WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1350/13

BEFORE:	R. McClellan : Vice-Chair B. Davis : Member Representative of Employers M. Ferrari : Member Representative of Workers
HEARING:	July 11, 2013 at Kitchener Oral No post-hearing activity
DATE OF DECISION:	August 22, 2013
NEUTRAL CITATION:	2013 ONWSIAT 1812
DECISIONS UNDER APPEAL:	WSIB ARO decision dated February 16, 2012 and April 12, 2013

APPEARANCES:

For the worker:	K. Beauclerc, Paralegal
For the employer:	Not participating

REASONS

(i) The appeal

[1] The worker appeals the decision of the Appeals Resolution Officer dated February 16, 2012. That decision concluded that the worker's loss of earnings (LOE) benefit was correctly calculated, based on a finding that the worker was capable of deemed earnings at the minimum wage from the designated suitable employment or business (SEB) of Customer Service Clerk, NOC #1453.

[2] The worker also appeals the decision of the Appeals Resolution Officer dated April 12, 2013. That decision concluded that the worker had reached maximal medical recovery for his compensable impairment in the cervical spine as of November 11, 2009. The decision also concluded that Board *Operation Policy Manual* (OPM) Document #18-05-05, "Effect of a Pre-existing Impairment," had been correctly applied by deducting 50% for the cervical spine and 25% for the right shoulder in calculating the worker's permanent impairment award.

[3] The issues before the Panel are:

1. Whether the worker was capable of obtaining employment in the suitable employment or business of Customer Service Clerk.

2. Whether the worker has entitlement to a recalculation of his LOE benefits at the final LOE review, based on his actual part-time earnings from employment as a bus driver rather than deemed average earnings from the designated SEB working full-time hours.

3. Whether the worker's maximum medical recovery date for the cervical spine was correctly established as November 11, 2009.

4. Whether Board OPM Document #18-05-05 was correctly applied in the calculation of the worker's NEL award for the cervical spine and the right shoulder.

(ii) Background

[4] The worker, now age 53, has two separate accident claims. The facts surrounding each of these claims are concisely summarized in a previous Tribunal decision, *Decision No. 399/11*, dated March 3, 2011. These findings of fact as set out in a Tribunal final decision are set out as follows:

> On May 18, 2000, the worker developed pain in his left shoulder while flipping wood panels. At that time, he was employed as a sander for a furniture manufacturer. The Board accepted his claim and initially limited his entitlement to a left shoulder strain.
>
> [4] At the hearing, the worker testified that he worked with large sheets of wood which were placed on a table for sanding. He testified that he frequently had to flip the sheets of wood in order to sand the opposite side. Although the dimensions and weight of the material he worked with varied, he often worked with sheets of wood measuring six feet by three feet and weighing up to 100 pounds. The worker testified that due to limited space around his workstation, he frequently had to lift his arms over his head in order to flip sheets of wood.

[5] The worker continued to work in modified duties until August 10, 2000, when his family doctor authorized him to stop working. He returned to work on September 18, 2000, but his employment was terminated on September 25, 2000. Full Loss of Earnings (LOE) benefits were reinstated effective September 25, 2000, when the Board determined that the employer did not have cause to terminate his employment.

[6] On October 10, 2000, the worker returned to work with a new employer at a wage loss. He testified that in this job he helped install gas furnaces and air conditioning units. Partial LOE benefits were granted from October 10, 2000 to January 1, 2002, when the Board determined that the worker had restored his pre-accident earnings. In the meantime, the worker also suffered from left elbow pain and underwent ulnar nerve transposition surgery on June 21, 2001. The Board accepted entitlement for the left elbow under the May 18, 2000 claim.

[7] In July 2003, the worker was granted a 12 percent Non-Economic Loss (NEL) award for the residual impairment in his left shoulder and elbow.

