left leg injury, is responsible for his low back and hip problems. The fact that he has been forced to use his right leg to compensate for his left along with the altered gait has led to the problems with his right leg and ankle. In other words, his left leg is not a separate entity from the rest of his body.
  >
  > (...)

- In a report dated May 7, 2012, Dr. Hostetler noted that the worker "Continues to be quite disabled with chronic left leg pain. He walks with a cane, but his gait is quite abnormal and puts a lot of strain on his right leg & foot".
- In a Physiotherapist's Treatment Extension Request form of March 9, 2012 the worker's physiotherapist provided a "working diagnosis" of "L knee injury→Complex Regional Pain Syndrome→gait disfunction→R leg/foot/back pain".
- In a report dated April 17, 2012 Dr. Hostetler noted that the worker "is suffering a flare up of Reflex Sympathetic Dystrophy (Complex Regional Pain Syndrome)".
- In a report dated August 15, 2012 Dr. Hostetler noted:

  > I am in receipt of several letters stating that "the worker's" file does not list an actual medical diagnosis for his leg pain. I fail to understand the confusion here as his chart repeatedly lists his diagnosis as Complex Regional Pain Syndrome. This is an accepted medical diagnosis & agreed upon by all doctors involved in his case. Contrary to what your letters state, this is not the same as simply saying he has "pain". Perhaps you know it under its older name of Reflex Sympathetic Dystrophy. In any case let me make it clear that the diagnosis for his ongoing knee pain, which also explains his pain in his thigh & feet is Complex Regional Pain Syndrome. The ICD-9 code is 337.22.

- In a report dated August 31, 2012, an occupational therapist noted that the worker "Is a 53 year old man who sustained an injury to his left knee and has since developed Chronic Regional Pain Syndrome with symptoms in his entire left leg and now the right foot".
- In a report dated September 26, 2012, Dr. J. Rau (pain clinic) indicated in part:

  (...)

  He now reports that he has left lower back pain that radiates to his left leg, left hip pain with decreased range of motion and localized pain to the lateral femoral tubercia. He also reports having right foot pain, especially in his toes and new symptoms that he reports started several weeks after his last appointment of pain in his right great toe, which radiates to the dorsal aspect of his right mid-shin.

  (...)

  Impression: (The worker) has Regional Complex Pain Syndrome involving his left leg. He has a new symptom of right big toe pain. He also has decreased sensation in the left large toe. He continues to have difficulty with WSIB.

- In a Physiotherapy Assessment Report of September 27, 2012 the worker's physiotherapist provided a history of injury of "original injury to L knee→Complex Regional Pain Syndrome→change in gait pattern→R calf/foot/lumbar pain".
- In a report dated October 23, 2013 Dr. Watson indicated in part:

  (...)

  He continues to struggle with the results of CRPS on his left leg. He continues to use two canes for walking and continues to have discomfort in his right foot. Overall, his pain has remained stable. He continues to find 3-4 weeks of benefit from local anesthetic infusion and definitely states he gets benefits from the trigger point injections that I do in his thigh at doctor's and his iliotibial band.

  (The worker) as usual remains quite frustrated at WSIB. They will not recognize that his altered gait has caused him to have low back pain and increased pain in his right foot because there is not a definite diagnosis provided. They refuse to recognize sequelae of injury at sites away from the site of injury. I also noted in reading through the report by the adjudicator that they were using information from my records very selectively. I suspect they may be doing that from other physicians' information as well.

- In a report dated March 13, 2017 Dr. Hostetler indicated:

  [The worker] is diagnosed with complex regional pain syndrome. This originated from a left knee injury. His symptoms were primarily in the left leg originally, with widespread pain and tenderness in his knee, hip & thigh, as well as weakness and muscle wasting in the left leg. The pain and weakness in his left leg causes him to have a significantly abnormal gait, which is apparent to anyone observing him walking. He requires forearm crutches to ambulate and walks with a significant limp. When standing or walking he puts a lot of his weight on the lateral edge of his right foot. This has caused him to develop right forefoot pain. I have been treating this aspect of his pain with periodic trigger point injections in the right foot and first toe. He receives definitely benefit from these injections with pain relief which also allows him to walk more normally. This pain in his right foot is secondary to his altered gait from his left leg injury. I should also note that he has other symptoms arising from the original injury which are occurring in anatomic locations different from the left leg-in addition to his right foot pain he also has significant pain in his low back and hips, which is secondary to his dysfunctional gait.

- Addendum #6 includes a copy of an article entitled "Complex Regional Pain Syndrome" authored by Dr. J. Payne (May 5, 2016) from www.patient.info/health/compex-regional-pain-syndrome-leaflet. In that article, Dr. Payne notes that "the pain and other symptoms often spread up the arm or leg from the site of the original injury. The symptoms may suddenly affect the opposite limb". Similarly, the worker's representative has provided an article from www.mayoclinic.org entitled "Complex Regional Pain Syndrome" which notes that "Complex Regional Pain Syndrome occasionally may spread from its source to elsewhere in your body, such as the opposite limb. The pain may be worsened by emotional stress".
- The Board's decision to deny the worker entitlement for his secondary conditions appears to have been made without the benefit of an internal medical opinion.

[39] For the reasons noted above, I find, after reviewing all of the evidence before me (and in particular the medical opinions provided by the worker's treating healthcare practitioners) that the symptoms of pain and discomfort which the worker is experiencing in his low back, left hip, right leg and right foot can be causally related to the compensable injury recognized in this claim. My review of the evidence satisfies me that the symptoms the worker is experiencing in these areas are, more likely than not, symptoms of CRPS, a diagnosis which the Board has already accepted in regard to the worker's left lower limb.

[40] Given the worker's testimony about his continuing symptoms and his ongoing treatments some six years after the compensable accident, I am satisfied that the CRPS in the low back, left hip, right leg and right foot are permanent and the worker is entitled to be assessed for a NEL award.

(b) NEL redetermination for the left knee

[41] OPM Document No. 18-05-09 entitled "Redeterminations" provides in part:

> **Policy**
>
> The WSIB may consider a worker's request for a redetermination of his/her existing non-economic loss (NEL) benefit provided that
>
> - the worker's degree of permanent impairment was previously determined to be **greater than zero**
> - the worker's condition has deteriorated significantly since the last NEL determination, and
> - 12 months have passed since the worker's last NEL decision.

[42] Given that the worker was granted an 18% NEL award (reduced to 16%) for his left knee condition and that more than 12 months have passed since the last NEL decision, the issue to be addressed in deciding whether the worker is entitled to a NEL redetermination is whether his condition has "deteriorated significantly" since the last NEL assessment. OPM Document No. 18-05-09 defines a "significant deterioration" as a "marked degree of deterioration in the work-related impairment that is demonstrated by a measurable change in objective clinical findings".

[43] While the worker testified that he believed his condition has deteriorated over the years, I was not referred to medical reporting which documented objective clinical findings that would support there had been a measurable change in the condition of the worker's left knee since it was assessed for NEL purposes in 2011. In a recent report of July 26, 2017 Dr. Watson noted

that "really nothing has changed with him. He continues to find the Lidocaine infusions very important to allow him to carry on with activities of daily living and keep his pain under reasonable control". In a report of May 3, 2017 Dr. Watson had noted that the worker "has a number of chronic sites of pain the worst and most prominent being his left leg and low back with some pain into his right foot. [The worker] continues to find these Lidocaine infusions provide him with an improvement in his ability to ambulate and do some things around the house for about eight to ten weeks".

[44] In 2011 the Board recognized that the worker had a permanent impairment with respect to his left knee and his CRPS. While the evidence establishes that the worker has continued to experience pain in his left knee which limits his ability to ambulate, I am unable to conclude that the evidence before me establishes that there has been a "significant deterioration" in the worker's condition as required by Board policy. As such, the worker's request for a NEL redetermination must be denied.

[45] That being said however, it remains open to the worker, at some point in the future, to ask that the Board re-determine the quantum of his NEL award if he is able to provide them with evidence of a significant deterioration.

(c) Suitability of modified work and LOE benefits beyond January 16, 2013

[46] Pursuant to section 43(1) of the WSIA, a worker who has a loss of earnings "as a result of" his or her compensable injuries is entitled to receive LOE benefits beginning when the loss of earnings begins and continuing, among other things, until the loss of earnings ceases.

[47] In this case, the Board decided that the worker was entitled only to partial LOE benefits beyond January 16, 2013 being of the view that he remained capable of working 24 hours a week in the modified duties offered by the accident employer. Put another way, the ARO was of the view that the loss of earnings the worker experienced beyond January 16, 2013 was due, in part, to his decision to retire and to refuse the modified work offered. Having had the opportunity to consider all of the evidence before me however, I find that I am led to a different conclusion. My review of the evidence satisfies me that as of January 16, 2013 the worker ought to have been considered essentially incapable of employment or of earning any income from suitably modified work as a result of his compensable injuries. In reaching that conclusion, I have taken particular note of the following:

- At the time the ARO made the decision that the worker was capable of continuing to work 24 hours a week with the accident employer, the only area of recognized entitlement was that in his left knee. As noted earlier in this decision, I have now expanded the worker's entitlement to include CRPS with symptoms in his low back, left hip, right leg and right foot.
- The Board has also now recognized that the worker has a compensable psychotraumatic condition under this claim and he was granted a 15% NEL award for this compensable major depressive disorder and adjustment disorder.
- In a report dated September 3, 2014, Dr. N. Reist (psychologist) indicated in part:

  > Despite making these gains however, [the worker's] symptoms continued to meet DSM-IV diagnostic criteria for Major Depressive Disorder, Single Episode, Moderate, Chronic, Panic Disorder In Partial Remission, and Adjustment Disorder With Anxious Mood. Furthermore, he continued to experience severe and persistent pain that significantly

> impaired his functional status and psychological state. As such, it remains my opinion that [the worker's] pain difficulties and psychological symptoms remain both Severe and prolonged and, as such, have attained Maximal Medical Recovery. Moreover, as noted in my previous report, [the worker's] pain and psychological difficulties continue to severely impact his mobility and his ADL's, Impair his sleep, memory, concentration, and persistence with tasks, prevent him from performing tasks and errands on a consistent basis, impact his relationships and limit-his social and leisure pursuits, and impair his stress tolerance skills. Consequently, [the worker] is permanently incapable of working in any substantially gainful occupation from a psychological and pain status.

