# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

# DECISION NO. 1866/18

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| **BEFORE**: | C. Zehr : Vice-Chair<br>K.J. Soden : Member Representative of Employers<br>M. Tzaferis : Member Representative of Workers |
| **HEARING:** | June 21, 2018 at Toronto<br>Oral |
| **DATE OF DECISION:** | September 17, 2018 |
| **NEUTRAL CITATION:** | 2018 ONWSIAT 2958 |
| **DECISION(S) UNDER APPEAL:** | WSIB Appeals Resolution Officer (ARO) decision dated March 12, 2015 |

**APPEARANCES:**

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| **For the worker:** | R. Fink, Lawyer |
| **For the employer:** | Not participating |
| **Interpreter:** | Not applicable |

## REASONS

### (i) Introduction

[1] The worker appeals a decision of the ARO dated March 12, 2015, which denied entitlement to full Loss of Earnings (LOE) benefits from June 10, 2013 to January 27, 2014 and March 7, 2014 to June 4, 2014.

### (ii) Background

[2] The worker, now 44 years of age, had been working three months as a welder for the employer, who had operations outside of Ontario, in another province (province #1), when a workplace accident occurred. On November 12, 2011, the worker was driving a quad runner through a ditch when it rolled backwards landing on his chest. He was taken by ambulance to the emergency department and given a diagnosis of three left rib fractures.

[3] The worker filed a claim with the Workplace Safety and Insurance Board (the Board) and the Board accepted that the worker had sustained a work-related injury to his left chest. Entitlement was eventually extended to include a T10 fracture and soft tissue injuries to the cervical spine and right shoulder.

[4] The worker returned to stay with his parents, who also lived outside of Ontario in a different province (province #2), during his recovery and to address non-compensable family matters. He commenced physiotherapy in province #2. The Board's Case Manager deemed the worker fit for modified duties on January 24, 2012. The worker continued to reside in province #2; however, he advised the Case Manager that he would be willing to return to work in province #1 if suitable work with the employer became available.

[5] With the involvement of a Return to Work Specialist (RTWS) from the Board, on February 14, 2012, the employer identified suitable modified work, which was scheduled to begin February 22, 2012 and involved supervisory duties, picking orders, material deliveries without loading and unloading duties, and completion of safety inspections. However, the modified work came into question once the worker returned to province #1 and as a result, he did not commence work as scheduled. According to the worker, upon arrival and contact with the employer, the employer asked him if he could perform welding functions and unload trucks, which were tasks outside of his physical restrictions. The employer disputed this statement and the RTWS scheduled another meeting with the workplace parties on February 29, 2012, during which a new Return to Work (RTW) plan was devised. According to the RTWS memorandum dated February 29, 2012, the modified work involved fabricating (welding) brackets and sorting fittings at a bench workstation. Work hours were to increase gradually over the course of the RTW plan. The worker was to be paid partial LOE benefits up to April 2, 2012 when he was expected to have resumed full work hours.

[6] On March 19, 2012, the worker contacted the Board and advised that he had to return to province #2 for personal reasons. The employer confirmed that the modified work remained available. Partial LOE benefits ceased as of April 2, 2012 because the worker's wage loss beyond this date was deemed not related to the workplace injury.

[7] On March 30, 2012, the worker attended a Regional Evaluation Centre (REC) for an assessment, at which time it was reported that his fractured ribs and other soft tissue injuries had

largely recovered. However, he was left with marked restricted range of movement in his right shoulder and post-traumatic adhesive capsulitis. An MRI was conducted on April 10, 2012, which revealed a SLAP type 1, partial thickness tear through the distal supraspinatus tendon, involving approximately 50% of the tendon thickness. Tendinosis and degenerative changes of the acromioclavicular and glenohumeral joints were also noted. Over the next year, the worker participated in extensive physiotherapy in province #2 and attended multiple assessments at specialty clinics, which were arranged by the Board.

[8] A second MRI was conducted on March 12, 2013 and revealed an extensive superior labral tear with extension into the biceps. A type IV SLAP tear was noted. Pain with radiation into the neck and positive impingement signs were noted as a significant barrier to function, according to the physiotherapist in April 2013. On May 1, 2013, Dr. Gallay at the Sunnybrook Shoulder and Elbow clinic opined that the worker had permanent restrictions for the right shoulder and would not be able to return to the heavy duties of his pre-injury job. As a result, the Board determined that the worker had a permanent impairment and maximum medical recovery had been achieved as of June 27, 2012. The Board granted the worker a 10% Non-Economic Loss (NEL) award on June 24, 2013 and noted permanent restrictions of no heavy lifting, pushing or pulling, no above shoulder work and no repetitive or forceful use of right arm away from the body.

