



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 498/13

BEFORE: S. Hodis : Vice-Chair
A.D.G. Purdy : Member Representative of Employers
K. Hoskin : Member Representative of Workers

HEARING: March 13, 2013 at Kitchener
Oral

DATE OF DECISION: January 31, 2014

NEUTRAL CITATION: 2014 ONWSIAT 212

DECISION UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) F. Pansino dated
November 29, 2011

APPEARANCES:

For the worker: L. Horne, Office of the Worker Adviser

For the employer: Not participating

Interpreter: None

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

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REASONS

(i) Introduction to the appeal proceedings

[1] The worker appeals a decision of the ARO, which denied the worker a non-economic loss (NEL) redetermination for the left shoulder and a review of loss-of-earnings (LOE) benefits after the 72 month final review date. The worker's 72 month final review date is March 1, 2006. The ARO rendered a decision based upon the written record without an oral hearing.

(ii) Issues

[2] The issues under appeal are as follows:

1. Does the worker have entitlement to a NEL redetermination for her left shoulder?
2. Is the worker entitled to a review of her LOE benefits subsequent to March 1, 2006 for full LOE benefits from December 12, 2008 to September 2009 and partial LOE benefits from September 2009 onwards?

(iii) Worker's testimony

[3] The worker testified that she began her employment with the accident employer in September 1988 as a press operator. Throughout her 20 years at the accident employer, the worker worked as a press operator, in quality assurance and as an assembly worker. In February 2000, the worker injured her left shoulder while working on the production floor doing assembly.

[4] The worker testified that after her injury she was placed on modified duties in the assembly department. The worker testified that she suffered recurrences of her injury while on modified duties.

[5] The worker testified that her first NEL assessment was put on hold as she was to undergo an operation on her left shoulder. The worker had surgery in May 2002 and returned to work after her recovery period to a modified position. The worker participated in physiotherapy for one year. She then had a second surgery on her shoulder in 2005.

[6] The worker testified that in October 2005, she followed up with her surgeon who recommended she use a TENS machine, which she did. The worker testified that this provided some relief. The worker testified that she returned to work and helped around the office but was never assigned a specific job. In December 2005, the worker was given the permanent position of Manufacturing Technician which she worked at until her employment was terminated. This position was an office position. She was required to develop work instruction procedures and maintain prevention maintenance records.

[7] The worker testified that she was never trained for this position but had taken courses for quality assurance and computer courses in 2004 which assisted her in this position. The worker testified that she took these courses on her own to improve her skills as she realized that she would not be able to do physical work any more. She was also a health and safety committee member. The worker testified that her health and safety background also helped her with this new job.

[8] The worker testified that in 2008 her employment with the accident employer was terminated. The worker testified that no one else in the office was terminated. The worker testified that people who worked on the floor were also terminated. The worker testified that she did not have the lowest seniority and that someone else was hired to work in her position.

[9] The worker testified that she went to a massage therapist after her surgery for her left shoulder to help keep the blood flowing in her left shoulder and to keep things moving. She also went to a chiropractor on her own. The worker testified that she still sees a massage therapist every four to six weeks since 2005 and pays for the treatment on her own. The worker testified that the treatments with the massage therapist help prevent her from seizing up.

[10] The worker testified that in April 2010 her family doctor gave her new medication for her increased pain which she is still taking.

[11] The worker testified that after her second surgery she was never able to go back to assembly work.

[12] The worker testified that after her employment with the accident employer was terminated she looked for other work at Service Canada and job websites for jobs that would suit her experience and qualifications. The worker testified that she applied for Manufacturing Technician, Quality Assurance and Record Keeping jobs. The worker testified that she did not get any calls back. The worker testified that through Employment Insurance she participated in a three-week course to assist her with her resume and how to do interviews.

[13] The worker testified that she researched what she could do based on her limitations. She went back to school from June 2009 to February 2010 and took an accounting and payroll course which was paid by Employment Insurance. She was eventually able to secure employment at \$10.70 per hour working as a cashier part time while attending school. The worker was also able to obtain a full-time position in invoicing in April 2010 which she left in October 2012 for a full-time position doing reception and office administration.

[14] The worker was asked if she had a worsening of her symptoms in 2010. The worker testified that she was in pain all the time but not sure if her symptoms had worsened. The worker testified that she attended physiotherapy which helped in reducing her symptoms.

[15] The worker confirmed that she is left hand dominant.

