Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2704/16

BEFORE: J. Goldman: Vice-Chair
J. Blogg: Member Representative of Employers
C. Salama: Member Representative of Workers

HEARING: October 20, 2016 at Toronto
Oral

DATE OF DECISION: November 7, 2016

NEUTRAL CITATION: 2016 ONWSIAT 3013

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) dated November 22, 2013

APPEARANCES:

For the worker: B. Brown, Paralegal

For the employer: Not participating

Interpreter: N/A

REASONS

(i) Introduction

[1] The worker appeals a decision of the ARO dated November 22, 2013, which concluded that he is entitled to partial Loss of Earnings (LOE) benefits from December 1, 2011, based on earnings of $10.25 per hour, for 40 hours of work per week.

[2] An ARO decision dated March 27, 2013, granted the worker entitlement to full LOE benefits until December 1, 2011.

(ii) Issues

[3] The issue under appeal is entitlement to full LOE benefits from December 1, 2011.

(iii) Background

[4] The following are the basic facts.

[5] On August 25, 2010, the now 50 year old worker, employed with the accident employer since 2007 as a maintenance supervisor, twisted his left knee when he missed the last rung of the extension ladder he was descending.

[6] The Board granted the worker entitlement for a left knee sprain and meniscal tear. He received LOE benefits from October 15, 2010 until November 3, 2010, when he returned to work. On January 4, 2011, the worker underwent arthroscopic surgery. LOE benefits were restored and were to be paid until October 30, 2011, when, following a return to work plan, the worker was to return to full time work.

[7] In correspondence dated October 18, 2011, the Case Manager concluded the meniscal tear which was repaired on January 4, 2011, had resolved by January 24, 2011, and that any further left knee problems were the results of the worker's non-compensable osteoarthritis and degenerative tears.

[8] The worker has had three prior non-compensatory left knee surgeries. In 1997 and 1998 he underwent left knee arthroscopic surgery, and in November 2004 he underwent a left knee arthroscopic debridement and an arthroscopic partial resection of the left medial plica.

[9] The ARO in a decision dated March 27, 2013, referred to the worker's pre-existing left knee condition which he noted was only going to deteriorate with time. However, he concluded as follows:

> ...the medical on file supports that the worker had not returned to his pre-accident state as of January 24, 2011. The aggravation had continued and therefore the worker's benefits should be restored. The ARO also accepts the further surgery of November 1, 2011. The report of December 1, 2011 indicated continued problems post-surgery with the worker to be reassessed in seven weeks...

[10] The ARO therefore granted the worker full LOE benefits until December 1, 2011, when the Board considered him fit to return to suitable work within his restrictions. However, employment as a maintenance supervisor was not considered to be suitable in light of the worker's ongoing left knee condition, and since the accident employer was not able to offer the worker suitable work beyond March 24, 2011 when he ceased employment with the accident employer, the Board granted him partial LOE benefits based on his potential to pursue suitable

employment in the Suitable Occupation (SO) of Elemental Occupations at a minimum wage of $10.25 per hour, for a 40 hour week.

[11] On April 8, 2014, the worker was granted an 11% Non-Economic Loss (NEL) award for a left knee medial meniscal tear and post traumatic arthritis.

[12] In his decision dated November 22, 2013, the ARO concluded that the worker was partially impaired with restrictions for the left knee, and capable of suitable work, and that the SO of Elemental Occupations was suitable and appropriate for the worker. Consequently the ARO found that the worker's LOE benefits were correctly adjusted to reflect his ability to earn minimum wages on a full time basis, as of December 1, 2011.

[13] On November 4, 2014, the worker underwent left knee arthroscopic surgery. The Board accepted entitlement for the surgery based on the opinion provided by Dr. Christopher H. Gallimore, Board Medical Consultant, on January 20, 2015, in which Dr. Gallimore concluded that the surgery was related to the compensable injury in August 2010.

[14] After a review of the medical documentation, Dr. Gallimore, stated the following:

> In my opinion there is compatibility and this IW does have susceptibility in the knee because of pre-existing complaints; however, there seems to have been a progression of his osteoarthritis as a result of the work injury and the two subsequent arthroscopic surgeries. In my opinion therefore, the procedure would be related to the compensable claim.

[15] The worker's objection to the quantum of LOE benefits from December 1, 2011, is the subject of this appeal.

[16] Since the worker was injured in March 2010, 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.

[17] Specifically, sections #42 and #43 of the WSIA govern the worker's entitlement in this case.

[18] Tribunal jurisprudence applies the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. See, for example, *Decision No. 280.*

[19] The standard of proof in workers' compensation proceedings is the balance of probabilities. Pursuant to subsection 124(2) of the WSIA, the benefit of the doubt is resolved in favour of the claimant where it is impracticable to decide an issue because the evidence for and against the issue is approximately equal in weight.

[20] Section 126 of the WSIA, requires this Tribunal to apply Board policy. The Board's Operational Policy Manual No. 18-03-02, entitled "Payment and Reviewing of LOE Benefits (Prior to Final Review)"; OPM No. 19-03-03, "Determining Suitable Occupation"; and OPM No. 11-01-15, "Aggravation Basis", are relevant in the present claim.

(iv) Testimony

[21] The worker testified that he has always worked in construction. Following the August 25, 2010 work place accident in which he sustained a left knee injury, he returned to modified duties with the accident employer. The worker indicated that the modified work was not suitable in light of his restrictions and that, as a result, he reinjured his left knee in March 2011, and stopped working for the accident employer.

[22] The worker testified that at no time was he referred for Labour Market Re-entry services. He does not know how the SO of Elemental Occupations was identified as appropriate since he was unable to stand for any length of time, and required the use of crutches and later a cane.

[23] The worker indicated that prior to August 2010 he was able to perform his regular duties and did not lose time from work despite his previous left knee procedures. As well, he was able to resume his sports activities. However, following his workplace accident in August 2010, he has been unable to return to his pre-accident employment, or participate in sports activities because of the severity of his pain. Given his present left knee condition he is not able to commit to employment on a regular basis. The worker indicated that he is sometimes unable to leave his bed because of the pain.

(v) Submissions

[24] Mr. Brown, the worker's representative, submitted that the worker is no longer capable of employment in the construction industry, and that the SO of Elemental Occupations is not suitable in light of his left knee disability. Mr. Brown referred to the medical evidence which indicates that the workplace accident exacerbated the worker's pre-existing condition in a significant way, and that consequently the worker is entitled to full LOE benefits beyond December 1, 2011. Mr. Brown noted that the worker has had ongoing left knee problems since August 2010, and that he was granted entitlement for a left knee procedure which he underwent on November 4, 2014.

(vi) Analysis

[25] The appeal is allowed for the reasons set out below.

[26] In order to arrive at a decision the Panel must determine whether the worker's present condition is causally related to the workplace accident; and whether the worker is capable of gainful employment as of December 1, 2011 due to the nature of his injury.

(a) Is the worker's present left knee disability causally related to the work place accident in view of his pre-existing condition

[27] In the present claim, the worker has a left knee pre-existing condition, and as noted in the evidence, underwent three left knee surgeries prior to the workplace left knee injury he sustained in March 2010.

[28] However, it is well established in Tribunal jurisprudence that the fact that a worker has a pre-existing condition is not necessarily a deterrent to entitlement to benefits. What has to be determined is whether the workplace injury made a "significant contribution" to the disability from which the worker suffers.

[29] The issue to be determined, therefore, is whether the worker's left knee condition subsequent to December 1, 2011, is related to the workplace left knee injury he sustained in March 2010, or whether it is the result of the natural progression of his non-compensable osteoarthritis and degenerative tears.

[30] That distinction was enunciated in Decision No. 652/87 where the Panel described the issue as follows:

> This case raises the issue of the distinction between disabling symptoms appearing as the result of the impact of employment on a pre-existing degenerative condition which symptoms may be fairly taken as reflecting a compensable exacerbation or acceleration of the pre-existing condition; and disabling symptoms appearing as a result of the impact

> of employment on a pre-existing degenerative condition which symptoms may be fairly taken as merely evidence of the disabling nature of the pre-existing condition.

[31] However, even if the Panel found that the nature of the worker's duties exacerbated his pre-existing condition, the Panel must still determine whether, in light of the worker's preexisting left knee osteoarthritis, the workplace injury was a significant contributing factor to his condition subsequent to December 1, 2011.

[32] The Vice-Chair in *Decision No. 2654/00* provides guidance in determining whether a worker's disability results from a compensable injury.

> … In deciding whether a subsequent disability "results" from an original injury, the usual question asked by Tribunal decision makers is whether the original injury is a factor which has made a significant contribution to the development of the subsequent disability. This question must be answered on a balance of probabilities.
>
> The "significant contribution test" recognizes that there are very often multiple factors that contribute to a worker's disability. It is not necessary that the work-related accident be the sole cause of the subsequent disability. However, the work-related accident must be a factor that makes a significant contribution to the subsequent disability. In assessing the significance of the accident-related factors, it is necessary to consider the evidence about other factors and the pre-accident history.

[33] OPM Document No. 11-01-15 "Aggravation Basis" applies in cases

> Where the worker has a **pre-accident impairment** and suffers a minor work-related injury or illness to the same body part or system, the WSIB considers entitlement to benefits on an **aggravation basis.**

[34] The Policy defines "an aggravation" as follows: "An aggravation is the effect that a work-related injury has on the pre-accident impairment…" A pre-accident impairment is thought to exist where a worker has "a previously identified and symptomatic medical condition/impairment."

[35] In Tribunal *Decision No. 1354/00* the Panel noted that it is a well-established principle of compensation law that workers who sustain injuries which aggravate an underlying condition are entitled to compensation benefits until the worker reaches his or her pre-accident condition.

[36] In coming to our decision that workplace accident on August 25, 2010 was a significant contributing factor to the worker's present left knee condition, we have taken the following into consideration.

[37] In his report dated February 14, 2012, Dr. K. Wayne Marshall, Orthopaedic Surgeon, who has treated the worker since 1998, reviewed the worker's medical record and concluded as follows:

> Based on the very slow progression of osteoarthritis that he had previously seen between 1998 and 2010 and now a marked worsening of symptoms in (the worker's) left knee as well as a fairly rapid progression of the underlying degenerative changes as noted between the arthroscopies of January 2011 and November 2011, it seems clear that the traumatic injury at work has significantly exacerbated his pre-existing osteoarthritis. In my opinion, given that we had seen a very stable situation with regard to progression of his osteoarthritis over a twelve year period, the rapid progression of the disease process and accompanying symptoms that we have seen subsequent to his recent work-related injury makes it highly likely that the worker-related injury has **significantly exacerbated his osteoarthritis.**
>
> (Emphasis added).