- In a report dated January 13, 2015 Dr. Hostetler noted that the worker "is disabled due to Complex Regional Pain Syndrome left leg".
- In a report dated May 3, 2017 Dr. Hostetler advised:

> Overall, [the worker's] pain reporting and illness behaviour scores do not really change very much from visit to visit. He still shows evidence of significant interference with most general activity, relations with other people, sleep, enjoyment of life etc. as he has reported in the past.

- As the ARO noted in the decision on appeal, the worker has been granted CPP disability benefits reflecting his inability to maintain employment.

[48] In this case, the worker has been left with compensable injuries that affect not only his back but both legs. He requires the use of crutches and/or a scooter to get around. He and his wife had to sell their home and move into an apartment because of his physical limitations. In his uncontradicted testimony the worker described how his compensable injuries have affected his activities of daily living. He now requires the assistance of his wife in many of these activities including bathing and showering. In his uncontradicted testimony the worker also described the modified duties offered to him by the accident employer. While it is accepted that the worker was not required to perform some of the heavier aspects of his pre-injury job (i.e. shipping and receiving and display work) it remained apparent that the essence of his job involved assisting customers with clothing purchases. This was not a job which could be performed properly from a seated position. To his credit, the worker attempted to continue performing these modified duties at reduced hours but as he noted in his testimony, he was frequently in pain and by the time he got home at the end of his shift, he frequently required assistance undressing. In my view, the effects of the worker's compensable CRPS (affecting his low back and both lower limbs) along with his compensable major depression, rendered the position of a sales associate unsuitable. In fact, given the widespread nature of his symptoms, the worker ought to have been considered essentially incapable of employment beyond January 16, 2013 and entitled to full LOE benefits pursuant to section 43 of the WSIA subject to further statutory reviews.

(d) Entitlement for a scooter

[49] OPM Document No. 17-01-02 (October 2004) entitled "Entitlement to Health Care" provides that "a worker entitled to benefits under the insurance plan is entitled to such health care as may be necessary, appropriate and sufficient as a result of the injury". The policy document suggests that "health care" includes "modification to a person's home and vehicle and other measures to facilitate independent living which are appropriate in the WSIB's opinion".

[50] In the decision on appeal, the ARO decided that the worker was not entitled to reimbursement for a scooter because there was "no evidence of the worker having instability in the compensable left knee which would require the use of such a device". The ARO also noted

that "the worker's primary barrier to mobility is pain associated with the diagnosis of CRPS; however, the worker's non-compensable right issues may also be contributing to his pain and reduced mobility". As indicated earlier in this decision however, I have now decided that the worker has a permanent impairment with respect to CRPS with symptoms in his low back and both legs.

[51] Reviewing Board policy, I find that the relevant analysis in this type of issue is whether a scooter would facilitate the worker's independent living.

[52] In his testimony at this hearing the worker indicated that without his scooter, he would seldom be able to leave the home. He is now required to use bilateral forearm crutches when a scooter is not available. He is unable to walk more than 50 or 75 metres without having to rest. With his scooter, he is now able to accompany his wife on trips outside the home and also take his dog for walks. Being able to get outside improves his overall emotional state.

[53] In addition to the worker's testimony with regards to the benefit of a scooter, the worker's treating healthcare practitioners have also been supportive. For example, in a report dated April 3, 2014 Dr. Hostetler noted:

> [The worker] is applying for coverage for an electric scooter. His leg disability requires him to walk with crutches. He tires out and his pain increases when he walks any distance. This severely impacts his ability to live a normal life. For example he is unable to go shopping or go for walks with his wife and instead will just sit in the car. I would suggest that he get a scooter to improve his quality of life.

[54] Dr. Hostetler reiterated the fact that the worker "requires power scooter for medical reasons" in his report of September 4, 2014.

[55] OPM Document No. 17-06-03 entitled "Independent Living Devices" provides that "severely impaired workers" may be entitled to reimbursement for devices that assist, among other things, in helping to restore a worker's ability to be mobile. OPM Document No. 17-06-02 defines a severely impaired worker to be one with PD awards totaling 100% or NEL awards totaling 60%. While it is clear that this worker does not meet the policy definition of a severely impaired worker (a fact noted by the ARO in the decision on appeal) I am satisfied that the facts of this case are sufficiently exceptional to warrant a departure from the Board policy. In my view, the facts of the case are similar to those before the Vice-Chair in *Decision No. 2384/05* who noted:

> While the worker's NEL award is not at the 60% level, in my view, the medical reporting from all of the worker's physicians supports the need for a motorized scooter in order to improve the worker's mobility, which is one of the accepted goals to qualify for independent living devices listed in the Board's policy. Based on the real merits and justice of this case, I find that the worker is entitled to a motorized scooter. The Board must pre-approve the type of scooter and the purchase price prior to the actual purchase.

[56] A similar conclusion was reached by the Tribunal Vice-Chair in *Decision No. 2585/08*.

[57] After reviewing all of the information before me, I accept the worker's testimony that the compensable CRPS which he experiences has significantly limited his ability to ambulate. The availability of a scooter has improved the worker's emotional condition and has helped him deal with the effects of his CRPS. His doctors support that a scooter is necessary and appropriate. In my view, given the exceptional facts of this case, I am satisfied that the provision of a motorized scooter is an appropriate healthcare measure for this worker.

(e) Trigger point injections for the right foot

[58] In the December 16, 2015 decision on appeal the ARO decided that the worker had entitlement to trigger point injections for his left leg and hip but not his right foot. The reasoning of the ARO appears to have been that the injections were required because of the "diagnosed hallux limitus and hammer toe problems" and did not have any relation to the compensable accident. As noted earlier in this decision, I have now concluded that the worker has entitlement to CRPS with symptoms in his low back, left hip, right leg and right foot. It is unclear from the medical reporting before me whether the trigger point injections the worker is receiving in his right foot are due to his now compensable CRPS or the hallux limitus and hammer toe issues. As such, the question of the worker's entitlement to these injections is returned to the Board's operating level for further adjudication given my finding that the worker has compensable CRPS involving his right foot.

DISPOSITION

[59] The worker's appeal is allowed in part.

[60] The worker is granted secondary entitlement in this claim for CRPS with symptoms in his low back, left hip, right leg and right foot. The Board will assess him for a NEL award.

[61] The worker is not entitled to a redetermination of the 18% NEL award granted for his left knee condition.

[62] The modified duties offered by the accident employer were not suitable. The worker is entitled to full LOE benefits from January 16, 2013 subject to any further statutory reviews.

[63] The worker has entitlement for a motorized scooter under this claim. The issue of the quantum of benefits flowing from this conclusion will be returned to the Board for further adjudication.

[64] The issue of the appropriateness of the right foot trigger point injections the worker is receiving is returned to the Board for further adjudication in light of the conclusions reached in this decision.

DATED: December 21, 2017

SIGNED: R. Nairn

Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 3448/17

BEFORE:	A.G. Baker : Vice-Chair M. Lipton : Member Representative of Employers K. Hoskin : Member Representative of Workers
HEARING:	November 2, 2017 in London Oral
DATE OF DECISION:	November 30, 2017
NEUTRAL CITATION:	2017 ONWSIAT 3654
DECISION UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) decision dated February 20, 2014
APPEARANCES:	
For the worker:	S. Emeny, Paralegal
For the employer:	Not Participating
Interpreter:	n/a

REASONS

(i) Introduction and issues

[1] The worker appeals the decision of Appeals Resolution Officer (ARO) S. Johnson, February 20, 2014. The issues on appeal from those rulings were as follows:

1. Redetermination of the Non-Economic Loss (NEL) award for the low back.
2. Entitlement to benefits for permanent Psychotraumatic Disability (PD).
3. Quantum of Loss of Earnings (LOE) benefits from May 16, 2012.

[2] The Panel also notes that the worker withdrew the issue of entitlement to benefits for Chronic Pain Disability at the outset of the oral hearing.

(ii) Background

[3] The ARO noted the background to this matter in the decision under appeal as follows:

> On February 28, 2006 this then 36 year old tire technician developed lower back pain after he attempted to load and unload 30 tires at work. The worker received first medical treatment on February 28, 2006 at which time he was diagnosed with an acute low back strain. Conservative medical treatment was prescribed that included medications, physiotherapy, a CT scan of the lumbar spine, and restrictions on standing, lifting, bending, twisting, and climbing stairs/ladders.
>
> Full LOE benefits were paid from March 1, 2006 to May 24, 2006.
>
> In a decision letter dated June 13, 2006, the CM concluded that initial entitlement was allowed on an aggravation basis only as it was determined that the work incident of February 28, 2006 aggravated the worker's pre-existing symptomatic chronic lower back condition. This decision letter concluded that the aggravation of the worker's pre-existing lower back condition ended on June 13, 2006.
>
> In a subsequent decision letter dated May 28, 2008 the CM concluded that the worker was eligible for a NEL assessment to recognize the permanent aggravation of his lower back condition.
>
> On November 12, 2008 an 18% NEL award was processed that recognized the permanent impairment in the worker's lower back region.
>
> In a decision letter dated March 6, 2009 the CM concluded that the worker was eligible to receive full LOE benefits retroactive to May 24, 2006 and ongoing. The worker was referred for WT (formerly Labour Market Re-entry) Services to determine his prospect for a successful employability outcome.
>
> In a decision letter dated March 27, 2009 the CM concluded that there were no reasonable prospects for this worker to achieve a successful employability outcome and determined that he was eligible to receive full LOE benefits until the age of 65. The CM also concluded that, should the worker's circumstances change to the extent that he is capable of retraining, then he would be entitled to receive a WT plan in the future.
>
> The worker's case was reviewed by the Operating Area on May 25, 2011 at which time it was recommended that the worker be considered for WT Services to re-explore his options to promote a successful employability outcome. On June 2, 2011 … psychological treatment was approved on a temporary basis to provide the worker with supportive counselling while he participated with WT Services.

