WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1691/11

BEFORE: T. Mitchinson: Vice-Chair

HEARING: September 1, 2011 at Toronto
Oral

DATE OF DECISION: October 12, 2011

NEUTRAL CITATION: 2011 ONWSIAT 2330

DECISION(S) UNDER APPEAL: WSIB ARO decision dated November 17, 2010

APPEARANCES:

For the worker: D. Drury, Office of the Worker Adviser

For the employer: Not participating

Interpreter: N/A

REASONS

(i) Introduction

[1] This appeal was heard in Toronto on September 1, 2011. The worker appeals the November 17, 2010 decision of Appeals Resolution Officer (ARO) S. Marangoni. The ARO denied the worker entitlement to Loss of Earnings (LOE) benefits following a company layoff on January 30, 2009.

[2] The worker attended the hearing and was represented by Don Drury from the Office of the Worker Advisor. The employer did not participate. The worker testified and Mr. Drury made submissions on behalf of his client.

(ii) Applicable law

[3] The workplace injury giving rise to the claim in this case occurred in 2001. Therefore, the *Workplace Safety and Insurance Act* (the *Act*) applies.

(iii) The issue on appeal

[4] The only issue in this appeal is whether the worker has entitlement to further LOE benefits from January 30, 2009.

(iv) Background

[5] The worker sustained a left shoulder injury while performing regular job duties as a lift truck driver on October 22, 2001. He notified his supervisor and filed a claim with the Workplace Safety and Insurance Board (the Board). The claim was accepted for health care benefits and the worker was provided with modified duties with no lost time or earnings.

[6] In May 2003, the worker underwent non-work-related hip replacement surgery, returning to the workplace in September 2003.

[7] On November 5, 2003, the worker suffered a recurrence of the left shoulder injury, which was accepted by the Board. He again resumed work on an accommodated basis.

[8] Left shoulder pain persisted, and in March 2006 the Board determined that the worker had sustained a permanent impairment of this body part and granted a 3% Non-Economic Loss (NEL) award.

[9] On January 30, 2009, the worker was permanently laid off as part of a company-wide closure. He contacted the Board at that time seeking entitlement to ongoing benefits, but the claim was denied by the Adjudicator assigned to his file on the basis that the 72-month window for LOE benefit entitlement had closed and the left shoulder condition had not deteriorated to the point where the window could be re-opened under the *Act* and Board policy.

[10] The worker objected, maintaining that the 72-month lock-in does not apply to situations where a worker and employer are participating in Early and Safe Return-To-Work (ESRTW) measures.

[11] On review, ARO Marangoni concluded that, although the worker and employer maintained a relationship until January 2009 and the worker self-accommodated various job duties, this did not constitute an ESRTW plan under Board policy at the time of the company-wide layoff. She also found that the worker's shoulder condition had not significantly deteriorated to the point that would warrant a NEL redetermination.

(v) The worker's position

[12] The worker testified that he began work with the accident employer, an automobile paint manufacturer, in 1992. He sustained a compensable left shoulder injury in 1998, which required physiotherapy treatment, but he was fully recovered by 2001. The worker also testified that he had no left shoulder problems outside of work.

[13] In his testimony, the worker confirmed that he had non-compensable left hip replacement surgery in 2003, and received benefits while off work from the workplace insurance carrier.

[14] The worker testified that he never fully recovered from the October 22, 2001 left shoulder injury, sustained when the lift truck he was driving had a faulty steering mechanism that created shoulder strain. He was assigned light duties in the period immediately following the injury and was referred for physiotherapy treatments.

[15] According to the worker, a surgical correction for his shoulder was not an option, and he continued working with no wage loss under modified duties provided by the employer and self-accommodations worked out with co-workers who were prepared to handle specific job tasks that caused left shoulder strain.

[16] The worker testified that accommodations became more difficult in 2005 when job duties for all assemblers changed, but he and the employer were able to make adjustments that allowed him to continue working on a full-time basis in a permanently modified job.

