WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 530/05

BEFORE:	R. Nairn: Vice-Chair
HEARING:	September 8, 2009 at Hamilton Oral
DATE OF DECISION:	December 23, 2009
NEUTRAL CITATION:	2009 ONWSIAT 2999
DECISION UNDER APPEAL:	WSIB ARO decision dated October 16, 2008
APPEARANCES:	
For the worker:	Mr. L. Hirscu, CAW Local 504
For the employer:	Ms. L. Russell, Paralegal
Interpreter:	None

REASONS

(i) Introduction

[1] On approximately May 5, 2000, the worker experienced an onset of pain in her low back which she related to the lifting and carrying of grocery items and bags of linen in the course of her employment as a porter on a bulk carrier ship. The Health Professional's First Report of May 17, 2000, provided a diagnosis of "low back pain [with] radiculopathy L leg". The Workplace Safety and Insurance Board (the "Board") recognized the worker's back injury as compensable and she was granted Loss of Earnings ("LOE") benefits. Information on file indicates that the worker returned to her regular duties as a marine porter on approximately July 1, 2000.

[2] The worker experienced an exacerbation of her back pain requiring lost time from work from March 8, 2001 to May 18, 2001. The Board recognized this recurrence as compensable.

[3] The worker suffered a further recurrence of her back pain while at work on February 10, 2002 and received LOE benefits until she returned to work on approximately August 23, 2002.

[4] In Memo #29 dated June 10, 2002, Dr. G. Cantlie of the Board indicated in part:

> I note this is the first med/nursing review of the claim, now over two years from anniversary date. Claimant has pre-existing DDD of spine ("spondylosis") as indicated in plain x-ray of 17 May 00 and confirmed by CAT scans of 05 Feb 01 and 03 Apr 02 which indicate mild spinal stenosis secondary to that process. Her very heavy job description has likely enhanced this condition and the aggravation appears ongoing with good medical continuity. (Conservative) tx has been in order, and she is unlikely to come to surgery.
>
> MMR may therefore be declared as of the 15 Apr 02 report from Dr. Clements. PI evident under roster code 01 for the back; diagnosis chronic discogenic low back pain. Permanent standard back precautions which as Dr. Clements indicates will likely preclude return to her usual job.
>
> MRI scan is in order at Dr. Clements suggestion – however the above recommendations will not be changed and this leads to a surgical procedure.

[5] In September 2002, the worker was examined by Dr. E. Blackman for the purposes of a Non-Economic Loss ("NEL") assessment. Following that assessment, the worker was advised, in a decision dated December 19, 2002, that she was being granted a 19% NEL award for her compensable back condition.

[6] In late 2002/early 2003, it became apparent that the worker would be unable to return to her pre-accident employment and the employer was unable to provide suitably modified duties. As such, the Board offered the worker Labour Market Re-Entry ("LMR") assistance. An LMR assessment was conducted on December 30, 2002 and on approximately February 26, 2003, an LMR plan was developed which recommended a Suitable Employment or Business ("SEB") of "Customer Service, Information and Related Clerks". It was anticipated that the worker would participate in a customer service skills training program followed by a job search training program.

[7] Information on file indicates that the worker completed the customer service skills training program but on June 10, 2003, about two days after starting the job search training portion of her LMR plan, withdrew from the program because of a recurrence of her low back pain. On March 2, 2004, the worker underwent back surgery performed by Dr. M. Clements. The surgery performed was "posterolateral decompression, left L4 nerve root, followed by L3 to S1 segmental instrumentation and fusion". The Board reinstated LOE benefits from March 2, 2004 following the compensable back surgery.

[8] Initially, the Board paid the worker LOE benefits from June 10 to June 30, 2003, since this was the anticipated completion date of the LMR program. The Operating Level denied ongoing LOE benefits after June 30, 2003 being of the view that the worker was fit to work in the SEB of customer service clerk. The worker objected to this decision and the matter was eventually referred to an Appeals Resolution Officer ("ARO"). In a decision dated March 30, 2004, the ARO granted the worker's appeal and directed that full LOE benefits be paid from June 30, 2003 to March 2, 2004. The ARO concluded:

> At issue, then, is whether the worker's level of impairment was likely to have prevented the worker from pursuing employment on June 30, 2003.
>
> I note that the worker was considered totally disabled during acute periods prior to June 2003 based on similar complaints and findings. Both the family doctor and the physiotherapist found the worker to be totally disabled for periods during which sciatica was a predominant symptom. This conclusion was based not only on low back pain recognized by the NEL assessment, but also on the degree of left leg impairment not evident at the time of the NEL assessment and therefore not reflected in the subsequent award.
>
> I find, therefore, the balance of evidence supports that the worker was totally disabled due to her back injury when she withdrew from the LMR plan on June 10, 2003. There is no evidence that the worker's condition improved significantly by March 2, 2004 when the worker underwent surgery.

