WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1644/09

BEFORE:	B. Kalvin : Vice-Chair B. Wheeler : Member Representative of Employers K. Hoskin : Member Representative of Workers
HEARING:	June 29, 2010 and January 20, 2011 at Toronto Oral
DATE OF DECISION:	February 14, 2011
NEUTRAL CITATION:	2011 ONWSIAT 354
DECISION UNDER APPEAL:	WSIB ARO Decision dated November 28, 2007
APPEARANCES:	
For the worker:	E. Grisolia, Office of the Worker Adviser
For the employer:	R. A. Wood, lawyer
Interpreter:	N/A

REASONS

[1] These are the reasons for decision of the Workplace Safety and Insurance Appeals Tribunal with respect to an appeal by an employer from a decision of the Workplace Safety and Insurance Board (the "Board") concerning a benefit claim made by one of the employer's workers.

(i) Background

[2] The background to this appeal is as follows. The employer is in the business of marine transportation. On July 15, 1997, while working on board one of the employer's vessels as a tunnelman, the worker injured his low back and groin while lifting and installing heavy doors. The worker was 45 years old at the time. The worker continued working until July 19, 1997, after which he laid off and sought medical attention. Initial medical reports indicated that the worker had sustained soft tissue injuries to the low back and groin. On July 22, 1997, he was diagnosed with left groin tenderness and a low back strain. On August 4, 1997, the worker was diagnosed with mechanical low back pain and a left sacroiliac joint strain. The worker never returned to work after laying off after his shift on July 19, 1997.

[3] As a result of this accident, the worker made a claim for compensation benefits. The Board accepted that the worker had sustained a personal injury as a result of a workplace accident and approved his claim. The Board eventually determined that while the worker had fully recovered from the back injury which he sustained on July 15, 1997, he did not fully recover from the injury to his groin. The Board determined that the accident had left the worker with a permanent impairment of the groin.

[4] Because the worker's accident occurred in 1997, his entitlement to benefits is governed by the pre-1997 *Worker's Compensation Act* (the "pre-1997 Act"). Under that statute, a worker who sustains a permanent impairment as a result of a workplace accident is entitled to a non-economic loss ("NEL") benefit as compensation for that permanent impairment. Because the worker was living in Nova Scotia at the time, he was sent for a NEL assessment in that province. Following receipt of the report of the NEL Assessor, the Board rated the worker's permanent impairment at 5% of his whole body and based his NEL benefit on that rating.

[5] As noted above, under the pre-1997 Act a worker who sustains a permanent impairment as a result of a workplace accident is entitled to a NEL benefit as compensation for that permanent impairment. The worker is also entitled to benefits for any future economic loss ("FEL") which results from that permanent impairment. The Board calculates the quantum of the FEL benefit by subtracting from a worker's pre-accident earnings amounts which the worker is deemed likely able to earn, at various fixed points in time, after the accident. Under the pre-1997 Act, the points at which assessments are made about how much a worker is likely able to earn are, first, at the time the FEL award is given (D1), second, 24 months after that (R1), and finally, 60 months after D1 (R2).

[6] In this case, the Board Claims Adjudicator's final FEL decision, that is, the R2 decision, is set out in a letter to the worker dated April 7, 2004. The Claims Adjudicator ruled that the worker was entitled to 100% FEL benefits because it was unlikely that the worker would be able

to return to work in a competitive environment. The Claims Adjudicator's April 7, 2004 decision reads as follows:

> We are now required to conduct a final FEL review of your future economic loss (FEL). The decision of this review and any benefits confirmed will apply until July 1, 2017. In the past we determined if you were entitled to receive a future economic loss (FEL) benefit. I am now reviewing this decision to see if it is still valid based on your current situation.
>
> …
>
> As per my previous letter of January 28, 2000, you were granted a 100% FEL award since it was determined that it was unlikely you would be able to return to work and earn a competitive wage noting the nature of your injury, age and education … This award will continue until July 1, 2017 when you reach the age of 65.

[7] In a subsequent decision dated May 4, 2006, the Claims Adjudicator reviewed the worker's FEL entitlement again. On this occasion, the Claims Adjudicator assessed an offer of a job as a wheelsman which the employer offered the worker on June 14, 2002. Relying on reviews by a Board Return to Work Advisor, the Claims Adjudicator ruled that this job was not suitable for the worker and confirmed the worker's entitlement to a full FEL benefit.

[8] The employer objected to these decisions made by the Board's Operations Branch to award the worker a NEL benefit for a permanent impairment and to grant the worker a full FEL benefit. The employer's objection was considered by an Appeals Resolution Officer ("ARO") in the Board's internal Appeals Branch. In a decision dated November 28, 2007, the ARO denied the employer's objection. With respect to the worker's entitlement to a NEL benefit, the ARO ruled as follows:

> Under the circumstances, I am satisfied that the worker suffered a permanent impairment as a result of the accident and has been appropriately compensated with a five per cent non-economic loss (NEL) benefit which was granted in June 2001.

The ARO also ruled that the wheelsman job which the worker had been offered on June 14, 2002 was not suitable and that the worker was unemployable and therefore entitled to a full FEL benefit:

> After carefully considering all of the information on the claim record, I am satisfied that given the worker's medical condition, age, and education that he is unemployable. I also find that the modified position offered of a wheelsman is not suitable, given the concerns expressed by the return to work advisor and the worker's unemployability.
>
> As such, the 100 per cent FEL benefit is confirmed.

[9] The employer now appeals to this Tribunal.

(ii) Issues

[10] The issues to be resolved on this appeal are as follows:

1. Is the worker entitled to a NEL benefit for a permanent impairment?
2. Is the worker entitled to full FEL benefits at R1 and R2?

(iii) Analysis

Is the worker entitled to a NEL benefit for a permanent impairment?

