WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2656/08

BEFORE:	R. McClellan : Vice-Chair B. Wheeler : Member Representative of Employers D. Felice : Member Representative of Workers
HEARING:	December 8, 2008 at Toronto Oral Post-hearing activity completed on May 27, 2009
DATE OF DECISION:	September 22, 2009
NEUTRAL CITATION:	2009 ONWSIAT 2222
DECISION(S) UNDER APPEAL:	WSIB ARO decisions dated January 31, 2006 and July 27, 2007

APPEARANCES:

For the worker:	Mr. Dave McCormick, Paralegal
For the employer:	Ms Meaghan Ferguson, Lawyer
Interpreter:	N/A

REASONS

(i) The appeal

[1] The worker appeals the decision of the Appeals Resolution Officer, Mr. Pinto, dated January 31, 2006. That decision concluded that the worker did not have entitlement to loss of earnings (LOE) benefits between August 2004 and February 2005 on the grounds that she had recovered from her compensable left leg injury and was capable of working at a concurrent part-time sales job during this period.

[2] The worker also appeals the decision of the Appeals Resolution Officer, Ms. Diaz, dated July 27, 2007. That decision concluded that the worker did not have entitlement for permanent impairment in the left knee as a result of the compensable left leg injury of July 28, 2004.

[3] The issues before the Panel are:

- whether the worker has entitlement to loss of earnings (LOE) benefits between August 2004 and February 2005 as a result of inability to work at her concurrent employment during this period. The related question is whether her concurrent employment in retail sales was above her medical restrictions and functional capabilities as a result of compensable injuries sustained on July 28, 2004; and,
- whether the worker has entitlement for a permanent impairment in the left knee as a result of the compensable left leg injury of July 28, 2004.

(ii) Background

[4] The worker, now age 24, was employed as a summer student with a school board as of May 2004, performing landscaping duties. On July 28, 2004, the worker was standing on the curb, leaning against a fence, when a co-worker drove up to her on a John Deere mowing tractor and ran into her, hitting her on the left lower leg, at the shin bone area. The co-worker then panicked, took her foot off the clutch and brake, and struck the worker again with the tractor, pinning the worker against the fence.

[5] The worker was treated at the walk-in clinic at Scarborough Centenary Hospital where the diagnosis was left leg/shin contusion, with pain in the left knee and ankle. The worker returned to work August 16, 2004 and was assigned to modified duties by the employer. The worker finished her summer student contract September 3, 2004 and returned to school September 7, 2004.

[6] The worker also had been working in concurrent employment at a retail store part -time since September 2002. The worker claimed that she was unable to return to work at her concurrent job at the retail store after the accident 2004 because of ongoing knee injury. She did return to her part-time retail job in February 2005.

[7] In the decision of January 31, 2006, the ARO found that the worker had recovered from her left leg injury without medical restrictions and was capable of resuming regular employment. She was deemed to be fully capable of resuming her concurrent part-time retail sales job and entitlement to LOE benefits was denied.

[8] In the decision of July 27, 2007, the ARO found that the worker had reached maximum medical recovery for a left shin injury effective August 16, 2004, without permanent impairment, and that any left knee condition was not related to the accident of July 28, 2004.

(iii) The medical evidence

[9] In Board Memo #30, dated December 5, 2006, Board Medical Consultant Dr. Kashani advised that the medical evidence did not establish that there was a permanent impairment in the left knee related to the accident of July 2004.

[10] The Physician's Report Form 8, dated July 28, 2004, from the emergency physician Dr. Mandel, reported contusion of the left leg/shin, with pain on movement of the left knee and ankle. Restrictions were to avoid prolonged standing, and walking for one week.

[11] The Functional Abilities Form from Dr. Teplinsky dated August 10, 2004 stated that the worker was off work as a result of an injury to the left shin until August 16, 2004, at which time she could return to full duties.

[12] On September 3, 2004, the treating physiotherapist reported left knee strain, and a possible meniscus injury with restrictions against standing more than 15 minutes, lifting, bending/twisting, kneeling and climbing. The statement recorded that the worker had been hit on the left knee twice by a riding lawnmower on July 28, 2004.

[13] On September 15, 2004, the Form 26 Progress Report from Dr. Teplinsky stated that the worker had ongoing left knee and left leg pain, had been prescribed physiotherapy and Vioxx and was unable to work at the present time because she is unable to stand up for a four-hour shift without pain.