[9] The worker's LMR plan was suspended while she recuperated from her surgery. In late September 2004, the Claims Adjudicator requested a medical opinion on the state of the worker's condition. In Memo #96 dated October 5, 2004, Dr. Cantlie of the Board indicated in part:

> […] Claimant went on to instrumented three level spinal fusion on 02 Mar 04 now seven months ago. Recovery has been satisfactory and the six month reports from both specialist and fam md (13/21/Sep 04) may serve as MMR date. Diagnosis is multilevel disc disease requiring fusion surgery. Coincidentally, this MMR date comes exactly two years after the initial NEL exam, which now needs to be rebooked on a redetermination basis. […]
>
> In my view, the precautions listed in section 10 of the 21 Sep 04 F26 are adequate for general purposes. If there is any contentious vocational issue about what can or cannot be done, or if there is any concern regarding the "S" in the "ESRTW" policy, then a formal FAE should be done.

[10] According to the decision on appeal, the worker's LMR assistance was reactivated as of November 22, 2004 and she completed the LMR plan on December 17, 2004. As noted in Memo #107 dated December 21, 2004, the worker's LOE benefits, following completion of her LMR program, were adjusted to reflect projected earnings of $9.00 per hour in the SEB of customer service clerk.

[11] On June 7, 2005, the worker was assessed by Dr. P. Loveless for the purposes of a NEL redetermination. Following that assessment, the worker's NEL award was increased to 36%.

[12] In testimony provided at this hearing, the worker indicated that after completing her LMR program, she sent our résumés to a variety of potential employers and in the summer of 2005, found a job as a night auditor, working the midnight shift, with a hotel. She was not paid for her time as she trained for this position and left the employment, after working four night shifts, because of increased back pain.

[13] In approximately September 2005, the worker, through the assistance of a friend, found a part-time job working two hours per day as a school bus monitor, earning about $9.25 per hour. She has continued with this employment to the present day.

[14] Just prior to June 1, 2006, the Claims Adjudicator conducted the final review of the worker's LOE benefit level. In a decision dated May 26, 2006, the Claims Adjudicator advised:

> […]
>
> After reviewing this information, in addition to other relevant information on file, it would appear that the originally chosen SEB of Library, Correspondence and Related Information Clerks (145) would continue to be appropriate and suitable. Although your lower back NEL award increased in July 2005 to 36% following compensable surgery, the accepted lower back restrictions of prolonged standing, sitting, bending, twisting and lifting have remained the same. Furthermore, although the April 13, 2006 specialist report from Dr. Aubin suggests working at four hrs/day initially then onto work hardening with limitations, there is no indication that you could not eventually progress to full hours within the recommended SEB. According to the 67-month questionnaire that you completed, you returned to work September 6, 2005 for two hrs/day, five days/week but not in a SEB-identified job.
>
> As per operational policy 18-03-03 reviewing LOE benefits, when a final review is required to be completed, the wages to be used when paying LOE benefits, if the worker is not returned to work in a SEB identified job, are the updated wages for the SEB for a fully experienced worker. However, noting that your LMR program was completed in December 2004 and taking into consideration your age and likelihood of achieving fully experienced earnings by age 65, I have determined that the most appropriate wages for use would be midrange wages – these midrange wages were obtained from the 2004 [local] Employment Insurance Wage Rate Guide.
>
> Based on this rate guide, the midrange wages of a [local] library, correspondence and related clerk is $11.60/hr with a weekly gross rate of $464.00 for forty hours/week. Therefore, effective June 1, 2006, your loss of earnings benefit rate will be based on projected gross weekly earnings of $464.00.
>
> There is no further review of this benefit payment, unless there is a material change in circumstances that occurred before the 72 month period. […]

[15] The worker objected to the conclusions of the Claims Adjudicator and this issue was forwarded to another ARO. At the time the worker's objection was considered, the ARO agreed to a request by the employer to add the matter of the appropriateness of the worker's 36% NEL award to the issue agenda. In a decision dated October 16, 2008, the ARO denied both the worker's and employer's appeal. With respect to the worker's request for full LOE benefits after June 1, 2006, the ARO noted:

- Although, as Mr. Hirscu argued, [the worker's] symptoms leading up to the surgery rendered her totally disabled based on her prior ARO decision, and her condition now is what it was then, the surgery was performed to alleviate her symptoms. Despite her increase in the NEL award to 36%, Dr. Clements reported on March 15, 2005 that the worker's symptoms had improved, as had her walking and standing capabilities. An attempt to return to the workforce in some capacity was encouraged;
- Given the medical evidence available at the time of the final lock in, I am satisfied that the worker remained capable of resuming full-time work within the restrictions provided by Dr. Aubin in April 2006. There has been no acceptance of any further recurrence or a finding of a significant deterioration to warrant a review of the final LOE lock in;
- The worker has been able to maintain some employment since 2005 and this confirms the fact that she is not totally disabled. Although she has limited her hours,

she has demonstrated the fact that she is able to get ready for work and be responsible enough to maintain employment;

- Having reached the conclusion that the worker remained employable, I will now address the suitability of the SEB. Both the LMR service provider and the vocational evaluation conducted confirm the SEB is suitable and within this worker's restrictions. On-site training would only be required and the SEB would allow the worker to alternate between sitting and standing. There would be limited bending if any required and no heavy lifting;

[16] The employer had also raised the issue of the wage level used to determine the quantum of the worker's LOE benefits. The ARO noted:

- With respect to the wages used, I find the average wages used of $11.60 per hour remains appropriate. The worker had to switch to a new skills set and she continued with restrictions from her compensable injury. Based on her complete picture, as per policy, the average wages of $11.60 per hour were accurately used;
- The worker's actual earnings cannot be used as she is under-employed and does have the skills necessary to obtain a job in the identified SEB;
- The employer representative suggested that earnings of $14.28 per hour be used as these were the earnings reported for a potential library job the worker had applied to. While I note their argument, what is also noted is the fact that the worker never received an interview for this position and it is not likely that the worker would have been able to secure a job at these wages, given her lack of prior experience in the identified SEB, as well as the fact that her computer knowledge is limited.