[17] The worker described his restrictions as no lifting from floor to knee level, and weight restrictions for other lifting tasks. He was no longer able to drive a lift truck, because all vehicles were operated from a standing position using the left hand to steer and turn.

[18] The worker testified that he was in regular contact with the employer regarding his job restrictions during the 2001-2009 period, and attended the company health centre on many occasions when he experienced shoulder pain while working. He also continued physiotherapy treatments until the time of his layoff.

[19] The worker testified that he attempted to find alternative employment after the January 2009 layoff, and took one year of schooling in HVAC skills. He also sought work through temporary placement agencies, but had limited success due to his left shoulder restrictions. At present he is working on a part-time temporary basis at an automotive dealership moving cars around the lot.

[20] Mr. Drury submits that the worker never fully recovered from his left shoulder injury and was receiving ongoing medical care, including regular physiotherapy treatments and care from

the employer's health centre from 2001 until the time of his layoff. He also points to the NEL award in 2005 as evidence of ongoing permanent impairment.

[21] Mr. Drury also identifies notations in the Case Record where Board officials recognized permanent functional restrictions associated with the worker's injury, as well as documentation outlining investigations undertaken by the employer to assess the worker's functional capabilities and recognized restrictions.

[22] Mr. Drury submits that the 72-month lock-in for LOE benefits does not apply to the worker in this case. The worker was able to continue working in a modified job from the time of his injury until the company closed operations in January 2009, with no wage loss, due to the efforts of both the worker and the employer in finding suitable work. However, at no point had the worker been able to resume the full range of regular job duties and the accommodations were made permanent prior to the layoff.

[23] Mr. Drury argues that the worker and employer were participating in ERSTW activities up to the time of the layoff, in ongoing efforts to accommodate the worker's shoulder restrictions. Following the layoff, the worker made efforts to find alternative work but was not successful due to his permanent shoulder impairment, the same reason that he was not able to resume regular work with the accident employer. ESRTW activities terminated through no fault of the worker, and he should be entitled to LOE benefits from the time of the layoff, pending a Labour Market Re-Entry (LMR) assessment to determine whether an LMR Plan is warranted.

[24] Finally, Mr. Drury referred to Tribunal *Decision Nos. 734/10* and *1641/08* in support of the worker's position.

(vi) Analysis and findings

[25] Board *Operational Policy Manual* (OPM) Document No. 15-06-01 outlines entitlement to benefits following a work disruption including a permanent layoff:

> [The Board] may provide a worker who is unable to continue working due to a work disruption, and whose employability is affected by his/her work-related impairment/disability and associated clinical restrictions, with
>
> - additional loss of earnings (LOE) benefits, ..., and possibly
> - labour market re-entry (LMR) services.
>
> ...
>
> When the work disruption is long-term or permanent, it is generally presumed that the worker will have to seek employment elsewhere. Decision-makers, therefore, have to determine whether the worker
>
> - is labour market ready, or
> - requires assistance to re-enter the labour market.
>
> To make this determination, decision-makers have to consider whether the worker, because of his/her work-related impairment/disability and associated clinical restrictions, has a distinct disadvantage in finding similar post-accident suitable worker when compared to an uninjured co-worker.

> To assist with this determination, decision-makers examine the work the worker was doing at the time of the work disruptions and consider the following questions
>
> - Is the worker unable to perform the pre-accident job due to his/her work-related impairment/disability?
> - Is it likely that the worker's work-related impairment/disability is permanent?
> - How different is this work from the worker's pre-injury job? how long has the worker been doing this work?
> - Is the work available in the general labour market and, if so, are the wages comparable to what the worker was receiving and is the required productivity at the level the worker was doing at the time of the work disruptions?
> - Does the suitable work involve some form of accommodation?
> - What is the likelihood that another employer will provide the required accommodation?
>
> Based on the answers to these questions the decision-maker can decide whether
>
> - the suitable work that the worker was doing at the time of the work disruption is the worker's appropriate suitable and available employment or business (SEB), or
> - a formal LMR assessment is needed to determine an appropriate SEB for the worker. Based on the results of the LMR assessment, which includes the identification of potential SEB options, [the Board] decides whether a worker requires an LMR plan to re-enter the labour market.

