WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2320/09

BEFORE:	M. Crystal: Vice-Chair
HEARING:	November 27, 2009 at Toronto Oral hearing
DATE OF DECISION:	April 1, 2010
NEUTRAL CITATION:	2010 ONWSIAT 813
DECISION UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) decision dated November 15, 2007

APPEARANCES:

For the worker:	Ms. M. Bottos, Office of the Worker Adviser
For the employer:	Did not participate

REASONS

(i) Introduction

[1] This appeal was heard, in Toronto, on November 27, 2009. The worker appeals the decision of ARO Trish Chalmers, dated November 15, 2007. That decision determined that, in relation to the worker's accident that occurred on October 28, 1996:

i) the worker is not entitled to benefits for psychotraumatic disability;

ii) the worker is not entitled to benefits for Chronic Pain Disability (CPD);

iii) the worker is not entitled to further supplementary benefits, pursuant to section 43(9) of the pre-1997 Act ("the Act");

iv) the worker is not entitled to benefits or services for drug or alcohol dependency, including treatment for such dependencies; and

v) the worker is not entitled to further Labour Market Re-Entry (LMR) services.

[2] The worker appeared and was represented by Ms. Meri Bottos, Office of the Worker Adviser. The employer did not participate in the appeal. The worker testified at the appeal hearing. Submissions were provided by Ms. Bottos at the hearing.

(ii) The issues on appeal

[3] The issues to be determined in this appeal are:

i) whether the worker is entitled to benefits for psychotraumatic disability;

ii) whether the worker is entitled to benefits for CPD;

iii) whether the worker is entitled to supplementary benefits, pursuant to section 43(9) of the pre-1997 Act for the period from June 1, 2003 to November 26, 2003, and for the period subsequent to January 7, 2004;

iv) whether the worker is entitled to benefits or services for drug or alcohol dependency, including treatment for such dependencies; and

v) whether the worker is entitled to further LMR services.

(iii) The evidence

[4] The worker suffered a workplace injury on October 28, 1996. At that time he was employed by the accident employer, a masonry contractor. The accident occurred when the worker was helping to carry scaffolding and he twisted his right ankle. The worker was treated at hospital on the day of the accident. An *Emergency Record* prepared at hospital on the date of accident indicated that the worker had tenderness over the lateral malleolus on the right ankle. X-rays taken of the right ankle on that date indicated "marked soft tissue swelling over the lateral malleolus" but that no evidence fracture was noted. The worker's ankle injury did not resolve and he was referred to the York-Finch General Hospital Regional Evaluation Center (REC) for a Multi-Disciplinary Assessment. The REC report, dated January 28, 1997, prepared by Dr. N. Lithwick, orthopaedic surgeon, and Vida Bruce, physiotherapist, stated that there was local tenderness over the anterior talofibular ligament and pain stressing it, but that the fibulocalcaneal ligament was intact, and the prognosis was considered to be good.

[5] The worker's ankle injury did not resolve and he was referred for Vocational Rehabilitation Services (VR) in June 1997. According to an Operative Report, dated September 3, 1997, the worker underwent a right arthroscopic ankle debridement on August 25, 1997. The case materials included a Future Economic Loss (FEL) entitlement memo, dated January 16, 1998, which indicated that the worker completed a course in "Micro Computer Skills" in November 1997, in order to acquire skills necessary for the Suitable Employment or Business (SEB) of auto parts clerk/inventory clerk. He continued upgrading to complete his Grade 12 diploma. The memo stated that worker was entitled to a FEL award based on the entry level wage of $7.00 per hour, which was the entry level wage for this SEB. The FEL award was calculated to be $216.17 per month. The FEL award was to be effective from March 1, 1998 to March 1, 2000. Because the worker was participating in a VR program he was entitled to a supplementary benefit, pursuant to section 43(9) of the Act, and any extension of the supplementary benefit was to be determined by the Claims Adjudicator (CA).

[6] In early 1998, the worker was referred for further vocational assessment. Following the assessment, the worker participated in a work placement at a restaurant. The worker was offered a paid position, which he performed for a few months, however, he subsequently found this work to be unsuitable and, according to a VR memo dated July 24, 1998, he requested VR services to receive training as a Class AZ truck driver. The Board had some concerns about this SEB, given that the worker was only 23 years old and insurance could be an issue, that he had been charged with impaired driving during the previous three years, and that he reported his foot was too sore to drive his own car. The worker indicated, however, that he had contacts which would allow him to obtain employment in this field, and he obtained a letter which indicated that there was an employer prepared to hire him as a truck driver. The Board sponsored the worker in an amended VR program with the SEB of truck driver.

[7] The worker completed his training to obtain his AZ trucking licence in early 1999, and he was sponsored by the Board for a six month local job search. The sponsorship was closed, however, in March 1999, when the worker had an accident at home, which the Board determined was not related to his compensable condition. According to an internal Board memorandum, dated March 19, 1999, the worker advised the Board's CA that he had fractured his ankle as a result of "horsing around" with his roommate. The Board concluded that the ankle fracture that occurred in March 1999 was not a compensable condition.

[8] According to an internal Board memorandum, dated February 16, 2000, prepared in relation to the worker's FEL entitlement at the 24 month review date (R1), the worker had not reported earning any income after his job at the restaurant in 1998. The worker indicated that he did not believe that employment as a truck driver was suitable, and that a sedentary job would be more appropriate. The memo noted that at the R1 review, the SEB of "Recording, Scheduling and Distributing Occupations" was identified for the worker. The memo indicated that the worker's monthly FEL award from March 1, 2000 to March 1, 2003 would be $34.25 per month.

[9] The worker objected to the Board's decision that the fracture that he experienced in relation to the right ankle in March 1999 was a non-compensable injury. He also objected to decisions made by the Board that he was not entitled to further LMR services, or a redetermination of his FEL award, based on a different SEB. The worker appealed these decisions to the Board's Appeals Branch. In a decision, dated April 21, 2001, which is not the subject of this appeal, the Board's ARO determined that the worker's right ankle fracture was related to his compensable injury, and allowed entitlement to benefits in relation to the injury. The ARO decision, however,

denied entitlement to further LMR services, or to a FEL reassessment, and the worker appealed these issues to the Appeals Tribunal.

[10] In *Decision No. 1797/02*, dated January 7, 2003, the Tribunal determined that the SEB of truck driver or parts clerk/store keeper were not suitable for the worker and that he was entitled to a further LMR assessment to identify suitable sedentary employment for the worker. The decision also concluded that the worker was entitled to a redetermination of his R1 FEL award which would be related to the new SEB identified for the worker through the new LMR assessment. In addition, although the decision did not identify the question of the worker's Non-Economic Loss (NEL) entitlement in the issue agenda, it concluded that the worker was entitled to a further NEL assessment which would address any new issues that arose as a result of the March 1999 injury to the ankle.

[11] The worker underwent a further LMR assessment in early 2003. According to a report, dated March 13, 2003, which outlined a new LMR Plan Proposal for the worker, a new SEB of NOC 2282 – User Support Technician (i.e., computer support) was identified for the worker, and a 40 week PC Support Specialist training program was proposed.

[12] Although the worker initially expressed enthusiasm for the new program, when the program began, his attendance in the program was poor. An LMR Progress report, dated May 7, 2003, indicated that the worker attributed his poor attendance in the program to "stress in his life he is currently experiencing, legal difficulties he is having as well as poor sleeping habits that he is trying to change." The report stated, in part:

> **BARRIERS/ISSUES**
>
> The worker is currently experiencing difficulty developing a suitable attendance pattern. I have spoken to the worker several times and relayed the importance of attending, however, he offers one excuse after another as to why he cannot attend. I have currently requested the worker attend class for a minimum of 5 hours each day, five days per week until such time as he is fully caught up. He has been made fully aware of both his responsibilities as well as the consequences of non-compliance. I close monitor of the situation [sic] will be kept and WSIB will be made aware of any changes in the situation.

