WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 571/18

BEFORE:	G. McCaffrey: Vice-Chair
HEARING:	February 26, 2018 at Toronto Written
DATE OF DECISION:	February 28, 2018
NEUTRAL CITATION:	2018 ONWSIAT 680
DECISION UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) L. Mansueti dated January 31, 2017

APPEARANCES:

For the worker:	R. Fink, Lawyer
For the employer:	Not participating
Interpreter:	Not applicable

REASONS

(i) Introduction and issue

[1] The worker appeals the decision of Appeals Resolution Officer (ARO) L. Mansueti dated January 31, 2017. The worker objects to the quantum of the Non-Economic Loss (NEL) award for chronic pain disability (CPD).

(ii) Background

[2] The following are the basic facts.

[3] The worker began her employment as a restaurant cook/cashier in June 2007. On August 6, 2007, at age 39, she was cleaning the inside of a food warmer when she cut her right index finger on a tray guide slide. Entitlement was accepted for a right index finger ulnar nerve laceration. Loss of earnings (LOE) benefits were granted as of August 20, 2007, when the worker stopped work. The ulnar nerve was surgically repaired on December 13, 2007.

[4] In May 2008 the WSIB Hand Specialty Program reported the worker continued to experience pain in her finger with hypersensitivity. Continued physiotherapy was recommended along with a psychological assessment. An October 2008 chronic pain management assessment found the worker had developed pain throughout her right hand, arm, shoulder, and neck, which was significantly affecting her functioning.

[5] LOE benefits continued until January 2, 2012 when the Board concluded the worker no longer had an organic impairment related to the right index finger injury, and that she also had no entitlement for CPD or a psychotraumatic impairment.

[6] Tribunal *Decision No. 1731/16* dated July 11, 2016 concluded:

> [62] The worker has entitlement for a chronic pain disability. Given the duration of the worker's chronic pain disability I find that the condition is a permanent one.
>
> [63] The worker is entitled to a redetermination of her earnings basis on the grounds that she was a student at the time of her accident and that she could not complete the college course that she was to participate in in September 2012 due to her workplace accident. Any further determinations that need to be made in order to re-determine the worker's pre-injury earning capacity are returned to the WSIB for a determination with the parties retaining their usual rights of appeal.
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> [64] The worker is entitled to full LOE benefits from January 2, 2012 until April 1, 2013.
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> [65] The worker is entitled to partial LOE benefits from April 2, 2013 until March 11, 2014 based upon her ability to work 15 hours per week at the same rate of pay that she obtained when she first became employed in 2014.
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> [66] The worker's LOE entitlement past March 11, 2014 is returned to the WSIB for a determination with the parties retaining their usual rights of appeal.

[7] On August 3, 2016 the Board processed a 20% NEL award recognizing permanent impairment related to CPD. The date of maximum medical recovery (MMR) was considered to be January 19, 2009, when the worker was discharged from a chronic pain management program. The ARO decision of January 31, 2017 confirmed the quantum of the CPD award.

[8] The sole issue now before the Tribunal for final determination is the quantum of the 20% NEL award for CPD.

(iii) Law and policy

[9] As 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.

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

[11] "Impairment" means a physical or functional abnormality or loss (including disfigurement) which results from an injury and any psychological damage arising from the abnormality or loss.

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

[13] Legislation and Board policy provide that the degree of a worker's permanent impairment is determined in accordance with the prescribed rating schedule or criteria, any medical assessments, and having regard to the health information on file. The prescribed rating schedule for most impairments is the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 3rd edition (revised) (the AMA Guides). The Board has adopted specific rating schedules for impairment due to psychological disability, fibromyalgia, chronic pain and other conditions.

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

[15] I have considered the policies the Board stated apply to the subject matter of this appeal, pursuant to section 126 of the WSIA.

(iv) Analysis

[16] I find that the quantum of the worker's NEL award for CPD impairment should be adjusted to 25% for the following reasons.

[17] The worker's representative submits the quantum of the worker's NEL award should be placed in the higher end of Class 3 Moderate impairment, as outlined in *Operational Policy Manual* (OPM) Document No. 18-05-11. In his July 28, 2017 submission the worker's representative indicates the quantum of the NEL award should be 45%.