[9] The RTWS conducted another meeting on May 30, 2013 and the employer offered a different modified position in security, at $14.00 per hour for 50 hours per week. The position was available as of June 10, 2013; however, the worker declined the position noting that he was not able to relocate back to province #1 until early July for personal reasons. The Case Manager ruled that the modified work of security was suitable, and since the worker refused the position, the Case Manager ruled that the worker was not entitled to LOE benefits or Work Transition (WT) Services.

[10] Over the summer of 2013, the worker discussed the potential sponsorship of a pain program with the Board; however, this did not come to fruition until in November 2013 and he underwent a comprehensive assessment with Dr. Schofield at Altum Health. Dr. Schofield suggested that the overall prognosis for functional improvement was poor without a cognitive behavioural therapy and multidisciplinary function and pain program (FPP). The Board approved the program and the worker participated in the FPP from January 27, 2014 to March 7, 2014. After discharge from the program, the worker advised the employer in a letter dated April 23, 2014 that he was ready to return to work according to the FPP program.

[11] On May 30, 2014, the Board's Case Manager conducted a thorough review of the case and determined that retroactive LOE benefits were warranted for periods of time. The Case Manager continued to find the security position, which was offered by the employer on May 30, 2013, suitable and producing earnings of $14.00 per hour at 50 hours per week ($700.00 gross income per week). However, the Case Manager noted that, with these earnings, the worker would have experienced a wage loss. Therefore, partial LOE benefits were warranted from June 10, 2013 based on the income of $700.00 per week.

[12] Since the worker fully participated in the FPP from January 27 to March 7, 2014, the Case Manager granted the worker full LOE benefits for this period of time. In addition, the Case Manger found that following the discharge from the FPP, the worker did not make a reasonable attempt to secure employment or return to work; therefore, partial LOE benefits from

March 7, 2014 based on the security position were granted. The Case Manager referred the worker's case to a Work Transition Specialist (WTS) for a WT assessment to determine what specialized assistance the worker required to enable a return to work with the injury employer or another occupation in the general labour market. The worker was granted full LOE benefits once the WT assessment commenced on June 4, 2014. The worker participated in a psycho-vocational assessment (PVA) on June 17, 2014, which identified potential suitable occupations within his capabilities and training potential.

[13] The WTS contacted the employer on July 7, 2014 and the employer advised that they had work available in the shop, assembling gates and chain link fences (gate mesher). The work was $14.00 per hour for 40 hours per week and seasonal. The employer was supposed to send a video of the position to assist the WTS in determining whether the position was physically suitable; however, this did not materialize. The employer also indicated there were time constraints with respect to the start date for the position, which did not allow the worker time to relocate. The Board proceeded with further WT Services and consideration of retraining for other occupations in the workforce.

[14] A WT plan was designed to allow the worker to pursue a suitable occupation (SO) of Public Works Maintenance Equipment Operator or Truck Driver, which involved a brief certification program, job search training and opportunity for employment placement services. The worker participated in the program, which commenced on September 22, 2014 and was scheduled to end on March 13, 2015. However, the worker secured full time employment in the SO, which fully restored his preinjury earnings on January 17, 2015.

[15] In the meantime, the worker had objected to the denial of full LOE benefits for the periods of June 10, 2013 to January 27, 2014 and March 7, 2014 to June 4, 2014. The worker had been paid partial LOE benefits for these periods based on the expectation that he could have earned $700.00 per week in the security position. The case was referred to an ARO in the Board's internal Appeals Services Division. In a decision dated March 12, 2015, the ARO denied full LOE benefits; however, he deemed that partial LOE benefits should be based on the worker's capability to earn $560.00 per week. The ARO found that the wage expectation should have been based on 40 hours per week as opposed to 50. The ARO denied the full LOE benefit request because he found that the worker was offered and refused suitable work as of June 10, 2013. The ARO also ruled that the offer of suitable work remained available after the FPP program and the worker had not made reasonable efforts to contact the employer after the FPP. The ARO noted that each time the employer had been approached by the Board, the employer offered suitable work. The worker objected to the ARO's decision and now appeals the decision to this Tribunal.