[17] With respect to the issue of the employer's objection about the quantum of the 36% NEL award, the ARO concluded that the award had been accurately assessed and noted in part:

- Policy 18-05-05 allows for a reduction in the NEL award if there is a pre-existing permanent impairment, which includes non-work related impairments, work related impairments for which there is a permanent disability pension and work related impairments for which there is a NEL benefit. These are measurable impairments. The worker did not have a measurable permanent impairment in this case prior to her work related injury;
- A reduction in the NEL award can also be considered when there is a pre-existing impairment that is not measurable. In these instances, the WSIB rates the total areas impairment and reduced the rating according to the significance of the pre-existing impairment. If minor, there is no reduction. If moderate, there is a 25% reduction and if major, there is a 50% reduction;
- A pre-existing impairment, whether measurable or not is determined based strictly on the clinical information available at the time of the work-related injury;
- In this instance, at the time of the work-related injury, the medical documentation shows that there was no pre-existing impairment, but a pre-existing condition, based on radiological evidence dated May 17, 2000. The doctor, on the initial Form 8 confirmed that there was no history of a similar prior medical condition and there is no evidence to suggest this worker suffered from any impairment as a result of the pre-existing condition;
- The claim was accepted on an aggravation basis initially and then a permanent impairment was accepted as a permanent aggravation of the pre-existing condition was allowed. As such, the degenerative disc disease that was initially diagnosed, as well as the initial findings regarding the spinal stenosis that was later accepted as per Dr. Cantlie's June 10, 2002 memo would also be a responsibility of this claim;
- Furthermore, even if one were to accept there was a pre-existing impairment, based on the radiological evidence, the pre-existing condition is considered to be minor, as

> Dr. Cantlie commented on in June 2002. There is therefore no reduction in the NEL award on this basis; […]

(ii) Issues on appeal

[18] The issues to be determined in this case are:

(a) employer appeal – whether the 36% NEL award granted for this worker's compensable back injuries is appropriate;

(b) employer appeal – what is the appropriate level of wages to be used in calculating the worker's LOE benefits;

(c) worker appeal – whether the worker ought to be granted full LOE benefits from June 1, 2006. At the commencement of the hearing, Mr. Hirscu confirmed that the worker's position is that since June 1, 2006, she has been incapable of any employment; and

(d) worker appeal – whether the SEB of customer service clerk is suitable for this worker's compensable injuries.

(iii) The worker's testimony

[19] Under questioning from Mr. Hirscu, the worker essentially confirmed the testimony attributed to her in the ARO decision under appeal. She confirmed that a SEB of customer service representative was selected and that she began her LMR plan in approximately April 2003. This plan required her to take a six week customer service course that consisted of three or four hours of classroom work each morning. She completed this particular aspect of her LMR plan which was to be followed by four weeks of job search training. The worker testified that she decided to withdraw from the LMR program after the second day of the job search training because she found that the sitting required while working online, aggravated her back pain. When she stopped the LMR program, in June 2003, her back pain was quite intense with radiation down her left leg into her left foot. Prior to starting her LMR plan, she had not been experiencing the left leg pain. The worker confirmed that she underwent back surgery in March 2004 and was eventually granted retroactive entitlement to LOE benefits from the time she stopped the LMR program in June 2003 up until the date of her surgery. Her surgery was recognized as compensable by the Board and she was granted ongoing LOE benefits until about January 2005.

[20] The worker recalled that she started her LMR program again in October 2004 and eventually completed it in December 2004. She was required to attend each day for about four hours in the morning. When the program was completed, she sent our résumés to a variety of potential employers and was successful, in the summer of 2005, in obtaining a job as a night auditor at a hotel. She was not paid by this employer while she underwent training and she found that after completing four night shifts, her back pain was such that she could not continue and she resigned.

[21] In September 2005, the worker, with the assistance of a friend who was a bus driver, obtained a job as a monitor in a school bus. She worked in a 12 seat bus with a wheelchair lift. She worked one hour in the morning and one hour in the afternoon and was responsible for keeping an eye on two passengers, one of whom was in a wheelchair. She testified that there was no physical labour involved in this job as that particular aspect was handled by the bus driver. She recalled that there was one period of two weeks when she filled in for another monitor which meant she worked two hours each morning and afternoon for two weeks, monitoring about eight to ten children on a bus. She found that the extra sitting required

aggravated her back and suggested that if she had been offered work over and above her regular two hour a day, she would not have been able to accept it.

[22] The worker confirmed that she went to see her surgeon, Dr. Clements, in March 2006 because she was starting to have recurring symptoms of pain radiating down into her left leg. She did not find Dr. Clements to be particularly approachable and therefore asked her family doctor for a referral for a second opinion. The family doctor made arrangements for her to visit Dr. Aubin.