[26] Board OPM Document No. 16-06-03 includes specific provisions relating to permanent layoff situations. For worker's whose clinical condition is stable at the time of the permanent layoff, but who are still unable to perform their pre-accident job because of their work-related impairment and associated clinical restrictions:

> - The decision-maker determines whether the suitable work that the worker was doing at the time of the permanent layoff is available in the general labour market.
> - If the suitable work that the worker was doing at the time of the permanent layoff is available in the general labour market, then that suitable and available work would usually become the worker's SEB and, if appropriate, a partial benefit would be paid, based on the SEB.
> - If the decision-maker is unable to determine an appropriate SEB for the worker and the worker meets the eligibility criteria for an LMR assessment then [the Board] offers an LMR assessment.
>
> Once the decision-maker rules that the criteria for a permanent work disruption have been met and that he/she is unable to determine an appropriate SEB for the worker, [the Board] can offer an LMR assessment to workers who
>
> - have a likely permanent impairment/disability, and
> - are unable to perform their pre-accident job due to the work-related impairment/disability, and
> - have not previously received LMR services.

[27] Section 44 of the *Act* defines criteria that must be met to trigger entitlement to LOE benefits after the normal 72-month lock in period. Section 44(2.1) allows for payment under certain exceptional circumstances including sections 44(2.1)(c) and (g), which read:

(2.1) The Board may review the payments more than 72 months after the date of the worker's injury if,

(c) after the 72-month period expires, the worker suffers a significant deterioration in his or her condition that results in a redetermination of the degree of the permanent impairment under section 47;

(g) when the 72-month period expires,

(i) the worker and the employer are co-operating in the worker's early and safe return to work in accordance with section 40, or

(ii) the worker is co-operating in health care measures in accordance with section 34.

[28] Board OPM Document No. 18-03-16 outlines sets out the corresponding policy governing LOE benefit payments more than 72 months after the date of the worker's injury. In general, once LOE benefit levels have been set at the 72-month mark, they cannot be further reviewed, unless one of the exceptional circumstances outlined in the policy are present. These exceptions are:

- if the worker is co-operating in health care measures, early and safe return to work (ESRTW) activities or is involved in a LMR plan and the plan is not completed at the time of the final review, or
- the provision of additional reviews due to a significant deterioration in the work-related injury/illness.

...

[The Board] defines the workplace parties' co-operation in ESRTW activities to include

- the accident employer and work initiating and maintaining communication with each other throughout the worker's recovery and impairment
- identifying and securing suitable and available work (employer attempting to provide suitable work/worker assisting the employer to identify suitable work)
- providing relevant worker's information to [the Board] concerning the worker's return to work
- notifying [the Board] of any difficulty or dispute concerning return to work.

[The Board] general considers the workplace parties to be co-operating in ESRTW at the 72-month period if

- the employment relationship between the workplace parties has been maintained
- the workplace parties are actively attempting to identify suitable and available jobs or in the process or arranging a return to work consistent with the worker's functional abilities
- neither workplace party is refusing to abide by his, her or its co-operation obligations.