[38] Clearly Dr. Marshall has no doubt that the August 2010 workplace accident is a significant contributing factor to the worker's present left knee condition.

[39] In his opinion dated January 20, 2015, Dr. Gallimore, Board Medical Consultant, recommends entitlement for the worker's left knee procedure which he underwent on November 4, 2014. Dr. Gallimore notes that the worker does have "susceptibility in the knee because of pre-existing complaints". Significantly, he concludes that "there seems to have been a progression of his osteoarthritis **as a result of** (emphasis added) the work injury and the two subsequent arthroscopic surgeries".

[40] The Panel has also noted, as indicated by Dr. Marshall, that between 1998 and 2010, there was a very slow progression of osteoarthritis, compared "to the fairly rapid progression of the underlying progressive changes" as a result of the August 2010 workplace accident. Despite his preexisting left knee condition, the worker was capable of performing his regular duties until August 2010. He required neither accommodation nor time off work.

[41] The Panel has concluded that the worker's disabling left knee condition is the result of the impact of the workplace accident on a pre-existing degenerative condition, and that the worker's left knee symptoms reflect a compensable acceleration of the pre-existing condition. We therefore find that the worker's left knee condition is causally related to the August 25, 2010 work place accident.

(b) Is the worker entitled to full LOE benefits from December 1, 2011

[42] In the present claim the worker contends that he is not capable of gainful employment as a result of his compensable left knee injury, and that consequently he is entitled to full LOE benefits from December 1, 2011. The Panel notes that although the Board determined that the accident employer was not able to provide him with suitable modified work within his functional restrictions, the worker was not referred to Work Transition (WT) services as required in accordance with Section 42 of the WSIA.

[43] Section 43 of the Act which governs the worker's entitlement in this case contains the following provision:

> **Payment 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. 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 injury, if the worker was 63 years of age or older on the date of injury;
>
> (d) the day on which the worker is no longer impaired as a result of the injury.

[44] OPM Document No. 18-03-02, "Payment of LOE Benefits," provides that

> A worker who has a loss of earnings as a result of a work-related injury is entitled to payment of loss of earnings benefits beginning when the loss of earnings begins. The payment continues until the earliest of
>
> - The day on which the worker is no longer impaired as a result of the injury.

[45] In his report dated February 14, 2012, Dr. Marshall notes that the worker underwent left knee arthroscopy on January 4, 2011 and that subsequent to the injury and arthroscopy, the worker experienced continuing pain, swelling and weakness in the left knee. He was treated unsuccessfully with anti-inflammatory medication, corticosteroid injections, physiotherapy and a series of Synvisc injections, and as a result underwent another arthroscopy on November 1, 2011. The worker underwent further left surgery in June 2013 and in November 2014.

[46] In his report dated November 11, 2011, Dr. Marshall indicates that the worker was reassessed on November 9, 2011, following his surgery on November 1, 2011, and authorized to remain off work at least until he was reassessed in "four weeks time". In his report dated December 1, 2011, Dr. Marshall indicates that the worker continues to be disabled from work "as he recovers from his recent knee surgery until his next reassessment scheduled on January 16, 2012". In his report dated January 27, 2012, Dr. Marshall indicates that the worker is disabled from work until his reassessment on April 5, 2012. Clearly, the worker was not capable of gainful employment from December 1, 2011. Furthermore, in our view his inability to pursue gainful employment is causally related to the workplace injury he sustained in August 2010. The worker is therefore entitled to full LOE benefits from December 1, 2011.

DISPOSITION

[47] The appeal is allowed. The worker is entitled to full LOE benefits from December 1, 2011, because the nature of his left knee injury causes him to be incapable of pursuing gainful employment.

[48] The quantum 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: November 7, 2016

SIGNED: J. Goldman, J. Blogg, C. Salama

Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 3406/18

BEFORE:

K. Jepson : Vice-Chair
C. Sacco : Member Representative of Employers
J.A. Crocker : Member Representative of Workers

HEARING:

December 3, 2018 at Hamilton
Oral

DATE OF DECISION:

March 21, 2019

NEUTRAL CITATION:

2019 ONWSIAT 728

DECISION(S) UNDER APPEAL: WSIB ARO decision dated August 29, 2017

APPEARANCES:

For the worker: S. Emeny, Paralegal

For the employer: Not participating

Interpreter: Not applicable

REASONS

(i) Background

[1] The worker was employed as a delivery driver. On October 21, 2009 he injured his low back lifting a rear truck differential in the course of his employment. The injury was diagnosed as a lumbar strain. The Workplace Safety and Insurance Board (WSIB) (the Board) granted entitlement to benefits for the low back injury.

[2] The worker's injury did not recover as initially expected. He continued to present with significant back pain as well as leg pain and numbness. He was unable to return to work. The worker was referred to a specialized chronic pain program where he was diagnosed with chronic pain disorder and depressive symptomology. In August 2010, at the Board's request, the worker underwent an independent psychiatric assessment and was diagnosed with major depressive disorder.

[3] Following a Regional Evaluation Centre (REC) assessment in October 2010, the Board determined (in a decision letter dated January 17, 2011) that the worker would be fully recovered from his organic low back injury as of January 28, 2011. The Board accordingly terminated the worker's entitlement to any further benefits as of January 28, 2011. In the same decision, the Board also considered whether the worker had entitlement under the Board's Chronic Pain Disability (CPD) policy or entitlement for psychotraumatic disability. Entitlement for these non-organic conditions was denied, principally on the basis that the worker's presentation in medical assessments was not genuine.

[4] An Appeals Resolution Officer (ARO) decision dated August 29, 2017 confirmed the Board's denial of all entitlement after January 28, 2011, including entitlement for CPD, entitlement for psychotraumatic disability, and entitlement for any ongoing organic low back injury beyond January 28, 2011. The worker now appeals that decision to this Tribunal.

[5] The documentary evidence in this appeal consisted of the Case Record and four Addenda to the Case Record. The Panel heard testimony from the worker and we heard submissions from the worker's representative. The employer did not participate in the appeal.

(ii) Issues

[6] The issues to be determined in this appeal are:

1. whether the worker has entitlement for CPD; and

2. in the alternative to entitlement for CPD, whether the worker has entitlement for psychotraumatic disability;

3. whether the worker has ongoing entitlement to benefits beyond January 28, 2011.

(iii) Applicable statutory framework

[7] Since the worker's injury occurred on October 21, 2009 the worker's entitlement to benefits is governed by the *Workplace Safety and Insurance Act, 1997* (the WSIA). All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[8] We refer to more specifically applicable provisions of the WSIA and Board policy in our analysis below of the specific issues.

(iv) Analysis

(a) The nature of the worker's disability: CPD vs. psychotraumatic disability

[9] The worker is seeking entitlement for CPD or, in the alternative, for psychotraumatic disability. Where a worker suffers from both pain and psychological or psychiatric symptoms Tribunal case law has held that it is necessary to determine the predominant nature of the disability. An injury is characterized as CPD if the nature of the disability is most closely associated with pain which cannot be attributed to organic causes. If, however, the nature of the disability is most closely associated with a psychiatric diagnosis that is distinct from the worker's pain then it is generally compensated as a psychotraumatic disability (see, for example, *Decision No. 1858/13*). As set out in our analysis below, we find that the medical evidence in this case shows that the worker's disability in this case is more in keeping with a pain disorder: the medical evidence persuades us that the psychological elements of his condition—primarily depression and anxiety, as well as some unusual behaviours—are factors that are inextricably bound up with, and largely emanate from, his pain disorder. Accordingly, we find that the worker's disability is more appropriately assessed under the CPD policy.

[10] We acknowledge that the Board CPD policy specifically notes that where pain is predominantly attributable to conversion disorder or post-traumatic stress disorder the worker's disability is compensated under the Board policy for psychotraumatic disability. In this case there was mention in one medical assessment of conversion disorder. However, for reasons explained in more detail below, we find the worker never had a confirmed diagnosis of conversion disorder. Although the worker has presented with ancillary behaviours and symptoms, the predominant nature of the worker's disability remains one of a pain disorder that cannot be explained by organic findings.

(b) Entitlement for CPD

[11] *Operational Policy Manual* (OPM) Document No. 15-04-03, "Chronic Pain Disability," sets out specific criteria for entitlement for CPD. The policy also suggests the type of evidence which might support a finding that each criterion has been met. The five CPD criteria are:

1. A work-related accident occurred.

2. The pain persists 6 or more months beyond the usual healing time of the injury.

3. Chronic pain is caused by the injury: there is evidence of consistent, continuous and genuine pain which (except for its persistence and/or severity) is compatible with the work-injury.

4. The degree of pain is inconsistent with organic findings.

5. The chronic pain impairs earning capacity, as evidenced by "marked life disruption" in the worker's personal, occupation, social, and home life.

[12] A worker must meet all five criteria to have entitlement for CPD.

[13] For the reasons that follow, we are persuaded the worker's disability meets the above criteria and he has entitlement for CPD.

1. CPD criteria 1 and 2: Workplace injury, pain persisting more than six months beyond expected healing time

[14] It is not contentious in this appeal that the worker suffered a low back injury while lifting a heavy object in the course of his employment on October 21, 2009. We note that the ARO decision appeared to doubt the significance of this injury in the worker's ongoing back condition, stating that the worker's injury occurred against a backdrop of a pre-existing symptomatic back condition. In so stating the ARO implicitly revised the worker's entitlement to entitlement on an aggravation basis. On the evidence, we disagree with that finding. The medical evidence cited by the ARO, in our view, in fact confirms the worker's own reports to the Board that he had a minor back issue from a slip and fall at home in July 2009 but had received no medical treatment for that low back problem after August 12, 2009 and prior to the October 2009 workplace accident. There is no evidence of any lost time from work during that period, and no evidence of back treatment between August 12, 2009 and October 21, 2009. In any event, for the purposes of analysis under the CPD policy it makes no difference whether the injury was on an aggravation basis or not; even in the case of an aggravation, a workplace injury occurred. The first criterion of the CPD policy is met. The ARO also evidently had doubts about the extent to which the October 2009 accident contributed to the worker's subsequent condition, but initial entitlement for that accident was not rescinded, and questions about the contribution of the accident are addressed in our analysis below of whether the worker's pain condition is caused by the October 21, 2009 accident.

