# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

# DECISION NO. 2069/17

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| **BEFORE**: | B. Doherty: Vice-Chair |
| **HEARING:** | July 5, 2017 at Toronto<br>Oral |
| **DATE OF DECISION:** | August 8, 2017 |
| **NEUTRAL CITATION:** | 2017 ONWSIAT 2370 |
| **DECISION UNDER APPEAL:** | WSIB Appeals Resolution Officer (ARO) decision dated September 17, 2015 |

**APPEARANCES:**

| | |
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| **For the worker:** | R. Fink, Lawyer |
| **For the employer:** | Not participating |
| **Interpreter:** | N/A |

## REASONS

### (i) Introduction to the appeal

#### The ARO decision

[1] The worker appeals the decision of Appeals Resolution Officer (ARO) Shepherd of the Workplace Safety & Insurance Board (the Board[1]) dated September 17, 2015. In a decision based on a hearing in writing, including written submissions from the worker's representative dated July 14, 2015, the ARO denied the worker's objection to the Board's decision regarding his entitlement to section 147(4) supplementary benefits, finding that he did not have a wage loss related even in part to his workplace accident in 1988, when he was a minor.

[2] The ARO found that the worker had a minor wrist impairment following his compensable injury in late 1988 and that the only residual impairment disclosed by the medical reporting in early 1989 was restricted range of motion. Although this would have prevented him from performing heavy work with his dominant left hand, he subsequently demonstrated that he was capable of driving a truck and working in manufacturing. The ARO concluded that the worker would have been capable of performing that kind of work since 1989, and that he had established a capacity to perform generally available employment without training.

[3] The ARO noted that there had been a significant deterioration in the worker's compensable condition in January 2010, such that he was no longer able to work in the production sector, his pre-layoff employment. He was, however, able to engage in some kind of minimum-wage employment. Minimum wage in 2010 was $10.25 per hour. The ARO found that minimum wage work would have restored his pre-injury, Minor's Rate, in 2010 of $412.11 per week. There was accordingly no wage loss during the period 2010 to 2012 that was related to the worker's compensable condition.

#### The issue as described

[4] The issue in the worker's appeal to the Tribunal had been described in the Tribunal's Hearing Ready letter as involving the worker's entitlement to supplementary benefits under section 147 (implicitly, section 147(4) and (14) supplementary benefits) after 1989. The Board has, however, accepted that the worker is entitled to section 147(4) and (14) supplementary benefits as of June 1, 2015. At the outset of the hearing, during the discussion of the description of the issue in the appeal, the worker's representative advised that the worker is seeking entitlement to section 147(4) and (14) supplementary benefits for certain periods of time, being:

1. May 1989 – January 1995, from the time the worker's temporary total disability benefits ended and while he was in high school

2. January 1995 – end of 2001, when the worker was either unemployed or sub-optimally employed

3. 2004, when the worker's earnings were slightly below the Minor's Rate earnings

4. October 2009 – May 15, 2012, from the date of the worker's layoff until he began to receive full temporary total disability benefits from the Board

[1] A term I use to encompass its predecessor, the Workers' Compensation Board.

[5] These are the periods during which the worker claims he sustained a wage loss due at least in part to his compensable condition.

[6] As discussed later in these Reasons, section 147(4) and (14) supplementary benefits involve statutory reviews at 24 months and 60 months. The worker's representative drew my attention to Tribunal case law that has interpreted the time periods associated with those reviews as beginning to run from the date of the decision finding the worker entitled to those benefits, even where retroactive supplementary benefits are awarded. *Decision No. 214/09* is summarized as follows:

> The worker suffered a compensable injury in 1987. In Decision No. 1898/02, released in October 2004, the Tribunal found that the worker was entitled to supplementary benefits under s. 147(4) of the pre-1997 Act as of April 1998. The Board paid the supplement retroactive to April 1998, and [then] reviewed and recalculated the supplement in October 2006, which was two years after the award was granted.
>
> The worker appealed a decision of the Appeals Resolution Officer to review the supplement in October 2006. The worker submitted that the award could only be reviewed on the statutory reviews 24 months and 60 months after the award, which would have been April 2000 and April 2003, so that the time for reviews would have already passed.
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> The Vice-Chair agreed with Decisions No. 1376/05 and 969/06 and interpreted the words in s. 147(13) *that an award is reviewed in the 24th month and 60th month following an award to mean following the determination to allow an award, which is the decision date*. In this case, the decision date was in October 2004. The Board correctly reviewed the award in October 2006.
>
> [Emphasis added]

[7] The significance of this interpretation is that if I find that the worker is entitled to supplementary benefits, the time periods for the statutory reviews would not begin to run until the date of my decision. And, in any event, the worker has already been found to be entitled to supplementary benefits, as of June 1, 2015; he indicated at the hearing that the 24 month review had already taken place.

[8] Accordingly, my determination of the worker's entitlement to section 147(4) and (14) supplementary benefits does not involve any consideration of the statutory reviews.

### (ii) Background evidence

[9] The accident employer did not participate in the worker's appeal. I heard testimony from one witness, the worker.

#### (a) The worker's work-related left wrist injury in 1988 and the events that followed, until 2012

[10] The worker, who was born in 1974 and who was 14 years old at the time of his work-related injury in 1988, was employed on a part-time basis as a lane attendant with the accident employer, a bowling business, earning $3.89 an hour. The worker testified that he had worked there for one year and worked 20 to 25 hours a week.

[11] He sustained a crush injury to his left forearm/wrist on November 13, 1988 when it was caught in the pin-setting machinery. The worker is left-handed.

[12] He had surgery. The last progress report of the orthopaedic surgeon who performed the surgery, Dr. J. Rathbun, is dated April 17, 1989. That report is based on an examination on February 13, 1989. In the part of that form report that asks for physical findings, the orthopaedic surgeon referred to a well-healed left wrist lacking full extension and rotation. There is no reference to shaking or tremor in the affected hand. Dr. Rathbun stated that the injury would likely result in a permanent disability. The worker is described in this report as unable to do his usual work and also unable to do modified work at the time of the examination, with disability lasting beyond 21 days.

