# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

# DECISION NO. 605/12

**BEFORE**: S. Darvish: Vice-Chair

**HEARING:** March 29, 2012 at Toronto
Oral

**DATE OF DECISION:** July 18, 2012

**NEUTRAL CITATION:** 2012 ONWSIAT 1617

**DECISION(S) UNDER APPEAL:** WSIB Appeals Resolution Officer (ARO) dated August 11, 2005 and May 26, 2011

**APPEARANCES:**

**For the worker:** Ms. D. Coulson, union representative

**For the employer:** Not participating

**Interpreter:** Ms. E. Pistarelli, Italian language

## REASONS

### (i) Introduction to the appeal proceedings

[1] The worker appeals two ARO decisions. The first is a decision dated May 26, 2011 which concluded that:

- The worker did not have initial entitlement for headaches and dizziness on an organic basis.
- The worker's pre-accident job of a machine operator was suitable employment for him.
- The worker was not entitled to full future economic loss ("FEL") benefits as of March 30, 2000.

[2] The second is a decision dated August 11, 2005, which concluded that the worker had a recurrence and he was entitled to temporary total disability benefits from his last day of work in October 1999 up to an including March 30, 2000. The ARO rendered a decision based upon the written record without an oral hearing.

### (ii) Issues

[3] Ms. Coulson indicated that the issue under appeal was whether or not the worker was entitled to full FEL benefits from March 30, 2000 onwards on the basis that he was competitively unemployable. The determination of this issue turns, in part, on whether or not the worker's pre-injury job of a front-end loader operator was suitable for him. Ms. Coulson indicated that if the worker is not granted a full FEL benefit, then in the alternative, the worker seeks the following:

1. entitlement to temporary total disability benefits subsequent to March 30, 2000; and

2. entitlement to headaches and dizziness on an organic basis.

[4] The appeal is allowed in part for the reasons set out below.

### (iii) Background

[5] On August 15, 1997, the worker, then a 53 year old heavy equipment operator, was operating a front-end loader when the loader struck the side of a trench, causing him to lurch forward and strike the left side of his forehead on the front window of his machine. The worker was treated in the emergency department of a local hospital and diagnosed with a minor head trauma. He was off work until August 18, 1997 when he returned to regular duties. He lost further time from work and was paid temporary total disability benefits from August 21, 1997. The worker developed post-traumatic depression and received psychotherapy. He was assessed at a head injury clinic in 1998, and following further psychiatric treatment and a work hardening program, returned to his regular work duties on June 3, 1999, two hours per day. He was at full-time hours of work by July 12, 1999. Temporary total disability benefits were paid from August 21, 1997 to July 12, 1999.

[6] Entitlement was also accepted for post-traumatic stress disorder ("PTSD"). The worker claimed a recurrence of disability from October 18, 1999 when he had an episode of dizziness and headache at work, which he related to his head injury of August 15, 1997. In June 2003, following a review by a Board medical consultant, the claims Adjudicator accepted that while there was no ongoing organic impairment, there was a permanent psychological impairment. The worker was considered to have reached maximum medical recovery ("MMR") by December 21, 1999 with restrictions of less demand on attention span, memory, and cerebral function. In March 2004, he was granted a 20% non-economic loss ("NEL") award for a permanent psychological impairment. On August 11, 2005, the ARO granted the worker entitlement to a recurrence as well as temporary total disability benefits from October 18, 1999 to March 30, 2000.

[7] When the claim was returned back to the Board's Operations area after the August 2005 ARO decision, the Case Manager determined that the worker was fit to return to his pre-injury duties as a front-end loader operator, and that his wage loss was not the result of his compensable injury. The worker was therefore denied entitlement to further FEL benefits. In a letter dated September 17, 2009, the worker's representative also requested entitlement for headaches and dizziness on the basis that these were related to the worker's compensable head injury sustained on August 15, 1997. The Board denied the worker's request for further entitlement to headaches and dizziness on an organic basis. The Case Manager also ruled that the worker's pre-injury job of a heavy equipment operator was suitable for him. The ARO decision of May 26, 2011 confirmed the Case Manager's decisions in this regard.