[8] In October 2005, the worker was diagnosed with left C7 radiculopathy and he underwent surgery on November 2, 2006. The worker pursued entitlement for his neck disability under the May 18, 2000 claim, but was denied by a Claims Adjudicator (CA) and ARO who both concluded that the worker's neck condition was not related to the compensable left shoulder and elbow disability. In the decision dated November 7, 2007, the ARO reasoned that clinical findings in 2005 and 2006 including degenerative changes and disc related pathology in the worker's cervical spine were not present in the medical reporting in 2002. He wrote:

This decision is not intended to express or imply and view as to possible entitlement for the cervical spine under [the July 25, 2005] claim.

b) The July 25, 2005 claim (on appeal)

[9] On January 12, 2003, the worker was hired by the accident employer, a plumbing and heating service. The worker testified that prior to being hired, he attended school and obtained certification in gas fitting and air conditioning. The worker testified that he performed a variety of tasks including installing furnaces, water softeners and air conditioners. The worker testified that he was frequently required to work overhead in order to install piping into ceilings and tie in ductwork into existing furnaces. On some occasions, he was required to work in confined spaces such as crawl spaces in older homes. The worker testified that he was also required to use a shovel to assist in laying pipes in the ground.

[10] At the hearing, the worker recalled that he stopped working on July 22, 2005. He recalled that he and a co-worker were required to move a 1500 pound boiler the day before. He testified that he experienced increasing symptoms in his left upper extremity and, in particular, his left hand. He stated that he had tingling, swelling and increased weakness in left hand.

[11] On July 25, 2005, the worker was referred to Dr. E. Haider, orthopaedic surgeon, for an opinion respecting his left shoulder. Dr. Haider noted that the worker had a long history of shoulder problems. He noted that the worker complained of pain over the scapula and left trapezius which radiated to the back of the chest. The worker also reported tingling and numbness in his left hand involving all of his fingers. Dr. Haider arranged for further imaging investigations.

[12] In a Physician's First Report (Form 8) dated August 2, 2005, Dr. P.J. Hay, family doctor, advised that the worker was participating in physiotherapy and consuming Arthrotec and Tylenol #3.

[13] In a report dated September 2, 2005, Dr. Haider advised that an MRI scan indicated a SLAP lesion and Bankhart lesion in the worker's left shoulder. He advised that the worker would likely require surgery.

[14] On October 5, 2005, the worker was examined by Dr. B. O'Doherty, physiatrist. He noted that the worker was employed as a heating and air conditioning installer and experienced a flare-up of pain in his left shoulder. Dr. O'Doherty noted the worker's prior history of left upper extremity symptoms including surgery to the left elbow. He noted that there was evidence of denervation in a left C7 pattern which suggested left C7 radiculopathy, although EMG and nerve conduction studies were normal. He ordered an MRI scan of the worker's neck.

[15] On December 19, 2005, Dr. Haider performed an arthroscopy, debridement, synovectomy, SLAP repair and arthroscopic rotator cuff repair of the worker's left shoulder.

[16] In a report dated January 11, 2006, Dr. O'Doherty advised that the worker's left shoulder was stabilized with a sling after the surgery. He advised that the MRI scan of the worker's neck revealed degenerative changes at the C5-6 and C6-7 levels including a broad based left-sided disk protrusion at the C6-7 level. He opined that the worker suffered from cervical radiculopathy, probably at the C7 level on the basis of C6-7 degenerative changes.

[17] In a report dated January 24, 2006, Dr. Haider advised that the worker should discontinue using the sling and start physiotherapy. At the hearing, the worker recalled that his left shoulder had become very stiff. He confirmed that he participated in extensive post-surgical physiotherapy.

[18] On April 19, 2006, Dr. O'Doherty saw the worker again and noted "marked wasting of the left pronator teres and flexor carpi radialis muscles with a hollowing out of the volar proximal forearm". He noted that the worker demonstrated diffuse weakness in the left upper extremity. Dr. O'Doherty recommended a referral to a neurosurgeon.

[19] In Memorandum #18A dated June 7, 2006, Dr. Meenan, Board Medical Adviser, reviewed the worker's claim files and opined:

> The neck problem has no relationship to the [left] shoulder other than it will complicate the healing process in the [left] shoulder after the surgery in December 2005. The cervical radiculopathy has no relationship to any claim issues.

[20] On August 1, 2006, the worker was examined by Dr. N. Duggal, neurosurgeon. In his initial consultation report, Dr. Duggal recorded the worker's prior history including the ulnar nerve transposition and SLAP repair surgeries. He advised that the worker subsequently developed a frozen shoulder and required extensive physiotherapy. Dr. Duggal opined that the worker might benefit from surgical decompression at the C5-6 and C6-7 levels.