[23] Under questioning from Ms. Russell, the worker provided a more detailed explanation of the work she performs as a bus monitor. When she started this job, in September 2005, she was earning about $9.00 per hour. She currently earns about $9.59 per hour in this unionized position.

[24] According to the worker, the bus picks her up at her home at about 6:50 a.m. She and the bus driver then make the 10 to 15 minute trip to pick up their first student at his home. He is in a wheelchair and is wheeled out to the driveway. The bus driver latches the student's wheelchair onto the lift and the worker will wheel him off the lift inside the bus. The bus driver then secures the wheelchair inside the bus and they proceed to pick up the second passenger, seven or eight minutes away. This particular student is able to walk on the bus himself. The worker makes certain that this student is belted in and she places her own seatbelt on and they drive to the school, normally arriving between 7:25 and 7:30 a.m. According to the worker, she acts as the driver's eyes in the bus and if the student, who is not in the wheelchair, were ever to act up, then she would be responsible for restraining him. She noted that she has never done so in the four years that they have been driving together. The bus driver then takes the worker back home and they arrive about 7:45 a.m. The worker noted that the entire trip normally takes less than an hour. She performs the same tasks, in reverse order, beginning at about 2:00 p.m. in the afternoon. There have been no changes in the job or the equipment used since she started in 2005. According to the worker, in theory, she could put her name on a list to obtain more hours each week (the jobs are handed out on the basis of seniority) but she does not feel capable of working any more than she currently does. She felt that even replacing her co-worker for that two week shift, had aggravated her back pain.

[25] Under questioning from Ms. Russell, the worker also confirmed that prior to starting with the accident employer in 1995, she had worked in a shoe factory, a parachute manufacturing factory, a hairdressing shop and also worked for about a year as a licensed real estate agent. For the two years prior to starting with the accident employer, she had been the manager of a bar/restaurant.

[26] When she started with the accident employer, she worked as a porter, about 56 hours a week, and was required to perform cleaning services, on a seasonal basis, throughout various ships. She would work from February or March of each year until December. Later, she secured a position as a second cook where she would help prepare breakfast, bake, clean the dining rooms and generally help the cook prepare the main meal. She worked on a permanent full-time basis between 1995 and 2000.

[27] The worker had a general recollection of the LMR assessment she underwent with the Board and remembered discussing various career options with Board staff. She indicated she really had no idea what type of work she could do but remembered agreeing to a suggestion about a customer service clerk. She felt she had to cooperate with the Board or her benefits would be terminated. She eventually decided however, that this position would not be suitable because of the sitting involved.

[28] The worker confirmed, under Ms. Russell's questioning, that she secured a job with a local hotel as a night auditor. This required a lot of computer work both at the desk and at the counter. There was also some filing she had to perform while standing and she found this rather difficult. She was also required to see that the coffee machine was working by 5:30 a.m. She stopped working at this job after four night shifts because of increased pain. She never received any wages for this work and thought that if she had started a job, it would have been at minimum wage. She has not looked for other work since.

[29] The worker also advised Ms. Russell that after her surgery, her back felt better. She found that she no longer needed to be in bed all the time taking extensive amounts of narcotics. Her pre-surgery "excruciating" pain was replaced by a more "minor" pain. She indicated that the surgery made her life a little more worth living. She was happy with the surgery performed by Dr. Clements which, according to her understanding, involved a three disc fusion and decompression. She recalled Dr. Clement also suggesting that she be checked for osteoporosis.

[30] The worker indicated that she had no reason to visit a doctor for back pain prior to the onset of her compensable injuries nor had she injured her back on any other occasion either inside or outside her employment.

[31] After recovering from her surgery, the worker finished the job search training and was taught how to write a résumé and conduct a job search and how to participate in an interview. She sent out a number of résumés and this is how she obtained the job with the hotel. She found the bus monitor job with the assistance of a friend and did not require any particular experience to obtain it. She had to undergo a two day first aid course and also pass a police check. The worker indicated that she does not consider the bus monitor position to be a job as she does not do anything. While she may be under-employed mentally, she does not feel she is under-employed physically. She continues to experience back pain and can only walk about half a block before she begins to experience pain in her leg. She tried swimming/water aerobics for a short period but stopped when her pain did not improve. She currently takes pain medication (Tylenol No.3) only occasionally. There has been no talk of further surgery and she does not take ongoing therapy of any type.

(iv) Analysis

(a) Appropriate quantum of NEL award

[32] As Ms. Russell noted in her submissions, the employer does not dispute the Board's decision that the worker was entitled to a redetermination of her 19% NEL award. The employer does submit however, that the Board erred when it increased the worker's NEL award to 36% since it failed to take into account the worker's pre-existing, underlying back condition.

[33] Board *Operational Policy Manual* "OPM" Document No. 18-05-05 entitled "Effect of a Pre-existing Impairment" provides in part:

> **Policy**
>
> When calculating NEL benefits for workers who have a pre-existing permanent impairment, the WSIB
>
> - rates the area of the body affected by the new permanent impairment
> - disregards any pre-existing permanent impairments affecting other areas of the body, and
> - factors out pre-existing permanent impairments affecting the same area of the body.
>
> If there is a NEL benefit for the pre-existing permanent impairment, the WSIB calculates a second NEL benefit for the new permanent impairment.