**(iv) The worker's testimony**

[8] The worker testified that he had worked for the accident employer for 32 years. He initially began employment as a labourer. He then worked as a front-end loader operator for 26 years. Prior to the injury, his duties as a front-end loader operator were to bring materials to the crew, finish the grade work, and load soil into dump trucks. The worker was involved in a workplace accident on August 15, 1997 when the machine he was operating slid into a trench. He stated that he struck his head onto the windshield, causing it to crack. He did not recall what happened afterwards.

[9] The worker testified that he returned to work on August 18, 1997 for several days. He returned to his pre-injury job as a front-end loader. However, he had headaches and he had no strength in his legs, as a result of which he was unable to operate the machine. He stopped work on August 20, 1997.

[10] The worker stated that prior to the workplace injury he never missed work due to illness, injury, headaches or dizziness. He began suffering from headaches immediately after the accident. Subsequent to the accident, he experienced headaches several times per day, four to five times per week. He stated that the dizziness accompanies the headaches.

[11] Between June and October 1999, the worker was working in his pre-injury job as a front-end loader operator. However, he had difficulty performing his job duties. For example, he could not load soil into the dump trucks, he could not complete the grade work, and he could not keep up with the pace of work. He had continuous headaches and dizziness as he worked. He stated that he had difficulty operating the front-end loader as he had no strength to maneuver the levers and pedals. The worker was also unable to perform the other duties related to the job such

as maintenance of the loader and clearing mud and debris from the loader. The worker stated that a shovel was required to clear mud and debris from the loader and he did not have the strength to perform this task. The worker stated that despite his difficulties, he pushed himself to work. He often fell asleep in the loader throughout his shift as a result of his headaches and dizziness.

**(v) The testimony of a union member**

[12] A business representative who worked in the same union as the worker provided testimony. He testified about the job demands of a front-end loader. He stated that he has driven the front-end loader operated by the worker. He described the front-end loader as a track loader with a bucket at the front that is used to carry materials. It is 12 feet high by 15 feet long by 8 feet wide. It feels rough to ride as there is no suspension on the machine. He explained that in order to backfill with stone and gravel, the loader has to approach the site on a 45 degree angle. He explained that the grade finishing task is difficult as the front-end loader has blind spots. It requires a lot of experience to operate this machine properly. He further explained that delivering materials to the crew is usually performed when sewers are being built or repaired. It involves carrying heavy equipment with the front-end loader. He stated that it is very important for a front-end loader operator to work fast on a job site as there are usually three to five machines on a typical job site that rely on each other to perform work. If one person slows down, then the entire job site is forced to slow down. This could cut production in half.

**(vi) The submissions**

[13] Ms. Coulson submitted that the worker was a stoic person. Despite the problems he had with his compensable injury, he was motivated and he co-operated in attempting to return to work. He returned to his pre-injury job duties from June to October 1999, but he had difficulty performing those duties and he was unable to perform the essential duties of his job. Since the worker was experiencing headaches and dizziness, it was not safe for him to operate machinery such as a front-end loader. Ms. Coulson submitted that the worker is unemployable given his age and his low level of education. In addition, his past work experience is limited to that of a labourer, he does not speak English, and he has a cognitive impairment.

**(vii) Law and policy**

[14] Since the worker was injured in August 1997, the pre-1997 *Workers' Compensation Act* is applicable to this appeal. All statutory references in this decision are to the pre-1997 Act, as amended, unless otherwise stated. The hearing of the appeal commenced after January 1, 1998; therefore, certain provisions of the *Workplace Safety and Insurance Act, 1997* (the "WSIA") also apply to the appeal.

[15] 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 #1 – Initial Entitlement;
- Package #38 – Recurrence;
- Package #47 – Early and Safe Return to Work & Temporary Benefits as of January 1, 1998;

- Package #64 – NEL Redetermination;
- Package #68 – FEL Benefits – as of July 1, 2007; and
- Package #300 – Decision Making/Benefit of Doubt/Merits and Justice.