[15] It is also not significantly contentious in this appeal that the worker has continuously reported pain symptoms well beyond the expected healing time for a low back strain injury. The medical evidence overwhelmingly demonstrates ongoing complaints of low back pain, accompanied by pain radiating down the leg, up to the present. The clinical notes of the worker's primary care physician, Dr. Wooder, show back pain continuing to at least April 2017 (the last date for which such notes are in evidence). The worker utilizes a walker and cane for assistance and continued to do so as of the date of the hearing. The medical evidence demonstrates that the worker has consistently been on significant pain medication, mostly narcotic pain medication. He was prescribed Fentanyl (until he was weaned off that drug in 2014), has taken Oxycocet, and he continued at the time of the hearing to regularly take Gabapentin, Meloxicam and Tylenol 3 for chronic pain, as well as Trazodone to assist with sleeping.

[16] There is no specific evidence of the expected healing time for a lumbar strain, although the October 2010 REC report provided a prognosis at that time that the worker's condition would resolve in a further 12 weeks. As noted above, subsequent medical evidence indicates it did not do so. Other medical reporting, discussed further below, clearly implies that a low back strain would not be expected to be continuing to cause the worker's ongoing pain even as of May 2010 (when the worker was admitted to the chronic pain unit), let alone through to the present. The worker meets the second criterion of the policy.

2. CPD criteria 3 and 4: Cause of pain and inconsistency with organic findings

[17] For the following reasons we conclude that the worker's chronic pain was caused by the October 21, 2009 injury and his pain and related symptoms are not consistent with the underlying organic findings.

[18] The ARO found, in part, that the worker's pain condition was not caused by the October 2009 accident because the worker had a pre-existing symptomatic back condition. Implicitly, the ARO viewed the October 2009 workplace accident as insignificant in causing the worker's condition subsequent to October 2009, and his pre-existing back condition to be the overwhelming cause. We find otherwise. We observe, first, that the worker was working at the time of the October 21, 2009 accident and, as noted above, there is no persuasive evidence of any lost time in the several months prior to that accident. The worker acknowledged he injured his back in July 2013 and had "one or two" treatments from his chiropractor. He also testified that, independently from that back accident, he saw regularly saw his chiropractor from time to time for "adjustments." As we understood the worker's testimony, these were to address aches and pains from his physical activity, including very regular and fairly high level engagement in karate. We accept that this type of maintenance chiropractic care does not necessarily mean the worker had an ongoing and consistently symptomatic back impairment.

[19] The employer advised the Board that the worker was "seen limping" at work prior to the October workplace accident. However, the family doctor's notes from April through June 2009 show that the worker was having problems with painful feet, diagnosed as plantar fasciitis. If the worker was seen limping, it was more likely due to this foot condition than back pain. This is not persuasive evidence of a symptomatic pre-existing back condition.

[20] The medical evidence in the several months prior to the October 2009 accident does not show treatment for the worker's back. He was continuing to work full time, in a job that required lifting. We find that, even if the worker had had some sporadic problems with his back prior to October 2009, it was not an ongoing symptomatic condition. By contrast, his condition was markedly changed after the October 21, 2009 accident, as evidenced by the medical reporting discussed below. For the purposes of assessing whether the worker's pain condition was caused by the workplace injury, we find that the October 21, 2009 accident was not only a significant contributing factor to that condition, it was by far the most significant factor contributing to the worker's subsequent pain condition.

[21] Apart from the issue of a pre-existing significant contribution back condition, which we discuss above, there is also no suggestion of another alternate cause for the worker's pain condition, such as a non-compensable injury subsequent to the October 21, 2009 accident. Board adjudication makes some reference to the possibility that certain underlying organic conditions of the worker's spine are degenerative and therefore non-compensable. However, that issue is linked to whether or not the worker's condition is consistent with the underlying organic findings. We turn now to that question.

[22] On December 2, 2009, shortly after the injury, the worker underwent an MRI of his lumbar spine. The findings were largely unremarkable, with largely mild degenerative changes, other than a moderate paracentral disc protrusion at L4-L5. The protrusion was interpreted as displacing the L5 nerve root. The radiologist concluded the MRI report with a statement that "This [the L4-L5 protrusion] would correlate with the patient's symptoms." However, the

totality of the medical evidence does not, on balance, suggest that this finding explains the worker's full array of symptoms and his overall presentation. Shortly after the December 2009 MRI the worker was assessed by Dr. B. Drew, an orthopaedic surgeon. Dr. Drew's January 22, 2010 report stated, "in spite of MRI findings, the patient's symptoms are outside the L4-L5 nerve distribution, and his prime area of pain is low back with intermittent right leg discomfort." Dr. Drew went on to note that the worker's presentation was "pain-focused." He also noted "diffuse tenderness" of the lower back and paravertebral muscles on palpation; in the context of the overall report, we interpret Dr. Drew as flagging this as a non-organic sign. Dr. Drew recommended referral to a pain clinic, further underscoring that the presentation was not one amendable to any intervention based on organic findings.

[23] With respect to the MRI findings, an October 2010 REC assessment report (described in more detail below) also provided the opinion that the MRI findings did not correlate with the worker's clinical presentation. We place more weight on these orthopaedic opinions than on the one-line note from the radiologist, who did not directly examine the worker and was only working from brief referral information. It is worth noting that Dr. B. Kirsh, leading the chronic pain unit, also expressed the same opinion that the MRI findings did not correspond with the worker's symptoms, apparently accepting and endorsing the prior opinion of Dr. Drew.

[24] The worker underwent a repeat MRI in November 2013. The report from that imaging indicates findings similar to the 2009 MRI, with relatively mild degenerative changes at L3-L4 and L5-S1, and a disc bulge at L4-L5. The report states, "The previously noted right paracentral disc protrusion now presents as a slightly more diffuse disc bulge resulting in mild effacement of the bilateral traversing nerve roots with the lateral recesses." Thus, the effects of the L4-L5 disc bulge, if any, had become less acute. Yet, between 2009 and 2013 the worker's symptoms did not improve. Indeed, as detailed below, if anything they worsened. This further reinforces Dr. Drew's original assessment, and that of the REC assessors, that the findings on the MRI scans do not fully explain the worker's presentation.

[25] Subsequent to the one brief comment from the radiologist, followed by the contrary views of Dr. Drew, Dr. Kirsh, and the REC assessors, there is no other specialist's medical opinion stating that the worker's condition has been explained by the underlying changes in the spine seen on the MRI scans. Instead, the medical reporting instead reflects that the worker continued to present with unusual behaviours and numerous other non-organic signs.

[26] In May 2010 the worker was assessed at the Chronic Pain Management Unit (the CPMU) of Chedoke McMaster Hospital by Dr. Kirsh, psychiatrist and Medical Director of the unit, occupational therapist I. Bladon, social worker A. Titterson, and physiotherapist M. O'Brien. Psychological testing and reporting was provided by psychologist Dr. R.C. Bradley and psychometrist C. Steinberg. Upon intake assessment, Dr. Kirsh suggested the worker's presentation included psychological factors that were playing "an important role" in the maintenance of the worker's problem. He was found to be a candidate for the pain program.

[27] In a June 14, 2010 report the CPMU physiotherapist described how the worker had entered the program using a walker in a slightly unusual way. The physiotherapist recommended that a rollator walker be provided. It is notable that the physiotherapist did not suggest the worker did not require the walker or that he should be weaned off its use. In conjunction with this, it is also noteworthy that the Board conducted surveillance of the worker on two dates in November 2010. The investigation report shows that the worker was observed to use his walker,

and a cane, for such activities as visits to a store (e.g., to move from the car to the store). The worker used these aids even when he did not know he was being observed. This further reinforces that the worker's reliance on the walker—although not fully explained by any physical findings—is a genuine need for him based on his subjective pain experience.

[28] The worker attended the CPMU for four weeks commencing on May 17, 2010. The CPMU Outpatient Program Discharge Summary, dated June 30, 2018, summarizes the worker's presentation during the program. The report states that the worker presented with "many odd pain behaviours." These included "standing hunched over his walker, shaking of his legs, and groaning (growling)." The worker was again reported to have an unusual gait, utilizing his walker. He was noted to have difficulties with respect to interactions in groups. Staff had to remind the worker his behaviours were disruptive. The CPMU team noted:

> His pain behaviours seemed exaggerated and bizarre. We believe there are significant psychiatric aspects to his presentation.

[29] The occupational therapist similarly reported, "His odd and overt behaviours, along with frequent and unusual social interactions, were taken by the team to be evidence of psychiatric factors." The reporting from the CPMU stresses the worker's "gross somatization," which was indicated on Axis II in the formal DSM diagnoses. The CMPU Discharge Summary provided a diagnosis (per Dr. Kirsch, the psychiatrist) of Pain Disorder Associated with both Psychological Factors and a General Medical Condition. The assessors wrote:

> While we believe that [the worker] has organically based low back pain, his overall presentation is more consistent with conversion disorder. **We believe that he genuinely suffers with psychiatric illness and that his disability is not being consciously generated.** [emphasis added]

[30] The CPMU final psychological report indicated the worker scored high on the Pain Catastrophizing Scale. The assessors also noted severe depressive symptomology (although they did not provide a diagnosis of major depressive disorder, as Dr. Kiraly did later). The psychological assessors noted that the worker had received benefits from participation in the pain management program, primarily through the use of relaxation strategies. However, the report states, there were "unexpected negative increases" in use of the maladaptive strategies of asking for assistance, resting, and guarding. Again, somatization was emphasized.

[31] Dr. Kiraly, the psychiatrist who performed an independent psychiatric assessment for the Board in August 2010, provided a report dated August 18, 2010. Dr. Kiraly reviewed the worker's reporting about the significant impacts of his back and right leg pain on most of his activities of daily living. She observed, like the CPMU, that the worker presented with "unusual behaviours" that included standing crouched over his walker and supporting himself with the walker while "jiggling up and down." Dr. Kiraly diagnosed (i) major depressive disorder with anxiety features and (ii) mixed chronic pain disorder associated with both psychological factors and a general medical condition. Responding to a specific question from the Board, Dr. Kiraly opined that the worker did not meet the criteria for conversion disorder. The reason provided was that that diagnosis can only be provided after a thorough medical investigation had been performed to rule out an "etiological, neurological or general medical condition." She went on to state that the worker had disc protrusions at two levels on MRI scans, apparently finding this to be an organic explanation for the worker's pain. She therefore concluded he had pain magnification, but not conversion disorder. Dr. Kiraly did opine, however, that the worker "needs involvement of a psychiatrist in his care."

