WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2857/17

BEFORE: R. Nairn: Vice-Chair

HEARING: September 20, 2017 at Toronto
Oral

DATE OF DECISION: November 15, 2017

NEUTRAL CITATION: 2017 ONWSIAT 3473

DECISION(S) UNDER APPEAL: WSIB ARO decisions dated May 5, 2014 and March 30, 2015

APPEARANCES:

For the worker: R. Fink, Lawyer

For the employer: Did not participate

Interpreter: N/A

REASONS

(i) Introduction

[1] At the time of the accident under consideration here, the worker was employed as a room attendant in the accident employer's hotel. Born in 1960, the worker started with the accident employer in 2009.

[2] On June 6, 2011 the worker was injured at work when, while walking down a flight of concrete stairs, she slipped and fell backwards. In her Report of Injury/Disease (Form 6) the worker indicated that when she fell, she injured her back, neck, right shoulder and left knee.

[3] The worker sought medical attention and as noted in Memo #1 of August 10, 2011 a WSIB (the "Board") Adjudicator noted that "entitlement in the claim is being accepted for left knee contusion and cervical, thoracic and lumbar strains based on diagnoses provided on the F8 of 06Jun2011". As noted in Memo #1 there was no lost time initially as the worker was provided with modified duties.

[4] As noted in Memo #5 of September 2, 2011 the worker was authorized off work by her doctor beginning August 10, 2011. Loss of Earnings ("LOE") benefits were authorized by the Board.

[5] As noted in Memo #12 of September 22, 2011 the Board Case Manager, after a conversation with the worker's physiotherapist, expanded entitlement in the claim to include the worker's right shoulder. According to the Case Manager, the physiotherapist "confirmed although not outlined on the reports the wkr has complained of a right shoulder problem consistently. The major problems initially were the worker's neck and low back and the worker's right shoulder ended up being more significant than anyone thought".

[6] On September 29, 2011 a Board Return-to-Work ("RTW") Specialist arranged a meeting between the worker, a representative of her union and the employer's HR manager and VP of Human Resources. In the October 25, 2011 memo which followed that meeting, the RTW Specialist indicated in part:

> Plan was formulated to have worker in modified duties (pre-injury accommodated) as per below, it was agreed with [HR Manager] that with 1 hr. tolerance that she could work in 45 min intervals and take a small break before going onto next task and plan was being put together and then HR VP came into meeting putting the plan on hold. Employer then insisting on worker returning to former modified work that she was doing prior. I attempted to convince this employer that the goal was to get worker back to pre-injury and felt it was in workers best interests also to start there attempting pre-injury accommodated. Meeting was adjourned with understanding that clarification would be obtained from CM on the non-compensable/OxyContin medical restrictions clarified/employer possible co-operation issue and determine course of action.

[7] From October 28 to November 28, 2011, the worker participated in a work hardening program at Network Niagara. In Memo #22 of November 16, 2011 the Case Manager noted the following after a conversation with the occupational therapist of the work hardening program:

> She advised the work hardening program will be complete on 28Nov2011 with the wkr at 4 hours/day. She advised the wkr is doing extremely well. The wkr is very compliant and has shown significant improvement. The wkr's grip strength has doubled. She is participating in job simulated tasks such as vacuuming and making beds and the wkr is learning proper body mechanics. She did ask about assistive devices. I outline this likely

> would not be considered at this time. We anticipate a full recovery but this issue may be addressed at RTWS meeting. Possible something the i/e could purchase.

[8] According to the decision on appeal, the worker returned to modified duties on November 29, 2011 and continued until about January 14, 2012 when she, along with co-workers, were laid off as part of a seasonal layoff. The Board reinstated full LOE benefits effective January 14, 2012.

[9] On March 13, 2012 the worker was assessed at the Board's Regional Evaluation Centre. In the report which followed that assessment, Dr. E. Blackman, the evaluating physician, concluded:

> **CONCLUSION:**
>
> **Diagnosis**
>
> Work-related injuries:
>
> 1. Soft tissue injury cervical spine
> 2. Soft tissue injury right shoulder
> 3. Soft tissue injury lumbar spine
>
> **Recommendations**
>
> No further investigations are necessary.
>
> She should continue her home exercise program.
>
> **Return to Work Restrictions**
>
> Permanent restrictions are recommended such that she avoid heavy lifting, repetitive and sustained over shoulder level activity with the right shoulder.
>
> **Prognosis**
>
> Category 2; that is, partially recovered now and no further recovery anticipated.
>
> Permanent Impairment for Work Related Injury:
>
> Yes

[10] In Memo #44 of June 14, 2012 a Case Manager dealt with the issue of the worker's entitlement to benefits after March 13, 2012 and indicated in part:

> (…)
>
> **Rationale:**
>
> - In reviewing fibromyalgia through documented medical literature, conditions/symptoms associated with fibromyalgia are depression. Chronic fatigue
>
> -·According to the medical evidence, fatigue, depression, sleep problems are seen in almost all patients with fibromyalgia
>
> - Other symptoms include memory and concentration problems, numbness and tingling in the hands and feet, tension and migraine headaches
>
> ·To be diagnosed with fibromyalgia, you must have at least 3 months of widespread pain, and pain and tenderness in at least 11 of 18 areas, including arms(elbows), buttocks, chest, knees, lower back, neck, rib cage, shoulders, and thighs.
>
> -Blood tests and urine tests are usually normal