[13] The worker briefly returned to work for the accident employer as a lane attendant but stopped working there in 1989 either because of a fear of re-injury or because his family moved. (Both reasons are referred to in the records.) In his testimony, the worker stated that he was unable to continue that work because of pain, tremor, swelling, and an inability to climb a ladder.

**The period from 1989 to 1995**

[14] The worker did not otherwise work and he did not earn income after 1989 for a number of years.

[15] He testified that he thought that he called the Board in the spring of 1989 and was told that he was not entitled to further benefits because he had returned to work. Reference was made to a May 3, 1989 memorandum of the claims adjudicator. That memorandum, however, does not support the worker's testimony in this respect. He did call the Board that day, but the subject of the call had to do with whether a cheque was to be sent out.

[16] The records indicate that the claims adjudicator attempted to contact the worker in late June 1989 but was unsuccessful. His temporary total disability benefits were suspended effective June 8, 1989. The records do not refer to any consideration of vocational rehabilitation services.

[17] The worker testified that he finished Grade 8 in June 1989 and subsequently missed a year of school. He referred to his father being abusive and leaving his parents' home in the summer of 1989, to live at a friend's home.

[18] The worker stated that he was unable to recall when he last saw Dr. Rathbun, but he did not see him after he moved out of his parents' home.

[19] The worker testified that he returned to school in September 1990 after having taken a year off. He stated that he looked for work during that year off but was not successful in securing a job. He referred to trembling/shaking in his left hand, bruising, swelling, being unable to lift more than 10 pounds, and living in a small municipality and not having a driver's license. The worker does not have any records of job search activities in 1989-1990.

[20] The worker, who testified that he returned to live with his parents briefly in September 1990 but moved out again, rented a room and began to receive what was described as student welfare.

[21] He graduated from high school in January 1995.

[22] He was asked by his representative whether he saw a physician between 1990 and 1995, and his response was that he could not find a family physician. He testified, however, that he saw

a physician a few times in 1991 or 1992 for a shoulder problem. He also saw a physician a few times for depression, but was unable to recall the physician's name.

**The period from 1995 to 1998**

[23] The worker testified that after he finished high school in 1995, he was not employed until 1998, when he got his first job through a temporary agency. He stated that he could not find a job before 1998, referring to being unemployable because potential employers could see the shaking and tremor in his hand.

[24] The worker stated that he got his driver's license in 1996 and moved to a new municipality that year because there was no work where he had been living.

[25] The worker's tax information for 1996 and 1997 shows the following: 1996 - no income or earnings other than social assistance payments; 1997 – approximately $1900 in other income in addition to social assistance payments.

[26] The worker retained a representative in 1998/1999 regarding a reopening of his claim with the Board. Although the Board file shows that a copy of his claim file was provided to his then representative, the worker testified that nothing came of that retainer.

**The period from 1998 to 2001**

[27] The worker moved again and began working as a machine operator in 1998 through a temporary employment agency. Information provided by the worker's representative to the Board indicates that the worker's hourly wage from 1998 to 2001 while working through the temporary agency was $12-14.

[28] In his testimony, the worker estimated that he worked half of the time or three quarters of the time while he was working through the temporary employment agency. He testified that he was always applying for manufacturing jobs, but referred to "massive restrictions" with his left hand. His tax information shows the following: 1998 – approximately $334 in earnings, plus social assistance payments; 1999 – approximately $6000 in earnings, plus social assistance payments; and 2000 – approximately $7700 in earnings, plus social assistance payments.

**The period from 2001 to 2003**

[29] The worker testified that he found his first steady job in the spring or summer of 2001, working as a material handler and a driver for a carpentry business. He was paid $16 an hour. His tax return information shows earnings of almost $26,000 in 2002 and approximately $17,800 in total earnings in 2003 (plus net business income of approximately $1400).

[30] The worker testified that he was unable to work outside in a cold environment because his left hand was very painful and was "useless."

[31] He was laid off by the carpentry business after working there for two years.

**The period from 2003 to 2005**

[32] The worker testified that he began working as a delivery driver for a big box hardware store in 2003. He was paid $13 an hour and he worked part-time. He testified that he struggled with lifting in that job. He quit that job when his sister-in-law was diagnosed with cancer.

[33] He testified that he then worked for a few months in 2003 for a landscaping company as a driver, earning $16 an hour. The work was seasonal and ended in November.

[34] He then went to work for another company where he worked a full 40 hour week and was paid $12.50 an hour. The worker resigned from that employment when his sister-in-law died in June 2004 and he was involved in caring for his nephews. His tax information for 2004 shows approximately $10,250 in total earnings and a business loss of approximately $1500.

[35] It was in 2004 that the worker had medical attention for his compensable condition. The Board received a copy of the Consultation Note of plastic surgeon Dr. J. Kao dated September 28, 2004. As discussed in greater detail below, the worker told the plastic surgeon that his compensable left wrist disability affected his ability to maintain steady employment. On examination, he had good grip strength, decreased wrist range of motion, and decreased thumb extension, with good finger and thumb flexion. He had decreased sensation subjectively. The plastic surgeon recommended a nerve conduction study. There is no subsequent report from Dr. Kao in the Case Record materials and there is no report of any nerve conduction study.

**The period from 2005 to 2009**

[36] The worker testified that he worked for a few days in 2005 for a company initially as a forklift operator but later doing labour. He sustained a lower back injury and resigned. He subsequently secured steady employment in the summer of 2005 as a machine operator at a company making wire. He described that as the same job that he had done through the temporary agency. He was paid almost $20 an hour and worked a 40 hour week. He does not claim supplementary benefits for the period of time he worked in this job.

[37] Shortly before the hearing, the worker's representative provided the Tribunal with a copy of the September 19, 2005 report of neurologist Dr. C. Geenen. It was Dr. Geenen whom Dr. Kao referred the worker to. The neurologist begins her report by stating that the worker had been referred to her for symptoms in his left hand. He was working at the time as a machine operator. His main complaint was cold intolerance. He had symptoms and functional impairments during the winter months. The nerve conduction studies that had been conducted had been reported as normal. Dr. Geenen expressed the opinion that the worker had a chronic pain syndrome relating to his 1988 injury. She stated that it was curious that the pain was only present in the winter. It was not clear to her whether it was in fact neuropathic pain.

