WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2728/18

BEFORE:	W. Sutton: Vice-Chair
HEARING:	September 18, 2018 at Toronto Oral No post-hearing activity
DATE OF DECISION:	March 7, 2019
NEUTRAL CITATION:	2019 ONWSIAT 612
DECISION UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) S. Yjo, dated February 15, 2017

APPEARANCES:

For the worker:	R. Fink, Lawyer
For the employer:	M. Rocca, Paralegal
Interpreter:	Not applicable

REASONS

(i) Introduction

[1] The worker appeals the decision of the Workplace Safety and Insurance Board (Board or WSIB) in which the ARO concluded that the worker's left shoulder strain injury had resolved. As a result, the worker was denied ongoing entitlement for the left shoulder, including a finding of permanent impairment of the left shoulder. The ARO rendered the decision based on the written record, without an oral hearing.

(ii) Preliminary matters

[2] At the commencement of the hearing, the worker's representative advised that he was withdrawing the issue of aggravation of a pre-existing condition involving the worker's left shoulder. It was explained to the representative that if the appeal of this issue was returned to the Tribunal, it would be subject to the time limits of appeal pursuant to subsection 125(2) of the *Workplace Safety and Insurance Act, 1997* (WSIA). The issue agenda was adjusted accordingly.

(iii) Issues

[3] The issues under appeal are as follow:

1. Does the worker have ongoing entitlement for the left shoulder as a result of his injury on May 27, 2015?

2. If so, does the worker have a permanent impairment (PI) of the left shoulder and entitlement to a non-economic loss (NEL) determination?

(iv) Background

[4] The following are the basic facts.

[5] In June 2007, the worker commenced his employment with the accident employer, a window manufacturer. On May 27, 2015, while working as a machine operator, the worker injured his left shoulder in the course of lifting bundles of 13 vinyl stops that were 16 feet long and weighed 60 pounds. The worker's entitlement for the left shoulder was granted by the Board on June 1, 2015 on a diagnosis of left shoulder sprain/strain. It was noted at the time that the worker had a prior left shoulder injury stemming from a 2008 motor vehicle accident (MVA).

[6] On November 12, 2015, the Eligibility Adjudicator (EA) allowed the worker's ongoing entitlement to healthcare benefits, noting that he had been working in modified duties since his injury and had remaining recovery issues.

[7] On March 16, 2016, the Case Manager (CM) denied ongoing entitlement for, and a permanent impairment of, the worker's left shoulder. The CM concluded that the worker's left shoulder sprain/strain had resolved without evidence of impairment and, in the result, his file with the Board was closed.

[8] The Case Manager (CM) denied entitlement for the worker's left shoulder on an aggravation basis on August 3, 2016 and again, on reconsideration on September 2, 2016. In doing so, the CM concluded that as the worker's May 2015 injury could not be considered minor

in nature, there was no entitlement for the left shoulder on an aggravation basis, pursuant to Board policy.

(v) Law and policy

[9] Since the worker was injured in May 2015, the WSIA is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[10] Section 46 of the WSIA provides that if a worker's injury results in permanent impairment, the worker is entitled to compensation for non-economic loss.

[11] "Impairment" means a physical or functional abnormality or loss (including disfigurement) which results from an injury and any psychological damage arising from the abnormality or loss.

[12] "Permanent impairment" means impairment that continues to exist after the worker reaches maximum medical recovery.

[13] Legislation and Board policy provide that the degree of a worker's permanent impairment is determined in accordance with the prescribed rating schedule or criteria, any medical assessments, and having regard to the health information on file. The prescribed rating schedule for most impairments is the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 3rd edition (revised) (the AMA Guides).

[14] Tribunal jurisprudence applies the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. See, for example, *Decision No. 280.*

[15] The standard of proof in workers' compensation decisions is the balance of probabilities.