Guidelines

General

Pre-existing permanent impairments include

- non-work-related impairments
- work-related impairments for which there is a permanent disability pension, and
- work-related impairments for which there is a NEL benefit.

Pre-existing non-work-related impairments

[…]

New injury affecting the same body area

If both impairments affect the same area of the body, and the pre-existing impairment is measurable, the WSIB

- rates the total impairment to the area
- determines the rating for the pre-existing impairment, and
- subtracts the rating for the pre-existing impairment from the total impairment rating to get the rating for the new work-related impairment.

If the pre-existing impairment is not measurable, the WSIB

- rates the total area's impairment, and
- reduces this rating according to the significance of the pre-existing impairment (see pre-accident disability in 14-05-03, Second Injury and Enhancement Fund).
    - if minor, there is no reduction
    - if moderate, there is a 25% reduction
    - if major, there is a 50% reduction.

NOTE
A pre-existing impairment is "measurable" or non-measurable" depending on whether it can be rated using the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 3rd edition (revised). This determination is based strictly on the clinical information available at the time of the work-related injury.

[34] As noted above, in dealing with these issues, reference must also be made to OPM Document No. 14-05-03 “Second Injury and Enhancement Fund”. This policy provides in part:

[…]

Definitions

Pre-accident disability is defined as a condition which has produced periods of disability in the past requiring treatment and disrupting employment.

Pre-existing condition is defined as an underlying or asymptomatic condition which only becomes manifest post-accident.

[…]

Pre-existing condition impact on claims

[…]

Permanent disability

The presence of a pre-existing condition is reflected in any permanent disability award when the degree of residual disability is increased due to an underlying condition. Permanent disability awards to the worker, and cost transfers from the accident employer, Schedule I only, are made considering the medical significance of the pre-existing condition, the severity of the accident, and whether or not the pre-existing condition is measurable.

> When the extent of transfer to the SIEF exceeds 50%, the employer receives the benefit of such determination applied to all or part of a claim, depending on individual circumstances.
>
> […]
>
> **Other Prior Conditions**
>
> **Worker Permanent Benefits**
>
> When the pre-existing condition is not measurable, but creates a pre-accident disability that enhances a residual work-related disability, the worker's benefits for work related disability may be reduced according to the percentage of disability produced by the pre-existing condition.
>
> **Application to employee award where prior condition is not measurable**
>
> | **Prior Condition** | **Amount of relief** |
> |---|---|
> | Minor | 100% (full assessment) |
> | Moderate | 75% |
> | Major | 50% |
> […]

[35] In this case, the employer takes the position that the Board erred, in increasing the worker's NEL award to 36%, by failing to take into account the pre-existing non-compensable degenerative conditions which had been present in this worker's back. These conditions have been commented upon in a number of occasions in the case materials. For example:

- An MRI of the lumbar spine performed on June 14, 2002, was interpreted to reveal:

  > Findings:
  >
  > There is moderate spondylolysis through the lumbar spine. This is worse at the L5-S1 level.
  >
  > At L3-4 there is advanced bilateral facet degenerative change causing moderate central stenosis.
  >
  > At L4-5 there is moderate facet degenerative change causing mild central stenosis.

- In a report dated July 18, 2002, the worker's surgeon, Dr. Clements, indicated that "this lady at 53 has had an MRI scan. This shows significant degenerative change at the L3-4, L4-5 and L5-S1 levels. At 3-4 and 4-5 there is a moderate degree of spinal stenosis due to facet hypertrophy". Dr. Clements also noted that "the only way of effective altering her symptoms require consideration of decompression and in view of the fact that the 3-4 and 4-5 levels are involved would require consideration of a three level fusion".

- In a report dated April 1, 2003, Dr. B. Thomas (family physician) noted that "this patient has lumbar spinal stenosis which varies in its severity from time to time. Wherever she is employed I think she will miss a lot of time from work".

- In his report of July 24, 2003, Dr. Clements noted that "this lady is obviously symptomatic from her stenosis and this appears to be the main problem".

- In his report of January 8, 2004, Dr. Clements noted that "this lady has degenerative disc disease at the lower lumbar spine from L3 to S1. She has a mild element of spinal stenosis in relation to that. In view of this, she is being considered for a decompression and instrument effusion".

- In his operative report of March 2, 2004, Dr. Clements noted that the worker showed "that she had a hypertrophied facet at L3-4. This was producing compression on the L4 nerve

root on the left side. She also had significant degenerative changes at 5-1 at to a lesser degree at L4-5".

- In Memo #29, Dr. Cantlie of the Board, after reviewing the medical information on file, noted that the worker "has pre-existing DDD of the spine ("spondylosis") [and] mild spinal stenosis secondary to that process". Dr. Clements also confirmed that "her very heavy job description has likely enhanced this condition and the aggravation appears ongoing with good medical continuity".
- As the Claims Adjudicator noted in Memo #30 of June 14, 2002, the worker's claim was allowed on the basis of a "permanent aggravation of a pre-existing condition".

[36] While it is apparent, from a review of the medical evidence referred to above, that this worker had a pre-existing back ***condition***, which included degenerative changes and a spinal stenosis, I am not satisfied that she had a pre-existing ***impairment***, as that term is used in OPM Document No. 18-05-05.

