WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1294/12

BEFORE:	G. Dee : Vice-Chair B. Wheeler : Member Representative of Employers J.A. Crocker : Member Representative of Workers
HEARING:	July 3, 2012, at Toronto Oral
DATE OF DECISION:	August 10, 2012
NEUTRAL CITATION:	2012 ONWSIAT 1786
DECISION(S) UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) dated May 5, 2011

APPEARANCES:

For the worker:	V. Mehra, Lawyer
For the employer:	Not participating
Interpreter:	N/A

REASONS

(i) Issues

[1] The worker seeks recognition of a permanent psychiatric impairment as a result of his workplace accident of January 23, 2004.

[2] The worker also seeks entitlement for a neck, bilateral shoulder and upper back injury as a result of the same accident.

[3] Finally, the worker seeks Loss of Earnings (LOE) benefits after November 23, 2009 as well as entitlement to Labour Market Re-entry (LMR) services.

(ii) Background

[4] The worker was repairing the frame of a sofa when he hammered a block of wood. The block broke away from the frame and hit the worker in the left eye causing a permanent injury. The worker was 27 years old at the time of the accident. His left eye condition includes a post-traumatic glaucoma.

[5] The job that the worker was performing as an assembler was the first job that the worker performed since coming to Canada. The worker had been employed by the employer for almost seven years at the time of the accident.

[6] The worker's education in his home country was completed when the worker was 12 years old and in Grade 5. Although the worker speaks English well, he indicates that his ability to read and write English is limited. The worker has received no formal education in Canada.

[7] The worker eventually received a 14% Non-Economic Loss (NEL) award for his left eye condition. The worker returned to modified work with the accident employer until 2008 when he stopped working.

[8] After the worker stopped working in 2008 the WSIB recognized that the worker had an injury related psychiatric condition. The WSIB recognized this condition on a temporary basis at that time.

[9] The worker underwent a number of psychiatric evaluations in 2008 and 2009. As one of the psychiatric conditions that the worker was diagnosed as having was a Pain Disorder associated with Both Psychological Factors and a General Medical Condition, the worker was also referred to a Functional Restoration Program (FRP) which included psychological counseling.

[10] The WSIB sent the worker a warning letter regarding his cooperation requirements on July 20, 2009 as the worker has been absent "a couple of times" from the FRP.

[11] A further warning letter was sent to the worker on October 2, 2009, due to the worker missing three psychological treatment sessions.

[12] When the worker missed two further psychological treatment sessions on November 26, 2009 and December 3, 2009 the worker was discharged from the FRP. The WSIB then wrote to the worker on December 9, 2009. The letter closed the worker's entitlement to LOE benefits based upon a finding of non-cooperation. The same letter denied that the worker's

psychiatric condition was permanent and also denied the worker entitlement for a neck and upper back condition.

[13] In a decision of the Appeals Resolution Officer dated May 5, 2011, the WSIB issued a final decision denying the worker entitlement for neck, upper back and bilateral shoulders given the lack of medical reporting concerning such injuries in the period following the workplace accident. Entitlement to a NEL award for the worker's psychiatric condition was denied on the basis that there were other non-compensable problems that prevented the ARO from stating conclusively that there was a work related permanent psychiatric entitlement. The ARO also found that the termination of LOE benefits beyond November 23, 2009 was appropriate due to the worker's non-cooperation in LMR services and that LMR services were not to be re-instated.

[14] The worker appeals to the Appeals Tribunal.

[15] The employer did not participate in the appeal.

(iii) The Law

[16] As the worker's accident occurred in 2004, the worker's claim is governed by the provisions of the *Workplace Safety and Insurance Act* ("the WSIA:" or "the Act").

[17] Loss of Earnings (LOE) benefits are determined under section 43 of the WSIA. Subsections 43(1) to (3) and (7) of the WSIA provide as follows:

> 43(1) A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins. The payments continue until the earliest of,
>
> (a) the day on which the worker's loss of earnings ceases;
>
> (b) 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;
>
> (c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury;
>
> (d) the day on which the worker is no longer impaired as a result of the injury.
>
> (2) Subject to subsections (3) and (4), the amount of the payments is 85 per cent of the difference between,
>
> (a) the worker's net average earnings before the injury; and
>
> (b) the net average earnings that he or she earns or is able to earn in suitable and available employment or business after the injury.
>
> However, the minimum amount of the payments for full loss of earnings is the lesser of $15,312.51 or the worker's net average earnings before the injury.
>
> (3) The amount of the payment is 85 percent of his or her pre-injury net average earnings less any earnings the worker earns after the injury if the worker is co-operating in health care measures and,
>
> (a) his or her early and safe return to work; or
>
> (b) all aspects of a labour market re-entry assessment or plan.

