

WORKPLACE SAFETY AND INSURANCE BOARD

APPEALS RESOLUTION OFFICER DECISION

CLAIM:

OBJECTING PARTY:

REPRESENTED by: Richard A. Fink, Fink & Bornstein Prof. Corp.

RESPONDENT:

REPRESENTED by: Michael Woo, Michael Woo Safety First Consulting

HEARING:

May 30, 2017, Toronto

HEARD by:

Judy Cantwell, Appeals Resolution Officer

ADDITIONAL ATTENDEES:

INTERPRETER:

Cybele Oliveira, Portuguese

ISSUES

1. The quantum of the non-economic loss (NEL) award for chronic pain disability (decision dated July 20, 2016).
2. The worker's ability to work full time (decision dated September 27, 2016).
3. The suitable occupation (SO) of delivery driver (decision dated October 20, 2016).
4. The work transition (WT) plan for the SO of delivery driver (decision dated November 10, 2016).
5. The loss of earnings benefits paid from January 15, 2015 to January 23, 2016 and from January 23, 2016 forward (decision dated October 20, 2016).

BACKGROUND

On August 10, 2012, the worker, a 49 year old dry wall installer injured his left shoulder as he flipped a piece of drywall overhead. Entitlement was accepted for a left shoulder strain. The worker returned to work on modified duties, but had ongoing problems.

On January 18, 2013, the worker was injured in a work-related motor vehicle accident under This is a no lost time claim as modified work was available. A permanent impairment was not accepted in this claim. The Appeals Resolution Officer (ARO) Decision of January 26, 2015 denied entitlement to psychotraumatic disability and chronic pain disability, confirmed the suitability of the WT plan and denied entitlement to loss of earnings benefits.

The worker last worked for the injury employer in May 2014. Pre-injury duties were available, but the worker was not able to return to this work.

The background of the current claim is outlined in the Appeals Resolution Officer (ARO) Decision dated April 13, 2016 and can be referenced directly. The ARO accepted entitlement for a left rotator cuff tear and the associated surgery performed on September 14, 2014; chronic pain disability (CPD); and full loss of earnings (LOE) benefits from September 14, 2014 to January 15, 2015. Entitlement for benefits beyond January 15, 2015 and work transition (WT) services was returned to the operating area.

On July 20, 2016, the NEL clinical specialist determined a 10 percent NEL award for the worker's impairment due to CPD.

On September 27, 2016, the case manager identified physical restrictions for overhead reaching, repetitive pushing/ pulling and heavy lifting with the left arm and psychological restrictions for avoiding tasks that require frequent customer contact, tasks with deadlines, time pressures or high expectation for productivity. He concluded the worker was capable of full time work.

On October 20, 2016, the case manager noted the worker had located work as a delivery driver on January 23, 2016 earning \$15.00 per hour, averaging 15 hours per week. He accepted the opinion of the work transition specialist (WTS) that delivery driver was a suitable occupation (SO) for the worker without training. Partial loss of earnings benefits from January 15, 2015 to January 23, 2016 were paid based on the ability to earn minimum wage, forty hours per week. Partial loss of earnings benefits from January 23, 2016 forward were paid based on the ability to earn of \$15.00 per hour, forty hours per week as a delivery driver.

On November 10, 2016, the work transition specialist (WTS) offered to sponsor the worker in a WT plan for the SO as a full time delivery driver.

On November 25, 2016, the worker representative advised the case manager the worker would not be participating in the WT plan and intended to remain working with his current employer.

During the hearing, Mr. Woo discovered he did not have a complete copy of the claim. He was missing some recent submissions to the claim including the report from Dr. Jeffries. We took a break and Mr. Woo read the report from Dr. Jeffries. He made arguments in his closing submissions on this report.

Following the hearing, we determined Mr. Woo was missing some other submissions from the fall of 2016. These were provided to Mr. Woo and he was given the opportunity to make a written submission. I spoke with Mr. Woo on June 2, 2017 to determine if he wished to make a written submission on the documents provided after the hearing. As he had made closing arguments on Mr. Jeffries report, it was determined that further submissions were not required.