[37] In *Decision No. 257/96*, a Panel, faced with a similar request to reduce the quantum of a NEL award to reflect a pre-existing condition (involving earlier versions of these policies), noted:

> **The Panel's findings and conclusions: the worker's NEL entitlement**
>
> As we noted above, in May 1997, the worker was assessed for non-economic loss. He was subsequently given a 44% NEL award.
>
> In his submissions on behalf of the employer, Mr. Brady argued that, in the event that the Panel found the worker's residual impairment subsequent to June 1993 to be compensable, then the worker's NEL award should be reduced to reflect the impact of the worker's pre-existing condition.
>
> The Panel was referred to the Tribunal's *Decision No. 63/98* and a reconsideration of that decision, *Decision No. 63/98R*, 48 W.S.I.A.T.R 105. In *Decision No. 63/98*, the Tribunal Vice-Chair "discounted" the worker's permanent benefits by 50% to reflect a pre-existing degenerative condition. In *Decision No. 63/98R*, the reconsideration Vice-Chair concluded that the act did not permit discounting permanent benefits. *Decision No. 63/98* was reopened.
>
> The Board's General Counsel made submissions to the reconsideration Vice-Chair that took issue with *Decision No. 63/98*. The General Counsel submitted that the "thin skull" principle required the Board to provide benefits for the consequences that "result from" the worker's injury. The General Counsel went on to state:
>
> > If a consequence 'results from' the injury, nothing in the Act permits the Board to reduce the benefits to account for any non-work-related factors that may have combined to contribute to that consequence.
>
> The reconsideration Vice-Chair concluded that this submission was correct and supported by the statute. As the reconsideration Vice-Chair noted, none of the provisions regarding permanent benefits "makes any reference to discounting of an award in recognition of an underlying condition".
>
> Mr. Brady, in his submissions, cited the provisions of the Act pertaining to NEL awards, found in section 42 of the pre-1997 Act. Mr. Brady noted that compensation for non-economic loss is to be based on "permanent impairment arising from the [workplace] injury". In Mr. Brady's view, this stipulation requires that some consideration be given to a reduction of permanent benefits where the evidence establishes that a portion of a worker's permanent impairment does not arise from his workplace injury.

In support of this submission, Mr. Brady noted that the Board does, in fact, have policy that addresses the reduction of NEL benefits. Document #05-06-07 from the Board's *Operational Policy Manual* stipulates, at page 1:

> If the worker has a measurable non-work-related impairment and then suffers a work-related impairment to the same body area, the work-related impairment is rated independently, with the prior impairment being subtracted to determine the work-related impairment.

Page 2 of the document stipulates:

> If the worker has a non-measurable non-work-related impairment and suffers another work-related impairment to the same body area, the impairment rating is determined using the combined values chart applicable and the impairment may be reduced based on a moderate or major pre-accident disability.

The Appeals Resolution Officer, in the decision under review, concluded, as a factual matter, that there was no evidence of a "moderate or major pre-accident disability" prior to the workplace accident of June 1993. Hence in the Appeals Resolution Officer's opinion, the policy did not apply.

Having reviewed the medical evidence cited above, the Panel agrees with that finding. Disability is defined in the Act as "the loss of earning capacity". In the opinion of the present Panel, at the time he was injured, the worker was not experiencing a loss of earning capacity as a result of a pre-existing condition.

However, Mr. Brady raised two further arguments in this regard. Mr. Brady noted, first of all, that, if the pre-existing condition is measurable, then the NEL award is to be reduced by calculating the extent of the "prior impairment". Hence, in Mr. Brady's view, the Appeals Resolution Officer erred by looking only at pre-existing disability.

Furthermore, Mr. Brady noted that, although the worker did not have a "disability" immediately prior to the compensable accident, he did have a disability in 1990 that required surgery. Hence in Mr. Brady's view, the Appeals Resolution Officer's decision was incomplete.

I note, parenthetically, that Mr. Brady's position suggests an apparent inconsistency between the Board's policy and the position taken by the Tribunal's General Counsel as that position informed the Vice-Chair in *Decision No. 63/98R*. More will be said of that below.

Regarding Mr. Brady's specific arguments, we have already stated that we agree with the Appeals Resolution Officer that there was no evidence of a non-compensable disability prior to the compensable accident. We are also persuaded that there was no evidence of a pre-existing impairment prior to the compensable accident. Impairment is defined in the Act as "physical or functional abnormality or loss". We are persuaded by the medical evidence cited above that, although the worker had an impairment at the time of his surgery in 1990, he subsequently recovered from that impairment. We note, again, in this regard, the absence of any continuity of complaint or medical treatment from December 1990 to June 1993 and the evidence of Dr. Hansebout, in September 1993, that suggests apparent recovery from the 1990 surgery.

Mr. Brady's other argument, regarding the application of the Board policy, was that the terms disability or impairment could refer to a disability or impairment that substantially preceded the compensable accident even if that disability or impairment did not appear to be affecting the worker at the time of the accident. However, in our view that is not the intended meaning of those words. In our view, the policy documents are intended to address situations where there is either an impairment or disability present and affecting the worker at the time of the compensable accident.