[16] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision No. 9, would apply to the subject matter of this appeal:

- Policy Package No. 212, "Determining MMR and PI",
- Policy Package No. 281, "Pre-existing Condition",
- Policy Package No. 292, "Aggravation Basis", and
- Policy Package No. 300, "Decision Making/Benefit of Doubt/Merits and Justice".

[17] I have considered these policies as necessary in deciding the issues in this appeal.

(vi) Relevant medical and documentary evidence

[18] While I have reviewed the worker's file in its entirety, I note, in particular, the following relevant medical and documentary reporting:

- March 17, 2008: Following the worker's MVA of March 16, 2008, there appear to be several references in handwritten clinical notes prepared by family physician, Dr. Yeung, regarding the worker's left shoulder complaints in 20008 and 2009. (It is to be noted that Dr. Yeung's notes are otherwise difficult to read.)
- April 14, 2010: Dr. Ryan, a family physician working at a pain and disability management centre, assessed the worker for his insurance company based on his complaints of

multi-level chronic pain and persistent myofascial pain symptoms. It was noted that the worker had been involved in an MVA on March 15, 2008. His subsequent complaints included left shoulder and cervical pain. Examination of the shoulder revealed a "full range of motion (ROM) with tenderness on palpitation of anterior GH joint". Dr. Ryan's multiple diagnoses did not specifically include the left shoulder.

- January 5, 2011: Physiatrist, Dr. Kachooie, examined the worker regarding multiple pain complaints including the neck and "recent pain to the left shoulder". He noted reduced ROM with pain in the left shoulder with abduction "only 65 degrees. There is no external rotation". Dr. Kachooie diagnosed "left rotator cuff tendonitis, early frozen shoulder". An MRI of the left shoulder was recommended.
- February 24, 2011: Dr. Yeung clinical notes reported the worker's left shoulder pain.
- June 7, 2011: In a handwritten follow-up report, Dr. Kachooie noted the worker's current symptoms as left shoulder pain and low back pain involving the right leg. His assessment was "impingement syndrome, full ROM, pronated shoulders". It is not clear as to what the impingement syndrome and full ROM applied.
- January 24, 2012: There was no further report included in Dr. Yeung's clinical note until this date, at which time, Dr. Yeung reported "also left shoulder with pain". Then, up to the day of his injury in May 2015, Dr. Yeung reported:
    - February 27, 2012: "still c/o left shoulder pain"
    - April 16, 2012: "got 3 injections left shoulder" from Dr. Kachooie
    - June 8, 2012: "left shoulder ... pain"
    - July 4, 2012: "still pain over left ant shoulder"
    - March 21, 2013: "still c/o persisting pain over left shoulder ... and neck"
    - April 26, 2013: "diffuse neck shoulder ... pain" and "ROM normal diffuse tenderness along post neck shoulders..."
    - November 26, 2013: "still shoulder/neck pain"
    - April 23, 2014: "occ pain from neck shoulder (L) ... since mva 2008" and "ROM normal diffuse tenderness along post neck shoulders..."
    - June 9, 2014: "shoulder ... and neck pain"
    - November 12, 2014: "still c/o left shoulder pain"
- May 28, 2015: Subsequent to the May 27, 2015 injury, Dr. Yeung reported that the worker "injured left shoulder yesterday at work when heavy lifting, increased pain". The diagnosis was "strain left shoulder".
- June 3, 2015: Dr. Yeung completed a Form 8 Health Professional's Report. He diagnosed "left shoulder strain" and stated "re-aggravation of chronic left shoulder injury". He stated that for the neck eight to 14 days, the worker had limitations in lifting, bending, twisting and use of his upper extremities.
- June 5, 2015: Dr. Yeung stated: "Functional inquiry – doing modified duties due to left shoulder pain".

