WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2666/18

BEFORE: J. Josefo: Vice-Chair

HEARING: September 12, 2018, at Toronto
Oral

DATE OF DECISION: September 19, 2018

NEUTRAL CITATION: 2018 ONWSIAT 2986

DECISION(S) UNDER APPEAL: WSIB decision of Appeals Resolution Officer (ARO) P. Bouwman, dated December 31, 2015

APPEARANCES:

For the worker: R. Fink, Barrister & Solicitor

For the employer: Not participating

Interpreter: N/A

REASONS

(i) The worker's appeal

[1] The worker appeals the December 31, 2015 decision of Board Appeals Resolution Officer ("ARO") P. Bouwman. ARO Bouwman confirmed a May 2, 2012 "Reconsideration Decision" of Mr. N. Hunte, a WSIB Manager.

[2] That May 2, 2012 decision concluded that certain earlier Board decisions, made in or about 2005 and 2008, did not follow Board policy. Mr. Hunte accordingly reversed the decisions dated November 2, 2005, December 1, 2005, and May 1, 2008. He also confirmed the Case Manager's decision of October 5, 2005 which found that the worker no longer had a wage loss, and thus no longer had entitlement to partial Loss of Earnings benefits, effective May 6, 2005.

[3] The ARO decision was rendered after a review of the record, without an oral hearing.

(ii) Issues

[4] The issue is whether the worker has entitlement to Loss of Earnings ("LOE") benefits from May 6, 2005. In order to determine that, I must conclude whether the ARO was correct to confirm the policy interpretation of Mr. Hunte, as set out in his May 2, 2012 Reconsideration decision. The policy in question is *Operational Policy Manual* ("OPM") Document No. 18-03-06, "Final LOE benefits review".

[5] A question which arises is which version of this policy applies to this matter. Attached in Addendum 1 to these materials (marked as Exhibit #3) is the version of the policy published on July 3, 2007. The application date of that policy is for decisions made with respect to wage loss entitlement periods on or after July 1, 2007, for all accidents on or after January 1, 1998.

[6] Yet Mr. Fink submitted that subsequent versions of the policy document, published either December 1, 2010 or July 15, 2011, apply to this matter. The application date of the December 1, 2010 version of the policy provides that it applies to all decisions made with respect to wage loss entitlement periods on or after December 1, 2010, for injuries on or after January 1, 1998. The version of the policy published on July 15, 2011 applies to all decisions made on or after July 15, 2011, for all injuries on or after January 1, 1998.

[7] I will address herein which version of OPM Document No. 18-03-06 applies to this case.

(iii) Overview of the facts; and the worker's position

[8] The facts in this matter are not in dispute. ARO Bouwman, in the December 31, 2015 decision before me, provided a succinct and helpful summary upon which I cannot improve. Thus, I excerpt the summary of the facts from the decision of the ARO, as follows:

> ISSUES
>
> The worker objects to the decision of May 2, 2012 regarding reconsideration of the final LOE (Loss of Earnings) benefit review.

BACKGROUND

On January 6, 1996 the worker, then 30 years of age and employed as Assembly Worker with the employer for 6 years, was trying attempting to dislodge a fender and injured her neck and upper back. Entitlement was accepted for an upper back and neck strain.

A 16% non-economic loss (NEL) award was granted on December 2, 2002.

After a permanent impairment was accepted, the employer could no longer accommodate the worker with suitable work and she became involved in a Labour Market Entry (LMR) program. The Appeals Resolution Officer (ARO) decision of Aril 27, 2003 accepted the SEB (suitable employment or business) of Civil Engineering Technician. The worker was not able to manage in this program and the SEB was adjusted to Retail Sales/Customer Service Representative.

The worker subsequently obtained employment in November 2004. The final LOE benefit review was then processed based on actual earnings of $7.25 per hour, effective November 8, 2004.

A NEL re-determination increased the NEL benefit to 21% February 25, 2005.

The worker returned to work with the Accident Employer on May 16, 2005, restoring her preinjury earnings. Under Bill 179, the final LOE benefit was then reviewed and adjusted accordingly. This decision was dated October 5, 2005 (effective the date of material change).

Subsequent to this decision, three more adjustments to the final LOE benefit were made based on material change as outlined in the decisions of November 2, 2005, December 1, 2005 and May 1, 2008.

The Operations Manager reviewed the case and determined the three decisions subsequent to October 5, 2005 were made inappropriately and not within policy, thereby overturning these decisions. It was confirmed the final LOE benefit decision of October 5, 2005 following the NEL re-determination was the correct one.