The WT plan for the SO of Elemental Occupations (NOC 6683) was approved and involved the following:

1. Job Search Training (JST) for 2 weeks from February 13, 2012 to February 24, 2012.
2. Training on the Job (TOJ) for 10 weeks from February 27, 2012 to May 4, 2012.
3. Employment Placement Services (EPS) for 8 weeks from May 7, 2012 to June 29, 2012.

On February 16, 2012 the worker suffered a non-work related myocardial infarct. He did not participate in the WT plan that was scheduled to begin on February 13, 2012.

In a decision letter dated May 17, 2012 the CM reconfirmed the closure of WT Services on February 22, 2012 based on the worker's expressed inability to do so. This decision letter also concluded that the worker's LOE benefits would be adjusted effective May 16, 2012 to reflect his ability to command $10.25 per hour for a 40 hour work week in the determined SO of Elemental Occupations (NOC 6683) and that this LOE benefit would be paid to the age of 65.

In a decision letter dated July 4, 2012 the CM concluded that there was little medical evidence to support that the worker experienced a significant deterioration in his work-related lower back injury. The CM also concluded that although the worker was eligible to receive WT Services, he was not eligible to receive full LOE benefits beyond the final review date on May 16, 2012 should he elect to participate in the approved WT plan.

In a decision letter dated July 23, 2013 the CM concluded that entitlement to a psychotraumatic disability and CPD were denied.

[4] As noted above, the worker is no longer pursuing CPD entitlement. However, he objected to the denial of a NEL redetermination, the denial of psychiatric benefits, and the determination of his LOE benefits. The ARO denied the worker's objections in regard to all three issues, and the worker has appealed those issues to the Tribunal.

(iii) Law and policy

[5] The *Workplace Safety and Insurance Act, 1997* is applicable to this appeal. The Panel also noted section 126 of the WSIA requiring that we apply Board policy. In that regard, the following policy packages, Revision #9, remain applicable and have been stated by the Board to be applicable to this appeal:

9 – Psychotraumatic Disability

222 – Adjusting Benefits for Non-Work Related Changes – from July 15, 2011 to November 30, 2012

226 – Final LOE Review – benefits from July 15, 2011 to February 14, 2013

264 – NEL Redetermination

300 – Decision Making/Benefit of Doubt/Merits and Justice

[6] We also noted in particular Board *Operational Policy Manual* (OPM) Document No. 15-04-02, which refers to Psychotraumatic Disability in the following terms:

> **Policy**
>
> A worker is entitled to benefits when disability/impairment results from a work-related personal injury by accident. Disability/impairment includes both physical and emotional disability/impairment.
>
> **Guidelines**
>
> **General rule**
>
> If it is evident that a diagnosis of a psychotraumatic disability/impairment is attributable to a work-related injury or a condition resulting from a work-related injury, entitlement is granted providing the psychotraumatic disability/impairment became manifest within 5 years of the injury, or within 5 years of the last surgical procedure.
>
> Psychotraumatic disability/impairment is considered to be a temporary condition. Only in exceptional circumstances is this type of disability/impairment accepted as a permanent condition.
>
> Psychotraumatic disability/impairment resulting from organic brain damage is assessed as a permanent disability/impairment.
>
> **Psychotraumatic disability entitlement**
>
> Entitlement for psychotraumatic disability may be established when the following circumstances exist or develop
>
> - Organic brain syndrome secondary to
>   - traumatic head injury
>   - toxic chemicals including gases
>   - hypoxic conditions, or
>   - conditions related to decompression sickness.
> - As an indirect result of a physical injury
>   - emotional reaction to the accident or injury
>   - severe physical disability/impairment, or
>   - reaction to the treatment process.
> - The psychotraumatic disability is shown to be related to extended disablement and to non-medical, socioeconomic factors, the majority of which can be directly related to the work-related injury.

[7] The Panel also noted that there are a range of factors when considering a worker's employability. In that regard, Tribunal *Decision No. 2342/06* discussed generally how the Tribunal has addressed employability and stated in part the following:

> The concept of "competitively unemployable" is not defined or addressed in the Act or Board policy. It arises out of Tribunal case law as a consideration of the cumulative effect of medical, psycho-social, and employment market factors related to the workplace injury that would reasonably impact a worker's ability to obtain and sustain employment. In one respect, the concept widens the prospect of a worker's ability to establish unemployability beyond strict medical grounds. Yet, the concept also requires that the cumulative effect of the factors considered achieve the same result as a finding of total medical disability, that is, unemployability arising from the injury.

[8] We also noted *Decision No. 1004/10*, which stated in part that:

> [44] The Panel prefers to use terminology that is more in keeping with the wording of the Act. Section 43 of the Act contains the following provision:
>
> **Payments for loss of earnings**
>
> 43(1) A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins. The payments continue until the earliest of,
>
> (a) the day on which the worker's loss of earnings ceases;
>
> (b) the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury;
>
> (c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury;
>
> (d) the day on which the worker is no longer impaired as a result of the injury. 1997, c. 16, Sched. A, s. 43 (1).
>
> [45] Thus, in our view, the test for whether a worker is entitled to full Loss of Earnings benefits is better expressed in terms of whether the worker is capable of earning any income in suitable employment. In our view, this terminology is also in keeping with the wording of the Board's Operational Policy Manual Document No. 18-03-02 which states that a worker is entitled to full LOE benefits "if the nature or seriousness of the injury completely prevents a worker from returning to any type of work".

[9] We agree that the entitlement to full LOE should be consistent with the wording in the WSIA and under Board policy. It remains, however, in such cases, to examine the worker's level of physical and/or psychiatric impairment arising from the work injury and according to the medical information on file. In making such determinations, factors to consider also include the worker's age, education, language proficiency, transferrable skills and work experience.

(iv) Decision

(a) NEL Redetermination

[10] In regard to the worker's claimed deterioration in his compensable low back condition, the worker's representative cited the various tests on file and treatments such as the worker's injections. It was also noted that the worker suffered from nerve compression and that his condition included the aggravation of various discs in the back. It was claimed that, according to Board policy, the worker had suffered significant deterioration in his work-related impairment.

[11] The Panel however was not persuaded that there was measurable deterioration in the worker's condition. As the ARO also noted, the NEL Soft Tissue Pain Diagram Report completed by the worker on August 21, 2008, described the nature of the worker's low back pain. The following was cited from that reporting:

- The quality of his lower back pain was a sharp throbbing pain with numbness radiating down the right leg, with some numbness down the left leg.
- The pain was constant with frequent exacerbations and night awakenings.
- Pain was rated as an 8/10 on a scale of 0-10. :
- The pain is aggravated by walking, bending, and going up stairs.

- The pain is eased with laying down on his right side and ingesting pain medications.
- The condition has increased over time.

[12] The Panel finds similar to the ARO that the nature of the worker's lower back pain did not change over time in any significant manner. Similar comments were made at the Board level and before this Panel regarding the worker's sharp pain, numbness, aggravation with walking, bending and climbing stairs. The worker also noted well his ongoing medication regimen for many years. The NEL assessment findings were also compared with findings for example from Functional Abilities Examinations in 2011, and from the reporting of Dr. Piche in 2012. As the ARO also noted, the worker's passive ranges of motion in the lumbar spine did not vary with any significance.

[13] It was also notable that the worker's medication regimen has not been largely altered over many years. Over 2008, 2011, 2012, and 2013, Dr. Piche noted the worker was taking Lyrica for his nerve root irritation and for low back pain radiating into the legs. The worker was also taking Percocet daily and it was found that there was no likelihood of rehabilitating the worker. The medications were stated to be for pain control. More recent medical reports made similar findings, for example from the medication record in September of 2017 that also noted Lyrica, Trazadone, Paxil and Percocet as being medications covered by the Board.

[14] In that regard, this worker has had a longstanding low back injury that prevented him from returning to gainful employment. His physical condition has not largely changed and he continues to take daily medication to control his pain, as he has for many years. The Panel agreed in that regard that the worker has had a significant low back impairment for which there were no measurable changes in his lumbar ranges of motion. Nor are there any evident changes to the worker's medication regimen, neurological functioning, or back related health care generally. In the view of the Panel, the worker has not suffered significant deterioration in his permanent low back impairment since his NEL assessment, and he is not entitled to a NEL redetermination in that regard.

(b) Psychotraumatic Disability

[15] The worker stated at the oral hearing that he had no depression or anxiety before his injury. He stated that he felt depressed since the injury and has been on a steady medication regimen for his pain and depression. He stated that he continues to have sleep problems, requires help from family members for basic chores, and is limited in terms of walking, sitting, standing, and climbing. He stated that he has no hobbies and no longer does any physical activity.

[16] The ARO however noted a number of reports and concluded that the worker's injury was not a significant contributing factor to the worker's ongoing psychiatric condition. Rather, the worker suffered myocardial infarction in February 2011 and February 2012, which were found to be intervening events and separate injuring processes with respect to the worker's psychiatric condition. It was concluded that the infarcts, notably the second attack in 2012, overwhelmed the significance of the work-related factors.

