



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2730/17

BEFORE:

J.E. Smith: Vice-Chair

HEARING:

September 8, 2017 at Toronto
Oral

DATE OF DECISION:

December 4, 2017

NEUTRAL CITATION:

2017 ONWSIAT 3693

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decisions dated January 15, 2013 and December 16, 2016

APPEARANCES:

For the worker:

R. Fink, Lawyer

For the employer:

Not participating

Interpreter:

R. Inkoom, Twi

Workplace Safety and Insurance
Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle
et de l'assurance contre les accidents du travail

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REASONS

(i) Introduction

[1] The worker appeals two ARO decisions. In the first decision, dated January 15, 2013, the ARO denied entitlement for a permanent impairment of the right shoulder and to LOE benefits beyond October 3, 2011. In the second decision, dated December 6, 2016, the ARO denied entitlement for psychotraumatic disability and for chronic pain disability (CPD), and for orthotics.

(ii) Issues

[2] The issues under appeal are as follows:

1. Recognition of a permanent impairment (PI) and entitlement to a non-economic loss (NEL) award for the right shoulder;
2. Entitlement for psychotraumatic disability, or for chronic pain disability (CPD);
3. Suitability of the pre-injury job and entitlement to loss of earnings (LOE) benefits from October 3, 2011; and,
4. Entitlement for orthotics.

(iii) Background

[3] The now 60 year old worker was injured on September 13, 2010, while working as a buffer, when large wooden panels fell on him. He sustained injuries to both shoulders, the left foot and thigh, and face. The WSIB (the Board) granted entitlement for these injuries.

[4] The worker claimed that his right shoulder injury was permanent. The Board found that the right shoulder impairment had resolved by October 3, 2011 and that any residual impairment was the result of underlying degenerative issues. The Board also found that the worker's pre-accident employment was suitable and he was therefore capable of returning to work. The worker claimed that he could not return to work.

[5] The worker had motor vehicle accidents in July and November 2011 which involved injuries to the neck and low back.

[6] In the January 2013 decision, the ARO found that the worker right shoulder injury had resolved and thus confirmed the denial of LOE benefits from October 3, 2011.

[7] The worker claimed entitlement for psychotraumatic disability or CPD and entitlement for orthotics. In the 2016 decision, the ARO denied entitlement for all three.

(iv) Law and policy

[8] Since the worker was injured in 2010, the *Workplace Safety and Insurance Act, 1997* (the "WSIA") is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[9] Section 126 requires the Tribunal to apply Board policy when making its decisions.

[10] The standard of proof applicable in workers' compensation proceedings is the balance of probabilities. Pursuant to section 124(2), the benefit of the doubt is given to the claimant in resolving an issue where the evidence for and against is approximately equal in weight.

[11] Section 46 of the WSIA provides that if a worker's injury results in permanent impairment, the worker is entitled to compensation for non-economic loss. "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. "Permanent impairment" means impairment that continues to exist after the worker reaches maximum medical recovery.

[12] Section 47 of the WSIA obliges the Board to determine the degree of permanent impairment "expressed as a percentage of total permanent impairment." 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. Specifically, the impairment determination must be made in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 3rd edition (revised) ("the AMA Guides"), which is the prescribed rating schedule.

[13] OPM Document No. 15-04-02, "Psychotraumatic Disability," provides that 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. The policy sets out the following "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.

...

[14] The policy further states that 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.