AUTHORITY

18-05-11 Assessing Permanent Impairment Due to Mental and Behavioural Disorders
18-03-02 Payment and Reviewing LOE Benefits (Prior to Final Review)

19-02-01 Work Reintegration Principles, Concepts and Definitions
19-02-02 Responsibilities of the Workplace Parties in Work Reintegration
19-03-03 Determining Suitable Occupation
19-03-05 Work Transition Plans

ANALYSIS

1. The NEL Award

I conclude the 10 percent NEL award does not reflect the worker's level of impairment. I have increased it to 25 percent. I will review my reasons for reaching this conclusion.

The NEL award is calculated according the Guides to Evaluation of Permanent Impairment, 3rd Edition, Revised (AMA guides). The AMA guides direct the decision maker to consider the impact of the psychological impairment on the worker's activities of daily living; social functioning; concentration, persistence and pace; and adaptation to stress. Policy provides guidelines by which to rate this impairment.

The Mental and Behavioural Disorders Rating Scale is used to assess permanent impairment benefits for psychotraumatic disability, chronic pain disability, and fibromyalgia syndrome. The worker was rated in the mild impairment class. The worker representative seeks entitlement in the moderate impairment class. I will review the mild and moderate rating scales for the purpose of this decision.

Mental and Behavioural Disorders Rating Scale:

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

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

Class 2: Mild impairment (5-15%) - impairment levels compatible with most useful function
There is a degree of impairment of complex integrated cerebral functions, but the worker remains able to carry out most activities of daily living as well as before. There is also some loss in personal or social efficacy and the secondary psychogenic aggravations are caused by the emotional impact of the accident.

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

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

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

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

The emotional state may be compounded by objective physical discomfort with persistent pain, signs of emotional withdrawal, depressive features, loss of appetite, insomnia, chronic fatigue, mild noise intolerance, mild psychomotor retardation, and definite limitations in social and personal adjustment within the family. At this stage, there is clear indication of psychological regression.

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

Assessment of the Evidence

I have carefully reviewed the medical evidence with particular focus on the psychiatric reports from Toronto Western Hospital, the Function and Pain Program (FPP) initial and final reports, the December 25, 2016 report from Dr. Jeffries, psychiatrist provided by the worker representative. I also considered the testimony of the worker.

I conclude the worker has a moderate psychological impairment, at the lower end of this scale. A mild impairment is defined in policy as impairment levels compatible with most useful function. I find the medical reporting clearly demonstrates the worker has not retained most useful function. Rather, his overall function is consistent with impairment levels compatible with some but not all useful function, a moderate impairment.

The worker suffers from impaired function in his activities of daily living; social functioning; concentration, persistence and pace; and adaptation to stress. His function is detailed in the above mentioned medical documentation and in the NEL evaluation. These reports can be referenced directly.

Dr. Jeffries concluded the worker had 30 percent impairment. I am not persuaded the worker functions at a 30 percent impairment level. I find the totality of the medical reporting does not describe this level of dysfunction. Also, Dr. Jeffries saw the worker once and his report on the worker's function is not as detailed as that provided by the FPP. The worker attended 24 sessions at the FPP. The FPP report is based on the worker's self-report, formal testing and his observed function.

The worker is not at the high end of the moderate impairment scale. He has anxiety and depression and this has affected his work and family life, but there has not been a breakdown of

social integration. The worker has negative emotions, but he does not present with bizarre behaviour, nor is he room bound or home bound.

With respect to the activities of daily living, the initial FPP report reviewed the worker's activities of daily living and his psychological function. The FPP noted the worker presented as physically fit and appropriately groomed. I also found he appeared fit. His wife assisted him with some of his self-care tasks. The worker reported sleep disruption. He reported that he does not engage in household activities. He functioned at a sedentary level at the time of discharge from the FPP. He testified to working three hours a day and then resting. He testified to attending church for two to three hours every Sunday. He also volunteers at the church in the reception area welcoming people to the church for about 15 minutes, twice a month.