[14] The worker's Progress Report dated September 19, 2004, recorded the worker's statement that she had been unable to return to her retail sales job because she is unable to walk and stand for long periods of time.

[15] An ultrasound of the left knee taken on November 23, 2004, was normal.

[16] On December 3, 2004, the physiotherapist submitted and a treatment extension request to the Board, with a working diagnosis of left knee patellar/ femoral pain, and restrictions against prolonged walking, climbing, or bending. The prognosis for complete recovery was "unknown at this time." A second treatment extension request was submitted by the physiotherapist on December 14, 2004. The diagnosis was left knee patellofemoral pain and sprain.

[17] On January 12, 2005, Dr. Teplinsky reported:

> [The worker] is having persisting pain in her left knee and left leg as a result of her previous work injury. She has been unable to stand for any length of time and has therefore been unable to resume her position in retail sales. She has recently been sent for an ultrasound of her left leg which revealed no abnormalities.

[18] An MRI taken on February 4, 2005, showed mild ill-defined signal within the posterior horn of the medial meniscus without a deficit surfacing meniscal care, likely related to a mild mixoid degeneration. Mild chondromalacia was identified.

[19] On May 29, 2007, consulting orthopedic specialist Dr. Hummel reported that the worker presented with ongoing problems in her left knee. On examination, there was no obvious wasting on the left side, but a degree of laxity of the ACL without real crepitus. He reported a discrepancy between the clinical examination, which indicated some areas of tenderness as well as a possible ligamentous laxity of the ACL whereas the MRI was negative. Strengthening exercises were recommended but the doctor stated, "She probably eventually require surgery to resolve the conflict," with arthroscopy to determine the full extent of the possible injury.

[20] On January 21, 2005, the Nurse Case Manager (NCM) recorded in Board Memo #14, that the worker had been diagnosed with a left knee strain, ACL/MCL sprain, and possible meniscus injury. The NCM noted the recent request for physiotherapy extension and granted MRI for the left knee. She wrote, "discussed with C/A Martini who agrees medical supports ongoing problems and MRI funding allowed." She also noted the January 12, 2005 note from Dr. Teplinsky that the worker was unable to stand for any length of time and had been unable to resume her position in retail sales.

[21] In a report dated August 16, 2006, Dr. Teplinsky advised that he had treated the worker for a knee injury on August 3, 2004, August 10, 2004, September 15, 2004, October 27, 2004, November 17, 2004, December 31, 2004, January 28, 2005, December 30, 2005, June 21, 2006 and August 14, 2006. The worker also saw Dr. Bacher on August 17, 2004. Dr. Teplinsky wrote:

> [The worker] is suffering from persistent pain in her left knee secondary to a soft tissue injury. The MRI of her left knee revealed a mild chondromalacia patella. On her most recent examination she was noted to have crepitis in her left knee. The rest of the examination was within normal limits. [The worker] has been referred to Dr. J. Hummel.

[22] The worker's journal entry for August 17, 2004, recorded that she saw Dr. Larry Bacher instead of Dr. Teplinsky who was away on vacation because she developed extreme pain in her left knee after returning to work on August 16. The worker stated that Dr. Bacher prescribed Vioxx, and physiotherapy for the left knee, and wrote a note to the concurrent employer indicating that the worker was unable to return to work because of her injury.

(iv) The worker's testimony

[23] The worker stated that she had kept a journal of all the events following her accident of July 28, 2004, and that she had recorded these notes on the day of the events described.

[24] The worker described the accident of July 28, 2004: she was standing on a sectional cement parking curb and leaning against a fence, when a co-worker ran into her with a John Deere tractor, striking her on the left leg at the shin. The co-worker panicked and ran into her a second time, striking her higher up on the left leg just below the knee, and the tractor jumped over the curb, leaving the worker’s left leg pinned underneath the tractor in a twisted position. She stated that she remained pinned in that position for about 10 minutes until the caretaker arrived and pulled the tractor off her. The worker testified that she had pain and

swelling in her left leg, shins and knee. She stated that at the hospital, her leg was swollen from the knee down.

[25] The worker stated that after being ordered off work by family physician Dr. Teplinsky, she kept her leg elevated, used crutches to stay off her left leg and self-medicated with heat and ice until, on August 10, 2004, Dr. Teplinsky cleared her to return to work on August 16.