[9] After considering the matter, the ARO came to the following conclusion:

WSIB policy provides the criteria by which a review of the final LOE benefit review can be made, including if the worker suffers a significant deterioration in his or her condition that results in a re-determination of the permanent impairment (NEL). This is the criteria that applied in this case and provided the authority to review the final LOE benefit following the increase in the worker's NEL benefit. The policy also provides when the further review of the LOE benefit should take place as follows…[including] 24 months from the NEL processing date if the NEL determination or re-determination confirms a significant deterioration of the permanent impairment resulting in a NEL or an increased NEL benefit based on the facts of the case. …

In this case the NEL benefit was increased from 15 to 21% on February 25, 2005. This then provides a 24 month window for review from February 25, 2005 to February 25, 2007. The review can take place any time during this 24 month window, depending on the material change in earnings. At the time of the NEL re-determination the worker was employed earning $7.25 per hour, which was the basis for the final LOE benefit that had already been locked in. There was no material change in earnings and, therefore, no reason for conducting the review at that time. The worker was then re-hired by the accident employer on May 16, 2005, and she was no longer experiencing a wage loss.

Noting the significant change in post-injury earnings, the Case Manager appropriately conducted the review of the LOE benefit. This decision is dated October 5, 2005. As documented in Memo No. 117, the Case Manager was mistakenly under the impression that the LOE benefit could be reviewed as frequently as necessary during the 24 month

> window. Subsequently, additional reviews/adjustments of the LOE benefit were conducted as outlined in the decisions of November 2, 2005, December 1, 2005, and May 1, 2008. There is no provision in policy to conduct a further review of the final LOE benefit, unless there is a further significant deterioration in the worker's condition [*emphasis added*].

[10] Accordingly, the ARO found that the Board was correct in the May 2, 2012 decision to confirm that, as was decided on October 5, 2005, as of that time the worker no longer had a wage loss, and thus no longer had entitlement to partial LOE benefits.

[11] The worker appeals from that conclusion. The worker asserts that the policy does not in fact preclude subsequent reviews within the 24 month period, as the ARO confirmed. Indeed, Mr. Fink stated that to so limit (or fetter) a decision-maker in that fashion would be contrary to the merits and justice of the matter, as well as contrary to rational decision-making.

[12] In this case, Mr. Fink noted that the worker, as of October 5, 2005, had returned to the accident employer for several months. Yet he submitted that Case Manager Ms. S. Talbot appropriately recognized as of November 2, 2005 that the worker was laid off on October 25, 2005, given a lack of permanent suitable work being available.

[13] Mr. Fink referenced that the December 1, 2005 determination of Ms. Talbot clarified the worker's entitlement as set out in the November 2, 2005 letter and confirmed the worker's current weekly partial LOE rate. The Case Manager's subsequent letter of December 19, 2005 confirmed that the December 1, 2005 letter "is correct, and your partial Loss of Earnings is based on the difference between $27.65 per hour and your actual wage loss of $7.75 per hour. This benefit is locked in to age 65".

[14] Finally, the Case Manager's April 19, 2007 letter to the worker confirmed the worker's partial LOE benefits and also confirmed that the benefits would be in effect until the worker attains age 65, pursuant to the "final, 72 month review of the claim". In that letter, Ms. Talbot also stated the following:

> The benefits are locked in to age 65 and cannot be changed even if your income changes.

[15] It was in essence the argument of Mr. Fink that the worker had been subject to layoffs and then re-hiring by the accident employer, and that there was some precariousness to her ongoing employment, which Ms. Talbot well and appropriately recognized in her decisions. It was submitted that the decisions of the Case Manager were consistent with OPM Document No. 18-03-06.

[16] In Mr. Fink's written submissions of September 9, 2015, he made the following point:

> (…) The WSIB has the policy and legal authority to consider the earnings loss right up to the end of the 24 month period (…) because the WSIB must "act in a financially responsible manner"(See section 1 of the WSIA). (…)
>
> The 24 month period is there rather than employing a month-long window after the NEL is revised for the express purpose of allowing the WSIB to garner all of the information, and with a time for reflection concerning the appropriate LOE. During the 24 month period, the worker was employed for four out of the 24 months with the accident employer. This is why that, by the end of the 24 month period, the final review of December 1, 2005 was the most appropriate LOE lock in decision. "Financially responsible" does not mean picking a date for the final review that saves the Board the most money. It does mean the WSIB needs to look at cases on their real merits, and make a rational decision considering all of the facts and applicable policies.

[17] Accordingly, Mr. Fink, on behalf of the worker, appeals from the decision below.

(iv) Law and policy

[18] Since the worker's date of injury was, without any dispute, January 6, 1998, the *Workplace Safety and Insurance Act, 1997* (the "WSIA") is applicable to this appeal. 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:

- Policy packages 34, 39, and 300.