- June 29, 2015: The worker underwent assessment by psychiatrist, Dr. Lowe, who noted that at "the June 10 appointment, [the worker] stated that Dr. Yeung prescribed medication ... for pain in the left shoulder and put him on modified duties – mostly less heavy lifting".
- July 8, 2015: Dr. Yeung reported that the worker had "c/o increasing left shoulder pain... difficult to lift or put arm back".
- July 24, 2015: Dr. Yeung stated that the worker had "c/o increasing pain to the left shoulder, difficult to raise or put it back, worse with work and better off work, resting at home". Objectively, Dr. Yeung noted "decreased post internal rotation with left shoulder/abduction due to pain". The diagnosis was "chronic pain left shoulder" and referral to a pain clinic was recommended.
- August 10, 2015: The EA reported that following his injury of May 27, 2015, the worker had "NLT [no lost time] – IW stated that AE did not modify his work. IW self-accommodated by using his right hand – IW is left hand dominant". It was noted that the worker had yet to start physiotherapy. His claim for the left shoulder was allowed.
- August 12, 2015: Dr. Yeung noted "tender along left shoulder with restricted rom in all directions" and diagnosed "chronic left shoulder tendinitis".
- September 10, 2015: Pain specialist, Dr. Chen, evaluated the worker's chronic pain condition for Dr. Yeung, noting the worker's headaches, neck, shoulder and back pain. Dr. Chen noted that the worker had been in car/pedestrian accidents in 1999 and 2003, suffering respectively a left wrist fracture and a closed head injury. Dr. Chen stated that the 2008 MVA resulted in "sprained neck/shoulder" and the compensable injury in May 2015 resulted in "sprained shoulder". He noted that the worker currently exhibited left rotator cuff tenderness and stiffness.
- October 22, 2015: The worker's physiotherapist completed a Functional Abilities Form (FAF) on which he diagnosed left shoulder arthropathy. He recommended that the worker was capable of working on modified within restrictions of bending, twisting, work at or above the shoulder level, and repetitive movement of the left arm.
- October 29, 2015: The physiotherapist provided a diagnosis of left shoulder sprain/strain, advising that the worker could perform "pre-injury accommodated duties" at regular hours. The ROM in the left shoulder was flexion of 95 degrees and abduction of 95 degrees. It was recommended that the worker adhere to limitations against pushing, pulling, lifting from waist to shoulder and overhead and avoid exposure to vibration.
- October 30, 2015: Dr. Yeung reported that the worker was being seen at a pain clinic, and "tried injection to shoulder, no help ...".
- November 4, 2015: The physiotherapist reiterated his October 29 recommendations.
- November 5, 2015: The physiotherapist's discharge report indicated that in order to benefit the worker's return to work, further investigations and rehabilitation were required. He stated that it would be four to six months before the worker could return to full and unrestricted duties.
- November 5, 2015: The EA reported that in discussion with the worker on October 28, the worker advised that he was in too much shoulder pain and his doctor had suggested he take

time off work. The worker stated that since May 2015, his condition had not resolved. And he "had a shoulder injury approximately 4 years ago – mostly healed and the pain was not that bad". The EA noted that "when first injured no mod offered".

- November 12, 2015: The EA reported that the accident employer advised that the worker "has been on modified duties for the entire time". The EA concluded as follows:

  > The worker and the employer confirmed that he has been working modified duties since the DOA and has been unable to return to his regular duties. The worker confirmed that he did not go to physiotherapy immediately ...
  >
  > The F8 confirms a diagnosis of a left shoulder strain. The FAF dated 22OCT2015 indicates a diagnosis of left shoulder arthropathy. The chart notes dated 12AUG2015 confirms a diagnosis of chronic left shoulder tendinitis. Noting that arthropathy is of a degenerative nature and noting that his chronic left shoulder tendinitis is likely a result of his pre-existing left shoulder issues, I am limiting entitlement to a left shoulder strain injury only.
  >
  > The worker continues to have ongoing recovery issues with his left shoulder. The worker and the employer confirmed that he has been working modified duties since DOA and has been unable to return to his pre-injury duties. Although the worker had documented pre-existing issues with his shoulder, he was still able to work his regular duties prior to this work-related injury on 27MAY2015 and has since not been able to return to these pre-injury duties. Noting this information, I am allowing ongoing entitlement to HC benefits in this claim ...