[32] The Board appeared to place weight on the fact that Dr. Kiraly did not confirm the diagnosis of conversion disorder. We find little turns on this. First, we find that that portion of Dr. Kiraly's report is not persuasive because her opinion was based on the fact that the worker's pain was explained by organic findings, subject to his magnification of that pain. However, the preponderance of medical reporting does not support that conclusion. As reviewed above, the orthopaedic surgeon, Dr. Drew, did not believe the worker's condition was consistent with the MRI; in our view the CPMU reporting also endorses that the worker's condition is not explained by the MRI findings. It is therefore not clear that Dr. Kiraly had access to all the prior medical reporting when making the statement about organic findings. In any event, Dr. Kiraly is a psychiatrist, not an orthopaedic surgeon or physiatrist; although we place weight on other aspects of Dr. Kiraly's report, on this particular point regarding consistency with organic findings we place more weight on the other specialists for whom assessing the organic source of pain is more within the core of their expertise, such as Dr. Drew (and Dr. P. Robert in the later REC examination).

[33] Moreover, and perhaps more importantly, we note that the CPMU team did not in any event actually diagnose conversion disorder. Their formal diagnosis was Pain Disorder Associated with both Psychological Factors and a General Medical Condition, a diagnosis with which Dr. Kiraly also concurred. The CPMU team wrote that the worker's "overall presentation is more consistent with conversion disorder" but they did not actually include that diagnosis in their formal DSM diagnosis summary. We do not interpret this as an oversight. Given that context, we interpret the CPMU team comment regarding conversion disorder to mean that the worker's presentation suggested elements of conversion disorder, but the best DSM diagnosis was chronic pain disorder. As we interpret the report, the comment regarding conversion disorder was related to the assessors' observations that the worker presented with odd behaviours and it was intended to convey that they felt these behaviours, although unusual, were *un*conscious responses to his pain disability as opposed to conscious exaggeration or malingering. This interpretation accords with the other portion of the CPMU report, quoted above, where the assessors expressly stated that the team felt the worker's presentation included "very significant psychiatric aspects" but was nevertheless genuine.

[34] Dr. Kiraly's report recommended ongoing psychiatric treatment. The CPMU follow-up report of July 20, 2010 also recommended ongoing psychological support. Board memoranda show that the worker was keen to engage in this treatment, but it appears there were difficulties with referrals for such treatment through the worker's family doctor. Board memoranda show the worker sought the Board's involvement, and the Board attempted numerous times to follow up with the family doctor in the months of July, August and September of 2010. Ultimately it appears no psychological treatment was arranged at that time. However, as we interpret the CPMU reports and Dr. Kiraly's assessment, ongoing psychological or psychiatric treatment had been clearly recommended, which in turn supports a finding that the worker had an ongoing non-organic impairment. Neither the CPMU reports nor Dr. Kiraly suggested the worker had recovered.

[35] An October 20, 2010 REC assessment was completed by Dr. Robert, an orthopaedic surgeon, and E. Crother, a chiropractor. Consistent with the CPMU assessments and Dr. Kiraly's assessments, the REC assessment reflects a presentation which is significantly non-organic in nature. The examiners expressly noted a number of non-organic signs. The worker presented with constant low back pain, graded at 7/10, accompanied by both pain and

numbness radiating into the right buttock and right mid-thigh. The worker also reported spikes of more severe pain. The assessors observed that the worker also presented with a "voluntary full body tremor intermittent in nature." The worker continued to require a walker to ambulate. He was noted to prefer to stand most of the time, an observation that is again consistent with other assessments such as Dr. Kiraly's. The REC assessors wrote, "The examination revealed a halting stutter like gait necessitating the walker. He was in a forward flexed position and when standing stationary did a danced [sic] up and down on his tip toes." There were specific non-organic signs on examination: complaints of extreme pain in tactile stimulation over the skin in the sacral region; pain on simulated axial compression and reported pain on simulated axial rotation. There was a discrepancy between supine and straight leg raising, another non-organic sign. The examiners noted the MRI results and opined they did not correlate with the clinical presentation. The diagnosis provided was a low back strain, with a recommendation for 12 weeks of active physiotherapy. Despite noting the various non-organic aspects of the worker's presentation, the REC assessors did not comment on this presentation when providing their diagnosis and prognosis.

[36] The worker's chiropractor spoke to the Board on January 14, 2011, as recorded in a Board Memo of that date. The memo records:

> He agrees that the worker's presentation is most unusual. He said that he has known the worker a long time (treated him prior to the injury) and believes he had pain issues. He understands that the worker's behaviour makes it hard to identify what the problem actually is. He states that perhaps his injury is simply not "textbook."

[37] We interpret the above memo as evidence that the worker's chiropractor, like the CPMU team, felt that the worker's presentation was genuine despite it being unusual and difficult to clearly assess.

[38] The medical evidence reviewed above describes an ongoing pain condition with psychological or psychiatric aspects that is not explained by the lumbar sprain injury the worker initially suffered. Nor, as discussed above, is the presentation explained by underlying imaging findings in the lumbar spine. The presentation is on balance one that includes significant non-organic components. These conclusions lead, in turn, to the most contentious issue in this appeal: the genuineness of this non-organic presentation.

[39] Both the Case Manager and the ARO appear to have concluded that because the worker demonstrated non-organic signs this supported a conclusion that the worker was deliberately exaggerating or magnifying his symptoms. However, that is not a necessary conclusion when non-organic signs are present. Non-organic signs are indicators that there is a lack of organic explanation for the presentation and that other factors are at play in that presentation. These other factors can include motivation, conscious or unconscious exaggeration, or unconscious psychological factors. Accordingly, non-organic signs *may* indicate a consciously non-genuine presentation, but they do not necessarily do so (see, e.g., *Decision No. 267/06*; *Decision No. 1588/12*; *Decision No. 2178/03*).

[40] In this case, when we consider the reported non-organic signs in the context of the overall medical reporting, coupled with our assessment of the worker's credibility, we conclude that the non-organic signs in this case are not signs of conscious exaggeration or deception, but rather indicators of the largely unconscious psychological, non-organic aspects of the worker's chronic pain disability. We reach this conclusion for several reasons. First, in assessing the worker's testimony as a whole, we found that, the worker was non-evasive and broadly credible in his

testimony. Although he was not always an accurate historian, we did not interpret his errors to include any intent to deceive or mislead. We note his testimony about his disability was broadly consistent with the medical reporting. Second, as indicated above, despite doubts expressed by the employer and others, under clandestine surveillance the worker continued to rely on his walker and did not demonstrate any abilities that were significantly inconsistent with his presentation in medical assessments. Third, there is no medical reporting suggesting that the worker was consciously exaggerating or malingering. To the contrary, the CPMU assessors specifically opined, as quoted above, that despite the unusual nature of the worker's presentation it was a genuine presentation. We place significant weight on this reporting as the CPMU team spent considerable time with the worker and had extended contact with him (directly and, presumably, through staff) for a four-week period. The CPMU team was well placed to assess the genuineness of the worker's presentation. Dr. Kiraly, despite questioning the diagnosis of conversion disorder, still provided the diagnoses of pain disorder and major depressive disorder. Despite referring to some symptom magnification, and behaviours which Dr. Kiraly thought were "idiosyncratic," she did not make any comments suggesting the worker's presentation was non-genuine (we note again here that symptoms magnification, like other non-organic signs, may be either conscious or unconscious; Dr. Kiraly did not suggest it was conscious). She administered formal testing of such parameters as attention, concentration and memory and opined they were affected. She made no comment that the worker's results on these tests suggested any inconsistent performance. The REC assessment, although somewhat oddly eschewing any discussion of the non-organic findings, nevertheless did not include any overt comments that the worker's presentation was exaggerated or malingered. The worker's chiropractor, who had treated him for "many years" and was also well placed to assess his genuineness, also reported to the Board (reflected in a Board memo dated January 14, 2011) that although the worker's presentation was unusual he had a genuine pain condition. We conclude that the worker's pain disability, with its accompanying non-organic aspects, is genuine.

[41] In summary, we find that the medical evidence and the worker's testimony show that as a result of the October 2009 workplace injury the worker developed a chronic non-organic pain condition in his low back, with accompanying leg symptoms and associated psychological aspects. The worker's pain is not explained by the organic findings. He meets criteria 3 and 4 of the CPD policy.

3. CPD criteria 5: marked life disruption

[42] We are also persuaded that the worker's pain condition has resulted in marked life disruption as required by the CPD policy.

[43] The worker has marked life disruption in the occupational sphere. He was working at the time of the injury and has largely been unable to return to work. The worker did attempt a graduated return to work with the accident employer in November 2010, beginning at four hours a day initially doing desk work. The plan was for the worker to gradually return to his pre-injury work as a driver. However, a January 11, 2011 Board memo shows that by that time the employer told the Board that the worker was reporting he could not sit as a passenger in the truck for more than an hour. The worker was also reportedly engaging in forward leaning postures while riding as a passenger that blocked the driver's view. In the January 14, 2011 Board memo recording the Board's discussion with the worker's chiropractor, the chiropractor is reported to have stated that despite a genuine effort to do the exercises given to him the worker had not made progress and was in too much pain. The chiropractor told the Board the worker should not

be at work at all. It appears that the worker ceased participating in the return to work trial at or around that time. He has not worked since then in any capacity. There is clear evidence of marked life disruption in the occupational sphere.

[44] The worker has also experienced marked life disruption in relation to his personal and social sphere. He testified, and we accept, that prior to the accident he was engaged in a number of fairly physical hobbies on a regular basis. He stated he had three different black belts in karate, which he practiced five days a week. He also engaged in horseback riding, kayaking, and paintball. A hobby the worker noted that he used to particularly enjoy was hiking, which he testified he did almost daily. The worker can no longer engage in any of these activities since the October 2009 workplace injury. As a further result, the worker explained, he no longer sees many friends with whom he used to engage in these active pastimes.

[45] The worker testified that he does very basic cooking, such as heating something in the toaster oven, but a friend helps him with cooking as well. He stated that the same friend helps to get groceries and with cleaning. Dr. Kiraly's report corroborates the worker's testimony that his daily activities are significantly affected by his pain condition. Dr. Kiraly reports that the worker is able to dress himself but does so slowly. The report confirms that the worker has difficulty with cooking. He has difficulty cutting his food. The report notes the worker switched from showering to bathing because of fear that he might "collapse" while showering. Dr. Kiraly's report also indicates, consistent with the worker's testimony, that the worker has very poor sleep due to pain. As noted above, Dr. Kiraly also reported that the worker's attention, memory and concentration were affected.

