



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2928/18

BEFORE: C.M. MacAdam: Vice-Chair
M. Falcone: Member Representative of Employers
M. Ferrari: Member Representative of Workers

HEARING: October 11, 2018 at Toronto
Oral

DATE OF DECISION: December 19, 2018

NEUTRAL CITATION: 2018 ONWSIAT 3919

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

APPEARANCES:

For the worker: R. Fink, Lawyer

For the employer: Not participating

Interpreter: M. Wolosiuk, Polish language

REASONS

(i) Introduction

- [1] The worker appeals a decision of the ARO, dated April 13, 2017 that found the occupation of Construction Estimator (NOC #2234) was not a suitable occupation (SO) for the worker, that the worker remained employable in jobs including but not limited to Cashier (NOC #6611), Other Elemental Sales Occupations (NOC #6623), Retail Sales Clerk (NOC #6421), and that partial Loss of Earnings (LOE) benefits from July 24, 2012 should be based on minimum wage.
- [2] The worker is seeking full LOE benefits from July 24, 2012 on the grounds that he has been unemployable due to several factors, one being his compensable right shoulder impairment rated at 6% by the Non-Economic Loss (NEL) specialist.
- [3] The issues for determination are suitability of a direct entry SO and the quantum of LOE benefits from July 24, 2012.

(ii) Background

- [4] The worker was hired by the employer as an Electrician in November 2008.
- [5] In his February 17, 2011 Form 6 the then 59 year old worker indicated an onset of bilateral shoulder symptoms in August 2011 that he associated with overhead work as an electrician. The claim was accepted with an accident date of August 17, 2011. That decision was overturned on June 28, 2012 on a finding that the worker had been off work since April 2011 when he first sought medical treatment for his bilateral shoulders in August 2011. The decision was confirmed on July 23, 2012, October 9, 2012, and by the ARO on November 19, 2013. In WSIAT *Decision No. 2730/15* dated January 5, 2016, the Panel granted initial entitlement for the right shoulder on a disablement basis with an accident date of August 17, 2011. The nature and duration of benefits flowing from the decision was directed back to the Board for further adjudication with the worker retaining his right of appeal.
- [6] On June 3, 2016, the worker was assessed at 6% for a NEL award for chronic right shoulder rotator cuff tendinopathy and sub acromial impingement related to the August 2011 disablement injury.
- [7] In a decision letter dated June 17, 2016, the Case Manager (CM) determined the worker was partially impaired and able to work as a Construction Estimator (NOC#2234). Partial LOE benefits were paid effective July 24, 2012. The worker objected to the decision. In the decision of April 13, 2017, the ARO determined that Construction Estimator (NOC#2234) was not suitable, and that the worker remained employable in a direct entry occupation as an attendant, clerk, or cashier at minimum wage. The worker now appeals that decision to the Tribunal.

(iii) Law and policy

- [8] Since the worker was injured in August 2011, 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.

[9] 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).

...

[10] 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*.

[11] The standard of proof in workers' compensation proceedings is the balance of probabilities.

[12] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision #9, would apply to the subject matter of this appeal: #52, 224, and 300.

[13] *Operational Policy Manual* (OPM) Document No. 19-03-03, "Determining Suitable Occupation" states in part the following:

Determining a SO

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

- a worker's functional abilities
- a worker's employment-related aptitudes, abilities, and interests

- what jobs are available with the injury employer through direct placement, accommodation, or retraining
- labour market trends, and the likelihood of the worker being able to secure and maintain work within the occupation with another employer, and
- in accordance with 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.

...

Determining the availability of the SO

When identifying available work, the WSIB will identify SO opportunities as follows

- SO with injury employer in local labour market
- SO with injury employer in surrounding area to which the worker may reasonably be expected to commute
- SO in the local labour market with a new employer
- SO in broader labour market with a new employer.

The WSIB identifies labour market demand for the job or group of jobs on which the SO is based.