> (7) The Board may reduce or suspend payments to the worker during any period when the worker is not co-operating,
>
> (a) in health care measures;
>
> (b) in his or her early and safe return to work; or
>
> (c) in all aspects of a labour market re-entry assessment or plan provided to the worker.

[18] WSIB policy on non-cooperation in health care is provided in *Operational Policy Manual* (OPM) Document No. 22-01-03 and states as follows:

> Workers must co-operate in the health care measures the WSIB considers appropriate. If they do not, the WSIB may reduce or suspend their benefits until they co-operate.
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> Examples of non-co-operation include
>
> - changing health professional without WSIB approval, see 17-01-03, Choice and Change of Health Professional
> - not following prescribed treatment
> - intentionally abusing prescription medication, or
> - missing appointments with health care practitioners.
>
> If a worker has a legitimate reason for failing to follow prescribed treatment, the decision-maker, in consultation with WSIB health care staff, considers acceptable alternative treatments.

[19] The WSIAT must apply WSIB policy in rendering appeal decisions in accordance with the provisions of section 126 of the Act.

[20] Entitlement to NEL benefits is determined under section 47 of the Act. Subsection 47(1) of the Act states:

> 47(1) If a worker suffers permanent impairment as a result of the injury, the Board shall determine the degree of his or her permanent impairment expressed as a percentage of total permanent impairment.

[21] Under section 2 of the Act “impairment” and “permanent impairment” are defined as follows:

> “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.

[22] “Maximum medical recovery” is not defined by the Act. However, the phrase is defined by WSIB policy in OPM Document No. 11-01-05 as follows:

> Workers reach maximum medical recovery (MMR) when they have reached a plateau in their recovery and it is not likely that there will be any further significant improvement in their medical impairment.

[23] In Tribunal proceedings an accident does not need to be the only cause of an impairment before entitlement may be granted. However, the accident must be at least a significant contributing factor in the cause of the impairment.

[24] The question of what a significant contributing factor might be was considered in the Tribunal's *Decision No. 280*, 6 WCATR 27. In that decision, the Panel stated:

> A "significant contributing factor" is a factor of considerable effect or importance or one which added to the worker's pre-existing condition in a material way to establish a causal connection.…

[25] WSIB policy concerning entitlement for psychiatric disorders is found in OPM Document No. 15-04-02 that contains the following statements:

> 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.

[26] The standard of proof required in Tribunal proceedings is proof on the balance of probabilities. See *Decisions No. 1386/03*; *426/07*; *230/07*; *226/07*; and *583/07*.

[27] The principles the Tribunal is required to apply in its decisions are stated in the Act. Subsections 124(1) and (2) of the Act read as follows:

> 124(1) The Appeals Tribunal shall make its decision based upon the merits and justice of a case and it is not bound by legal precedent.
>
> (2) If, in connection with a claim for benefits under the insurance plan, it is not practicable to decide an issue because the evidence for or against it is approximately equal in weight, the issue shall be resolved in favour of the person claiming benefits.

[28] The "merits and justice" and "benefit of the doubt" provisions of the WSIA are also discussed in the WSIB's OPM Documents No. 11-01-03 and 11-01-13.

(iv) Analysis

(a) Overview of the decision

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

[30] The worker is entitled to a NEL award for his psychiatric impairment. The worker's psychiatric impairment is longstanding and must be regarded as permanent. The medical evidence on file is heavily supportive of the workplace accident and subsequent permanent eye impairment playing a significant causal role in the development of the worker's psychiatric impairment.

[31] The worker is not entitled to recognition of upper back, neck and bilateral shoulder problems as being caused by his workplace accident. There is no evidence of medical treatment being sought for these conditions or being related to the workplace accident for several years following the initial accident. Although the worker's concern for his significant eye injury might explain a short delay in seeking medical treatment for these conditions, the Panel does not accept that those concerns would have resulted in such a lengthy delay in seeking treatment for injuries that resulted from the workplace accident.

[32] The Panel finds that the worker failed to co-operate in the Functional Restoration Program that was provided to him given the number of absences from treatment that took place and the warnings that the worker was provided with concerning those absences. The Panel finds however that the worker's non-cooperation was not with an LMR plan but was instead with health care measures. The worker is therefore not prohibited from receiving further LMR services.