[21] The worker underwent the recommended surgery. In the operative report dated November 2, 2006, Dr. Duggal described the procedure as follows:

> 1) anterior cervical discectomy at C5-6 with insertion of artificial disc (Prestige disc 5 x 16 mm); 2) intraoperative fluoroscopy.

[22] In a report dated November 29, 2006, Dr. Duggal advised that the worker's initial complaints related to a repetitive strain injury that occurred at work. He understood that despite surgery to the worker's left shoulder, he continued to experience symptoms. However, following the surgery to his neck, the worker reported "complete resolution" of his shoulder and left upper extremity discomfort. Dr. Duggal felt that it was possible the worker's left shoulder pain was secondary to the cervical disc herniations.

[23] At the hearing, the worker testified that following the surgery to his neck, he experienced a complete resolution of symptoms in his left shoulder. However, he stated, he continues to experience frequent swelling and residual weakness in his left hand. He stated that he does not experience any further tingling sensation.

> [24] In a report dated November 17, 2010, Dr. Duggal advised that the worker had a well-documented injury while at work which "precipitated the cascade of problems that eventually evolved." He advised:
>
> …there is no doubt in my mind that his cervical disc herniation relates to the injury that occurred at work.

[5] In *Decision No. 399/11,* the vice chair accepted the evidence of the treating neurosurgeon Dr. N. Duggal as determinative, as against the opinion of the Board medical consultant and the Vice-Chair concluded in paragraphs 37 and 38 of the Decision, as follows:

> [36] Dr. Meenan echoed this opinion in Memorandum #46A dated May 31, 2007:
>
> …there is no rationale to advised [sic] a cervical spine injury under this claim
>
> [37] However, as noted above, in his report dated November 17, 2010, Dr. Duggal advised that the worker had a well-documented injury while at work which "precipitated the cascade of problems that eventually evolved." He advised:
>
> …there is no doubt in my mind that his cervical disc herniation relates to the injury that occurred at work.
>
> [38] Dr. Duggal does not specify which injury he relates to the disc herniation. However, I am satisfied that the neurosurgeon was referring to the same process that led to the SLAP lesion. His reporting demonstrates a complete understanding of the worker's prior history including the ulnar nerve transposition and SLAP repair surgeries. The worker's employment between January 2003 and July 2005 was heavy and required frequent strenuous activity above shoulder/head level. I am satisfied that the medical evidence for and against the issue of causation is at least equal in this case. Accordingly, the benefit of doubt applies. The worker has entitlement for the injury to his neck and the decompression surgery in November 2006.
>
> [39] The worker has entitlement for a neck injury and resultant surgery under the claim established for the compensable left shoulder injury of July 25, 2005. All other ancillary benefits that may flow from this decision are remitted to the Board for determination.
>
> **DISPOSITION**
>
> [40] The worker's appeal is allowed. The worker has entitlement for a neck injury and resultant surgery under the claim established for the compensable left shoulder injury of July 25, 2005. All other ancillary benefits that may flow from this decision are remitted to the Board for determination.

[6] The Panel in this appeal holds these findings from Tribunal *Decision No. 399/11* as binding findings of fact which apply to the circumstances of the case before us.

[7] As noted above, in July 2003, the worker received a 12% NEL award for a permanent impairment in the left shoulder and elbow, under the May 2000 accident claim. In January 2008 the worker was awarded an additional 16 % for the left shoulder under the 2005 accident claim, for a net increase of 11%. (Total for the left shoulder 21%).

[8] Following the release of *Decision No. 399/11*, the worker received a permanent impairment reassessment on February 17, 2012, under the 2005 accident claim. Assessment of the cervical spine under the *AMA Guides to the Evaluation of Permanent Impairment* resulted in an rating of 9% for permanent impairment in the cervical region: this was reduced by 50% through the application of Board OPM Document #18-05-05, resulting in an award of 4.5%. An assessment of the right shoulder under the AMA Guides resulted in a rating of 10%, which was reduced by 25% through the application of OPM Document #18-05-05. The combined total was 12% for the neck and right shoulder.

[9] The worker's new combined permanent impairment award was 12% for the neck/right shoulder + 12% for the left shoulder equals 23% under the 2005 accident claim, combined with 12% under the May 2000 accident claim for revised total of 32%, (of which 12% had already been paid).