**(iii) Issues**

[16] The issues under appeal are as follows:

1. Entitlement to full LOE benefits from June 10, 2013 to January 27, 2014.

2. Entitlement to full LOE benefits from March 7, 2014 to June 4, 2014.

**(iv) Analysis**

[17] Based on the preponderance of evidence, we find that the worker is entitled to full LOE benefits from June 10, 2013 to January 27, 2014 and from March 7, 2014 to June 4, 2014. The rationale for our decision is set out below.

[18] Since the worker was injured in November 2011, the *Workplace Safety and Insurance Act, 1997* (the WSIA) is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated. In addition, pursuant to section 126, the Tribunal must apply Board policy when rendering a decision. As a result, applicable references to the Operational Policy Manual (OPM) will be noted throughout this decision.

[19] Under section 43(1), a worker who has a loss of earnings as a result of a compensable injury is entitled to LOE benefits. *Decision No. 2474/00* held that under section 43(1) a causal relationship between the injury and wage loss is a condition precedent to the payment of LOE benefits. *Decision No. 2474/00* also found that a refusal of suitable work is not necessarily an act of non-cooperation, but it may lead to a conclusion that the worker's loss of earnings does not result from the injury. Section 43(2) operates to reduce a worker's benefits where the worker refuses suitable employment/occupation. LOE benefits are 85% of the difference between the worker's net average pre-injury earnings and the net average earnings the worker earns or is able to earn in a suitable employment after the injury. In the case before us, we must consider what the worker was able to earn for the periods in question and whether there were offers of suitable work. According to the ARO, the worker could have earned $14.00 per hour at 40 hours per week in the security position offered by the employer as this was ruled as suitable employment. However, if suitable work was found not to have been available to the worker, section 43(3) authorizes full LOE benefits where the worker is cooperating in health care measures and his early and safe return to work or all aspects of a labour market re-entry plan.

[20] According to OPM Document No. 19-02-01, "Work Reintegration Principles, Concepts, and Definitions," a suitable occupation (SO):

> …represents a category of jobs suited to a worker's transferrable skills that are safe, productive, consistent with the worker's functional abilities, and that, to the extent possible, restores the worker's pre-injury earnings. The SO must be available with the injury employer or in the labour market.

[21] OPM Document No. 19-02-01 also suggests a number of factors to consider when determining if suitable work is available with the employer. Specifically, if the worker has a permanent impairment, the clinical condition is stable and the worker is unable to return to the pre-injury job, policy suggests that the work with the employer has to have a "reasonable prospect of being available in the longer term."

[22] The worker's representative argued that full LOE benefits were warranted for the periods in question because the security position was not genuinely available based on the evidence within the file, including the history related to the modified work offers. In addition, the representative suggested that the worker was not capable of restoring his earnings until assisted by WT Services.

**(a) Entitlement to LOE benefits from June 10, 2013 to January 27, 2014**

[23] The worker testified that after returning to province #1 at the end of February 2012, he had attempted the modified work for about five days. He was told that a supervisory position

was not available and was given the responsibility of welding brackets. He testified that he found the work difficult due to the reaching requirement. He felt it was not suitable; however, he admitted that, in March 2012, he removed himself from any modified work opportunity because he had to return to province #2 for personal reasons.

[24] The case materials do not indicate that the worker attempted modified work at any point and the worker representative acknowledged the lack of evidence within the Case Record to support the worker's testimony regarding his attempt to work. However, when testifying during the hearing, the Panel found the worker to be genuine and forthcoming with details, even with those related to non-compensable issues, which could possibly have precluded his rights to LOE benefits. We also found that the worker's descriptions of events were consistent with other evidence in the Case Record. For instance, according to the RTWS memorandum dated February 14, 2012, the modified work initially offered by the employer involved supervisory duties and during a telephone conference call with the workplace parties and the RTWS, the worker agreed to relocate back to province #1 to start the modified work. According to the RTWS memorandum dated February 29, 2012 (two weeks after the original modified work offer), the RTWS held a meeting during which the employer offered a different modified job involving the fabrication of brackets at a bench workstation. The RTWS's memorandum does not detail how the brackets were fabricated, other than a stool would be provided for breaks and the worker could ask for help to organize work. Noting the worker's restrictions at the time, which included the avoidance of above shoulder activity and extended reaching, it would have been beneficial to have had a more detailed account of the physical demands and postures necessary to fabricate brackets in order to confirm physical suitability. The meeting of February 29th was prompted when the worker informed the Board that the employer inquired into his ability to do welding or loading when the worker first arrived in province #1 and contacted the employer. The employer disputed the worker's statement. However, as evident in the case materials, on February 29, 2012, the offer from the employer appears to have involved welding at a workstation. The case materials support the worker's claim that he relocated to province #1 with the understanding that a supervisory position would be offered and once in province #1, the work changed to a welding position, albeit details of this position are limited.