[26] She stated that as soon as she started to use her left leg at work on August 16, she experienced worsening pain in the left knee and saw Dr. Bacher on August 17. She stated that Dr. Bacher sent a medical note to her concurrent employer stating that she was unable to stand. The worker stated that she presented Dr. Bacher's medical notes to the concurrent employer, which are not in the file, and said she would provide them to the Panel and Ms Ferguson post-hearing.

[27] The worker stated that the accident employer accommodated her and provided light-duty work for the remainder of her summer employment contract. She stated that she was able to perform light caretaking duties by using a wheeled chair and performing tasks in a continuously sitting position and that she was not required to do any standing, walking or lifting. She stated that when she was assessed by Dr. Teplinsky on August 10, she had not been using her left leg since the day of the accident. She reiterated that as soon as she returned to work and started walking and standing on her left leg, her left knee became painful, swollen and "locked," and she returned to her family physician immediately for advice. She stated that the advice was to avoid standing and walking.

[28] The worker stated that when she returned to school in September, where she was studying political science and journalism, she was driven by a family member to and from school and was able to avoid distance-walking, standing, or climbing.

[29] The worker described her part-time job with the concurrent employer, a retail clothing chain store: her tasks included maintaining inventory, shipping, lifting boxes, serving customers on the floor, cashier duty, and staffing fitting rooms. She stated that it was not possible to do any of these jobs from a sitting position: all required continual standing and/or walking. Her normal pre-accident shift was weekends, Friday night, all day Saturday and Sunday, averaging 12 to 15 hours per week or 60 hours per month.

[30] The worker testified that following the accident she asked her manager, on a number of occasions, which she said were documented in her notes in the Case Record, for modified work that did not require standing. She stated that on each occasion her manager informed her that they could accommodate her with modified hours but they could not provide any modified work which required continual sitting. The worker stated that she had advised her Claims Adjudicator of this fact, and again referred to her journal notes in the Case Record, recording her conversations. She stated that she gave written consent for the Claims Adjudicator to speak to the concurrent employer, and reiterated that she was never offered modified work at any time by the concurrent employer which would avoid continual standing and walking.

[31] The worker stated that she was able to return to part-time work with the concurrent employer in February 2005 as a result of being issued any knee brace which serve to stabilize her

left knee, and that she continued to work part-time at modified hours but at regular duties. She continued to work for the concurrent employer until she left later in 2005.

[32] The worker stated that she returned to summer employment with the accident employer during the summer of 2005 and again during the summer of 2006 and both years she was provided with modified duties which eliminated all heavy physical work and allowed her more rest breaks as required.

[33] The worker testified that she had no prior injuries or symptoms of any kind in the left leg prior to the accident of July 2004. She stated that she had been active in sports, particularly soccer, but since the accident of July 2004 she is no longer able to play soccer, is unable to dance, cannot wear high heels, and is unable to do any heavy lifting. She continues to use the knee brace as required. She stated that she does not have regular treatment of the left knee at this time and that she was not willing to have the arthroscopic surgery proposed by Dr. Hummel because of her young age, although it may be required in the future.

(v) Submissions of the worker's representative

[34] Mr. McCormick reviewed the medical evidence in detail. He also reviewed the worker's journal notes which are contained in the Case Record, which he submitted fully corroborated the worker's testimony. He argued that Dr. Teplinsky's Functional Abilities Form from August 10 was premature and that the worker evidently became severely symptomatic following her return to work on August 16, as shown by the subsequent medical reports, as well as by the fact that the worker was immediately provided suitable modified work by the accident employer. He submitted that the medical evidence clearly documented that the worker was unable to return to work with the concurrent employer for the reason that the concurrent employer did not have suitable work available within her medical restrictions and functional capabilities and was unable to accommodate the medical restrictions that she was unable to stand or walk for prolonged periods.

[35] Mr. McCormick reviewed the worker's journal notes in detail and submitted that this was reliable evidence first, that the worker had fully complied with the obligation to mitigate her circumstances and to cooperate with ESRTW, and second that suitable modified work was never made available or offered to the worker during the period in dispute by the concurrent employer.

[36] The worker was therefore entitled to LOE benefits, for the period from August 16, 2004 until September 3, 2004, when it was obviously impossible for her to do two jobs; and also, from September 4, 2004, until her return to work in February 2005, on the grounds that suitable modified work was not available from the concurrent employer.

[37] With respect to the second issue of entitlement for a permanent impairment in the left knee, Mr. McCormick submitted that it was clear that two years after the accident the worker's knee symptoms had not resolved, and that the diagnosis of chondromalacia patella and mixoid degeneration in the left knee constituted proof of permanent impairment.