[10] The worker objected to the application of Board OPM Document #18-05-05 which had resulted in a reduction of the award for both the cervical spine in the right shoulder on the grounds that they were pre-existing degenerative conditions. In the decision of April 12, 2013, the ARO confirmed the decision on the grounds that, based on MRI testing of the right shoulder in 2001, the worker had pre-existing severe osteoarthritic changes of the clavicle which were not associated with the nature of his work.

[11] At the time of the accident of July 25, 2005, the worker was employed at a plumbing and heating service since January 2003, after obtaining certification in gas fitting and air-conditioning. Following his surgery of December 19, 2005, and November 2006, the worker was unable to return to his pre-accident employment and he was referred for Labour Market Reentry (LMR) Services. On June 15, 2007, he received a Psychovocational Assessment (PVA) report which summarized as follows:

> [The worker] who was 47 years of age, finds itself in a very precarious position, from an employment perspective. He has worked all his life in activities of a manual nature. However, he now has restrictions for his left elbow, left shoulder and neck that prevent him from undertaking any employment of a laborious nature…. From a retraining perspective, [the worker] also has serious limitations. His results indicated a General Learning Disability which encompasses reading, writing and arithmetic. Although [the worker] has always been in special education classes, he reported repeatedly failing grades…. [The worker acknowledges his difficulties, from a learning perspective and as a result, realizes that upgrading is not an avenue that he could pursue in order to better his qualifications, from an alternative employment perspectives.
>
> Because of the severity of [the worker's] work restrictions, along with his major learning disability, he is not seen as a candidate for a retraining program. [The worker] wants to return to some form of gainful employment. Consequently, it may be best to grant him an LOE with the prospect of his pursuing "basic" entry employment and/or work of a seasonal nature because of the rural district where he resides.

[12] The PVA concluded by discussing some occupations which could be considered in principle, provided the worker could do so within his physical restrictions.

[13] Following the PVA, an LMR Plan was developed to include upgrading to Grade 10, with the vocational goal of Customer Service Clerk, NOC #1453, with a wage goal of $8.10 per hour (the minimum wage at that time). The program commenced in August 2007, but as of June 2009, the worker's progress was described as diligent and cooperative but that he was making a "slow progression." In November 2009, the worker's LMR program was closed as "completed." The report states that the worker had completed his academic upgrading as of October 2008, and participated in the Customer Service Clerk diploma program between November 3, 2008 and September 25, 2009. However, the worker was able to secure employment as a bus driver prior to the completion of his program and did not require job search training. The report stated:

> SEB at closure: NOC #7412-bus drivers.

> Hourly wage: $44 per day and approximately 20 hours per week. Weekly wage $220 plus additional bus route and charters. Hours per week: 20.

[14] On May 24, 2011, the worker underwent further surgery on his right shoulder as a result of overuse, which was allowed as a recurrence. The worker returned to work as a bus driver in September 2011.

[15] The 72-month final LOE review was conducted in September 2011. In Board Memo #95, dated September 23, 2011, the case manager ruled that the worker had reached MMR and was capable of returning to work in the designated SEB of Customer Service Clerk. Entry-level earnings were identified as $10.25 per hour at 40 hours per week. The case manager applied Board OPM Document #18-03-06 and concluded that the worker was employed but under-employing himself by working part time. He then ruled that the worker would be deemed capable of earning the average earnings from the designated SEB in his geographic area, $13.16 per hour on a 40-hour week.

[16] In the decision of the February 16, 2012, the ARO confirmed the decision that the worker was voluntarily underemployed and confirmed the use of average earnings in the designated SEB of customer service clerk on a full-time basis as the appropriate benefits for determining the worker's LOE benefits entitlement.

(iii) Law and policy

[17] On January 1, 1998, the *Workplace Safety and Insurance Act, 1997* ("WSIA") took effect and applies to this case.

[18] Provisions for Payments for Loss-of-Earnings are set out in section 43.

[19] The provisions of section 43 as it reads after July 1, 2007 are 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.

[20] Compensation for Non-economic Loss is set out in section 46:

> **46.** (1) If a worker's injury results in permanent impairment, the worker is entitled to compensation under this section for his or her non-economic loss. 1997, c. 16, Sched. A, s. 46 (1).