- November 24, 2015: The accident employer's Progress Report stated that the worker had lost no time from work following his injury and that he was working on modified duties at regular pay and on regular hours.
- December 8, 2015: An MRI of the worker's left shoulder revealed the following:

  > Mild degenerative change in the acromioclavicular joint
  >
  > Minimal interstitial tearing of the supraspinatus tendon...
  >
  > Mild bursal fluid

- December 10, 2015: An MRI of the worker's cervical spine identified "severe degenerative disc disease with resultant neural foraminal stenosis... The most pronounced findings are seen of the C4-5 and C5/6 and also C6/7 levels".
- January 13, 2016: The worker's chiropractor completed an FAF, noting the worker was performing modified duties and was experiencing difficulties lifting his left arm, pain on pushing and pulling, and difficulty reaching overhead.
- February 3, 2016: The physiotherapist's FAF stated that the worker had "difficulty moving/using left arm ... pain in the L shoulder with repetitive movements of the neck ...". Also noted were the worker's right arm and bilateral foot conditions.
- February 10, 2016: The physiotherapist's Form 8 stated that the worker had "degenerative changes on the cervical spine and left shoulder supraspinatus tendinitis".
- March 16, 2016: The CM reached the following decision:

  > On May 27, 2015, you were lifting a bundle of stops and felt pain in your left shoulder. Your claim was accepted for a left shoulder strain/sprain injury. Your employer provided

you with appropriate accommodated work and you continue to perform these duties to date. You attended 14 weeks of physiotherapy from August to November 2015.

The clinical information on file demonstrates that you have a longstanding history of left shoulder pain that has involved treatment for a number of years. An MRI of your left shoulder was performed on December 8, 2015. It demonstrated minimal interstitial tearing of your supraspinatus and mild degenerative changes in your acromioclavicular joint.

(...)

Decision:

The information on file does not support ongoing impairment related to your workplace injury. The findings of the MRI are not compatible with the incident of May 27, 2015. There may be ongoing impairment related to non-compensable conditions. There is no ongoing entitlement in your claim and your left shoulder strain is considered fully recovered.

- September 2, 2016: The CM concluded as follows:

  Decision:

  The clinical information supports that you had a pre-existing left shoulder injury that required treatment at least once per year beginning [*sic*] in 2010. You did not require accommodation or time off related to this impairment in the 2 years prior to your workplace injury.

  On the date of injury, you lifted a bundle of 16' vinyl stops you estimated weighed between 50 and 75 lbs., when you would normally separate them and lift them in smaller bundles. I do not consider the work related incident to be minor in nature as it is capable of causing a strain injury. As I do not consider the injury minor in nature, I cannot allow it under the aggravation basis policy.

  Additionally, the medical information supports that you had a work related strain injury that has now resolved. Your representative has directed us to review a functional abilities form that confirms you have ongoing impairment. This form indicates that you have multiple areas of injury that are impaired and unrelated. It also indicates that you experience increased pain in your left shoulder with repetetive [*sic*] movements of your neck, which is not an allowed area of injury in this case.

  I am upholding my prior decision based on the above information.

- January 15, 2018: The CM reviewed the accident's employer costs regarding the worker's pre-existing condition under the Second Injury and Enhancement Fund (SIEF). The CM concluded as follows:

  I have reviewed and considered all relevant information including the medical reports and factors that may demonstrate evidence of a pre-existing condition. I am satisfied that there is evidence of an underlying or pre-existing condition (mild degenerative changes, minimal tearing, minimal bursal fluid) that has enhanced or prolonged the claim.

  In assessing the information on file, I have established the accident was of a moderate severity as the force of lifting material that weighed over 60 pounds could reasonably be expected to cause a disabling injury. The level of the pre-existing condition is considered to be of a minor severity based on the medical information.

  In determining the SIEF value, I have combined the moderate accident severity with the minor pre-existing condition assessment. As required by our policy, I have granted 25 percent SIEF cost relief in this case.