[11] The pre-1997 Act defines "impairment" and "permanent impairment" as follows:

> "impairment", in relation to an injured worker, means any 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," in relation to an injured worker, means any impairment that continues to exist after maximum medical rehabilitation of the worker has been achieved.

[12] In order to determine whether the worker was entitled to benefits for a permanent impairment, the Claims Adjudicator sought the opinion of one of the Board's Medical Consultants. In an opinion dated May 21, 1999, Dr. Arvisais on May 21, 1999, noted that the worker has been consistently diagnosed since the date of the accident with an adductor strain. Dr. Arvisais opined that this condition was chronic and that no further improvement was expected:

> The ongoing impairment is that of a left groin pain which has been consistently diagnosed from the date of the accident until now with the consistency of an adductor strain. His hip x-rays have been normal. So that the March 19, 1999 ongoing impairment the left groin is consistent with a chronic adductor tendonitis. No further significant improvement is anticipated. Related permanent medical precautions are those of:
>
> - no repeated climbing of stairs;
>
> - no repetitive movement of the left lower extremity against resistance as in kicking or pedaling [sic];
>
> - no walking on rough ground;
>
> - no prolonged walking or standing;
>
> - no repeated crouching or kneeling.

[13] After reviewing Dr. Arvisais' opinion, a Claims Adjudicator granted the worker entitlement to a NEL benefit for a permanent impairment of his groin. The worker was not granted entitlement to benefits for a permanent impairment of his back.

[14] As noted earlier, in order to determine the quantum of the worker's NEL benefit, the worker was sent for a NEL assessment. This was conducted in Nova Scotia on January 31, 2000 by Dr. M. Smith, who is a Medical Advisor to the Workers' Compensation Board of Nova Scotia. Following receipt of Dr. Smith's report, a Claims Adjudicator granted the worker entitlement to a 5% NEL benefit for the permanent impairment of his groin.

[15] Part of the employer's objection to the decision to grant the worker a NEL benefit is based on Dr. Smith's conclusion which states: "Final Estimated PMI – 0%." PMI presumably refers to a permanent medical impairment. In his decision to uphold the worker's entitlement to a NEL benefit, the ARO noted that even though Dr. Smith concluded that there was a 0% PMI, the text of Dr. Smith's report was not consistent with that conclusion. The ARO noted that the body of Dr. Smith's report documented abnormal findings which contradicted the conclusion of

a 0% PMI. The ARO referred to the abnormalities documented in the body of Dr. Smith's report and concluded as follows:

> Under the circumstances, I am satisfied that these findings warrant ongoing problems, related to the accident, and although the medical advisor indicated that there was really nothing objective to find on physical examination, I find that to be contradictory in that the content of the actual examination memo indicates abnormal findings and the medical advisor has indicated that the worker co-operated fully with the physical examination and did not appear to exaggerate his condition. Under the circumstances, I am satisfied that the worker suffered a permanent impairment as a result of the accident and has been appropriately compensated with a five per cent non-economic loss (NEL) benefit which was granted in June 2001.

[16] The body of Dr. Smith's report which the ARO felt disclosed findings of abnormality and contradicted a conclusion of a 0% impairment, reads as follows:

> **PHYSICAL EXAMINATION** revealed an overweight for height individual who walked from the waiting room to the examining room without a limp or abnormal gait. He was examined with his shoes and trousers removed. He tells me that he is five foot eight inches tall and today he weighed 246 pounds on my scale. He tells me that he has gained weight since he stopped working. He did not appear to be in distress. He cooperated fully with the physical examination and did not appear to me to be exaggerating his condition.
>
> In the standing position there is a very prominent abdominal paunch. He can stand perfectly upright. Forward flexion was fingertips to ankle level. He returned to the upright position without difficulty. Hyperextension caused him some discomfort in the left lower back. He was quite tender over the left sacroiliac joint area of sciatic notch. Sideways flexion and rotation at the waist aggravated this painful area.
>
> Holding hands at his hips and rotating him at the knees and shoulders, taking great care not to move his lumbar spine, also resulted in complaints of some pain in this area on full rotation to the left. This of course is not as it should be. He could stand on his tiptoes and walk on his heels.
>
> He was examined in the supine position. Strength of the plantar and dorisflexors of the ankle were equal and symmetrical. Straight leg raising was to 60 degrees bilaterally. Flexing the knees and hips on the right side caused him some discomfort in his low back. Flexing the knees and hips on the left side caused him discomfort in the left groin, especially on external rotation of the hip. Sensation to palpitation and to pinprick was intact over both legs and thighs. He was tender on light stroking over the skin of the left scrotum and left thigh.
>
> Knee and ankle jerk reflexes were tested in the sitting position and were brisk and symmetrical. There was really nothing objective to find on physical examination.

[17] In submitting that the worker is not entitled to a NEL award for a permanent impairment, the employer relies on Dr. Smith's conclusion that there were no objective findings on physical examination and that there was a 0% "PMI." The employer also refers to other medical reports which comment on the lack of objective findings. Some of these reports are as follows.

[18] On May 15, 1999, Dr. D. I. Alexander, an orthopaedic surgeon, reported that the worker's lower extremities move normally and that "he is not a candidate for surgery as there is no objective evidence of any serious pathology."

[19] In an opinion dated June 7, 2006, Dr. G. Greenwood stated the following:

> The patient's own family physician came to favour Dr. Sapp's opinion, which was that of a nerve entrapment syndrome, possibly involving the ilioinguinal nerve, but the evidence is not convincing. Unfortunately, there is no evidence in the file that any other testing was performed with a view to the possibility of the presence of another bone disease or condition.
>
> …
>
> The assertion that he had developed marked weakness in the left hip area would suggest a progression of his condition which is not supported by any objective physical examination data.

Dr. Greenwood's credentials are not known, and curiously his or her opinion is set out on letterhead belonging to the employer's representative.