(vi) Submissions of the employer's representative

[38] Ms Ferguson submitted that the worker's left knee condition was not related to the accident of July 28, 2004, and that there was no injury to the left knee as a result of that accident. She submitted that there was no statement of cause for the diagnosed condition of chondromalacia patella and mixoid degeneration, which was most probably related to other non-compensable factors. She submitted that the medical opinion of the Board medical consultant should be determinative.

[39] Ms Ferguson noted that under the provisions of the *Ontario Human Rights Code* the concurrent employer had a duty to accommodate the worker and if it failed to do so, it would be manifestly unfair to charge the accident employer the costs of the claim. The accident employer had fully complied with its obligations under the WSIA and provided modified work beginning on August 16, 2004, notwithstanding its conviction that the worker’s left knee injury was not related to the compensable accident.

[40] Ms Ferguson also submitted that weight should be placed upon the Claims Adjudicator's notes in the Case Record, which indicated that the worker's manager at the concurrent employer had advised that there was always some place for the worker to sit and that the Claims Adjudicator had concluded that suitable work was available from the concurrent employer.

[41] She submitted that the worker had been found capable of performing the regular duties of caretaker with the accident employer as of the Functional Abilities Form of August 10, 2004, and that the worker therefore was equally capable of performing her job with the concurrent employer.

[42] She submitted that there was no entitlement for permanent impairment in the left knee on the grounds as stated above, that there was no relationship between the worker's left knee condition and the compensable accident of July 28, 2004.

(vii) Post-hearing evidence

[43] Following the hearing, the worker undertook to provide a copy of any medical reports submitted to the concurrent employer and, the Panel undertook to obtain an un-expurgated copy of the clinical notes at page 70 of the Case Record. Following receipt and distribution of post-hearing documents, the parties will have an opportunity for final written submissions.

[44] On August 17, 2004, Dr. Bacher issued a note stating that the worker was unable to work because of a leg injury.

[45] In a report dated September 3, 2004, the physiotherapist reported that the worker was being treated for a left knee injury sustained at work, with medical restrictions against prolonged standing or walking for greater than 15 minutes, no kneeling or bending, no stair or ladder climbing, effective two to three weeks, pending a reassessment.

[46] The clinical notes from Dr. Teplinsky make no reference to a prior knee problem.

(viii) Post-hearing submissions

[47] Post-hearing submissions were received from the two parties to the appeal as well as from the worker's concurrent employer.

[48] In submissions dated March 12, 2009, the worker's representative submitted that Dr. Teplinsky's notes as well as the report from Dr. Bacher corroborated the worker's testimony. He submitted that since the worker had already returned to duties with the accident employer, Dr. Bacher's letter of August 17, 2004, could only refer to the worker's concurrent employer, meaning that the worker was incapable of working for the concurrent employer at that time. Mr. McCormack submitted that the Tribunal did not have the authority to apply the terms and conditions of the WSIA to a third party, i.e., other than the accident employer. He submitted that the employer's assertion that a separate employer was responsible for the costs associated with the worker's claim was inconsistent with the WSIA. He also submitted that the medical evidence established that the worker did have a permanent impairment in the left knee. With respect to the concurrent employer, he submitted that the concurrent employer had no obligation under the WSIA to provide early and safe return to work, and that the worker had returned to her pre-accident employment in February 2005, when she was physically capable of doing so.

[49] On behalf of the accident employer, Ms Ferguson submitted that it had fully complied with the provisions of ESRTW under the WSIA, and was not responsible for the worker's loss of earnings from part-time employment with the concurrent employer. She argued that the worker had been able to return to work with the accident employer on August 16, 2004, and that the employer had not been asked for modified work. It was the employer's position that sections 40 and section 41 of the WSIA should be interpreted to require all employers, even the non-accident employer, to fulfil their duty to return an injured worker to work or to accommodate the worker up until the point of undue hardship. Ms Ferguson cited the provisions of the *Ontario Human Rights Code*, which she submitted imposed an obligation upon the concurrent employer to accommodate the worker's disability. Finally, she submitted that there was no medical evidence of a permanent impairment of the left knee, either from the ultrasound of November 23, 2004 or the MRI of February 24, 2005.