Based on the worker's self-report, I conclude he is moderately impaired with respect to his activities of daily living in that he requires assistance for some basic daily activities. However, he has continued to maintain daily and weekly routines, independently. I conclude the impairment is at the low end of this scale.

With respect to social functioning, the worker described being estranged from his family. He reported minimal social support outside his family. His wife does assist him with his self-care, which leads me to conclude there continues to be some interaction. When he was at the FPP, his affect seemed brighter as he spent more time at the FPP. He was pleasant and cooperative. In testimony, he acknowledged some limited verbal communication with his children (greetings). He testified to getting help from a friend at his church with job searching. He said sometimes his friend would drive him during his job search.

I conclude the worker is moderately impaired at the lower end of this rating scale. The worker's social and personal life have been moderately affected by the work injury, but the worker continues to actively participate in society.

With respect to concentration, persistence and pace, I conclude the worker is moderately impaired at the lower end of this scale due to pain. The worker reported cognitive difficulties. However, the FPP found he did not display apparent difficulties with attention, concentration, memory perception or judgment. He was pain focused and demonstrated slow, stiff and effortful movement. He changed position frequently and presented as excessively guarded. His speech was clear and coherent with no evidence of disordered thinking. Correspondence from the employer indicates the worker performed at an extremely slow pace while on modified duties. The worker testified that he requires frequent breaks.

I do not find the evidence establishes the worker's cognitive function has been impaired. I conclude his pace and his ability to persist at a given task have been moderately impaired at the mid-range level by his pain experience. Overall, I conclude the worker functions at the low to mid-range level of the moderate scale with respect to concentration, persistence and pace, primarily due to pain.

The last area of function is adaptation to stress. He has symptoms of depression and anxiety that persist despite treatment at the FPP. His physical symptoms are not explained by the injuries he has sustained. He has been diagnosed with an adjustment disorder and a pain disorder. The FPP indicated these conditions presented barriers to his ability to maintain work.

The worker testified that he cannot work more than three hours because he gets nervous. He said he starts to shake, gets headaches and has increased pain.

The FPP described the worker as motivated and compliant with the program. His attendance was excellent. He was highly engaged and an active participant in the psychoeducational sessions. He was observed to make use of appropriate pain management strategies, resulting in modest improvement in mood and reported improvement in the ability to live/ cope with his pain. The employer noted that these improvements did not assist the worker to improve his production at work. The worker was at work, forty hours per week, when he finished the FPP but his production was extremely low compared to the norm (16 compared to 300 parts per hour).

Overall, I conclude the worker's ability to manage stress has been the most impacted area of function because his pain response adversely affects all aspects of his function. His production on modified duties was very poor because he spent most of his time taking breaks. He also suffers from depression and anxiety. I conclude the worker is moderately impaired with respect to his adaptation to stress, at the mid-range level.

When I consider all areas of function, I conclude a 25 percent NEL award appropriately reflects the worker's impairment as a result of his chronic pain disability. He has mild to moderate emotional disturbance. He has objective physical discomfort with persistent pain affecting all aspects of his life, depression and anxiety, and sleep disturbance resulting in significant work and familial disruption.

2. Level of Impairment and Ability to Work Full Time

I conclude the worker is unable to work full time. I am satisfied he can work 20 hours per week. I will review the evidence that led to this conclusion.

Policy 19-02-01 indicates that suitable work means post-injury work (including the worker's pre-injury job) that is safe, productive, consistent with the worker's functional abilities, and that, to the extent possible, restores the worker's pre-injury earnings. Available means that employment must exist and be in demand in the labour market to the extent that the worker has a reasonable prospect of obtaining employment.

While at the FPP, the worker was compliant with in-clinic and home exercise programs. His progress was very slow. He made slow but steady progress. At the end of the program, he was working full time hours with the injury employer.