[17] In reaching that finding, the ARO also noted the worker had a pre-existing back problem for which he had been prescribed medication dating back to 1993. The worker evidently related that to the development of marital problems and to prior psychiatric treatment for anxiety, to the extent that he was able to continue working full-time and manage his family life. However, there

were evidently clinical notes from Dr. Piche describing low back pain that caused the worker other dysfunction, dating from 2003. Paxil was also prescribed for both pain and dysfunction. The worker and his spouse also attended psychotherapy prior to his work-related injury.

[18] The ARO also noted the reporting from Dr. Foley, psychologist, in 2011 and 2012. Over several reports, the doctor related the worker's injury to his ongoing disability, problems in his home life, depression, and two suicide attempts. The ARO noted however that there was no reference in the 2011 reporting to the worker's myocardial infarctions. Those events were not therefore included in the diagnoses, for example, in the June 2011 reporting from Dr. Foley. It was also noted that the worker made only one suicide attempt, which again was not accurate in Dr. Foley's reporting.

[19] The ARO found that much of the psychological reporting simply did not cite the worker's cardiac problems. It was also found that the worker did not seek psychological treatment until mid-2011, over five years post-injury. That was particularly notable given that the worker related his marital problems and attempted suicide to his work injury. The ARO placed significant weight on the absence of any reference to those difficulties in the months following his reported back injury. The absence of such comments in the medical reporting into early 2007 was emphasized, along with family difficulties that evidently led to the worker being arrested.

[20] There were also a number of medication records that indicated the worker had stopped some medication at times, such as Paxil. It was noted that he stopped for a time in 2008. Other conditions were also noted in relation to further prescriptions in 2008 and 2009, including anxiety and cardiac problems. It was also noted that there were no Paxil prescriptions from early 2009 into mid-2011. Anxiety and cardiac problems were again noted in May of 2011, and the worker was again prescribed Paxil. In that regard, the ARO found that the worker's psychological condition was largely related to his cardiac problems, and not his work injury.

[21] It was also noted that the worker's psychiatric condition was not diagnosed until outside the five year window under the policy. Nor was the worker seen or treated during the five years following the low back claim. Again, the ARO emphasized myocardial infarction in February 2011, anxiety problems in May of 2011 that were related to his cardiac difficulties, problems with atrial fibrillation, and a second myocardial infarction in 2012. In summary, the ARO found that there was no record of ongoing psychological treatment in the five year window following the low back injury, and that the development of his psychiatric problems were related to significant non-compensable intervening events, mainly his cardiac problems.

[22] The Panel however noted that the Board recognized the worker's psychiatric difficulties in 2009, when they also found the worker competitively unemployable, and in part found that the worker scored in the severe category for psychological heath. A March 2009 LMR assessment found that the worker scored in the severe category in psychological testing and it was recommended that the worker begin seeing a clinical psychologist. The report also recommended pain management and found that the worker had significant psychological barriers that would impede any retraining. That reporting of course predates his myocardial infarctions by some 2 years, suggesting that the worker's depressive symptomology was present but untreated well within the five year window under the policy.

[23] The reporting from Dr. Piche was also noted between 2006 and 2011, and the Panel acknowledged the intermittent periods where Paxil was prescribed. However, the worker was also prescribed significant pain medication over that time period that included Oxycocet and

Hydromorph Contin. The worker was also prescribed at times Trazadone, Lyrica, Percocet, and Zoloft, as noted for example in the clinical notes from Dr. Piche in October of 2009, which also stated that the worker was narcotic dependent. There were also numerous reports from Dr. Piche that confirmed the worker's ongoing anxiety disorder, depression and prescribed medication well within the five year window under the policy, and again, predating the worker's heart problems.

[24] The above noted medical records indicate that, while some medication may have been stopped for a time such as Paxil, this worker has had a significant daily medication regimen since his accident in 2006. The medications have been prescribed for chronic pain control, sleep, anxiety and depression. In that regard, the worker's symptoms and treatment with medication for depression and anxiety began well within the five year window under the policy and well before his cardiac events in 2011 and 2012.

[25] The worker was also assessed psychologically by Dr. Segal, Assistant Professor of Psychology at the University of Western Ontario, in 2011. The report clearly related the worker's ongoing poor degree of pain control to his sense of demoralization and to his anxiety. That reporting is also consistent with the reporting from Dr. Piche and from the reporting of the worker's treating psychologist Dr. Foley. Further, if one carefully reviews the reports from Dr. Foley, the doctor was evidently well aware of the worker's cardiac events according to the report in February of 2012.

[26] A notable report from Dr. Foley in April of 2012 also clearly related the worker's pain and psychological difficulties to his work injury. After noting the worker's back injury, the doctor continued by relating further problems with his family, finances, and attempted suicide to the impact of his work injury. Certainly the Panel recognizes that the worker also suffered two heart attacks, which were also factors impacting the worker's psychological health. However, it was evident that much of the worker's difficulties were long-standing prior to those events, and have not ceased. As Dr. Foley diagnosed the worker, he has severe depression, anxiety, adjustment disorder, musculoskeletal problems, occupational problems, and a reduced overall level of functioning at a GAF score of 45.

[27] In the view of the Panel, the worker has more than one contributor to his ongoing psychiatric difficulties. Certainly there are pre-existing physical and psychiatric problems that were treated, but did not prevent the worker from working or managing his family problems. However, post-accident, the worker has a long-standing medication regimen that includes treatment for chronic low back pain, depression and anxiety. Much of the medical reporting from Dr. Piche confirmed treatment for those conditions, both before and after the cardiac events noted above. As Dr. Piche found in August of 2012, the worker "drifted" after his work injury into chronic pain syndrome with associated anxiety, depression and dependence on narcotic medication.

[28] We also again note the psychological reporting on file, such as that from Dr. Foley, who was clearly aware of the worker's cardiac problems. In our view, while the worker's injury may not have been the sole contributor, it was evident that the worker's permanent low back injury was a significant contributing factor to the worker's ongoing psychotraumatic disability. It was also evident that the worker's condition developed within the five year window under the policy and has been ongoing for many years, to the extent that we find the worker's condition is permanent. He is therefore entitled to a NEL assessment for his Psychotraumatic Disability. The appeal is allowed in that regard.

(c) LOE Quantum

[29] In regard to the worker's employability and LOE quantum, the ARO found that the worker's abilities had changed by July of 2011, to the extent that he could engage in WT services. The ARO also found that the psycho-educational assessment in November of 2011 found that the worker should be supported in his transition back to the workplace. It was also noted that the worker had been provided with psychotherapy as recommended by Dr. Foley in 2011 and 2012. The ARO also noted the worker's heart attack in 2012 and the extension of full LOE benefits. The ARO noted the worker's ongoing cardiac problems, but also noted that there had been no deterioration in his back condition, no psychiatric entitlement, and no CPD entitlement. It was therefore concluded that LOE benefits had been properly determined on a partial basis beyond May 16, 2012.

[30] However, as the worker testified, he was with the employer for some 16 years before he was injured while loading tires. He stated that he had prior issues, but they never stopped him from working. He also again noted his ongoing physical and psychiatric difficulties. He stated that he did not attempt to return to work since his injury. He stated as well that his condition had not improved physically or psychiatrically since he was deemed unemployable in 2009.

[31] The worker also stated that he had a low education level and a largely labouring background working in a shop and on tires since he was young. He stated that he had never worked in customer service. He has also continued to be limited physically and the injury has had a significant financial impact.

[32] It was evident to the Panel in this case that the worker was left with physical abilities at the sedentary level. It was also evident that the worker has a low level of education and a lack of transferrable skills from his previous employment. It is also important to note that all the factors that left the worker unemployable before his cardiac problems continue to be applicable from 2012 and beyond.

[33] We noted for example that the worker has ongoing psychiatric problems that include depression and anxiety. In that regard, we again note the worker's ongoing psychiatric problems, his treatment, and his longstanding medication regimen for both his pain and depressive/anxiety difficulties. As the worker noted, he continues to use Percocet, Trazadone, Paxil and Lorazepam on a daily basis.

[34] It was also evident from the assessment information on file that the worker had significant barriers to returning to work. For example, the WT specialist reported in 2011 that the worker may have been able to perform many of the essential skills in the SO, but there were several potential barriers. They included his education level, lack of formal education in English in Canada, being unable to write, limited numeracy skills, and very limited computer skills. The WT specialist also warned that continuous learning may be a problem.

[35] Those comments were not surprising, as the previous 2009 LMR assessment did not recommend any LMR activity due to the worker's compensable medical and non-compensable barriers. We found the following summary of factors from the March 27, 2009 memorandum by the adjudicator to continue to apply to the worker, as follows:

*only has grade 8 and was educated in Saudi Arabia

*first language is Arabic

*only ever worked as a general labourer with vehicles tires

*extensive physical precautions

*low mobility (uses a cane) limit SEB options

*psychological health – scored in the severe category

*test scores indicate aptitudes are in the low to lower extreme range

*highest possibility of a learning disability

*potential criminal record

*large amounts of medication

[36] In the view of the Panel, while the worker is not of an advanced age, all other factors suggest that he is unable to return to gainful employment. He has language and educational problems, limited physical ability, no transferrable skills, psychiatric barriers, and continues to take regular pain and psychiatric medication. We also note that he was not considered to be a candidate for LMR/WT services in 2009, before his cardiac problems, and that those factors have not in our view changed. That finding was also supported by his treating doctors who continued to find he was unemployable due to his physical and psychological difficulties.

[37] For example, Dr. Foley reported in July of 2012 that the worker's prognosis remained guarded, that his depression and anxiety were barriers to retraining, and that he was also diagnosed with Attention Deficit Hyperactive Disorder (ADHD) that may be impacting his lack of success in retraining. The doctor referenced both the worker's physical and psychological problems, and stated in part the following:

> [The worker] has physical problems that cause pain. Information on his physical condition that prevents him from getting back to work are more appropriately determined by a physician. Psychologically, as long as the depression, anxiety and ADHD are present, [the worker] will not be able to concentrate or attend to tasks appropriately. This could result in him being a danger to himself or others in most jobs that are available to him. Because of his restricted education and difficulties with re-training, [the worker's] vocational opportunities are limited to physical ones and this is where things could be dangerous. As a result, it is my opinion that [the worker] is unable to work because of his psychological condition.