[50] At the invitation of the Tribunal, the concurrent employer, a retail chain store, was invited to make post-hearing submissions on the issue of the worker's entitlement to LOE benefits from August 2004 until February 2005, and upon the issue of work accommodation. The concurrent employer submitted that the accident employer had been able to accommodate the worker's physical restrictions inasmuch as she was able to perform her duties in a seated position with the provision of a rolling chair. The concurrent employer submitted that it was unable to accommodate the worker between August 16, 2004 and October 29, 2004, based on the medical restrictions issued by the physiotherapist and Dr. Teplinsky, which effectively ruled out prolonged standing or walking beyond 15 minutes, as well as ladder climbing, all of which were required and accounted for 75% of the worker's duties. The concurrent employer submitted that it was incapable of providing modified work for this worker without undue financial hardship. Subsequent to October 29, 2004, the concurrent employer had advised the Claims Adjudicator that it could accommodate the worker, on the basis that she was able to stand for up to four hours, but that the modified work on offer had been rejected by the worker. The concurrent employer submitted that it had fulfilled its obligations under the *Ontario Human Rights Code*,

and was not responsible for the worker's loss of earnings at any time between August 2004 and February 2005.

(ix) Law and policy

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

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

> **43.** (1) A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins. The payments continue until the earliest of,
>
> (a) the day on which the worker's loss of earnings ceases;
>
> (b) the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury;
>
> (c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury;
>
> (d) the day on which the worker is no longer impaired as a result of the injury. 1997, c. 16, Sched. A, s. 43 (1).

[53] Compensation for non-economic loss is set out in section 46.

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

[54] Pursuant to sections 112 and 126 of WSIA, the Appeals Tribunal is required to apply any applicable Board policy when making decisions. Pursuant to WSIA section 126, the Board has identified certain policies applicable to this appeal. We have considered these policies as necessary in deciding this appeal. In particular, we have considered Board Policy packages: 183 and 300.

(x) The Panel's conclusions

[55] The two issues before the Panel in this case are: whether the worker has entitlement to LOE benefits between September 2004 and February 2005 as a result of lost income from her concurrent employment in retail sales due to a compensable injury; and, whether the worker has a permanent impairment in the left knee arising from the accident of July 28, 2004.

[56] The employer's representative has raised the issue of the accident employer's liability for the claim, but that issue has not been given a final decision by the Board and is not within our jurisdiction.

[57] The Panel considers the worker in this case to be a reliable and credible witness, whose testimony was given in a straightforward manner without exaggeration and which was corroborated by the documentary evidence in the Case Record.

1. The issue of LOE benefits between August 2004 and February 2005

[58] The employer's representative has submitted first, that the worker's left knee condition was not related to the accident of July 28, 2004, and second, that suitable modified work was available from the concurrent employer.

[59] With respect to the first point, the first medical report from the emergency physician Dr. Mandel dated July 28, 2004, recorded that the worker had sustained pain in the left knee as a result of the accident. In our view, it is important not to minimize the seriousness of the accident of July 28, 2004. The worker was struck twice on the left lower extremity by a very powerful machine, a John Deere mowing tractor, driven by a co-worker. It is evident that the co-worker, also a summer student, was not in control of the tractor, suggesting either a lack of training or supervision, or both. The second time that the worker was hit by the tractor she sustained a blow just below the left knee. The worker was then pinned underneath the tractor for about 10 minutes with her leg in the twisted position.

[60] Following medical treatment, the worker was cleared to return to work on August 10, 2004 by Dr. Teplinsky, but after attempting regular duties involving standing and walking, she was forced to return for further treatment because of severe left knee pain. At that point, the accident employer did provide modified work for the remainder of her summer employment contract, and allowed the worker to work from a seated position with no standing or walking.

[61] Medical restrictions against standing more than 15 minutes were issued on September 3, 2004.

[62] Again, in September 2004, Dr. Teplinsky advised that the worker was unable to work at her concurrent job in retail sales because ongoing left knee pain made it impossible for her to stand or walk. The worker continued to receive physiotherapy treatment throughout the fall of 2004, and on December 3, 2004, the treating physiotherapist advised that the worker required another course of physiotherapy treatment. The physiotherapist reissued restrictions against prolonged walking or standing.

[63] On January 12, 2005, Dr. Teplinsky advised that the worker was still unable to stand for any length of time because of persistent pain in her left knee and left leg.

[64] The concurrent employer, a retail chain store, has advised the Tribunal that the worker's duties required prolonged standing and walking as well as ladder climbing and that these activities accounted for 75% of her retail job duties. The concurrent employer stated that it had been unable to accommodate the worker on the basis of the September 2004 medical restrictions, but that they felt they could accommodate the worker after October 29, 2004, based on their understanding that at that time she was capable of standing and walking for up to four hours.