[19] The Board specifically referenced OPM Document No. 18-03-06, dated July 3, 2007.

(v) Discussion and conclusions

(a) Which version of OPM Document No. 18-03-06 applies?

[20] The Board relies upon the policy published on July 3, 2007 which applies to decisions made with respect to wage loss entitlements on or after July 1, 2007, for accidents after January 1, 1998.

[21] Mr. Fink, however, submits that the applicable version of OPM Document No. 18-03-06 is the one published either on December 1, 2010, which applies to decisions made on or after December 1, 2010 for injuries after January 1, 1998, or the version published on July 15, 2011. That version applies to decisions made with respect to wage loss entitlements on or after July 15, 2011 for injuries on or after January 1, 1998.

[22] Why is this important? It is important because the December 1, 2010 and July 15, 2011 versions of the policy provide for a "further review of the LOE benefit". That portion of the policy document is not found in the version published July 3, 2007. To situate this discussion in context, it is helpful to excerpt the wording under the heading "Further Review of the LOE benefit", as follows:

> Further Review of the LOE benefit:
>
> Although the LOE benefit may be paid or adjusted at the outset when the worker has suffered a significant deterioration, the decision-maker must conduct a further review of the 'locked-in' benefit and, if warranted, adjust the benefit before that review opportunity ceases. This review should normally take place:
>
> - When a significant temporary deterioration ends,
> - Whenever the WSIB determines that a NEL determination or re-determination of the worker's permanent impairment is not required, or,
> - 24 months from the NEL processing date if the NEL determination or re-determination confirms a significant deterioration of the permanent impairment resulting in a NEL or an increased NEL benefit, based on the facts of the case [*emphasis added*].

[23] The decision of Board Manager Mr. Hunte was made May 2, 2012. That was accordingly the final decision subsequent to Mr. Hunte having informed the worker by correspondence dated February 1, 2012 that he would re-open the worker's LOE benefits, given his intention to conduct what was described in his February 1, 2012 correspondence as a "periodic review of cases to ensure that the … Act and policy have been applied appropriately".

[24] Mr. Hunte thus made his decision on May 2, 2012 after obtaining submissions from the worker's then representative (not Mr. Fink). That decision, as outlined earlier in these reasons, made clear the conclusion that the worker's partial LOE benefits were wrongly determined, and that the Board, pursuant to Mr. Hunte, "had the authority to review your Loss of Earnings benefit only once".

[25] Thus, in my view, this was a decision made not only on or after December 1, 2010, but on or after July 15, 2011. So on that basis, either the December 1, 2010 or July 15, 2011 published version of OPM document No. 18-03-06 would apply to this decision.

[26] There is no question that the accident occurred after January 1, 1998, albeit only a few days after. Yet, those few days are nevertheless quite sufficient to conclude that the accident occurred after January 1, 1998.

[27] Accordingly, I conclude, given the lack of reference in the decision-making below to the above-excerpted wording discussing the "further review of the LOE benefit", that the wrong (earlier) version of the policy was interpreted by the Board in this matter. The correct version of the policy would be with that excerpted wording for a "further review of the LOE benefit". Given the identical language and that both fit the timeline, either the version published December 1, 2010 or July 15, 2011 can apply.

(b) Does the policy properly before me allow a review of LOE only once during the 24 month period?

[28] Reviewing the wording of the policy document, I see no indication that, during the 24 months from the NEL processing date, the Board is limited to only one review, or is specifically precluded from further reviews of the LOE entitlement. I find that Mr. Fink is correct in his interpretation when he suggests, as excerpted above, that the 24 month period allows the Board an opportunity to review all information and consider the worker's position so that, ultimately, and acting in a financially responsible fashion, the Board can make a fully informed decision or, if necessary, decisions. Again, if circumstances change during the 24 months, the Board has, I find, the ability to react to and address such changes with further decision-making.

[29] In this case, my conclusion will likely benefit this particular worker. Yet in other cases, the decision may lead to a worker conceivably receiving a reduction in LOE, depending upon what happens during the entirety of the 24 month period, if the Board reasonably seeks to (further) review entitlement for a particular worker. Such will, of course, depend on the individual facts and circumstances of each case.

[30] In this case, after all, when the initial decision was made on October 5, 2005, the worker had been for several months working and earning a significant wage. She had no ongoing wage loss. Accordingly, the Board considered that she no longer was entitled to, or needed, partial LOE benefit support. That was a quite appropriate decision.