[13] According to a further report, dated August 28, 2003, provided by the LMR service provider, LMR services were closed to the worker due to his unsatisfactory attendance in the program.

[14] The worker underwent a further NEL assessment in September 2003. As a result of this assessment the worker's NEL award for his right ankle injury was increased to 15%. He had previously been awarded a 10% NEL award following his first assessment in 2000.

[15] According to an internal Board memorandum, dated February 24, 2004, the worker's FEL benefit was inactivated as of August 1, 2003, because the projected earnings in his new SEB would have fully restored his pre-accident earnings. The memo also confirmed that the Board's "decision to stop LMR services remains denied."

[16] The worker was seen by Dr. David J. G. Stephen, orthopaedic surgeon, on October 2, 2003. Dr. Stephen's report referred to the worker's initial injury in 1996. It stated that the worker was reporting that "his entire right leg is bothering him right from his back, hip, knee, foot and ankle" and that he was not able to sit for the five hour periods required for his computer training. Dr. Stephen stated that "his description of pain and numbness in his foot when sitting is puzzling concerning his right ankle considering most pain would occur with weight bearing." He stated, however that "because he is having ongoing pain I think he is a candidate for a right

ankle arthroscopy for debridement." This surgery was performed by Dr. Stephen on November 26, 2003. According to an internal Board memorandum, dated December 16, 2003, the worker was paid further supplementary benefits for six weeks following the surgery, while he was recovering.

[17] The case materials included a report, dated November 11, 2003, in relation to a CT scan that was performed in relation to the worker's lumbar spine at that time. The report stated that the worker had a "moderately severe spinal stenosis [at L4-5] that is slightly worse than on the previous study" and that "at L5-S1, there is a disc herniation slightly better than on the previous study." A report, dated January 6, 2004, prepared by Dr. Stephen, stated that the worker was "having symptoms, ongoing for at least two years that was affecting his schooling" and that he cannot sit for prolonged periods of time because of change in temperature, pain and discomfort in his right foot." The report indicated that this problem appeared to resolve almost immediately after his recent surgery and "should be taken into consideration with regards to his past history with regards to his schooling and the inability to sit for a prolonged period of time."

[18] The case materials included a report, dated May 31, 2004, prepared by Dr. H. C. Jilesen, the worker's family physician. In relation to a visit by the worker on May 29, 2003, the report stated, in part:

> Continues to have sore ankle/leg. Discussed multiple problems. He started back to school to upgrade himself. Says he cannot sleep at night because of pain in his ankle. Says he has been using cocaine, Percodan, marijuana and alcohol to the point of being unconscious at times.
>
> We discussed his constant focus on pain though physically his ankle has no swelling. His ability to walk is grossly normal…
>
> [The report provided a summary of visits between June 2003 and April 2004, at which the worker reported ankle pain. Missed appointments were also noted].
> …
>
> The summary of his visits I feel demonstrate what had happened during that summer [i.e., Summer 2003]. With him having dealt with WSIB for the last seven years I believe he understood that upgrading was important and that part of the success of the program was attendance. It is unfortunate on his part that he advised me after the fact or neglected to mention that he was repeatedly absent from school and simply expected me to advocate for him after the fact when I had no objective evidence or indication from him prior to his absences.
>
> All I can simply state [is that] he advised me that he was in too much pain to focus on school and that he could not sit through classes and that he did share with me though refused to elaborate that he used other medications and substances to control his pain.

[19] The materials included a report, dated July 27, 2004, prepared by Dr. Ricardo J. Valazquez, orthopaedic surgeon, which stated, in part:

> [The worker] has back and groin and buttock pain which radiates down to the thigh and below the knee and I think given the result of the CT scan it is probably and independent condition and responsible for his back and leg pain.

[20] The worker was referred by Dr. Jilesen to Dr. G. S. Sidhu, psychiatrist, who saw the worker on August 12, 2004, at the mental health clinic at a hospital. Dr. Sidhu's report of that date stated that his main reason for seeking the consultation was to obtain help "with the stress and frustration that he is experiencing in his life at the present time" and also to obtain help "with some sort of pain relief". The report noted that he had lived in a town in central Ontario, but that he had recently moved to a town in southern Ontario, to reside with his father and "make a

change" and "start a new life". The worker reported not feeling successful and thinking that he was "already outliving his welcome at his father's house."

[21] The report noted that, in 2003, the worker was convicted and put on probation for theft of over $5,000.00, but that he felt that he had been wrongly convicted of stealing a cheque and that he had been "framed" by his girlfriend. The report stated that the worker had been charged with mischief and possession of cocaine and heroin. The drug possession charges arose in 2000. The report stated that "because of the pain that he had been experiencing, he was trying to overcome it by using these drugs" and that "at one point he was also drinking alcohol to overcome the pain." The report also noted that the worker had been charged with impaired driving in 1996 and his licence had been suspended for 16 months. The report noted that the worker had been taking Percocet , one tablet three times per day for the past nine months, and Triazolam, two tablets of .25 milligrams at bed time to help him sleep. The report stated that the worker was not suffering from any psychotic symptoms, was not suicidal or homicidal, was oriented to time, place and person, had insight and did not have impaired judgement. The report concluded by stating:

> CONCLUSION: My impression is that [the worker] is a 29 year old single male whose history and symptoms suggest that he sustained an injury while at work in October of 1996. Since then he has never really back to his previous level of functioning. He still has pain in his right ankle and in addition to this he is now also having pain in his lower back. A combination of ankle and back pain problems seem to be making him frustrated and miserable. He also has no source of income and feels "I am useless, I am a bum, I feel that I have no confidence and I have no motivation."
>
> He has got mild to moderate symptoms of depression but these are related to his present life circumstances. A trial with an antidepressant would be worthwhile to see if it would be worthwhile if it would bring about any changes but it is unlikely to be of any benefit if no changes are brought about with respect to his occupational, social and financial well being. In this matter it would be something for the Workmen's Compensation Board to review his case and see if they can retrain him for being a productive member of our community. The most appropriate antidepressant which we could try for him would be either AMITRIPTYLINE which he said that he has already tried and did not really find to be particularly helpful. The other thing would be to try him on one of the SSRIs such as CELEXA in a dose of 20 to 50 mg per day and see how he feels over the next 3 to 6 months.
>
> I have also recommended to him that he should probably try and lose some weight so that it is easier for his body posture with respect to his lower back.

[22] The case materials included an internal Board memorandum, dated November 22, 2004, prepared by Dr. M. Ho, the Board's medical consultant, which stated that, based on the July 27, 2004 report from Dr. Velazquez, the worker's low back problem did appear to be related to his accident history. The memo also stated that, based on Dr. Sidhu's report, dated August 13, 2004, the worker's psychiatric issues did not appear to be related to his ankle injury or the sequelae associated with treatment of the injury.

[23] The worker was referred to Dr. Robert McBroom, orthopaedic surgeon, who saw the worker on April 11, 2005. Dr. McBroom's report noted that the worker reported that his most recent arthroscopy improved his ankle pain but that since then, the pain had been coming from further up his leg, at the front and back of the thigh and into the calf. Prolonged walking, standing and sitting, as well as bending and lifting enhanced this pain. He concluded that further surgery might be required, but that further MRI and EMG studies be conducted to confirm the nature of his problem.

[24] The case materials included a report, dated March 7, 2005, prepared by Dr. Jackie Gardner-Nix. Dr. Gardner-Nix is not accredited in an area of specialized medicine, although her practice is related to pain management. The report noted that the worker had participated in "Mindfulness based chronic pain classes" and that he had requested a consultation "to look at his chronic pain management."