[15] OPM Document No. 15-04-03, "Chronic Pain Disability," sets out five criteria to assist adjudicators in determining entitlement for CPD. For a worker to qualify for compensation for CPD, all of the following conditions must exist, and must be supported by the evidence:

Condition	Evidence
A work-related injury occurred.	A claim for compensation for an injury has been submitted and accepted.
Chronic pain is caused by the injury.	Subjective or objective medical or non-medical evidence of the worker's continuous, consistent and genuine pain since the time of the injury, AND a medical opinion that the characteristics of the worker's pain (except for its persistence and/or its severity) are compatible with the worker's injury, and are such that the physician concludes that the pain resulted from the injury.
The pain persists 6 or more months beyond the usual healing time of the injury.	Medical opinion of the usual healing time of the injury, the worker's pre-accident health status, and the treatments received, AND subjective or objective medical or non-medical evidence of the worker's continuous, consistent and genuine pain for 6 or more months beyond the usual healing time for the injury.
The degree of pain is inconsistent with organic findings.	Medical opinion which indicates the inconsistency.
The chronic pain impairs earning capacity.	Subjective evidence supported by medical or other substantial objective evidence that shows the persistent effects of the chronic pain in terms of consistent and marked life disruption.

[16] When a worker suffers a loss of earnings as result of a compensable injury, LOE benefits are payable provided that the injured worker participates in the prescribed health care measures and in the process of early and safe return to work or labour market re-entry. Specifically, a worker who sustains a loss of earnings because of a compensable injury is entitled to LOE benefits pursuant to section 43 of the WSIA. Subsection 43(1) sets out a worker's right to LOE benefits and requires that a worker have a loss of earnings "as a result of the compensable injury."

[17] Subsection 43(2) provides that a worker's "full" LOE benefits are 85% of the difference between the net average earnings before the injury and the net average earnings that the worker "earns or is able to earn in suitable employment or business after the injury." Accordingly, in order to establish entitlement to full LOE benefits, a worker must be considered unable to earn any income from employment as a result of the compensable injury.

[18] Under the WSIA, every worker who sustains a compensable injury is entitled to such health care as may be necessary, appropriate and sufficient as a result of the accident and is entitled to make the initial choice of health care professional. The Board, and on appeal, the Tribunal, shall determine questions concerning the necessity, appropriateness or sufficiency of health care and payment for health care. See WSIA, section 33.

[19] Under section 32 of WSIA “health care” is defined as:

“Health care” means,

- (a) professional services provided by a health care practitioner,
- (b) services provided by or at hospitals and health facilities,
- (c) drugs,
- (d) the services of an attendant,
- (e) modifications to a person’s home and vehicle and other measures to facilitate independent living as in the Board’s opinion are appropriate;
- (f) assistive devices and prostheses;
- (g) extraordinary transportation costs to obtain health care;
- (h) such measures to improve the quality of life of severely impaired workers as, in the Board’s opinion, are appropriate.

(v) Testimony

[20] The worker testified that he was born in 1957. He completed grade 12 in his country of origin. He worked on a farm and for a brewery packing bottles into cases in his country of origin prior to coming to Canada in January 1988. He testified that after coming to Canada he initially worked loading trucks and spot welding. He began employment with the accident employer in 1998 as a buffer. His job involved taking doors from a rack, carrying them to where they were buffed, placing them on a table, applying a paste on each door, then buffing them with a machine by moving the machine back and forth. He testified that the buffer weighed approximately 15 to 20 lbs. and the paste was sticky and therefore he had to push the machine back and forth with significant force, using both hands. Each piece of wood would be buffed for five minutes to 30 minutes to a full hour, but on average required 30 minutes. Once the piece was finished he would place it on a rack and would move on to start another one.

[21] The worker testified that on the day of accident he was working on panels the size of the hearing table. Approximately 20 panels were sitting on the wall, and fell on him like dominoes. He injured his left foot and right shoulder. As the panels hit him he fell to the ground and the panels fell on top of him. Co-workers had to come to remove them from him. He went to Emergency and his wife came to help him there. His foot was broken and he had shoulder pain. He thought that he attempted to return to work in August 2011 and again in February 2012. He attended the return to work meeting in August 2011 to look at the available work but the first time he actually attempted it was on February 6, 2012. When he showed up on that day his boss told him that they did not have the buffing job for him so he had to go home and come back the next day. When he came back the next day he attempted to perform the buffing job, the same job that he had been doing for 12 to 13 years.