[21] Pursuant to sections 112 and 126 of WSIA, the Appeals Tribunal is required to apply any applicable Board policy when making decisions. Pursuant to WSIA section 126, the Board has identified certain policies applicable to this appeal. We have considered these policies as necessary in deciding this appeal

[22] Board OPM Document #18-05-05, "Effect of a Pre-existing Impairment," reads in part as follows.

> **Policy**
>
> When calculating NEL benefits for workers who have a pre-existing permanent impairment, the WSIB
>
> - rates the area of the body affected by the new permanent impairment
> - disregards any pre-existing permanent impairments affecting other areas of the body, and
> - factors out pre-existing permanent impairments affecting the same area of the body.
>
> **New injury affecting the same body area**
>
> If both impairments affect the same area of the body, and the pre-existing impairment is measurable, the WSIB
>
> - rates the total impairment to the area
> - determines the rating for the pre-existing impairment, and
> - subtracts the rating for the pre-existing impairment from the total impairment rating to get the rating for the new work-related impairment.
>
> **Effect of a Pre-existing Impairment**
>
> If the pre-existing impairment is not measurable, the WSIB
>
> - rates the total area's impairment, and
> - reduces this rating according to the significance of the pre-existing impairment (see pre-accident disability in 14-05-03, Second Injury and Enhancement Fund).
> - if minor, there is no reduction
> - if moderate, there is a 25% reduction
> - if major, there is a 50% reduction.

(iv) The worker's testimony

[23] The worker testified on each of the issues in this appeal.

[24] With respect to the date of maximum medical recovery, the worker stated that the cervical spine surgery in 2006 slightly improved his left arm function but he still had residual symptoms of hand weakness, numbness and reduced grip strength. He stated that he saw the surgeon Dr. Duggal every six months after the surgery, until May 2008.

[25] With respect to the NEL offset, the worker reviewed his work history as documented in the psychovocational assessment report contained in the Case Record, stating that it was accurate, except that he had actually started with the accident employer in January 2003 not 2004 as stated in the report. The worker stated that he had also done identical gas fitter work at a plumbing company between 2000 and 2003. He stated that he was fully capable of performing

the physically demanding tasks of a gas fitter between 2001 when he obtained his gas fitter certification and his injury in July 2005.

[26] With respect to his LMR program, the worker testified that he completed the academic upgrading component to Grade 10 and was within a week of finishing his Customer Service Clerk training, but there was still no job placement pending for him. He stated that his caseworker advised him that he was going to have to put together multiple part-time customer service clerk jobs to achieve his wage goals. The worker stated that he then learned of a job vacancy for a bus driver in his community. He stated that he discussed this vocational option with his caseworker, who had raised no objections and in fact, the Board paid for the worker's medical examination which was required to qualify for the bus driver job. The worker stated that he started with a short route based on his position at the bottom of the seniority list, which paid only $44 per day. He stated that with increased seniority he was soon able to get better bus routes as well as charter runs and that he now earns $70 per day from his daily bus route which is able to top up by charter runs two or three times a week. The worker stated that this job is stable and secure, as opposed to the almost complete absence of any full-time customer service jobs in his area.

[27] The worker stated that as a bus driver he has achieved earnings equivalent to a full-time minimum-wage job. The worker stated that the modern buses that he drives are designed in such a way that he is able to work within his medical restrictions from his multiple permanent impairments. He reiterated that his only alternative option would have been multiple part-time customer service jobs at the minimum wage, and that nothing else would have been available within the rural area where he lives with his family.

(v) Submissions of the worker's representative

[28] With respect to the MMR date, Mr. Beauclerc cited Board OPM Document #11-01-05, "Determining Maximum Medical Recovery" which states that MMR is reached when a worker has reached a plateau in his or her recovery and it is not likely that there will be any significant improvement in the worker's medical impairment. He submitted that the report from Dr. Duggal dated November 13, 2007 should be taken as evidence that MMR had been reached as of that date. He reviewed Dr. Duggal's reports and submitted that it was evident from the subsequent report of May 27, 2008 that the worker's condition had not changed since November 2007 and that no further medical treatment had been provided. He concluded that the actual MMR date should be reestablished as of November 13, 2007.

