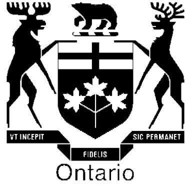

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2797/07

BEFORE:	M. Crystal: Vice-Chair
HEARING:	January 20, 2009 at Toronto Oral hearing
DATE OF DECISION:	January 23, 2009
NEUTRAL CITATION:	2009 ONWSIAT 207
DECISIONS UNDER APPEAL:	WSIB ARO decision dated October 31, 2006

APPEARANCES:

For the worker:	Mr. Emmanuel Abitbol, consultant
For the employer:	Mr. David Gorelle, Legal counsel

Workplace Safety and Insurance Appeals Tribunal

505 University Avenue 7th Floor
Toronto ON M5G 2P2

Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

505, avenue University, 7e étage
Toronto ON M5G 2P2

REASONS

(i) Introduction

[1] This appeal was heard on January 20, 2009 in Sault Ste. Marie.

[2] The worker appeals the decision of Appeals Resolution Officer (ARO) B. J. Romano, dated October 31, 2006. The employer cross appeals the decision. That decision concluded that:

i) The worker was not entitled to loss of earnings (LOE) benefits in November 2004 or subsequent to his layoff from work on January 24, 2005;

ii) The worker was entitled to health care benefits in relation to a shoulder injury that resulted from a workplace accident that occurred on January 9, 2004; and

iii) The worker was entitled to LOE benefits for the period from November 3, 2005 to December 12, 2005, in connection with shoulder surgery that the worker underwent in relation to his shoulder injury.

[3] The worker was represented by Mr. Emmanuel Abitbol, consultant. The employer was represented by Mr. David Gorelle, legal counsel. The worker appeared and testified at the hearing. The employer's disability case manager and its manager of equipment and building maintenance also testified at the hearing. Submissions were provided by Mr. Abitbol and Mr. Gorelle.

(ii) The issues on appeal

[4] In relation to the worker's appeal, the issue to be determined is whether the worker is entitled to LOE benefits for the period subsequent to his layoff from work on January 24, 2005.

[5] At the appeal hearing, the worker's representative advised that the worker wished to withdraw his appeal in relation to entitlement to LOE benefits for a period in November 2004. The worker's representative indicated that the worker was aware that if he wished to pursue this issue in the future, the matter would be subject to the provisions in the *Workplace Safety and Insurance Act, 1997* concerning the time limits for appeals. In the circumstances, I agreed to allow the worker to withdraw his appeal in relation to that issue.

[6] In relation to the employer's cross-appeal, the issues to be determined are:

i) Whether the worker is entitled to health care benefits in relation to a shoulder injury that resulted from a workplace accident that occurred on January 9, 2004; and

ii) Whether the worker is entitled to LOE benefits for the period from November 3, 2005 to December 12, 2005, in connection with shoulder surgery that the worker underwent in relation to his shoulder injury.

(iii) The evidence

[7] The worker suffered a workplace accident that occurred on January 9, 2004. At the time of the accident, the worker was employed by the accident employer, a municipal corporation, as a watchman/janitor. The accident occurred when the worker was walking down a flight of stairs at work, lost his footing and fell down the stairs. The worker testified that as he was falling he

reached out for the railing with his right arm, but that he could not hold the railing, and he fell down the stairs landing on his shoulder. He stated that, upon picking himself up after the fall, he did not experience any immediate pain in the shoulder. He testified that he reported to his supervisor, the manager of equipment and building maintenance ("the supervisor"), that he had fallen down stairs, and that the supervisor asked him if he needed to obtain medical treatment. The worker testified that, at the time of the accident, he did not believe that he had suffered a serious injury, and that he did not believe that there was a need to obtain medical treatment.

[8] At the time of the accident, the worker did not make a claim to the Board in relation to the January 2004 fall, and the employer did not complete an Employer's Report of injury in relation to the accident.

[9] The worker testified, however, that his right shoulder became symptomatic in or about March 2004, and that he sought treatment from Dr. Dan Sicoli, chiropractor, at that time. The case materials included clinical notes prepared by Dr. Sicoli, which indicated that the worker obtained treatment from Dr. Sicoli on several dates in March and April 2004, beginning on March 23, 2004. The worker testified that Dr. Sicoli referred him for physiotherapy to treat the shoulder, and the case materials include notes apparently prepared by K.M. Hinding, the worker's physiotherapist, which indicate that the worker was treated for his right shoulder pain beginning in April 2004.