[20] In an opinion solicited by the employer, Dr. J.C. Clifford, a physiatrist, was asked whether he thought there was "objective medical on file to support a 5% NEL award [sic]?" Dr. Clifford stated:

> No. Subjective complaints of pain and limitations in active range of motion do not constitute "objective" medical evidence.

In response to the question as to whether the worker's compensable accident would be expected to have resulted in a permanent impairment, Dr. Clifford stated:

> This question cannot be answered in the context of available medical documentation.

[21] Assessing all of the medical evidence, we find that the Board properly determined that the worker is entitled to a NEL benefit for a permanent impairment of his groin. We agree with Dr. Arvisais, that the medical reports reveal that the worker has consistently complained of ongoing pain in his left groin area since the time of the accident. We agree also, that in light of the longevity of those complaints, it is unlikely that the worker will fully recover from that condition. In this regard, we note that while Dr. Alexander reported that there was no objective evidence of any serious pathology, "his long term prognosis with respect to getting pain relief is dismal."

[22] While Dr. Smith's NEL assessment indicated that there was nothing objective to find on physical examination and rated the worker's PMI at 0%, we agree with the ARO that the body of Dr. Smith's report does document ongoing problems related to the worker's compensable injury. For instance, Dr. Smith notes that some movements produced complaints of pain. Dr. Smith stated:

> This of course is not as it should be.

We agree with the ARO that Dr. Smith's observation that the worker was not exaggerating his complaints is significant.

[23] Further, after receipt of Dr. Smith's report, it was referred by a Claims Adjudicator to another Board Medical Consultant to determine whether the 5% NEL award was appropriate. In an opinion dated August 16, 2002, Dr. B. Prichett, agreed with the earlier assessment of

Dr. Arvisais, that the worker had a permanent impairment of the groin which warranted the permanent medical precautions which Dr. Arvisais had identified on May 21, 1999. Dr. Prichett noted that he did not know what criteria were used to assess a permanent impairment in Nova Scotia, but that that under the criteria used by the Board, a permanent impairment award was in order.

[24] It is important to bear in mind that a worker is entitled to benefits for a permanent impairment if a workplace accident results in "functional abnormality or loss." The impairment does not have to be identifiable by "objective" evidence. If a worker cannot move without pain, then the body part which is in pain is presumably not functioning normally. The injury will have resulted in a functional abnormality. Even though the worker's complaints of pain are subjective, as opposed to objective evidence, this does not mean that the worker's complaints of pain cannot be relied on in determining whether the worker is entitled to benefits for a permanent impairment. Having heard the worker's testimony at the hearing of this appeal, and reviewed the medical record which documents consistent complains of chronic pain in the worker's groin, we accept that the workplace accident resulted in a permanent impairment of the worker's groin because he is unable to perform certain movements of the groin without experiencing pain. There is a functional abnormality.

[25] We are fortified in this conclusion by numerous decisions of this Tribunal which have found that a worker's subjective complaints of pain, or of decreased range of motion, have led to a finding that the worker has a permanent impairment. For instance, in *Decision No. 1010/98*, the Vice-Chair ruled that the worker's complaints of pain in the knee which restricted his activities was sufficient to justify a NEL benefit even in the absence of clear evidence of measurable findings of physical loss. The Vice-Chair stated:

> Dr. Monette concluded that the worker has a "functional permanent impairment, as some activities will likely trigger discomfort". The medical reports on file, as well as the worker's testimony, establish that the worker's physical knee condition has restricted his activities. He is unable to engage in prolonged weight-bearing activities such as prolonged standing or sustained walking. Activities such as sustained kneeling or other activities which put pressure on his knee aggravate his condition. Although it is not clear from the existing medical reports whether there are, on examination, measurable findings of physical loss, I am satisfied that the evidence establishes that there is a functional loss resulting from the worker's physical condition. The impairment from the worker's injury has continued to exist after maximum medical rehabilitation was achieved. The worker therefore has a "permanent impairment" within the meaning of the Act, and he is entitled to NEL compensation in accordance with section 42 of the Act.

Similarly, in the present case, we accept the worker's testimony that certain movements and activities aggravate his groin condition and constitute a functional loss or abnormality.

[26] In *Decision No. 1033/98*, the Panel concluded that the worker was entitled to NEL benefit even though it was not clear that the worker had sustained any measurable physical loss. The Panel stated:

> The Act defines "impairment" as a "physical or functional abnormality or loss". Thus, in deciding whether this worker has a permanent impairment, the Panel considered not only the evidence about physical loss which might be measurable on some physical testing of

> the worker (such as EMG testing or some anatomic evaluation), but also the evidence about how the worker's physical condition resulted in functional impairment[1].
>
> It is not clear from the existing medical reports whether the physical loss described by the worker (of, for example, loss of hand strength and hand dexterity) is measurable on examination. But the evidence does establish that the worker has suffered a functional loss as a result of his compensable hand/wrist condition. We accept his evidence about how his hand/wrist condition has interfered with his daily living activities. He has a continuing physical condition which restricts his activities and means that he is functionally unable to do, or to sustain, certain activities which he was able to do before his compensable condition developed. He therefore has a permanent impairment within the meaning of the Act, and the degree of that permanent impairment should be assessed in accordance with section 42 of the Act.