[38] Like Dr. Kao's report, Dr. Geenen's report describes interrupted employment causally related to the worker's compensable disability. The neurologist describes the work the worker did as a labourer, stating that he went from job to job because of frustration related to the painful syndrome involving his left hand.

[39] The worker's tax information shows approximately $19,000 in earnings in 2005 and net business income of $1160 as well as worker's compensation benefits; approximately $31,600 in total earnings plus some other employment income and employment insurance (EI) benefits in 2006; approximately $27,600 in total earnings plus some other income and EI benefits in 2007; and similar earnings in the other years that he worked for that employer.

[40] The worker continued to work at his job as a machine operator for the wire company but testified that his compensable condition worsened over time.

[41] In October 2009, there was a shortage of work and he was laid off. The company subsequently shut down in 2010.

**Following the worker's layoff in late 2009**

[42] The worker collected EI benefits for most of 2010. He testified that he looked for work constantly in 2010. He looked for work in car sales and in manufacturing. He was unsuccessful in securing employment in car sales, which he attributed to the shaking in his hand. The worker provided a list of businesses to which he applied for jobs in manufacturing or in selling in 2010. The list was prepared in 2017, based on the worker's recollection of his job search activities seven years earlier. The list is not exhaustive. The worker testified that he looked for work, approximately 20 jobs per week. He did not keep records of those job search activities.

[43] The worker testified that he began working on a part-time basis in 2011 helping a friend in asbestos removal. This work involved driving and setting up the plastic barriers. He was paid in cash, which he stated he declared for income tax purposes. He testified that he was employed for about a third of the time in 2011 and the first part of 2012. He testified that he continued to look for work in manufacturing or with a car dealership.

[44] In April 2010, the worker contacted the Board to re-open his claim. The Board obtained medical documentation, and accepted that the worker had sustained a permanent disability as a result of the workplace accident and was entitled to a permanent disability (PD) pension.

[45] On March 8, 2011, the worker underwent a PD assessment with Dr. T. Shore, a medical consultant with the Board's Clinical Services Branch. He was found to be entitled to a 3% PD pension from the date of the injury to December 24, 2009, when his condition deteriorated. The pension was increased to 10% effective that date.

[46] Dr. Shore's March 8, 2011 memorandum to the case manager contains the medical consultant's recommendations regarding pension quantum. It also states that the worker needed restrictions and a one-handed job, as his grip and exquisite tenderness basically eliminated him from most jobs and especially the ones he had done in the past.

[47] In a fax transmission dated June 27, 2011 to the worker's representative, the Board advised that the minimum earnings basis for permanent disability awards for minors at the date of the worker's 1988 accident was $345 per week ($17,940 annually). That is the Minor's Rate.

[48] In a letter dated October 7, 2011, the worker's representative requested section 147(4) and (14) supplementary benefits on behalf of the worker. The representative told the Board that the worker had been unable to work from the time of his workplace accident in November 1988 until late 1998 because of the pain and disability associated with his left wrist injury as well as poor labour market conditions where he resided and his lack of a driver's license. The representative referred to pre-accident earnings of $345 a week or $17,940 annually. He provided copies of the worker's income tax information between 1991 and 2010. The representative told the Board that the worker did not file tax returns between 1988 and 1990 because he had been on social assistance during those years and not earning income. The representative submitted that the worker had experienced a wage loss due to his compensable wrist disability since 1989 and that he was entitled to supplementary benefits for most of the period from June 1989 to May 2012. The letter provided information regarding the worker's history. The representative referred to the Minor's Rate earnings of $17,940 annually and compared that amount to the annual earnings shown in the worker's tax statements, stating that the worker's highest annual income during that period had been $10,760 in 1999. The representative submitted that the worker was entitled to section 147(4) and (14) supplementary

benefits because he had sustained a wage loss due at least in part to his work injury, and he should be entitled to supplementary benefits going back to the accident date. (The legislation, excerpted below, states that there is no entitlement to supplementary benefits before July 26, 1989.)

[49] The worker's representative arranged an assessment of the worker with orthopaedic surgeon Dr. M. Ford on November 1, 2011. Dr. Ford's report describes the worker's occupational history, stating that it was his understanding he was previously self-employed as a carpenter and a machine operator, but had not worked in over two years because of increasing problems with his left wrist. Dr. Ford described the worker as left-hand dominant but having learned over the years to do many activities with his right hand. He could write with his right hand, but it was somewhat sloppy.

[50] Dr. Ford described the worker as having sustained a significant injury to his wrist, with marked immobility. He had quite severe degenerative changes in the wrist which would undoubtedly progress. From that point on, the worker was going to be relegated to relatively sedentary occupations. It was highly unlikely that he would ever return to any job requiring heavy physical activity. He would need retraining.

[51] Dr. Ford also commented on the worker's 12.5% PD rating at the time. He stated that the worker had virtually complete loss of pronation and supination, which would be rated at 10%, and therefore the total came to 22.5%.

[52] Dr. Ford provided a supplementary report dated November 28, 2011 at the request of the worker's representative. In this report, the orthopaedic surgeon stated that the worker's loss of mobility was longstanding from the date of injury, but his pain progressed secondary to the development of post-traumatic osteoarthritic changes. The loss of pronation and supination dated back to his injury but other range of motion loss and pain would have been more recent.

[53] The worker was assessed at the Board's Hand & Wrist Specialty Program on April 2, 2012. The report of that assessment refers to chronic severe pain of the left wrist, severe post-traumatic osteoarthritis of the joint, malunion of the fractured radius and bowstringing of extensor tendons. The assessors, a plastic surgeon and an occupational therapist, noted that the worker was not working at the time. They expressed the opinion that: "He is suitable only for use of his right hand," stating that, given the severe pain, his left hand would be of limited use even as a helper hand. They recommended referral to a surgeon.

