WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 179/18

BEFORE: E. J. Smith: Vice-Chair

HEARING: January 15, 2018, at Kitchener
Oral

DATE OF DECISION: April 6, 2018

NEUTRAL CITATION: 2018 ONWSIAT 1148

DECISION(S) UNDER APPEAL: WSIB Appeal Resolution Officer (ARO) decisions dated January 14, 2015 and October 19, 2016

APPEARANCES:

For the worker: R. Fink, Lawyer

For the employer: Not participating

Interpreter: Not applicable

REASONS

(i) The issue

[1] The worker injured her right shoulder in an accident on November 29, 2004. She continued working until June 29, 2009 when her symptoms worsened. She has been granted a 4% NEL award for the right shoulder.

[2] She appeals the decision of the Board Appeals Resolution Officer (ARO) dated January 14, 2015, which denied the worker full loss of earnings (LOE) benefits in various time periods prior to the final review date of November 27, 2015. She has been paid partial loss of earnings benefits only in those time periods based on deemed earnings as a receptionist. The time periods in issue are:

- From June 29, 2009 to February 8, 2011
- The month of June 2011
- From April 1, 2012 until August 9, 2012
- The month of December 2012
- From October 16, 2013 to January 19, 2014

[3] The ARO decision and the hearing ready letter refer to the initial time period in issue as from June 29, 2010 and not as from June 29, 2009. Mr. Fink submits that the reference to June 29, 2010 should be to June 29, 2009 and that the date reference is an error. I have addressed my jurisdiction to award benefits from June 29, 2009 until June 29, 2010 below.

[4] The worker had also appealed the ARO decision of October 19, 2016, which addressed the worker's LOE benefits at the final review date of November 27, 2015. However, the worker's appeal of the 2016 ARO decision was withdrawn at the Tribunal hearing. The worker had obtained employment at wages in excess of the deemed wages determined by the ARO as of the final review date.

[5] From the file, the worker had also originally claimed for entitlement for her left shoulder on the basis of a new 2009 accident. However, the claims for the 2009 accident and for the left shoulder were withdrawn.

[6] I have granted full benefits for the time period from June 29, 2009 until February 8, 2011, and for the time period from December 18, 2013 to January 19, 2014. .

[7] I have denied full benefits for the time period from April 1, 2012 to August 9, 2012, for the months of June 2011 and December 2012, and for the time period from October 16, 2013 until December 18, 2013. During those time periods, I agree with the ARO that partial LOE benefits are payable based on deemed earnings in the suitable occupation of receptionist.

(ii) Background facts and testimony

[8] The worker injured her right shoulder when transferring a patient on November 29, 2004, while working as a personal support worker at a retirement residence. She continued working and her injury was not initially recognized as a permanent impairment. She was 32 years old at the time of the accident.

[9] The worker testified that she had completed grade 12 and had taken a course as a personal service worker in 2002, before taking this job. The course was a one-year college program to qualify as a personal service worker. After college, she worked in assembly line work for a year. She then was hired at a retirement home, where she had her shoulder injury.

[10] Over time the worker experienced worsened symptoms. She continued working from 2004 until 2009. She went off work on June 29, 2009 due to her worsened symptoms, which caused her to be unable to continue in her job. She testified that the employer laid her off because it considered her unable to continue safely even in the modified work it had offered her.

[11] The Board at first denied ongoing entitlement for the 2009 symptoms. The Tribunal's *Decision No. 2032/13*, dated December 18, 2013, then granted the worker ongoing entitlement. The extent and duration of benefits resulting from the Tribunal decision were referred back to the Board, and this appeal is now from aspects of the Board's subsequent implementation determinations.

[12] After the 2013 Tribunal decision, the worker was assessed for a non-economic loss award and was granted a 4% NEL award on February 18, 2014. The award was based on a diagnosis of a repetitive strain injury and a rotator cuff tear. The Board identified the MMR date as May 26, 2011. The Board also offered work transition (WT) services, which commenced in 2013, and the worker completed training as a medical secretary.

[13] The worker was paid full LOE benefits while she was in the WT program from January 20, 2014. In the time period prior to January 2014, the Board determined a suitable occupation (SO) of receptionist and set the worker's deemed earnings at $10.25 an hour in this SO, which I understand was minimum wage. The ARO determined that the worker was able to work as a receptionist without retraining.