**(viii) Analysis**

[16] The worker seeks full FEL benefits from March 30, 2000 on the basis that he was unemployable and that his wage loss as of that date arose from his compensable psychological condition. On the basis of the reasons that follow, I find that as a result of his compensable psychological condition and his personal and vocational characteristics, the worker was unable to return to his pre-injury job as a front-end loader operator and he was furthermore unable to work in any job or to benefit from retraining.

[17] The concept of "competitively unemployable" is not defined or addressed in the Act or in Board policy. It is discussed in Tribunal case law as a consideration of the cumulative effect of medical, psycho-social, and employment market factors related to the workplace injury that would reasonably impact a worker's ability to obtain and sustain suitable employment. In one respect, the concept widens a worker's ability to establish unemployability beyond strict medical grounds. Yet, the concept also requires that the cumulative effect of the factors considered achieve the same result as a finding of total medical disability, that is, unemployability arising from the injury. See for example *Decisions No. 1689/06; 114/06; 2150/05;* and *2380/05.*

[18] As stated in *Decision No. 1/08*, the determination of a worker's competitive employability is not an exclusively medical determination. A multitude of factors must be considered in determining a worker's employability and ability to earn, including the degree of impairment and functional capability, the medical restrictions, the worker's transferable skills, the worker's personal aptitudes, the worker's job-search skills and abilities, any pre-existing conditions, and the degree or amount of loss or earnings. A worker's co-operation and effort in labour market re-entry (LMR) activities including job search efforts following the completion of LMR activities are also factors that have been considered in determining whether a worker is competitively unemployable as a result of a workplace injury. See for example *Decisions No. 248/06*; *1567/07*; and *1771/09*.

[19] I find that the worker's pre-injury job of a heavy equipment operator was not suitable for him given his compensable psychological condition and his restrictions. The worker was rated as having a moderate psychological impairment and he was awarded a 20% NEL for that impairment. The diagnoses recognized were that of post-traumatic stress disorder and major depressive disorder. In the NEL assessment performed on February 6, 2004, Dr. J. Farewell, a psychiatrist, observed that the worker had a moderate level of difficulty with memory, concentration, and attention span. Although the worker was motivated to attempt a return to work, and he in fact did return to work for several months between June and October 1999, I note that the worker's compensable condition prevented him from performing the essential duties of his job.

[20] In this regard, I find it instructive that the worker testified that he was unable to perform many of his pre-injury job duties. He testified that he could not load soil into the dump trucks, he could not complete the grade work, and he could not keep up with the pace of work. He had continuous headaches and dizziness as he worked. He stated that he had difficulty operating the

front-end loader as he had no strength to maneuver the levers and pedals. The worker was also unable to perform the other duties related to the job such as maintenance of the loader and clearing mud and debris from the loader. The worker stated that a shovel was required to clear mud and debris from the loader and he did not have the strength to perform this task. I find that the worker made a good faith effort to return to work, but he was unable to sustain this job as a result of his compensable condition.

[21] The worker's attempt to return to work does not, in this case, imply that the worker's pre-injury job was suitable for his compensable condition. As per the worker's testimony, he continued to experience headaches and dizziness during the June to October 1999 work trial. I am of the view that operation of heavy equipment such as a front-end loader would was not suitable for a worker who was experiencing headaches and dizziness and who had documented difficulty with memory, concentration, and attention span. In my view, it is significant, that just two months shy of the worker's return to work, Dr. Hadjiski, a Board Medical Liaison, opined in Board Memorandum No. 28 that the worker's precautions included working at heights, avoiding rapid body movements, heavy lifting, and operating dangerous machinery. It is also instructive that Dr. J. Lacroix, the clinical psychologist, who assessed the worker for a psychovocational assessment on June 19, 1998, opined that the worker's pre-injury job of a heavy equipment operator was not suitable for him given his profile. The unsuitability of the pre-injury job of machine operator was further confirmed by Dr. P. Schmalfuss, the worker's family physician, subsequent to the worker's unsuccessful attempt to return to work. In a report dated February 22, 2000, Dr. Schmalfuss opined that given the worker's condition "it would not be safe for him to operate heavy equipment". On May 10, 2000, Dr. Schmalfuss reiterated that that given the worker's poor response to anti-depressant medication, he would pose a threat to himself and to others if he was to return to his pre-injury job as a heavy machinery operator.