(iv) Medical evidence

[16] A report from Dr. Holtby (surgeon) dated May 3, 2006 indicated that the worker's assessment had not changed significantly in the last six months. The worker's range of motion was as follows: Flexion 100 degrees, Internal rotation to waist level and external rotation to 20 degrees. Dr. Holtby indicated that the worker has a permanent impairment and he did not expect any significant change in the future.

[17] A WSIB Shoulder and Elbow Specialty Program Return to Work Consultation Closure Report indicated that the worker was seen on May 3, 2006. The worker was placed in a full-time permanent modified job at the accident employer and as such no return to work intervention was required.

[18] The worker underwent a NEL assessment in July 2006. Her range of motion for her left shoulder was recorded as follows: Flexion 115 degrees, Extension 25 degrees, Adduction 35 degrees, Abduction 65 degrees, Internal Rotation 35 degrees and External Rotation 70 degrees.

[19] Dr. Noonan (family doctor) in a report dated April 20, 2010 indicated that the worker had a worsening of her condition in the last few months. Dr. Noonan opined that it was unclear whether this acute worsening would improve back to her baseline level of pain and function or whether she would have a persistent deterioration in her symptoms. On April 20, 2010, her range of motion was as follows: Flexion 110 degrees, Extension 15 degrees, Abduction 90 degrees, Adduction 15 degrees, External Rotation 20 degrees and Internal Rotation 30 degrees. Dr. Noonan opined that the worker's extension, internal and external rotation had worsened since her last assessment.

[20] Board Medical Consultant, Dr. Herrick in Board Memo #100A dated May 7, 2010 opined that the worker has deteriorated below her NEL level; however, there was insufficient information to be able to comment on whether it is a permanent or temporary deterioration.

[21] A Health Professional's Progress Report dated September 7, 2010 and completed by Dr. Noonan indicated that the worker had a flare up of pain with decreased range of motion (ROM) in her left shoulder. Her ROM measurements were: Flexion 90 degrees, Abduction 80 degrees, Extension 15 degrees, Adduction 15 degrees, External Rotation 20 degrees, and Internal Rotation 30 degrees.

[22] A report from the physiotherapist dated January 26, 2011 indicated that the worker had been discharged from physiotherapy on January 3, 2011. The report indicated that the worker had reached a plateau in her progress and had returned to her "normal" pain level. The worker's active ROM measurements were: Flexion 100 degrees, Abduction 90 degrees, Internal Rotation reach T11 and external rotation 70 degrees.

[23] Board Medical Consultant, Dr. Herrick in Board Memo #112A dated January 31, 2011 opined that the worker was no longer below her NEL level.

(v) Submissions

[24] The worker's representative submitted that the worker is entitled to a NEL redetermination and a review of her LOE benefits subsequent to her layoff in 2008.

[25] The worker's representative submitted that the medical evidence shows a temporary deterioration in the worker's condition below her NEL rating. The worker's representative submitted that the Board Medical Consultant accepted a temporary deterioration of the worker's condition and granted the worker two physiotherapy extension requests. However, on review, the Board Medical Consultant found that the worker had not deteriorated below her NEL level. The worker's representative submitted that the Board Medical Consultant based his opinion on the physiotherapist report which was missing the abduction and extension range of motion measurements. The worker's representative submitted that the findings of Dr. Noonan should be followed and that they clearly show a worsening of the worker's NEL rating. The worker's representative further submitted that the physiotherapist's findings compared to the NEL findings show some improvement in some areas and worsening in others such as flexion.

[26] The worker's representative submitted that the problem was that there was not enough information in the file to do a NEL assessment to determine if a deterioration had occurred. The worker's representative submitted that the Board Medical Consultant should have requested further information to make a proper comparison.

[27] The worker's representative submitted that the Board failed to properly consider Board *Operational Policy Manual* (OPM) Document No. 18-03-06. The worker's representative submitted that the worker's 72 month final LOE review was never done according to the Policy as the worker was still following up with her surgeon and her permanent impairment was not rated. The worker was still co-operating in the return to work process and the employment relationship was maintained. The Board focused on the worker's no wage loss but failed to follow up on her health status. The worker's representative submitted that the 72 month review was never done as there is nothing in the Board's memos or correspondence to indicate the 72 month lock in. The worker's representative submitted that the Board disregarded the basic guidelines in the review process which led to an unfair and unjust outcome for the worker.