[25] The report noted that the worker "did get into recreational drugs and alcohol to try to get some relief." It noted that the worker was "very hyper and speaks very fast and does not listen well." The report stated that the worker "scared the other patients in his class as he was doing some strange things during meditation."

[26] The report indicated that the worker's parents separated when he was 12 years old, and that he was "raised by his Grandfather and an uncle". His grandparents passed away when the worker was about 12 years old, and this was traumatic for the worker. It stated that, "in 2001 he did find recreational drugs were helpful for his pain, and he got into some crack and cocaine." It noted that he was arrested for drug trafficking in October 2004 and his court case was coming up soon. The worker indicated that he expected that he would be going to prison, and that he had been to prison in the past for a few days as a result of an assault.

[27] The report noted that the worker was taking Oxycocet, but that he took more at the beginning of a prescription fill "and then he has to go without." He also took Tylenol No. 3 that had been prescribed for his mother. The report also noted that the worker found that marijuana brought down his pain level. It stated that:

> He takes 2 Percocets and feels on a bit of a high and can then function. He finds that 1 Percocet and 1 beer is the best combination and lasts for about 2 hours – he feels he can function on that. His Percocet speeds up his talking.

[28] Dr. Gardner-Nix stated that she believed that the worker was likely "suffering from adult ADHD [Attention Deficit Hyperactivity Disorder] and that the Percocet was probably a contributing factor to his hyperactivity. Noting that the worker apparently would be incarcerated in the near future, Dr. Gardner-Nix recommended that the worker focus on his meditation CD, have his Percocet dispensed in smaller quantities, and not combine alcohol with this medication. She recommended that next steps be deferred until the worker was out of prison, and until a further course of action had determined by Dr. McBroom.

[29] The case materials included an internal Board memorandum, dated July 12, 2005, prepared by Dr. Germansky, another of the Board's medical consultants, on the issue of the worker's entitlement to benefits for CPD. The memo reviewed the worker's history, and noted that the worker's pain level had an organic basis, namely post-traumatic arthritis which could be expected to progress. Dr. Germansky concluded that the worker's injury was work-related, that his chronic pain was caused by the injury, that the pain had persisted for six months or more beyond the usual healing time for the injury, but that the worker's pain was not inconsistent with his organic findings. Given that the worker did not meet all of the Board's criteria related to entitlement to benefits for CPD, he concluded that the worker was not entitled to benefits for CPD.

[30] In a further memo, dated August 25, 2005, Dr. Germansky stated that he did not believe that there was sufficient evidence of drug addiction associated with the worker's accident claim. The memo indicated that there was evidence of recreational drug use, as well as evidence of criminal activity, but that the evidence did not support entitlement for drug addiction.

[31] A further MRI of the lumbar spine was conducted on November 22, 2005, which disclosed disc herniations at the L4-5 and L5-S1 levels. A tear in the annulus fibrosis of the L3-L4 disc was also demonstrated by the MRI scan.

[32] The case materials included a "Discharge Summary" apparently prepared by a staff member at a centre that offered an alcohol and drug addiction rehabilitation centre. The document was not dated, but stated that the date of the Discharge Follow-up was February 15, 2006, and this appears to be when the report was prepared. The worker was admitted to the program on October 24, 2005 and discharged on November 11, 2005. The report stated, in part:

> [The worker's] drug and alcohol use has been problematic for the past three years. He has used alcohol, cocaine, crack, marijuana and heroin and other prescribed opiates for pain control due to an accident in 1996. His drug of choice seemed to be alcohol. [The worker] drank and used cannabis daily. He recognizes that alcohol is a problem and he admits that drinking often leads to cocaine use, He drank daily during the previous ninety days. He reports that he drinks from 12 to 20 standard drinks per day. He has used 2-3 grams of crack cocaine at each use and he use 15 out of the same 90 day period [sic] and smoked pot daily. [The worker's] scores were high on both alcohol and drug dependency. [The worker] had to be detoxed from alcohol and prescription meds that he had been using for chronic pain management before his admission to [the rehabilitation centre].

[33] The report stated that, upon admission, the worker "struggled with compliance" but that he became more compliant in the later part of his stay.

[34] Dr. Stephen prepared a report, dated October 12, 2006, which reviewed the worker's history of injury and treatment. The report concluded by stating:

> This gentleman at the present time is not retrained to a sedentary job. Certainly, he would likely benefit from retraining to a sedentary and at most a light labour occupation. The big question is whether his back pain occurred as a result of the [compensable] injury. At any rate, I would think that he would benefit from evaluation in a WSIB specialty clinic, either a back clinic and/or foot and ankle clinic…
>
> I have not made arrangements to see him as there is not much more for me to offer him here…

[35] The worker was seen at the Toronto Western Hospital WSIB Foot and Ankle Specialty Clinic on January 8, 2007, by Dr. J. Lau and A. Macdonald, physiotherapist. Their report of that date reviewed the worker's history and concluded by stating:

> My impression is that this patient has a low back pain as well as some mild to moderate ankle arthritis that has been accurately treated with the ankle scope. The arthritis will progress with time but currently his pain is well managed on his current treatment regimen.
>
> I would not recommend further surgery on his ankle. He would benefit from a home exercise program with a focus on peroneal strengthening, proprioceptive re-training and lower extremity strengthening. He needs to have more investigation and follow-up for his back.
>
> He will have some limitations from his ankle but his ankle arthritis is not causing his right buttock and lower extremity pain. From our cursory exam today, it seems that most of his symptomology at this time is stemming from his chronic low back pain. He has been discharged from the TWH Foot and Ankle Specialty Clinic at this time.

[36] The case materials included a report, dated May 7, 2008, prepared by Dr. P. Lepage, psychiatrist, in relation to a consultation that the worker had with Dr. Lepage at that time. The report stated that the worker was a 33 year old single male, who had been referred to the mental health clinic where he saw Dr. Lepage "at the urging of his lawyer [sic]". The report recounted

the history of the worker's ankle injury. It referred to the fact that he also suffered from back pain. It stated that "he has just come off two years of probation after doing six months in jail for trafficking and drugs". The worker indicated to Dr. Lepage that "he feels his mental problem stems from his pain condition."

[37] The report stated the worker was "on medicinal marijuana and has been for the last three months" but that "prior to that he was using it illegal for years". The worker reported taking five Percocet a day to maintain pain relief, but that "he has always used drugs and alcohol to manage his pain". The report stated that "at times he will contradict himself". It stated that "family history is significant for alcoholism and he's also had two maternal uncles who suicided, one by hanging and one by shooting." The report stated, in part:

> …This [compensable] injury that he had to his ankle occurred when he was about 21. A couple of years later, he started using cocaine and it worked to control his pain for years. Then he started to deal it. He has been in at least one rehab program for 21 days…In terms of his drug use, he's been a heavy cocaine user but has not had any in the last six months. He uses marijuana daily and he states that it works great for his pain. He would drink daily and quite acknowledges that. He prefers to drink and he would like to be drinking five to six beer a day but that's limited now due to money problems.

[38] The report noted that the worker often spoke in contradictory terms, and that "at times he would say the appropriate feelings" but that when discussing his child, or the death of his child's mother, "he didn't show any concern or empathy." The report stated that the worker "described a yearning to do 'blow' because he's happy then and the pain is gone." The report provided the following DSM-IV multi-axial diagnosis:

> Axis I: Chronic Pain Disorder due to a general medical condition and psychological factors;
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> Polysubstance Dependence;
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> Cocaine Dependence in remission;
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> Organic Mood Disorder;
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> The issue of him having an Attention Deficit Disorder with Hyperactivity as a child doesn't hold up in the current history but one does have to consider it and one also does have to consider that he may have a Bipolar Disorder and may have had that premorbidly.
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> Axis II: Antisocial Personality Traits
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> Axis III: Addicted to marijuana, opiates and benzodiazepines.
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> Axis IV: Chronic and severe stress, mostly financial but relational difficulties are prominent. He is generally a deeply conflicted person.
>
> Axis V: GAF is around 55

[39] Dr. Lepage indicated that the worker might benefit from Neurontin or Lyrica to address the worker's pain, and perhaps to stabilize his mood and irritability. She also recommended that the worker might benefit from a trial of an "SSRI, something like Celexa" although she noted that the worker might be compromised from having any benefit from this type of drug, "due to his current medical regimen." The report concluded by stating:

> The next appointment set up was to see his mother with him and really give this idea of attention deficit disorder with hyperactivity some consideration but apart from that I really don't see that there is much of a role for a psychiatrist here and I'm not sure what he's looking for as I have concerns about secondary gains.