[18] In support of the appeal the worker's representative provided a June 6, 2017 report from Dr. J. Jeffries, psychiatrist. Dr. Jeffries is a Tribunal medical assessor and a staff psychiatrist at the Centre for Addiction and Mental Health (CAMH), as well as an associate professor of psychiatry. The worker's representative included in his submission three Tribunal decisions which he indicates attest to the Tribunal's confidence in Dr. Jeffries (*Decision Nos. 366/10, 480/11, and 2310/15*).

[19] In the current appeal, Dr. Jeffries is not an independent medical assessor. He assessed the worker at the request of her representative.

[20] Dr. Jeffries interviewed the worker prior to his June 3, 2013 report and again before his June 6, 2017 report. I find the reports of Dr. Jeffries are detailed with respect to the worker's personal and family history, the accident, her subsequent treatment, and her circumstances at the time of the reports. I also find Dr. Jeffries assessments to be consistent with the other medical reporting in the claim. For example, an April 4, 2012 report by Dr. Book, psychiatrist, and reports by Dr. Antoniazzi, psychologist, dated March 28, 2011 and November 14, 2011 are referred to in both the July 2016 NEL evaluation and Dr. Jeffries reports.

[21] In his June 6, 2017 report Dr. Jeffries provides an opinion regarding the quantum of the NEL award, based on OPM Document No. 15-04-02 "Psychotraumatic Disability" as that was the document provided to him.

[22] OPM Document No. 15-04-02 includes the permanent impairment rating schedule for accidents which occurred before January 2, 1990 and therefore is not the correct OPM Document in this appeal, in which the accident occurred in 2007. However, for comparison purposes both OPM Document No. 15-04-02 and the correct document, OPM Document No. 18-05-11, "Assessing Permanent Impairment Due to Mental and Behavioural Disorders," which is for accidents on or after January 2, 1990 are included.

[23] OPM Document No. 15-04-02 reads in part:

> **Psychotraumatic and behavioural disorders rating schedule**
>
> The following criteria apply to the assessment of permanent disability awards for psychotraumatic disability, chronic pain disability, and fibromyalgia syndrome (see 15-04-04, Chronic Pain Disability Rating Schedule).
>
> **Category 1 - minor impairment of total person (10%)**
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> In this category, the injured worker's daily activity is slightly limited and no apparent difficulties are reported in personal adjustment. There is also some loss in personal or social efficacy and the secondary psychogenic aggravations are caused by the emotional impact of the accident.
>
> A mild anxiety reaction is apparent. The display of symptoms indicate a form of restlessness, some degree of subjective uneasiness and tension caused by anxiety. There are subjective limitations in functioning as a result of the emotional impact of the accident. The disability, from the psychiatric point of view, is not expected to be permanent.
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> **Category 2 - moderate impairment of total person (15% - 25%)**
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> In this category, the worker is still capable of looking after personal needs in the home environment but, with time, confidence diminishes and the worker becomes more dependent on the members of the family in all activities which take place outside the home. The worker demonstrates a moderate, at times episodical, anxiety state, agitation with excessive fear of re-injury, nurturing strong passive dependency tendencies.
>
> The emotional state may be compounded by objective physical discomfort with persistent pain, signs of emotional withdrawal and depressive features, loss of appetite, insomnia, chronic fatigue, low noise tolerance, mild psychomotor retardation and definite limitations in social and personal adjustment within the family. At this stage, there is a clear indication of psychological regression.
>
> **Category 3 - major impairment of total person (30% - 50%)**
>
> In this category, the worker displays a severe anxiety state, definite deterioration in family adjustment, incipient breakdown of social integration, and longer episodes of depression. The worker tends to withdraw from the family, develops severe noise

intolerance and a significant diminished stress tolerance. A phobic pattern or conversion reaction will surface with some bizarre behaviour, a tendency to avoid anxiety-creating situations, with everyday activities restricted to such an extent that the worker may be homebound or even room-bound at frequent intervals.