- August 2, 2018: The worker's representative provided the worker's medical documents and asked Dr. Visnjevac, a chronic pain specialist, to assess the worker based on the following questions:

  > Did the accident (work events and requirements) of May 27, 2015 significantly aggravate and cause further physiological damage to the shoulder?
  >
  > A pathological explanation is required with reference to complaints of shoulder pain dating from 2008 with a motor vehicle accident of 2007.
  >
  > What are the current diagnosis, prognosis and work restrictions?

- August 19, 2018: Dr. Visnjevac reported that the worker's chief presenting complaints included left shoulder pain and bilateral neck pain. He noted that the worker had undergone shoulder surgery in 2017, but no report had been provided. ROM evaluation of the left shoulder revealed full flexion and extension, active abduction limited to 85 degrees and a passive abduction of 103 degrees. Dr. Visnjevac's diagnoses were as follows:

  > 1. LEFT shoulder pain:
  >
  > a. Rotator cuff pathology suspected. 2015 MRI indicated interstitial tear of the supraspinatus tending itself, which was perhaps erroneously noted to be an incidental finding in previous documentation, as this imaging was performed approximately 6.5 months after the stated injury of May 2015 with no mention of scar formation in the tendon itself within the same report. Scar formation is indicative of an old injury and may take 6-12 months to form, which suggests the MRI taken in December of that year is indicative of a subacute injury. The findings of the MRI are consistent with the injury that which is described in the correlating WSIB claim herein (lifting 50-70lb load) and, to answer the questions "did the accident (work events and requirements) of May 27, 2015 significantly aggravate and cause further physiological damage to the shoulder", I would agree, based on the MRI findings, that the event in question significantly injured his previous shoulder injury and caused physiological damage as described in the apparent subacute findings reported in the 2015 MRI. The subacute nature of the findings in this MRI is evidence of a pathological explanation of the shoulder injury within the preceding 12 months, since "old" injuries sustained in previous years would be expected to be clearly identified by radiologist through the formation of scars and typically reported as such. Despite the small size of the tear, the tensile properties of the supraspinatus tendon change rapidly when torn and are often reflective of the lack of capacity for load bearing as described in the historical reports relating to this claim.
  >
  > (...)
  >
  > Diagnosis: Rotator cuff pathology with elements of instability, likely involving the supraspinatus, but lacking recent imaging to corroborate physical examination findings.

  As to the worker's neck pain, Dr. Visnjevac noted elements including "stenosis, spondylosis and degenerative disc disease". He stated:

  > Although [the worker's] neck pain appears to predate the accident associated with this WSIB claim, ... no pre-2015 cervical spine MRI imaging was made available to me. Hence, it is unclear at this time whether the event associated with this WSIB claim also contributed to an exacerbation of his neck pain or not.
  >
  > (...)
  >
  > He has multilevel pathology ... with significant limitations and ROM, contributing to levator scapulae and trapezius dystonia and myofascial pain.

(vii) The worker's testimony

[19] The worker testified that his MVA of 2008 resulted in left neck whiplash and injury to his left shoulder that became more of a problem in 2009, causing pain when he attempted to lift his left arm. The worker acknowledged an incident in 2010 when he attempted to lift a large window and experienced strain in his left shoulder. He stated that while he reported this injury, he did not file a claim with the Board as the injury "wasn't that severe", so he continued working his regular duties. In 2011, the worker testified, his discomfort increased in the left shoulder when he was transferred to window assembly, but the left shoulder improved over the next year. In 2012, however, the worker explained, his shoulder was "not that great" and while he could work, the shoulder remained painful.

[20] The worker testified that in 2012 he was transferred to modified duties as a machine operator, which involved pushing buttons. His left shoulder continued to cause him daily pain. He found overhead work very painful and he avoided using the shoulder as much as he could. The worker stated that by 2014, while still in the same job, the left shoulder was "okay" and not as painful. He stated that the lighter duties helped and he relied on Advil for pain relief.