[28] The worker's representative submitted that the Board's 72 month final review memo indicated that the worker had no wage loss and was successfully accommodated. However, the worker was not working at her pre-injury job and was in a highly accommodated job. The worker was unable to get an office job after she was terminated without additional schooling and she was no longer able to work in her pre-injury job of a production worker. The worker was not assessed or rated for NEL at this time. The worker was seen for a follow up in May 2006 by the WSIB specialty clinic and was undergoing continuous massage and chiropractic treatment in 2006. The worker's representative submitted that in March 2006, the worker was actively participating in health care measures and early and safe return to work. The worker's representative submitted that the worker's 72 month review should have been deferred.

[29] The worker's representative submitted that subsequent to her layoff the worker returned to school on her own. The worker's representative confirmed that the worker is seeking full LOE benefits from December 12, 2008 to September 2009 and partial LOE benefits from September 2009 onwards.

[30] The worker's representative referred the Panel to WSIAT *Decision No. 1691/11* and asked the Panel to follow the analysis in that decision.

(vi) Law and policy

[31] Since the worker was injured in 2000, the *Workplace Safety and Insurance Act, 1997* (the "WSIA") is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[32] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision #8, would apply to the subject matter of this appeal:

- Package #39 – Final LOE Review – benefits as of July 1, 2007
- Package # 64 – NEL Redetermination
- Package #74 – Work Disruptions – Layoffs
- Package # 300 – Decision Making/Benefit of Doubt/Merits and Justice

[33] We have considered these policies as necessary in deciding the issues in this appeal.

(vii) Analysis

[34] The worker was injured in February 2000 and suffered a recurrence in September 2001. Although she was originally scheduled for a NEL assessment in November 2001 it was postponed as the worker had surgery to her left shoulder in May 2002. The worker had a second surgery in April 2005.

[35] The worker's 72 month lock in date is March 1, 2006. In July 2006, the worker underwent a NEL assessment and a 14% NEL award was granted in November 2006.

[36] More than 24 months after the worker's 72 month lock in date, she was terminated from her employment in December 2008. In April 2010, the worker suffered a temporary deterioration of her condition as reported by Dr. Noonan in his report dated April 20, 2010. Board Memo #106 dated August 27, 2010 indicated that the Board approved 12 weeks of physiotherapy in light of the worker's temporary worsening in order to return her to her NEL level. Board Memo # 109 dated November 16, 2010 approved an extension of physiotherapy treatments to January 3, 2011. The Board's medical consultant opined that the worker's condition as of January 2011 was no longer below her NEL level.

[37] The worker is seeking a review of her LOE benefits from December 2008 onwards on the basis that she suffered a significant deterioration of her condition below her NEL level and on the basis that when the 72 month period post accident expired she was co-operating in early and safer return to work and health care measures.

[38] Section 44 of WSIA outlines when a review of loss of earnings benefits can take place. Section 44(2) is the subsection that is relevant to the issues in this appeal as the period sought for a review of LOE benefits is post 72 months from the date of accident. The relevant section of 44(2) states:

No review after 72-month period

(2) Subject to subsection (2.1), the Board shall not review the payments more than 72 months after the date of the worker's injury. 2002, c. 18, Sched. J, s. 5 (5).

Exception

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

- (a) before the 72-month period expires, the worker fails to notify the Board of a material change in circumstances or engages in fraud or misrepresentation in connection with his or her claim for benefits under the insurance plan;
- (b) the worker was provided with a labour market re-entry plan and the plan is not completed when the 72-month period expires;
- (c) after the 72-month period expires, the worker suffers a significant deterioration in his or her condition that results in a redetermination of the degree of the permanent impairment under section 47;
- (d) after the 72-month period expires, the worker suffers a significant deterioration in his or her condition that results in a determination of a permanent impairment under section 47;
- (e) after the 72-month period expires, the worker suffers a significant deterioration in his or her condition that is likely, in the Board's opinion, to result in a redetermination of the degree of permanent impairment under section 47;

- (f) after the 72-month period expires, the worker suffers a significant temporary deterioration in his or her condition that is related to the injury; or
- (g) when the 72-month period expires,
 - (i) the worker and the employer are co-operating in the worker's early and safe return to work in accordance with section 40, or
 - (ii) the worker is co-operating in health care measures in accordance with section 34. 2002, c. 18, Sched. J, s. 5 (5); 2007, c. 7, Sched. 41, s. 3 (1, 2).

...