[27] More recently, in *Decision No. 136/09*, the Vice-Chair ruled that a worker was entitled to benefits for a permanent back impairment based on the worker's testimony of back pain and the way in which that pain limited her activities. In the course of that decision, the Vice-Chair set out a useful list of Tribunal decisions which had granted entitlement to benefits for a permanent impairment based on functional abnormality or loss:

> Having reviewed all the medical documentation, I accept the opinion of Dr. Germansky, the Board Medical Consultant, that the worker has not suffered a permanent physical impairment as a result of the workplace accident in March 2001. The only diagnosis has been for her pre-existing DDD.
>
> However, the definition of a permanent impairment includes as well a permanent **functional** abnormality or loss that results from the compensable injury. There are numerous instances in which this Tribunal has endorsed a worker's entitlement to benefits for a permanent impairment on the basis of functional loss:
>
> - Tribunal *Decision No. 1010/98* dealt with a worker who had suffered a knee injury. The worker's activities were restricted as a result of his knee condition. The Vice-Chair concluded that the worker was entitled to be assessed for a NEL award because he could not engage in prolonged weight-bearing, sustained kneeling, or other activities that put pressure on his knee.
> - Tribunal *Decision No. 1033/98* considered the issue of whether a permanent impairment could be found in the absence of physical findings resulting from testing such as electromyography (EMG). In that decision, the Panel noted:
>
> …
>
> > In our view, the absence of physical findings such as abnormal EMG studies does not mean the worker has no permanent impairment within the meaning of the Act.
> >
> > The Act defines "impairment" as a "physical or functional abnormality or loss". Thus, in deciding whether this worker has a permanent impairment, the Panel considered not only the evidence about physical loss which might be measurable on some physical testing of the worker (such as EMG testing or some anatomic evaluation), but also the evidence about how the worker's physical condition resulted in functional impairment.

---

[1] Tribunal *Decision No. 572/97* discussed the importance of this definition of "impairment" even in situations where the *AMA Guides to the Evaluation of Permanent Impairment* might not provide for the assessment of functional impairment from certain types of injuries.

> It is not clear from the existing medical reports whether the physical loss described by the worker (of, for example, loss of hand strength and hand dexterity) is measurable on examination. But the evidence does establish that the worker has suffered a functional loss as a result of his compensable hand/wrist condition. We accept his evidence about how his hand/wrist condition has interfered with his daily living activities. He has a continuing physical condition which restricts his activities and means that he is functionally unable to do, or to sustain, certain activities which he was able to do before his compensable condition developed. He therefore has a permanent impairment within the meaning of the Act, and the degree of that permanent impairment should be assessed in accordance with section 42 of the Act.

- In Tribunal *Decision No. 1196/01* the Vice-Chair stated:

> The statutory definition of "impairment" refers not only to *physical* abnormalities or losses but also to *functional* abnormalities or losses. It is therefore important to consider the worker's testimony concerning her limitations. I find the worker's testimony to be credible, especially given that it is confirmed by the reports of the doctors on file. In my view, the Board under-estimated the effects of the worker's continuing pain on her ability to function.
>
> …
>
> As the list of her complaints outlined above indicates, the worker's ability to function as she did prior to her compensable accident is now clearly limited. Her restrictions relate not only to her personal life (e.g., elevation and ice needed for sleeping, problems rising in the morning) but also to her current job duties (e.g., the inability to stand for prolonged periods, the inability to walk long distances, the need to sit to rest her knee). Some of the worker's limitations affect both her personal life and her work life (e.g., problems with stairs, with pivoting and with lifting). These are all, in my view, "functional abnormalities or losses."

- In Tribunal *Decision No. 738/02* the Panel found that a worker had a permanent impairment of his hip even though he was found to have full range of motion in that hip. The Panel stated:

> The Board appears to have taken the position that the only determinant of permanent impairment of the hip is whether or not there is a restricted range of motion. However, as is noted by Dr. Weinberg, and others, the worker has a weakness in his hip which "prevents strenuous activity involving the left lower extremity". The worker testified that he has no strength in his hip and has spasms that go into the calf. His hip, he said, "feels like vice grips". The Panel finds his evidence to be credible.

The Panel referred to a number of earlier Tribunal decisions and concluded:

> We concur with the conclusions expressed in these decisions that a finding of normal range of motion does not necessarily preclude a "physical or functional abnormality or loss" resulting from the injury. In our view, this worker does have such a loss and the Board is directed to arrange a NEL assessment.

Having considered the evidence and submissions put forward in this appeal, I am of the view that the worker did sustain a permanent impairment of her left knee and low back in the accident of March 17, 2001 and is therefore entitled to benefits for that condition. My reasons for this conclusion are as follows.

I accept the testimony that the worker gave at the hearing of this appeal as credible and reliable evidence. The worker testified that prior to the accident of March 17, 2001 she had not suffered any back or knee problems, whereas she has experienced pain in varying

> degrees since the accident. Her regular duties required extensive lifting, bending and twisting. Although she returned to regular work after the accident, the activities caused considerable pain, and she did her best to accommodate and work through the pain. In January 2002 she left her job with the non-accident employer because of her inability to transfer patients on her own. The worker testified to a number of restrictions caused by her knee and back condition subsequent to the 2001 injury. She had to give up activities such as speed walking, skating, and camping, and was restricted in her ability to pick up her nieces and nephews. She required assistance in shopping and housecleaning, and had to rely on her mother to do these chores. The pain interfered with her sleep. When she returned home from work she had to apply ice or heat for the pain. I accept the worker's testimony that she has suffered with knee and back pain on a consistent basis ever since the 1991 injury.

[28] For the reasons set out above, we find that the worker's compensable accident has resulted in a condition which produces chronic pain in his groin such that his groin cannot be said to function normally. Accordingly, the workplace accident has resulted in a functional abnormality which entitles the worker to a NEL benefit for a permanent impairment.

Is the worker entitled to full FEL benefits at R1 and R2?

[29] The employer submits that the worker is not entitled to a full FEL benefit for two reasons. First, the employer claims that the wheelsman's job which it offered the worker in 2002 was a suitable job. Second, and alternatively, the employer submits that if the worker was not capable of performing the wheelsman's job, he was still not totally unemployable and was capable of some form of work.

[30] Having considered the evidence and submissions, we find that the wheelsman's job which the employer offered to the worker was not suitable for two separate and independent reasons.