- Cognitive behavioural therapy is an important part of treatment, it helps to teach how to deal with "negative thoughts"

Conclusion:

- 13 Mar12 underwent a multidisciplinary health care assessment at Network Niagara and was diagnosed with soft tissue injuries to neck, rt. Shoulder, and low back with P1
- P1 determined
- Continue in home exercise program
- Limitations permanent Avoid heavy lifting, repetitive /sustained over shoulder Reaching with rt shoulder

None of the other areas of pain, headaches, depression/anxiety, and fatigue was not assessed at the time because it was not an area to be assessed

The accepted entitlement under this claim is soft tissue injuries to rt. Shoulder, neck and low back.

- Worker is experiencing all the typical symptoms associated with fibromyalgia

- The depression, anxiety, fatigue, and headaches are related to the fibromyalgia and not arising out of the work-related injury

Entitlement:

There is no entitlement to the fibromyalgia and associated depression/anxiety fatigue headaches/migraines, "all-over" pain

- The only areas of entitlement are R.T. shoulder, neck and low back for permanent soft tissue injuries

[11] Information on file suggests that the worker stopped working with the accident employer on about May 30, 2012 and in a decision dated June 19, 2012 a Case Manager confirmed that the worker had no entitlement to benefits after that date and noted:

(…)

On May 30, 2012, your family physician took you off work for 4 weeks with the diagnoses of Fibromyalgia and depression/anxiety. Since January 2012 you have been experiencing migraine-like headaches, depression/anxiety, fatigue and dizziness, increased pain "all over", and negative thoughts. Medical evidence supports there is no known cause for this condition and the symptoms you are experiencing are typical to Fibromyalgia.

Fibromyalgia and the associated symptoms you are experiencing are not the result of the injury you sustained under this claim; therefore, there is no entitlement to Loss of Earnings benefits for your current lost time; or, ongoing healthcare measures associated with it.

(…)

Currently, while you are off work for your non-work related condition, I will temporarily put your case on hold until such time that you are ready to resume the accounting clerk position with your employer.

[12] In Memo #70 of July 18, 2013 the Case Manager considered the issue of the worker's entitlement for a psychotraumatic disability and denied that request concluding that "the psychotraumatic disability has not been shown to be directly and clearly related to the work injury". The Case Manager also confirmed the denial of entitlement to benefits for Chronic Pain

Disability ("CPD") concluding that the worker had not met out all of the criteria set out in Board policy and in particular, the requirements that the chronic pain be caused by the injury, that the pain persists six or more months beyond the usual healing time, that the degree of pain be inconsistent with organic findings and that the chronic pain impair earning capacity.

[13] Subsequently, the Case Manager issued a decision dated July 18, 2013 confirming the denial of entitlement for a psychotraumatic condition and CPD.

[14] The worker objected to a number of the decisions made by the Board's Operating Level including the decisions that she did not have a permanent impairment of her right shoulder, that she had no entitlement for a psychotraumatic condition or CPD and the denial of entitlement to LOE benefits from May 30, 2012. The worker also disputed the Board's refusal to recalculate her earnings basis on the grounds that she was a student. These issues were eventually referred to an Appeals Resolution Officer ("ARO") and in a decision dated May 5, 2014 the ARO granted the worker's appeal in part.

[15] In the May 5, 2014 decision the ARO accepted that the worker had a permanent impairment of her right shoulder and referred her for a Non-Economic Loss ("NEL") assessment.

[16] The ARO denied the worker entitlement for a psychotraumatic condition concluding:

> The worker had problems with anxiety symptoms prior to the work accident for which she sought medical attention. She then had the work accident and displayed again some symptoms of anxiety; I considered the evidence supports there was recovery to a certain point that a return to work was initiated and that the anxiety resolved. It then appears as if depression symptoms began in the return to work phases and were triggered by the worker's perception of her treatment by the employer, which is the stated harassment and poor workplace environment. This reaction has not abated.
>
> What I must answer is whether the workplace accident is the significant contributing factor to the emergence of the diagnosis of major depressive disorder. After review of the evidence, the testimony I do not [find] her emotional reaction to the workplace situation merits entitlement under the psycho-traumatic disability policy.
>
> (…)
>
> After review of the file evidence, hearing the worker and the medical opinion from Dr. Jeffries, I find that the worker's psychiatric condition does not merit entitlement under the psycho-traumatic disability policy. This condition was not a result of the worker's injury, it is only indirectly connected in that while she was on modified duties she experienced a reaction to her treatment and her environment, and the work accident was not the significant contributing factor to its onset Therefore entitlement to the non-organic symptoms and diagnoses are denied.

[17] The ARO also denied the worker entitlement for CPD concluding:

> Consideration was given to the evidence to determine whether the non-organic condition merited entitlement under this policy. There are five criteria outlined in the policy document that must be met for allowance to be recognized. In this case with the diagnoses identified by the assessing psychiatrists of major depressive disorder, somatoform pain disorder, and organic affective disorder I find that they are more appropriately reviewed under the psycho-traumatic disability policy rather than under this policy. The diagnoses are not pain diagnoses that merit review for CPD entitlement. In making this decision I reviewed the file record and testimony paying particular attention to the evidence cited in the section on psycho-traumatic disability entitlement review.