Time for review when clause (2.1) (c) applies

(2.4) If clause (2.1) (c) applies, the Board may review the payments,

- (a) within the 24 months after the date on which it redetermines the degree of permanent impairment;
 - (a.1) within 30 days after the date on which the labour market re-entry plan is completed, where the Board redetermines the degree of permanent impairment of a worker who was provided with a labour market re-entry plan that is not completed when the 24-month period in clause (a) expires; and
 - (b) at any time, if the worker, at any time on or before the day on which the Board reviews the payments under clause (a), fails to notify the Board of a material change in circumstances, or engages in fraud or misrepresentation in connection with his or her claim for benefits under the insurance plan. 2002, c. 18, Sched. J, s. 5 (5); 2007, c. 7, Sched. 41, s. 3 (3).

Time for review when clause (2.1) (d) applies

(2.4.1) If clause (2.1) (d) applies, the Board may review the payments,

- (a) within 24 months after the date on which the Board determines the degree of permanent impairment under section 47; and
- (b) within 30 days after the date on which the labour market re-entry plan is completed, where the Board determines the degree of permanent impairment of a worker who was provided with a labour market re-entry plan that is not completed when the 24-month period in clause (a) expires. 2007, c. 7, Sched. 41, s. 3 (4).

Time for review when clause (2.1) (e) applies

(2.4.2) If clause (2.1) (e) applies, the Board may review the payments during the period that begins on the day the Board determines that the significant deterioration in the worker's condition is likely to result in a redetermination of the degree of permanent impairment and ends on the day it makes the redetermination or determines that no redetermination shall be made. 2007, c. 7, Sched. 41, s. 3 (4).

Time for review when clause (2.1) (f) applies

(2.4.3) If clause (2.1) (f) applies, the Board may review the payments,

- (a) at any time it considers appropriate in the period during which the worker is suffering a significant temporary deterioration in his or her condition; and
- (b) when it determines that the worker has recovered from the significant temporary deterioration in his or her condition. 2007, c. 7, Sched. 41, s. 3 (4).

Time for review when clause (2.1) (g) applies

(2.4.4) If clause (2.1) (g) applies, the Board may review the payments up to 24 months after the date of the expiry of the 72-month period. 2007, c. 7, Sched. 41, s. 3 (4).

[39] Board OPM Document No. 18-03-06 is also relevant to the issues in this appeal and reiterates the requirements in section 44 of WSIA. Board OPM Document No. 18-03-06 also states that a significant deterioration refers to a marked degree of deterioration in the work-related impairment that is demonstrated by a measurable change in the worker's work-related condition. To determine if there is evidence of a significant deterioration, decision makers consider the following factors:

- a. The need for further active medical/health care intervention to improve the worker's condition
- b. Establishment of objective medical evidence to support a significant deterioration
- c. Evidence of increased medical precautions
- d. Job change impacts

[40] Where a significant temporary deterioration is found, LOE benefits may be reviewed for a period of deterioration until the worker recovers from the significant temporary deterioration as supported by objective medical evidence.

[41] Board OPM Document No. 18-03-06 further goes on to explain that when a significant temporary deterioration is accepted it may not be apparent that the worker requires a permanent impairment review. The decision maker continually monitors and assesses the health care information to decide if a redetermination of the worker's permanent impairment should be arranged.

(a) Has the worker suffered a significant deterioration below her NEL level to warrant a review of LOE benefits?

[42] The worker underwent a NEL assessment in July 2006 and was awarded a 14% NEL award in November 2006. Her range of motion for her left shoulder was recorded as follows: Flexion 115 degrees, Extension 25 degrees, Adduction 35 degrees, Abduction 65 degrees, Internal Rotation 35 degrees and External Rotation 70 degrees. Subsequent to her NEL assessment in July 2006, the first objective medical evidence that determined that the worker had a deterioration in her condition was Dr. Noonan's report dated April 20, 2010 in which he indicated that the worker's range of motion was as follows: Flexion 110 degrees, Extension 15 degrees, Abduction 90 degrees, Adduction 15 degrees, External Rotation 20 degrees and Internal Rotation 30 degrees. Dr. Noonan opined that the worker's extension, internal and external rotation had worsened and this was confirmed by the reduction in range of motion measurements. Board Medical Consultant, Dr. Herrick in Board Memo #100A dated May 7, 2010 agreed that the worker has deteriorated below her NEL level; however, there was insufficient information to be able to comment on whether it is a permanent or temporary deterioration. A Health Professional's Progress Report dated September 7, 2010 and completed by Dr. Noonan indicated that the worker's range of motion measurements were: Flexion 90 degrees, Abduction 80 degrees, Extension 15 degrees, Adduction 15 degrees, External Rotation 20 degrees, and Internal Rotation 30 degrees. This report confirmed ongoing deterioration for which the worker was receiving ongoing physiotherapy treatment.