[14] In addressing these retroactive benefits (applicable to the time period during which entitlement had not yet been granted), the ARO applied the Board's Adjudicative Advice document: "Practice Advice for Ordering LOE Benefit Arrears." This document is not Board policy, and I am not bound to apply it under section 126 of the Act. However, I have taken it into account in addressing the issue. The Document contains guidelines applicable when LOE benefits are addressed on a retroactive basis. It states that 100% LOE is payable when an impairment exists that prevents the worker from returning to pre-injury employment, and no suitable employment has been offered, but the worker is making reasonable efforts to secure suitable employment or is engaging in other activities (e.g. active health care treatment) reasonably aimed at improving employability and minimizing LOE.

[15] The guidelines state that partial LOE is payable when the worker has not made reasonable efforts either to secure suitable employment or to improve his/her employability. The post-accident earnings are to be based on the SO (i.e. "suitable occupation") (then referred to as the SEB, or suitable employment or business) through an LMR (labour market re-entry) assessment to determine what work the worker could do without retraining.

[16] The ARO found that the worker had engaged in a self-directed job search sufficient to entitle her to full benefits (subject to adjustment for times worked) in the time periods from February 9, 2011 to May 31, 2011, from July 1, 2011 until March 30, 2012, from August 10, 2012 to November 30, 2012, and commencing again on January 20, 2014, which was

when the WT activities commenced. As a consequence, these time periods are not a part of this appeal.

[17] I have considered each of the time periods for which the ARO denied full benefits separately below.

(iii) The time period from June 29, 2009 to June 29, 2010: the jurisdictional issue

[18] Before addressing the other time periods, I have considered first my jurisdiction to address the time period from June 29, 2009 until June 29, 2010.

[19] In his identification of the issue and in his conclusions, the ARO addresses only the time period commencing on June 29, 2010. On the second page of his decision, the ARO refers to the time period appealed by Mr. Fink as commencing in June 2010.

[20] Mr. Fink submits that the date reference is a typographical error. He refers me to the operating level decision dated March 26, 2014, which denied full LOE benefits for the time period from June 29, 2009 to February 8, 2011 under the heading "Summary of LOE entitlement: Issue #4." Mr. Fink refers me to the Board letter dated September 16, 2014, which acknowledges receipt of his appeal for full loss of earnings benefits commencing June 29, 2009. The worker went off work on June 29, 2009, not June 29, 2010.

[21] I accept that the ARO's reference to June 29, 2010 means that he mistook the dates that were the subject of the appeal. However, the question is whether I have jurisdiction to address the earlier time period or whether that time period must be returned to the ARO for further adjudication.

[22] In my view, the question is whether the earlier time period was implicitly before the ARO. I have considered whether the error was simply a typographical error with respect to the date, and whether the ARO had addressed his mind to the full time period despite the wrong references to the relevant dates.

[23] In my view, in the substance of the decision, the ARO did address the time period commencing from June 2009. In the list of matters addressed by the operating branch, on the first page of his decision under the third bullet, he refers to the time period for which partial benefits were applicable as commencing in June 2009. On the last page of his decision, he refers again to the modified work done by the worker in 2009 (prior to her lay off in June 2009) and so he has addressed his mind to that time period.

[24] I do not consider there to be any useful purpose in sending the matter back to the Board, given that the full time period was appealed to the ARO and that the ARO has considered the evidence in the full time period. In my view, the full time period was before the ARO and I have jurisdiction to address the full time period that was appealed to the ARO.

(iv) The time period from June 29. 2009 to February 8, 2011; entitlement to full LOE

[25] I have granted the worker full LOE during the time period from June 29, 2009 until February 8, 2011.

[26] Mr. Fink submitted that the worker was unable to work in this time period because of her shoulder injury. He submitted that the identified SO of receptionist was not suitable because she

had not yet been retrained. However, I agree with the ARO that the SO was suitable. The worker had had some limited clerical experience when doing modified work at the employer before her lay off. In any event, the SO of receptionist was not the only job identified for the worker as suitable without re-training. The psycho-vocational assessment dated February 21, 2014 also identifies the SO of cashier as suitable without retraining. The low end wages in that SO are the same as those used by the Board for the receptionist SO. While this SO refers to parking lot cashiers as well as to cashiers generally, and Mr. Fink has provided me with a Board letter that it no longer uses the SO of parking lot attendant, the reference to the cashier job in this report includes cashiers generally and not just those at parking lots.