[54] The worker was subsequently assessed by the Board's Surgical Specialty Program orthopaedic surgeon Dr. H. Von Schroeder and occupational therapist C. Wong on May 3, 2012. Their report refers to post-traumatic osteoarthritis at the wrist. Surgery was recommended. The worker is described at that time as able to return to full-time modified duties using his left hand as a simple assist.

**(b) Resumption of benefits in 2012 – temporary total disability benefits and subsequently section 147(2) benefits**

[55] On May 16, 2012, the worker had surgery with Dr. Von Schroeder. The surgery is described in a subsequent report from Dr. Von Schroeder as involving a reconstruction of the left wrist, including arthroplasty of the distal radioulnar joint, arthrodesis of the wrist, and tendon transfer and tenolysis.

[56] The worker was paid temporary total disability benefits by the Board from the date of surgery.

[57] The June 28, 2012 and August 13, 2012 Specialty Program reports discuss the worker's progress, stating that he could at that time use his left hand as a simple assist only. The worker's November 2, 2012 Form 41 *Worker's Progress Report* to the Board states that the surgery had resulted in no change and also that he was worse than before the surgery.

[58] In November 2012, the worker was considered by the Board to be fit for suitable work and he was referred for Work Transition (WT) services. The January 15, 2013 memorandum of the Work Transition Specialist (WTS) regarding the WTS's initial interview with the worker states, among other things, that the worker reported that he was in great shape, though he had difficulties sleeping due to hand/wrist pain and it took him a bit longer to perform activities of daily living. The worker reported that he had worked mainly in manufacturing and "has no issues with getting a job."

[59] The worker was provided with a WT plan by the Board to obtain employment as a Truck Driver. He found a job as a Truck Driver and WT services were closed in early September 2013.

[60] The worker received full section 147(2) supplementary benefits while involved in WT activities.

[61] The worker had a further surgical procedure performed by Dr. Von Schroeder on September 20, 2013. The October 9, 2013 report of the Specialty Program orthopaedic surgeon and physiotherapist states, among other things, the worker was able to return to work at the sedentary level with minimal use of his left hand pending further reassessment.

[62] The worker had a further surgical procedure performed by Dr. Von Schroeder on June 11, 2014.

[63] The Board communicated its decision regarding the worker's entitlement to section 147(4) supplementary benefits in July 2014. In a decision letter dated July 14, 2014, the case manager told the worker that he would have benefited from an earlier vocational plan which would have restored his pre-accident escalated earnings, and he was accordingly not entitled to section 147(4) supplementary benefits.

[64] The worker was discharged by the Board's Upper Extremity Specialty Program in December 2014. The December 1, 2014 report of the Specialty Program orthopaedic surgeon Dr. Von Schroeder and the occupational therapist notes that the worker was not working at the time, referring to his having been retrained for truck driving but unable to do that job. He was taking a number of medications, Percocet twice a day and anti-inflammatories, and he had recently tried medical marijuana. Findings on examination are described. The report states that the worker could use his left upper extremity/hand as an assist only within the sedentary level. In describing the prognosis and recovery, the orthopaedic surgeon and the occupational therapist stated that the worker would have permanent issues with his fused wrist, with reference to hypersensitivity, chronic pain and weakness.

**(c) The Board's decision in 2015 that the worker was unemployable and entitled to section 147(4) and (14) benefits**

[65] In February 2015, the worker's PD pension was increased to 24.5% for his left forearm and wrist disability.

[66] The May 26, 2015 Documentation Memo of the Board's WTS includes the following information:

- The updated pre-injury wages used by the Board were $11.34 per hour x 40 hours a week.
- The WTS had been asked to determine potentially suitable occupations for the worker. The worker previously participated in a WT consultation in December 2012, following which he was referred for WT Services beginning in January 2013. A WT plan had been developed which had identified two suitable occupations, Truck Driver and Retail Sales Clerk. Following training, the worker was successful in obtaining employment as a Truck Driver and subsequently WT services were closed.
- The worker worked for only three weeks, resigning because of pain and insomnia. The Truck Driver occupation had been found to no longer be suitable.
- The worker met with the WTS on May 21, 2015. He took the position that he was unemployable due to combination of sleep problems, constant pain, and the medication and medical marijuana that he took. He was nonetheless willing to co-operate in WT services.
- The worker reported that the surgeries he had undergone beginning in 2012 did not provide relief and actually made his condition worse.
- The worker told the WTS that he managed his activities of daily living by using one hand.
- The WTS identified two suitable occupations (SOs): Retail Sales Clerk, a direct entry occupation, and Dispatcher, an occupation requiring training. Both were generally consistent with the worker's physical precautions and he met the employment requirements. Jobs were available.
- The worker could expect to earn at least $11 per hour (minimum wage) in either SO and would likely restore his pre-injury earnings of $11.34 per hour as he gained employment experience.

[67] The Board concluded that the worker was unemployable and entitled to section 147(4) and (14) supplementary benefits, effective June 1, 2015. The May 29, 2015 Documentation Memo of the case manager describes some of the factors affecting the worker's employability: he had not worked since 2013 when he worked as a truck driver for only three weeks; he had irregular sleep and constant pain; he took Percocet as well as medicinal marijuana to help with inflammation, pain and sleep; he had a valid driver's license but could not drive for six hours after consuming marijuana; he had only achieved a high school diploma; and he did not have "great employment experience." The case manager stated that the medicinal marijuana would make him unemployable and unsafe to work. She would not be referring him for further WT services. The worker's temporary total disability benefits would end, and he would receive section 147(4) and (14) supplementary benefits from June 1, 2015.

**(d) The August 18, 2016 report of Vocational Evaluator and Rehabilitation Consultant Mr. M. Bachman**

[68] After the September 17, 2015 ARO decision denying the worker section 147(4) supplementary benefits, the worker's representative arranged for the worker to be assessed by Mr. M. Bachman, a Vocational Evaluator and Rehabilitation Consultant.