[22] When asked questions about the May 16, 2012 meeting with the employer he confirmed that he was told that they would provide him with a someone to help with the lifting but they did not say that he could work a part of the day only on buffing. The only work they had for him was buffing. He testified that he could not tolerate using the buffing machine for even 10 to 20 minutes as the vibration aggravated his shoulder symptoms. He testified that he was never provided with assistance using the buffing machine and it was not possible to perform this job

one-handed. He testified that he had no problems with either shoulder prior to the work accident in 2010.

[23] The worker testified about the details of the car accidents in which he was involved in 2011. In the first car accident in July 2011 he was driving, stopped at a red light, and was hit from behind. He injured his low back and did not injure his shoulders. In November 2011, he was “t-boned” when coming out of a driveway. He injured the left side of his neck and back. He was taken to hospital by ambulance. He testified that he fully recovered from the neck and back injuries after approximately one year.

[24] The worker testified that he went for psychological treatment in the summer of 2011 due to the pain in his right shoulder. His left foot at that time was not better and has still not resolved. He has pain in the morning and cannot wear safety boots. His orthotics were paid for by the Board and are now five years old. He cannot afford to replace them.

[25] The worker testified that prior to the accident he played soccer; in the summer he trained his three sons on how to play soccer and basketball, went out with friends every weekend, went to church every week and had a happy marriage. Now he cannot go out and play with his kids, he sees his friends infrequently and he and his wife have separated, in part due to the financial problems and his low mood flowing from his work injury. He used to work two jobs to provide for his family and now is unable to do this. He testified that since the accident he gets angry very easily, he feels like someone is following him, he is worried that something else is going to happen to him, he has lost his appetite, and he cannot sleep. He takes medication to help him sleep.

[26] The worker testified that he began looking for work in 2013 but he did not keep a list of where he attempted to find employment at that time. He looked for any job; something that would help him pay the bills. He looked for work in customer service in the hotels and in malls, and estimated that he applied to four jobs per day, five days per week. He began keeping a list of where he applied in December 2014 after being advised that he should by his representative. He would go personally to apply for jobs or his eldest son would help him apply on the computer. He has since learned to use a computer, so for the past year or so he has been able to apply online himself but continues to get assistance from the YMCA with building his resume and looking for a job. They have told him, though, that his situation is different because of his shoulder. He estimated that he gets an interview approximately once per month. Most recently a potential employer told him they could not hire him for a customer service retail job as he would be required to take stock off the trucks. He applied to a plastics company for a general helper job but they would not hire him as he could not wear safety boots due to his left foot impairment. Other companies have said they would call him but never did.

[27] The worker testified that he continues to take antidepressants prescribed by his family doctor.

[28] When asked by the Vice-Chair why he did not begin looking for work until 2013, the worker testified that he was having ongoing difficulty with his foot and shoulder problems. He testified that he still had the same pain in 2013 but his finances were getting worse and worse so he pushed himself to look for something. However, he has not been successful in finding employment.

(vi) Analysis

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

(a) Entitlement for a right shoulder permanent impairment

[30] Beginning with the issue of ongoing entitlement for the right shoulder, I find that the worker sustained a permanent right shoulder impairment in the 2010 work accident and thereby has entitlement for a NEL assessment for this injury. I arrive at this conclusion for the following reasons.

[31] First, I note that the medical reporting before me establishes continuity of complaint in respect of the right shoulder from the accident date onward.

[32] Second, I note that the worker's treating and assessing health professionals have unanimously stated that his right shoulder condition has not resolved. I note that the worker was assessed at the Board's Shoulder and Elbow Specialty Clinic following the work accident. In the follow up assessment report, dated September 24, 2010, the assessor, orthopaedic surgeon, Dr. T. Axelrod, stated that the worker continued to present with "minor rotator cuff tendinopathy of his right shoulder" with some pain and restricted range of motion. It was recommended that he perform modified duties with "restrictions of no heavy lifting, no forceful pushing or pulling and no overhead work with his right arm." The assessors opined that a full recovery was anticipated and that the restrictions were to remain in place for three to four months.