[46] The CPMU Program Assessment Report dated May 7, 2010, by social worker A. Titterson, also reflects the disruption in the personal and home spheres of the worker's life. It confirms again that he has difficulty cooking. It also states that the worker wakes up frequently in the night due to pain. It notes reduced appetite. The report confirms that the worker "expressed frustration that he has very little routine and virtually no social life since the onset of his injury."

[47] Ms. Titterson's psychological report describes how important the worker's relationship with his daughter is to him, noting that "he spoke with a great deal of pride when discussing his daughter." The report states that the worker and his daughter used to spend a lot of time together in nature and he feels he is no longer able to enjoy the activities they previously did together. Again, the worker provided similar evidence in his testimony about the impact of his pain condition on his relationship with his daughter. Another passage in Ms. Titterson's report indicates that the worker expressed concerns that he has had difficulties with his daughter since the accident, indicating, "there have been significant changes and he has difficulty explaining things in a way that she can understand. He is looking forward to assistance in this area."

[48] We find that the evidence indicates the worker has experienced marked life disruption in his occupational, personal, social and home life due to his chronic pain condition. He meets the fifth criterion of the CPD policy.

4. Summary of findings on CPD entitlement

[49] In summary, we find that the worker suffered a workplace injury—a low back strain—and since that time he has experienced consistent and genuine pain that has lasted much more than six months beyond the usual healing time for his injury. We find that worker's ongoing

pain is caused by the injury and the organic findings do not explain the nature and extent of his symptoms. The worker has suffered marked life disruption as a result of his persistent pain condition. Accordingly, the worker meets the policy criteria. He has entitlement for CPD.

[50] The CPD policy notes that, given the nature of the CPD entitlement criteria, once a worker has met those policy criteria it follows that their CPD is considered a permanent impairment. The worker is therefore entitled to a non-economic loss (NEL) assessment for his CPD.

[51] Pursuant to the "no-stacking" rule contained in the Board's policy for rating CPD impairments, OPM Document No. 15-04-04, the worker's CPD award subsumes and replaces his prior organic entitlement for his low back.

(c) Entitlement for psychotraumatic disability

[52] Given our finding that the worker has entitlement for CPD, it is unnecessary to address entitlement for psychotraumatic disability, since the worker can only be awarded entitlement for one or the other non-organic impairment. For the reasons given above, we find the worker's condition to be better more appropriately assessed under the CPD policy.

(d) Ongoing entitlement after January 28, 2011

[53] It follows from our findings above that the worker's compensable condition did not resolve by January 28, 2011. The worker continued to have an ongoing impairment in the form of CPD. The worker has entitlement to benefits beyond January 28, 2011.

[54] The Board has not considered loss of earnings benefits and health care benefits beyond January 28, 2011 and, in addition, the worker will now undergo a NEL assessment to quantify his CPD award. In the circumstances, we find it appropriate to remit the issue of the worker's entitlement to benefits beyond January 28, 2011 to the Board to be adjudicated in the first instance.

DISPOSITION

[55] The appeal is allowed as follows:

1. The worker has entitlement for CPD. He is entitled to a NEL assessment for that permanent impairment.

2. The worker has entitlement to benefits beyond January 28, 2011. The nature, duration and quantum of such benefits is remitted to the Board for adjudication, subject to the usual rights of appeal.

DATED: March 21, 2019

SIGNED: K. Jepson, C. Sacco, J.A. Crocker

Ontario

ORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 310/19

BEFORE:	N.A. Carlan	: Vice-Chair
	K.J. Soden	: Member Representative of Employers
	M. Ferrari	: Member Representative of Workers
HEARING:	February 14, 2019, at Hamilton Oral Post-hearing activity completed on May 16, 2019.	
DATE OF DECISION:	July 9, 2019	
NEUTRAL CITATION:	2019 ONWSIAT 1587	
DECISION UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) June 17, 2015	

APPEARANCES:

For the worker:	K. Hahn Paralegal
For the employer:	K. Meehan Lawyer
Interpreter:	N/A

REASONS

(i) Introduction

[1] The employer appeals a decision of the ARO, which concluded that worker was unable to work and was entitled to full Loss of Earnings benefits (LOE) until the age of 65. The ARO rendered a decision based upon the written record without an oral hearing.

(ii) Preliminary issues

[2] Preliminary issues were raised at the hearing by the Panel. Specifically the Panel sought submissions with respect to the Tribunal's authority to reduce LOE benefits after the 72 month final review. The Panel also requested submissions on the admissibility of video tape evidence taken after the final LOE review. The Panel received the post hearing submissions on May 16, 2019.

[3] With respect to the first issue the employer's representative argued that the final decision of the Workplace Safety and Insurance Board (WSIB) rendered by the ARO determined that the worker was not capable of work or in other words the worker was competitively unemployable. The employer is arguing that the ARO incorrectly determined that the worker was competitively unemployable and entitled to benefits flowing from that finding. The worker's representative agreed that the ARO had ruled on this substantive issue (employability) and therefore the substantive matter was properly before the Panel. Neither party argued that the worker improved after the final LOE assessment. Therefore the appeal before the Tribunal is whether the worker was able to return to the workforce and whether the worker has entitlement to full LOE benefits between July 20, 2012, and the age of 65. Based on these submissions and the clear ARO decision, the Panel has determined that it has the jurisdiction to assess the worker's employability and benefits that would flow as a result of that decision.

[4] With respect to the admissibility of video tape evidence, supplied by the employer, the Panel accepts that there is no question about the authenticity of this evidence. The employer's argument is that although the evidence was secured in 2016 and 2017 after the final lock-in-date (2015), it continued to be relevant because the worker's condition had not changed. In support of their argument they relied on WSIAT *Decision No. 858/18* which indicated that there was no prohibition to relying on evidence which was relevant to the worker's condition at the time of the final review.

[5] The worker's representative argued that the Panel should not accept this evidence. Specifically he wrote:

> ….evidence post lock in should not be considered in determining benefit entitlement unless the worker is fraudulent or misrepresents their claim for benefits.

[6] He argued that since the evidence showed that the worker was conducting herself in keeping with the limitations identified by the WSIB there was no question of misrepresentation. On this basis the evidence should not be accepted.

[7] The Panel accepts the logic in previous WSIAT decisions that videotape evidence, which is relevant to the issue under appeal, should be accepted. The Panel finds that there was no significant change in the worker's condition after the 2015 lock-in. Based on this finding the Panel accepts that the evidence obtained in 2016-17 was relevant to the worker's condition in 2015, the lock-in-date. Accordingly we will accept the videotape evidence.

(iii) Issues

[8] The issues under appeal are as follows:

1. Whether the work related injury completely prevents the worker from returning to any type of work.

2. Quantum of LOE from July 20, 2012 until the age of 65.

(iv) Background

[9] The worker, who is now 58, started as a cleaner with the accident employer, a casino, in 2006. She was injured on June 16, 2009, when she slipped and injured her right ankle.

[10] The claim was allowed and full LOE benefits were paid. The worker was originally granted a 5% Non-Economic Loss Award (NEL). That award was subsequently increased to 20% in recognition of Chronic Regional Pain Syndrome (CRPS). The worker has not returned to paid employment. She has qualified and is in receipt of Canada Pension Benefits Disability.

(v) Law and policy

[11] Since the worker was injured in 2009, 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.

[12] Specifically, sections 40 and 43 of the WSIA govern the worker's entitlement in this case. Section 40 of the WSIA provides in part:

> **40(1)** The employer of an injured worker shall co-operate in the early and safe return to work of the worker by,
>
> (a) contacting the worker as soon as possible after the injury occurs and maintaining communication throughout the period of the worker's recovery and impairment;
>
> (b) attempting to provide suitable employment that is available and consistent with the worker's functional abilities and that, when possible, restores the worker's pre-injury earnings;
>
> (c) giving the Board such information as the Board may request concerning the worker's return to work; and
>
> (d) doing such other things as may be prescribed. 1997, c. 16, Sched. A, s. 40 (1).
>
> **(2)** The worker shall co-operate in his or her early and safe return to work by,
>
> (a) contacting his or her employer as soon as possible after the injury occurs and maintaining communication throughout the period of the worker's recovery and impairment;
>
> (b) assisting the employer, as may be required or requested, to identify suitable employment that is available and consistent with the worker's functional abilities and that, when possible, restores his or her pre-injury earnings;
>
> (c) giving the Board such information as the Board may request concerning the worker's return to work; and
>
> (d) doing such other things as may be prescribed. 1997, c. 16, Sched. A, s. 40 (2).
>
> ...

[13] 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).

[14] As noted above, the issue before the Tribunal is the worker's entitlement to LOE benefits. Under section 43(1) a worker who has a loss of earnings as a result of a compensable injury is entitled to LOE benefits. *Decision No. 2474/00* held that under section 43(1) a causal relationship between the injury and wage loss is a condition precedent to the payment of LOE benefits. A refusal of suitable work is not necessarily an act of non-cooperation, but it may lead to a conclusion that the worker's loss of earnings does not result from the injury. Section 43(2) operates to reduce a worker's benefits where the worker refuses suitable employment. Thus, a worker who refuses suitable employment at no wage loss is not entitled to LOE benefits because the loss of earnings is not caused by the injury, but caused by the refusal of the suitable employment.

[15] 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.

[16] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, 215; 224; 230; 235 and 300 Revision # 9.

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

> OPM Document No. 18-03-02 "Payment and Reviewing LOE Benefits (Prior to Final LOE Review)," explains the circumstances in which "Treatment with No Return to Work" is appropriate:
>
> If the nature or seriousness of the injury completely prevents a worker from returning to any type of work, the worker is entitled to full LOE benefits, providing the worker co-operates in health care measures as recommended by the attending health care practitioner and approved by the WSIB. If the worker does not co-operate, the WSIB may reduce or suspend the worker's LOE benefits.
>
> Operational Policy Manual (OPM) Document No. 19-03-03 "Determining Suitable Occupation."
>
> When determining a SO for a worker, every effort is made to
>
> • maintain the employment relationship between the worker and the injury employer by identifying appropriate occupations with the injury employer
>
> • provide for effective and meaningful input and choice on the part of the worker in identifying a SO, and
>
> • re-integrate workers into suitable and available work, all within a reasonable cost structure
>
> In determining a SO, the WSIB works with the worker and employer and considers
>
> • a worker's functional abilities
>
> • a worker's employment-related aptitudes, abilities, and interests
>
> • what jobs are available with the injury employer through direct placement, accommodation, or retraining
>
> • labour market trends, and the likelihood of the worker being able to secure and maintain work within the occupation with another employer, and
>
> • in accordance with applicable human rights legislation, any pre-existing non work related condition(s) (e.g., including non-physical disabilities such as a learning disability) a worker may have, as well as any other human rights-related accommodation requirements.