[65] However, in our view, the medical evidence from both the treating physiotherapist and the treating family physician clearly establish that the worker was not capable of prolonged standing and walking as of October 29, 2004. This condition was documented again by Dr. Teplinsky as of January 12, 2005. As of February 2005, the worker was able to return to her regular part time retail sales job with the concurrent employer. In our view, the medical evidence

from the worker's treating healthcare providers has established that she was not capable of returning to her retail sales job prior to February 2005. She therefore has entitlement to LOE benefits for any and all loss of earnings from her concurrent employment between the accident date and her to return to work with the concurrent employer in February 2005.

[66] The employer's representative has raised the interesting argument that the concurrent employer had an obligation to re-employ the worker under the provisions of section 41 of the WSIA, and that the obligation to re-employ and to provide suitable alternative work applied equally to the accident employer and to the worker's concurrent employer.

[67] In our view, the early and safe return to work provisions set out in the WSIA at part V of the statute, at sections 40 and 41 are intended to apply to the accident employer and to the accident employer alone. It is clear from the language of section 40(a) and (b) that it is the accident employer's obligation to maintain contact with its injured employee and to attempt to provide suitable and available employment consistent with the injured worker’s functional abilities.

[68] A second consideration respecting our understanding that the employer referred to in section 41 is the accident employer’s obligation to re-employ, set out in section 41, is explicitly limited to workers who had, on the date of injury, been continuously employed by the employer for at least one year. The re-employment obligation is further limited under the provisions of section 41(7) by the imposition of time limits: the re-employment obligation lapses after the earliest of the expiration of two years from the date of injury or, one year from the date of full recovery, or, age 65. While the statute does not specifically identify the employer as the "accident employer," the plain meaning of the time limit sections of the WSIA is that the employer referred to in the statute, and to whom the time limits apply, is the employer in whose workplace the injured worker sustained the injury.

[69] The employer's representative has also submitted that the concurrent employer also had a duty to accommodate the worker in this case under the provisions of the *Ontario Human Rights Code*. That is undeniably true. However, there is no evidence before the Panel, and certainly there has been no complaint from the worker in this case, that the provisions of the *Ontario Human Rights Code* have been abrogated. This Panel has no jurisdiction over the issue of the concurrent employer’s duty to accommodate under the *Code*.

[70] The employer's representative has complained in her post-hearing submissions that the employer was denied the opportunity to cross-question the concurrent employer with respect to its accommodation obligations. With respect, the employer had every opportunity during the pre-hearing phase of the proceedings, to request the participation of the concurrent employer as a witness at the appeal hearing, by Tribunal summons, if necessary. That option was not exercised.

[71] In the final analysis, the question before the Panel in this case was not the concurrent employer's liability to provide accommodated employment but rather, whether the injured worker’s loss of earnings with the concurrent employer was due to her compensable injury.

[72] It is the Panel's finding that as a result of her compensable left knee condition, the worker was not capable of performing the work available to her from the concurrent employer from the

date of the accident until her return to work in February 2005. The worker is therefore entitled to LOE benefits for any and all loss of earnings from her concurrent employment between the date of the accident and her return to work in February 2005.

2. Entitlement for permanent impairment of the left knee

[73] The worker sustained an injury to her left knee as a result of being struck repeatedly by a John Deere tractor and then being pinned underneath the tractor with her leg in a twisted position for at least 10 minutes. Continuity of treatment and complaint for a left knee injury has been established based on documentation in the medical files contained in the Case Record, from the date of the accident through to May 2007, with the prospect of further surgery identified by treating specialist Dr. Hummel. We are satisfied that the worker's condition is permanent and ongoing.

[74] The worker is entitled to a NEL assessment and a NEL award for a permanent impairment in the left knee arising from the compensable accident of July 28, 2004.

DISPOSITION

[75] The appeal is allowed.

[76] The worker was not capable of performing the work from the concurrent employer from the date of the accident until her return to work in February 2005. The worker is entitled to LOE benefits for any and all loss of earnings from her concurrent employment between the date of the accident, July 28, 2004 and her return to work in February 2005.

[77] The worker is entitled to a NEL assessment and a NEL award for permanent impairment in the left knee arising from the compensable accident of July 28, 2004.

DATED: September 22, 2009

SIGNED: R. McClellan, B. Wheeler, D. Felice