[43] A report from the physiotherapist dated January 26, 2011 indicated that the worker had been discharged from physiotherapy on January 3, 2011. The report indicated that the worker had reached a plateau in her progress and had returned to her “normal” pain level. The worker’s active ROM measurements were: Flexion 100 degrees, Abduction 90 degrees, Internal Rotation reach T11 and external rotation 70 degrees. Board Medical Consultant, Dr. Herrick in Board Memo #112A dated January 31, 2011 opined that the worker was not below her NEL level.

[44] While the worker suffered a significant deterioration in her condition, the objective medical evidence from the worker’s treating physician, physiotherapist and the opinion of the Board’s medical consultant clearly demonstrates that the worker’s deterioration was temporary in nature. The Panel is not satisfied on the medical evidence before it that the worker suffered a permanent significant deterioration below her NEL level that would warrant a redetermination of her NEL. As such, the worker’s request for a NEL redetermination is denied.

[45] The Panel is satisfied that the worker suffered a temporary deterioration of her condition below her NEL level from April 20, 2010 to January 3, 2011. Dr. Noonan in his report dated April 20, 2010 opined that the worker has deteriorated below her NEL level and provides objective medical evidence by way of range of motion findings. The Board’s Medical Consultant, Dr. Herrick confirms that the deterioration had taken place and opined that the worker returned to her NEL level as of January 3, 2011. The Board accepted the worker’s temporary deterioration and allowed extensive physiotherapy treatments in order to restore the worker back to her NEL level.

[46] In accordance with section 44(2.1(f)), the worker is entitled to partial LOE benefits from April 20, 2010 to January 3, 2011 to compensate her for her wage loss during this time period. The Panel notes that the worker was working to some extent during this time period and the wages earned during this time period will be taken into account when determining the quantum of the worker’s LOE benefits.

(b) Is the worker entitled to a review of LOE benefits under section 44 (2.1(g)) of WSIA

[47] The Panel has reviewed *Decision No. 1691/11* that was submitted by the worker’s representative. In *Decision No. 1691/11*, the worker was seeking a review of his LOE benefits post 72 months from the date of accident but prior to the expiration of 24 months post 72 month lock in date on the basis that he was participating in early and safe return to work activities at the time of the 72 month lock in date. The one significant distinguishing fact between *Decision No. 1691/11* and the appeal before this Panel is that the worker in *Decision No. 1691/11* was seeking to review LOE benefits within the 24 month period post the 72 month lock in date. In the appeal before this Panel, the worker’s 72 month lock in date is March 1, 2006. The worker is seeking to review LOE benefits from December 12, 2008 which is more than 24 months post March 1, 2006 and also 24 months post the date the Board determined the degree of permanent impairment under section 47.

[48] Under section 44 (2.4.4) of WSIA and Board OPM Document No. 18-03-06, a worker’s LOE benefits may be reviewed post 72 months from the date of injury if the worker is participating in early and safe return to work activities or health care measures at the time the 72 months expires. If the worker can satisfy this exception to the general rule that LOE benefits are not to be reviewed after 72 months, a review of benefits is limited to the period of 24 months after the 72 month date. Under section 44(2.4.1), a review of LOE benefits post 72 months is

permitted if the worker suffers a significant deterioration in his or her condition that results in a determination of a permanent impairment under section 47, provided that the review takes place before the expiration of 24 months post the date the NEL award is determined. The worker's initial determination of a permanent impairment occurred in November 2006 which was after the 72 month post accident date. Even if the worker would have qualified for this exception to the general rule of no reviews post 72 months, the 24 month period would have expired in November 2008 which is prior to the period for which the worker seeks a review.

[49] Unfortunately for the worker in this appeal, the period in which the worker seeks to review LOE benefits is after the 24 month period post final review date and her NEL determination date. As such, in accordance with the section 44(2.4.4) and (2.4.1) of the WSIA and Board Policy, the Panel is unable to grant the worker a review of her LOE benefits for periods other than the period of April 2010 to January 2011 when the worker suffered a temporary deterioration of her condition below her NEL level.

DISPOSITION

[50] The appeal is allowed in part as follows:

1. The worker is entitled to partial LOE benefits from April 20, 2010 to January 3, 2011 as a result of a temporary deterioration in her left shoulder condition.
2. The worker is denied entitlement to a NEL redetermination for her left shoulder.
3. The worker is denied a review of LOE benefits for all other periods requested.

DATED: January 31, 2014

SIGNED: S. Hodis, A.D.G. Purdy, K. Hoskin