[21] The worker testified that he was sent back to regular duties two to three days prior to his May 2015 injury, assembling and cleaning windows. He no longer had the use of a helper and the job involved increased production. The worker stated that this decision was made by the accident employer as his restrictions had expired. While there was no specific injury incident, this change affected his shoulder.

[22] The worker described the May 27, 2015 as occurring as he tried to lift the bundle of vinyl stops on his own. He stated that he was returned to modified duties as a supervisor for "a couple of months after the injury". He disputed being returned to modified duties immediately following the accident. The worker testified that he performed the modified duties from August 2015 until he was terminated in March 2016. He did only 15% to 20% regular duties in regular assembly in this period. He stated that his shoulder became increasingly worse; his pain increased and he could not lift above his waist.

[23] The worker testified that he underwent left shoulder surgery in June 2017, which resulted in some improvement to the shoulder. He returned to other employment in April 2018, driving two to three hours per day, three to four days per week. That employment ended a few weeks before this hearing, but he was continuing to seek employment.

[24] In cross-questioning, the worker testified that he had car/pedestrian accidents in 1999 and 2003. In the first, he injured his left wrist, which required surgery; in the second, he suffered a head injury. The worker stated that as a result of the 2008 MVA, he injured his neck, suffering whiplash, and had some left shoulder pain. He underwent therapy for his neck for about a month and for his left shoulder which, after a few months, improved. When it was noted that Dr. Yeung reported seeing the worker about shoulder complaints between February 2011 and November 2014, the worker had difficulty recalling.

[25] The worker testified that he recalled what Dr. Yeung reported as "persisting pain" in 2013, but did not undergo therapy and was advised to perform modified duties. He acknowledged that while he had stated that his shoulder pain was "okay" in 2014, he still saw his doctor.

[26] The worker was asked why he did not seek physiotherapy after his injury until September 2015. He testified that both his doctor and the accident employer had been delayed in providing the necessary forms to the Board.

[27] The worker stated that, at present, his left shoulder was "okay" and while he still had pain, he could manage it. He saw his doctor for a number of issues, including his neck, once or twice each month, the last being "a couple of weeks ago, in August".

(viii) The submissions of the parties

[28] The representatives for the parties made detailed oral submissions, and the accident employer's representative also relied on prior written submissions. I have summarized their arguments below, as I understand them, and refer to them in more detail, as necessary, in the analysis that follows.

(a) The worker's representative

[29] As noted above, the worker's representative withdrew his appeal for entitlement for the worker's left shoulder on an aggravation basis. He argued that, as the SIEF CM had concluded, the worker's pre-existing condition was minor in nature and that his accident was more severe. As such, the representative submitted that while following the MVA of 2008, the worker experienced some shoulder problems, he was able to continue working until May 2015. The representative argued that the medical evidence supported the conclusion that the worker's injury and its effects justified ongoing entitlement for benefits, including a NEL assessment.

(b) The accident employer's submissions

[30] The representative for the accident employer submitted that the worker had a clinical history of shoulder pain prior to the May 27, 2015 injury, and the diagnosis for that injury was for left shoulder strain only. As the May 2015 was not minor in nature, it could not be considered an aggravation. The representative argued that the worker had been diagnosed with left shoulder tendonitis pre-and post- May 27, 2015 and that the pre-injury diagnosis overwhelmed the strain the worker suffered as a result of the May 2015 injury. The representative also submitted that the medical evidence also suggested that the worker's left shoulder pain was the result of repetitive movements of his non-compensable neck condition. As such, the worker's appeal should be denied.

(ix) Analysis

[31] The issue in this case is the worker's ongoing entitlement for the left shoulder based on his May 27, 2015 injury under this claim. If so, has the worker developed a permanent impairment of his left shoulder that entitles him to a NEL determination?