[10] An initial assessment form, dated April 12, 2004, prepared by the Ms. Hinding, indicated that the worker started to get shoulder and arm pain "26 days ago" (i.e., in March 2004). At the appeal hearing, the worker testified that, when he first obtained treatment for his shoulder from Dr. Sicoli in March 2004, he told Dr. Sicoli that he had fallen on the shoulder at work in January 2004. According to an internal Board memorandum, dated January 25, 2005, prepared by the Board's Claims Adjudicator (CA), the CA had a telephone conversation with Dr. Sicoli on that date, in which Dr. Sicoli advised the CA that the worker had not mentioned a January 2004 accident to him when he treated the worker in March 2004. The memo stated that "Dr. Sicoli reviewed his records and stated [the worker] never mentioned to him about injuring himself at work in January 2004." The memo stated that Dr. Sicoli determined from his records that the worker "came in on March 23, 2004 with complaints of right shoulder pain for the last couple of weeks prior to attending chiropractic treatment."

[11] At the appeal hearing, the worker and the supervisor both testified about the worker's work duties. The evidence about the worker's duties was generally consistent, and not contentious in this appeal. The supervisor testified that the worker's work duties fell into two general categories, associated respectively with work as a watchman, and work as a janitor. The "watchman duties" included acting as a dispatcher for the municipality's field crews, fielding and responding to calls from outside workers and members of the public, receiving sewer pump station alarms, monitoring the heat in the municipal building, ensuring that windows and doors were closed, monitoring people coming onto the building site during his shift, and other related duties associated with monitoring the building. The worker's "janitor duties" included mopping and sweeping floors, hosing down the garage floor, cleaning washrooms, keeping doorways clear, disposing of garbage, and other similar or related activities.

[12] The supervisor testified that priority was to be given to the worker's watchman duties by the worker. He stated that, prior to the worker's January 2004 fall down the stairs, he was aware of the fact that the worker suffered from some non-work related health issues, and that the worker was given flexibility in relation to the janitor duties that he performed. He stated that the worker was expected to perform his watchman duties, but that it was understood that the worker would perform as many of the janitor duties as he felt able to do. He stated that the worker was to use his own discretion as to the extent of the janitor duties that he would perform, and if some of the janitor duties were not performed by the worker, it would not be a problem and there would be no disciplinary consequences for the worker.

[13] At the appeal hearing, the worker testified that he experienced difficulties as a result of a few non-work-related medical conditions. These included kidney disease, hypertension and depression. The worker also testified that in 2003 or 2004 he was experiencing pain in his feet and knees, but that he was subsequently prescribed orthotics and that the orthotics relieved the problems associated with his feet and knees to a great degree. The worker stated that he underwent a kidney biopsy in or about 2003 and that there were complications associated with infection subsequent to the procedure. He stated that he was hospitalized for a few days as a result of the kidney problems, and that subsequently he required a period of bed rest.

[14] The supervisor testified that he was aware that, prior to the January 2004 fall, the worker suffered from kidney disease, as well as problems with depression and anxiety. He stated that he was aware that the worker fatigued easily, and for that reason, he was provided with flexibility in the janitorial duties that he was required to perform.

[15] The supervisor testified that the employer became aware that the worker had a disabling shoulder injury in April 2004, when the employer received documentation from Dr. Sicoli concerning the worker's shoulder injury. The case materials included an internal Board memorandum, dated December 14, 2004, prepared by the CA, which stated that she had spoken to the supervisor and that he indicated that "it wasn't until April 2004 that [the supervisor] became aware [the worker] had started to go for physiotherapy and requested modified work."

[16] The supervisor testified that during the period between January and April 2004, although the worker had flexibility in relation to the janitorial duties he was required to perform, it did not appear that the worker was having particular problems in relation to his right shoulder. The supervisor stated that during this period, it was his impression that the worker's general condition was improving. After the supervisor received documentation in April 2004 from Dr. Sicoli, the worker's duties were restricted in relation to the use of the shoulder. In this regard, the worker was not required to perform overhead lifting, and other co-workers attended to disposing of garbage. He stated that the worker's duties also changed in relation to mopping. The supervisor stated that the worker did not experience any wage loss as a result of the change in duties.

[17] The worker suffered a further incident on November 15, 2004, in relation to his right shoulder. A Worker's Report of Injury in relation to the matter, dated November 30, 2004, stated, in part:

> *Describe what happened to cause your injury*:...
>
> Walking up stairway carrying floor wash bucket with wringer inside bucket, in right hand, broom and mop in left hand. Holding bucket handle and wringer in right hand, the wringer slipped from my grip, causing the pail to tilt backwards. I felt a jolt of pain in my already injured shoulder which occurred in January of 2004.

[18] The supervisor testified that the worker went home after the accident on November 15, 2004, and he also lost time the next day. He stated that the worker had a shorter shift on the day after that, and that he returned to work for that shift. The supervisor testified that after the worker returned to work following the November accident, his duties were modified further, in that the worker performed mostly work which required him to use the telephone or to sit at his desk. He stated that between November 2004 and January 2005, the worker performed only the lightest of physical duties associated with his janitorial work, such as replacing paper towel rolls in the washrooms.