(vi) Testimony documentary and medical evidence

[18] The worker had always been engaged in physical labour. On June 16, 2009, the worker had an accident at work. She immediately provided the following history to the employer and the WSIB:

> I used an elevated sink to assist myself in reaching for garbage bags that were on a shelf above me and I slipped off the edge of the floor sink, twisting my ankle and resulting in fractures and ligament damage.

[19] The WSIB recognized the claim and LOE benefits were granted.

[20] At the hearing the worker testified that she has been severely limited in her mobility since the accident. The pain in her leg recurs after being active for any length of time. She uses a cane when walking outside and has not driven a car since the accident. Her leg and foot pain in addition to her medication have also limited her capacity to concentrate. She has also moved from a house to an apartment because she was no longer capable of maintaining a house. By way of example she testified that she could no longer vacuum and because she can not stand for more than half an hour she has to sit on a stool while doing the dishes.

[21] The worker also addressed the surveillance evidence submitted by the employer. She did not dispute any of the evidence. She did, however, testify that she was able to go shopping and engage in recreational activities on occasion. The worker testified that she was not totally disabled but her disability rendered her unable to be gainfully employed.

(a) The medical evidence

[22] On July 31, 2009, the worker was seen by Dr. P Missiuna, an orthopedic surgeon. He wrote:

> The patient was reviewed in my fracture clinic today for ongoing treatment of a right fracture at the base of the fifth metatarsal. She is currently in a walking air cast and is unable to resume her previous work activities.

[23] The worker's recovery was monitored by the WSIB Nurse Case Manager (NC). On November 23, 2009, the NC wrote:

> Following my review, I note that (the worker) had a straight forward fracture which has unfortunately not healed in a straight forward manner. She continues to have swelling and pain and limited mobility with the foot/ankle. There is evidence of slow to non healing of the fracture. And there is a question of whether she will require surgery to repair, most likely she will not require surgery. Noted is an underlying degenerative condition that may be affecting the recovery process.

[24] In another memo on the same day the NC wrote:

> I SPOKE WITH DR. JEFAK THIS MORNING. HE INFORMED ME THAT (THE WORKER) HAS BEEN WORKING REALLY HARD AT REHAB. THEY ARE WORKING ON EXERCISES THAT ARE INCREASING THE STRESS OF WEIGHT BEARING

[25] On March 16, 2012, Dr. Ballesteros, at Hamilton Health Services examined the worker and wrote:

> This patient has opted for conservative treatment because none of the interventional procedures that we are offering her are a cure for this disease and she will have to deal with the side effects if she were to decide to get any, so we have discussed this to a great length and she has decided to follow conservative treatment, which is a good line of treatment. So the patient needs the aid of a cane to walk. The distance from the entrance of the hospital to the clinic is about 100 meters, she is still not able to walk that distance. So we do not know how W.S.I.B. wants her to go back to work. At this moment in time, we do not under no circumstance want this patient to ever go back to work because we still are not able to control her neuropathic pain. We are going to see her in about 24 days to review the trial of these medications and we will make further decisions at that time.

[26] Dr. Missiuna, examined the worker again on March 22, 2010, and he wrote:

> She has attempted to drive the car but cannot endure more than 15 minutes behind the wheel rendering it is impossible for her to drive herself to and from work at

> (the accident workplace). She continues to have ongoing pain immobility and must use a cane to aid in her walking. At this point we have ordered her a customized brace and special walking footwear for her to give her support and aid with her mobility. She continues to attend physiotherapy on a regular basis and she is diligent in following (my) prescribed treatment plan. Once she has received the brace and shoes she will be re-assessed in two weeks' time.
>
> At this point in time (the worker) remains unable to return to work at the (employer). It is uncertain when, if ever, she will be able to resume her former position of employment.

[27] On July 19, 2010, Dr. Missiuna confirmed his previous findings and indicated that the worker could not drive a car safely and was limited in walking.

[28] On November 19, 2013, Dr. Ballesteros again examined the worker and wrote:

> This patient is known to have a history of CRPS [Chronic Regional Pain Syndrome] on the right leg. She is quite steady with the Tylenol No. 3's and the venlafaxine, so we are not going to change this medication. We have done multiple trials before and she has also developed some sort of allergy or intolerance to some medication. So, at this moment in lime, we are going to keep her on this.
>
> She actually stopped smoking and it is more than six months and she actually is doing some water walking. She cannot swim but she is doing some stretches and actually doing some walking in the water, a very mild exercise but three times a week so that it is very promising for her ability lo cope with activities of daily living.
>
> We have said multiple times this patient is never working again and at this moment in time we are going to keep her on the same medication and keep her on conservative treatment.

[29] On July 30, 2010, the worker was granted a 5% NEL award for the residual ankle and foot disability. This NEL award was increase to 20% in recognition of the worker's CRPS.

[30] There is no evidence before the Panel which indicates that the worker has made a significant recovery or that her compensable injury has improved.

(b) The videotape evidence

[31] The employer engaged a private firm to surveille the worker after her final LOE review on four different days. The Panel had an opportunity to review these tapes. They showed the worker walking with a cane. She seemed to be walking at normal pace, with a cane. When not relying on a cane she relied on a shopping cart. She managed to climb stairs with the use of a railing.

[32] The worker was seen at a casino for about eight hours on one occasion. During that outing she was seated for most of the time and her leg was often elevated.

[33] On another occasion the worker was seen shopping. She managed to look through racks of clothing and carry some items to the cash.

[34] The worker was never seen driving. She was able to get in and out of the vehicle.

(c) Post injury occupational activity

[35] After the worker completed her active medical treatment, the accident employer began to look for possibilities which could result in the worker's return to suitable employment.

[36] A significant stumbling block with respect to a return to work was the worker's ability to get to work. The worker gave up her driver's license after the accident. The record indicates that it would take the worker about 90 minutes by public transit to get to the workplace, which was in a very suburban location. Shortly after the worker was preparing to return to work, the employer suggested that it might be willing to provide taxi services for the worker to get to work. That offer was withdrawn and then there were discussions about the worker attending classes that would educate her about the option of driving with her left foot. Ultimately these plans fell through. The worker declined to take a course on alternative driving techniques (using her left foot) for a number of reasons. According to the worker the recurring sharp pain in her right foot made it dangerous to drive and the medication impaired her ability to concentrate. As previously described these concerns about driving were supported by her treating physicians.

[37] The employer offered the worker a part-time opportunity, which was premised on the worker's ability to get to work. The offer was withdrawn when there was no reasonable expectation that the worker could get to work.

[38] In May 2012 the Work Transition Specialist (WTS) prepared a Return to Work (RTW) programme described as:

> This WTS recommends that this worker complete an academic upgrading program at (approved private career college provider) from June 24 to September 13, 2012, to upgrade her English and Mathematics skills. Following that program, this WTS recommends that she complete a basic 8-week computer training program at Diskovery at Ontario March of Dimes from September 16 to November 8, 2012. This program is sponsored through (a local community college). The worker will then complete the formal training program, a 26-week Executive Administrative Office Diploma at Grade Learning (approved PCC program) from November 11, 2012 to May 16, 2013. At the conclusion of the formal training program, this WTS recommends that she complete JST/EPS programs from May 19, 2013 to July August 8, 2013. All of the above providers have agreed to the WSIB sponsorship terms and/or are approved PCC providers.

[39] In October 2012 the worker advised the WSIB that she would not be participating in RTW programme because she did not believe that she could be employed. No additional efforts were made to help the worker re-enter the labor force.

(vii) Submissions

[40] The appellant's representative argued that the worker's permanent compensable injury did not result in total disability. Specifically she indicated that the worker would have been able to perform many sedentary jobs and the worker made no attempt to re-enter the labour market. In making this argument she relied on early Functional Abilities Forms which indicated that the worker would make a good recovery. The representative submitted that not being able to drive should not be considered in assessing the worker's employability. She asked the Panel to recognize that many workers who do not drive are still able to get to work every day. In closing she argued that the worker's subjective assessment of her pain was not sufficient to establish total disability. In her submission the doctors who opined that the worker was unemployable were no longer giving medical opinions but were advocating on behalf of the worker.

[41] The worker's representative argued that the medical evidence supported the ARO's conclusion that the worker was unemployable. He pointed to the evidence that indicated that the worker could not walk more than 100 meters. He noted that after the accident the worker required assistance with activities of daily living. With respect to the video evidence he argued

that the worker was always seen using her cane and none of her activities went beyond the limitations noted by the physicians. Finally he noted that the worker had been co-operative in all the medical treatment and therapy but still had significant neurological pain which limited her daily activities.

(viii) Analysis

[42] The appeal is denied for the reasons set out below.

[43] The critical issue in this case is the worker's employability following the work accident. The employer's position is that the worker is able to do some work following the accident. In contrast the worker's position is that she was rendered competitively unemployable. The finding on this issue will define the nature of benefits to which the worker is entitled. There are multiple WSIAT decisions which consider entitlement to LOE when a worker has not returned to work even when they are not totally medically disabled.

[44] Specifically WSIAT *Decision No. 620/17* provides a useful discussion about the difference between total impairment and competitively unemployability. In that decision the Vice Chair wrote:

> Although the term competitively unemployable has been used to describe a worker who is incapable of earning any income in suitable employment, the term is not contained in the legislation or Board Policy. In order to determine if a worker is entitled to full LOE benefits as sought, in accordance with the test set out in the legislation, I must determine if the worker is unable to earn any income in suitable employment due to the compensable conditions. See for example *Decision No. 1006/10*.
>
> As stated *in Decision No. 1/08*, the determination of a worker's competitive employability is not an exclusive medical determination. A multitude of factors including the degree of impairment and functional ability, medical restrictions, transferrable skills, personal aptitudes, job search skills and abilities, pre-existing conditions and the degree and amount of loss of earnings are considered. See *Decision Nos. 248/06; 1567 /07 and 1771/09.*
>
> Tribunal jurisprudence takes into account that employability and impairment are separate and distinct concepts. As stated in *Decision No. 563/08*:
>
> A worker may only be partially impaired but competitively unemployable if he or she has no real prospect of being able to obtain or maintain employment in the labour market. Competitive unemployability may occur for a number of reasons, including the worker's age, level of education, transferable skills, literacy or the nature of the compensable condition from which the worker suffers. Workers who become competitively unemployable have been granted full LOE benefits by Tribunal decisions.
>
> In addition, the concept of competitive unemployability is discussed in *Decision No. 1689/06* which held:
>
> The concept of "competitively unemployable" is not defined or addressed in the Act or in Board policy. It is discussed in 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 suitable employment. In one respect, the concept widens 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.