Hence, in our opinion, applying the Board's policy in this case does not mandate a reduction of this worker's NEL benefits.

[38] Similarly, in *Decision No. 63/98*, a Vice-Chair had granted full temporary benefits for the acute phase of a recurrence but directed that the quantum of NEL and FEL benefits be discounted by 50% because there was an underlying pre-existing condition. An application to reconsider this decision was granted. In *Decision No. 63/98R*, the Vice-Chair indicated:

> Both provisions contain specific directions for the calculation of NEL and FEL awards. Neither of these provisions makes any reference to discounting of an award in recognition of an underlying condition. The legal significance of such conditions in the context of worker's compensation law was accurately stated by the Board's General Counsel. The decision to apply a discount to the benefits payable in this case cannot be supported by reference to either the applicable legislation, or the general principles of compensation law. In my view, there is a clear error of law disclosed in *Decision No. 63/98*, and I find that the Tribunal's threshold test for granting a reconsideration request has been met.

[39] I agree with and adopt the reasoning in these decisions and interpret them to suggest that a NEL award ought not to be reduced unless there is evidence which suggests that the pre-existing condition had an impact on earning capacity. In this case, the worker's uncontradicted evidence is that in the five years immediately prior to her accident in 2000, she worked about 56 hours a week as a porter and then as a second cook. There is no suggestion, as OPM Document No. 14-05-03 requires, that the pre-existing condition "produced periods of disability in the past requiring treatment and disrupting employment".

[40] After considering all of the information before me, I find myself in agreement with the conclusion of the ARO that the worker's NEL award should not have been reduced from 36% because the spinal stenosis and degenerative disc disease, while they were conditions which existed prior to the compensable accident, were not "pre-existing impairments" or "pre-accident disabilities" as those terms are used in Board policy.

(b) Benefits after June 1, 2006

[41] As noted earlier, the essence of the worker's position is that she ought to be granted full LOE benefits after June 1, 2006, on the basis that the evidence suggests she is incapable of any employment. Mr. Hirscu submits that even though the worker has actually been working as a school bus monitor for quite some time, this is "not a real job" because the worker merely gets out of bed, gets dressed and sits on the bus for a couple of hours a day. In Mr. Hirscu's opinion, the worker is being penalized by the Board for making an effort to return to work.

[42] After reviewing all of the information before me however, I cannot conclude that the balance of evidence supports the worker's position that she ought to have been considered incapable of any kind of employment (competitively unemployable) at the time her LOE benefits were locked in as of June 1, 2006. In reaching that conclusion, I have taken particular note of the following:

- At the time the worker's LOE benefits were locked in, the worker was approximately two years post-surgery. As the worker noted in her testimony, she felt the surgery had improved her condition and lessened her pain levels. In fact, her condition improved to the point that she was able to complete the remaining portions of the LMR plan.
- In a report dated September 13, 2004, Dr. Clements noted that "at this point I have encouraged her to continue with an exercise and strengthening program. I think this lady will be capable of returning to some type of work but I am not certain as to what type of work she would be capable of doing".

- In his report of March 15, 2005, Dr. Clements noted that:

  > Overall she has actually done reasonably well. Certainly her symptoms of back pain and claudication both appear to be improved at this point. She reports improvement in her walking and standing capabilities. She realizes, however, that she is not capable of returning to her previous occupation and at this point in time is considering job modification alterations.

- In his report of April 19, 2006, Dr. Aubin indicated that "she had surgery because she had severe spinal stenosis at L3-L4-L5 area" and "she can start working but only four hours per day initially and then go on a work hardening program with limitations of bending and lifting, as well as standing and sitting".

- In Memo #96 dated October 5, 2004, (after the worker's March 2004 surgery) Dr. Cantlie of the Board indicated that, rather than being incapable of employment, the worker was partially impaired with medical restrictions (as outlined in the family doctor's progress report of September 21, 2004) of no prolonged sitting, standing, twisting, lifting or bending.

- While I acknowledge Mr. Hirscu's opinion on the matter, one cannot, in my view, ignore the fact that "despite her claim to be incapable of employment" the worker has continued to work, albeit only two hours a day, since 2005. As Ms. Russell noted, the school bus monitor job requires the worker to maintain a schedule, get on and off a bus, sit, bend and twist. As the worker noted in her testimony, she has been able to continue with this employment while, at the same time, weaning herself off of virtually all her pain medication.

[43] In summary, after reviewing all of the material before me, I am not satisfied that there is sufficient evidence available to support the worker's position that she ought to be granted full LOE benefits as of June 1, 2006, on the grounds that she was incapable of employment.

(c) Suitability of the SEB

[44] As an alternative to his submission that the worker was incapable of employment after June 1, 2006, Mr. Hirscu suggests that the SEB of customer service was unsuitable for this worker. As noted above, I have decided that rather than being totally disabled and incapable of employment, the worker's compensable back injuries have rendered her partially disabled and capable of suitable employment. As confirmed by Dr. Cantlie in Memo #96 of October 5, 2004, and by the worker's family physician in his report of September 21, 2004, the worker's compensable injuries have left her with restrictions against prolonged sitting, standing, twisting, lifting and bending.