[31] Yet very shortly thereafter, indeed on October 25, 2005, the permanent work within the worker's restrictions was no longer available to her. That this could happen to an injured worker, who has greater restrictions and greater limitations than the average worker, is again not surprising and, I find, is indeed foreseeable. While a non-injured worker may well be able to exercise union "bumping rights", or take other measures to obtain comparable employment if one job ends, an injured worker facing those similar circumstances has a disadvantage. It must be

recalled that the disadvantage likely arises out of the work accident. Thus, the situation calls for careful consideration over a period of time—the period of 24 months, ideally.

[32] I further agree with Mr. Fink that the policy document provides for 24 months, a period of two years, and not a period of two weeks or two months. Rather, a considerable amount of time is allocated to the Board so that a careful consideration of the worker's complete situation can be made. To me, allowing such reasonable yet, as discussed below not open-ended, opportunities for review makes good worker's compensation sense in the circumstances. It allows appropriate flexibility to take into account changing circumstances during a finite window. To preclude such a common-sense approach, policy wording would have to be very clear and specific. In this case, I do not find that the policy precluded what occurred.

[33] In this case, the decision of Ms. Talbot on December 1, 2005 clarified her earlier decision of November 2, 2005. That decision noted that the worker was going to receive partial LOE benefits based on the difference from her layoff rate of $27.65 and her actual wage in the SEB of $7.75 per hour. The December 19, 2005 letter from Case Manager Talbot clarified why the rate of $27.65 was used for the 72 month lock-in, and ultimately confirmed the December 1, 2005 decision and the worker's wage loss as set out therein.

[34] I am unable to take issue with what this Case Manager did. In my view, this adjudicator in fact recognized the merits and justice of the matter when observing that the worker was laid off shortly after the October 5, 2005 decision, and so would suffer a significant wage loss absent LOE benefits being provided. The purpose of those benefits is, after all, to make an injured worker whole. The reason that the benefits are ultimately locked in is to generate finality, so that decisions are not endlessly re-visited (especially, as ultimately happened in this case in 2012, *years* after the fact) but rather, only during certain opportunities as defined in the Act and policy.

[35] The concern of the worker in this case somehow receiving a windfall given that she has been working for the accident employer since 2011 is something I have considered. Mr. Fink brought to my attention to the worker's earnings, which show that since 2011 the worker has been back at work (before then in 2007, 2008, and 2009 she received other income).

[36] Yet, the question is not only the worker's needs "today", and the fact that she is presently employed with the accident employer. The question is what will happen to the worker "tomorrow". The point of locking in a matter at a certain point in time means that with partial LOE support, as in this case, if the worker loses her income entirely she will not receive a full income top-up. Rather, she will have to find, and will be expected to find, work in the SEB. Yet doing so may not be all that easy for the worker as she ages and loses, possibly, a competitive advantage. The worker certainly would be less well off, as discussed earlier, than a non-injured worker who is also subject to lay off, yet who can take on physically demanding work elsewhere without having to worry about restrictions and limitations. Moreover, an uninjured worker may be able to "bump" into other work, without limits due to the need for modified tasks, which opportunities arguably would be less likely for an injured worker.

[37] In this case, there is, accordingly, valid reason to recognize that the earlier decisions of Ms. Talbot were correct and were within policy. I find that Ms. Talbot was correct to write to the worker on April 19, 2007, confirming that the worker's partial Loss of Earnings benefits were locked in to age 65 "and cannot be changed even if your income changes".

[38] I find that the decision of December 1, 2005, which clarified the November 2, 2005 decision, to be consistent with policy. I confirm that there is no limitation to one, and only one, review during the 24 month period, as was concluded by the Manager in the May 2, 2012 decision, and as was confirmed by the ARO in the December 31, 2015 decision under appeal.

[39] Accordingly, as the prior Board decisions in this matter were appropriate and consistent with policy, there was no need for the May 2, 2012 decision. The ARO decision confirming it is, with respect, incorrect. Thus, the December 1, 2005 decision of the Claims Manager is reinstated. On that basis, the worker is entitled to LOE benefits from May 6, 2005.

DISPOSITION

[40] The worker's appeal of the December 31, 2015 ARO decision is allowed. The worker has entitlement to LOE benefits from May 6, 2005, as described herein.

[41] For reasons stated herein, I find that the prior decision-making of the Case Manager in this matter was correct. I thus reinstate the December 1, 2005 decision of the Case Manager which, as the Case Manager wrote on April 19, 2007, is confirmed as locked in until the worker attains age 65 "and cannot be changed even if your income changes".

[42] I find that prior decision-making fully consistent with the letter and spirit of the Act, and also with Board policy.

DATED: September 19, 2018

SIGNED: J. Josefo