[45] The Panel agrees and adopts the Tribunal's jurisprudence. The Panel focused on the whether the worker is competitively unemployable and not whether she was totally disabled. This line of decisions evaluates employability and considers the nature of the compensable condition, the worker's age, level of education, transferable skills and literacy.

[46] One of the first considerations for the Panel is the nature of the ongoing disability. The worker suffered a fracture. Unfortunately she did not have a complete recovery from this injury according to the WSIB NC. As a result she has had continuing pain, swelling and immobility in her right ankle and foot. These findings were confirmed by the treating physicians Dr. Missiuna and Dr. Ballesteros. In addition to the physical disability, the worker also developed CRPS for which the Board granted entitlement. The worker's NEL award was increased to 20% to reflect the worsened condition of her foot and ankle. The Panel finds with the combination of the organic disability and CRPS the worker has an ongoing disability which exceeds the original prognosis and has rendered the worker significantly impaired. Finally the Panel did not identify any activities on the videotapes that exceeded the limitations identified by her treating physicians.

[47] Another consideration is whether the worker was co-operative in efforts to recover. In this case the NC in a memo in November 2009 reported that the treating physician indicated that the worker was working "really hard at rehab." The treating orthopedic specialist indicated that the worker was diligent following the prescribed treatment plan. Finally, Dr. Ballesteros reported that her mild water exercise regime was very promising. These reports lead the Panel to conclude that the worker was an active participant in her physical recovery. However these programmes were not successful in significantly limiting the worker's symptoms and disability.

[48] Considering the worker's personal characteristics, the Panel notes that the worker's employment history is limited primarily to physical labour. That employment history did not provide the worker with the opportunity to develop transferable skills like computer work or customer relations. The worker on the advice of her physicians no longer drives which severely limits her ability to get to work. However, in this case given the worker's walking limitations she would probably be unable to get to work using public transit. The Panel finds that this has limited her employability. Her literacy is some what limited and English is the worker's second language. Finally the Panel notes that at the time of the final lock in the worker was 53, an age at which the success of retraining becomes questionable. None of these characteristics individually would have rendered the worker as competitively unemployable. However these characteristics when combined with the compensable disability have resulted in the worker's inability to be competitively employable.

[49] We recognize in the time shortly after the accident, the worker was an active participant in her rehabilitation, which was unfortunately unsuccessful. Based on the previous conclusions the Panel finds that the worker's compensable disability and her personal characteristics render her competitively unemployable. She was and is therefore entitled to full LOE benefits.

DISPOSITION

[50] The employer's appeal is denied. The worker is competitively unemployable and is entitled to full LOE Benefits until she turns 65.

DATED: July 9, 2019

SIGNED: N.A. Carlan, K.J. Soden, M. Ferrari

Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 55/15

BEFORE:	S. Darvish: Vice-Chair
HEARING:	December 7, 2016 at Toronto Written
DATE OF DECISION:	January 25, 2017
NEUTRAL CITATION:	2017 ONWSIAT 297
DECISION UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) decision dated January 9, 2013

APPEARANCES:

For the worker:	P. Duarte, Paralegal
For the employer:	Not participating
Interpreter:	None

REASONS

(i) Introduction

[1] The worker appeals a decision of the ARO, which concluded that the worker was not entitled to supplementary benefits from May 2, 1977 to July 26, 1989.

(ii) Issues

[2] The issue is whether the worker was entitled to supplementary benefits from May 2, 1977 to July 26, 1989.

(iii) Analysis

[3] The worker injured her thoracic and lumbar spines on June 11, 1976, while working as a labourer. She was laying out pipes and pulled out three pipes, but when reaching for and pulling out the fourth pipe, the crate of pipes fell striking her back.

[4] In *Decision No. 1777/08*, dated September 8, 2008, the worker was granted entitlement for a permanent disability ("PD") pension. This resulted in a PD pension of 5% from June 12, 1976 to October 30, 2003. The worker's PD pension increased to 10% as of October 30, 2003.

[5] In another Tribunal decision, *Decision No. 1233/11* dated July 11, 2011, the worker was granted entitlement to supplementary benefits under subsection 147(4) from May 2, 1977 and supplementary benefits under subsection 147(14) from January 1, 1995. The Board requested clarification from the Tribunal on the basis that subsection 147(4) supplementary benefits could only be paid as of July 26, 1989. As such, the Tribunal issued a reconsidered decision, *Decision No. 1233/11R* , dated September 9, 2011, which acknowledged the legislative limit for subsection 147(4) benefits and allowed the supplement from July 26, 1989.

[6] The worker then sought a further reconsideration to determine her entitlement to a supplement from May 2, 1977 to July 26, 1989. In a second reconsidered decision, *Decision No. 1233/R2*, dated May 29, 2012, the Tribunal indicated that the worker had only made a claim for benefits under subsections 147(4) and (14) and as such, the Tribunal did not have jurisdiction to rulings on other benefits. The Tribunal left the issue of supplementary benefits from May 2, 1977 to July 26, 1989 to the discretion of the Board.

[7] The Board subsequently issued a decision dated August 31, 2012 indicating that there was no evidence that the worker was involved in any self-directed work activities during the period from May 2, 1977 to July 26, 1989. Under subsection 43(5) of the pre-1985 Act, temporary supplements are payable when the impairment of the earning capacity of the worker is significantly greater than is usual for the nature and degree of the injury, and the worker is in a medical or vocational rehabilitation program that could assist the worker in a return to work. Tribunal case law has also held that there must be a rehabilitative purpose to this supplement (see *Decision No. 495/88*).

[8] The Board determined that the worker did not meet the above test because she was not involved in a medical or vocational rehabilitation program during the period in question. The Board also determined that the worker did not qualify for an older worker supplement because of her age at the time.

[9] In written submissions dated June 16, 2016, Mr. Duarte, submitted that in determining whether or not the impairment of earning capacity is significantly greater than is usual for the nature and degree of the injury, the evaluation is based on the worker's ability to perform the pre-accident occupation and in making this determination, consideration must be given to the whole person concept. Regard must be had to factors such as the worker's age, education, ability to communicate, availability of employment, and physical requirements of the pre-accident occupation. I note that Tribunal case law has generally held that the impairment of earning capacity which is usual for the nature and degree of the injury is evidenced by the amount of the pension (see *Decision No. 495/88*).

[10] I note that during the period for which the worker seeks supplementary benefits, from May 1977 to July 1989, the worker was rated for a 5% PD pension award for her back, thus she had restrictions for her back. I further note that medical evidence on file indicated that the worker could not return to her pre-injury job duties. In this regard, I rely on a chiropractic report dated April 25, 1977, which recommended that the worker should attempt to change her job because her pre-accident job duties of lifting heavy cartons would aggravate her back. I also reply on a medical report from Dr. Hetherington, dated March 22, 1977, which indicated that the worker may not be able to return to her pre-injury job duties. An earlier medical report from Dr. Martin, an orthopaedic surgeon, dated February 18, 1977 also recommended modified duties for the worker or rehabilitation at the Board to assess the worker for a different line of work.

[11] Unfortunately, the Board never offered the worker any vocational rehabilitation services. This was because at the time, the worker did not have ongoing entitlement for her low back, which was only given to her after *Decision No. 1777/08* was released on September 8, 2008. As the Panel noted in *Decision No. 1233/11*, the worker was qualified to receive some vocational rehabilitation. I agree with the Panel's findings in *Decision No. 1233/11* that there was no evidence of the worker failing to cooperate with the Board in a vocational rehabilitation plan. The Panel's findings in that decision are binding. Starting at paragraph 29 of *Decision No. 1233/11*, the Panel stated:

> From the worker's evidence, we are persuaded that her back problem was a significant factor. She was never offered any vocational rehabilitation (VR) and was qualified to receive some VR. Upon reviewing the evidence in this case, we find no evidence that the worker made herself unavailable nor did she fail to cooperate with the Board in a vocational rehabilitation assessment or plan. We are left with the position that, during the period in question, it is impossible to determine whether the worker would have likely benefited from such a program. Left to her own devices, we conclude that the worker was involved in a self-directed vocational rehabilitation program, which did not result in increasing the worker's earning capacity to approximate pre-injury earnings.
>
> It appears from the medical information that the injury to her back precluded her from earning what she earned pre-accident. Although the level of earnings was not high she was unsuccessful in trying to sustain any work record and it appeared that on most occasions she was let go because of back problems. Whether she might have come close to matching her previous earnings on occasion is questionable but the evidence satisfies us that she could not sustain it to any degree prior to 1993. From that point on we are satisfied from Dr. Carr's information that she was then in fact totally disabled for a combination of reasons which included her back problem.
>
> It is unfortunate that she did not receive any VR assistance. It was only through the earlier Tribunal decision that the Board recognized a degree of permanent disability which increased in 2004.

[12] Consistent with *Decision No. 1233/11*, I find that the worker was involved in a self-directed vocational rehabilitation plan during the period in question. The worker made several attempts to find suitable work, but she could not sustain that work because of her ongoing compensable low back problems. The worker testified at the June 6, 2011 Tribunal hearing that she worked as a cleaning lady before her psychological breakdown in November 1977. She then worked in a donut shop for three or four years, but stopped because of her back. She also worked as a cashier, but she could not manage the prolonged standing. She also worked as a clerk in an insurance company, which she gave up because of her back and also because the employer would not give her time off to attend to her son. The worker also recalled working as a clerk at a large retailer, but having to give that up because of her back.

[13] I also find that during the relevant period, the worker was involved in a self-directed medical rehabilitation program. In this regard, I rely on a Chiropractor's First Report dated September 1, 1988 in which Dr. R. Koch, a chiropractor, confirmed treating the worker between 1977 and 1984.