(a) Ongoing entitlement for the left shoulder

[32] There is no dispute that the worker had a pre-existing left shoulder condition following his March 2008 MVA. This was diagnosed by Dr. Kachooie in January 2011 as "left rotator cuff tendinitis [and] early frozen shoulder". There is no medical evidence of substance following this diagnosis that the "early frozen shoulder" progressed. As well, it is noted that the worker continued to work up to the date of his May 2015 compensable injury. As the CM noted on September 2, 2016, in the two years prior to the May 2015 accident, the worker lost no time from work or required accommodations.

[33] The diagnosis that followed the worker's compensable May 2015 injury was established by Dr. Yeung at the time as left shoulder strain. In his report of June 3, 2015, Dr. Yeung prognosticated that the worker's left shoulder restrictions would remain in place for the subsequent eight to 14 days. Review of the worker's file, however, indicates that this did not occur. On July 8, 2015, Dr. Yeung reported that the worker's complaints of left shoulder pain had increased. On July 24, 2015, Dr. Yeung noted again the worker's complaint of increased left shoulder pain, along with decreased post internal rotation with left shoulder abduction due to pain. At that time, Dr. Yeung described the worker's left shoulder pain as chronic. Dr. Yeung reported on August 10, 2015 that the left shoulder was fully restricted in ROM. Given the length of time since the May, 27, 2015 injury, namely two and one-half months, it is evident that the worker's left shoulder strain had not recovered in this period.

[34] On August 12, 2015, Dr. Yeung diagnosed "chronic left shoulder tendonitis". On September 10, 2015, Dr. Chen also diagnosed the worker's "sprained shoulder" as a result of the compensable injury. The worker's physiotherapist stated on October 22, 2015 that the worker suffered from left shoulder arthropathy, but on October 29, 2015, the diagnosis was that of left shoulder sprain/strain. The EA limited the worker's entitlement to left shoulder strain as of November 12, 2015, noting his post-injury diagnosis of "chronic left shoulder tendinitis", attributing it to the worker's pre-existing condition, and his diagnosis of left shoulder arthropathy considered to be degenerative in nature. Thus, while rejecting the contribution of tendinitis and arthropathy of the worker's left shoulder as elements of his entitlement, the EA nonetheless concluded that the worker's left shoulder strain remained an ongoing issue as of November 2015, this being now five and one-half months following the May 2015 compensable injury. This was well beyond the reasonable expected time of recovery for a left shoulder strain as anticipated by Dr. Yeung in June 2015. It is further significant, in my view, that on November 5, 2015, the physiotherapist advised that on discharge from treatment, the worker still needed further investigation and rehabilitation and that it would require a further four to six months before the worker could return to full duties.

[35] The MRI of December 8, 2015 noted both degenerative changes in the worker's left shoulder and "[m]inimal interstitial tearing of the supraspinatus tendon". The CM found on March 16, 2016 that the two conditions were not compatible with the compensable injury of May 27, 2015 and concluded that the worker's left shoulder sprain had resolved.

[36] However, in his August 2018 review, Dr. Visnjevac concluded otherwise. While Dr. Visnjevac was reviewing the worker's condition in an aggravation context, he clearly found that the interstitial tears were the result of the May 2015 compensable injury. Dr. Visnjevac concluded as follows:

> a. Rotator cuff pathology suspected. 2015 MRI indicated interstitial tear of the supraspinatus tending itself, which was perhaps erroneously noted to be an incidental finding in previous documentation, as this imaging was performed approximately 6.5 months after the stated injury of May 2015 with no mention of scar formation in the tendon itself within the same report. Scar formation is indicative of an old injury and may take 6-12 months to form, which suggests the MRI taken in December of that year is indicative of a subacute injury. The findings of the MRI are consistent with the injury that which is described in the correlating WSIB claim herein (lifting 50-70lb load) and, to answer the questions "did the accident (work events and requirements) of May 27, 2015 significantly aggravate and cause further physiological damage to the shoulder", I would agree, based on the MRI findings, that the event in question significantly injured his previous shoulder injury and caused physiological damage as described in the apparent

> subacute findings reported in the 2015 MRI. The subacute nature of the findings in this MRI is evidence of a pathological explanation of the shoulder injury within the preceding 12 months, since "old" injuries sustained in previous years would be expected to be clearly identified by radiologist through the formation of scars and typically reported as such. Despite the small size of the tear, the tensile properties of the supraspinatus tendon change rapidly when torn and are often reflective of the lack of capacity for load bearing as described in the historical reports relating to this claim.