[40] At the hearing, the worker testified that prior to his ankle injury in 1996, he did not drink alcohol excessively, he did not smoke marijuana very frequently and he did not use cocaine. He stated that he began using street drugs in about 2001 or 2002, when he became involved with a girlfriend who used these types of drugs. He stated that he did not initially want to use these drugs but others in his circle of friends encouraged him to try these drugs and he found that they were effective at decreasing his pain, and allowed him to walk with less pain.

[41] At the hearing, the worker testified that prior to the arthroscopic surgery that was performed on his ankle in November 2003, he considered his pain to be at a level of about five out of 10, with zero representing no pain, and 10 representing excruciating pain. He stated that after the November 2003 surgery, his pain decreased to about one to three out of 10. He stated that the ankle inverts from time to time and gives him pain. He stated that, at around the time of the hearing, his pain was at about four or five out of 10, and he was trying to bring this down to two to three out of 10.

[42] As noted above, in or about 2004, the worker left the area in central Ontario where he was raised, to live with his father in a town in southern Ontario. The worker testified that he tried to perform work in a scrap metal yard in or about 2004, but that he was not able to perform this work due to ankle pain. He also stated that he performed some volunteer work at a food bank in or about 2004, at the encouragement of his step mother. As noted above, he had a consultation with a psychiatrist, Dr. Sidhu, while he was living in southern Ontario. He stated that he returned to central Ontario in Fall 2004, and that at that time, he was selling illegal drugs to make money, and he was arrested for drug trafficking.

[43] The worker stated that he lived with his mother in central Ontario in 2005, and he was treated by Dr. Gardner-Nix, who started him in the "Mindfulness Based" pain treatment program, referred to above, which incorporated meditation, and was provided through video conferencing. He stated that he was in the program for about one month, and that he was asked to leave because he was "scaring" some of the other participants with his behaviour.

[44] The worker testified that he stopped seeing Dr. Jilesen, his family physician, because Dr. Jilesen "wasn't listening" to him and was treating him judgementally. He stated that he began treatment with a nurse practitioner, Lee Berriault, whom he found helpful. As noted above, the worker also participated in a 21 day drug rehabilitation program in late 2005. He stated that he attended meetings of Narcotics Anonymous between 2005 and 2007.

[45] It appears that the worker was incarcerated in late 2005 or early 2006. He testified that he was released from jail in or about May 2006. He stated that he saw a psychiatrist while in jail and that he was prescribed Amitriptyline while in jail. He stated that when he was released from jail, he resumed his prescriptions of Percocet and Halcyon.

[46] The case materials included a set of clinical notations apparently prepared by Nurse Berriault between August and October 2007. The notes indicated that that the worker discussed topics such as nutrition and addiction counselling with Ms. Berriault. They state that, at times, the worker indicated that he felt he was making progress, but that at other times, he was struggling with his drug addiction problem. An entry, dated August 30, 2007, stated, in part:

> Assessment: [The worker] does not appear to be at a stage where he is truly ready to make changes, despite his verbal expression to do so. He had difficulty engaging in a solution focussed conversation and did not appear interested when this writer suggested that he needed to address the addiction issues in order to assess mental health. [The worker] needs to address his addiction issues as well as his anger management.

[47] At the hearing, the worker also testified that he has been working with a counsellor at his local mental health centre, who tries to keep him focussed and helps him with his résumé. He stated that he also worked with a career counselling organization between April and June 2009, to help him prepare for job interviews. He stated that he thought he could manage attending an LMR program for about 20 hours per week. He also indicated that, at the time of the hearing, he was performing data entry work on a volunteer basis for a taxi company, where his mother is employed.

[48] The worker testified that prior to his accident, he worked at private sales with a franchised company, he worked on his car, he played guitar, was learning construction trades and enjoyed running and skating. He stated that he was not able to participate in these activities since his accident. He stated that since his accident, he has not been able to work on a sustainable basis, and he has only been able to do some work on a volunteer basis. He stated that he does domestic duties such as washing dishes and vacuuming.

[49] The worker testified at the hearing that he has not seen Dr. Stephen, his orthopaedic surgeon, for a long time. He stated that he just has to watch what he does so that he does not re-injure his ankle.

(iv) Applicable law

[50] The workplace accident which is the subject of this appeal occurred on October 28, 1996. Accordingly, the worker's entitlement to benefits in this appeal is governed by the pre-1997 Act ("the Act").

[51] In this appeal, the worker is seeking entitlement to benefits for psychotraumatic disability. Board policy on entitlement to benefits for psychotraumatic disability is included in *Operational Policy Manual* Document No. 15-04-02, which states in part:

> **Policy**
>
> A worker is entitled to benefits when disability/impairment results from a work related personal injury by accident. Disability/impairment includes both physical and emotional disability/impairment.
>
> **Guidelines**
>
> **General Rule**
>
> If it is evident that a diagnosis of a psychotraumatic disability/impairment is attributable to a work-related injury or a condition resulting from a work-related injury, entitlement is granted providing the psychotraumatic disability/impairment became manifest within 5 years of the injury, or within 5 years of the last surgical procedure.
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> Psychotraumatic disability/impairment is considered to be a temporary condition. Only in exceptional circumstances is this type of disability/impairment accepted as a permanent condition.
>
> …
>
> **Psychotraumatic Disability Entitlement**
>
> Entitlement for psychotraumatic disability may be established when the following circumstances exist or develop.
>
> - Organic brain syndrome secondary to
> - traumatic head injury
> - toxic chemicals including gases
> - hypoxic conditions, or
> - conditions related to decompression sickness.

- As an indirect result of a physical injury
  - emotional reaction to the accident or injury
  - severe physical disability, or
  - reaction to the treatment process
- The psychotraumatic disability is shown to be related to extended disablement and to non-medical, socio-economic factors, the majority of which can be directly and clearly related to the work related injury.

[52] In addition, in this appeal, the worker is seeking entitlement to benefits for CPD. The Board's *Operational Policy Manual* Document No. 15-04-03 sets out the Board's criteria for entitlement to benefits for CPD. Those criteria require evidence of:

- a work-related injury
- chronic pain which is continuous, consistent and genuine
- pain being caused by the workplace accident
- pain persisting for six or more months beyond the usual healing time for the injury
- pain inconsistent with organic findings
- pain that impairs earning capacity, as evidenced by marked life disruption.

(v) Analysis

Entitlement to benefits for drug addiction, including treatment for drug addiction

[53] In her submissions, the worker's representative indicated that some of the other areas of entitlement that the worker is seeking in this appeal, may be, at least to some extent, contingent upon a finding that he is entitled to benefits for drug addiction and treatment for that problem. For example, the worker is seeking entitlement to supplementary benefits pursuant to section 43(9) of the Act for certain periods when he was obtaining treatment for drug and alcohol addiction. The representative acknowledged that if the worker did not have entitlement to benefits associated with his addictions, he would not be eligible for supplementary benefits while he was seeking treatment for that condition. Because it could affect other areas of entitlement, I have elected to address that issue first in my reasons.