[14] 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.

(iv) Testimony

[15] The worker testified that he immigrated to Canada in 1991 at the age of 39. He was an electrician and he began working in that capacity on his arrival in Canada.

[16] The worker confirmed he had been laid off for lack of work in April 2011 until September 2011. He had then stopped working on February 2, 2012 due to bilateral shoulder pain, as well as unrelated right wrist and right knee symptoms. He received short term and long-term disability benefits (STD and LTD) through the employer’s insurance. The worker testified that he began psychiatric therapy in 2013 because he was depressed at not being able to work. He did not look for light work at that time, for fear that he might lose his union benefits. His claim had been denied by the Board from 2012 to January 2016. He asked the employer’s insurer about re-training though he was not offered any. The worker began receiving his union pension in 2014 at age 62. He repaid the employer’s insurance company when initial entitlement from 2013 was granted in 2016.

[17] The worker confirmed that the job search documentation in evidence concerns his job search from November 2017 to January 2018. He had about 14 telephone and online interviews though he was not offered a job. He named three large stores where he applied for sales jobs. He was asked if he had limitations and told of his shoulder, right wrist and right knee limitations. He described his English language proficiency as 50/50 or about half that of a native English speaker.

(v) Submissions

[18] The worker's representative reviewed the claim history. The representative had advised the worker to document a job search and he arranged to have the worker seen by Mr. Bachmann. The worker's representative submits that Mr. Bachmann should be considered an expert and that his report should be paid for, following previous¹ Tribunal decisions. The representative reviewed Mr. Bachmann's report on the worker's employability in detail and noted the conclusion that the worker is competitively unemployable.

[19] The representative made submissions on statistics that indicate what he argues is a problem the Board has in getting workers back to work as cashiers and sales clerks after LMR/WT plans. The representative cited *Decision No. 1204/18* in that respect. He submits the LMR/WT problem is part of a larger problem.

[20] The representative also relies on *Decision No. 494/14* dated May 29, 2014 where the Vice-Chair found it reasonable for a worker to maintain his disability and drug benefits from the employer's insurance rather than pursue part time work where she would lose those benefits and have less income.

(vi) Analysis

[21] In assessing claims for full LOE benefits the Panel has considered *Decision No. 740/12* which notes that it is preferable to focus the analysis on the language of the WSIA and applicable Board policy. Current Board policy now provides some additional guidance in this area. Document No. 19-02-01 of the OPM states in this regard:

Employable

Refers to a worker having the necessary skill and training to be capable of obtaining and performing full-time or part-time employment on a regular basis in the labour market. Factors that influence a worker's employability include but are not limited to:

- level of education/training (including special certificates/licenses)
- transferable skills/aptitudes and work experience
- work-related impairment(s)/disabilities, and
- other non-work-related impairment(s)/disabilities (e.g., including non-physical disabilities such as a learning disability).

[22] Other relevant factors to consider may include a worker's age and English language ability. With regard to the fourth factor, it is well-established in the Tribunal case law that the thin skull rule applies where the worker had a stable pre-existing condition (for example, a

¹ Decision Nos. 864/08, 1136/07, 11/13, 1586/16, and 597/17.

hearing impairment or learning disability); however, that rule does not apply where the pre-existing condition worsens following the accident or the worker develops a new non-compensable condition following the accident. Section 43 of the WSIA provides that a worker is entitled to benefits to compensate for the loss of earnings arising from the work-related injury; as such, it is necessary to show a causal connection between the workplace injury and the loss of earnings.

[23] In summary, the determination of a worker's employability is multifactorial, and includes consideration of factors such as the restrictions/limitations associated with the compensable injury; the worker's transferable skills, aptitude and ability; pre-existing stable medical conditions; English language ability/literacy; and age.