When considering whether to conduct a review of LOE benefits after the 72-month period for workers who are co-operating in ESRTW, [the Board] considers the following factors such as whether

- job suitability/sustainability concerns existed prior to the 72-month period
- the job being performed post-72 months is highly accommodated

> - the worker experiences further or additional reduction of earnings after the final review due to a job change or another situation directly related to the injury
> - there is evidence that the worker is having difficulty performing the job ..., and/or
> - there is an indication that the accommodated job is temporary or could cease due to employment circumstances.
>
> A worker's post-72 month job is generally considered highly accommodated if it
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> - includes significant work or workplace modifications that would not generally be available in the general labour market
> - pays the worker at a rate significantly higher that what the employer pays for similar jobs, or is one where the productivity required of the worker is significantly lower than would normally be expected
> - was created especially for the worker, or
> - if eliminated, restricts the worker's ability to find new employment with similar medical precautions/accommodations in the general labour market.
>
> If the worker returns to accommodated employment and that job is no longer available at the time of the final review, the decision-maker may refer the worker for LMR services.

[29] The worker was clear in his testimony that he had never resumed regular job duties following his shoulder injury, and was only able to continue working with no time or wage loss due to his own efforts to reach informal accommodations with co-workers and the employer's willingness to provide modified duties on a permanent basis.

[30] I find that the worker's testimony is supported by documentation included in the Case Record.

[31] The worker sustained his left shoulder injury in October 2001. In file notations from February 2002, the employer confirms that the worker was on modified duties and "has been seen several times by the company doctor". The employer and the Claims Adjudicator assigned to the worker's file agreed that the worker would benefit from a Regional Evaluation Centre (REC) assessment. It is unclear whether this assessment was undertaken at that time, but the Board did write to the worker in May 2004 advising that he would be assessed at the Board's Shoulder/Elbow Program. This assessment was conducted by orthopaedic surgeon, Dr. Marks. The worker was given an injection to his shoulder and follow-up appointments later in 2004.

[32] On February 18, 2005, the Adjudicator wrote to the employer advising that the worker continued to be partially impaired as a result of his shoulder injury and had not reached maximum medical recovery. The letter continued:

> This means the worker is capable of performing modified duty work, within the following restrictions/precautions for his left shoulder:
>
> - Avoid overhead work with left upper extremity and from repetitive distance reaching and heavy lifting/pushing/pulling with the left upper extremity.
> - The worker's condition of ongoing impairment and restrictions will be addressed pending further medical reports.

> - If you are unable to provide the worker with suitable modified work within the worker's current restrictions the worker will be eligibility [sic] for loss of earnings benefits.

[33] By March 2006, the Board determined that the worker's left shoulder had reached maximum medical recovery with a residual permanent impairment and permanent left shoulder restrictions.

[34] There is no further documentation describing job duties or work performance until December 2008, at which point the worker is advised that the company was closing. However, in a January 9, 2009 letter to the Board, the parent company provided a December 11, 2008 review of the worker's permanent restrictions, "which provides a detailed listing of his abilities, and some activities to avoid".

[35] The medical evidence would also suggest that the worker's shoulder condition continued throughout the period leading to the plant shutdown.

[36] In a February 2003 letter to the Board, the employer states that the worker attended at the on-site health centre 18 times in 2001, 39 times in 2002 and 14 times in the first two months of 2003 "with complaints of pain or discomfort in his left shoulder". More recent details are not available, but the worker was clear in his testimony that on-site treatment continued through to his layoff, which I find to be consistent with his subsequent attendance at the Board's Shoulder/Elbow Clinic and the Board's recognition of a permanent shoulder impairment in 2006.

[37] There is also regular reporting from the worker's family doctor, Dr. Waters, indentifying left shoulder pain and treatment through his period of ongoing employment, including a number of Functional Abilities Forms identifying left shoulder restrictions and corresponding functional limitations. Various reports from the worker's treating chiropractor also confirm ongoing left shoulder conditions.

[38] In July 2004 and again in November 2004 the worker participated in return-to-work consultations with Board officials and the employer. Left shoulder restrictions were acknowledged in this context. The worker indicated at that time that he would not recover enough to return to his regular job, but could manage "a less physically demanding job". His ability to continue working was dependent on the employer's willingness to provide ongoing accommodations, and the employer confirmed that the worker's restrictions were being accommodated at that time.