The worker worked for the employer on a full time basis after both work injuries, even after he had developed and been diagnosed with a pain disorder. The ARO decision in claim : indicates the employer testified the worker worked full time from January 2014 to May 2014. The worker testified that he sometimes left early and did not work the full forty hours. He estimated he worked 22 to 30 hours. With the available information, I conclude the worker demonstrated the ability to attend work 40 hours a week. However, he took so many breaks that he did not perform at a competitive level. The worker produced very little work.

The worker is currently working for his cousin. The WT report of July 19, 2016 indicates the worker is driving a van to deliver paperwork such as blueprints to job sites. He also said it is his

job to watch the workers to make sure they are working. He said he did whatever odd jobs the employer needed. He worked three to four hours per day, earning \$15.00 per hour. He said he got the schedule each morning from the employer.

The worker testified that his cousin knew his situation and offered him work doing construction delivery. He tried the job before he began on payroll in January 2016. He said he uses his own minivan to deliver items. He drives to his cousin's house at the start of the shift. His cousin has a shop. Other workers load the van with items and also unload it. He waits 10 to 30 minutes at the destination while the van is unloaded. He also delivers blueprints. If he has to drive forty minutes, he takes breaks after 15 minutes of driving. His breaks are 20 minutes. When he returns to the shop after he delivers the items, he watches other workers to make sure they are not fooling around until the end of his shift. He can sit and relax while he does this.

The worker testified he works mornings or afternoons for three hours. He said he has tried to work four hours but he cannot work more than that. He stops work after three hours because he starts to get nervous. He starts to shake and gets a headache and he has more pain. After work, he goes home and tries to relax.

In addition to working for the employer, the WTS documented (in the September 13, 2016 and October 7, 2016 memos) that the worker attended English as a Second Language training in February and March of 2016, two hours per day in the evening. This is evidence the worker can work more than three hours in a day.

I accept the worker's sworn testimony that he is not working full time. There is no evidence to the contrary. The worker has demonstrated the ability to be at work for 40 hours, but has not demonstrated the ability to work at a competitive level on a full time basis. I conclude this is due to his pain response.

The claim record shows the worker generally works three hours per day. It appears that he chooses to limit his work day to three hours, but he has worked four hours per day in his current job. He says this is his upper limit. After considering the evidence carefully, I conclude the worker can work four hours per day, five days a week utilizing the pain management strategies he was taught at the FPP.

3. *The SO*

I am satisfied this SO is suitable.

Policy 19-03-03 indicates that when determining a SO, the WSIB works with the worker and employer and considers:

- a worker's functional abilities
- a worker's employment-related aptitudes, abilities, and interests
- what jobs are available with the injury employer through direct placement, accommodation, or retraining
- labour market trends, and the likelihood of the worker being able to secure and maintain work within the occupation with another employer, and
- in accordance with applicable human rights legislation, any pre-existing non-work-related condition(s) (e.g., including non-physical disabilities such as a learning disability) a

worker may have, as well as any other human rights-related accommodation requirements.

The worker representative argued the SO of delivery driver is not suitable because the worker cannot perform work as a courier. He also noted the worker's cousin is extremely accommodating and other employers likely would not be as accommodating.

The worker testified to always having pain. He has limited strength. He said he can lift about 5 kilograms with the right hand, but not much with the left. He can sit and stand for about 10 minutes and walk about 5 minutes. The FPP identified sitting and standing tolerances of 15 to 20 minutes, a walking tolerance of 5 minutes and a bilateral lifting tolerance of 3.2 kilograms.

The worker has demonstrated the ability to work as a delivery driver. He performed these duties for the employer for a few months until his second work injury. He is currently employed in this capacity.

I agree the worker does not have the strength requirement to be a courier. However, I am satisfied the worker has the skills and abilities to work as light delivery driver for a pharmacy, flower shop or pizza shop. Delivery work in these settings is light and allows for position change. It involves local deliveries, so the worker is driving short distances. The work is routine and not highly demanding from a physical or psychological perspective. It is within the worker's physical and psychological restrictions.