[18] The ARO also denied the worker entitlement to LOE benefits from May 30, 2012 indicating:

> The worker is claiming LOE benefits as of May 30, 2012; she had been placed in alternative employment with the employer at no wage loss but left that employment after seeking medical attention and being diagnosed with depression and fibromyalgia by her family doctor. As entitlement has not been extended to include these diagnoses and that there is no evidence of deterioration in the work impairments, I conclude that no LOE benefits are in order for this claimed lost time.

[19] With respect to the issue of the worker's status as a student, the ARO denied a request for a recalculation of her earnings basis and noted:

> The worker claimed that recognition be given to her as a student such that this would lead to a change to her earnings basis to reflect her loss of earnings not as a room attendant but as a certified general accountant. I find that the worker was a student at the time of her injury and would be entitled to a recalculation if it were demonstrated she did not finish her education due to her work injury. I find the reason she did not finish her education is not part of her entitlement and therefore no recalculation is in order.
>
> (…)
>
> I find that the worker was a student however I do not find that the worker was not able to complete her education because of the work injury given the current accepted entitlement and as such the request for a recalculation is denied.

[20] As directed by the ARO in the May 5, 2014 decision, the worker was subsequently assessed for a NEL award for her right shoulder with the accepted diagnosis being "full thickness tear & calcific tendinitis right rotator cuff". On June 9, 2014 a NEL Clinical Specialist concluded that the worker had a 5% right arm impairment which translated into a 3% whole person impairment and NEL award. In reaching that conclusion, the Clinical Specialist noted:

> **Additional Information Used In NEL Rating**:
>
> • Ultrasound dated Aug 3/11 notes a full thickness tear of the SS tendon.
>
> • MRI dated Nov 7111 notes mild AC joint hypertrophy.
>
> • Dr. Langer's report dated Oct 25113 notes worker complains of right shoulder pain which is aggravated with use at or above the shoulder level.
>
> • Range of motion (ROM) of the shoulder is about 90% normal with endpoint discomfort. No muscle atrophy or neurological deficit noted. ROM of shoulder provided in report.

[21] The worker objected to the quantum of the 3% NEL award and this objection was eventually referred to another ARO. In a decision dated March 30, 2015 an ARO denied the worker's appeal and concluded:

> The worker's representative submitted that the worker should be entitled to a discretionary increase to his NEL award and referenced page 52 of the AMA Guides which states:
>
> > In rare cases, the severity of the clinical findings (e.g. loss of shoulder motion) does not correspond to the true extent of the musculoskeletal defect (e.g. severe and irreparable rotator cuff tear of the shoulder) as demonstrated with a variety of imaging techniques (e.g. MRI or surgical visualization). If the examiner feels that the measured anatomical impairment does not appropriately rate the severity of the patient's condition, an additional impairment can be given at discretion.

> In support of the appeal the worker's representative referenced other findings outlined by Dr. Langer and these findings included pain symptoms. However, subjective factors, such as pain are not considered in the NEL evaluation for organic impairments.
>
> I have reviewed the NEL Triage and Evaluation Report, and the medical reports leading up to the evaluation. I find the NEL clinical specialist took into consideration the objective findings as documented in the medical reports. The appropriate NEL award was established in the case based on the available information, and based on the factors that are appropriately taken into consideration.
>
> In this case, I conclude the severity of clinical findings in this case is in keeping with the true extent of the musculoskeletal defect and that the worker did not suffer from a severe defect that was not adequately assessed by rating the abnormal ROM.
>
> Therefore, I deny the request for a discretionary increase to the NEL quantum and confirm the three percent NEL award for the right shoulder is appropriate.

(ii) Issues on appeal

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

1. Whether the worker ought to be granted initial entitlement to benefits for psychotraumatic condition in this claim;

2. In the alternative, whether the worker ought to be granted entitlement to benefits for CPD;

3. Whether the 3% NEL award granted for the worker's right shoulder was correct;

4. Whether the worker has ongoing entitlement to LOE benefits from May 30, 2012 and,

5. Whether the worker is entitled to a recalculation of her earnings basis on the grounds that she was a student.

(iii) The worker's testimony

[23] Under questioning from her representative the worker testified that she was born in 1960 and while living in her home country she obtained a Bachelor and Master's degree in accounting. She worked in her own country as an accountant, operating her own business, for about ten years. She came to Canada in 2002 and was eventually hired by the accident employer working as a housekeeping room attendant in one of its hotels. She testified that her poor English language skills kept her from obtaining work as an accountant in this country.

[24] The worker testified that she started with the accident employer in 2004. A prior WSIB claim was established for an incident in February 2006 when she developed a headache after using some cleaning fluid in the hotel rooms. She did not recall suffering any lost time as a result of this problem.

[25] Beginning in 2008 the worker found a full-time job working from Monday to Friday in a call centre. She continued working at the hotel on the weekends and was also taking English language courses. She continued working at the call centre through 2008.