[69] The worker's representative provided the Tribunal with a copy of his letter to Mr. Bachman requesting the report. In that letter, the representative refers to Dr. Ford's November 1, 2011 report and the orthopaedic surgeon's opinion that the worker could do sedentary work, the representative stating that it should be assumed that this restriction would apply throughout the relevant period. I do not read Dr. Ford's report as supporting that assumption; as discussed above, the assessing orthopaedic surgeon referred to the worker being relegated to relatively sedentary occupations "from this point on," that is, from November 2011. The representative goes on to say that the worker seemed to have demurred from employment for 10 years between 1989 and 1998, and speculated as to the reason: "perhaps for reasons of psychological discomfort, but there is no medical evidence of this."

[70] Mr. Bachman reviewed documentation and interviewed the worker, resulting in a report to the worker's representative dated August 18, 2016.

[71] Mr. Bachman begins his report by stating that he had been asked to evaluate the worker's past employability, particularly from 1989 to 2012. He describes the symptoms the worker described to him, being a constant tremor as well as markedly reduced dexterity, strength and range of motion. He refers to the September 19, 2005 report of neurologist Dr. Geenen who referred to a chronic pain syndrome with neuropathic features.

[72] The vocational evaluator and rehabilitation consultant describes the worker's first 10 years after the injury, until he commenced employment, suggesting that he was in fact unable to secure employment because of his left wrist disability and having been shunted aside with respect to vocational rehabilitation assistance. Mr. Bachman stated that this resulted in "vocational immaturity," and that the disability set the stage for subsequent vocational underachievement, unemployment, and poor attachment to the labour market.

[73] Based on what the worker told him in 2016, Mr. Bachman describes the worker's work for temporary employment agencies beginning in 1998, involving jobs that were sporadic, casual and part-time due to his compensable limitations. He did not have steady employment until 2001, when he began working for the carpentry company, a job from which he was let go after two years due to shortage of work, "but possibly due to his lack of productivity." One or two years after that, he was hired as a delivery driver for a big box store but had to stop working to support his sister-in-law (described elsewhere as his sister or as his girlfriend) who had cancer. He was subsequently hired as a delivery driver but sustained a work-related injury that he told the vocational evaluator and rehabilitation consultant was causally related to his 1988 compensable injury. (To the extent that I have documentation relating to the worker's other workers' compensation claims, I see no reference to the worker reporting that his 1988 injury played a role in any subsequent injury.) A couple of other jobs are described, until the worker began to work as a machine operator in the wire manufacturing plant in September 2005.

[74] Mr. Bachman refers to the fact that the Board accepted (in 2015) that the worker was unemployable. He summarizes the situation, referring to a serious injury with lifelong vocational repercussions, culminating in unemployment and unemployability. The vocational evaluator and rehabilitation consultant refers to a study showing that individuals with early disability onset have a significantly lower likelihood of a lower earnings potential, referring to the worker's significantly below-average lifetime earnings. The worker's chronic and neuropathic pain was an employment barrier.

[75] In conclusion, Mr. Bachman states that the worker was vocationally vulnerable when he was injured, and had limited vocational potential at the time of the vocational assessment by the Board in 2013, "which can reasonably be assumed to have been present at the date of injury . . ." That assumption is not, in my view, well-founded in light of the deterioration in the worker's compensable disability over the years. Mr. Bachman went on to say that his competitive employability had been undermined by his injury, and he was predisposed to becoming competitively unemployable. Notwithstanding "occasional periods of work," Mr. Bachman's assessment of the worker "is one of overriding competitive unemployability that has been the dominant feature of his working life. It seems reasonable to think that the situation applied continuously from 1988 to 1998 and intermittently to 2012."

[76] In considering the weight to be accorded to opinions expressed in this report, I find that there are elements of this report which suggests a lack of evenhandedness (that is, advocacy) in assessing the worker's employability following his work-related injury in 1988. For example, Mr. Bachman states that the worker's injury interrupted his education and vocational development; he was absent from high school for two years after the injury, his graduation was delayed by three years, and he could not work during high school because of his injury. This history is presumably based on what the worker reported to the vocational evaluator almost 30 years after the events and in the context of an appeal of the Board's decision. No contemporaneous records have been provided that would support this narrative. Mr. Bachman does not refer to the fact that for most of the time period discussed (1989-late 2009), the worker's level of disability as assessed by the Board, was quite modest, at 3%. The only reference the vocational evaluator and rehabilitation consultant makes to the worker's pension level is to the 24.5% pension in 2015, which followed deteriorations in his compensable condition beginning in late 2009.

[77] The vocational evaluator and rehabilitation consultant's assumption that the worker's vocational potential in 2012 and 2013 was the same as it was in 1989 does not appear to be well-founded. Among other things, the worker's disability had worsened over the years, with the development of degenerative changes, including post-traumatic arthritis.

[78] There is no medical or other documentary evidence that supports Mr. Bachman's narrative, involving an injury that is so disabling that it causes the worker to be unable to find any employment for 10 years, but does not cause him to see a health professional (or contact the Board). The question that arises is whether that narrative makes sense.

[79] An example of what I consider to be a lack of evenhandedness in describing the worker's employment history is Mr. Bachman's discussion of the worker's employment history that culminated in the work that he did from 2005 until 2009, when he was laid off. The fact that the worker was able to secure that employment, 17 years after his work injury, and maintain that employment, paying approximately $20 an hour, until he was laid off in 2009 for reasons unrelated to his compensable injury, would not appear to be consistent with the picture painted by the vocational evaluator regarding the worker's employability.

[80] Significantly, Mr. Bachman does not discuss changes in the worker's compensable condition in the almost 30 years following the workplace injury. There is no recognition of the fact that the medical evidence in 1989 (Dr. Rathbun's last report) is very different from the medical evidence beginning in 2010. Mr. Bachman refers to the Board as having accepted that the worker was unemployable, but does not discuss the fact that this was in 2015. I note that

when the worker was provided with the WT plan in 2012, the contemporaneous records, discussed above, show that he was keen to pursue the Truck Driver SO.

[81] Instead of recognizing that there were changes in the worker's compensable condition over time, increasing his disability, the picture painted in this report by the vocational evaluator is that the injury was "catastrophic" and profoundly disabling from the outset. That is simply not consistent with the medical evidence or the worker's activities and employment after 1989 for many years.