An interpreter was present during the hearing, but she was utilized infrequently. The WTS contacted CLARS (Coordinated Language Assessment and Referral System) and was informed the worker's language skills had been assessed in August 2015. The worker tested at CLB (Canadian Language Benchmarks) level 5 for speaking and listening and at level 2 for reading and writing. This is consistent with the psychovocational assessment. I conclude the worker has sufficient skills to read names and addresses and drive to the delivery address.

The WT specialist provided documentation to support that work as a delivery driver is generally available. I am satisfied that this work is generally available. Therefore, I conclude this SO is suitable for the worker.

4. The WT plan

I conclude the WT plan developed for the worker is appropriate. The worker was offered a period of job search training and job search assistance for the SO of delivery driver. The worker declined the WT plan because he is currently employed.

Policy 19-03-03 indicates that the Work Transition (WT) plan outlines the assistance and services a worker requires to enable a return to work with the injury employer in the identified suitable and available work or, if required, to re-enter the labour market in the identified suitable occupation (SO).

The worker representative argued the WT plan was not adequate because the worker was not offered ESL or upgrading, and driving was not recommended in the psychovocational assessment. The employer representative supported the decision made by the case manager.

The worker was born in 1963. He testified he completed grade 8 in Brazil. He sold papers and toys and then worked in a factory prior to coming to Canada. He came to Canada in 1987. He worked as a cleaner in a hospital for three years, a bricklayer's helper for three years and then as a drywall installer for over twenty years until the work injury.

Psychovocational testing identified the worker had an overall borderline learning ability. He might be able to upgrade marginally and is best suited to training on the job for more routine duties. The psychovocational assessment identified potential occupations that would require ESL training and/ or upgrading including elemental service worker, retail sales, cashier or attendant. These jobs generally start at or near minimum wage.

The October 7, 2016 WTS memo indicated the worker stopped attending ESL training after two months because he was unable to concentrate and had not learning anything.

I conclude the SO of light delivery driver is the best option for the worker because it does not require upgrading. The psychovocational testing identified the worker is best suited to learning on the job for more routine duties. Given his psychovocational profile, his ability to benefit from upgrading including ESL is uncertain. He reported no benefit from the ESL training he attended in 2016. The alternative SO's identified as achievable with some ESL and/ or upgrading do not provide the worker with a better earnings potential and are not more physically suitable. In fact, retail sales can involve prolonged positioning. I conclude the WT plan which offered to develop the worker's job search skills is an appropriate plan given the worker's vocational characteristics.

5. *LOE Benefits*

I conclude the worker is entitled to additional loss of earnings benefits. I will explain my reasons for concluding this.

The worker representative argued the worker conducted a reasonable job search and is entitled to full loss of earnings benefits during his job search. He also argued the worker is unable to work full time and should receive partial loss of earnings benefits that reflect this. The employer representative agreed with the decisions made in the claim.

Section 43(1) of the Workplace Safety and Insurance Act (the Act) indicates: A worker who has a loss of earnings as a result of a work-related injury is entitled to payment of loss of earnings (LOE) benefits beginning when the loss of earnings begins. The payment continues until the earliest of

- the day on which the worker's loss of earnings ceases
- the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury
- two years after the date of injury, if the worker was 63 years of age or older on the date of the injury, or
- the day on which the worker is no longer impaired as a result of the injury.

January 15, 2015 to January 23, 2016

I conclude the worker is entitled to full loss of earnings benefits from January 15, 2015 to November 23, 2015. I conclude he engaged in a reasonable job search given his skills and abilities.

The employer representative noted the worker did not engage in an efficient job search. He did not use the internet. He did not use government agencies.

The worker representative provided copies of the worker's job search lists. The worker went to 723 places to look for work. He said he went in person. He looked in factories, stores and in construction. He said he was trying to find a place to work, but he could not find any place. He was desperate for money. He said he was looking for something that would fit him. He said he told the truth about what he could do and said he would try to work. He said he could do driving or something. He was asked if he looked for work as a courier. He said not exactly.