[33] However, the evidence before me supports that a full recovery did not occur. On January 21, 2011, orthopaedic surgeon, Dr. M Roscoe, reported that the worker continued to present with tenderness over the right distal clavicle and acromion with range of motion restricted at the extremes by pain and a "little crepitus felt in the subacromial area." Dr. Roscoe stated that the worker required "ongoing conservative measures in the form of physiotherapy and rehab," that the worker's "prognosis in regards to his shoulder remains in doubt," and he "has a long way to go from a rehab perspective."

[34] On February 22, 2011, Dr. Roscoe reported that the worker's ultrasound showed evidence of calcific tendinitis in the infraspinatus and a "focal area of severe tendinopathy in the supraspinatus possibly consistent with a tear." At that time the worker reported "poor improvement in the overall function of his shoulder." Dr. Roscoe reported "active abduction to only about 80 degrees and forward flexion to maybe 90," and "a lot of pain with attempts at resisted external rotation." Dr. Roscoe opined that the worker had "ongoing impairment with regards to his shoulder" and sent him for an MRI.

[35] The worker underwent a comprehensive assessment at the Shoulder and Elbow Specialty Clinic on April 5, 2011. Following that assessment, Dr. Axelrod noted that the worker presented with "continued pain at the apex of his right shoulder" and limited range of motion and diagnosed the worker with "a traumatic rotator cuff injury to his right shoulder" from which he was partially recovered at that time and the prognosis was pending the results of the MRI.

[36] The worker underwent a right shoulder MRI on April 25, 2011 which revealed moderate tendinosis of the distal supraspinatus tendon, with no evidence of tearing of the tendons, and mild degenerative changes at the acromioclavicular joint. After reviewing the MRI, Dr. Roscoe, on May 3, 2011, reported that the "MRI scan does show evidence of a tendinopathy in his shoulder. There are no discrete tears. There is some hooking of the acromion, AC joint degeneration and obvious impingement."

[37] The worker underwent treatment at the Board's work hardening program. He was subsequently assessed again by Dr. Axelrod, on October 12, 2011. At that time Dr. Axelrod again noted the moderate right rotator cuff tendinopathy in the MRI, reported that the worker continued to have right shoulder pain "in the upper fibres of the trapezius in the posterior aspect of the shoulder" with limited range of motion to "100 degrees of flexion and 120 degrees of abduction." Dr. Axelrod made no further recommendations for treatment other than a home exercise program, stated that the worker had "permanent job restrictions for heavy lifting or overhead activities with his right arm" and had reached maximum medical recovery.

[38] Following an independent medical evaluation (IME) on May 20, 2015 orthopaedic surgeon, Dr. E. English, stated that the worker sustained a "supraspinatus tendon injury as a direct result of [the September 2010 work] accident" and was not capable of reaching, lifting more than 20 lbs. at desk level, and above shoulder level lifting. Dr. English diagnosed him with "right shoulder strain with a secondary rotator cuff tendinopathy and restricted movement with reduced strength in his right shoulder rotator cuff muscles."

[39] I find the foregoing evidence establishes that, while Dr. Axelrod originally anticipated a full recovery of the right shoulder work injury, this did not come to pass. The evidence demonstrates a continuity of complaint, with symptomology that included pain and restricted motion, and the recommendation by all treating and assessing health professionals, including Dr. Axelrod, that as the worker's right shoulder tendinopathy was permanent, he had permanent medical restrictions as a result. I therefore find the worker has entitlement for a permanent right shoulder impairment and, thereby, a NEL assessment for this injury.