[19] At the appeal hearing, the worker testified about a further incident that occurred at work on January 7, 2005. The worker testified that on that date, he was working at his computer and when he stood up from his desk, he had a sudden and strong urge to urinate. He attributed this unusually strong urge to his ongoing kidney disease as well as to the fact that he had been prescribed and was taking a water pill, due to his non-compensable medical condition. He stated that the washroom was on another floor of the building and he did not believe that he could get to the washroom in time, due to the problems he had been having with his feet and knees, and he was unable to run. The worker testified that he entered the boiler room, which was closer than the washroom, where there was a floor drain, and that he urinated into the floor drain. He testified that the floor drain emptied into the sewer system. The worker testified that he had urinated into this floor drain a few times before the incident on January 7, 2005.

[20] While the worker was urinating into the drain, he was observed by a co-worker who was responsible for the equipment in the boiler room. The co-worker reported the incident to the employer's management. The incident was discussed at a meeting held on January 24, 2005, attended by the worker, the supervisor, the disability case manager, a union representative, the commissioner, who was responsible for the municipality's public works, and the municipality's manager of human resources. As a result of the meeting, the employer's management determined that it wished to obtain further information concerning the general state of the worker's health. The disability case manager wrote correspondence, dated January 26, 2005, to Dr. R. D. Wytsma, the worker's family physician to obtain such further information. The correspondence stated in part:

> The meeting on January 24th, 2005 was held as a result of the following incident. On January 7th, 2005, [the worker] was observed urinating in a floor drain stating he was not well enough to walk down the stairs to use the bathroom as the reason. Aside from the Health and Safety concerns, the employer is concerned that [the worker's] health is significantly limiting him in the workplace. The essential duties of the Janitor /Watchman position include the ability to manoeuvre throughout the building. The Physical Demands Analysis for Janitor / Watchman has been enclosed for your review.
>
> At the meeting, [the worker] provided details of his medical conditions. He indicated he suffers from renal disease and provided an internet printout of IgA Nephropathy. He also indicated he suffers from hypertension, has bilateral knee problems, bilateral foot problems, for which he is being fitted for orthotics, as well as the right shoulder injury. It

> is encouraging that [the worker] is utilizing the services of the Employee Assistance Program (EAP) for stress related concerns.
>
> [The worker] has indicated that he enjoys his job and appreciates the flexibility it provides him for attending to his various medical appointments. However, the employer is concerned that [the worker] may be minimizing his limitations. At the meeting, [the worker] would indicate that his health is improving and conversely, he would indicate that his medical conditions limit his functioning in the workplace and his ability to attend work on a regular basis.
>
> Please be advised that [the worker] has been placed off work and on sick leave until the employer receives definitive information with respect to his medical condition and his ability to perform the duties of his job.
>
> Please provide definitive comment with regard to the following.
>
> 1. Is [the worker] capable of returning to work and performing the duties of Janitor / Watchman as per the attached PDA [Physical Demands Analysis]?
> 2. Please comment on [the worker's] current medical status.
> 3. What precautions, limitations or restrictions would you place on [the worker]?
> 4. In your opinion, would [the worker] benefit from any further treatment or rehabilitation? Please provide any further recommendations.
> 5. Please provide a prognosis with respect to [the worker's] medical conditions.
> 6. Please comment on [the worker's] ability to attend work on a regular basis.
>
> ….

[21] According to correspondence, dated June 23, 2005, from the employer to the worker, referred to in greater detail below, the worker was absent from work due to illness from January 10 to 13, 2005. At the hearing, the worker testified that he could not recall being absent from work on those dates, but acknowledged that he probably was absent from work at that time, if that was the information which was disclosed by the employer's records. He stated that, if he was absent from work due to illness at that time, the absence might have been related to his kidney problems.

[22] The worker testified that shortly after the meeting held on January 24, 2005, the supervisor spoke to him and advised him that the employer would be seeking the further medical information. The worker testified that he did not agree to allow the employer access to his full medical records, however, he signed a consent which would allow the employer to obtain medical information from Dr. Wytsma in response to specific questions posed by the employer. The questions were those noted above in the correspondence dated January 26, 2005. The worker also testified that, on January 24, 2005, the supervisor told him to that he was to go home with pay for the day, and that he was not to return to work until the employer obtained further medical information from his physician. The worker testified that he initially objected to this decision, but that he ultimately agreed to go home.