[38] The above excerpt and opinion was also echoed by Dr. Piche in August of 2012, with no evident significant changes in the worker's physical or psychological condition, or in his medication use, since that time. The doctor continued to note the worker's chronic pain syndrome, anxiety, depression, and dependence on narcotics. The doctor stated that "It is unlikely that [the worker] will improve sufficiently in the future to allow a return to any kind of employment, part-time or full-time." The doctor again noted his pain levels, the impact on his daily activities, and that "He really has nothing to offer a potential employer." Dr. Piche also continued by noting that the worker cannot read or write, that he has cardiac problems, and that his anxiety level clearly has a direct impact on his physical abilities. The doctor summarized the worker's condition as follows:

> …[the worker] has a chronic pain syndrome of the lower back, complicated by anxiety, depression and Coronary Artery Disease. He is on a considerable amount of medication without significant impact on his condition. He is unemployable now and in the future with little prospect that any treatment will help him.

[39] The Panel has considered the range of factors regarding this worker's employability, as well as the above noted medical opinions from his treating doctors that the worker is not employable. We find on a balance of probabilities that he is unable to earn any income in suitable employment. Therefore, the worker is entitled to full LOE benefits from May 16, 2012 to age 65.

DISPOSITION

[40] The appeal is allowed in part.

[41] The worker is not entitled to a redetermination of his NEL award for the low back.

[42] The worker is entitled to benefits for Psychotraumatic Disability, and a NEL assessment in that regard.

[43] The worker is entitled to full LOE benefits from May 16, 2012 to age 65.

DATED: November 30, 2017

SIGNED: A.G. Baker, M. Lipton, K. Hoskin

Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1500/17

BEFORE: S. Peckover: Vice-Chair

HEARING: May 12, 2017 at Toronto
Written

DATE OF DECISION: July 18, 2017

NEUTRAL CITATION: 2017 ONWSIAT 2163

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decision dated March 19, 2013 and ARO decision dated January 13, 2015

APPEARANCES:

For the worker: K. Hahn, Paralegal

For the employer: Not participating

Interpreter: Not Required

REASONS

(i) Introduction

[1] The worker appeals two ARO decisions, the first dated March 19, 2013, and the second dated January 13, 2015. The two decisions found as follows:

- The **ARO decision dated March 19, 2013** concluded that the worker was not totally impaired as a result of his workplace injury, and was fit for suitable work within his medical precautions. Full Loss of Earnings (LOE) benefits from July 1, 2009 to age 65 therefore were not in order. The Business Unit was directed to refer the worker for a Work Transitions assessment, to determine a Suitable Occupation (SO) that the worker could have done without training, noting his skills and abilities, and to pay LOE benefits accordingly as of July 1, 2009, offset by any money the worker had received. Work Transitions Services was also directed to explore other possible options, moving forward, which could help the worker to further mitigate any wage loss, and provide the appropriate servicing, if this was in order.
- The **ARO decision dated January 13, 2015** denied entitlement to a Non-Economic Loss (NEL) redetermination for the neck and low back conditions. It also confirmed that the worker's LOE benefits from 72 months post-accident to age 65 were correctly calculated using the SO of Auto Service Adviser with projected earnings of $10.25 per hour, 37.5 hours per week.

(ii) Issues

[2] The issues under appeal are as follows:

1. Suitability of the SO of Auto Service Adviser;
2. Quantum of the LOE benefit,
   (a) From July 1, 2009 to the 72-month lock-in; and
   (b) From the 72-month lock-in to age 65; and
3. Entitlement to a NEL redetermination for the low back and neck, currently rated at 38%.

(iii) Background

[3] The worker, born in 1949, began working with the accident employer in 1973, and has occupied various positions there over the years. He was injured on April 27, 2007, when a co-worker driving a fork-lift truck rammed into a partition behind him and jarred the chair on which he was sitting, resulting in a low back and neck strain.

[4] At the time of the workplace accident, the worker was on modified duties as a stock controller, due to a prior compensable low back injury.

[5] The worker's employment ended as of June 30, 2009, as the employer closed the plant and moved its operations elsewhere. The worker took the package offered, which included

severance pay and a pension. He also applied for regular Canada Pension Plan (CPP) benefits. The worker then inquired about LOE benefits.

[6] In a decision letter dated October 15, 2009, the Case Manager noted that a Permanent Impairment had been recognized for the neck and low back, and the worker's file had been sent for a NEL determination. With respect to LOE benefits following the worker's lay-off from work, the Case Manager had asked a number of questions regarding the nature of the work the worker was doing at the time of the lay-off, whether it was his regular work or modified work, and so on, and had not yet received the answers. S/he therefore could not make a decision on entitlement until those questions were answered.

[7] In January of 2010, the worker was granted a 38% NEL for the residual impairment in his low back and neck.

[8] In a letter dated March 8, 2010, Mr. Hahn wrote to the Board seeking full LOE benefits from July 1, 2009, given the worker's 38% NEL award. The Case Manager referred him to her previous letter, the questions in which, it was noted, had not yet been answered. After Mr. Hahn provided the responses, the Case Manager issued a decision letter dated June 15, 2010 in which she found that the evidence indicated that the worker's intention following his layoff was to retire. He was not looking for work, and was receiving CPP benefits and a pension from his former workplace. He therefore was not entitled to LOE benefits. The worker objected.

[9] At the Appeals Services Branch, as indicated above, the ARO found that full LOE benefits were not in order, as the worker was not totally impaired, and was able to perform suitable modified work. A Work Transitions (WT) assessment was to be done, to find an SO which the worker could do without training. That SO would be used to set the worker's LOE rate.

[10] In implementing that decision, the Board conducted a Work Transitions (WT) assessment, and the Suitable Occupation (SO) of Automotive Service Adviser was chosen. The entry-level wage of $10.25 per hour for a 37.5-hour work week was used to determine his LOE benefit. The worker objected.

[11] Also, in late 2012, the worker sought entitlement to a NEL redetermination, on grounds that his compensable conditions had deteriorated. In a decision letter dated February 26, 2013, the Case Manager denied entitlement, finding that his compensable condition had not deteriorated, and that there were other non-compensable conditions, including degenerative changes in the worker's spine, which were causing his difficulties. The worker objected.

[12] At the Appeals Services Division, in a decision dated January 13, 2015, a different ARO found that the worker was capable of working as an Automotive Service Adviser, and the SO was suitable. The rate of $10.25 per hour therefore was appropriate for his LOE benefit from the 72-month lock-in to age 65.

[13] The worker appeals from both ARO decisions.

(iv) Law and policy

[14] Since the worker was injured in 2007, 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.

[15] 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 No. 36 – LOE Benefits – prior to December 1, 2010;
- Package No. 37 – Reviewing LOE – benefits from July 1, 2007 to November 30, 2010;
- Package No. 50 – Suitable and Available Employment – benefits from July 1, 2007 to November 30, 2010;
- Package No. 74 – Work Disruptions Layoffs;
- Package No. 133 - Cooperation & Non-Construction Re-employment Obligations;
- Package No. 216 – Final LOE Review – benefits as of February 15, 2013;
- Package No. 224 - LOE Benefits - benefits as of July 15, 2011; and
- Package No. 300 – Decision Making / Benefit of Doubt / Merits and Justice.

[16] I have considered these policies as necessary in deciding the issues in this appeal.

(v) Analysis

(a) Suitability of the SO of Automotive Service Advisor

[17] In his submissions dated December 23, 2016, Mr. Hahn reviewed the Psychovocational Assessment, and submitted that the worker would have required training to become an Automotive Service Advisor. He reviewed the worker's personal characteristics, and argued that the worker would not have been employable in this occupation without training, and therefore, full LOE benefits should have been paid from July 1, 2009.

[18] In reviewing the Psychovocational Assessment report dated June 4, 2013, I note that the worker left school in grade 10 at the age of 17 to go to work. He stated that he was a troubled student, and had failed a number of courses while in school. He did not particularly enjoy any school subject. He had worked for his employer for 18 years as a stock controller; 4 years as a sandblaster; 10 years as a machinist; and 7 years as a chrome plater. He had very basic computer skills, which included turning it on and sending an e-mail. He had no application knowledge, and no keyboarding skills. His stated driving tolerance was 30 minutes.

[19] The Psychovocational Assessment indicates that the SO of Automotive Service Advisor usually required, at a minimum, a high school diploma. Some college education usually was advantageous. Further, the worker had no computer skills. Thus, in order to work in this SO, the worker would require some retraining and/or academic upgrading. The ARO instructed Operations to find a SO which the worker could do without retraining. Further, the assessors indicated that the preferred college where such training could occur was an hour away from the worker's home, while the worker could only drive for 30 minutes without exacerbating his compensable back and neck conditions. I therefore find that this SO, while it might have been possible to render it suitable in terms of the ability to sit and stand at will, was not suitable for the worker, given that he lacked the necessary educational background and computer skills to do it without further training, and the distance he would have to travel to obtain the necessary education was outside his restrictions.

[20] I also note that the worker was born in 1949. Thus, in July of 2009, he was about 60 years of age. Given his low educational level, his lack of transferable skills, the fact that any jobs he might qualify for and which might be suitable for his compensable condition would require academic upgrading and/or computer training, and the distance he would be required to drive to obtain that training, I am of the view that the worker was competitively unemployable as of July 1, 2009.

(b) Quantum of LOE benefits from July 1, 2009 and from the 72-month Lock-in to Age 65

[21] Given my findings in the previous section, I conclude that the worker is entitled to full LOE benefits from July 1, 2009 to the 72-month lock-in. As the same considerations apply equally at that time, he also is entitled to full LOE benefits from the 72-month lock-in to age 65.