[24] After considering all the evidence, the Panel finds that from July 24, 2012, the worker was not able to earn income in any employment and is therefore entitled to full LOE benefits from that date, subject to statutory reviews. The ARO found the worker did not have the education and training required for jobs in the SO of Construction Estimator, then found the worker remained employable at minimum wage. We have come to a different conclusion. We find the worker's dominant right shoulder impairment, his lack of transferable skills, and his age each were significant contributing factors to the worker's inability to work from July 2012. Our analysis follows.

[25] The worker had been an electrician for over 30 years. His first language is not English. The WSIAT decision in 2016 granted initial entitlement for an August 17, 2011 disablement injury of the dominant right shoulder. The worker's claim was denied as of 2012 and remained so until the WSIAT decision in 2016 granted entitlement for the right shoulder as an August 17, 2011 disablement injury. During that period the worker was unemployed and received no training. A permanent right shoulder impairment was accepted with permanent restrictions to avoid heavy lifting, impact activity, climbing and repetitive or forceful use of his right upper extremity away from the body.

[26] The worker testified and we accept that he had difficult time adjusting to his right shoulder impairment and the loss of his livelihood as an electrician. He was treated for a psychological condition in September 2013 although we accept that the worker's psychological condition is not an issue before us in this appeal. The worker first saw a psychiatrist, Dr. Z.R. Mech, on September 30, 2013 for anxiety and depression. In the report of October 16, 2013 Dr. Mech described how the worker was unable to work because he could not lift his arms above shoulder height, that he is frustrated but mainly depressed, and that his wife does not support his complaint of pain. The diagnosis was Adjustment Disorder with Anxious and Depressed Mood, and Major Depressive Disorder. Dr. Mech opined that the worker would remain depressively symptomatic "as long as forced to work...hangs over his head."

[27] The Panel is persuaded that in July 2012 the worker lacked the transferable skills required to work as anything other than an electrician for which there is no dispute he could no longer do. He had no experience in working with the public in a sales, cashier, or attendant job. He had poor English literacy skills and he was 60 years old.

[28] The worker was assessed at the Board's Shoulder and Elbow Specialty Clinic on July 24, 2012. The diagnosis was chronic right rotator cuff tendinopathy and sub-acromial impingement. A permanent impairment was indicated with permanent restrictions to avoid heavy

lifting, impact activity, climbing and repetitive or forceful use of his right upper extremity away from the body.

[29] In his report of April 23, 2018 Mr. Bachmann reviewed the Career Handbook and matched the worker's job history to the National Occupational Classification (NOC) codes in the Handbook. Mr. Bachmann found 16 occupations suitable for the worker when his compensable right shoulder and non-compensable right hand and right knee conditions were considered. Mr. Bachmann reviewed same and concluded they were all not suitable. Mr. Bachmann opined that the worker would be subject to ageism in the labour market since he was 59 at the time of the accident in August, 2011. Mr. Bachmann cited a research paper² indicating people with disabilities had a significantly lower employment rate that was exacerbated with age. By their 6th decade only 28% of people with disabilities were employed compared to 65% of those without disabilities. Of those disabled without a college education, like the worker in this case, only 18% were employed. Mr. Bachmann reviewed the worker's 281 entry job-search that yielded no interviews and opined the worker is not a good candidate for employment.

[30] Mr. Bachmann reviewed NOC #6611, Cashier, and noted the worker's 30 year history as an electrician provided no related transferable skills. He opined that the upper limb coordination requirements of a cashier would likely exceed the right shoulder limitations. NOC #6421, Retail Sales and Sales Clerk, was considered unsuitable given the worker's poor English literacy and computer skills, the standing/walking, repetitive handling, gripping/grasping and overhead work. NOC #6623 Other Elemental Sales Occupations, was considered unsuitable on the grounds that they require walking/standing, upper limb coordination and carrying. Sub-group #6623.4 Telephone Solicitors and Telemarketers, was considered unsuitable due to the worker's poor English language skills. Mr. Bachmann concluded the worker was competitively unemployable and has been since 2011.