[27] However, the worker is entitled to full benefits notwithstanding my finding that she was not unemployable prior to her retraining. The Board declined full benefits in this time period because the worker had not kept a record of her job search. The worker testified that she started to keep a list of her job searches when Mr. Fink became her representative and told her to do so. She did not know that she should be keeping a list of her job search activities until Mr. Fink informed her of this. She testified that she made extensive efforts to find work in the time period between June 29, 2009 and February 8, 2011, when she began to keep a record of those searches.

[28] I agree with Mr. Fink that the distinction made by the ARO between the time periods during which the worker kept a list of her job searches and the earlier time period is not a reasonable basis upon which to distinguish benefits on these facts. The worker had no way to know that a job search list would be required in this time period. She was appealing for recognition of her ongoing symptoms as they related to her earlier injury. The Board had not recognized the causal relationship, which was accepted only in the Tribunal decision in December 2013. Therefore her earlier appeal to the Tribunal was not yet focused directly on the loss of earnings issue. It was focused on the issue of medical causation. Until she had a representative, she had no advice on this issue, and the Board's initial denial of ongoing entitlement meant that there was no opportunity for the Board to have told her to maintain a job search list.

[29] In my view, this is not a situation in which she should have known to keep a specific list of her job search activities and had not done so. At this stage of the appeal process, loss of earnings benefits were not yet directly in issue, and she would not necessarily have been aware of how the Board addressed the issue of LOE benefits or, for instance, of the practice of deeming LOE benefits.

[30] In my view, the issue of whether the worker's job search activities from 2009 were sufficient in the circumstances must be addressed based on all the evidence, and not just on whether the worker maintained a specific record of her job search. The worker testified that she searched continuously for work. She testified that she searched for many different kinds of work. The worker also testified about doing some volunteer work with a community service organization, which, from the file, consisted of clerical work at about three hours a week over several months. That work would have given her some additional clerical experience on her CV. Once benefits were granted, she successfully completed the WT program to become a medical secretary and has now found work in this field. I accept her evidence that she conducted an extensive job search even in the earlier time period especially in the context of the very extensive job search lists that have been provided for the later time periods. The worker was at some disadvantage in finding new work because she had previously been doing physically heavy work

for which she had specific training, and it was now necessary for her to find different, less physically demanding work.

[31] I also consider it important to note that the worker was not at MMR during the time period to February 2011. The worker was ultimately granted a NEL award of only 4% for her shoulder, based on an MMR date of May 26, 2011. A 4% NEL award reflects only a minor level of ongoing permanent impairment. However, the worker's symptoms would have been worse than those reflected in the 4% award during the time period prior to MMR, because she was still recovering. This would have further hampered her efforts to return to work.

[32] In this circumstance, I accept het testimony that she used her best efforts to find work. She is entitled to full benefits from June 29, 2009 until February 8, 2011.

(v) The time period of June 2011: full benefits are denied.

[33] The worker was paid full benefits from February 9, 2011 until May 31, 2011 based on her job search activities. However, she did not submit job search records for June 2011 because she testified that she went to visit her brother, on vacation.

[34] Mr. Fink submits that she should be granted full benefits for this month because, having been active in her job search to this date, she was entitled to vacation. For this month, the Board has paid her only partial benefits, based on deemed earnings in the receptionist SO, at $10/25 an hour.

[35] I do not accept Mr. Fink's submission on this point. In my view, while the worker had been conducting an ongoing job search to this date, there is no basis in the evidence for me to find that that job search required activity at eight hours a day or that the effort required was equivalent to working. I do not consider her job search a basis for the payment of vacation benefits. At this point in time, she had not been working for 2 1/2 years. Given that she had not been working, she did not require paid time off from work.

(vi) The appeal for time periods in 2012; the cervical surgery

[36] The worker provided job search records and was paid full benefits from July 1, 2011 until April 1, 2012. From the file, she then had a medical difficulty with her cervical spine, leading to surgery. When asked, she testified that this was the reason that she stopped looking for work from April 1, 2012.

[37] She had a cervical disc replacement on April 30, 2012. She testified that it was a major surgery. She testified that she "could not move" for three or four months. However, when she was recovered, her 2009 employer (not the 2004 accident employer) offered her modified work. She had never been terminated from this job, but had been laid off on an unpaid leave of absence in 2009. In 2012, that employer offered modified work and she worked from August 10, 2012 until November 27, 2012. However, that employer then laid her off again. The worker testified that the employer was not satisfied that she could do the work without danger of re-injury.