[82] I recognize that the worker was experiencing symptoms and impairment following his injury. He had pain, as discussed by Dr. Geenen in 2005, as well as functional impairments involving his left, dominant, hand. However, the history as described by Mr. Bachman in 2016 involved elements that are new in 2016 (for example, the job the worker did as a machine operator between 2005 and 2009 was an "unusually accommodating occupation"). The worker apparently told the vocational evaluator that he had been "pushed aside and forgotten about" (quotations original), effectively shut out of the labour market for 10 years following his injury and not provided with vocational rehabilitation supports. That may have been the worker's perception in 2016, but it is not consistent with the Board's inability to get in touch with him in 1989.

[83] Mr. Bachman, as noted above, ultimately concluded that there was no job which the worker was reasonably suited and he was unemployable. The Board has accepted that this was the case in 2015. If the vocational evaluator and rehabilitation consultant is suggesting that the worker was unemployable at some point in time earlier, he does not say when this would have been. The worker was clearly employable for many years after his injury as evidenced by the fact that he was employed.

[84] For these reasons, I would accord little weight to Mr. Bachman's report in considering the question of whether the worker's compensable condition affected his earning capacity as described in the legislation.

### (iii) The legal framework

[85] Because the workplace accident took place in 1988, the "pre-1989" *Workers' Compensation Act*, as amended (the pre-1989 Act), governs the worker's entitlement to benefits.

[86] Section 147 supplementary benefits for workers who were injured in workplace accidents before 1990 are set out in the "pre-1997" *Workers' Compensation Act* (the pre-1997 Act). The relevant provisions of section 147 state:

> **Temporary supplement**
>
> 147(2) Subject to subsections (9) and (10), the Board shall give a supplement to a worker who, in the opinion of the Board, is likely to benefit from a vocational rehabilitation program which could help to increase the worker's earning capacity to such an extent that the sum of the worker's earning capacity after vocational rehabilitation and the amount awarded for permanent partial disability approximates the worker's average or net average earnings, as the case may be, before the worker's injury.

**Idem**

(3) A supplement under subsection (2) is payable for the period during which the worker participates in a Board-approved vocational rehabilitation program.

**Permanent supplement**

(4) Subject to subsections (8), (9) and (10), *the Board shall give a supplement to a worker,*

*(a) who, in the opinion of the Board, is not likely to benefit from a vocational rehabilitation program in the manner described in subsection* (2); or

(b) *whose earning capacity after a vocational rehabilitation program is not increased to the extent described in subsection (2*) in the opinion of the Board.

**Duration of supplement**

. . .

(6) A supplement under subsection (4) for a worker described in clause (4) (b) becomes payable as of the latest of,

(a) the 26th day of July, 1989;

(b) the day the Board determines the worker has a permanent disability; or

(c) the day the worker ceases to participate in a vocational rehabilitation program.

**Idem**

(7) A supplement under subsection (4) shall continue until the worker becomes eligible for old age security benefits.

**Amount of supplement**

. . .

**Idem**

(10) The amount of a supplement under this section for a worker with a pre-1989 injury shall be calculated so that the sum of the supplement, the amount awarded for permanent partial disability, $200 and 90 per cent of the worker's net average earnings, if any, after the injury equals 90 per cent of the worker's pre-injury net average earnings. R.S.O. 1990, c. W.11, s. 147 (10); 1994, c. 24, s. 33 (2).

. . .

**Recalculation**

(13) *The Board shall review a supplement given under subsection (4) in the twenty-fourth month following the award and in the sixtieth month following the award and recalculate the amount of the supplement* in accordance with subsections (9) and (10). R.S.O. 1990, c. W.11, s. 147 (11-13).

> **Additional amount**
>
> (14) The Board shall pay an additional $200 per month to a worker who is receiving an amount awarded for permanent partial disability or who received a lump sum commuted from such an amount if the worker is entitled to a supplement under subsection (4) or would be but for subsection (7).
>
> . . .
>
> **Reduction, pre-1989 injuries**
>
> (17) The payment under subsection (14), for a worker with a pre-1989 injury, shall be reduced, if necessary, so that the sum of the following amounts does not exceed 90 per cent of the worker's pre-injury net average earnings:
>
> 1. The payment under subsection (14).
> 2. The amount awarded for permanent partial disability.
> 3. 90 per cent of the worker's net average earnings after the injury, if any.
> 4. Any pension for old age security that the worker is eligible for under section 3 of the Old Age Security Act (Canada). 1994, c. 24, s. 33 (3).

[87] Under section 126(1) of the current act, the *Workplace Safety and Insurance Act, 1997*, the Tribunal is directed to apply Board policies in its decision-making. The policies are contained in the Board's *Operational Policy Manual* (OPM).

[88] OPM Document No. 18-07-10, *Pre-1990 Pension Supplements* (15 February 2013), states that a worker with a pre-1990 injury is entitled to a full supplement under section 147(2) if it appears that he or she would benefit from a Work Transition (the term that replaced "Vocational Rehabilitation") Plan and co-operates in such a plan. If a worker is unable to benefit from such a plan or did not increase his or her earning capacity to the extent expected following the completion of the plan, the worker may be entitled to a supplement under section 147(4).

[89] In discussing general eligibility for section 147 supplements, the policy states that, to be considered for a supplement, the worker need only establish that his or her wage loss is in part related to the workplace injury:

> In many cases, both work-related and non-work-related impairments exist in a claim. To consider a worker for a s.147 supplement, the decision-maker must ensure that the worker's wage loss is at least partially related to the work injury.

[90] *Decision No. 579/02*, provided by the worker's representative at the hearing, states that the work injury does not need to be a significant contributing factor to the wage loss, only a factor.

[91] The policy states that the Board uses the worker's earnings at the time of the application for the supplement to calculate the amount of the supplement.