(c) Entitlement to a PI Redetermination

[22] Section 46 of the *Workplace Safety and Insurance Act, 1997* (the WSIA) and section 42 of the pre-1997 *Workers' Compensation Act,* as amended, provide that if a worker's injury results in permanent impairment, the worker is entitled to compensation for non-economic loss.

[23] "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.

[24] "Permanent impairment" means impairment that continues to exist after the worker reaches maximum medical recovery.

[25] 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. The prescribed rating schedule for most impairments is the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 3rd edition (revised) (the AMA Guides). The Board has adopted specific rating schedules for impairment due to psychological disability, fibromyalgia, chronic pain and other conditions.

[26] Subsections 47(9) and (10) of the WSIA provide that if a worker with a permanent impairment greater than zero suffers a significant deterioration in his or her condition, and 12 months have passed since the Board's most recent determination concerning the degree of impairment, the worker may request that the Board redetermine the degree of the worker's permanent impairment. Board *Operational Policy Manual* (OPM) Document No. 18-05-09, "Redeterminations" defines the term "significant deterioration" as follows:

> A significant deterioration refers to a marked degree of deterioration in the work-related impairment that is demonstrated by a measureable change in objective clinical findings.

[27] In order to determine whether a worker's permanent impairment has deteriorated, then, it is necessary to compare the worker's condition at the time of the most recent PD assessment to that more recently.

[28] At the 2010 NEL assessment, the worker was complaining of ongoing low back pain with radiation to the knees, although the back pain predominated. He also had variable pain in his neck radiating into the shoulders and into the interscapular area. He was taking Tramacet as needed. Lumbar lordosis and spinal alignment were normal. Cervical range of motion was

within functional limits, but somewhat limited in rotation to the left and right and on lateral flexion. The shoulders had functional, painful range of motion. Neurological examination of the upper extremities was normal, as were motor tone and strength. Sensation to touch was intact. Deep tendon reflexes were 2+ and symmetrical.

[29] In terms of the low back, flexion was reasonably supple. Extension was associated with some low back pain. Straight leg raising was to 90 degrees bilaterally. Nerve root tension signs were negative. Hip movement was functional and pain free. The distal neurological exam was normal, as was the worker's gait. He could toe and heel walk.

[30] The physiotherapist at the NEL assessment added some important commentary and measurements. Tender areas were identified as centrally over the cervico-thoracic spine from C6 to T4, and the upper trapezius and rhomboid muscles bilaterally. The cervical spine range of motion findings were as follows:

- Forward flexion – full, with tightness in the central cervico-thoracic region
- Extension was about 25%, and limited by pain in the base of the neck
- Side flexion was to about 30 degrees bilaterally
- Rotation to the right was to 60 degrees, with discomfort in the central cervico-thoracic region; to the left was to 45 degrees, with discomfort in the same area.

[31] The physiotherapist noted that muscle power, reflexes, and sensation all were normal. Hip range of motion was full. Tender areas were centrally at L5 and S1, and laterally at L5-S1, right greater than left, and in the buttocks. Range of motion findings for the low back were as follows:

- Forward flexion was nearly full, the fingers just above the knees, and limited by back pain.
- Extension was about 30% of normal, with end-range pain in the low back.
- Side flexion was slightly decreased, with fingers just above the knee bilaterally, limited by low back pain.

[32] Mr. Hahn indicates that in January 2012, the worker had a flare-up of symptoms, and was referred to a pain clinic, where he has been receiving injections into his back and neck from Dr. Billing. Treatment initially was once a month, but increased to every two weeks. He argues that this is an indication of a permanent worsening in the worker's condition since it was last rated in January 2010.

[33] There are many medical reports on file from Dr. Billing, which appear to be a form letter in which the only substantial differences from one to the other, other than the date, are the degree of pain the worker indicates he is experiencing when he arrives and the number of days of pain relief he obtained from the previous injection. The most recent report is dated October 1, 2015, and states as follows:

> Thank you Dr. Moores for asking me to see [the worker]. He has bilateral neck pain bilateral shoulder pain, pain in the lumbar area. He graded his pain today at level 7 on a scale of 0 to 10. He told me he had good pain relief for 9 days with the last treatment. During the period of pain relief he was more mobile and functional with less pain. ADLs are less painful. His quality of life has improved.

PHYSICAL EXAMINATION:

Neck movements, flexion extension and rotation to the right and left are limited and restricted by spasm and tenderness of the neck muscles including spasm and tenderness of the sternocleidomastoid muscles on both sides. He has spasm and tenderness of the trapezius muscles on both sides. Shoulder movements are normal and painful at the end range. He has moderate tenderness in the following areas; both shoulders, both sides of the neck at multiple facet joints in the cervical spine. He has trigger points in the lumbar area on both sides.

IMPRESSION & DIFFERENTIAL DIAGNOSES

Chronic pain syndrome, work related injury, cervical disc disease, osteoarthritis of the cervical spine, herniated disc in the cervical spine, spinal canal stenosis in the cervical spine, myofascial pain in both shoulders.

...

[34] In comparing those results with those from the 2010 NEL assessment, I see a very similar description of the worker's difficulties. It is unfortunate that Dr. Billings did not provide range of motion findings for the shoulders and low back, as this would have provided solid evidence of whether the worker's condition had deteriorated, improved, or remained the same. According to the various letters from Dr. Billings on file, the worker obtains complete pain relief from the treatment, but it gradually returns after a number of days. Pain, or relief of pain, is not a measure of deterioration or improvement, as far as a PI is concerned, because pain is subjective, and cannot be measured. Range of motion findings, however, are more objective. Since there do not appear to be any range of motion findings on file with respect to the period after the 2010 NEL assessment to compare with those in the NEL assessment, I find that the medical evidence is insufficient at this time to find that the worker's condition has deteriorated.

[35] A NEL reassessment therefore is denied.

DISPOSITION

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

1. The SO of Automotive Service Advisor was not suitable for the worker.
2. The worker is entitled to full LOE benefits from July 1, 2009 to age 65.
3. The worker is not entitled to a NEL reassessment.

[37] The nature and duration of benefits flowing from this decision will be returned to the WSIB for further adjudication, subject to the usual rights of appeal.

DATED: July 18, 2017

SIGNED: S. Peckover

Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 3641/17

BEFORE:	R. Woodrow: Vice-Chair
HEARING:	November 21, 2017 at Kitchener Oral
DATE OF DECISION:	December 12, 2017
NEUTRAL CITATION:	2017 ONWSIAT 3827
DECISION UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) dated October 21, 2015

APPEARANCES:

For the worker:	S. Emeny, Paralegal
For the employer:	Not participating
Interpreter:	N/A

REASONS

(i) Introduction

[1] The now 57-year-old worker worked as a labourer with the accident employer since October 12, 1999. She injured her left shoulder on April 26, 2003 while working at a copper machine winding coils; the Board allowed entitlement as a disablement due to repetitive duties.

[2] The Board arranged for the worker to attend a regional evaluation centre (REC) for assessment of her left shoulder; she was diagnosed with left rotator cuff tendonitis and a rotator cuff tendon tear was queried.

[3] Orthopaedic surgeon, Dr. G. Stamp, performed a left shoulder arthroscopic surgery, including a rotator cuff tendon tear repair, debridement, and acromioplasty on June 1, 2004.

[4] The worker was assessed a 15% whole person non-economic loss (NEL) impairment for her left shoulder tear with arthroscopic debridement, acromioplasty, and rotator cuff tendon repair in a decision dated May 27, 2005. The worker's permanent restrictions were noted in a letter dated November 26, 2008 as avoid repetitive use or movement of the shoulder against any resistance; avoid above shoulder activity with the left arm; avoid heavy, excessive, or repetitive lifting with the left arm.

[5] On December 1, 2009 the Board allowed entitlement to the right elbow as a secondary injury and denied a recurrence for the left shoulder, but allowed an aggravation. The Board later amalgamated the original 2003 left shoulder claim with the later 2009 left shoulder second accident claim, finding the 2009 claim was a recurrence, in a decision dated July 27, 2010.

[6] The Board denied entitlement for the right shoulder as a result of the worker's job duties on June 1, 2010. However, a later decision, dated July 27, 2010, allowed entitlement for a right shoulder injury secondary to the left shoulder injury, with no permanent impairment.

[7] The worker attended a REC assessment on September 7, 2010. The worker was assessed with a left rotator cuff tear with surgical repair and subsequent re-injury with mild impingement and tenosynovitis and a right shoulder strain with partial thickness tear of the supraspinatus. Her prognosis was noted as partially recovered with no further recovery expected. The left shoulder restrictions were no repetitive pushing and pulling, working with the left hand in the elevated position, repetitive grasping and gripping in the elevated position, and repetitive heavy lifting. The right shoulder restrictions were no pushing and pulling, working with the hand in the elevated position, working with the hand in the elevated position involving grasping or gripping, and repetitive heavy lifting. Also, the restrictions were noted as permanent and the worker should have the opportunity to stretch or pace herself at her place of employment.

[8] The worker was referred for labour market re-entry (LMR) services after the employer could no longer accommodate her injuries on June 22, 2010; her last day worked was March 11, 2010.

[9] The worker attended a vocational evaluation on September 8, 2010. The worker's test scores suggested she was in the below average range with some exceptions and had limited potential for development; barriers were noted including a possible undiagnosed learning disability. The LMR Plan Proposal and Assessment selected the suitable and available employment or business (SEB) of customer service information and related clerks (NOC 1453),

specifically with a goal of retail customer service. The LMR plan included 6 weeks essential workplace academic upgrading with basic computer training, 12 weeks work placement program, and 4 weeks job search training. The worker started her LMR program on November 1, 2010.

[10] The worker's family physician, Dr. S. McArthur, specialist in family medicine, wrote a note on November 2, 2010 that the worker required part time work and "can start with 15 h/week." The Board decided, on November 17, 2010, that there was no objective evidence to support that the worker was unable to participate in the LMR program or work full time hours.