[54] In the circumstances of this appeal, the worker injured his right ankle in October 1996. He testified that prior to this injury he lived an active life, participating in activities such as running and skating. Vocationally, prior to the accident, he was involved in a franchise business selling products to consumers, and he was also learning construction trades. He also testified that prior to the accident, his use of alcohol and marijuana was occasional, and that he did not use cocaine. He stated that he began abusing these substances in or about 2001 or 2002, when he became involved with a girlfriend who made these substances more available to him. He also stated that he became involved with a circle of friends at about that time, who also encouraged him to abuse these substances. He testified that when he used these substances, his level of pain was decreased, and that he was able to move around more easily. Subsequently, the worker became addicted to non-prescription drugs, and he sought treatment for his addictions. In this appeal, he is seeking entitlement for the addictions and treatment for the addictions.

[55] Section 4(1) of the Act provides that "where…personal injury by accident arising out of and in the course of employment is caused to a worker" the worker and/or his dependants are entitled to benefits under the Act. It is well established by the Tribunal's jurisprudence (see *Decision No. 915*, 7 *W.C.A.T.R.* 1 at 134), that the issue of "causation" as intended by this provision, should be considered in the context of whether the accident made a significant contribution to the injury. In this context, an injury may be due to a constellation of factors,

some of which may be compensable, and others of which may be non-compensable. In order to attract entitlement, it is not necessary to demonstrate that the injury is attributable solely to the compensable factors, so long as it can also be demonstrated that the compensable factors contributed in a significant manner to the injury. Entitlement will follow where non-compensable factors have contributed significantly to the injury, if it can be shown that the compensable factors also made a significant contribution. Where, however, non-compensable factors overwhelm the significance of the compensable factors as the basis for the injury, or break the chain of causation, it may be determined that the compensable factors did not contribute significantly to the injury.

[56] In the context of this discussion, the injury is the worker's drug addiction. The worker's 1996 accident and physical injury to the ankle, the medical treatment for the ankle injury, and the organic symptoms which would ordinarily be expected to arise from such an injury and treatment, including some measure of pain, are all compensable factors.

[57] The basis of the worker's submission in relation to this issue is that he sought pain relief for the organic factors by taking non-prescription drugs and alcohol, and that he subsequently became addicted to these substances. As I understand the submissions provided by the worker's representative, on this basis, he should be entitled to benefits for his addiction and for treatment of the addiction.

[58] I have reviewed the Tribunal's jurisprudence as it relates to entitlement to benefits for drug addiction. A common theme in several of the Tribunal's decisions is that a distinction should be drawn between substance dependency which is caused by the compensable injury, and dependency which is related to the exercise of a choice by the individual.

[59] In *Decision No. 726/09*, the worker, who suffered a shoulder injury in 2001, was sponsored by the Board in an LMR program to become a pharmacy technician. She completed the program, as well as a work placement, but her employment was subsequently terminated due to problems she had with drug abuse. The decision stated in part:

> …In our opinion, this evidence indicates that the worker excelled in the SEB when she was following the advice of her doctors, and that she lost her ability to function in the SEB when she stopped following the advice of her doctors and sought pain medication beyond the scope of her treatment.
>
> In these circumstances, the worker's loss of income was not due to her injury, but to her drug dependency. That dependency was not caused by her compensable injuries. Her dependency was caused by her decision not to follow her doctor's medication regime and by her decision to obtain pain medication from other sources.

[60] Similarly, in *Decision No. 1009/02*, the worker, who had suffered back and neck injuries in a compensable motor vehicle accident, sought entitlement for drug dependency. That decision stated, in part:

> The balance of probabilities leads us to the conclusion that the worker, although he was prescribed with reasonable amounts of pain medication, on his own chose to augment such medication with illegally obtained street drugs. Board Medical Coordinator, Dr. R.D. Longmore, in a June 13, 1997 letter to one of the worker's treating physicians, states as follows:
>
> > I cannot justify an addiction would have occurred on one pill per day if he had followed the doctor's prescription. The worker was negligent in the administration of these pills and, unfortunately, must be deemed the author of his own misfortune. The quantities the worker was taking has nothing to do with his compensable injuries as these were not

> prescribed but rather obtained off of the street and I can see unfortunately where we cannot or should not accept any entitlement.… It is possible that [the worker's] pain behaviour is influenced by non-organic factors and, of course, these are not within the responsibilities of the compensation claim.…
>
> With these comments, the Panel agrees.
>
> …
>
> Thus, the worker's theory that all his subsequent ills stem from the compensable work accident ignores the worker's own choice and free will. The worker has not accepted responsibility as of yet for the choices he freely made and the actions he freely took.

[61] In *Decision No. 1901/05*, the worker suffered compensable injuries in 1988 and 2002 and subsequently became addicted to drugs. He was admitted into a methadone treatment program, and he sought entitlement for the treatment. The decision stated in part:

> On the basis of the evidence available to the Panel, we must conclude that the Methadone treatment was not necessary as a result of the injury. The Methadone treatment program was required to help the worker recover from his addiction to narcotic medication. While the worker was seemingly prescribed large amounts of narcotic medication by various doctors over the years, it is clear that the worker supplemented the medication he was prescribed with medication and drugs, including crack cocaine, that he purchased on the street. The evidence is clear that this activity started a long time before the worker's benefits stopped.
>
> ….
>
> It seems clear to the Panel that it was the worker's use of street drugs that made the Methadone treatment program necessary and not his work-related injuries. We therefore conclude that the worker is not entitled to reimbursement for Methadone or for transportation costs associated with the Methadone treatment program.

[62] In keeping with this jurisprudence, I conclude that the worker's addiction to alcohol and drugs cannot be attributed to his workplace injury. I note that the worker testified that the pain associated with his ankle injury improved significantly after his second arthroscopic surgery in November 2003. He stated that, after that surgery, his pain decreased to about one to three, on scale of one to 10. Although the worker testified that his significant drug abuse began before the surgery, in about 2000 or 2001, the medical evidence, in 2007, from his practical nurse, Ms. Berriault indicated that the worker "need[ed] to address his addiction issues" at that time.

[63] Further, I note that the worker's injury occurred in 1996. If it is true that the worker did not have any significant substance abuse problems until 2000, it follows that he was able to manage his pain without resorting to alcohol and cocaine between 1996 and 2000. The fact that the worker was able to manage the pain associated with his compensable condition without extensive use of addicting drugs from 1996 to 2000, taken together with the fact that he continued to use drugs after his surgery in 2003, which apparently significantly diminished his pain, leads me to conclude, on a balance of probabilities that the worker's compensable condition was not a factor which contributed significantly to his drug addiction.

[64] I also conclude, in keeping with the jurisprudence noted above, that that the worker's alcohol and drug abuse problems were not a reasonable consequence of his compensable injury, and that the worker's own intentional conduct was an intervening cause that broke the chain of causation between the compensable injury and the worker's alcohol and drug abuse. On this basis, I also conclude that the worker's compensable injury did not significantly contribute to his drug addiction.

[65] For these reasons, I conclude that the worker's drug addiction is not a compensable condition, and that he is not entitled to benefits for that condition.

[66] I note that in her submissions, the worker's representative indicated that, should I determine that the worker did not have entitlement to benefits for drug addiction, I should allow entitlement for treatment of the addiction to allow the worker to move ahead with his rehabilitation from his injury. Such an approach is consistent with the approach taken in *Decision No. 2356/08* and *Decision No. 213/07*. In *Decision No. 2356/08*, for reasons similar to those noted above, the panel found that the worker did not have entitlement to benefits for drug addiction, however, it concluded that, in determining entitlement to an LMR Plan, the decision-maker must consider any non-work-related disability or condition that a worker may have. This requirement is set out in the OPM Document No. 19-03-04. Similarly, in *Decision No. 213/07*, the Vice-Chair indicated that it was not necessary to determine whether the worker's alcoholism was work-related, indicating that treatment was a necessary component of the LMR plan, to which the worker was entitled.