(b) Entitlement for psychotraumatic disability or CPD

[40] Turning to the next issue, I begin by summarizing that which is stated above; OPM Document No. 15-04-02 sets out three circumstances in which entitlement may be granted for a psychotraumatic disability: where the psychotraumatic disability results from a brain injury; when the condition is due to an emotional reaction to a physical injury or treatment process; or when the condition is due to extended disablement and to non-medical, socioeconomic factors, the majority of which can be directly related to the work-related injury.

[41] In this case, I find that the evidence demonstrates that the worker developed depression and anxiety as a result of the pain and limited function resulting from his organic injuries to the right shoulder and left foot, and the extended disablement and non-medical socioeconomic factors related to these compensable injuries, thus supporting his entitlement for psychotraumatic disability under OPM Document No. 15-04-02. In arriving at this conclusion I have regard for the following evidence in particular.

[42] I note that the worker testified that he was depressed, anxious and easily angered as a result of his ongoing pain and limited function following the September 2010 accident. I find his testimony is consistent with the documentary record before me. The worker underwent a screening assessment by psychologist Dr. P. Sanghera at the Board's Foot and Ankle Specialty Clinic in March 2011. Dr. Sanghera reported that the worker suffered with depression and anxiety as a result of his ongoing pain and disablement:

Overall based on [the worker's] clinical presentation during the assessment and his response on the self-report questionnaires, he appears to be suffering from symptoms of depression and anxiety in the moderate range. Symptoms of depression including feeling like he wanted to cry but couldn't, poor self-esteem, sadness, feeling more discouraged

about the future than he used to be, anhedonia, low energy, irritability and poor sleep. Symptoms of anxiety included nervousness, feeling scared, nightmares, ruminating about the workplace accident, fear of losing control, heart pounding or racing, fear of the worst happening and inability to relax. [The worker's] overall perceived disability with respect to the accident, and the changes this had evoked in his life was within the very high range. His response on the pain measures revealed that there was anxiety related to pain and that he primarily utilized passive coping techniques to cope with pain.

[43] Dr. Sanghera recommended twelve sessions of psychotherapy to improve the worker's functioning and mood. The Board granted entitlement for the psychotherapy recommended by Dr. Sanghera to improve the worker's mood and pain coping strategies, to support his return to work and to decrease his anxiety while still getting treatment to his shoulder. (See Board Memorandum No. 28, dated May 12, 2011).

[44] The worker underwent treatment with Dr. Sanghera until September 29, 2011, with similar issues documented and minimal progress reported. The worker testified that he continues to take antidepressants prescribed by his family doctor.

[45] In the IME in 2015, the worker was assessed by psychologist Dr. J. Lee. Dr. Lee diagnosed the worker with adjustment disorder with mixed anxiety and depressed mood and somatic symptom disorder, which he attributed to the work accident. Dr. Lee noted that the worker presented with "low mood, reduced motivation, feelings of worthlessness, poor appetite due to stress, weight loss, dampened energy, sleep disruption, nightmares, anxiety about loud noises and paranoia of things falling on him, and diffuse cognitive difficulties." Dr. Lee opined that at that juncture it was "highly unlikely [the worker] will improve substantially without a different approach to his chronic pain symptomology." Dr. Lee stated that "the extent of his physical and psychological dysfunction is such that his injuries will likely be permanent and any chronic pain intervention will focus on coping rather than cure."

[46] I find no reason to reject the opinions of Dr. Sanghera and Dr. Lee. Accordingly, I find the worker developed depression and anxiety as a result of his compensable work injuries, specifically his ongoing and persistent pain and loss of function. As these criteria fall squarely within the considerations set out in OPM Document No. 15-04-02, I find the worker has entitlement for psychotraumatic disability. Further, given that the worker continues to be treated with antidepressant medication, it is now seven years post-accident and Dr. Lee's opinion that the worker's psychological injury was likely permanent, I find that the worker sustained a permanent psychological impairment as a result of his compensable organic injuries and is thereby entitled to a NEL assessment for this impairment.