[23] The supervisor testified that the employer was concerned about the incident that occurred on January 7, 2005 because it created health and safety concerns relating to sanitation in the workplace, but also because it raised questions about the worker's ability to be mobile in the workplace. It was noted that the worker often worked alone, and could be the sole person

responsible in a situation of emergency. If the worker did not have the mobility to get to the washroom, he might not be able to respond adequately to such an emergency situation. The supervisor and the disability case manager both indicated that there was a concern that if the worker had a lack of mobility, this could be a factor affecting both his own health and safety, as well as the health and safety of others.

[24] The worker testified that, on February 7, 2005, he filed a grievance with the employer in relation to its decision to send him home pending the further medical information. He testified that he wanted to remain at work, and that he believed that he was fit to perform the modified work which had been provided by the employer, in keeping with his restrictions for his shoulder injury.

[25] Dr. Wytsma prepared a report, dated February 11, 2005, in response to the employer's request for medical information. The employer's disability case manager testified that the employer received the report on February 18, 2005. The report stated:

> I am writing in reply to your letter of January 26, 2005.
>
> I will attempt to answer the six questions that you list on page two of your letter.
>
> Number One: [The worker] is capable of returning to work and performing the duties of janitor/watchman. As you are aware, he has a disability with respect to his right shoulder that restricts him from doing heavy or repetitive lifting with that arm. The PDA you have enclosed suggests that he might briefly have to use a wheelbarrow of up to 27 kilograms, he would likely have difficulty with that.
>
> Number Two: You ask me to report on his current medical status. I believe you are already aware of the diagnosis of his conditions. They are:
>
> 1. Chronic renal failure, secondary to IgA nephropathy.
> 2. Generalized aches in his knees and feet.
> 3. Right shoulder pain, possible rotator cuff tear, seeing Dr. Elder in April.
> 4. Past history of depression and anxiety, now well controlled to moderately controlled on medication. He is using the EAP program as you are aware.
>
> His medical status with regards to these conditions over the past one to two years has been overall stable. His level of strength or functioning will vary from week to week or month to month to some degree, though as I have said, overall his condition has been relatively stable.
>
> Number Three: You inquire about precautions and restrictions. As stated, he has a restriction with regards to repetitive or heavy work with his right arm.
>
> With regards to his general strength besides having the above noted illnesses, I would point out that he is 60 years old. Shift work and sleep cycle disruption may also be a difficulty, however, he reports that is not the case. Overall however, I would expect that he would have days or periods of fatigue and weakness due to his renal disease and other conditions.
>
> Number Four: You inquire if he would benefit from any further treatment or rehabilitation. As I have noted above, he is waiting to see an orthopaedic surgeon regarding his right shoulder.

> Number Five: You inquire about a prognosis. I anticipate that his condition will remain stable for the foreseeable years. As stated, he will have some degree of fluctuation from week to week.
>
> You inquire about his ability to attend work on a regular basis. As best as can be predicted, I believe he is able to attend work on a regular basis.
>
> I hope this is sufficient information.

[26] On the same date that the employer received this report from Dr. Wytsma, a "Stage 1 grievance meeting" was held in relation to the grievance that had been filed by the worker on February 7, 2005. At that meeting, according to the employer, members of its management team observed the worker apparently having some trouble climbing stairs, and appearing to be unwell. Notwithstanding the report received from Dr. Wytsma, the employer continued to have concerns related to the worker's general health status, and the employer requested that the worker undergo a Functional Capacity Evaluation (FCE) and Independent Medical Examinations (IMEs) to be carried out, respectively, by a physiatrist (i.e., a medical specialist in physical rehabilitation) and a psychiatrist. The worker refused to undergo these further medical evaluations, and effective June 29, 2005, the employer terminated the worker's employment. The employer's Commissioner of Public Works and Transportation sent correspondence, dated June 23, 2006, to the worker, setting out the reasons for the worker's termination. The correspondence stated in part:

> ….
>
> A Step 1 grievance meeting was held with you on February 18, 2005. In attendance with you were [the supervisor], and [the manager of human resources], as well as…[two union representatives]. At that meeting [the manager of human resources], observed you were, in his view, not in good health and had difficulty climbing the stairs to proceed to the meeting. At the time, you stated you could not do "mopping, sweeping, or garbage pick up".
>
> [The supervisor] and [the manager of human resources], that day relayed to [the disability case manager] by e-mail their observations and their concern that the medical information provided by the physician was completely in conflict with their observations and your own statements of being unable to perform numerous janitorial functions of your job.
>
> [The supervisor] raised further concerns with [the disability case manager] regarding your health and safety on the job, the health and safety of your co-workers, the fact that you typically work alone, and that you suffered a recent fall on stairs. Both Managers were concerned that your physician may not have had all of the facts regarding your health and ability to work when preparing his letter of February 11, 2005.
>
> As a result of the observations, [the disability case manager] arranged for a Functional Capacity Evaluation (FCE) for you to attend in Sault Ste. Marie at Back In Motion Physiotherapy, to be paid for by [the accident employer] on March 18, 2005. [The disability case manager] also scheduled an Independent Medical Examination with a physician for you on May 30, 2005.
>
> You attended a W.S.I.B. Mediation meeting on March 9, 2005 concerning a compensable shoulder injury you have. The [accident employer] maintained at this meeting that there is significant discrepancy between the observed limitations you have and what your doctor stated to us. You told those at the meeting you could perform the Watchman portion of your job but not the Janitorial components of your job.