[67] I interpret the Board's policy document to mean that where a worker is otherwise entitled to LMR services, if substance abuse is likely to be a barrier to success in the program, treatment for the problem should be a component of the LMR plan. I do not interpret the decisions, or the Board's policy document, to mean that, where substance abuse is not a compensable condition, as I have found in this case, it will be a basis of entitlement to LMR services, unless the worker is entitled to LMR services otherwise, on the basis of compensable factors.

[68] I will address the worker's entitlement to LMR services below. Should it be determined that the worker is entitled to further LMR services, I will address the question of whether the worker's LMR program should include a component to address his non-compensable drug addiction condition.

Entitlement to benefits for psychotraumatic disability

[69] I am not able to conclude that the worker is entitled to benefits for psychotraumatic disability.

[70] The Board's policy document on Psychotraumatic Disability, which is excerpted above, provides that a worker will be entitled to benefits for such disability in three main sets of circumstances: where the worker has sustained an organic brain injury; where the worker has suffered a psychological injury as a result of an emotional reaction to the accident, injury or treatment process, and where the worker has suffered a psychological injury due to extended disablement which results in non-medical, socio-economic factors, the majority of which can be related clearly and directly to the work injury. The worker did not sustain an organic brain injury, and entitlement need not be considered on that basis.

[71] From the case materials, it appears that the worker has seen a psychiatrist on two occasions. He saw Dr. Sidhu in August 2004. At the hearing, the worker stated that he thought he saw Dr. Sidhu once or twice, however, Dr. Sidhu's report indicated that, following the appointment in August 2004, Dr. Sidhu did not make any further appointments with him. The report also stated that the worker had never been seen by a psychiatrist in the past. I conclude that the appointment with Dr. Sidhu in August 2004 was the worker's only appointment with this physician.

[72] Dr. Sidhu did not provide a DSM-IV diagnosis in his report, but stated that the worker had "mild to moderate symptoms of depression" and that "these are related to his present life

circumstances". These "life circumstances" are referred to in the evidence which has been summarized above, and include convictions for impaired driving, theft and possession of illegal drugs, being unemployed, substance abuse, and suffering from pain in his ankle and back. The report indicated that a trial of an antidepressant might be worthwhile to determine whether the worker might benefit from such treatment but that "such treatment would be unlikely to be of any benefit if no changes are brought about with respect to his occupational, social and financial well being."

[73] The worker subsequently saw Dr. Lepage in May 2008. The report stated that the worker had been referred to Dr. Legage "at the urging of his lawyer". Dr. Lepage provided a DSM IV diagnosis. The Axis I diagnosis included Chronic Pain Disorder, polysubstance dependence, cocaine dependence in remission, organic mood disorder, and possible Attention Deficit Disorder and Bipolar Disorder.

[74] In addition, the Axis II diagnosis was "antisocial personality traits". The Axis III diagnosis referred to his drug addictions. The Axis IV diagnosis indicated that the worker's "financial and relational difficulties are most prominent" and that the worker is "generally a deeply conflicted person".

[75] To the extent that the worker suffers from Chronic Pain Disorder, this will be addressed in the analysis below relating to his entitlement to benefits for CPD. Where chronic pain is the most prominent aspect of a worker's psychological disorder, CPD rather than psychotraumatic disability is the appropriate remedy.

[76] Dr. Lepage's report concluded by stating, "I really don't see that there is much of a role for a psychiatrist here and I'm not sure what he's looking for as I have concerns about secondary gains." The report stated that a further appointment was made for the worker to be seen with his mother, however, in his testimony, the worker did not refer to such an appointment having occurred, and the materials do not provide any further medical information from Dr. Lepage.

[77] From these psychiatric reports, I am not able to conclude that the worker suffers from a psychological condition which could be considered to be an emotional reaction to the accident, injury or treatment process which resulted from his compensable injury. Although Dr. Sidhu considered the possibility that the worker suffered from depression, when the worker saw Dr. Lepage about four years later, Dr. Lepage did not provide this diagnosis. A review of these two medical reports disclose that the worker's difficulties arise from an array of factors associated with the worker's personal life circumstances, with the worker's substance abuse being the prominent factor. I have provided my reasons, above, for my conclusion that the worker's compensable injury did not contribute significantly to his substance abuse issues.

[78] I have also taken into account the fact that, apart from the respective single visits to Drs. Sidhu and Lepage, the worker has not pursued psychiatric treatment in a significant manner, and that apart from a referral by Dr. Jilesen to Dr. Sidhu in 2004, the worker's physicians have not referred him for such treatment. Dr. Sidhu did not recommend a follow-up appointment, and Dr. Lepage indicated that she did not believe that there was "much of a role for a psychiatrist here."

[79] I also note that when the worker was seen in 2007 at the Toronto Western Hospital Foot and Ankle Specialty Clinic by Dr. Lau, the doctor indicated most of the worker's symptomatology was stemming from his chronic low back pain. I note that the worker does not have entitlement for a low back condition, and that the issue of entitlement for a low back injury is not under appeal.

To the extent that the worker's pain symptomatology is related to his low back (noting that Dr. Lau concluded that this was true for "most of his symptomatology"), this cannot be a basis for entitlement to benefits for psychotraumatic disability.

[80] For these reasons, I conclude that the worker does not suffer from a significant psychological condition which could be considered to be an emotional reaction to the accident, injury or treatment process which resulted from his compensable injury. Accordingly he is not entitled to benefits for psychotraumatic disability on that basis.

[81] The remaining basis for entitlement to benefits for psychotraumatic disability relates to whether the worker has experienced a psychological injury which can be "shown to be related to extended disablement and to non-medical, socio-economic factors, the majority of which can be directly and clearly related to the work-related injury."

[82] I accept that the worker may well have been disabled by a number of non-medical, socio-economic factors, however, I am not able to conclude that the majority of these can be related to the work injury. A review of the medical reports discloses that the worker's non-medical socio-economic difficulties arise primarily from his substance abuse and from factors such as his personality traits and his being a "deeply conflicted person". For reasons already given, I conclude that the worker's substance abuse problem is not "directly and clearly related to the work injury". I am not able to conclude that the worker's other characterological factors are related to the work injury.

[83] On this basis, I conclude that the worker is not entitled to benefits for psychotraumatic disability on the basis that he suffers from a "psychotraumatic disability [which] is shown to be related to extended disablement and to non-medical, socio-economic factors, the majority of which can be directly and clearly related to the work related injury."

[84] Having considered the available bases for entitlement to benefits for psychotraumatic disability, I conclude that he is not entitled to such benefits.

Entitlement to benefits for CPD

[85] As noted above, Dr. Lepage concluded that a component of the worker's DSM-IV diagnosis was Chronic Pain Disorder. In order to be entitled to benefits for CPD (i.e., chronic pain disability, within the meaning of the Board's policy document), however, it must be demonstrated that the worker meets the criteria that are set out in the Board's policy document, which is referred to above. A medical diagnosis of chronic pain syndrome or chronic pain disorder will not be sufficient to entitle a worker to benefits for CPD, unless the Board's criteria for such entitlement are also met.

[86] The worker satisfies several of the criteria for entitlement to benefits for CPD. In this regard, it is clear that the worker suffered a work-related injury, that he experienced pain that was caused by the injury, and that it has persisted for more than six months beyond the usual healing time for the injury. I also note that the worker has been awarded a NEL award on an organic basis which was rated at 10% in 2000, and increased to 15% in 2003.