[22] Furthermore, I find that in this case the worker would have faced significant obstacles when seeking re-employment elsewhere. Although the worker's compensable condition has attracted a 20% NEL award, I find that his disability, combined with his very limited transferable skills, age, and inability to communicate in English would preclude him from finding suitable work. In this regard, I note that the worker testified that he had only completed up to a grade two level of education in Italy. The documentation on file indicated that he had perhaps completed up to grade three. In any event, documentation on file indicated that the worker was effectively illiterate in both English and in Italian. The worker had not attended any school in Canada, nor had he ever taken any English as a Second Language courses. I note that in the psychovocational assessment report dated June 19, 1998, Dr. Lacroix, observed the following about the worker's performance:

- he had no computer skills;
- his performance intelligence quotient was in the 1$^{st}$ percentile;
- he had a borderline learning ability;
- there was the possibility of a verbal learning disability which could affect upgrading;
- the test scores would have required the worker to undergo one-to-one remedial upgrading;
- he was functionally illiterate in English;
- he had no conversational English skills; and

- he had very weak arithmetic skills.

[23] While Dr. Lacroix indicated that the worker's skills could be upgraded with one-to-one remedial assistance, he expressed significant reservation about the ability of the worker to be able to find suitable work. He stated the following at the conclusion of his report:

> Nonetheless, even with upgrading and retraining, it would likely be difficult for [the worker] to achieve his high pre-injury wage. Given his current high levels of emotional distress, it was our impression that coping with a vocational rehabilitation plan may overtax his coping skills.

[24] Moreover, the preponderance of the medical evidence on file indicated that the worker's compensable condition was such that he was unfit for any type of gainful employment. I note that the medical opinions regarding the worker's inability to work began in October 1999 and the opinions did not change over the years. On October 28, 1999, Dr. Schmalfuss, the worker's family physician, reported in a Physician's Report Re-opened Claim that when he saw the worker on October 18, 1999, the worker had complaints of weakness, dizziness, and headaches. He was tearful, sad, mentally and physically slowed down, and somewhat unsteady. Dr. Schmalfuss diagnosed a post-concussion depression, and he considered the worker unfit for work.

[25] On November 30, 1999, Dr. J. Mayer, a neurosurgeon, noted that the worker complained of headaches and dizziness. He was fearful and no longer drove a motor vehicle. In his opinion, the worker had anxiety and emotional disturbances. He opined that it was unlikely that he would be able to return to work in his present condition. In a report dated December 21, 1999, Dr. G. Ilacqua, a psychiatrist, noted that the worker's professional presentation had deteriorated since his last contact in July 1999. He was of the opinion that the worker met the criteria for major depression. Dr. Ilacqua attributed the worker's deterioration to his failed attempt to successfully return to work.

[26] In a report dated March 30, 2000, Dr. F. Smith, a psychiatrist, observed that the worker did not appear anxious and his mood was moderately depressed. The worker had somatic complaints including headaches, dizziness, weakness of his legs, and upset stomach. Dr. Smith opined that the worker suffered from a chronic adjustment disorder with depressed mood. Dr. Smith recommended that the worker receive further psychiatric treatment.

[27] The worker saw Dr. S. Mallia, a psychiatrist, who reported on July 8, 2000 that when he first saw the worker on June 7, 2000, his thought content was filled with multi-somatic complaints and vegetative symptoms of depression. Dr. Mallia's impression was that the worker's psychological and physical complaints were in tune with a chronic pain disorder. He commented that the worker might suffer from an organic mood syndrome, depressed type. His impression was that the worker's prognostic outcome was "very guarded". He stated the following:

> Given his poor response to pharmacological, physical and psychological treatment, it is unlikely that he will regain full employability. At this present time I believe he is totally incapacitated for any foreseeable employment.