[33] In addition, the complete permanent termination of LOE benefits for non-cooperation in health care measures is not supported by the provisions of either subsection 34(2) or 43(7) of the WSIA or WSIB policy. The appropriate penalty under either of these subsections is the reduction of benefits only during the period of non-cooperation. The Panel accepts that the initial decision to terminate LOE benefits was appropriate. However, the worker was not allowed the opportunity by the WSIB to demonstrate his willingness to cooperate in health care measures and reinstate his LOE entitlement after the WSIB had initially appropriately determined that he had been uncooperative. If the worker had been given the opportunity to cooperate in health care measures following the reduction of his LOE benefits to zero, the Panel finds that the worker would likely have cooperated and been involved in health care measures in approximately six months after the benefit termination.

[34] Following the six month reduction of LOE benefits that started on November 23, 2009, the worker's entitlement to LOE benefits shall be determined under subsection 43(2) of the WSIA. The worker's post-injury earning capacity was zero as of that time. The worker is therefore entitled to full LOE benefits following May 23, 2010.

[35] The evidence and analysis relied upon by the Panel to reach these conclusions is discussed in greater detail below.

(b) Permanent psychiatric impairment

[36] The initial claims level decision concluded that the worker did not have a permanent psychiatric impairment.

[37] The ARO decision concluded that the worker' non-organic problems were not related to his workplace injury.

[38] In the Panel's view, the medical evidence does not support these conclusions but instead supports the conclusion that the worker has a permanent work related psychiatric impairment.

[39] There is no medical opinion that denies a role for the workplace injury in causing the psychiatric difficulties that the worker experiences.

[40] On the other hand, there are a number of medical opinions that support a causal relationship. These opinions include the following:

- Dr. Light, Psychologist, March 14, 2007 – "[The worker] is substantially disabled as a result of the trauma arising from the January 23, 2004 IA".
- Dr. Gotkind, Psychiatrist, December 3, 2007 – "I had seen patient on October 30, 2007, because of an eye injury he suffered o January 23, 2004. He has developed SEVERE ANXIETY with depression and terrible insomnia due to the terrible incapacitating pains.
- Dr. Van Kampen, Psychiatrist, September 11, 2008 - "He had been followed by Dr. Gotkind around October 2007 at which time he was diagnosed with Adjustment Disorder with anxiety, depression, and anger due to eye pain. … it is my opinion that the diagnosis has evolved from Adjustment Disorder into Major Depressive Disorder" .
- Dr. Slyfield, October 2, 2008 – "Diagnostically he is suffering from a severe Adjustment Disorder associated with injury to his left eye as well as Pain Disorder associated with this injury".
- Dr. Benas, Psychology Internist, and Dr. Bacchiochi, Psychologist, April 9, 2009 – "The accident is a major contributor to the Pain Disorder and Anxiety Disorder and a partial contributor to the major Depressive Disorder as his depressive symptoms onset approximately one year after the accident and are attributed, in part, to the pressure to return to work and interpersonal strain".
- Dr. Siu, Psychiatrist, April 3, 2009 – "[The worker] suffers from a major depressive disorder, PTSD symptoms, and a pain disorder which are related to his workplace accident".

[41] None of these reports indicate that the worker's condition has resolved. The worker even to the present time continues to see Dr. Slyfield for psychiatric counseling and the prescription of medications for his psychiatric condition including Cipralex, Apo-Zopiclone, and Apo-Quetiapine.

[42] Given the above medical information the Panel accepts that on the balance of probabilities the worker's workplace injury is a significant contributing factor to his ongoing psychiatric illness and that given the duration of this illness, his condition must be regarded as permanent.

[43] The worker is therefore entitled to a NEL award for his psychiatric condition.

(c) Upper back, neck, and bilateral shoulders

[44] The worker's accident occurred on January 23, 2004.

[45] The worker in his testimony described the accident occurring in such a way that he fell backwards hitting his neck and upper back before falling to the ground and that the symptoms he experienced at that time or shortly following the accident in his neck, shoulders and upper back have been with him ever since.

[46] This history of accident is not provided on the Employer's Report of Injury/Disease and is not noted in the initial medical reporting.

[47] There is in fact a gap of more than three years until the first indications are noted in medical reports of possible problems with the worker's neck, shoulders or upper back.

[48] The worker explains these gaps by noting that he was primarily concerned with the changes that had occurred to his left eye and his pain and fears with respect to that injury and that as a result his problems with neck, shoulder and back pain were not reported.

[49] There is still at this time no detailed medical diagnosis concerning these other areas of difficulty and the worker in his testimony draws a strong link between the pains that he experiences in his eye and the onset of his pains in these other areas.

[50] If the worker's difficulties with his left eye were responsible for masking the worker's pain in other areas or for a lack of priority being placed by the worker on treatment for those other areas, the Panel would have expected that this masking effect would have been over much sooner than several years following the accident.