[92] In discussing section 147(4) supplements, the policy states:

> The WSIB pays s.147(4) supplements to workers
>
> • who have a wage loss but are not eligible for a s.147(2) supplement, or
>
> • whose earning capacity, after participating in a WT plan and receiving a supplement under s.147(2), did not increase to the extent that the worker's total potential earning capacity approximated the escalated pre-injury earnings.
>
> The WSIB does not pay s.147(4) supplements if the decision-maker cannot determine if a worker would benefit from a WT plan and be entitled to a section 147(2) supplement because the worker
>
> • refuses to participate in a WT plan
>
> • is uncooperative in a WT plan, or
>
> • would benefit from an WT plan but
>
> ◦ has left the country
>
> ◦ is incarcerated, or
>
> ◦ has removed him/herself from the workforce.

[93] The policy discusses reviews of section 147(4) supplementary benefits, including a review when the worker's PD pension changes::

> **Reviews**
>
> The WSIB only reviews s. 147(4) supplements
>
> • in the 24th and the 60th month after one is allowed
>
> • if a provisional permanent disability benefit expires, or
>
> • if the worker dies while receiving the supplement.
>
> **NOTE**
>
> These reviews ignore arrears payments to July 1989. After 60 months, reviews can only take place if the worker failed to notify the WSIB of a material change that occurred before the 60-month point, or engaged in fraud or misrepresentation in connection with the claim for benefits.
>
> The WSIB may adjust s.147 (4) supplements any time the permanent disability benefit changes, given the supplement's calculation requirements.
>
> In the case of an objection, entitlement to a s.147 (4) supplement is judged based on the facts at the time of the initial decision.

[94] The standard of proof in workers' compensation proceedings is the balance of probabilities. Pursuant to subsection 124(2) of the WSIA, the benefit of the doubt is resolved in favour of the claimant where it is impracticable to decide an issue because the evidence for and against the issue is approximately equal in weight.

**(iv) Discussion, analysis and conclusion**

[95] Section 147(4), set out above, states that the Board shall pay a worker what are described as permanent supplementary benefits in two circumstances: (1) where the worker is not likely to benefit from a vocational rehabilitation program; or (2) where the worker's earning capacity after the vocational rehabilitation program is not increased to the extent described.

[96] Section 147(7) states that the section 147(4) supplement shall continue until the worker becomes eligible for old age security benefits.

[97] *Decision No. 2229/11* discusses the distinction between (i) entitlement to supplementary benefits under section 147(4), and (ii) the quantum of those benefits. In paragraph 7, the Vice-Chair discussed the definition of the issue before him, stating the following:

> . . . according to the system of benefits outlined in the Act, it was misleading to refer to "entitlement" to a partial 147(4) award. *Section 147(4) sets out the test for entitlement* for a supplementary benefit (i.e., benefits intended to supplement a permanent disability (PD) award). If the test is met, entitlement is granted. *Once entitlement is granted, the quantum of the award is determined pursuant to . . . section 147(10)* (where the subject accident occurred between April 1, 1985 and January 1, 1990 . . .

[98] In paragraph 30 of that decision, the Vice-Chair states that when a worker has been found entitled to section 147(4) supplementary benefits, that entitlement continues (though the quantum of the benefit is reviewed at 24 months and 60 months following the decision accepting entitlement):

> It is noteworthy that section 147(7) states that "a supplement under subsection (4) shall continue until the worker becomes eligible for old age security benefits." Accordingly, although a decision determining that a worker is entitled to benefits under section 147(4) may be reviewed on appeal, if the initial decision to grant entitlement is not varied, in light of section 147(7), the grant of entitlement "shall continue until the worker becomes eligible for old age security benefits", and shall not be rescinded upon the periodic reviews required by section 147(13). It is clear from the scheme of the section, that the issue upon review shall be exclusively related to the quantum of the benefits. In that sense, the quantum of the benefits may be reduced, possibly to zero, at the time of the periodic reviews, should the application of the formula used to determine the quantum, as set out in section 147(9) or 147(10), so dictate. According to the scheme of the section, however, *the question of whether a worker is entitled to section 147(4) benefits will not be affected by changes in relation to his earnings, as may come to light at the time of the periodic reviews.* Such changes in earnings at the time of the reviews will only affect quantum. The operation of section 147(4), in this manner, was articulated in the Tribunal's *Decision No. 941/94*, and this approach has been followed in numerous other Tribunal decisions.
>
> [31] This distinction between "entitlement" and "quantum" is important because *the test for determining entitlement, is significantly different from the process for determining quantum.* In determining entitlement, the decision maker must consider whether the subject worker is "likely to

> benefit from a vocational rehabilitation program which could help to increase the worker's earning capacity to such an extent that the sum of the worker's earning capacity after vocational rehabilitation and the amount awarded for permanent partial disability approximates the worker's average or net average earnings, as the case may be, before the worker's injury." Section 147(4) requires the decision maker to consider whether a worker would be "likely to benefit from a vocational rehabilitation program" in this manner for workers who have not participated in a vocational rehabilitation (VR) program. It also requires the decision maker to consider whether a worker has benefited from a VR program in this manner, for workers who have participated in a VR program. If a worker would not benefit from a VR program in this manner, or for workers who have participated in a VR program, if the worker did not so benefit, entitlement to section 147(4) benefits is granted.
>
> [32] It should be noted that *the issue of "entitlement" to section 147(4) benefits requires the decision maker to consider the worker's "earning capacity", rather than his or her actual earnings.* In this sense, "earning capacity" is the amount that the decision maker determines the worker should be able to earn, given the worker's personal and vocational characteristics, which will include the worker's physical capacity and the worker's skill sets, among other factors. It is certainly possible for a worker to have a relatively high "earning capacity" but no earnings.
>
> [Emphasis added]

[99] In considering the entitlement criteria under section 147(4), I find that this worker, who had a permanent disability involving his dominant hand, would have benefited from a vocational rehabilitation program. He did not receive vocational rehabilitation services through the Board. That he did not do so is not due to any fault on the part of the Board or on the part of the worker. The Board was unable to get in touch with the worker. The worker was 14 years old and was in challenging family circumstances.

[100] Tribunal case law has held that a vocational rehabilitation program is not confined to programs provided or approved by the Board and also includes a reasonable self-directed vocational rehabilitation program. In this case, I find that the worker was engaged in a reasonable self-directed vocational rehabilitation program when he was attending and completing high school.[2] (This would not include the 1989/1990 school year when he was not in school.)