[11] The worker's NEL award was increased to a 26% whole person impairment to include her right shoulder.

[12] The worker started a work placement at a hardware store but only participated for 15 hours per week; the work placement ended on March 4, 2011. The Board allowed the worker 10 extra weeks of placement assistance from April 4, 2011 to June 10, 2011.

[13] The worker's LMR plan was discontinued as the worker was unwilling to job search and was restricting her efforts, in a decision dated May 10, 2011. The worker's loss of earnings (LOE) benefits were reduced to partial LOE benefits based on $10.25 per week based on a 40 hour work week, effective May 16, 2011.

[14] The worker's final LOE review, decision dated June 21, 2011, noted that the worker was capable of working 40 hours per week at $10.25 per hour in her SEB.

[15] The worker appeals a decision of the ARO, based on the written record, who wrote that while the worker's representative submitted that the SEB was not suitable "the sponsorship of the worker in the LMR Plan to obtain employment as a Customer Services Clerk was not an issue before me and was not an identified issue in the June 21, 2011 decision letter." The ARO concluded that the final LOE benefit review was appropriately conducted and maintained the worker's wages at entry level.

(ii) Issue

[16] The sole issue under appeal is the quantum of LOE benefits at the final review.

(iii) Law and policy

[17] Since the worker was injured in 2003, 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] Specifically, section 43 of the WSIA governs the worker's entitlement in this case. Section 43 of the WSIA provides in part that:

> **43(1)** A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins. The payments continue until the earliest of,
>
> (a) the day on which the worker's loss of earnings ceases;
>
> (b) the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury;

(c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury;

(d) the day on which the worker is no longer impaired as a result of the injury. 1997, c. 16, Sched. A, s. 43 (1).

...

(3) The amount of the payment is 85 per cent of the difference between his or her net average earnings before the injury and any net average earnings the worker earns after the injury, if the worker is co-operating in health care measures and,

(a) his or her early and safe return to work; or

(b) all aspects of a labour market re-entry assessment or plan. 1997, c. 16, Sched. A, s. 43 (3); 2000, c. 26, Sched. I, s. 1 (6).

(4) The Board shall determine the worker's earnings after the injury to be the earnings that the worker is able to earn from the employment or business that is suitable for the worker under section 42 and is available and,

(a) if the worker is provided with a labour market re-entry plan, the earnings shall be determined as of the date the worker completes the plan; or

(b) if the Board determines that the worker does not require a labour market re-entry plan, the earnings shall be determined as of the date the Board makes the decision. 2007, c. 7, Sched. 41, s. 2 (2).

...

(7) The Board may reduce or suspend payments to the worker during any period when the worker is not co-operating,

(a) in health care measures;

(b) in his or her early and safe return to work; or

(c) in all aspects of a labour market re-entry assessment or plan provided to the worker. 1997, c. 16, Sched. A, s. 43 (7).

[19] 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*.

[20] 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.

[21] 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 #225 – Final LOE Review – benefits from December 1, 2010 to July 14, 2011
- Package #300 – Decision Making/Benefit of Doubt/Merits and Justice

[22] I have considered these policies as necessary in deciding the issues in this appeal.

(iv) Testimony

[23] The worker testified that prior to working for the accident employer she worked at home taking care of her family; she has a grade 9 education. The worker testified on her activities of

daily living: driving aggravates her shoulders, she has difficulty sleeping at night, she can't always wash her hair, she can't carry groceries, she receives help cleaning her house, and she does not do any outdoor house work like yard work or snow shoveling.

[24] The worker testified that she attended some training through her LMR program and then received a work placement in a hardware store. The worker testified that while at her work placement her primary responsibilities were checking out customers; she also did a little filing. She testified that checking out customers was difficult for her as she was working with her arms constantly. The worker testified that sometimes at the end of the day her arms were sore and she would go home to put heat or ice on her shoulder and rest. At the end of the work placement she was not offered a position with that employer.

[25] The worker testified that she is not working now and in her rural geographical area there are not a lot of customer service positions. The worker testified that she has not sought employment since her LMR program concluded as she "can't do it." The worker testified that she cannot perform many tasks at home and activities she used to do, such as gardening, knitting, and crocheting; she can no longer do as they cause her pain.

(v) Submissions

[26] The worker's representative submitted that I have jurisdiction to consider the suitability of the SEB as the earlier Claims Manager decision, dated June 21, 2011, which resulted in the October 21, 2015 ARO decision, considered the suitability of the SEB, in that the decision maker wrote that based on the worker's skills, training, and age she was able to achieve the SEB wage. Accordingly, the worker's representative submitted that I have jurisdiction to consider the suitability and availability of the SEB.

[27] The worker's representative submitted that as per *Operational Policy Manual* (OPM) Document No. 19-03-03 a suitable occupation (SO) is defined as:

> **Suitable occupation (SO)**
>
> A SO represents a category of jobs suited to the worker's transferable skills that are safe, consistent with the worker's functional abilities, and that to the extent possible, restores the worker's pre-injury earnings. The SO must be available with the injury employer or in the labour market.

[28] The worker's representative submitted that there were limited job prospects in the worker's geographical area, and that the demand was greatest for cashiers with math and customer service skills, as set out in the LMR Plan Proposal and Assessment. The worker's representative submitted that the worker's math skills were "below average" as established in the vocational evaluation on September 8, 2010, she had no prior experience in the SEB, she received no training, and the employment outlook was for younger workers with math and customer service skills.

[29] In addition, the worker's representative submitted that the worker's bilateral shoulder restrictions were not suitable for the SEB, as set out in the REC. The worker's representative submitted that customer service was fast paced, workers are expected to multi-task, and heavy and repetitive movements are required. The worker's representative submitted that this would not permit the worker to self-pace, change positions, or take breaks.

(vi) Analysis

(a) Jurisdiction to consider the suitability of NOC 1453

[30] In first considering this appeal, I must first determine whether I have jurisdiction to consider the suitability of the SEB. The relevant portion of the June 21, 2011 Claims Manager decision is:

> Based SEB (sic) 1453, you are employable in this field and capable of working a full work week of 40 hours making 10.25 per hour. I feel that based on your skills and training along with your age you will be able to achieve this wage.

[31] As noted above, the ARO did not consider the suitability of the SEB was an issue before him. However, I have come to a different conclusion. I agree with the worker's representative's submissions that the issue of the suitability of the SEB was considered by the Board in the initial Board decision. In particular, the June 2011 decision refers to skills, training, and age as factors considered in determining whether the worker was employable in the field and whether she could achieve the entry-level wage. I find that the skills and training referred to were those that were provided in the LMR program. As such, I find that the ARO had the issue of the suitability of NOC 1453 before him.

[32] In determining this issue I considered *Decision No. 975/07* which considered *Decision No. 90/00* and set out the Panel's comments:

> In our view, the fact that the Appeals Resolution Office did not consider both issues, when both issues were placed before her, does not deprive the Tribunal of jurisdiction over both issues.
>
> There are a number of Tribunal decisions that have concluded that an issue that is either implicitly before the Appeals Office, or was placed before the Appeals Office but not addressed through oversight, will be considered issues upon which the Board has made a "final decision" for the purposes of conferring jurisdiction on the Tribunal. (See, e.g., *Decisions Nos. 23/87, 330/88, 347/88, 428/89* and *1096/96*.)
>
> We conclude, therefore, that the question of entitlement to supplementary benefits was put before the Appeals Resolution Officer, and should have been dealt with by the Appeals Resolution Officer. In our opinion, the failure of the Appeals Resolution Officer to do so constitutes a "final decision" by the Board on that particular issue.

[33] In applying the above reasoning, I find that the issue of the suitability of the SEB was implicitly before the ARO, and the ARO failed to consider this issue, which represents a final decision of the Board on this issue. Accordingly, I have jurisdiction to consider the suitability of the SEB.

(b) Suitability of the SEB of NOC 1453 and LOE at final review

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

[35] The worker attended Vocational Evaluation Testing on September 8, 2010, and a Summary Report also dated September 8, 2010 was created. The conclusions and recommendations in the Summary Report noted the following:

> Her test scores suggest that she is operating, cognitively, in the below average range, with some exceptions, with limited potential for development. [The worker's] scores on both the GATB Numerical Aptitude test and the WRAT-1 Math Computation test were much lower than her other scores and much lower than her other achievement scores. Therefore, it is possible that [the worker] has some type of mathematics disorder (e.g.

> Dyscalculia), which is typically characterized by a mathematical ability that is substantially less than one would expect, considering age, intelligence and education.
>
> ...
>
> Given [the worker's] test scores and overall profile, she is best suited to hands-on or applied learning.
>
> ...
>
> However, there are several barriers present that may affect her success in her LMR plan. [The worker's] job options are limited due to her restrictions. Additional barriers include her: non-compensable medical issues; transportation difficulties; possibility of a learning disability (undiagnosed); and limited transferable skills. Moreover [the worker] reported having difficulties in school when she was younger and she may continue to experience difficulties going forward. These limitations will further reduce her job options and may affect her LMR Plan. Notwithstanding, she appears sincere in her desire to work and re-enter the work force.