[51] Given the lack of initial complaint and the lack of any treatment for the worker's neck, shoulders, or upper back for such a long period of time after the accident, the Panel concludes that it has not been demonstrated on the balance of probabilities that the worker's problems in these areas were caused by his workplace accident of January 23, 2004.

(d) Non-cooperation in health care measures

[52] The sequence of events that led to the WSIB's determination that the worker was not cooperating in his own rehabilitation is outlined above in the Background section of this decision.

[53] Although the events that formed the basis of the finding of non-cooperation all took place at a difficult time for the worker when he was struggling with his psychiatric impairment, the Panel accepts the opinion of Dr. Cheung at that time that the worker's "psychological symptoms do not currently appear to be of such an extent as to impair his ability to initiate or persist with activities to the extent reported".

[54] There were multiple absences from treatment and there were sufficient warnings of non-cooperation from the WSIB again as outlined in the Background section of this decision. The Panel does not accept that the worker was in too much pain to attend at treatments that were intended to assist him in dealing with that pain and with the emotional difficulties that he was experiencing.

[55] The Panel finds that a finding of non-cooperation as of November 23, 2009 was warranted and that the WSIB had provided the required warnings under its policies to reduce the worker's LOE benefit entitlement at that time.

[56] The Panel also finds however that the worker did not fail to cooperate in an LMR plan but instead failed to cooperate in health care measures. There was no specific occupational target being pursued with a particular earning potential. The program that the worker did not cooperate in was specifically medical and aimed at improving the worker's capacity to attend at work and perform work tasks.

[57] There are much different consequences for a failure to cooperate in health care measures than for failure to cooperate in LMR activities.

[58] The failure to cooperate in LMR activities may result in a worker being determined to be capable of earning the wages associated with the occupation targeted by that training under subsections 43(1), (2) and (4) of the WSIA.

[59] The failure to cooperate in health care measures under subsection 34(2) provides the WSIB with the authority to reduce or suspend payments to the worker "while the non-compliance continues". Alternatively, a finding of non-cooperation under subsection 43(7) of the WSIA provides the WSIB with the authority to reduce or suspend LOE benefits "during any period when the worker is not cooperating".

[60] In the Panel's view the wording of the legislation either under subsection 34(2) or under subsection 43(7) indicates that the ability to reduce or suspend benefits for non-cooperation in health care measures is intended to motivate compliance with ongoing health care measures and is not meant to result in a permanent reduction of benefits bearing no relationship to any loss of post-injury earning capacity brought about by the non-cooperation. The Panel notes in this regard that the likely success of the health care measures being provided in returning the worker to work was uncertain given the reporting that was provided as a result of the participation that the worker did undertake in the FRP during the summer and fall of 2009.

[61] The Panel accepts that the initial decision to terminate LOE benefits by reducing them to zero as of November 23, 2009 was appropriate. However, the worker was not allowed the opportunity by the WSIB to demonstrate his willingness to cooperate in health care measures and reinstate his LOE entitlement after his LOE entitlement had been reduced. This had the effect of turning what likely should have been a temporary reduction of LOE benefits into something much more significant.

[62] The Panel accepts that if the worker had been given the opportunity to cooperate in health care measures following the reduction of his LOE benefits to zero, that given the incentive to cooperate he would have cooperated in further health care measures. This would however have taken some time for the worker to be advised of the benefit reduction; for the worker to recognize the need for his cooperation and to communicate that willingness to cooperate to the WSIB; and for new arrangements for health care to be made. The Panel estimates that this amount of time would have been approximately six months.

[63] The worker is therefore not entitled to LOE benefits for the six months following November 23, 2009 until May 23, 2010.

[64] Following May 23, 2010, the worker's entitlement to LOE benefits shall be determined under subsection 43(2) of the WSIA.

[65] Given the comments contained in the medical reporting from 2009 noting that the worker was not capable of employment at that time, the Panel determines that the worker's post-injury earning capacity was zero from May 23, 2010 until the present time.

[66] The worker is therefore entitled to full LOE benefits following May 23, 2010 until the present time.

[67] The worker is also entitled to the provision of LMR services.

DISPOSITION

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

[69] The worker has a permanent, compensable, psychiatric impairment and is entitled to a NEL award in respect of this condition.

[70] The worker does not have entitlement for an organic neck, upper back, or bilateral shoulder impairment.

[71] The worker is entitled to receive LMR services from the WSIB.

[72] The worker is entitled to full LOE benefits from May 23, 2010 until the time when LMR services are started.

[73] The worker is not entitled to LOE benefits from November 23, 2009 until May 22, 2010.

DATED: August 10, 2012

SIGNED: G. Dee, B. Wheeler, J. A. Crocker