[29] With respect to the issue of the deduction of offsets for pre-existing impairment from the worker's NEL award, Mr. Beauclerc cited the Vice-Chair's findings in *Decision No. 399/11,* who found, as a fact, that the worker was capable of performing physically demanding labour as a gas fitter between January 2003 and the accident of 2005. He also cited the Vice-Chair's finding of fact that the worker's job duties had contributed to his degenerative disease and contributed to the disc herniation. Mr. Beauclerc submitted that the worker's upper extremity condition was an integral part of his compensable impairment and not a separate, unrelated pre-existing condition. He submitted there had been no justification for the reduction in the NEL awards.

[30] With respect to the worker's LOE benefit based on "average earnings" from the designated SEB, as opposed to the minimum wage, the representative cited Board OPM

Document #18-03-06, which permits the Board to base LOE benefits at the final review from a non-SO identified job. Mr. Beauclerc submitted that the worker was working a 30-hour shift each week together with regular charter runs and that he had approximated full-time minimum-wage income. With respect to the Board decision to base LOE benefits on deemed earnings at the average customer service clerk wage of $13.16 an hour, Mr. Beauclerc pointed to Board Memos 74, 80 and 91, each of which recommended that the worker be deemed capable of earnings from the designated SEB at the minimum wage on a 40-hour week. He submitted that these three recommendations had been ignored at the final LOE review for no reason, in Board Memo #95, when a different claims manager re-set the deemed earnings at $13.16 per hour. He submitted that this was a punitive decision which had ignored the fact that a full-time Customer Service position at $13.16 per hour or even at the minimum wage was simply not available in this worker's rural community as a being documented in the worker's Labour Market Re-entry Assessment (LMRA). He submitted that the worker was not voluntarily underemployed and to the contrary, the worker had successfully rehabilitated himself and achieved the original goal of a minimum wage income. He concluded that the worker was entitled to a revision of his LOE benefit at the final review, from the current $13.16 per hour on a 40-hour week, to his actual earnings from employment as a bus driver.

(vi) The Panel's conclusions

1. MMR Date

[31] On the issue of the actual MMR date, the worker's representative submitted that the two reports dated November 7, 2007 and May 27, 2008 from the treating surgeon, Dr. Duggal, with respect to the worker's recovery from cervical spine surgery established that there was no further change in the worker's condition after November 7, 2007. As of November 13, 2007, the worker's remaining symptoms were intermittent paresthesia in the medial aspect of the left arm, radiating into the fingers. At that time, Dr. Duggal recommended further radiological tests to determine whether there was osteophytic development at the surgical level and EMG testing to check for radiculopathy at C7. Following these tests, Dr. Duggal reported on May 27, 2008, that there had been no increase in the weakness of the worker's left hand or the decrease in the muscle bulk, and that the C7 radiculopathy identified in EMG studies taken in February 2008 was not a clinical concern. There was no need for any further investigation and he scheduled a two-year follow-up.

[32] The Panel accepts that as of November 2007, the worker's left upper extremity impairment had plateaued and no further medical treatment was provided. While the investigations ordered by Dr. Duggal in November 2007 did confirm the presence of C7 radiculopathy, the surgeon also made it clear that the worker had made a significant recovery, that his symptoms were essentially unchanged between November 2007 and May 2008, and no further medical intervention was required. The Panel finds that the date of MMR should be changed from May 2008 to November 2007.

2. The NEL offsets for pre-existing conditions

[33] With respect to the issue of the deduction of offsets for pre-existing conditions from the worker's NEL benefits, the Panel reiterates that the findings of Vice-Chair Ryan in *Decision No. 399/11* remain findings of fact. Specifically, the Vice-Chair in that Decision found

that the worker had been fully capable of performing strenuous physical labour as a gas fitter from January 2003 until the injury of July 2005. Specifically, the Vice-Chair wrote as follows:

> [37] However, as noted above, in his report dated November 17, 2010, Dr. Duggal advised that the worker had a well-documented injury while at work which "precipitated the cascade of problems that eventually evolved". He advised:
>
> > …there is no doubt in my mind that his cervical disc herniation relates to the injury that occurred at work.
>
> [38] Dr. Duggal does not specify which injury he relates to the disc herniation. However, I am satisfied that the neurosurgeon was referring to the same process that led to the SLAP lesion. His reporting demonstrates a complete understanding of the worker's prior history including the ulnar nerve transposition and SLAP repair surgeries. The worker's employment between January 2003 and July 2005 was heavy and required frequent strenuous activity above shoulder/head level. I am satisfied that the medical evidence for and against the issue of causation is at least equal in this case. Accordingly, the benefit of doubt applies. The worker has entitlement for the injury to his neck and the decompression surgery in November 2006.