[36] The direct entry SEBs suggested in the Vocational Evaluation Testing included NOC 1453 Information Clerks. The LMR Plan Proposal and Assessment proposed the SEB of NOC 1453 Customer Service, Information and Related Clerks which includes the following:

> **Lead statement**
>
> This unit group includes clerks who answer enquiries and provide information regarding an establishment's goods, services and policies and who provide customer services such as receiving payments and processing requests for services. They are employed by retail establishments, call centres, insurance, telephone and utility companies and other establishments throughout the private and public sectors.
>
> **Example Titles**
>
> accounts information clerk
>
> bus information clerk
>
> call centre agent – customer service
>
> complaints clerk – customer service
>
> counter enquiries clerk
>
> courtesy desk clerk
>
> customer service clerk
>
> customer service representative – call centre
>
> enquiries clerk
>
> hospital information clerk
>
> information clerk – customer service
>
> lost-and-found clerk
>
> order desk agent
>
> public relations clerk
>
> tourist information clerk
>
> **Main duties**
>
> The following is a summary of main duties for some occupations in this unit group:

> Customer service clerks in retail establishments answer, in person or on the phone, enquiries from customers and investigate complaints regarding the establishment's goods, services and policies; arrange for refunds, exchange and credit for returned merchandise; receive account payments; and receive credit and employment applications.
>
> Call centre agents take customer orders for goods or services; promote goods or services; respond to enquiries and emergencies; investigate complaints and update accounts.
>
> Customer service clerks in insurance, telephone, utility and similar companies explain the type and cost of services offered; order services; provide information about claims or accounts; update accounts; initiate billing and process claim payments; and receive payment for services.
>
> Information clerks provide information to customers and the public concerning goods, services, schedules, rates, regulations and policies in response to telephone and in-person enquiries.
>
> **Employment requirements**
>
> Completion of secondary school is usually required.
>
> Completion of some college or other post-secondary programs may be required.
>
> Clerical or sales experience may be required.

[37] The labour market information noted that there were four jobs postings in the worker's geographical area on the HRSDC Canada Job Bank, and five on Ontario.Jobs. The local employment prospects were expected to be good, noting that some of the growth was in part due to a "general rise in the demand for service industry workers." The labour market information noted by the worker's representative was for an alternate SEB (NOC 6611 Cashiers) and therefore I am not considering her submissions on the labour market information in making my decision. As such, I find that there were jobs available in the worker's geographical area.

[38] In all the circumstances, I consider that the SEB selected by the Board was suitable. The worker's work history was as a labourer with one employer, however it was for an extended period of 11 years. The barriers noted in the LMR Plan Proposal and Assessment were the worker "lacks transferrable skills" and the vocational evaluation results did not support formal training; also noted was the worker's "rural labour market" which further limited the SEB selection. A SEB, as noted in Board policy, is one that is suited to a worker's transferable skills; the worker's transferable skills were noted as "minimal" with no defined interests. However, the LMR Plan Proposal and Assessment noted that the work placement would afford the worker the opportunity for on-the-job training after completing her essential skills development. In further addressing suitability, the LMR Plan Proposal and Assessment noted that secondary school completion was usually required, the worker had a grade 9 education, and went on to note that the goal was entry-level retail customer service and essential skills modules would be provided. In a review of the LMRA Proposal, dated October 25, 2010, it was noted by the provider that:

> …this client appears to have a number of challenges that are going to make it difficult for her to find employment in a retail setting in this rural area where she lives. Given the amount of barriers: singular work history, no prior interactions with the public, no computer skills, and the fact that she reports significant restrictions, it is the SSP's experience that 12 weeks is the minimum amount of time to assist this client to have a chance at successful re-entry into the workforce (16 weeks would be optimal).

[39] The program components included:

Module 1 – essential workplace academic upgrading with basic computer training (12 weeks or less if placement can be secured in less time)

- Client would gain skills and increase her confidence in basic workplace English and Mathematics
- Client would achieve a basic level of computer operation to ensure she would be comfortable working in a retail environment with a computerized POS system
- Due to the fact that this client has only worked in a manufacturing environment where there was no exposure to direct customer contact, essential workplace communications training would be essential. A great deal of time would be spent working with this client on her communications skills and appropriate interactions with customers in the public environment.
- Due to the fact this client has never worked with the general public the SSP would need time to identify an employer who would be willing to take on someone with limited experience and limited physical capabilities, potentially seeking out some job shadow opportunities in order to give her some work experience to increase her marketability in the retail field
- Resume preparation, job search and interview skills would be very important in the ssp's search for a suitable work placement.

Module 2 – Work Placement Program (12 weeks or more if above intervention can be accomplished in less time)

- Includes up to 35 hours of work on client file (only billed for hours used)
- Includes search for work placement, set up and monitoring of work placement
- Includes additional resume writing, cover letters, job search techniques, labour market

Module 3 – Job Search Training Program (4 weeks)

- research, interview skills and follow up with employers

[40] On October 25, 2010 a revised LMR plan was set out, with a change from essential skills academic upgrading from 12 weeks to 6 weeks. I note that NOC 1453 indicates that completion of secondary school is usually required, accordingly, I find that completion of secondary school is not always required. I further find that the worker's ability to sustain employment over an extended tenure with the accident employer would assist her job search despite the fact that she did not complete secondary school. Further, the Board provided her with academic upgrading that provided her with skills that included English, math, and computers; the worker testified that she recalled being taught how to type and write stories.

[41] In considering the reporting from the work placement a work placement monitoring form dated March 1, 2011 noted that the worker's work habits, work attitudes, and specific skills were, mostly, satisfactory. For instance, under specific skills it was noted that the worker was thorough in performing her work, had average productivity, usually organizes and plans work well, uses good common sense, and had satisfactory job skills in cash, customer service, phones, and filing. In the employer's feedback the employer wrote that they enjoyed having the worker, however, her limitations limited the duties she could be assigned and that she was not suited to the position due to her physical limitations. An earlier work placement monitoring form dated January 12, 2011 was included in the Case Record. In considering the January 12, 2011 and

March 1, 2011 forms, it appears that the worker had improved in many areas listed. The worker's representative made submissions on the worker's low math abilities and possible undiagnosed learning abilities, however, this did not appear to be at issue in the worker's work placement given her satisfactory performance. I find that the reporting from the work placement indicates that the worker had gained skills in customer service, those skills improved throughout the work placement, and she performed those skills in a satisfactory manner.

[42] I also find that the NOC Career Handbook lists the physical activities as body position of sitting, with standing and walking incidental to the work being performed, limited strength demands, and upper limb coordination requirements. The worker has permanent restrictions with her upper limbs, however, I find these restrictions are compatible with the listed physical activities, as per the LMR Plan Proposal and Assessment, which also noted that "strength demands and duties in retail establishments vary."

[43] The worker testified that she would not have been able to maintain work with the work placement employer and that she had not looked for work since; further the worker testified that there was not a lot of customer service positions in her rural area, however, she testified that there was a town 10 to 15 minutes away that had stores and gas stations. I find that the worker's lack of a job search does not indicate that she would be unsuccessful in a search for employment. In addition, I find that the worker could have benefited from the further assistance of the Board in the employment placement services, however she limited her job search to areas within a 15 minute drive from her home, which caused the Board to close her LMR program.

[44] The worker's representative effectively argued that the worker was competitively unemployable; as I found above, work was available in the worker's geographical area and while the worker may have had limited transferrable skills, I find she was provided with sufficient training from the Board to obtain work in her SEB. I acknowledge that the worker was 50 years old at the time LMR began, and is now 57 years old, however, she still has some years left in the workplace and had success and learned customer service skills at her work placement.

[45] However, the worker's testimony and the reporting in the job placement supports that she had difficulties with certain duties. The work placement employer wrote that "her limitations physically due to past injuries (lifting, repetitive) limited the duties we could give her and even the light duties given caused pain to the point of missing next (sic) shift." The worker, in her conversations with the vocational rehabilitation consultant expressed that "she could not physically handle the duties of the job" in LMR Plan Progress Report #3 dated February 4, 2011. Similarly, in LMR Plan Progress Report #2 dated February 4, 2011, the worker reported that her arms were sore at the end of each shift.

[46] The Board considered that the worker could work full time work (40 hours). However, in considering the medical reporting, it indicates that the worker can only work reduced hours, which is consistent with her reporting to the Board. The REC did not comment on the hours of work the worker could work, but set out permanent restrictions, and recommended physiotherapy, which was prior to the start of the LMR program. A Physiotherapist's Treatment Extension Request dated November 2, 2010 indicated the worker had "min increase P/A/AAROM bilat shoulders, min increased strength." The Board, in Memorandum #89, dated November 23, 2010, approved an extension to allow consolidation of the worker's home exercise program, noting the worker was at maximum medical recovery (MMR) on September 7, 2010. Dr. McArthur, on November 2, 2010, indicated that the worker required part time work at 15

hours a week, just after she started the LMR program. A later Form 26 of Dr. McArthur dated January 18, 2011 indicated that the worker was "in job retraining light duties 15 h/wk but finds increased pain, using heat, ice NSAID." I accept the medical reporting of Dr. McArthur who supported the worker's ability to work 15 hours a week based on her compensable injuries; there is no medical reporting indicating that the worker is totally impaired and unable to work. I prefer the medical reporting of Dr. McArthur over the reporting of the REC as it is the only medical that was contemporaneous to the LMR program.

[47] The evidence before me indicates that the worker was able to sustain work at 15 hours a week in her work placement. I acknowledge that the worker had some absences from work, however, in the work placement attendance documents there are absences for varied reasons, and only one date, February 17, 2011, in which it is noted that "neck shoulder too sore." I also acknowledge that the employer indicated that the worker was not physically suited to the job because of her physical limitations, however, I prefer the LMR Plan Proposal and Assessment which noted that there were varied strength demands and duties in the SEB. I infer from this that the worker may have been successful in finding a position more physically suited to her restrictions; her evidence that she did not search for other work does not indicate that she would have been unsuccessful in finding employment.

[48] Accordingly, for all the foregoing reasons, on a balance of probabilities, I find that the SEB of NOC 1453 Customer Service, Information and Related Clerks was suitable, but only at part time 15 hours per week at $10.25 per hour.

DISPOSITION

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

1. The worker's final LOE review shall be based on her ability to work 15 hours per week in the SEB of Customer Service, Information and Related Clerks at an hourly rate of $10.25.

DATED: December 12, 2017

SIGNED: R. Woodrow