[47] Finally, I acknowledge that the worker's representative submitted that the worker seeks entitlement for CPD primarily and psychotraumatic disability in the alternative. Tribunal case law has held that it is necessary to determine the predominant nature of the disability when determining whether entitlement for psychotraumatic disability or CPD exists. An injury is characterized as CPD if the nature of the disability is most closely associated with pain which cannot be attributed to organic causes. If, however, the nature of the disability is most closely associated with a psychiatric diagnosis that is distinct from the worker's pain (e.g., depression or conversion disorder) then it is generally compensated as a psychotraumatic disability. See, for example, *Decisions No. 881/98 and 1858/13*.

[48] In this case, I have found that the worker has entitlement for psychotraumatic disability for the reasons stated above. Further, although the worker has been diagnosed with chronic pain,

his treating health care providers have not reported that his pain levels are inconsistent with his organic right shoulder injuries. As I am satisfied that the worker's psychiatric diagnosis is distinct from his pain, and his pain is consistent with his compensable permanent right shoulder impairment, I find that he does not have entitlement for CPD.

(c) Suitability of pre-injury job and LOE entitlement from October 3, 2011

[49] With regard to the issue of the worker's LOE entitlement from October 3, 2011, I begin by reiterating that a worker is entitled to LOE benefits when suffering a wage loss as a result of a work injury provided that the worker cooperates in the process of early and safe return to work or labour market re-entry. In this case, I find that the only work available to the worker with the accident employer was his pre-injury job as a buffer and this job was unsuitable for him in light of his permanent compensable right shoulder impairment. Further, I find that the worker attempted the job, despite it being unmanageable due to his permanent right shoulder restrictions. I therefore find that he continued to have entitlement to LOE benefits beyond October 3, 2011.

[50] In arriving at these conclusions, I note that the worker's right shoulder restrictions precluded him from heavy lifting, carrying, pushing, pulling, reaching and repetitive movements of the right shoulder. I accept that his job as a buffer involved repetitive pushing, reaching, and pulling the buffer, which weighed 20 to 30 lbs., vibrated and required force to maneuver. I therefore find the worker's pre-injury job was unsuitable.

[51] I note that this opinion was expressed by the worker's family doctor, Dr. T. Ampofo, in a report dated February 9, 2012, and by the assessing orthopaedic surgeon, Dr. English, in 2015 who stated that the buffing job:

...requires him to reach and move a buffing machine across the surface of the wood product. The larger the piece of material, the more exertion of his shoulder is necessary to move the arm. There is continuous buffing or vibration of the machine putting stress on his right rotator cuff, which is his dominant arm, which requires him to abduct and forward flex his right shoulder, reaching to the limits of the wood product that he has to work on. This is putting a significant stress on the shoulder. He also is required to do lifting of up to 50 pounds on a fairly regularly basis, which is also creating a stress on his right shoulder, so that it is my feeling that this man cannot return to his regular job buffing.

[52] Because the work available with the accident employer was not suitable, and no other work was available with the accident employer, I find the worker continued to have entitlement to full LOE benefits beyond October 3, 2011.

[53] Further, I accept that the worker attempted to find work to no avail, in large part as his right shoulder impairment precluded him from performing physically demanding tasks and his employment history is limited to manual labour type work. He testified that he attempted to make contact with approximately 20 potential employers per week and this is consistent with the job search records appearing before me in the case materials. Accordingly, I find the worker was engaged in reasonable self-directed LMR efforts in the circumstances, from 2011 to the date of the Tribunal hearing.

[54] I therefore find that the worker is entitled to full LOE benefits from October 3, 2011 to the date of the Tribunal hearing. Beyond the date of hearing, I remit the worker's LOE entitlement, and the question of whether a suitable occupation is ascertainable with assistance, to the Board for determination.