[14] Thus, based on the foregoing, I find that the worker's compensable low back impairment contributed significantly to the impairment of her earnings capacity between May 2, 1977 and July 26, 1989. I find that the worker's impairment of earnings capacity was greater than usual for the nature and degree of the injury and that she was involved in both a self-directed medical and vocational rehabilitation program during the relevant period. As such, the worker is entitled to supplementary benefits from May 2, 1977 to July 26, 1989.

[15] As per Mr. Duarte's submissions and as outlined in *Decision No. 592/06*, the worker's entitlement to supplements for this period falls under subsection 42(5) of the *Workmen's Compensation Act* as amended by *An Act to amend the Workmen's Compensation Act*, S.O. 1975, and continued in the *Workmen's Compensation Act*, R.S.O. 1980, Chapter 539, section 43, as replaced by section 136 of the *Workers' Compensation Act*, S.O. 1984, Chapter 58, and replaced by subsection 43(5). Thus, the worker is entitled to supplementary benefits under subsection 42(5) during the period from May 2, 1977 to 1985 and is entitled to supplementary benefits under subsection 43(5) during the period from 1985 to July 26, 1989.

[16] The worker is not entitled to an older worker supplement because the worker was only 31 years old in 1985.

DISPOSITION

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

1. The worker is not entitled to an older worker supplement.

2. The worker is entitled to a supplement from May 2, 1977 to July 26, 1989 under subsections 42(5) of the *Workmen's Compensation* Act as amended by *An Act to amend the Workmen's Compensation Act,* S.O. 1975 and subsection 43(5) of the *Workers' Compensation Act*, R.S.O. 1980, as amended by S.O. 1984, Chapter 58.

DATED: January 25, 2017

SIGNED: S. Darvish

Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 3622/17

BEFORE: M.F. Keil: Vice-Chair

HEARING: September 29, 2017 at Toronto
Written

DATE OF DECISION: May 23, 2018

NEUTRAL CITATION: 2018 ONWSIAT 1702

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) dated May 12, 2015

APPEARANCES:

For the worker: K. Hahn, Paralegal

For the employer: Not participating

Interpreter: N/A

REASONS

(i) Introduction to the appeal proceedings

[1] The now 55 year old worker was employed by a temporary employment agency. At the time of her compensable injury on June 13, 2007, she was working as a receiver/inspector. On that date, she suffered an undisplaced fracture of the distal left radius while pushing on a broken filing cabinet. She returned to modified work on July 1, 2007, working as a receptionist/administrative assistant.

[2] Orthopaedic surgeon Dr. J. Roth concluded, as of his February 2009 report, that the worker would have a permanent disability and would not be able to return to work requiring repetitive activities or heavy lifting, gripping or pinching with her left hand. The Board considered the worker to have reached maximum medical rehabilitation (MMR) as of the orthopaedic surgeon's report and awarded her a 4% Non-Economic Loss (NEL) award.

[3] In a letter dated October 1, 2010, the employer notified the worker it could not continue to offer the worker her current assignment and provided two weeks' notice. The employer told the Board the decision to lay the worker off was related to administrative restructuring and not because of her injury. The worker advised that she had been accommodated in her position (per her restrictions as outlined above).

[4] The worker now appeals a 2015 decision in which the ARO determined the worker was not entitled to loss of earnings (LOE) benefits beyond October of 2010, this since her employability had not been affected by her work injury and, further, because the job of receptionist/administrative assistant was available in the general labour market at comparable wages to those which the worker had been earning (approximately $18 an hour).

[5] The sole issue before me is whether the worker has entitlement to LOE benefits beyond her permanent layoff date of October 15, 2010.

(ii) Law and policy

[6] 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.

[7] Specifically, section 43 of the WSIA governs the worker's entitlement in this case.

[8] Pursuant to section 126 of the WSIA, the Board provided the relevant policy packages, Revision #9, applicable to the subject matter of this appeal. I have considered these policies as necessary in deciding the issues in this appeal.

(iii) Analysis

[9] This appeal was referred to me as a proposed settlement through the Early Intervention (EI) process. After a review of the file information and in consideration of the relevant law and policy, I agree that the appeal can be allowed in part as follows:

- The worker has entitlement to partial LOE benefits subsequent to October 15, 2010, based on a deemed ability to earn minimum wage in the identified Suitable Employment or Business (SEB) now called Suitable Occupation (SO) of receptionist/administrative

assistant. The worker withdraws all other aspects of her appeal, mindful of the statutory time limits set out in the WSIA.

[10] In accepting the above resolution I have relied on the following information:

1. In this case, the initial thinking was the worker's condition would improve and modified duties needed only to be provided on a temporary basis. This resulted in the worker performing modified duties, then being taken off them, and then being returned to them in October of 2008.

2. It is not in dispute that the worker has a permanent impairment and that she has permanent restrictions, these respecting left hand use. These were in place as of early 2009. It therefore follows that the worker's condition was stable, but that restrictions were ongoing. Further, it is not in dispute that the worker could not return to her pre-accident work of receiver/inspector. Lastly, it is not in dispute that the worker performed work as a receptionist/administrative assistant. It has been her uncontradicted evidence that the employer substantially modified the job in order to accommodate her restrictions.

3. A September 29, 2010 Board memorandum reflects a call from the employer asking what would happen if they could no longer accommodate the worker. The Case manager informed the employer that as the worker had not been employed for a year before the accident date, there were no re-employment requirements. An October 1, 2010 memorandum indicates the worker called to advise she was the only person who had been laid off and this was because the employer had stated it could no longer accommodate her.

4. Board *Operational Policy Manual* (OPM) Document No. 15-06-03, "Entitlement Following Work Disruptions: Permanent layoffs" provides for additional LOE (and other) benefits where there is a work disruption and the worker's employability is affected by the work-related impairment and associated restrictions. The policy indicates that, when a worker's condition is stable, but who is still unable to perform the pre-accident job, the decision–maker decides whether the work the worker was doing at the time of the permanent layoff is available in the general labour market. In this case, the worker provided detailed information to the Board as to the job modifications and accommodations she had been provided in her position, this would suggest her job, structured post-injury was not one generally available.

[11] In considering the above, I find that the worker was accommodated in her position as receptionist/assistant and did not perform all the duties normally expected in that position. The worker's statements to this effect form part of the case materials. If her view was being challenged, this needed to have been put to her; I see no indications that the Board questioned the worker's account when dealing with her. I also note the employer called the Board to ask what would happen if they could not continue to accommodate the worker – suggesting that the worker was not performing the regular duties of her position.

[12] In comparing her restrictions with the job requirements of a receptionist/administrative assistant I am satisfied that ongoing accommodations would have been necessary. This conclusion receives support in the return to work coordinator's letter of October 14, 2008, in which she sets out the job modifications necessary: self-paced duties, avoiding repetitive typing/keyboarding and lifting only small bundles of files. These were restrictions agreed to by the employer.

[13] From this, I conclude that the worker would have been at a disadvantage after her layoff and her employability would have been adversely affected. A self-paced environment cannot be considered the norm. Further, I find no evidence to suggest that the worker had ever been trained as a receptionist/administrative assistant. These were the modified duties offered by the accident employer and would have been specific to that workplace. Given the worker had no other experience in this filed, her transferrable skills would appear to be minimal.

[14] I find as a fact that the worker would be covered under the provisions of the Board policy on permanent layoffs: that is, her employability would be adversely affected and additional LOE benefits and/or other services should have been considered. In this case, no labour market re-entry (LMR) assessment was carried out because it was assumed the worker could fully carry out the duties of receptionist/administrative assistant. I have found that is not the case and it follows that I must determine what benefits the worker should have received following the permanent layoff in October of 2010.

[15] OPM Document No. 18-03-02, "Payment and Reviewing LOE Benefits (Prior to Final Review)," is of limited assistance in that the worker did not receive LMR (now called Work Transition (WT)) services. The policy provides that, earnings will be determined when a WT plan is completed/closed. The earnings are determined using current wage and labour market information. If a worker is employed in the identified SO, actual earnings will be used. If a worker returns to a comparable job, LOE benefits may be paid on the worker's actual earnings, provided the job is comparable to the SO-identified job with similar earnings expectations.

[16] In the instant case, the worker was earning over minimum wage working in a significantly modified position. It is not reasonable to assume the worker would have been able to locate employment in a new environment at that wage rate. I accept that the positions of receptionist/administrative assistant – unmodified and at the mid-level - would have attracted a rate around $15.00 - $17.00 an hour. I do not find the worker was in a position to command that wage, since she needed a self-paced position with limited keyboarding and assistance carrying anything other than small amounts of paper. I think it generally understood that most offices do not target assistants who operate as described above. Also, apart from her work with the accident employer and knowledge specific to that employer, the worker had no background in this position.

[17] I find, given the worker's restrictions, she might reasonably have been expected to obtain employment at minimum wage. Further, I find the worker was capable of doing suitable, modified work on a full time basis, this because she demonstrated the ability to do so between 2008 and 2010.

[18] I note, because the Board found there was no entitlement to LOE benefits, there was no operating level review at the worker's lock-in date of June 13, 2013. The ARO determined that there was no entitlement to any LOE benefits beyond October of 2010, this by way of a decision

dated May 12, 2015. Since that decision occurred after the lock-in date of June 2013, I find I have the jurisdiction to consider the worker's entitlement as of her lock-in date.

[19] OPM Document No. 18-03-06, "Final LOE Benefit Review, provides some guidance. The policy provides that, in conducting the final LOE review for a worker employed in a SO identified job, actual earnings will be used. Actual earnings may be used for a non-SO-identified job if the decision maker is satisfied that earnings come reasonably close to the SO-identified earnings. If a worker is not employed at the time of the final review, the Board will use updated entry level wages (for entry into a new field) or updated mid-range wages if the WT plan was designed to improve a worker's existing or transferable skills (referencing OPM Document No. 19-03-03, "Determining Suitable Occupation").

[20] In that the worker never received WT services and had not obtained employment in her field, I am satisfied that minimum wage (as it was in 2013) at 40 hours a week should be used.

[21] I am satisfied the above conclusions are in line with applicable law and policy.

[22] Lastly, the worker withdraws all other aspects of her appeal, mindful of the statutory time limits set out in the WSIA.

DISPOSITION

[23] The appeal is allowed in part. The worker is entitled to partial LOE benefits based on an ability to earn minimum wage (updated as appropriate up until the lock-in date in June of 2013), this at full time hours. The worker withdraws all other aspects of her appeal, mindful of the consequences of the statutory time limits set out in the WSIA.

DATED: May 23, 2018

SIGNED: M.F. Keil