[31] First, we note that this job was not offered to the worker until June 2002, that is, five years after he had stopped working on account of his compensable accident. At the time that the worker ceased working, the employer informed the Board that it did not have any suitable work available for the worker on either a permanent or temporary basis. In a memorandum dated June 8, 1999, a Board Claims Adjudicator documented a conversation with representatives of the employer as follows:

> Called the employer. Spoke to [KB], [MB]. Advised them of precautions noted in M # 17. They did not think that they will be able to offer him any modified work since all of the work they have is on board ship and the worker will not be able to work on board ship with these precautions.

Three months later, the Claims Adjudicator again recorded a conversation with a representative of the employer who stated that no modified work was available for the worker. The Claims Adjudicator's memorandum of September 7, 1999, states:

> Spoke to [KB]. They have reviewed this worker's position and his permanent precautions. They cannot offer him suitable modified work or accommodated work either temporarily or permanently.

[32] When a labour market re-entry program ("LMR") was initiated for the worker, the employer again indicated that the worker could not be accommodated. The LMR Assessment report states:

> I contacted [MB] on October 5th. He indicated that there was little that the organization could do for [the worker] given his permanent precautions.

[33] Five years later, in June 2002, the employer made the worker an offer of employment. Why the employer decided to make an offer of employment at this time is unclear. The lateness of this offer certainly raises questions about its *bona fides*. At the hearing of this appeal, MB, the employer's director of risk management, testified that the reason this offer was made five years after the worker stopped working was because it was at this point that the employer discovered that the worker had previously worked as a wheelsman which therefore rendered him qualified for a wheelsman's job. MB testified that prior to June 2002, the employer did not know of the worker's prior experience as a wheelsman and that is why the wheelsman's job was not offered earlier. MB was unable to state how the employer happened upon this new information in 2002.

[34] We do not believe MB. In our view, and we so find on a balance of probabilities, the wheelsman's job was offered in June 2002 not because of newly found information concerning the worker's employment qualifications, but rather because the employer wanted to curtail the worker's FEL benefits which it was directly responsible for paying as a Schedule 2 employer. We are fortified in this conclusion by the fact that the employer's June 14, 2002 letter offering the worker the wheelsman's job refers to "our record." It states:

> Our record show [sic] you have extensive experience as a wheelsman having served on such vessels as [the letter then lists a series of ship's names].

[35] Presumably, if the employer's records showed, in 2002, that the worker had extensive experience as a wheelsman, then the same records would have shown that fact in 1999. We are confirmed in this conclusion by the worker's testimony at the hearing of this appeal. The worker testified that not only had he worked as a wheelsman prior to 1999, but he had worked in that capacity for the employer. We accept the worker's testimony on this point. Given that the worker had previously worked as a wheelsman for the employer, it is highly unlikely that the worker's employment experience in this regard was new information which the employer happened upon in 2002 thereby enabling it to make an offer of employment. MB's testimony that the reason the worker was not offered the wheelsman's job prior to June 2002 was because it was only then that the employer learned of the worker's prior wheelsman's experience, is disingenuous and not believable.

[36] Further, there are numerous decisions in which this Tribunal has held that the timeliness of an employer's offer of work to an injured worker is a factor which affects the determination of whether it is reasonable to expect the worker to accept the officer. *Decision No. 1088/10* discusses some of the Tribunal's jurisprudence as follows:

> Several Tribunal decisions have considered the issue of a delay in offering work to an injured worker, and determined that it was not reasonable to expect a worker to be available to return to work after an extended period of time:

- In *Decision No. 737/02* the Tribunal considered a case in which the employer had offered a modified position to the worker more than five years after the injury, and two years after the worker had moved to Germany. The Tribunal found that the Board had erred in basing wage loss benefits on the stated wages for the position:

  > It is difficult to know on what basis the Board thought that an offer made at this time, which the worker clearly had no reasonable opportunity to accept, was a fair or reasonable basis on which to deem the worker's earning capacity. Any job offered by the accident employer was pure fiction by January 8, 2000.
  >
  > … If a worker is deemed to have refused suitable work with the accident employer, he will likely receive no wage loss benefits and may suffer a significant prejudice because of his move. This may be reasonable if he knew of the job offer when he moved, but in my view it is not reasonable when he did not. If the job offer is made only after he has moved, he has had no opportunity to accept the offer.

- A similar conclusion was reached by the Panel in *Decision No. 800/90*, who determined that the worker's refusal of late-offered work was not unreasonable, and that the worker had entitlement to ongoing benefits:

  > In this case, the employer did not offer modified work until January 1988. This was approximately seven months after the worker had returned to Kingston. The WCB had checked employment opportunities with the employer on at least three occasions, according to the Board memos, before and after the worker moved to Kingston. In each case, the employer advised that no modified work was available or expected to become available. By the time of the employer's late offer, the worker was settled in Kingston, he had married and was helping to support a family there. He was also involved with his Rehabilitation Counsellor and was actively looking for work in the area.

- In a case involving the initiation of LMR services, the Panel in *Decision No. 750/06* determined that an offer of modified work by the employer must be made within a reasonable period of time:

  > We note that the employer delayed from March of 2002 to October of 2002 before giving any indication that modified work might be available, and delayed a further two months, to December of 2002, before stating that the work available was the worker's pre-injury job. There was a similar silence from January 28, 2003 to July 22, 2003. While it could be argued that the delay was from July of 2002, when the Board began asking whether the employer had modified work available for the worker, this would reduce the delay to a total of six months in 2002, and six months in 2003. We are of the opinion that this total of 16 months of delay (or 12 months, if the shorter period is considered) on the employer's part is unreasonable, and that the Board could not be expected to keep the worker in limbo without LMR services during this period.