[26] From approximately September 2009 to April 2011 the worker completed an accountant diploma course while continuing to work weekends at the hotel. She attended school Monday to Friday about five hours a day. She also worked eight hours a day on Saturday and Sunday.

[27] The worker acknowledged information contained in the case materials that she had seen her doctor in 2009 for treatment of anxiety. She testified that these symptoms resulted from an incident involving her and her 21-year old daughter. Her daughter had missed her curfew one evening and the worker "kicked her out" for three days. The worker testified she could not sleep and was very anxious while her daughter was away but that situation was resolved three days later. She experienced a similar issue with her daughter in August of 2010.

[28] The worker confirmed that she completed her college accounting program in April 2011 and planned to enroll in a Certified General Accountant ("CGA") course beginning in September 2011. She registered and paid the tuition but could not attend because of the accident at work on June 6, 2011. She testified that the school agreed to postpone the commencement of the course until September 2012 but she did not feel capable of continuing at that point either. The worker had planned to complete the CGA courses on a part-time basis and estimated that would have taken her about five years. The worker testified that after paying the registration on about May 6, 2011 she started to look for accounting work and actually had some interviews scheduled for shortly after her accident in June 2011. Due to her accident however, she was not able to attend those interviews or to start her courses.

[29] The worker described the mechanics of the accident in June 2011 and confirmed that she slipped on a wet floor and fell backwards injuring her upper and lower back, neck, hip and right shoulder. She recalled being off work for a couple of days before she returned to modified duties. The worker testified that the modified duties consisted of work in the Human Resources building. She was assigned to work her usual shift from 2:30 pm to 11 pm and would sit by the elevator and welcome anyone coming to her floor. She performed these reception duties from about 2:30 pm to 5 pm but from 5 pm to 11 pm she essentially sat there by herself, doing nothing. She estimated that between 2:30 pm and 5 pm she was actually busy only 10 to 20% of the time. The worker performed these receptionist tasks for about two weeks. She felt that this was a "useless" job and she felt "foolish" sitting there doing nothing. There was only one light in the area and it felt to her as if it were a "jail". On one occasion, having been left there alone, she had a panic attack and sought medical attention.

[30] The worker was off work for a couple of days and then returned to the same job for about a week. She requested that management change her schedule so that she could work the same hours as the others in the office but that request was refused.

[31] Subsequently, the worker was given the job of putting price stickers on chocolate bars for a few days. Later, she was given a modified housekeeping job which involved inspecting hotel rooms to ensure they had been properly cleaned. She performed these duties for a period of time but had to stop when she began to experience increased pain in her right shoulder as she was required to open 50 or more heavy fire doors while moving from floor to floor to examine these rooms. She testified that management tried, on a number of occasions, to have her return to performing the actual cleaning of the rooms but she denied those requests.

[32] The worker was off work from about July to December 2011 when she returned to the modified housekeeping job. She worked at that position for about a month before she was laid off as part of a seasonal layoff.

[33] In January 2012 the worker was treated for symptoms of anxiety which she related to being unable to work and the financial impact which her injuries were having upon her and her family. In addition to this anxiety, she was also having difficulty sleeping because of her ongoing pain. She was very upset that she had lost her capacity to work. She was experiencing symptoms of dizziness on a daily basis and also had headaches and back pain. She was of the view that these conditions would have prevented her from participating in the CGA program.

[34] In April 2012 the employer placed the worker in the finance department where she performed clerical duties as well as some accounting functions. She worked on an almost full-time basis and while she still had some ongoing pain, she was largely able to do this work. She performed these tasks for about a month before the employer took her off that work. They then assigned her a job of photocopying which she did for a full day and this prolonged standing led to an aggravation of her back pain. She took a day off work and when she returned, she was given a job where she would do a few hours of accounting work and then nothing for the rest of the day. After doing this for about a week, she told her manager she was in too much pain and could not continue. She never returned to the accident employer.

[35] The worker testified that in September 2012 she and her daughter left the area and moved to another city. She continued to live with her daughter and her partner. In October 2012 the worker began to receive employment insurance benefits and effective March 2013 she began to receive ODSP benefits.

[36] The worker testified that in April 2013 she began volunteering in a nursing home helping to feed the residents. She worked two days a week, about three hours a day. In June 2014 she started an online accounting course and then completed another in 2015.

[37] In August 2015 the worker began working five days a week, three hours a day, in another retirement home assisting the residents. In December 2015 she found a full-time job in a call centre. She is currently working in the call centre on a full-time basis of 40 hours a week. She earns about $12 an hour. She testified she has been unable to obtain promotions in this field because she has difficulty focusing and her memory is very poor.

[38] As a result of her ongoing pain and anxiety, the worker finds that she frequently isolates herself from her family. She currently lives with her four children. She does not socialize as much as she did before her accident. She does not believe she would be able to complete her CGA program because she would need to be able to focus and have a good memory. She continues to experience pain and discomfort in her right shoulder. She is unable to lift with that arm. She continues to experience pain in her spine from her neck to her lower back. This pain has affected her ability to perform many household tasks.

(iv) Analysis

[39] Since this worker was injured in 2011, the applicable legislation is the *Workplace Safety and Insurance Act, 1997* (the "WSIA").