Category 4 - severe impairment of total person (60% - 80%)

In this category, the worker clearly displays a chronic and severe limitation of adaptation and function in the home and outside environment.

The worker is withdrawn, forgetful, unable to concentrate, and needs continuous emotional support within the family setting. The worker is incapable of self-care and neglects personal hygiene.

There may be an obvious loss of interest in the environment and the worker becomes extremely irritable, showing significant emotional [lability], changes of mood and uncontrolled outbursts of temper. The worker may be severely depressed with outstanding features of psychomotor retardation and psychological regression. The worker is usually homebound or even room-bound.

[24] OPM Document No. 18-05-11 provides the permanent impairment rating schedule relevant to this appeal:

The WSIB then rates the condition using the Mental and Behavioural Disorders Rating Scale, which combines elements of the American Medical Association's Guides to the Evaluation of Permanent Impairment, 3rd edition (revised), (the AMA Guides) with the WSIB's Psychotraumatic and Behavioural Disorders Rating Schedule.

Mental and Behavioural Disorders Rating Scale

The following scale applies to the assessment of permanent impairment benefits for psychotraumatic disability, chronic pain disability, and fibromyalgia syndrome.

Class 1, No impairment (0%) - no impairment noted

Class 2, Mild impairment (5-15%) - impairment levels compatible with most useful function

There is a degree of impairment of complex integrated cerebral functions, but the worker remains able to carry out most activities of daily living as well as before. There is also some loss in personal or social efficacy and the secondary psychogenic aggravations are caused by the emotional impact of the accident.

There is mild to moderate emotional disturbance under ordinary stress. A mild anxiety reaction may be apparent. The display of symptoms indicates a form of restlessness, some degree of subjective uneasiness, and tension caused by anxiety. There are subjective limitations in functioning as a result of the emotional impact of the accident.

Class 3, Moderate impairment (20-45%) - impairment levels compatible with some but not all useful function

There is a degree of impairment to complex integrated cerebral functions such that daily activities need some supervision and/or direction. There is also a mild to moderate emotional disturbance under stress.

In the lower range of impairment the worker is still capable of looking after personal needs in the home environment, but with time, confidence diminishes and the worker becomes more dependent on family members in all activities. The worker demonstrates a mild, episodic anxiety state, agitation with excessive fear of re-injury, and nurturing of strong passive dependency tendencies.

The emotional state may be compounded by objective physical discomfort with persistent pain, signs of emotional withdrawal, depressive features, loss of appetite, insomnia,

chronic fatigue, mild noise intolerance, mild psychomotor retardation, and definite limitations in social and personal adjustment within the family. At this stage, there is clear indication of psychological regression.

In the higher range of impairment, the worker displays a moderate anxiety state, definite deterioration in family adjustment, incipient breakdown of social integration, and longer episodes of depression. The worker tends to withdraw from the family, develops severe noise intolerance, and a significantly diminished stress tolerance. A phobic pattern or conversion reaction will surface with some bizarre behaviour, tendency to avoid anxiety-creating situations, with everyday activities restricted to such an extent that the worker may be homebound or even roombound at frequent intervals.

Class 4, Marked impairment (50 - 90%) - impairment levels significantly impede useful function

There is a degree of impairment of complex integrated cerebral functions that limits daily activities to directed care under confinement at home or in other domiciles. The worker clearly displays chronic limitation of adaptation and function, in the home and outside environment, that ranges from moderate to severe. The worker is withdrawn, forgetful, unable to concentrate, and needs continuous emotional support within the family setting. The worker is incapable of self-care and neglects personal hygiene.

There is a moderate to severe emotional disturbance under ordinary to minimal stress, which requires sheltering. There may be an obvious loss of interest in the environment with the worker becoming extremely irritable, showing significant emotional [lability], changes of mood, and uncontrolled outbursts of temper. The worker may be severely depressed, with outstanding features of psychomotor retardation and psychological regression.

Class 5, Extreme impairment (95%) - impairment levels preclude useful function

There is such a degree of impairment of complex integrated cerebral functions that the worker is unable to care for himself or herself in any situation or manner. There is severe emotional disturbance that continually endangers the worker or others.