[37] In *Decision No. 1088/10*, the Vice-Chair ruled that it was not reasonable to expect a worker to be available for work more than two years after the worker's accident:

> In conclusion, I am in agreement with the opinions expressed in these decisions that an offer of modified work must be made within a reasonable period of time, and that it is not reasonable to expect a worker to be available for work two years after the accident date. The employer had initially indicated that there was no modified work available, and no offer was made until after the worker had been involved in LMR re-training for 16 months. At the time that the worker decided to re-locate to Elliot Lake in the Spring of 2008 there was no indication that a job offer would be forthcoming. Consequently, I find

> that the employer's offer of modified work was made too late to be considered in the determination of the worker's entitlement to benefits.

[38] We agree with the approach outlined in these cases. In particular, we agree with *Decision No. 737/02* that if an offer of work is not made in a timely manner, and before a worker moves to a different city, or country in that case, it is not reasonable to expect the worker to accept the offer. Accordingly, we conclude that it is not reasonable to expect the worker to have accepted the employer's June 14, 2002 offer of employment, which was made more than five years after the worker's accident and several years after he had moved to a different province.

[39] Second, and alternatively, we are of the view that the job offered to the worker in June 2002 was not one which the worker was capable of doing in light of his permanent functional restrictions. As noted earlier, the restrictions resulting from the worker's compensable permanent groin impairment are described by Dr. Arvisais as follows:

> Related permanent medical precautions are those of:
>
> - no repeated climbing of stairs;
>
> - no repetitive movement of the left lower extremity against resistance as in kicking or pedaling [sic];
>
> - no walking on rough ground;
>
> - no prolonged walking or standing;
>
> - no repeated crouching or kneeling.

[40] A Summary of Critical Job Demands for the job of a wheelsman, provided to the Board by the employer, indicates that the job requires "frequent" walking and "constant" standing. The Summary states:

> The Wheelsman requires full range of motion at all joints in order to perform his duties. Prolonged standing is required during his navigational and maintenance duties.

Clearly, these duties violate Dr. Arvisais's proscription of no prolonged walking or standing.

[41] Another document provided to the Board by the employer entitled Wheelsman Job Description lists four basic responsibilities of a wheelsman. One of those is "maintenance of the boat." The description of the physical demands of this particular duty is described as follows:

> The Wheelsman engages in maintenance duties, such as chipping, priming and painting activities on decks and combings. This portion of the work can be classified as medium to heavy with respect to physical demands. Constant static strength is required when holding a power tool that weighs a maximum of 20lbs (12kg). This work involves constant standing, bending, crouching, twisting, kneeling, sitting, climbing, balancing on ladders and walking. Static horizontal and/or vertical reaching is performed when accessing structures between floor-level and approximately 30 feet (9m) above the deck.

[42] Another of the four basic responsibilities set out in the job description referred to above is "steering the vessel." The description of the physical demands of this duty is described in part as follows:

> This portion of the work can be classified as sedentary with respect to physical demands. Prolonged standing, occasional sitting and constant diagonal reaching at waist level is performed when steering the boat.

[43] At the hearing of this appeal, the employer takes the position that the worker would not have been required to perform the full duties of a wheelsman, but rather would have performed a modified version of that job. However, the employer's job offer of June 14, 2002 does not offer the worker a modified wheelsman's job; it offers the worker a job as a wheelsman. The employment offer reads as follows:

> Our records show that you have extensive experience as wheelsman having served on vessels such as … etc. As you are aware this type of function does not demand the same physical abilities as that of a tunnelman.
>
> The work can be conducted from sitting down on a stool when doing river work. It does not appear that any of the restrictions stated above can prevent you from exercising this function.
>
> We are offering you, on a 30 day trial period, the position, of wheelsman on the …

[44] The fact that what was being offered to the worker was a wheelsman's job, and not a modified version of that job, is confirmed, in our view, by a fax sent on June 14, 2002, by the employer to its counsel stating:

> I called [the worker] this morning at 8:00 offering him the wheelsman position on the …

[45] The employer has attempted to characterize the job which was offered to the worker as a "modified" wheelsman's job. However, as noted above, the job which was formally offered to the worker was a wheelsman's job, not a modified wheelsman's job. The employer has characterized the job offered to the worker as modified, it appears, on the ground that the worker would not be required to perform any tasks of the wheelsman's job, which exceeded his restrictions. No tasks are formally excluded in the job offer, but rather, in a letter to its counsel dated November 13, 2002, the employer indicated that "The captain will adapt the maintenance requirement to [the worker's] restrictions." In our view, there are reasons to doubt the suitability of a job when it entails functions which exceed a worker's physical limitations, but which comes with a proviso that the worker's supervisor will exempt the worker from any tasks that he or she cannot manage, but without any greater specificity than that. In our view, it is not sufficient to offer a worker a job which has functions that exceed his or her functional abilities, and to indicate that the worker's supervisor will have discretion to relieve the worker from performing those functions. In our view, the offer of modified work needs to identify with some specificity the tasks which the worker will be required to perform and those from which he or she will be exempt. We find this to be particularly true in this case where, for reasons set out earlier, there is reason to question the *bona fides* of the job offer. In other words, when the modified job is offered many years after the worker has stopped working, and many years after the employer indicated it could not provide the worker with modified duties, then there is added need for caution and specificity, concerning the exact nature of the tasks the worker will be required to do. It provides little assurance, in our view, for the employer to indicate simply that the worker's supervisor would not make him do anything that he could not manage. In our view, the worker was not offered a modified wheelsman's job. The formal offer to the worker was a job as a wheelsman.

[46] For similar reasons, we find the ergonomics report submitted by the employer to be unhelpful. The report is authored by J. Boakes. The report indicates that it was an ergonomic assessment of the following position "Wheelsman (modified)." However, as noted earlier, we find that the worker was not formally offered a modified wheelsman's job, but rather a wheelsman's job. Thus, this ergonomics report suggests that some aspects of the job might exceed the worker's functional abilities, but that the worker would not be asked to do these. For instance, the report states:

> Some maintenance duties are also required of a wheelsman who is fit to do so.