(a) Psychotraumatic entitlement

[40] Pursuant to section 126 of the WSIA the Tribunal is required to apply applicable Board policy. In this case, the Board has notified the Tribunal that one of the policies that applies to this appeal is *Operational Policy Manual* Document No. 15-04-02 entitled "Psychotraumatic Disability". This policy provides in part:

Policy

A worker is entitled to benefits when disability/impairment results from a work-related personal injury by accident. Disability/impairment includes both physical and emotional disability/impairment.

Guidelines

General rule

If it is evident that a diagnosis of a psychotraumatic disability/impairment is attributable to a work-related injury or a condition resulting from a work-related injury, entitlement is granted providing the psychotraumatic disability/impairment became manifest within 5 years of the injury, or within 5 years of the last surgical procedure.

Psychotraumatic disability/impairment is considered to be a temporary condition. Only in exceptional circumstances is this type of disability/impairment accepted as a permanent condition.

Psychotraumatic disability/impairment resulting from organic brain damage is assessed as a permanent disability/impairment.

Psychotraumatic disability entitlement

Entitlement for psychotraumatic disability may be established when the following circumstances exist or develop

• Organic brain syndrome secondary to

- traumatic head injury

- toxic chemicals including gases

- hypoxic conditions, or

- conditions related to decompression sickness.

• As an indirect result of a physical injury

- emotional reaction to the accident or injury

- severe physical disability/impairment, or

- reaction to the treatment process.

• The psychotraumatic disability is shown to be related to extended disablement and to non-medical, socioeconomic factors, the majority of which can be directly and clearly related to the work-related injury.

[41] In denying the worker's appeal the ARO concluded that the depression the worker was experiencing was "only indirectly connected" to her compensable accident and therefore entitlement was denied. Contrary to the conclusions of the ARO, the policy referred to above provides that there is entitlement where the psychotraumatic condition is "an indirect result of physical injury".

[42] It is now well accepted in Tribunal case law that in dealing with matters of causation, the Tribunal employs a "significant contributing factor" test. In order to be successful in this appeal the evidence must establish that the worker's compensable accident and its sequelae made a significant contribution to the onset of the worker's depression. It is not necessary that the workplace be the only contributing factor and entitlement would be in order even if there were a number of significant contributing factors as long as the compensable accident also made a significant contribution.

[43] Having had the opportunity to consider all of the evidence before me, including the worker's testimony, I find that the compensable accident of June 6, 2011 made a significant contribution to the depression which the worker subsequently developed and as such, she is entitled to be compensated. In reaching that conclusion, I have taken particular note of the following:

- While there is some reference in the case materials to the worker having experienced symptoms of depression prior to the compensable accident, I accept her uncontradicted testimony to the effect that the symptoms, which occurred in 2009 and 2010, were of a very short duration and were related to specific interactions with her daughter. I accept the worker's uncontradicted testimony to the effect that these symptoms resolved and there was no evidence of significance to suggest that there were ongoing problems with depression. Even if there were, they did not affect the worker's ability to continue in her physically demanding employment.
- In a Patient Encounter worksheet of July 3, 2012 the health care practitioner at the local walk-in clinic provided a diagnosis of "depression" and noted that the worker had "seen a psychiatrist today. Kept on some meds. Needs time off work due to depression & chronic pain".
- In a report dated July 3, 2012 Dr. B. Gopidasan (psychiatrist) provided an Axis I diagnosis of "Major Depressive Disorder, Single Episode and Partial Remission". With respect to the cause of this condition, Dr. Gopidasan noted:

  > (…) This was more precipitated due to disagreement between management at work and her. She apparently had a work-related accident one year ago. She said that she could not return to full-time work since then. In January she was told that she could go to full-time work and this precipitated a disagreement between her and the management and she said that she felt depressed for two weeks. She started to again feel depressed in the last few months. She realized that whenever the demands at work increased, she starts to experience depression or her depression begins to worsen. (…)

- In a report dated December 11, 2012 Dr. G. Griffiths (rheumatology) indicated:

  > Thank you for asking me to see this 52-year old patient today. I actually saw her over a year ago at Network Niagara for some chronic pain in her upper back and shoulder area. She had developed these symptoms after a slip and fall in June 2011 when she was doing housekeeping (for the employer).
  >
  > (…)
  >
  > Her main functional problem is actually depression and anxiety. It is quite clear that she has developed significant problems at this level. She has been placed on Cymbalta, essentially for depression, and this has seemed to help her. (…) She has had some type of psychological crisis counselling.
  >
  > (…)
  >
  > Impression: This patient has chronic cervical and upper back pain status post-injury 18 months ago. This is chronic pain at this level. She does not have widespread pain problem consistent with so-called fibromyalgia but instead we are dealing with localized chronic pain.
  >
  > Her course seems to have been aggravated by some concomitant mood disorder which I think needs to be treated more actively (…)

- In a report dated April 27, 2013, Dr. J. Jeffries (psychiatrist) responded to questions posed by the worker's representative and indicated in part:

  OPINION:

  This is a woman who clearly has some vulnerability to anxiety and depression. There is nothing in her childhood or family history that would make her vulnerable, but she has had prior symptoms, perhaps in the context of being a single mother with four children, but also with the challenge of moving to a country where she did not know the language and where she could not use her accounting qualifications, taking a relatively menial job. She also had some vulnerability to pain with a previous history of back pain. The accident did leave her with some soft tissue injuries, but unfortunately it appears to have been compounded by the way in which her dysfunction was managed at the hotel. Her perception was that she was humiliated and degraded and this had a marked impact on her self-esteem and created a good deal of distress, which likely contributed to the development of the chronic pain syndrome that she manifests. With the chronic pain and the dysfunction that followed she has now developed a major depression.