> Due to the contradictions with respect to your health and abilities, the [accident employer] again at that meeting requested you attend an FCE. You indicated you would only participate if the WSIB adjudicator advised you to participate.
>
> On March 10, 2005, [the CA] of WSIB advised you that it was in your best interest to attend the FCE. You told her that you were refusing to participate since it had nothing to do with your compensable claim.
>
> On March 11, 2005, a Step II grievance hearing was held with me. You and your Union were advised again that the City lacked the necessary medical information to accommodate you in a suitable position, and that the City remained concerned for your health and safety.
>
> On March 14, 2005 the Disability Case Manager forwarded correspondence to your physician requesting the physician to comment upon the advisability of an FCE for you given our observations and concerns. You did not attend the FCE scheduled for you on March 18, 2005.

[27] The correspondence went on to state that in further grievance proceedings, the employer confirmed its view that it required additional medical information before it would agree that the worker should return to work. The letter stated that the disability case manager spoke to Dr. Wytsma, and that Dr. Wytsma agreed that the worker's attendance at an FCA was a "reasonable plan" and that at an appointment on April 11, 2005, he advised the worker "very firmly" to attend the FCE. A new appointment was made for the FCE, however, the worker continued to refuse to attend. The correspondence concluded by stating:

> Further, you have refused all of our reasonable efforts and direction to undergo an FCE that would have enabled [the accident employer] to determine if you can return to work safely and if so, an appropriate accommodation consistent with your abilities and any restrictions.
>
> As stated previously, you were required to meet these directions and condition in order to maintain your employment with [the accident employer]. Clearly you have not complied.
>
> Consequently, your employment with [the accident employer] is terminated effective Wednesday June 29th, 2005.

[28] At the hearing, the worker testified that he filed a grievance in relation to the employer's decision to terminate his employment. He indicated that, following further grievance proceedings, he agreed to attend an FCE and the IMEs that the employer had arranged. He attended the FCE on July 19 and 20, 2006. Subsequent to the worker's participation in these further medical evaluations, the worker's employment with the accident employer was re-instated in August 2006.

[29] The case materials include records which indicated that the worker underwent regular physiotherapy treatments in January through June 2005. The records indicate that he attended these treatments during this period about three to five days per week.

[30] The worker was referred by Dr. Wytsma to Dr. G.M. Elder, orthopaedic surgeon, for treatment of his right shoulder condition. Dr. Elder provided a report dated April 20, 2005 which referred to the fact that the worker "fell at work on the 9th of January 2004 directly onto his right shoulder." The report indicated that an MRI scan would be ordered for the shoulder and that a cortisone injection to the shoulder was also suggested.

[31] A further report, dated April 25, 2005, was prepared by Ms. Hinding, the worker's physiotherapist. That report stated that the worker's "first injury…was on January 9, 2004. He stated that he had slid on some steel steps at work" and that the worker "reached out with his right hand to grab the railing to break his fall, and pulled the right shoulder." The report also referred to the "flare-up" of the worker's right shoulder pain in March 2004, and to the accident in November 2004, which is referred to above.

[32] The worker underwent an MRI scan of the right shoulder in or about June 2005. In a report from Dr. Elder, dated June 22, 2005, he referred to the scan and stated that "…interestingly, his rotator cuff is intact. It is in fact his AC joint that has the majority of the pathology with advanced osteoarthritis. There is some fluid in the subdeltoid bursa consistent with bursitis." The worker underwent a bone scan in or about July 2005. The report on the scan, prepared by Dr. Ray Torbiak, radiologist, indicated that the findings on the bone scan were "compatible with [osteoarthritis], prior injury or inflammatory arthritis." In a further report, dated September 26, 2005, Dr. Elder indicated that the worker was put on the waiting list for a "right shoulder distal clavicle resection".

[33] The case materials included an Operative Report, dated November 3, 2005, which provided a pre-operative diagnosis of "right shoulder osteoarthritis AC joint" and a post-operative diagnosis which was the same. The procedure described in the report was consistent with surgical treatment of osteoarthritis of the right shoulder.