This statement is highly cryptic in our view. Who is to determine whether the wheelsman is fit to do the maintenance work? Similarly, the report also states:

> Maintenance duties can include deck maintenance such as paint chipping, grinding and/or painting on an as needed basis. However, this work is not essential to the Wheelsman position, and would only be performed by individuals who are physically capable of performing it.

The same question arises. Who determines, while the ship is out in open water, whether an individual is capable of performing the maintenance work?

[47] In our view, this ergonomics report suggests that while some tasks of the wheelsman's job might exceed the worker's restrictions, the job is nevertheless suitable because the worker would not be required to perform those tasks. When questioned at the hearing of this appeal about where he received the information concerning tasks that the worker would not be required to perform, Mr. Boakes testified that he came to this conclusion after speaking with the captain. However, what the captain told Mr. Boakes is not a basis on which to conclude that a job has been appropriately modified. In essence, this report stands for the proposition that the job being offered to the worker is suitable because he will not be required to do anything that is unsuitable. The report does not specify who is to be the arbiter of what is suitable and what is not. It is precisely to avoid such ambiguity and potential for conflict that the manner in which a proposed job will be modified needs to be set out with some specificity. In our opinion, the worker was never offered a modified wheelsman's job. He was offered a regular wheelsman's job. Subsequently, the employer made vague assurances in correspondence with its own counsel, and in private conversations with the ergonomist it had retained, that the worker would not be required to do anything which exceeded his capabilities.

[48] At the hearing of this appeal, the employer's representative submitted that the June 14, 2002 offer was an offer of a work trial, and that the worker should have accepted that work trial in order to properly assess the suitability of the job. In support of his position, the employer's representative referred to *Decision No. 1056/01* and in particular to the following passage:

> There is no doubt that the worker has a significant back disability. However, that does not signify that he is totally disabled or incapable of any kind of employment. It is the case that, since 1994 the worker has continued to profess an inability to do any work or participate in vocational rehabilitation services, notwithstanding that his NEL award of 34% (not indicative of total disability). While Dr. Chaiton did suggest in 1994 that the worker could not pursue employment, his more recent reports (for the period in question from 1997 to 2000) have commented on functional overlay and the difficulty of

evaluating the worker's actual restrictions. In his letter of December 3, 1998, the rheumatologist did comment that the worker had no focal muscle wasting. If the worker's condition were as dire as suggested by the chiropractor in his February 2000 letter, one would expect some atrophy in the right leg owing to the degree of difficulty in walking.

The Panel is not suggesting that the worker's condition is ideal, far from it. The worker has a documented and significant back disability; what he does not have is evidence of total disability. The profession of total disability originates in the worker. It may well be a sincere belief but it is not borne out by the clinical evidence. For instance, the worker relies on a cane for ambulation (and apparently has done so since November of 1993) but there is no medical report recommending such usage that the Panel has been able to discover in the file documentation. The worker may find it easier to walk with the aid of a cane, but it has not been medically prescribed.

The Panel accepts that the worker is at maximum medical rehabilitation (MMR) and has been at this state for a number of years. The work he can do may be quite limited but it is not non-existent. The kinds of jobs that the PEEL assessment believed the worker would be capable of are detailed on file and there is no sense in that assessment that these jobs were unrealistic.

The issue then becomes whether the employer made a bona fide job offer and, if it did, was it suitable.

As to the first point, it is true that the employer mentioned a job in the summer of 1994 that never materialized. However, the employer did notify the Board that there was no suitable, modified work at that time and did not pretend otherwise. In December of 1995, the employer offered the worker a job in the kit room. There is detailed and extensive documentation on file as to the job duties and functional requirements, as well as an ergonomist's report. Accordingly, the Panel finds as a fact that the employer did make an actual job offer in December of 1995.

It remains only to assess whether this job offer constituted suitable, modified work. As was noted in *Decision No. 672/87* (1987), 5 W.C.A.T. R. 194, "sometimes the suitability of work can be assessed by comparing the description of the modified work to the medical restrictions imposed by treating physicians. The Panel went on to state that, if the above did not provide a definitive answer, "then the conclusions about the suitability of the work depend on whether we believe the worker was unable to perform the job."

In this case, no one has suggested that the job violated Dr. Walker's standard back restrictions for the worker. The worker however felt that certain tasks would be difficult for him to perform, especially in light of his use of a cane. He was also concerned about the distance between the parking lot and the job site.

As noted in *Decision No. 210/98*, a worker cannot render an offer of employment unsuitable simply by not discussing possible modifications. We note that the Board case worker is on record as saying that accommodation could and would have been implemented regarding the travel issue. With respect to the any other concerns about the worker's actual ability to perform the required tasks, the worker refused to try.

An assessment of suitability is rendered much more difficult when a worker refuses to try the job at all. While we acknowledge that a worker may have legitimate concerns about re-injury, reasonable accommodation is often not possible without an "actual run through" to ascertain what might need to be changed. Simply put, sometimes the best test for suitable modified work lies in the performing of it to accurately assess its appropriateness.

In this case, the employer offered a job that its ergonomist and the Board case worker considered to be suitable. This does not indicate that the job would have been suitable once performed but, absent any effort to carry out the duties, the Panel is left only with evidence of its suitability. Board policy is clear on the worker's obligations to co-operate

> and an unwillingness to even consider attempting modified employment constitutes a failure to co-operate. Mr. Di Santo has argued that performing the job would have put the worker's health and safety at risk but this seems speculative. There is no medical documentation suggesting such to be the case.
>
> In the final analysis, the Panel acknowledges it is possible that the job in the kit room might not have been suitable on an ongoing basis. However, without a sincere effort by the worker we can do no more than speculate. The evidence that we do have supports a conclusion that, at least on paper, the job was more likely than not suitable. Again, the reason that we must rely on the conceptual approach is because the worker refused to put the job to the test and the Panel cannot ignore this.