  ANSWERS TO YOUR QUESTIONS:

  l. *In your opinion, what is the current DSM-IV diagnosis including GAF score? Could you please comment on the fibromyalgia issues?*

  My diagnosis for her current state is that she has a major depression (296) with melancholic features. I do not consider the GAF a useful scale, but as you have asked I would place her at 47.

  I am personally one of those physicians who does not find fibromyalgia a convincingly delineated disorder. It is not of course in the DSM-IV diagnosis that I would give her also. This is otherwise referred to as chronic pain.

  (…)

  6. a) *Regarding the worker's "disagreement " with her employer - are the worker 's psychiatric diagnoses related solely to that disagreement and/or her prior psychiatric history whereby the work accident in itself is not playing a significant role? Please explain your response.*

  The worker's psychiatric diagnoses are not related solely to the disagreement with the employer. They are in part and that was certainly a core issue, but the injury itself and the pain that it engendered as well as the conflict with the WSIB are also major factors. The prior psychiatric history may not be relevant. That is not clear. Certainly we know that people who previously had mood symptoms are more vulnerable than others, but it is clear that this illness is not a prolongation of a prior illness, which should just be seen as a vulnerability factor.

  b) *Were the worker's psychiatric conditions exacerbated by the "disagreement" with her employer because the psychiatric condition is directly the result (of) the work accident? Please explain your response.*

  This question is unclear.

  c) *Have any of the worker 's psychiatric conditions occasioned by the "disagreement " with the employer not have been disability producing but for the work accident? Please explain your response.*

  I think that her depression is to a substantial extent caused by the disagreement, but that would not have occurred without the work accident, which is the original, central precipitating event of her current condition. They are inextricable.

- In a report dated October 24, 2003 Dr. D. Krishnaprasad (psychiatrist) provided an Axis I diagnosis of "dysthymic disorder superimposed with major depression. Differential

diagnosis organic affective disorder should be ruled out". With respect to the worker's "previous medical history" the psychiatrist noted "nothing significant except she had an accident and hurt her back, head, right shoulder in June 2011 by falling on the floor on the concrete while she was working at (the employer) as a housekeeper". With respect to "previous psychiatric history" it was noted "nothing significant. She has been feeling depressed since the accident since June 2011". With respect to the matter of causation, the physician noted that "she hurt her back, hips, neck and right shoulder. She also hurt her head. Since that time she started feeling chronic pain, not able to work, not able to feel good about herself.(…) She is going through severe financial stress, not able to pay her bills, not able to buy her food and she is feeling unhappy with severe financial stress."

- In a report dated August 30, 2016 Dr. Krishnaprasad noted that the worker has been treated for "chronic anxiety and depression, chronic bodily pains with Cymbalta (…) and Gabapentin".

[44] Even accepting, for the sake of argument, that there were other factors which contributed to the development of the worker's depression, for the reasons noted above I find that the compensable accident and its sequelae were also a significant contributing factor and as such, the worker is entitled to be compensated. In her testimony the worker related the onset of her depression to her continuing pain, her inability to perform the activities she once did and the effects which her disability has had on her ability to earn an income and maintain employment. In my view, the worker's psychotraumatic disability is related to extended disablement and to non-medical socioeconomic factors, a majority of which can be directly and clearly related to the work-related injury.

[45] Given the worker's testimony about her ongoing symptoms and the reporting provided by Dr. Krishnaprasad, it is apparent that the worker's depression is permanent and as such, the Board will assess her for a NEL award.

[46] Having granted the worker entitlement for a psychotraumatic condition, it is unnecessary for me to consider the alternate position of entitlement for CPD.

(b) LOE benefits from May 30, 2012

[47] Pursuant to section 43(1) of the WSIA, a worker who has a loss of earnings "as a result of" his or her compensable injuries is entitled to the payment of LOE benefits beginning when the loss of earnings begins and continuing, among other things, until the loss of earnings ceases. In the decision on appeal, the ARO decided that the worker was not entitled to LOE benefits beyond May 30, 2012 because the loss of earnings she was experiencing after that date were related to her "being diagnosed with depression and fibromyalgia by her family doctor". In his report of April 7, 2013 Dr. Jeffries concluded that "she is therefore in my opinion at this time unable to carry out any gainful employment on the basis of her psychiatric disorder". Similarly, as Dr. Griffiths noted in his report of December 11, 2012 the worker's "main functional problem is actually depression and anxiety". The comments in these reports are consistent with the worker's testimony to the effect that the combination of her pain and depression (which affected her concentration and memory) made it impossible for her to continue at work. Given that the worker has now been granted psychotraumatic entitlement and that this contributed to her loss of earnings after May 30, 2012, she is entitled to further LOE benefits from that date. The issue of the duration and quantum of those benefits is returned to the Board for further adjudication.