[38] The worker testified that she did not look for work again until January 2013. She testified that she was very upset about the loss of work. She had a "breakdown." She couldn't cope with the employer sending her home. She was in a dark place. However, in January 2013 she pulled herself together and started to look again for work. The Board has paid partial benefits from December 2012 and full benefits again from January 2013.

[39] Mr. Fink submitted that the worker should be entitled to full benefits from April 1, 2012 until August 9, 2012 on the basis that the worker was unemployable in any event due to her shoulder injury, and that as a result benefits should not be reduced because of her non-compensable cervical surgery. Mr. Fink did not dispute that the reason that the worker did not conduct a job search between April 1, 2012, until the time that she returned to work in August 2012, was because of her non-compensable neck condition. However, he submits that this should not affect her entitlement to full loss of earnings benefits. He submits that she should also be paid for the month of December 2012 as vacation. He also made submissions about her psycho-traumatic symptoms.

[40] However, I have already found that, absent the cervical surgery, the worker was not unemployable. The SO of receptionist was suitable and the SO of cashier had also been identified as suitable without retraining. In addition, at this point in time, the worker had only a 4% level of NEL impairment for her right shoulder. She had reached MMR. She was aware of the need to conduct a job search and to maintain job search records. She did not job search because of a non-compensable medical difficulty and not because of a lack of understanding of the need to job search or to maintain records.

[41] In my view, she is not entitled to additional benefits in the time period affected by her non-compensable surgery.

[42] I am also satisfied that she is also not entitled to additional benefits in December 2012. It is understandable that she waited over the Christmas time period before recommencing her job search. However, the disruption in her pattern of job search is attributable to the neck surgery. But for the neck surgery, in my view, there would have been no reason for her to have stopped her job search, assuming that she had continued to be unsuccessful in finding work.

[43] There is also evidence that the worker had psychological symptoms and depression in particular in 2012 and 2013. A report of Dr. Hassan, a psychiatrist, dated August 8, 2013, describes that the worker had suicidal ideation. In his report, Dr. Hassan has wrongly understood that both the worker's shoulder pain and her cervical injury were compensable. However, to clarify, the cervical symptoms are not compensable. There is no evidence of a change in the level of her shoulder impairment in this time period.

[44] Mr. Fink submits that I have jurisdiction to take the worker's psychological symptoms into account generally, with respect to all the time periods. However, I have not addressed those symptoms as they relate to the other time periods because they would not affect my determinations. I have granted benefits for the earlier time periods, except for the month of December 2011, when the worker took vacation. There is no evidence of psychological difficulty affecting her ability to job search in December 2011.

[45] I have considered how to address the psychological evidence only with respect to the 2012 time period.

[46] However, I have determined that I do not have jurisdiction to address the worker's psychological symptoms in this time period as a basis to award benefits. The ARO did not address psychological entitlement. Mr. Fink submits that I can take into account evidence of. psychological symptoms even when the question of entitlement for psychotraumatic disability has not been addressed by the Board. Mr. Fink refers me to *Decision Nos 638/89I* and *795/89I.*

[47] In *Decision No. 795/89I*, the Panel considered a leave to appeal application together with an appeal of a Hearings Officer decision addressing psychotraumatic disability and chronic pain. The Panel denied a request to withdraw the latter issues and addressed the issues on a whole person basis. However, I find the facts of that appeal distinguishable. There was a Hearings Officer decision on those facts, which had addressed psychotraumatic disability and chronic pain.

[48] I agree that, in *Decision No. 628/89I,* the Panel took jurisdiction to address symptoms of chronic pain despite the fact that the Board had not addressed that issue. The worker was unrepresented and it appears that the Panel was concerned about the delay for the worker if the hearing could not proceed based on all the evidence. However, this 1989 decision was issued in the time period very soon after the Board's introduction of its first 1988 policy on chronic pain. Prior to that time, the Tribunal had addressed pain issues in the context of organic entitlement and not separately. In my view, with respect, the stronger line of Tribunal decisions now take the position that a final decision of the Board is necessary in order for the Tribunal to address psychological entitlement or chronic pain (see for instance *Decision Nos. 90/99I*, *1176/16*, and *1476/11*). The policy criteria and the evidence that address these bases for entitlement are distinct and in my view require a final Board decision in order for the Tribunal to proceed.