[28] Dr. G. Marotta, a geriatric and internal medicine specialist, concurred with the previous opinions regarding the worker's employability. In a report dated December 15, 2000, he opined that as a result of the worker's cognitive impairment, the worker was permanently disabled and unlikely to be able to return to work, despite the best treatments. In a follow-up report dated

February 22, 2001, Dr. Marotta linked the worker's inability to work directly to the compensable accident when he stated the following:

> This gentleman continues to have deficits with attention, concentration, and short-term memory…He is not able to manage the cognitive requirements of a full-time job. He is unlikely to manage any new learning because of these deficits and therefore I believe his is permanently disabled as a result of this on the basis of mental changes. I do not think he has any reasonable chance of significant recovery and therefore I think he should be considered disabled.

[29] When the worker saw Dr. Mallia again on March 9, 2001, Dr. Mallia reiterated that the worker's prognosis was dim. Following a mental status examination of the worker, Dr. Mallia concluded as follows:

> [G]iven the chronicity of the symptoms and its refractory to pharmacological, physical, and psychological treatment, the prognostic outcome is poor. It is unlikely the patient will regain premorbid level of functioning and indeed, I believe he is totally disabled for any foreseeable employment.

[30] On June 20, 2001, Dr. Smith once again unequivocally opined that the worker was "clearly and totally disabled at present and cannot work".

[31] Upon reassessment on August 16, 2001, Dr. Marotta noted:

> Physically, he can move about and function but as a result of the combination of the major depression and severe concentration and attention problems, this man is not able to work in any occupation. It is possible he may improve but given the duration of his symptoms and the severity, I find this man to be completely disabled…

[32] On August 17, 2001, Dr. Mallia reiterated his previous opinion regarding the worker's unemployability.

[33] In February 2003, the worker was seen for a follow-up at the neurology program. Dr. R. Van Reekum, a psychiatrist, assessed the worker. In his report, Dr. Van Reekum opined that although the worker's progress was difficult to ascertain, he was "permanently handicapped and unable to work". He further noted that there was a high probability that the worker's condition would continue to decline over time in terms of his functional abilities. Dr. P. Comper, a clinical neuropsychologist, concurred with Dr. Van Reekum's opinion regarding the worker's prospects of returning to work. Following his assessment of the worker on February 12, 2003, Dr. Comper's clinical opinion was that the worker's "prognosis for a return to work or improvement at this point is poor".

[34] Dr. R. Arbitman, a psychiatrist, assessed the worker on September 9, 2003. He indicated that the worker had complaints of chronic headache, weakness, depression, insomnia, cognitive impairment, forgetfulness, and difficulties with concentration. He diagnosed the worker with an adjustment disorder and pain disorder with depression. Dr. Arbitman concluded that in view of the worker's age and the chronicity of his symptoms, the prognosis for a return to gainful employment was "practically zero".

[35] On January 12, 2006, Dr. Mallia indicated that during a follow-up assessment on November 7, 2005, the worker's mental status was unchanged. He had pain in both knees, both legs, poor motivation, and he was avoidant of daily activities. The worker was diagnosed with somatoform pain disorder with emotional and physical disturbances. Dr. Mallia concluded that the worker suffered from a chronic, enduring and debilitating illness. In Dr. Mallia's opinion, it

was unlikely that the worker would regain his premorbid level of functioning given his emotional, mental, and cognitive deficit. Dr. Mallia noted that the worker was totally disabled and unable to regain any competitive employment. He recommended that the worker continue with ongoing psychotherapy and medication to prevent further deterioration of his condition. On follow-up dated April 4, 2008, Dr. Mallia reiterated that the worker's prognostic outcome was poor. In a report dated April 6, 2010, Dr. Mallia confirmed the above diagnoses and indicated that the worker's condition had not changed since the worker was last seen in December 2009. I therefore infer that Dr. Mallia maintained his earlier view that the worker would be unable to return to gainful employment.