[34] We would add that the worker evidently performed the same duties as a gas fitter at his previous place of employment between 2001 and 2003. The Vice-Chair in *Decision No. 399/11* made a finding of fact that the worker's neck injury and resulting surgery were caused by the nature of his work duties, duties which he was capable of performing without any restriction or impairment between 2001 and 2005.

[35] The evidence before this Panel clearly establishes that the worker was capable of performing his regular duties as a gas fitter without any functional limitations prior to the injury of July 2005. The evidence clearly establishes that any pre-existing condition which the worker had was asymptomatic and without any functional effects prior to July 2005. Within the meaning of Board OPM Document #18-05-05, the worker's pre-existing impairment must be considered as *minor*, and therefore according to the terms of the policy, there should be no reduction. There is therefore no limitation on any compensation benefits to which the worker would be entitled. Causation of the worker's impairment has been established as work related, arising out of and in the course of employment in *Decision No. 399/11*.

[36] In our view, there was no basis for the application of proportionality to the worker's NEL award resulting in a deduction of 50% from his NEL award for the compensable left upper extremity injury of July 25, 2005. Further, the worker's right shoulder impairment was subsequently awarded on the basis of an overuse injury with impingement requiring surgery. In our view, there was no basis for deducting 25% from the worker's right shoulder impairment, which was diagnosed as a secondary overuse condition directly related to the worker's compensable left shoulder/neck impairment. In both instances, we have determined that the worker's pre-existing impairment was minor in nature.

[37] The worker is entitled to a recalculation of his NEL award as of the award date of April 19, 2012, based on the elimination of the proportional reductions, by restoring the full 9% rating for the neck and restoring the full 10% rating for the right shoulder.

3. LOE benefits

[38] The Panel accepts the worker's claim that he is entitled to a revision of the earnings basis used for calculating his LOE benefit at the final review, which was based on deemed average

earnings for the designated SEB of Customer Service Clerk at $13.16 per hour on a 40-hour week. We do so for the following reasons.

[39] It was noted in the PVA done in June 2007 as part of the worker's Labour Market Re-entry Assessment, and cited above, that this worker was capable of basic entry employment and/or work of a seasonal nature. The worker's original LMR plan, based on the designated SEB of Customer Service Clerk, NOC 1453, established from the outset that the worker's earnings goal would be the minimum wage.

[40] The worker successfully completed the academic upgrading component of his LMR plan and achieved a Grade 10 level, and then completed the Customer Service Clerk training course in September 2009. We accept the worker's testimony, as corroborated by the LMR reports, that no customer service job placement could be identified at the end of the worker's LMR program. This calls into question the availability of a full-time customer service position within the worker's labour market area. We also accept the worker's testimony that was advised by his vocational caseworker that in order to achieve a full-time minimum-wage income he would have to put together multiple part-time minimum-wage customer service jobs. Again this calls into question the availability of actual employment in the designated SEB for this worker. Absent availability, a designated employment or business cannot be considered suitable.

[41] Given these facts and circumstances, in our view, it was more than reasonable for the worker to take advantage of the opportunity which opened up just as he was completing his LMR program to obtain employment as a school bus driver.

[42] We also find that the decision to declare the worker "voluntarily under-employed" at the time of the 72-month review and to apply deemed earnings of $13.16 an hour despite all the previous decisions that the worker's vocational goal was full-time employment at the minimum wage, to be unjustified. In the worker's original LMR plan, confirmed again on completion of the LMR program, and in three separate Board Memos #74, 80 and 91, the original vocational wage goal of full-time minimum-wage earnings was confirmed and reiterated. It was only at the final LOE review in Board Memo #95 that these decisions were overturned by a new case manager, who evidently decided that the penalty set out in Board policy for being "voluntarily underemployed" should be applied to the worker.

[43] The Panel finds that this worker, in fact, successfully rehabilitated himself and that he made an intelligent and reasonable decision to take advantage of a secure, stable job opportunity which opened up in September 2009. At the time, it was evident that no full-time community service jobs were available in his rural area and proved to be impossible for the LMR provider to find him a job placement in his designated SEB. The only alternatives open to this injured worker, facing barriers of age, limited transferable skills, and multiple permanent impairments, was a prolonged and most likely futile job search and probable unemployment, or at best, a somewhat remote possibility of multiple part-time customer service jobs at the minimum wage level.