[49] In my view, the question is one of jurisdiction. The Act provides jurisdiction to the Tribunal only when there has been a final decision of the Board. The question with respect to psychotraumatic entitlement is the same as the question of entitlement for other sequential diagnoses, such as entitlement for fibromyalgia or CPD. The question is whether there is a final decision of the Board that addresses the relevant issues of causation and of the application of Board policy.

[50] In this case, Mr. Fink raised the issue of entitlement for depression in his submissions to the Board dated July 28, 2014. However, from the file, when the Board contacted Mr. Fink's office, his assistant, Pamela, confirmed to the Board that the depression issue was withdrawn. On these facts, the ARO would have not have reasonably considered evidence of psychological entitlement. Entitlement for psychological disability had not been addressed by the operating level because Mr. Fink had explicitly withdrawn that issue. Therefore the ARO did not address that issue and the issue was not implicitly before the ARO. Given the withdrawal, the ARO could not have been expected to proceed to address that issue even if his determinations had been different on the presenting issues. There is no final decision of the Board on the issue of entitlement for the psychological symptoms. In my view, I do not have jurisdiction to address the worker's psychological symptoms.

[51] In any event, based on this evidence, the symptoms in 2012 and 2013 are most clearly associated with the onset of the new and severe cervical difficulties. There had been no change in the compensable shoulder symptoms.

[52] Therefore the psychological symptoms are not a basis for the award of full benefits in 2012.

(vii) The time period from October 16, 2013 to January 19, 2014

[53] The worker was also paid only partial benefits between October 16, 2013 and January 19, 2014. The worker testified that she did not look for work in these weeks. No job search records were provided for the time period from October 16, 2013 until January 19, 2014. I

note again that January 19, 2014 is the date that the Board opened work transition services after the Tribunal decision of December 2013, and that the time period after January 19, 2014 is not in issue in this appeal.

[54] In his letter to the Board dated November 28, 2014, Mr. Fink submitted that the worker was doing volunteer work during this time period, which should be recognized as sufficient for the payment of full benefits. However, from the file, the volunteer work involved only three hours a week and would not have precluded a concurrent job search.

[55] The worker testified that she did not keep up her job search in this time period because she was waiting for the Tribunal hearing and hopeful that the Tribunal would re-open benefits. The Tribunal hearing took place on October 30, 2013. The decision was issued on December 18, 2013. That decision allowed entitlement for the worker's ongoing right shoulder symptoms on the basis that they were causally connected to the 2004 accident. The nature and duration of benefits flowing from the Tribunal decision were returned to the Board for further adjudication.

[56] I understand that the worker may have wished to wait, in particular, to see what training might be offered by the Board, once she knew that the appeal had been allowed. She had conducted an extensive job without success. It was not unreasonable for her to defer a further job search until she knew what retraining might be offered and/or until she had received the job retraining. The time that the Board took to implement the Tribunal decision was not within her control.

[57] However, in my view, this reasoning is only applicable once she knew that the appeal was allowed. Prior to that date, she did not know how long it might be until the decision was issued. In this case, the decision was issued about six weeks after the hearing. However, the time to decision could have been longer. Also, the worker did not know what the result of the decision might be. She is not entitled to full benefits in the time period leading up to the decision.

[58] In my view, the Board's practice guidelines provide for full LOE based only as an exception to the general rule, that benefits will be paid based on the deemed earnings that the worker could have earned in the applicable SO. To receive full benefits, the guidelines require that the worker be actively looking for work. These guidelines are not Board policy and I am not required to apply them. However, I find their application reasonable in this circumstance.

[59] In my view, the worker is entitled to full LOE benefits from December 18, 2013 until January 19, 2014, while she was waiting for the Board to commence her work transition activities. She is only entitled to the partial benefits paid from October 16, 2013 until December 18, 2013.

DISPOSITION

[60] The appeal is allowed in part.

[61] The worker is entitled to:

1. Full benefits from June 29, 2009 until February 8, 2011, and from December 18, 2013 until January 19, 2014.

[62] The worker is not entitled to benefits beyond the partial benefits paid for the month of June 2011, for the time period from April 1, 2012 until August 9, 2012, for December 2012, or for the time period from October 16, 2013 until December 18, 2013.

DATED: April 6, 2018

SIGNED: E.J. Smith