[87] In an internal Board memorandum, dated July 12, 2005, Dr. Germansky, the Board's medical consultant, considered the issue of the worker's entitlement to benefits for CPD, and concluded that the worker was not entitled to such benefits because it had not been shown that the worker's pain was inconsistent with his organic findings. I agree with this conclusion.

[88] At the hearing, the worker testified that subsequent to his second arthroscopic surgery in November 2003, the level of pain associated with his ankle injury decreased from about five out of 10 to about one to three out of 10. Dr. Jilesen prepared a report, dated January 30, 2004, which indicated that the worker felt he was "symptom free" at that time. He testified that, at the time of the hearing, his ankle inverted from time to time and that he was working at getting his pain level down to a level of two or three out of 10. He stated that he experiences pain if he turns his ankle the wrong way, however, he stated that he uses a brace for his ankle, and this helps with the situation.

[89] I also note that when the worker was seen by Dr. Lepage, the worker referred to pain in his back. Dr. Lepage's report states that "at [the time of the accident] his back injury wasn't acknowledged to the same degree [as his ankle injury] and this was a problem for him now." The worker also indicated to Dr. Sidhu that his low back was a source of pain. As I have noted above, when the worker was seen in 2007 at the Toronto Western Hospital Foot and Ankle Specialty Clinic by Dr. Lau, the doctor indicated most of the worker's symptomatology was stemming from his chronic low back pain. As I have indicated, the worker does not have entitlement for a low back condition, and that the issue of entitlement for a low back injury is not before me. To the extent that the worker's pain symptomatology is related to his low back (noting that Dr. Lau concluded that this was true for "most of his symptomatology"), this cannot be a basis for entitlement to benefits for CPD.

[90] In his memo dated July 12, 2005, Dr. Germansky noted that the worker's chronic right ankle pain had an organic basis, namely "post-traumatic arthritis which can be expected to progress". According to the worker, his ankle pain improved after the November 2003 surgery. He also stated that a brace has been helpful in relation to the ankle condition. These facts suggest that the worker's pain is directly associated with his organic condition. In my view, pain which is non-organic in origin is unlikely to improve with surgical treatment or with the use of a brace. The worker has an organic injury to his ankle and he has been awarded a NEL award for the injury. At the hearing, the worker described his level of pain associated with the ankle injury, as being essentially under control, so long as he does not twist the ankle the wrong way. In keeping with the comments from Dr. Germansky, I am not able to conclude that the pain that the worker experiences as a result of his ankle injury is inconsistent with his organic condition.

[91] The worker has not met the criterion that his pain is inconsistent with his organic findings. In addition, Dr. Lau indicated that most of the worker's pain was associated with his non-compensable low back condition. For these reasons, he is not entitled to benefits for CPD.

Entitlement to further LMR services

[92] As is outlined above, the worker has had extensive vocational rehabilitation (VR) and LMR services provided to him by the Board.

[93] After his compensable accident in October 1996, the worker was referred for VR services for the first time in the summer of 1997. The SEB of auto parts clerk was identified for him. He was sponsored by the Board in computer training. He took a further program to obtain his Grade 12 diploma. Following further VR assessment, the worker obtained employment at a restaurant. According to correspondence, dated May 1, 1998, VR services were closed to the worker because he obtained alternative employment.

[94] LMR services were re-opened to the worker and he was sponsored by the Board in a new LMR program to obtain a truck driver's licence. The worker completed this course in January

1999 and the worker began a job search for work in this field. The job search was discontinued when the worker re-injured his ankle, and LMR services were closed again to the worker.

[95] The Board denied the worker further LMR services, however, the worker appealed the Board's decision to this Tribunal, and in *Decision No. 1797/02*, dated January 7, 2003, the Tribunal awarded the worker further LMR services. The case materials indicate that the worker underwent a further LMR assessment in February 2003, and the SEB of User Support Technician was identified for the worker. The LMR documentation indicated that the worker began this LMR program, however LMR services were again closed to him due to poor attendance. The LMR documentation indicated that the worker indicated that the primary reason for his poor attendance was "stress in his life" as well as "poor sleeping habits". The documentation also indicated that the worker was having legal problems, and that there was a possibility that he would be incarcerated.

[96] At the hearing, the worker indicated that he wanted to try an LMR program but that he did not believe that he would be able to participate in a full-time LMR program. He stated that he was hoping to work towards being able to participate in a program that would require up to 20 hours per week.

[97] I note that OPM Document No. 19-03-04 on the subject of Entitlement to LMR Plans states that, generally, workers are provided with only one LMR plan. In the worker's case, he has had three VR/LMR plans, and in this appeal, he is seeking a fourth. I am satisfied from the LMR documentation that, at least in relation to the LMR program that ended in 2003, the closure of the program was not related to compensable factors. Although it is not reflected in the LMR documentation, at the hearing, the worker testified that his use of non-prescription drugs and alcohol were a significant factor related to his poor attendance in the 2003 program. As I have indicated above, I conclude the worker's substance abuse is not a compensable factor.

[98] Based on his past performance in his previous LMR programs, I conclude that he is not likely to benefit from further services. Dr. Lepage indicated in her report in May 2008 that the worker had a "yearning" for cocaine, and that "he would like to be drinking five or six beer a day, but that's limited now due to money problems." At the hearing, the worker testified that he did not believe that he would be able to participate in an LMR program on a full-time basis.

[99] I find that the worker is not entitled to further LMR services, primarily on the basis that he would be unlikely to benefit from such services, taking into account:

- the extensive VR/LMR services he has received to date, without benefit;
- his previous poor performance in his most recent LMR program;
- his indication at the hearing that he would be unable to participate in an LMR program, on a full-time basis.

[100] I indicated above that, although, the worker's substance abuse was not a compensable condition, if the worker was otherwise entitled to further LMR services, and his substance abuse problem would be a barrier to his success in such services, I would consider entitlement to a substance abuse rehabilitation program as a component of the LMR program. Having found that the worker is not otherwise entitled further LMR services, it is not necessary to consider this matter.

Entitlement to supplementary benefits pursuant to section 43(9)

[101] At the hearing, the worker's representative indicated that the worker was seeking entitlement to supplementary benefits pursuant to section 43(9) during the period from June 1, 2003 to November 26, 2003, as well as during the period from January 7, 2004 and ongoing. She indicated that during the first period, the worker was seeking the supplementary benefits on the basis that he participated in a program of medical rehabilitation, and that during the second period, he was seeking the benefits on the basis of medical treatment and courses and activities associated with upgrading, in which he participated during that period. The worker underwent his second arthroscopic surgery on November 26, 2003, and the Board awarded him supplementary benefits during the time between the two periods identified by the worker's representative, when the worker was recovering from the surgery.

[102] I have reviewed the medical information included in the case materials during the period from June 1, 2003 to November 26, 2003. Dr. Jilesen prepared a Physician's Progress Report, dated June 6, 2003 which stated that the worker's diagnosis at that time was "old ankle sprain/surgery". The same report stated that "clinically he has no effusion". Dr. Jilesen also indicated that on the worker's May 29, 2003 visit, the worker's ability to walk was "grossly normal". The materials also include clinical notes during this period, apparently prepared by Dr. Jilesen. The notes are generally poorly legible, however they disclose that the worker had several appointments with Dr. Jilesen during this period. They also disclose that the worker missed scheduled appointments with Dr. Jilesen. The notes appear to focus upon the discussion between the worker and his physician about the worker's concern about the closure of his LMR program. They indicate that worker was prescribed Percodan for pain.

[103] A report, dated October 2, 2003, prepared by Dr. Stephen, the orthopaedic surgeon who performed the arthroscopy in November 2003 stated that he found the worker's reports of pain and numbness in his foot while sitting "puzzling concerning his right ankle considering most pain would occur with weight bearing." The report indicated that Dr. Stephen would proceed with the arthroscopy, however it does not disclose any program of significant medical rehabilitation which preceded that procedure.