[34] Dr. Elder provided a follow-up report dated December 12, 2005. The report noted that the worker had had an "excellent result" with "complete relief of his symptoms". At the appeal hearing, the worker confirmed that he had an excellent result from his shoulder surgery, and that he has not had any problems with the shoulder since his recovery from the surgery. He stated that since he has returned to work in August 2006, he has not had any restrictions in relation to his work duties, and that he has performed his full duties as Watchman/Janitor. Dr. Elder's report of December 12, 2005 concluded by stating:

> ***Impression and Plan:*** There is really nothing further I can do for this gentleman. He has had some physiotherapy and will continue until he has plateaued. He has some questions regarding the cause of this and while this is not typically the result of trauma since he had no shoulder pain prior to his fall in January [2004], I suspect this is a case of early arthritic disease that was significantly flared up as a result of the fall, which is another way of saying that this fall did indeed cause his right shoulder pain.

[35] At the appeal hearing, the worker testified that, in hindsight, he believed that he may have "been stubborn" in his refusal to submit to the employer's request to undergo an FCE in 2005 and that he should not have taken this approach. He stated, however, that he had an honest belief that he was physically capable of performing the modified work that had been provided by the employer. The worker also testified that he believed that he had made "some bad decisions" but that these were precipitated by his feelings that he had been "harassed" by the employer.

(iv) Applicable law

[36] The workplace accident which is the subject of this appeal occurred on January 9, 2004. Accordingly, the worker's entitlement to benefits in this appeal is governed by the *Workplace Safety and Insurance Act, 1997* ("the Act").

(v) Analysis

Entitlement to LOE benefits subsequent to January 24, 2005

[37] In his submissions at the appeal hearing, the worker's representative acknowledged that during the period that preceded January 24, 2005, the employer provided the worker with suitable modified work to accommodate his compensable right shoulder injury, and that had the incident on January 7, 2005, and the subsequent events that followed in relation to that incident not occurred, the employer probably would have continued to provide the worker with suitable modified work. It follows that the employer's reasons for laying off the worker in January 2005 were not associated with his compensable right shoulder injury.

[38] In that connection, I note that the worker's supervisor testified that when the worker was laid off in late January 2005, the employer was not concerned about his shoulder injury. Rather, according to the supervisor, the worker was laid off because the employer was concerned about the worker's general health status, and in particular, whether the worker was well enough to be mobile throughout the employer's workplace facilities in order to perform the work functions associated with the watchman aspect of his job. It does not appear to be contentious that these functions would not be affected by the worker's shoulder injury. Similarly, it does not appear to be contentious in this appeal that the employer was willing to accommodate the worker in relation to any restrictions he had which were due to that injury.

[39] The theory of entitlement advanced by the worker's representative, however, was that the worker was entitled to LOE benefits subsequent to his layoff in January 2005, until he returned to work in August 2006, because the employer was in breach of its obligations imposed by the Act in relation to facilitating the worker's early and safe return to work (ESRTW). In that regard, the worker's representative cited section 40(1)(b) of the Act, which states:

> **40(1)** The employer of an injured worker shall co-operate in the early and safe return to work of the worker by,
>
> ….
>
> (b) attempting to provide suitable employment that is available and consistent with the worker's functional abilities and that, when possible, restores the worker's pre-injury earnings;

[40] The representative stated that the worker was disabled by a work injury at the time of his layoff in January 2005, and that the employer was in breach of its obligations under this provision because it did not provide the worker with suitable employment that was available and consistent with the worker's functional abilities. It was the representative's submissions that the worker's remedy in relation to this breach was LOE benefits for his lost time. He also noted that the question of whether the employer was in breach of its re-employment obligations under section 41 of the Act, was not an issue before me in this appeal.

[41] In the course of his submissions, Mr. Abitbol cited *Decision No. 930/01*. In that decision, the worker was an electrician who had injured his right knee as a result of a workplace accident. The worker in that case returned to modified work with the accident employer. The employer in that case subsequently terminated the worker's employment for reasons which the parties agreed were not related to the worker's compensable injury. In that case, the employer's representative acknowledged that the employer did not have just cause for terminating the worker, and the

Panel found that the employer did not have just cause to terminate the worker. The Panel went on to conclude that the employer had not fulfilled its re-employment obligations under section 54 of the Pre-1997 Act, and that the worker was entitled to temporary total disability benefits for the period subsequent to the termination.