[36] I am of the view that the medical evidence outlined above strongly supports a finding that the worker's compensable psychological condition was such that he was not fit for any type of work. There was no significant evidence of substance to challenge the medical opinions of the worker's treating physicians, which I have found to be persuasive in this case. Furthermore, I find that the worker would not have benefited from further retraining, given the combination of his compensable psychological condition and his psychovocational profile as outlined above by Dr. Lacroix. In this regard, I note that the worker had only completed at most a grade three level of education and he was functionally illiterate in English. The worker's prior work experience was limited to labour type work in the construction industry. He had limited learning ability as noted by Dr. Lacroix, which would have made upgrading or retraining difficult. Lastly, as noted by Drs. Mallia, Marotta, and Smith, the worker's compensable psychological condition and the accompanying difficulties with concentration, memory, and attention span, would have likely compounded the situation and made any upgrading unsuccessful. Therefore, in my view, further retraining services would likely not have been of any practical assistance to the worker. It may be that a 20% NEL award would not in many cases support a finding of a worker being competitively unemployable. However, in this case, my review of the evidence indicates that the impairment, along with the worker's restrictions, caused significant limitations, which along with the worker's personal and vocational characteristics, would add significantly to the worker's inability to return to gainful employment.

[37] Although entitlement to headaches and dizziness was raised as an alternative argument, I am of the view that the worker's headaches and dizziness were the result of his compensable psychological condition, rather than an independent organic condition that arose from the injury. The worker's headaches and dizziness were accounted for under the NEL assessment in February 2004. As noted below, there was no significant evidence of significance that the worker's headaches and dizziness were the result of the minor head injury that he sustained in the workplace accident in August 1997.

[38] On the day of the accident, the worker was diagnosed with a minor head injury. He returned to work three days later but went off work shortly after due to symptoms of headache, blurred vision, and dizziness. CT scan and skull x-rays were reported as normal. In January 1998, the worker had a multidisciplinary assessment in a neurology program with Dr. Comper. At that time, his major complaints were of dizziness, headaches, and some vision problems. Testing revealed difficulties with attention and concentration, which were thought to be due to an overlay of psychological and emotional difficulties rather than to organic brain injury.

[39] In October 1998, the worker was reassessed by Dr. G. Darby, a psychiatrist, whose clinical impression was that the worker's ongoing mental state was totally out of keeping with what one would expect for the nature and severity of the work accident.

[40] Dr. Comper re-assessed the worker again in February 2003. He opined that the worker's cognitive difficulties were not consistent with a mild concussion that occurred five years earlier. Dr. Comper noted that neuroimaging had not revealed any evidence of trauma to the head. He felt that the worker's cognitive problems were related to functional and non-organic factors rather than due to brain injury. Dr. D. Mikulis, a neurologist, opined that the MRI of the worker's brain in March 2003 suggested an idiopathic etiology. Following a review of the medical file, Dr. M. Ho, a Board Medical Consultant, opined in Board Memorandum No. 84, dated May 16, 2003, that the worker did not have an organic impairment resulting from the head injury. Although Dr. Marotta suggested in 2000 that the worker's cognitive impairments may have resulted from closed head injury, I note that Dr. Marotta is not a neurologist and it did not appear that he had the benefit of a brain MRI when he arrived at this conclusion. In this case, I prefer the opinions derived from the worker's assessment at the neurology program as they would have more expertise in dealing with head traumas. In addition, I note that the neurologist had the benefit of reviewing the worker's neuroimaging results. I am therefore of the view that there was insufficient evidence of significance to suggest that the worker's headaches or dizziness were the result of an organic brain injury or head trauma sustained as a result of the August 15, 1997 workplace accident.

**DISPOSITION**

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

1. Following the workplace accident in August 1997, the worker's pre-injury job of heavy machinery operator, namely front-end loader operator, was not suitable employment for him.

2. The combination of the worker's compensable condition and his personal and vocational characteristics rendered the worker unemployable. The worker's wage loss after March 30, 2000 arose from his compensable condition. The worker is therefore entitled to full FEL benefits from March 30, 2000.

3. The worker is not entitled to benefits for headaches and dizziness on an organic basis.

DATED: July 18, 2012

SIGNED: S. Darvish