[45] While I acknowledge the worker's testimony that sitting is her major problem, I do not interpret the medical evidence before me to suggest that she is incapable of working in the field of customer service as long as her restrictions are taken into account. I did not interpret the worker's testimony to be that she was not mentally or vocationally capable of working as a customer service representative. The worker's primary objection, as I understand it, is that she was not physically able to do such a job. As noted above however, my interpretation of the medical evidence is that it suggests that the worker is capable of performing suitably modified duties.

[46] While I am satisfied that insufficient evidence has been presented to warrant overturning the Board's decision about the appropriateness of employment as a customer service representative, I find myself in agreement with Mr. Hirscu that there is evidence available which

suggests the worker would not be capable of performing these duties eight hours a day. In reaching that conclusion, I note that when the worker was assessed by Dr. Aubin, an orthopaedic surgeon, on April 19, 2006, he suggested that the worker could start working "but only four hours per day initially". This level of employment is consistent with the worker's own experience wherein she finds that if she works for much more than two hours a day in her job as a school bus monitor, she begins to experience increased pain and discomfort. It is also worth noting, in my view, that the recurrence of back problems which led to her surgery in 2004 was preceded by her having to sit in a classroom for four hours a day.

[47] In summary, while I am satisfied that the SEB selected by the Board was appropriate, I am also satisfied that, rather than working eight hours a day, the worker's benefits ought to have been calculated on the basis that she is capable of working only four hours a day.

(d) Quantum of benefits payable

[48] The employer has taken the position that the Board erred in deeming the worker capable of earning "average wages" of $11.60 per hour. Ms. Russell submits that the wages for a "fully experienced worker" ought to have been utilized instead.

[49] OPM Document No. 18-03-03 entitled "Reviewing LOE Benefits" indicates in part:

> **s.23(3)**
>
> A person receiving benefits under the insurance plan or who may be entitled to do so shall notify the Board of a material change in circumstances in connection with the entitlement within 10 days after the material change occurs.
>
> **s.44**
>
> Every year or if a material change in circumstances occurs, the WSIB may review payments to a worker for loss of earnings and may confirm, vary or discontinue the payments.
>
> The WSIB shall not review the payments more than 72 months after the date of the worker's injury, unless
>
> - before the 72-month period expired., the worker failed to notify the WSIB of a change in circumstance or engaged in fraud or misrepresentation in connection with his/her claim for benefits under the insurance plan, or
> - the worker was provided with a labour market re-entry (LMR) plan and the plan is not completed when the 72 month period is reached, or
> - the worker suffers a significant deterioration in his/her condition that results in a redetermination of the degree of permanent impairment.
>
> **Guidelines**
>
> […]
>
> **Consideration at all reviews**
>
> […]
>
> When conducting the final review of an LOE benefit, or when an "older worker" chooses the "no review" option, the WSIB deems the worker's post injury earnings again, using
>
> - updated wage guide information, and
> - the amount a fully experienced worker would earn in the identified SEB.
>
> […]

Using changes to wage guide information to pay LOE benefits

	Returned to work in SEB-Identified job	Returned to work, but not in SEB-identified job	Not currently employed	Never returned to work
Periodic Reviews	Use actual wages.	Update wages for the SEB based on original entry or mid-range wages.	Update wages for the SEB based on original entry-or mid-range wages.	Update wages for the SEB based on original entry, or mid-range wages.
Final review or "no review" Option	Use actual wages.	Update wages for the SEB for a fully experienced worker.	Update wages for the SEB for a fully experienced worker.	Update wages for the SEB for a fully experienced worker.

[50] From the evidence in this case, it is clear that at the time the final LOE review was conducted in May 2006, the worker had returned to employment but not to the SEB identified job for a customer service representative. As noted earlier, the employer's position is that in calculating the quantum of the final LOE benefits therefore, the wages of a "fully experienced worker" should be used. Ms. Russell referred to information in the case materials which suggested that the wage of a fully experienced worker in this SEB was closer to $14.00 an hour.

[51] While I acknowledge the employer's position, I am not satisfied, given the particular facts of this case, that given the worker's personal and vocational characteristics, her wages would ever have reached the level of a fully experienced customer service representative. This appears to have been the conclusion of the ARO as well.

[52] At the time of the final review in 2006, the worker, born in 1949, was 57 years of age. She had a compensable back disability which left her with limitations regarding sitting, standing, twisting, lifting and bending. As noted earlier, I have determined that she could not work for more than four hours a day and, as noted by the ARO, she would have to have developed a new skill set given that she had virtually no experience in the customer service industry. For those reasons, I find it unlikely that the worker would ever reach the level of a fully experienced worker and therefore I find no reason to disagree with the Board's conclusion that it was appropriate to deem her capable of earning the average wage of $11.60 per hour.

DISPOSITION

[53] The employer's appeal is denied.

- The 36% NEL award is upheld.
- Subsequent to June 1, 2006, the quantum of the worker's LOE benefits will continue to be calculated on the basis that she was capable of earning $11.60 per hour.

[54] The worker's appeal is allowed in part.

- The worker is not entitled to full LOE benefits after June 1, 2006.
- The SEB of customer service clerk remains appropriate however, the worker's benefits will be calculated on the basis that she is capable of working only four hours a day.

DATED: December 23, 2009

SIGNED: R. Nairn