[104] I am not able to conclude from the available medical information that the worker participated in a program of medical rehabilitation during the period from June 1, 2003 to November 26, 2003 which would entitle him to benefits pursuant to section 43(9).

[105] In relation to the period subsequent to January 2004, as I have noted above, Dr. Jilesen's report dated January 30, 2004, indicated that the worker felt he was "symptom free" at that time. Dr. Stephen saw the worker on January 6, 2004 and indicated that the worker was "much improved" and would apply "no restrictions to him". Dr. Stephen saw the worker again on January 20, 2005, and his report of that date indicated that he did not believe that there was any role for further investigation or treatment of the worker's ankle problem. A further report by Dr. Stephen in October 2006 did not indicate any significant change in the worker's condition, and again indicated that he did not have further treatment to offer the worker.

[106] At the hearing, the worker testified that he participated briefly in a "Mindfulness Based" pain treatment program with Dr. Gardner-Nix in early 2005. The worker testified that he participated in this meditation program for about four or five classes, at about that time. Dr. Gardner-Nix's report, dated March 7, 2005, focussed to a significant extent on the worker's substance abuse problems and the fact that he would likely be incarcerated for drug trafficking in the near future. As noted above, the worker also participated in a residence based drug

rehabilitation program in late 2005. The case materials also disclose that more recently, the worker received medical care from Ms. Lee Berriault, a practical nurse at a family health clinic who has been trying to assist the worker develop a more healthy lifestyle.

[107] I am not able to conclude that the worker is entitled to supplementary benefits as a result of his participation in a program of medical rehabilitation for the period subsequent to January 2004. During this period, the worker was incarcerated and his substance abuse problems appear to be a prominent factor associated with his disabilities. I have concluded that the worker is not entitled to benefits for his substance abuse. It follows that he is not entitled to supplementary benefits for treatment of that problem.

[108] In keeping with my adjudication noted above, the only condition for which the worker has entitlement is his right ankle condition. He stated at the hearing that this condition improved significantly after the November 2003 arthroscopy. Dr. Jilesen indicated that the worker stated in January 2004 that he felt he was symptom-free. Dr.Stephen, the physician primarily responsible for treating the worker's compensable condition, indicated in 2004, 2005 and 2006, that it did not appear that anything more could be done for the worker in relation to that condition. Although the report from Dr. Gardner-Nix ostensibly was related to the worker's pain management, it is apparent from that report that the worker's substance abuse problems and his life circumstances associated with his imminent incarceration were central to his difficulties. These are not compensable factors. In my view the worker's compensable ankle problem was not the central subject of the treatment that he has received from Ms. Barriault and her associates at the local health clinic that the worker attends.

[109] For these reasons I conclude that the worker is not entitled to supplementary benefits pursuant to section 43(9) of the Act, as a result of his participation in a program of medical rehabilitation subsequent to January 2004.

[110] I also note that the worker testified about a variety of activities in which the worker participated after January 2004, which the worker's representative indicated could be the basis of entitlement to supplementary benefits related to a "self-directed" LMR program. These included:

- working on a voluntary basis at a taxi company where his mother has been employed;
- vocational counselling at local career counselling centre between April and June 2009;
- working with a counsellor who helps him "keep focussed", helps him with his résumé, and prepares him for employment interviews; and
- completion of a credit course in information technology in business in May 2006.

[111] I find that these activities do not qualify the worker for supplementary benefits pursuant to section 43(9). I have provided my reasons above for concluding that the worker is not entitled to further LMR services. Section 43(9) allows for the payment of benefits while a worker is participating in a Board approved LMR program. Where a worker is entitled to such services, but has not been granted them by the Board, section 43(9) has been interpreted to provide entitlement where the worker obtains such services through a self-directed approach. Where, however, a worker is not entitled to further LMR services, as I have found in this case, the worker cannot undertake a self-directed LMR program and receive supplementary benefits.

[112] In any event, I am not persuaded that these activities would be likely to significantly assist the worker in returning to work.

[113] The worker took computer training in his first VR program in 1997. His brief LMR experience in 2003 was also related to computer training. He has received, or has had the opportunity to receive, a significant amount of computer training. I conclude that he would not benefit from further such training, and he is not entitled to supplementary benefits for further training of this type.

[114] I note that the worker had the opportunity to receive job search training in the past and did not take up the opportunity. There appears to have been an opportunity for job search training in relation to his first and second LMR plans, and he would certainly have had the opportunity for further job search training had he completed the LMR program that began in 2003. I conclude that he would not benefit from further such training, and he is not entitled to supplementary benefits for further training of this type.

[115] In my view the volunteer work that the worker has performed for the taxi company that employs his mother is not an activity which would be likely to enhance the possibility of a return to work and it is not an activity which would attract entitlement to supplementary benefits pursuant to section 43(9).

[116] For these reasons, I conclude that the worker is not entitled to supplementary benefits for the period subsequent to January 2004. For reasons indicated above, he is not entitled to supplementary benefits for the period from June 1, 2003 to November 11, 2003.

Conclusions

[117] The worker's appeal is denied for the reasons noted above. In summary:

- The worker is not entitled to benefits for drug or alcohol dependency. His decision to take drugs was a voluntary choice that was closely related to non-compensable life circumstances. Any causal connection between his work injury and his substance abuse was overwhelmed by non-compensable life circumstances associated with his substance abuse. Such factors, and the worker's voluntary decisions to abuse drugs and alcohol, were intervening factors which break any chain of causation between the compensable factors and the substance abuse.
- The worker is not entitled to benefits for psychotraumatic disability. The worker's psychological problems were not the result of an emotional reaction to his injury and cannot be shown to be related to extended disablement and to non-medical, socio-economic factors, the majority of which can be directly and clearly related to the work-related injury. The worker had only two psychiatric consultations since 1996. Dr. Lepage indicated in 2008 that it did not appear that there was a role for a psychiatrist in the course of his treatment, and he appeared to be motivated by the possibility of secondary gain. Further, Dr. Lau concluded that most of the worker's ongoing symptomatology was related to his non-compensable low back condition, and this cannot serve as the basis of entitlement to benefits for psychotraumatic disability.
- The worker is not entitled to benefits for CPD. Following the surgery in November 2003, the worker indicated that he was virtually symptom-free. The worker's level of his pain is probably consistent with, and not greater than what would be expected given his level of organic injury for which he has been compensated. A significant element of the worker's pain may also be attributable to his non-compensable low back condition.

- The worker is not entitled to further LMR services. He has received extensive LMR services to date, pursuant to three separate LMR plans. He testified that he would be unable to participate in a full-time LMR program. He would be unlikely to benefit from further LMR services.
- The worker is not entitled to further supplementary benefits pursuant to section 43(9). The medical documentation relating to the periods from June 1, 2003 to November 26, 2003 and from January 2004 and ongoing does not disclose that the worker was participating in a program of medical rehabilitation during these periods which would attract entitlement to section 43(9) benefits. Given that the worker is not entitled to further LMR services, he is not entitled to further benefits pursuant to section 43(9) related to participation in such a program, either on a formal basis or on a self-directed basis. The limited self-directed activities that the worker has undertaken are not likely to assist him significantly with a return to work, and they replicate assistance that would have been available to him in earlier VR/LMR programs.

DISPOSITION

[118] The appeal is denied.

1. The worker is not entitled to benefits or services for drug or alcohol dependency, including treatment for such dependencies.
2. The worker is not entitled to benefits for psychotraumatic disability.
3. The worker is not entitled to benefits for CPD.
4. The worker is not entitled to further LMR services.
5. The worker is not entitled to supplementary benefits, pursuant to section 43(9) for the period from June 1, 2003 to November 26, 2003, and for the period subsequent to January 7, 2004.

DATED: April 1, 2010

SIGNED: M. Crystal