[44] Board OPM Document #19-04-06, "Suitable Employment" defines suitable employment as any work that the worker has the necessary skills to perform (or is able to acquire the necessary skills to perform), and does not pose a health and safety risk to the worker or to co-workers, and if possible, restores the worker's earnings. To evaluate the suitability of a job, consideration is given to the worker's functional abilities, the degree of the worker's impairment and medical prognosis of injury, and the worker's aptitude for the job's tasks and duties. The

term "available" in the statute at section 43(2)(b) is reasonably taken to mean first, that the suitable employment actually exists in the current labour market as a realistic opportunity for the injured worker and second, that the job is sustainable on a reasonably long-term basis. Sustainability includes an expectation that the job is a productive component of the employer's business and not a temporary make-work assignment.

[45] Instead of the dubious prospect of obtaining full-time employment in the designated SEB of Customer Service Clerk, which was not available, the worker is now working a regular 30-hour week with his basic school bus route earning $70 per day, with opportunities which increased his seniority for charter bus runs to top-up his basic wage. In our view, the worker has effectively achieved, to the fullest degree possible, the original wage goals set out in the LMR plan and confirmed at every step of the way prior to the 72-month review, of full-time minimum-wage earnings. Given this fact, together with the lack of availability of full-time employment in the designated SEB of Customer Service Clerk, we find that the worker does meet the criteria set out in Board OPM Document #18-03-06, "Actual Earnings from Non-SO-Identified Job," which states as follows:

> In conducting the final LOE review for a worker employed in a SCO identified job, the WSI be used as the worker's actual earnings to pay the LOE benefit, even left the earnings are not consistent with recent wage information. The only exception would be where the worker is voluntarily underemployed.
>
> **Actual earnings from non-SO-identified job**
>
> In cases where the worker has cooperated in a Work Transition plan and returns to work in a job not identified in the S0,(designated SEB) the final LOE benefit may be based on actual earnings if:
>
> - the decision-maker is satisfied that the earnings come reasonably close to the SO-identified earnings, and
> - represents the same or similar future potential earnings.

[46] The Panel also draws attention to the fact that the worker's LMR closure report contained the following statements:

> Initial SEB: NOC 1453-Customer Service, Information and Related Clerks.
>
> SEB at closure: NOC 7412-Bus Driver.

[47] While there was no formal amendment to the worker's original LMR plan, it is evident from the above statement that the worker's LMR provider considered the SEB at closure of bus driver to be reasonable and consistent with the goals of the worker's LMR plan.

[48] The worker is now an experienced school bus driver, earning at a minimum $350 per week from his regular school bus run together with additional income from charter bus runs. In our view, his income reasonably approximates the worker's future potential earnings as being full-time employment at the minimum wage on a 40-hour week.

[49] To summarize, based on the evidence before us, the Panel finds that the worker cooperated in his work transition activities. Full-time suitable employment within the designated SEB was not available to the worker in his community. The worker was not "voluntarily underemployed" but rather, acted reasonably in taking the best employment option available to him as a full-time school bus driver. There is therefore no basis for applying, as a penalty, the average earnings of $13.16 per hour as opposed to the worker's wage goal as established in the

LMR plan as the minimum wage. The worker's earnings are as reasonably close as possible to the SEB identified earnings as the worker's circumstances permit.

[50] The worker is entitled to a revision of his LOE benefit as of the final LOE review, the revision to be based on deemed earnings at the minimum-wage on a 40-hour week.

DISPOSITION

[51] The appeal is allowed.

[52] The worker is entitled to a revision of his LOE benefit as of the final LOE review, the revision to be based on deemed earnings at the minimum-wage on a 40-hour week.

[53] The worker is entitled to a recalculation of his NEL award as of the award date of April 19, 2012, based on the elimination of the proportional reductions, by restoring the full 9% rating for the neck and restoring the full 10% rating for the right shoulder, and revising the final NEL calculations as per the provisions of the *AMA Guides to the Evaluation of Permanent Impairment*.

[54] The date of Maximum Medical Recovery shall be changed from May 2008 to November 2007.

DATED: August 22, 2013

SIGNED: R. McClellan, B. Davis, M. Ferrari