The worker testified that when he came to Canada, he looked for work in person in his community.

He testified that he began job searing in January 2015. He went to two to three places a day, five days a week. He did not have a resume. He walked or he took his car. He said he can only drive 10 to 15 minutes and then he would get nervous, start to shake and get headaches. He also testified that sometimes he would call a friend from church to drive him and help him look. He would look for help wanted signs. He would bring paper with him to write down his job search.

The worker said he had two interviews. He was asked questions by the employer during his job search.

The worker was asked if he was ever asked to hand in an application. He said he did not remember. I did not find this response credible. Many employers who are cold canvassed about work direct applicants to the internet or ask for an application to be completed and then dropped off.

The worker agreed he spoke to his sons a little bit. He said he did not ask his sons for help to use the internet because they are always busy. He was asked if he ever went to the government to look for work. He said he went a couple of times and the jobs he saw asked for experience. He said the job postings did not fit him.

The worker said he stopped job searching when his cousin offered him the job. He was not sure when this was. He said he tried the job a couple of times but his cousin did not pay him. His cousin put him on payroll on January 23, 2016.

I conclude the worker does not have the skills or abilities to use the internet. I conclude his job search would not have been more successful if he had used the internet (with the help of his sons) or a government agency because his job search lacked focus and organization. I considered that the worker has limited work experience and education and a limited general learning ability.

I agree with the employer representative that the worker did not conduct an effective job search. I find it inconsistent that the worker said he did not remember being asked to complete any applications during his job search. His job search lists indicate only one of the 723 potential employers requested he complete an application. His job search lists provide very little detail (phone number or address). On the one hand, he said he looked for places with help wanted signs. Yet, his job search list says most of the places he went to were not hiring. I conclude the worker's primary objective was to complete the job search sheets (because he had been told to do so) without any real expectation that he would find work that "fit him".

At the same time, I also conclude the worker wants to work and has engaged in activities to mitigate his wage loss. This is evidenced by his job search efforts, however poorly executed. He continued to perform modified duties (albeit poorly) for the injury employer after both work injuries. He attended a CLARS assessment in August 2015. He attended English upgrading in February and March 2016. He is currently working and has been for 16 months.

All facts considered, I conclude the worker's loss of earnings from January 15, 2015 to November 23, 2015 is due to the work injury and that he engaged in activities to mitigate his wage loss. As such, full loss of earnings benefits are in order for this period. I conclude the worker made sufficient effort during this time to mitigate his wage loss, given his limited skills and abilities.

The worker did not job search after November 23, 2015. As of November 23, 2015, I conclude the worker did not take sufficient action to mitigate his wage loss. He did not start working for his cousin until two months later. I conclude the worker is entitled to partial loss of earnings benefits from November 23, 2015 to January 23, 2016 based on the ability to earn minimum wage, 20 hours per week as a light delivery driver.

As of January 23, 2016, I conclude the worker is entitled to partial loss of earnings benefits based on the ability to earn \$15.00 per hour, 20 hours per week as a light delivery driver.

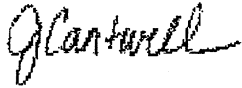
CONCLUSION

1. The NEL is increased to 25 percent.
2. The worker is limited to 20 hours of work per week.
3. The SO of light delivery driver is suitable.
4. The WT plan is appropriate.
5. The worker is entitled to full loss of earnings benefits from January 15, 2015 to November 23, 2015, inclusive.
6. The worker is entitled to partial loss of earnings benefits from November 24, 2015 up to January 23, 2016 based on the ability to earn minimum wage, twenty hours per week.
7. The worker is entitled to partial loss of earnings benefits from January 23, 2016 and continuing based on the ability to earn \$15.00 per hour, 20 hours per week.

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The worker's objection is allowed, in part.

DATED June 5, 2017

A handwritten signature in cursive script, appearing to read "J. Cantwell".

J. Cantwell
Appeals Resolution Officer
Appeals Services Division