[55] Lastly, I note that as the worker's accident was in 2010, the final 72-month LOE review was in 2016. However, since the worker was engaged in reasonable self-directed LMR efforts at the time of the final review, I find the worker's LOE benefit can be reviewed beyond the 72 month dated under section 44(2.1)(b).

(d) Entitlement for orthotics

[56] Finally, I consider the worker's entitlement for orthotics. I note that the worker sustained a crush injury to his left foot in the September 2010 work accident.

[57] Following an assessment at the Board's Foot and Ankle Specialty Program on May 25, 2011, orthopaedic surgeon, Dr. J. Lau, stated that the crush injury with a fracture of the second metatarsal had fully healed but the worker had "ongoing pain which may be from the soft tissues and very minor nerve injury." On that basis, Dr. Lau stated that the worker "requires custom orthotics" and noted that he could be at "high risk for developing arthritis in the surrounding joints due to the injury."

[58] The worker was provided with the orthotics as recommended by Dr. Lau, by chiropodist J. Owen on June 24, 2011 with the cost covered by the Board as a health care benefit.

[59] The worker testified that the original orthotics have not been replaced since then and he attempts to manage with drug store insoles as he cannot afford the cost of new orthotics.

[60] I note that in denying entitlement for the orthotics in 2016, the Board stated that the worker's left foot fracture had fully healed by May 25, 2011 without a permanent impairment and therefore payment for the orthotics could not be considered (see Nurse Consultant correspondence, dated January 25, 2016).

[61] This finding is at odds with the opinion of Dr. Lau who stated that soft tissue and or nerve issues continued on May 25, 2011, and on that basis the orthotics were covered. Furthermore, on July 13, 2011 the physiotherapist at the Foot and Ankle Specialty Program continued to note dull pain in the lateral border of the left foot with weight-bearing, decreased walking abilities, and decreased functional dorsiflexion of the left foot.

[62] In a report dated April 5, 2013, Dr. Ampofo stated that while the left foot fracture had healed the worker "has ongoing chronic pain in his left foot that radiates up his left leg."

[63] I note that following the IME in 2015, Dr. English stated that the worker had "difficulty standing on his left foot, although he does wear good shoes with biomechanical foot orthotics in them." Dr. English stated that the left foot problems seemed to have settled as long as the worker wears proper footwear and limits how much standing and walking he does. Dr. English continued to diagnose the worker with "left foot crush injury with a 2nd metatarsal shaft fracture as well as delayed union." Dr. English's report supports the finding that without orthotics the worker has ongoing impairment in his left foot.

[64] I take the above comments by Dr. Lau, Dr. Ampofo and Dr. English to mean that the worker's left foot work injury did not resolve, notwithstanding that the fracture appeared to have healed, in that he was left with ongoing pain, radiating up the left leg, and limitations on his tolerances for standing and walking. Further, in light of Dr. Lau's recommendations in 2011 and Dr. English's comment that the worker's problems with the left foot were not that significant *as long as* he wears the proper orthotics and limits his standing and walking time, I find that the

worker has entitlement for orthotics, as the orthotics are necessary, sufficient and appropriate health care flowing from his compensable left foot impairment.

DISPOSITION

[65] The appeal is allowed as follows:

1. The worker has entitlement for a permanent right shoulder impairment and thereby a NEL assessment for this area.
2. The worker has entitlement for psychotraumatic disability. The worker's compensable psychotraumatic disability is permanent. He therefore has entitlement to a NEL assessment for this impairment.
3. The worker does not have entitlement for CPD.
4. The worker has entitlement to full LOE benefits from October 3, 2011 to the date of the Tribunal hearing, September 8, 2017. The worker's LOE benefit entitlement beyond September 8, 2017 is remitted to the Board for adjudication.
5. The worker's left foot impairment did not resolve. The worker has entitlement for orthotics as a result of this impairment.

DATED: December 4, 2017

SIGNED: J.E. Smith