[49] While there may be cases in which a worker might be required to attempt the work being offered by an employer in order to assess its suitability, the present case is not one of them. We have already discussed at some length the fact of the employer's lengthy delay in making the work offer. When the work is offered more than five years after the fact, and after the worker has moved to a different province, then the employer's claim that the worker should have attempted the 30-day work trial in order to better assess suitability becomes less cogent. Further, in *Decision No. 1056/01* the employer had offered a job that both the Board's ergonomist and its caseworker considered suitable. In the present case, the Board's return-to-work adviser did not consider the employer's job suitable and raised a number of questions and concerns about it. The Board recommended that an ergonomics assessment of the job be carried out. In response, the employer's representative wrote to the Board on May 15, 2006 stating that the employer would "not be proceeding with the ergonomic assessment" which the Board had recommended. It was not until 2009 that the employer finally requisitioned an ergonomic assessment of the job it had offered in 2002, and which the Board had determined was unsuitable.

[50] For the reasons set out above, we conclude that the wheelsman's job which the worker was offered in June 2002 was not suitable because it exceeded the worker's functional limitations. However, even if we are wrong about this, and the job did not exceed the worker's functional limitations, we find that it is not reasonable to expect the worker to have accepted that job because it was made five years after he had stopped working, and several years after he had moved to another province.

[51] Finally, we agree with the conclusion of both the Claims Adjudicator and the ARO that the worker's compensable impairment, combined with his other personal and vocational characteristics rendered him competitively unemployable. In this regard, we note that the worker's prospects for retraining and re-employment were assessed in a "Labour Market Re-entry Assessment" conducted in October 1999. This report examined the viability of the worker returning to work in a variety of different jobs. The report concludes that the worker's compensable impairment and other vocational characteristics render him "a marginal candidate for employment." The report states further:

> At this time I am recommending that [the worker] be considered for a 100% Future Economic Loss Award.
>
> [The worker] has little education, having quit school at age 15 in grade 5. He does not read or write well enough to perform the most basic clerical tasks.
>
> …

> If he were able to travel the distances required to attend some basic literacy training, followed by some job training, he would be ready to attempt a re-entry to the work force at past 50 years of age.
>
> If this man's physical tolerances increase in the future, I would be happy to work with him in assessing further, a return to work plan.

[52] We note that when this LMR assessment was done, the employer took the position that the worker was unemployable. The LMR assessment states:

> The accident employer agrees that here [sic] is very little that can be provided for this client that will benefit him in the long run. They are in agreement with the determination that this man is likely not employable.

[53] At the hearing of this appeal, the employer submitted that this statement simply reflected the employer's concern that the worker not be provided with a lengthy and expensive LMR program only to have him subsequently deemed unemployable, rather than indicating that the employer actually believed the worker to be unemployable. While the employer may have wished, as a Schedule 2 employer to avoid the costs of an expensive LMR program, it appears that its position at that time was that the worker was "likely not employable." Thus, the LMR report states further that the employer indicated that even if the worker was provided with LMR services these "would likely have an unsuccessful outcome." If the employer was of the view that the worker was likely unemployable at the time of the LMR assessment, it is not clear why it thinks the worker was employable at the time of the FEL assessments.

[54] At the hearing of this appeal, the employer's representative noted that some of the reasons underlying the LMR assessor's conclusion that the worker is unemployable pertain to the limited job prospects in rural Nova Scotia. The employer's representative submitted that the job prospects in Nova Scotia are not relevant, and that for the purposes of this appeal, it is the worker's prospects of getting a job in Ontario that are relevant. We agree with the employer's submission that the question of whether or not the worker is unemployable should not be determined by reference to job prospects in Nova Scotia. However, our assessment that the worker is unemployable is based on his age, his vocational history, his meagre education, and his compensable permanent impairment. In our view, it is more likely than not that at the time of his FEL assessments, the worker would have been competitively unemployable in Ontario.

[55] At the hearing of this appeal, the employer submitted a videotape taken of the worker by a team of private investigators, one of whom posed as a person interested in buying the worker's boat. In order to get to the worker's boat, it was necessary to take a small rowboat. The worker rowed the boat.

[56] The videotape does not change our assessment that the worker was competitively unemployable. The tape shows the worker awkwardly getting into the rowboat and then falling. Eventually he rows the rowboat out to his larger boat. The trip lasts only a few minutes. At the hearing of this appeal, the worker testified that he primarily used his arms to row with very little engagement of his legs. Mr. Boakes, the ergonomist called by the employer, testified that it would not be possible to row without engaging the legs and in particular the adductor muscles. Mr. Boakes opined that if the worker could row the boat he could do the wheelsman's job.

[57] We have already noted that the wheelsman's job which was offered to the worker was not suitable for reasons independent of the worker's functional ability to do the job. A review of the videotape confirms, in our view, that the worker was not rowing in an unrestricted manner that entailed full use of his arms and legs. The worker appears to be rowing in a somewhat guarded fashion. Moreover, the worker did the rowing for a very short period of time. In our view, the video does not provide reliable evidence on which to conclude that the worker could do the wheelsman's job for a full shift on a regular basis. In our view, very little can be gleaned from this brief video about either the worker's ability to engage in paid employment on a permanent basis, or his ability to procure gainful employment in the first place. This brief surveillance videotape does not persuade us that the worker does not have a permanent impairment, or that he was competitively employable at the time of his FEL assessments.

DISPOSITION

[58] The appeal is denied.

DATED: February 14, 2011

SIGNED: B. Kalvin, B. Wheeler, K. Hoskin