(c) The 3% NEL award

[48] As I understand Mr. Fink's position on this matter, he does not dispute the 2014 NEL assessment findings but rather, has submitted that the worker should be entitled to a discretionary increase to her NEL award. He relies on a statement found at page 52 of the AMA Guides which provides:

> In rare cases, the severity of the clinical findings (e.g. loss of shoulder motion) does not correspond to the true extent of the musculoskeletal defect (e.g. severe and irreparable rotator cuff tear of the shoulder) as demonstrated with a variety of imaging techniques (e.g. MRI or surgical visualization). If the examiner feels that the measured anatomical impairment does not appropriately rate the severity of the patient's condition, an additional impairment can be given at discretion.

[49] In his written submissions to the Board, Mr. Fink concluded:

(…)

Dr. Langer's findings:

(i) Loss of range of motion in right shoulder:

Please consider the following table comparing the Loss of Range of Motion measures in the NEL Evaluation Report as compared to Dr. Langer 's findings:

Measurement	**NEL Report**	**Dr. Langer**	**Normal**	**%Impairment**
Abduction	160 degrees	160 degrees	180 degrees	1%
Adduction	30 degrees	30 degrees	45 degrees	1%
Flexion	170 degrees	170 degrees	180 degrees	1%
Extension	40 degrees	40 degrees	50 degrees	1%
External Rotation	70 degrees	70 degrees	90 degrees	0%
Internal Rotation	70 degrees	70 degrees	90 degrees	1%
Total Impairment%:				5%

(…)

(iii) Right Shoulder pain and disability severely impairs function:

Dr. Langer reported the following findings with regard to the worker's pain symptoms related to the right shoulder:

"The pain was felt in the right posterior shoulder including the scapula" (p. 8);

"The right supraspinatous tendon is torn, inflamed and is swollen and impinging on the coracoacromial ligament and subacromial area" (p. l2):

"The pain interferes with function and the vocational and non-vocational activities required for use of the right upper limb exacerbate the inflammation of the right shoulder, so that she has remained disabled for her pre-accident activities of daily living" (p. 13);

"In fact there is a possibility of further tearing of the right rotator cuff with activities of the right upper extremity in those areas such as at or above shoulder level" (p, 13),

"She has definite post-traumatic right shoulder pathology which is associated with limitations for right shoulder functions" (p, 14);

"The symptoms of pain and disability are derived from post-traumatic pathology; (the worker) is suffering from a tear of the rotator cuff and tendinitis" (p, l4);

(…)

Conclusion of argument:

We submit, based (i) on the findings of Dr. Langer as outlined above and as (ii) stipulated in the OPM 18-05-03 and (iii) on page 52 of the AMA Impairment Guides, that the worker's loss of range of shoulder motion does "not correspond to the true extent of the musculoskeletal defect (i.e. severe and irreparable rotator cuff tear of the shoulder".

We note that as described by Dr. Langer and other medical reporting in the claim, (the worker) has indeed suffered a work related, "**severe and irreparable rotator cuff tear of the shoulder**" as referred to in the AMA Impairment Guides.

We also submit that, an additional discretionary impairment should, be given to "appropriately rate the severity of the patient's condition" as prescribed in the AMA Impairment Guides.

We finally submit that the proper "discretionary" increase should be an additional 5% for the right shoulder for a total right shoulder NEL rating of 10% reduced to a 6% whole body NEL rating as compared to the current 3% whole body rating.

[50] In *Decision No. 1228/13* a Tribunal Vice-Chair dealt with a similar request and indicated:

[19] As quoted above, the AMA Guides provide for a discretionary increase in rare cases where clinical findings do not correspond with the extent of the musculoskeletal defect. Prior Tribunal authorities have held that discretion should be exercised with care and where the evidence clearly warrants such a result (see, for example, *Decision Nos. 881/12 and 208/13*).

[20] On the balance of probabilities, we find that the severity of clinical findings in this case (the loss of shoulder motion) corresponds to the true extent of the musculoskeletal defect. As noted previously, while the worker has defects, demonstrated on MRI, they are not of a severe nature. The worker has partial thickness tears and tendinosis. The range of motion findings recorded on the NEL assessment and which were used to rate the worker's NEL award appeared on their face to correspond to the musculoskeletal defects. There is no "severe" condition in this case. The worker's 12% NEL award was calculated taking into account the left and right shoulder abnormal range of motion findings, resulting in a 12% NEL award. In our view, the medical reports do not support the submission that the worker suffers from a severe defect that has not been adequately assessed by rating the abnormal range of motion.

[21] For these reasons, we deny the worker's request for a discretionary increase to the quantum of his NEL award currently rated at 12%.

[51] Like the ARO, I note that the range of motion findings used by the NEL Clinical Specialist and reported by Dr. Langer were identical. Those range of motion findings were interpreted to amount to a 5% right arm impairment. It has been acknowledged that the worker has a full thickness tear and tendinitis in her right shoulder. Having reviewed the medical reporting I find it does not support a conclusion that there is a "severe" condition in this worker's shoulder which would warrant an additional discretionary impairment. As the ARO noted in the decision on appeal, subjective factors such as pain are not considered in a NEL evaluation for organic impairments. As such, I would confirm the 3% NEL award granted for the worker's right shoulder.