[101] Based on this analysis of entitlement, rather than determining the worker's "entitlement" to section 147(4) and (14) supplementary benefits over different periods of time, as outlined by the worker's representative in describing the issue in the appeal, I will determine whether the worker was entitled to those benefits at some point, that is, whether his earning capacity after he completed high school in January 1995 plus his 3% PD pension fell short of approximating his pre-injury Minor's Rate earnings, and, if so, when that entitlement began.

[102] The worker's representative has advised that the Minor's Rate earnings were generally in the vicinity of minimum wage. I have considered whether there is persuasive evidence that the

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[2] The worker may be entitled to section 147(2) supplementary benefits for the time that he was in high school. That issue, however, is not for me in this appeal.

worker was unable to earn somewhat higher than minimum wage when he graduated from high school, due in part to his compensable condition, and I find that there is no such evidence.

[103] The worker did not work following his completion of high school in 1995 for a number of years, until 1998. There is no persuasive evidence that his compensable condition was in part responsible for that unemployment. Although the worker attributed his lack of employment to his compensable condition, in particular, trembling of his left hand, his testimony in 2017, more than 20 years after the fact and given in the context of a claim for benefits, has to be regarded with some caution. I note that it also involves speculation on the part of the worker as to the reason/s that he may not have secured jobs applied for. It is, in my view, relevant that the worker had no medical or other health professional attention or treatment for his compensable injury after early 1989 for something like 15 years, until 2004. If he was in fact experiencing significant problems with his wrist, problems that caused him not to be hired for basic employment, it would be reasonable to expect that he would have sought health professional attention and treatment (as he did in 2004).

[104] In his testimony, the worker's explanation for the lack of medical attention was that he was not able to find a family physician. However, he acknowledged that he saw a physician for some non-compensable health problems, involving his shoulder as well as depression.

[105] The worker's lack of medical attention for his compensable condition supports a finding that the left wrist/hand condition was not that significant a problem between 1995 and 2004. I do not accept the worker's testimony in 2017 that his compensable condition (involving his hand shaking) played a role in his not working at all until 1998.

[106] He was able to find work in 1998 through a temporary employment agency. He testified that he was able to find work as a machine operator at that time because he moved closer to where the work was. It is reasonable to infer that that route to employment was available to him when he finished high school in January 1995.

[107] When the worker began to secure work through a temporary employment agency in 1998, the hourly wage that he earned exceeded the hourly Minor's Rate. He did not, however, secure steady employment and his annual earnings were less than the annual earnings associated with the Minor's Rate. That his employment was sporadic was, according to the worker, related to his compensable disability, again, that the tremor would negatively impact his prospects of getting the job. For reasons discussed above, I do not accept the worker's testimony in this respect.

[108] I find that there is no persuasive evidence until late September 2004 that the worker's compensable condition was in part responsible for his lack of steady employment.

[109] The September 28, 2004 report of Dr. Kao, to whom the worker had been referred for his compensable left wrist condition, refers to the worker's reporting of constant trembling and shooting pains in his hand, especially with heavy lifting. He also told the plastic surgeon that he had extensive cold intolerance and that when he worked at various jobs, he had to work outdoors, but he was unable to tolerate the cold. The worker indicated that he was not able to work outside and therefore was not able to keep his jobs. Dr. Kao suggested that, in the long term, he might

refer the worker to the Board's hand unit for possible psychological and physical assessment and job retraining.[3]

[110] This report from Dr. Kao constitutes evidence that the worker's compensable condition affected his earning capacity at that time.

[111] However, because the hourly wage he earned when he worked exceeded the hourly Minor's Rate, the ARO found that the worker did not sustain a wage loss and was therefore not entitled to supplementary benefits. I have considered whether the consideration of whether the worker sustained a wage loss due in part to his compensable injury should have been limited to the hourly wage he earned when he worked or whether a broader period of time should also be considered.

[112] I see nothing in the legislation or in Board policy that directs that the determination of a worker's "average earnings" be limited to the consideration of the hourly rate only, and I see no reason in the circumstances here to consider only the hourly rate and not the worker's earnings over a longer period of time, such as a year. One of the worker's difficulties had to do with his intolerance to cold, an impairment which meant that he could not work outdoors in cold weather. In those circumstances, reference to only the hourly wage earned in, for example, summer months in considering the worker's earning capacity does not, in my view, fairly represent that earning capacity.

[113] I find that there is persuasive evidence that, beginning in late September 2004, the worker's compensable condition affected his earning capacity which I take to include his ability to maintain steady employment.

[114] I find that he is entitled to section 147(4) and (14) benefits as of September 28, 2004, based on Dr. Kao's report.

[115] Having found that entitlement, the next question that I have considered is whether I can review that entitlement over the years between September 2004 and May 2012, when his temporary total disability benefits were restored. The 24 month and 60 month statutory reviews are, for reasons discussed earlier, not applicable.

[116] There is no provision in the legislation to permit a review of a worker's section 147(4) and (14) supplementary benefits other than at 24 months and 60 months following the decision granting entitlement. There is, for example, no provision allowing a review where there is a material change in circumstances, such as a change in the worker's earnings. For that reason, I do not have jurisdiction to consider the worker's entitlement to those supplementary benefits at different times or for different periods.

[117] In conclusion, I find that the worker is entitled to section 147(4) and (14) supplementary benefits as of September 28, 2004.

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[3] In his submissions, the worker's representative suggested that the worker's difficulties with employment involved psychological issues, briefly referenced in Dr. Kao's report. The representative acknowledged that there is no medical or mental health evidence that would support that suggestion. The worker has not claimed and he has not been found entitled to benefits for a mental health condition. In determining the worker's entitlement to supplementary benefits, I am confining my consideration to his physical injuries and their impact on his earning capacity.

**DISPOSITION**

[118] The appeal is allowed in part. The worker is entitled to section 147(4) and (14) supplementary benefits beginning on September 28, 2004.

DATED: August 8, 2017

SIGNED: B. Doherty