[39] I am persuaded on the evidence in this case that the worker's employability following the work disruption in January 2009 was affected by his work-related impairment and associated clinical restrictions.

[40] I also find that the worker was not labour market ready at the time of his permanent layoff. Despite extensive efforts by both parties, the worker had not been able to resume regular duties. The November 2004 return-to-work consultation report indicated that the worker was not able to operate a lift truck for more than 10 minutes per hour, his predominant job duty and a skill that would normally be required by other employers providing similar job opportunities, without accommodation. The worker's impairments were permanent at the time of the layoff,

and the only reason he was able to continue as a productive employee to that point was due to informal self-accommodation and limitations that were recognized and accepted by the employer. The worker's lack of success in securing comparable employment following the layoff supports his position that he was not able to return to the labour market without further support and assistance.

[41] Applying the provisions of OPM Document No. 16-06-03 which deals with the implications of a permanent layoff, I find that the worker's clinical condition was stable at the time of the layoff in January 2009, but he was not able to perform his pre-accident job because of his work-related impairment and associated clinical restrictions. I also find that similar work for a different employer would not be available in the general labour market, given the worker's injury, and he meets the eligibility criteria for an LMR assessment set out in the policy: he has a permanent impairment; he is unable to perform his pre-accident job due to the compensable left shoulder impairment; and he has not previously received LMR services.

[42] The unusual factor at play in this case is that the worker never suffered a wage loss as a result of his compensable injury prior to the permanent layoff, and therefore LOE benefit entitlements did not come into play. That being said, as the Adjudicator indicated in her February 18, 2005 letter to the employer, if the employer had not been able to provide suitable modified work, the worker "would be eligible for loss of earnings benefits". Had LOE benefits been extended in that context, it is reasonable to conclude that they would also have been continued at the 72-month lock-in final review stage in October 2008. Although the worker's condition had stabilized by that point, his left shoulder impairment was permanent and permanent restrictions were in place.

[43] In my view, to deny the worker entitlement to LOE benefits on the basis that his actual wage loss did not begin until January 2009, 3 months after the 72-month lock-in date, is not justifiable in the circumstances. The evidence is sufficient to establish that the worker and the employer continued to co-operate by maintaining communications with each other throughout the worker's period of ongoing impairment, and between them they had found a way to allow the worker to continue employment at no wage loss through a combination of formalized modified duties and informal arrangements with co-workers. As such, I find that, although LOE benefits were not formally set at the 72-month mark for reasons previously outlined, it is appropriate in this case to deem LOE entitlement at that stage to have been set at $0, and eligible for further review under section 44(2.1)(g) of the *Act* and OPM Document No. 18-03-16 on the basis that the worker was continuing to co-operate in ESRTW activities once an actual wage loss occurred in January 2009.

[44] I also find that the worker's job suitability concerns existed prior to the 72-month period; there is evidence that he was having ongoing difficult performing regular job duties; and his required accommodations necessarily ended due to employment circumstances that were unrelated to his injury or compensable health status. Further, I find that the worker's modified job was highly accommodated at the time of the layoff, requiring modifications that would not generally be available for similar work in the general labour market and could reasonably be expected to restrict his ability to find new employment with similar accommodations, as evidenced by his job search efforts following the layoff and current employment status.

[45] For all of these reasons, I find that the worker has entitlement for an LMR assessment to determine what, if any, services are appropriate to assist a return to the workforce. In the meantime, and until the LMR assessment is completed, the worker is entitled to full LOE benefits, effective from the date of the permanent layoff on January 1, 2009.

DISPOSITION

[46] The appeal is allowed.

[47] The worker has entitlement for an LMR assessment.

[48] The worker has entitlement for full LOE benefits, effective January 1, 2009, pending the outcome of the LMR assessment.

DATED: October 12, 2011

SIGNED: T. Mitchinson