[25] On May 30, 2013, the modified work offered from the employer changed to a security position. Similar to the other offers, limited details regarding the position are noted. The RTWS, in her corresponding memorandum, noted that the security position entailed standing, walking, holding a clipboard and noting numbers on a spreadsheet.

[26] Regarding the availability of the security position, when the RTWS asked the employer if the job opportunity could be interrupted by the worker's participation in a FPP, the employer advised that "the job opportunity would no longer be available if the worker was to participate in the treatment program." During the hearing, the worker's representative acknowledged that it is not clear whether this statement suggests the job offer was removed if the worker intended to participate in the FPP or whether the offer would end if and when the worker went to the FPP. The RTWS's memorandum also noted that the employer was to fax a copy of the offer to the Case Manager for review. We cannot find correspondence related to an offer of the security position within the evidence before us.

[27] Although related more to the discussion of LOE benefits after the FPP, we noted that when the Board's WTS contacted the employer about modified work in June 2014, the security position was not offered; therefore, not available at that time. The employer only offered a

seasonal job involving the assembly of gates/chain link fences. The worker's representative argued that the history of modified work offers does not suggest that the security position was genuinely available. By May 30, 2013 (the first offer of the security position), the Board had ruled that the worker had a permanent impairment. Pursuant to OPM Document No 19-02-01 noted above, the prospects of the job being available in the future is a factor to consider when determining a SO, which in turn is used to calculate LOE benefits. Although we note that the employer offered modified work each time when approached by the RTWS, based on the above, we agree with the representative and find that the availability of the security position is not supported by the evidence before us in this appeal.

[28] In addition, for the period of June 10, 2013 to January 27, 2014, we find that the SO was not physically suitable, based on the worker's reported functional abilities prior to the FPP, which commenced on January 27, 2014. As noted above, OPM Document No. 19-02-01 requires a SO to be consistent with the worker's functional abilities. Even if we accept that the security position was available, the evidence before us in this appeal suggests that the worker's condition prior to the FPP did not allow him to perform any work, which would include the security position. According to OPM Document No. 18-03-02, "Payment and Reviewing LOE Benefits (Prior to Final Review)":

> If the nature and seriousness of the injury completely prevents a worker from returning to any type of work, the worker is entitled to full LOE benefits, providing the worker co-operates in health care measures as recommended by the attending health care practitioner and approved by the WSIB.

[29] Leading up to June 2013, the evidence indicates that the worker was involved in extensive physiotherapy treatment while residing in province #2 and the physiotherapist provided the Board with detailed and regular updates regarding progress. In addition, the worker agreed to and fully participated in six comprehensive assessments, which were suggested by the Board. For each assessment, the worker was required to travel to Ontario for the appointments. We find the worker to have been cooperative with prescribed health care and motivated for improvement.

[30] The worker's representative described the worker as not evasive, communicating regularly with the Board regarding treatment options and diligent during the FPP. We note that at discharge, the FPP confirmed the worker had excellent attendance and was confident he could manage his pain at the end of the program. Prior to the FPP, the physiotherapist advised the Board in September 2012 that the worker was frustrated by his slow recovery. Medical reports also indicated that pain was a barrier. Dr. Gallay, Orthopedic Surgeon, recommended in his May 1, 2013 report that the worker be considered for a pain assessment. The evidence suggests that in June 2013, the worker took it upon himself to contact pain programs in province #2 and proposed them to the Board. The worker sent a letter to the Board dated July 8, 2013 in which he advised the Case Manager, that he was in a lot of pain, but wanted to "continue navigating (the case) with her so (he could) improve (his) present health condition and ultimately return to work." By October 11, 2013, the Board approached the worker about the FPP in Toronto and the worker affirmed he would like to attend.