(d) Was the worker a student?

[52] As the ARO noted in the May 5, 2014 decision on appeal, the worker has requested that she be recognized as a student at the time of her accident because that would lead to a change in

her earnings basis to reflect her loss of earnings not as a housekeeping attendant but as a certified general accountant.

[53] OPM Document No. 18-02-08 entitled "Determining Average Earnings – Exceptional Cases" provides that the guidelines for calculating short-term and long-term average earnings are not applicable for those workers classified by the WSIB as students. The policy does not define a "student" but provides:

> **Students**
>
> For workers who are students, the average earnings are calculated by taking into account
>
> • the worker's earnings from all of the employers the worker was employed with at the time of injury
>
> • any pattern of employment that resulted in a variation in the worker's earnings, and
>
> • other information considered appropriate.
>
> The average earnings of a worker, who is a student, are recalculated,
>
> • if the worker is unable to complete his or her education as a result of the injury, when the worker would have completed his or her education if the injury had not occurred, or
>
> • in any other case, when the worker has ended his or her education.
>
> The recalculated average earnings of a worker, who is a student, are determined by using the average earnings of a worker employed in a job in which the injured worker would likely be employed if the injury had not occurred.
>
> If this is not possible, the recalculated average earnings are based upon the
>
> • average industrial wage for the year in which the worker's injury occurred
>
> • worker's level of education, and
>
> • worker's aptitude and skills at the time of the injury.

[54] As the above-mentioned policy suggests, a worker who is a student, is entitled to have his or her average earnings recalculated if that worker is "unable to complete his or her education as a result of the injury".

[55] In the May 5, 2014 decision on appeal the ARO accepted that the worker was a student at the time of her accident but concluded that she was not entitled to a recalculation of her earnings basis because the evidence did not establish that she was unable to complete her education because of the work-related injury. Having considered all of the evidence before me however, I find that I am led to a different conclusion. I find, on a balance of probabilities, that at the time of her compensable accident the worker was a student and that she was unable to complete her education as a result of her compensable injuries. In reaching that conclusion, I have taken particular note of the following:

- As the worker noted in her uncontradicted testimony, prior to coming to this country she had significant training and experience in the accounting field.
- Prior to her accident in June 2011 she had completed a college diploma program in business accounting. She was planning to enroll in an online course of study to become a certified general accountant.
- Information contained in the case materials establishes that on about May 6, 2011 the worker paid her fees for the CGA course.

- As the worker indicated in her testimony at this hearing she had planned to start the CGA course in the fall of 2011. A document from the Admissions and Registration Coordinator contained in the case materials confirms the worker's testimony to the effect that as a result of her prior experience she was granted exemptions from about six courses and the school agreed to extend their acceptance of her enrollment to August 18, 2012.
- In her testimony the worker indicated that prior to her compensable accident she had been looking for placements in the accounting field and had actually secured a number of interviews. These interviews were to have taken place shortly after the compensable accident. Due to the effects of her injuries however, the worker was unable to participate in those interviews nor was she able to enroll in the courses in September 2011 or in September 2012.
- When the Board made the decision that the worker's compensable injuries did not affect her ability to complete her education, her entitlement consisted only of a 3% NEL award for her right shoulder. I have now recognized that the worker has a permanent non-organic impairment with regards to her depression.
- As the ARO acknowledged in the decision on appeal, the worker's depression with its effects on her memory and concentration was the primary cause of her inability to continue in the CGA program. The ARO's conclusion in that regard is consistent with the worker's testimony and the opinion provided by Dr. Jeffries in his report of April 27, 2013 that:

  > The fact that she would love to be a CGA and that she has not been able to proceed in that direction is very strong evidence that she is currently totally disabled from even training to be an accountant where she already has experience. She is therefore in my opinion at this time unable to carry out any gainful employment on the basis of her psychiatric disorder.

- In addition, as noted earlier in this decision, Dr. Griffiths had indicated that the worker's "main functional problem is actually depression and anxiety".

[56] Having had the opportunity to consider all the evidence before me, I find that at the time of her compensable accident in June 2011 the worker was a student for the purposes of OPM Document No. 18-02-08. Her compensable organic and non-organic injuries played a significant role in her inability to complete her education. As such, she is entitled to have her earnings basis re-determined as provided in that policy.

DISPOSITION

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

[58] The worker is granted initial entitlement to benefits for a psychotraumatic condition. She will be assessed for a NEL award.

[59] The worker has ongoing entitlement to LOE benefits after May 30, 2012 subject to statutory reviews under the WSIA. The issue of the duration and quantum of those benefits will be returned to the Board for further adjudication.

[60] The worker is not entitled to an increase in the 3% NEL award granted for her right shoulder.

[61] The worker was a student at the time of her compensable accident. Her earnings basis is to be calculated to reflect her loss of earnings as a certified general accountant.

DATED: November 15, 2017

SIGNED: R. Nairn