[31] The Panel accepts the opinions of Mr. Bachmann as he is an expert in the field of vocational rehabilitation. In particular, we are persuaded by the fact that Mr. Bachmann's report surveys the significant factors affecting this particular worker's employability. The worker had poor English literacy skills; he had only worked as an electrician for 30 years and could no longer do so. He was 59 years old in 2011 at the time of injury. By 2016 the worker was 64 years old and considered himself retired. He had not worked in 5 years. He had never worked with the public in a sales, cashier, or clerking capacity. We find on a balance of probabilities that the worker would not have been able to secure or sustain suitable employment at minimum wage since July 2012. It follows that the job categories of Cashiers (NOC #6611), Other Elemental Sales Occupations (NOC #6623), Retail Sales Clerk (NOC #6421), and other direct-entry, minimum wage occupations were not suitable or reasonably available to the worker, and he was rendered unemployable as of July 24, 2012 due to his lack of transferable skills, his poor English language skills, his age, and his right shoulder limitations. The Panel is therefore satisfied, on a balance of probabilities, that the worker is entitled to full LOE benefits from July 24, 2012 and ongoing, subject to statutory reviews.

[32] The worker's representative has requested reimbursement from the Tribunal for the cost of Mr. Bachmann's report. Payment of expert reports at the Tribunal is governed by the Tribunal's authority to determine its own practice and procedure (pursuant to section 131 of the

² Mitchell, J.M., Adkins, R.H. & Kemp, B.J. (2006) The Effects of Aging on Employment of People With and Without Disabilities. *Rehabilitation Counselling Bulletin* 49(3), 157-165.

WSIA), along with its Practice Directions. The Tribunal's *Practice Direction on Expert Evidence* states, in part:

6.1 A party who files an expert report pays for the report. A party who calls an expert as a witness pays the full fee of the expert.

6.2 In exceptional circumstances, the Tribunal may pay for an expert report or expert fee for an expert witness called by a worker where the Hearing Panel or Vice-Chair decides:

- the expert report is significant in the decision making process; or,
- the expert testimony is of exceptional importance to the decision-making process.

6.3 If the Hearing Panel agrees to pay for an expert report or expert fees, the Tribunal pays based on the approved schedule of rates.

[33] The Panel finds the report of the April 23, 2018, Vocational Evaluator and Rehabilitation Consultant, M. Bachmann M.Sc. to be persuasive. Mr. Bachmann was contracted to assess the worker's employability. Mr. Bachmann indicates that he is a Canadian Certified Vocational Evaluator, a Certified Rehabilitation Counselor, and a Diplomate, American Board of Vocational Experts. Mr. Bachmann's opinions have been relied upon³ by the Tribunal and he has been recognized as an expert in vocational rehabilitation in *Decision Nos. 1586/16 and 597/17*. We accept that Mr. Bachmann is an expert in vocational rehabilitation. The worker's representative is requesting that the Tribunal pay for Mr. Bachmann's report as he is an expert and his report addressed the central issue in the appeal. Mr. Bachmann's report on the worker's vocational circumstances was significant in the decision-making process. The Panel therefore finds it appropriate for the Tribunal to pay for Mr. Bachmann's report in accordance with the Tribunal's schedule of rates.

³ *Decision Nos. 864/08, 1136/07, and 11/13.*

DISPOSITION

[34] The appeal is allowed.

[35] Direct entry employment at minimum wage is not suitable for the worker as he was unemployable as of July 24, 2012. The worker is entitled to full LOE benefits from July 24, 2012 and ongoing, subject to statutory reviews.

[36] The Tribunal will pay for Mr. Bachmann's report of April 23, 2018, in accordance with the Tribunal's schedule of rates.

DATED: December 19, 2018

SIGNED: C.M. MacAdam, M. Falcone, M. Ferrari