[42] A search of the Tribunal's jurisprudence discloses several decisions which relate to the question of whether an injured worker is entitled to ongoing LOE benefits after the worker's employment has been terminated by the employer. These include:

- *Decision No 1601/08* in which the injured worker's employment was terminated due to misconduct related to a complaint against him of sexual harassment. The Vice-Chair found that the employment was not terminated solely due to misconduct, but rather that the compensable back condition had also been a factor in the termination of his employment, and the worker was awarded LOE benefits subsequent to his termination.
- *Decision No 2540/08* which concluded that the worker's termination was due to an employment situation which was not related to the compensable injury and over which the Tribunal had no jurisdiction. The worker was not entitled to LOE benefits because his loss of earnings did not result from the compensable injury.
- *Decision No. 2035/00* which found that when workers are dismissed from suitable modified work at no wage loss for just cause, the workers must be deemed to have taken themselves out of the workplace through their own actions, and a loss resulting from such actions will not be compensable in the absence of other relevant circumstances. Such a loss cannot be said to be a result of a compensable workplace accident. In that case, the worker was dismissed for just cause, having repeatedly violated the employer's rules concerning break time and leaving work early. The worker was not entitled to further benefits or services.
- *Decision No. 2093/08* which concerned a worker who had returned to modified work but had his employment subsequently terminated. The Vice-Chair agreed with *Decision No. 2035/00* in that workers who are not experiencing a wage loss and are fired for just cause are deemed to have taken themselves out of the workplace through their own actions, and a loss resulting from such actions is not compensable.
- *Decision No. 655/08* which found that an injured worker who was performing modified work had brought about the termination of his employment by walking off the job, and because of personality conflicts with management and co-workers, rather than because of his injury. The worker was not entitled to further LOE benefits.

[43] A common theme in these decisions, and in other Tribunal decisions relating to similar situations, is that where an employer's reasons for terminating the employment of an injured worker are not related to the work injury, the worker will usually not be entitled to LOE benefits for the period subsequent to the termination. In particular, where there has been a determination that the termination was for just cause, the worker will usually not be entitled to further LOE benefits.

[44] *Decision No. 930/01*, which was cited by the worker's representative in this appeal, represents a somewhat different situation than that reflected in the other cases cited above. In that case, the employer's reasons for the worker's termination were not related to the workplace

injury, however, it was apparent to the Panel that there was no just cause for the worker's termination.

[45] I agree with the outcome in *Decision No. 930/01,* in that, although it is not explicit in its reasoning, it appears to adopt the view that where, the termination is not made in good faith, or is not made on a rational basis by the employer, an injured worker may nevertheless be entitled to LOE benefits subsequent to the termination, even when the factors associated with the termination are not related to the work injury. In this regard, I note that unless such an approach is taken, if an injured worker, who had been performing modified work, was terminated in bad faith, or without just cause by an employer, the worker could find himself or herself without employment, disabled by a work injury and with no recourse to benefits, due entirely to the unjustifiable actions of the employer.

[46] In my view, in this appeal, a similar test should be applied in relation to the worker's suspension on January 24, 2005, and his subsequent termination from his employment. I conclude that the suspension by the employer was not related to the worker's shoulder injury. The employer had provided the worker with modified work prior to January 24, 2005, and the worker's representative agreed that, had the incident on January 7, 2005 not occurred, the employer would likely have continued to provide the worker with modified work to accommodate his shoulder injury.

[47] The question remains, however, as to whether the employer's decision to suspend the worker on January 24, 2005 can be attributed to bad faith by the employer. I conclude that the suspension cannot be attributed to bad faith by the employer.

[48] In my view, the employer suspended the worker in order to obtain further information about the general state of his health because it had a *bona fide* concern about his health and safety, and the health and safety of others in the work environment. I come to this conclusion taking into account the fact that the worker admitted that the incident on January 7, 2005 occurred because he was not able to get to the washroom in time. This disclosed that the worker might well have mobility and other health issues that could affect his ability to carry out his duties as a watchman.

[49] The worker's physician, Dr. Wytsma, provided further information in relation to the state of the worker's health in Dr. Wytsma's report dated February 11, 2005. I note that, although that report indicated that the worker was "capable of returning to work and performing his duties of janitor/watchman" it was not entirely unequivocal in its assessment of the worker's health status. It indicated that the worker continued to suffer from "chronic renal failure" and "generalized aches in his knees and feet" in addition to his compensable injury, and his past history of depression and anxiety. The report also indicated that the worker could be expected to have "days or periods of fatigue and weakness due to his renal disease and other conditions".

[50] The worker's supervisor stated that when members of the employer's management team met with the worker on February 18, 2005, the same day that they received Dr. Wytsma's report, to discuss his grievance, he appeared unwell, and that he was also somewhat equivocal in his description of his own health. Taking this information into account, I conclude that the employer's request for further medical information to be generated by independent physicians

was motivated by management's concerns about the health and safety of the worker as well as others in the workplace, and was made in good faith.

[51] I have also taken into account the fact that the worker's grievance concerning his termination in June 2005 was settled in or about July 2006, presumably on the advice of the worker's union advisors, by the worker agreeing to undergo the further medical evaluations. I also note that the worker was apparently encouraged by the Board's CA and his own family physician, Dr. Wytsma, to co-operate in these further evaluations. Agreement by these individuals that the worker should so co-operate suggests that they believed that the employer's request for the further information was reasonable.