[25] With respect to the quantum of the NEL award in the current appeal, in his June 6, 2017 report Dr. Jeffries indicates:

> You asked me under which category the worker would fall according to the WSIB Rating Schedule under Operational Policy 15-04-02.
>
> …
>
> Looking at the actual categories, I considered category 2 - moderate impairment of the total person (15% to 25%). In this category, she should be capable of looking after her personal needs but becoming more dependent on members of the family, and activities which take place outside the home, and she would have at times episodic anxiety, agitation and fear of re-injury. There would be signs of emotional withdrawal and depressive features. She clearly fits this fully.
>
> I then considered category 3 - major impairment of total person (30% to 50%). In this category, she would have a severe anxiety state, deterioration of family adjustment, longer episodes of depression, noise intolerance and stress intolerance, phobias, conversion reactions, or bizarre behaviour might occur, and she might become homebound. It appears to me that she does not qualify for this category.
>
> I therefore see her as being at the very upper range of category 2, which I would consider a 25% impairment.

[26] The criteria from OPM Document No. 15-04-02 that Dr. Jeffries states "She clearly fits this fully" are also the criteria in the lower range of impairment of Class 3, Moderate impairment (20-45%) in OPM Document No. 18-05-11, which applies to this appeal.

[27] The criteria from OPM Document No. 15-04-02 that Dr. Jeffries states "It appears to me that she does not qualify for this category" are also the criteria in the higher range of impairment of Class 3, Moderate impairment (20-45%) in OPM Document No. 18-05-11.

[28] Dr. Jeffries concludes by indicating that he considers that the worker has a 25% impairment. That opinion is similar to the Board's assessment of the worker's impairment. There is no contrary medical opinion. A clarification from Dr. Jeffries, based on the correct OPM Document No. 18-05-11, has not been provided to the record.

[29] There are four areas outlined in the AMA Guides which are evaluated considering the criteria outlined in OPM Document No. 18-05-11. They are: activities of daily living, social functioning, concentration persistence and pace, and adaptation to stress.

[30] With respect to activities of daily living there is evidence of mild to moderate impairment. Although the worker was unable to start her planned college program after the accident she returned to volunteer work, and then gainful part time employment as a sales clerk in 2014. When contacted by a Work Transition Specialist in late 2016 the worker indicated she was going to increase to 20 hours per week but did not think she could work more than that. On November 29, 2017 the worker's representative advised that as of November 20, 2017 the worker was employed as an office administrator, working 17 hours per week at $15/hr.

[31] I find there is also a moderate impairment regarding concentration persistence and pace. The worker has a degree in journalism from her home country but advised Dr. Antoniazzi in March 2011 that she was having difficulty translating poetry manuscripts because of reduced stamina, concentration/memory problems, emotional distress, and medication.

[32] Similarly, I find there is mild to moderate impairment in the areas of social functioning and adaptation to stress. For example, in an April 4, 2012 report Dr. Book, psychiatrist reported the worker continued to have excessive feeling of worry, particularly around issues of pain and her overall health. That is consistent with her reporting to Dr. Jeffries in June 2017. The worker also advised Dr. Jeffries that she continues to see Dr. Book about once every three months. While she reported to Dr. Jeffries that most of the time she cannot tolerate crowds, she was working four short days per week in a retail store, and going to the gym about once a week at the urging of her husband.

[33] I agree with Dr. Jeffries that the worker's circumstances are not consistent with the criteria for the higher range of impairment in Class 3 Moderate impairment.

[34] In summary, when considering the worker's circumstances as a whole, the medical documentation before me, and the opinion of Dr. Jeffries, I find that the worker's circumstances are most consistent with the criteria in the lower range of Class 3 Moderate impairment. I find that on the balance of probabilities, a 25% CPD NEL award is appropriate. Accordingly, the worker's current 20% NEL award for CPD is to be adjusted to 25%.

DISPOSITION

[35] The appeal is allowed in part:

> The quantum of the worker's 20% NEL award for CPD impairment is adjusted to 25%.

DATED: February 28, 2018

SIGNED: G. McCaffrey