[37] In viewing the MRI results, Dr. Visnjevac found that the interstitial tears in the worker's shoulder were likely the result of the May 2015 compensable injury, stating that if they had been caused by the worker's earlier shoulder injury, the MRI would have revealed scars from that injury.

[38] In coming to my conclusions, I note that in making the SIEF determination, the CM concluded that the worker's pre-existing condition was minor in nature, while the May 2015 injury was characterized as a moderate injury.

[39] I do not overlook the argument posited by the representative for the accident employer that consideration of the worker's left shoulder problems should include the contribution of repetitive movements of his non-compensable neck condition. This issue was first raised by the worker's physiotherapist in February 2016, as "pain in the L shoulder with repetitive movements of the neck". Dr. Visnjevac considered the worker's neck pathology in his assessment of August 2018. While Dr. Visnjevac referred to the condition of the supraspinatus tendon as it related to the worker's left shoulder condition, his assessment of the impact of the worker's neck condition was related to levator scapulae and trapezius dystonia muscles in the worker's left shoulder. Thus, based on this opinion, while the worker may have experienced shoulder pain due to his neck condition, the pain was distinguishable from that caused by the compensable injury to the supraspinatus tendon,

[40] Finally, I do not overlook the numerous and conflicting reports regarding the nature of his work duties following the May 27, 2015 accident. The worker testified that he was not placed on modified duties until about two months following his compensable injury. The medical reporting and the documentation of the Board each refer variously to the modified work or regular work in this period. In my view, this is a moot issue. Even if the worker had been performing modified duties between May and August 2015, the medical evidence demonstrates that in this period, his left shoulder condition had worsened.

[41] From the above, I find the following. Notwithstanding his earlier2008 injury, the worker was able to work without accommodations or lost time in the two years prior to his compensable injury of May 27, 2015. The medical evidence supports the conclusion that the worker's left shoulder injury did not recover as of March 2016. The CM characterized the worker's left shoulder injury as moderate in nature, qualifying the pre-existing injury a minor. Dr. Visnjevac provided his opinion based on the objective medical evidence that the interstitial tears in the worker's left shoulder were attributable to the worker's May 27, 2015 compensable injury. For all of these reasons, I conclude that the worker has ongoing entitlement for the left shoulder as a result of his May 27, 2015 injury.

(b) Permanent impairment and NEL determination

[42] Having concluded that the worker has ongoing entitlement for the left shoulder, I also find that he has a permanent impairment of the left shoulder. The shoulder was injured in May 2015 on a diagnosis of left shoulder strain, which, did not resolve as expected. As noted

above, section 46 of the WSIA provides that if a worker's injury results in permanent impairment, the worker is entitled to compensation for non-economic loss. In this case, impairment applies to the worker's physical or functional abnormality or loss that resulted from his injury of May 27, 2015. I find that he has a permanent impairment that continued to exist after the worker reached maximum medical recovery. It is clear in my view, that the worker's left shoulder sprain/strain did not resolve within the usual healing time for such an injury, and that his left shoulder problems were unlikely to recover. As such, the worker is entitled to a NEL determination for the left shoulder pursuant to section 46 of the WSIA.

DISPOSITION

[43] The appeal is allowed as follows:

1. The worker has ongoing entitlement for his left shoulder injury as a result of his workplace injury of May 27, 2015.

2. The worker has a permanent impairment of the left shoulder and is entitled to a NEL determination.

[44] The nature and duration of the benefits flowing from these decisions are returned to the Board for further adjudication, subject to the usual rights of appeal.

DATED: March 7, 2019

SIGNED: W. Sutton