[52] The employer's general good faith was also demonstrated by its willingness to accommodate the worker in relation to his shoulder injury prior to January 2005, and its willingness to accommodate the worker in relation to his more generalized health issues, prior to January 2004.

[53] Finally I note that, with the benefit hindsight, the worker indicated that he realized that he had made some poor decisions in relation to the events that occurred after January 2005.

[54] I conclude that the worker's lost time associated with his suspension and termination subsequent to January 24, 2005 was not related to his work injury, and further that, for reasons given above, the employer's actions were motivated by a good faith desire to ensure that the worker could safely perform his watchman duties, as well as by a good faith desire to maintain health and safety in the workplace. I also conclude that the employer acted reasonably in the circumstances. In these circumstances, the worker is not entitled to LOE benefits for the period subsequent to January 24, 2005, except for the period. from November 3, 2005 to December 12, 2005 associated with the worker's recovery from the surgery required for his compensable shoulder injury.

Entitlement to health care benefits and LOE benefits for the period from November 3, 2005 to December 12, 2005

[55] I will address the issue of the worker's entitlement to health care benefits, together with the issue of his entitlement to LOE benefits for the period from November 3, 2005 to December 12, 2005. Although there is no final decision from the Board on the question of the worker's initial entitlement for the shoulder injury that resulted from the January 9, 2004 workplace accident, and I do not have jurisdiction to decide that question directly, both of these areas of entitlement relate to the worker's initial entitlement for his shoulder injury. Accordingly, the same evidence is relevant to both areas of entitlement.

[56] The employer's counsel advanced the argument that it was unlikely that the worker's shoulder problems were related to the January 2004 fall, given that the worker did not experience any pain symptoms in the shoulder or seek medical treatment for the problem until March 2004. He also noted that when the worker underwent surgery for the shoulder problem in November 2005, the report on the surgery was consistent with osteoarthritis rather than findings that might be associated with trauma from a fall. I interpret his submissions to mean that the delay in onset of symptoms and the medical findings are more consistent with the worker's

shoulder problems being attributable to non-compensable naturally occurring degenerative disease than to the January 9, 2004 accident.

[57] I find, however, based on the preponderance of evidence, that it is more probable than not that the January 9, 2004 accident made a significant contribution to worker's right shoulder problem which required surgery in November 2005.

[58] First, I note that the Accident/Incident Investigation Report prepared by the worker's supervisor on the date of the accident indicated that the worker fell on his "knee, shoulder, leg" as a result of the fall. That report also indicated that the accident was witnessed by another co-worker, and proof of accident is not contentious. The right shoulder is circled on the portion of the form that indicates the part of the body that was involved in the accident.

[59] Further, although there appears to have been some delay between the time of the fall and the onset of pain symptoms, the worker was apparently experiencing symptoms by mid March 2004. Although there was a period of about eight or nine weeks after the fall before the worker was bothered by pain, that period of time is not so lengthy so as to conclude that it was improbable that the accident contributed to the symptoms. This is particularly true given that the worker did not experience any shoulder symptoms prior to the January 2004 fall. The supervisor testified that although the worker was accommodated for more general issues prior to January 2004, the worker had not experienced any particular problems with his shoulder prior to early 2004.

[60] I have also been persuaded by Dr. Elder's conclusion which he stated in his December 12, 2005 report, that it was likely that the January 2004 fall contributed to the flare-up of the worker's early osteoarthritic disease. I also note that, although the worker's objective findings were associated with osteoarthritis and bursitis, the report on the bone scan listed "prior injury" as one of the possible factors which were consistent with the findings in the report.

[61] Taking all of this medical information into account, notwithstanding the delay of a few weeks in the onset of the worker's pain symptoms, I find that it is more probable than not that the accident on January 9, 2004 contributed significantly to the worker's right shoulder condition. Accordingly, the worker is entitled to health care benefits for the injury, as well as LOE benefits for the period from November 3, 2005 to December 12, 2005 associated with the worker's recovery from the surgery required for his compensable shoulder injury

DISPOSITION

[62] The worker's appeal is denied. The employer's appeal is denied.

1. The worker is not entitled to LOE benefits for the period subsequent to January 24, 2005, except for the period from November 3, 2005 to December 12, 2005 associated with the worker's recovery from the surgery required for his compensable shoulder injury.
2. The worker is entitled to health care benefits in relation to a shoulder injury that resulted from a workplace accident that occurred on January 9, 2004
3. The worker is entitled to LOE benefits for the period from November 3, 2005 to December 12, 2005, in connection with shoulder surgery that the worker underwent in relation to his shoulder injury.

DATED: January 23, 2009

SIGNED: M. Crystal