[31] It is not evident in the file as to why the referral to the FPP did not occur until November 2013. It would appear from the RTWS memorandum of May 30, 2013 that the worker's participation in an upcoming treatment program was in the future. We find that the

worker was ready and willing to participate in an FPP long before the Board referred the worker to Altum Health for the initial assessment in November 2013.

[32] According to the Altum Health initial assessment dated November 1, 2013, Dr. Schofield found the worker's "overall prognosis for functional improvement (including return to vocational activity) without any further intervention (was) poor." He opined that with implementation of the FPP and other medication recommendations, the prognosis was guarded. Although this statement is still cautionary, it indicates a possibility for improvement. With the benefit of hindsight, we determine that, after the FPP, he improved sufficiently to participate in retraining and secured employment.

[33] Based on the above analysis, we find that full LOE is warranted from June 10, 2013 to January 27, 2014 because the worker fully participating in prescribed and sponsored health care and was motivated to improved his functional ability, but due to the severity of his condition at the time, he needed an FPP to manage the symptoms to the extent of allowing a return to the workplace. In addition, we find that the availability of the security position was not substantiated with the evidence before us. As a result, pursuant to section 43(3) of the WSIA and OPM Document No. 18-03-02, full LOE benefits are warranted for this period of time.

**(b) Entitlement to LOE benefits from March 7, 2014 to June 4, 2014**

[34] The worker completed the FPP on March 7, 2014. For the period of March 7, 2014 to June 4, 2014, there is no evidence to suggest that the security position was available. As per the RTWS memorandum dated May 30, 2013, "The employer's job offer (the security position) would not be available after the treatment program end(ed)." In addition, the Board was not in contact with the employer during this time; therefore, the availability of the security position or any other position was not confirmed.

[35] When the employer was finally approached by the WTS and Case Manager in the summer and fall of 2014, the only position offered was a seasonal gate mesher position, ending in October. Therefore, the position would not have met the suggested SO requirement of availability for the long term. In addition, the WTS had requested that the employer send a video of the position to confirm physical suitability. In the WT Plan Proposal dated September 2, 2014, the WTS stated that the employer never sent a video for assessment.

[36] As a result, we find that there was no suitable work available with the employer from March 7, 2014 to June 4, 2014. The final question to answer is whether the worker had the capability to pursue suitable work and fully mitigate his wage loss prior to WT Service's intervention in June 2014, noting that a SO for LOE purposes can also be considered outside of the accident employer.

[37] We note from the WTS's initial interview dated June 9, 2014 that the worker did not have a high school diploma and completed Grade 9. He began a welding career a year after leaving school. His computer skills were very basic. His past employment consisted of welding and material handling positions, all of which would likely be physically unsuitable for his shoulder. His academic functioning, according to the PVA, ranged between grade 4.4 and 7.6. The PVA produced a list of potential occupations based on the worker's cognitive abilities and interests. Some occupations had physical demands that could have been prohibitive. Of those that were not a physical concern, training (at least short term training) was required. Based on the

evidence within the file, we understand that the worker had minimal resources at the time, which significantly limited retraining options without assistance.

[38] As a result, we find that, even though the worker was physically able to perform suitable work after the FPP, the worker still had significant barriers which prevented him from being competitively employable without the assistance of retraining and WT Services.

[39] Based on the analysis above and pursuant to section 43(3) and OPM Document No. 18-03-02, full LOE benefits are allowed from June 10, 2013 to January 27, 2014 as the availability of the security position was not established by the evidence before us in this appeal. The worker fully cooperated with prescribed health care and he was not fit to return to the workplace until after the FPP. In addition, entitlement to full LOE benefits from March 7, 2014 to June 4, 2014 is allowed as there was no offer of available, suitable work from the employer and the worker required assistance to pursue a SO, as defined by OPM Document No. 19-02-01.

**DISPOSITION**

[40] The appeal is allowed as follows:

1. The worker is entitled to full LOE benefits under section 43 from June 10, 2013 to January 27, 2014, and

2. The worker is entitled to full LOE benefits under section 43 from March 7, 2014 to June 4, 2014.

DATED: September 17, 2018

SIGNED: C. Zehr, K.J. Soden, M. Tzaferis