

--SUMMARY--

Decision No. 1116/20

09-Nov-2020

R.Nairn - C.Sacco - M.Ferrari

- Permanent impairment {NEL} (degree of impairment) (chronic pain)
- Loss of earnings {LOE} (employability)

*No Summary Available*

14 Pages

References: Act Citation

- WSIA

Other Case Reference

- [w5120n]k

Style of Cause:

Neutral Citation: 2020 ONWSIAT 1815



# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## DECISION NO. 1116/20

**BEFORE:**

R. Nairn : Vice-Chair  
C. Sacco : Member Representative of Employers  
M. Ferrari : Member Representative of Workers

**HEARING:**

October 1, 2020 at Toronto  
Oral by Teleconference

**DATE OF DECISION:**

November 9, 2020

**NEUTRAL CITATION:**

2020 ONWSIAT 1815

**DECISION(S) UNDER APPEAL:** WSIB Appeals Resolution Officer (ARO) January 17, 2019 and NEL Clinical Specialist July 30, 2019 (deemed a final decision by the May 14, 2020 decision of the Board's Executive Director, Appeals Services).

**APPEARANCES:****For the worker:**

Mr. F. Evangelista, Paralegal

**For the employer:**

Not participating

**Interpreter:**

Not applicable

Workplace Safety and Insurance  
Appeals Tribunal

505 University Avenue 7<sup>th</sup> Floor  
Toronto ON M5G 2P2

Tribunal d'appel de la sécurité professionnelle  
et de l'assurance contre les accidents du travail

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## REASONS

### (i) Introduction

- [1] At the time of the accident under consideration here, the worker was employed as a loader/operator in the accident employer's construction business. Born in 1962, the worker started with the employer in April 2012.
- [2] On May 12, 2012 the worker was injured when he fell about 4 feet off a crusher to the ground below. As noted in the Health Professional's Report (Form 8) of May 12, 2012, the worker sustained a "bilateral malleolar [fracture] R ankle". The worker had surgery performed on his right ankle - an "open reduction internal fixation fracture right ankle".
- [3] The WSIB (the "Board") established a claim to deal with this accident and recognized the worker's right ankle injury as compensable. He was granted health care and Loss of Earnings ("LOE") benefits. The Board also recognized that the worker had been left with a permanent impairment and in September 2013 he was granted a 12% Non-Economic Loss ("NEL") award for his compensable right ankle injury diagnosed as a "post-surgical bimalleolar fracture with internal fixation".
- [4] Information contained in the case materials indicates that the worker returned to modified duties with the employer in August 2012 but he stopped a short time later, claiming that the job aggravated his right ankle pain. The worker's request for ongoing LOE benefits was initially denied by the Board's operating level and his objection was eventually referred to an Appeals Resolution Officer ("ARO"). In a decision dated December 30, 2013, an ARO granted the worker's appeal, concluding that the duties offered to him were unsuitable, and reinstated full LOE benefits.
- [5] The worker returned to work again in about July 2013 when he was assigned to count cars. He continued working until November 2013 when he underwent surgery. On November 12, 2013, Dr. W. Latham (orthopaedic surgeon) operated on the worker and the post-operative diagnosis was "painful hardware, post-op internal fixation right ankle, ankle arthrofibrosis". The surgery and associated lost time were recognized as part of the worker's entitlement in this claim.
- [6] In November 2013 the Board considered the issue of whether the worker's entitlement in this claim ought to be expanded to include a psychotraumatic condition. In a decision dated November 15, 2013 a Case Manager granted the worker entitlement for a Major Depressive Disorder and Anxiety Disorder on a temporary basis, finding that these diagnoses were related to "extended disablement" in this claim. The Case Manager also indicated:
- I agree that you should continue with the already approved psychotherapy sessions. 14 weekly sessions were approved and treatment was started on September 3, 2013.
- From a psychological perspective, you are fit to return to work, however we will need to ensure that the job that is offered is not only physically suitable but is also taking into account the recommendations outlined by your psychologist.
- [7] When it became apparent to the Board that the worker would be unable to return to the accident employer, he was granted Work Transition ("WT") services. A Functional Abilities Evaluation ("FAE") was conducted by an Occupational Therapist ("OT") on May 20, 2014. In the report which followed that assessment, the OT indicated in part:

On formal testing, [the worker] demonstrated functional range of motion in his spine and functional range of motion of his extremities and he had no dermatomal weakness. However, the results of trunk testing showed that he had weakness in his core muscles.

[The worker] also demonstrated the ability to lift 60 pounds occasionally from knuckle to shoulder, to lift 35 pounds frequently from knuckle to shoulder, to carry 40 pounds over 30 feet using both hands. He was observed to push and pull a loaded four-wheeled cart requiring an initial force of 21.3 pounds over 30 feet. He demonstrated the ability to intermittently sit, stand and walk for 66 minutes, 83 minutes and 36 minutes respectively over a period of approximately three hours with discernable changes in his physical condition from the beginning to the end of the FAE (increased limping and favouring his right leg). The results of his functional testing indicate he meets the medium work category as defined by the Dictionary of Occupational Titles (DOT).

[8] Information contained in the case materials suggests that the implementation of a return to work plan was delayed due to concerns about the worker's medication intake. The worker was referred to a Concurrent Substance and Medication Assessment in June 2014 with a view to eliminating his use of Percocet. WT Services had identified the worker's use of narcotics for pain as a barrier to returning to work. Recommendations were made about changing the worker's medication.

[9] In a decision dated October 24, 2014 a Case Manager decided that the worker's temporary psychotraumatic entitlement would end as of April 29, 2014. The Case Manager concluded:

On June 13, 2014 your psychologist indicated that as of April 29, 2014 that you were no longer depressed and were in a better place mentally. At that time you had not been in treatment for approximately 8 weeks. It appears that once return to work conversations started up again your depressive and anxiety symptoms return. It would appear now that your anxiety is being caused due to the anticipation of returning back to work in general. Your employer appears to be offering you an existing position at the company and not a made-up job as in the past. There is no evidence that you are being harassed or forced to return to work too soon, in fact it has been 10 months since return to work negotiations commenced. I do not feel that this new flare-up of your psychological impairment meets the criteria under extended disablement as it is not the intent of the psychotraumatic disability policy to compensate for a person's generalized reaction to pain, return to work issues, or decisions made in the claim, I am not accepting that the criteria under the psychotraumatic disability policy is no longer being met and that your temporary psychological condition resolved as of April 29, 2014.

[10] Later, in a decision dated November 13, 2014 a Case Manager dealt with the issue of the worker's ongoing entitlement to benefits on an organic basis. The Case Manager decided that "there is no ongoing work related impairment precluding a return to work. You have reached maximum medical recovery with permanent precautions to the work related right ankle injury outlined in my correspondence dated May 28, 2014".

[11] In the November 13, 2014 decision the Case Manager found that the worker was fit for his pre-injury occupation of heavy equipment operator with some accommodations. The employer though, did not have any work available. In December 2014 WT Services advised the worker that he would be sponsored in a WT Plan with an employment goal or Suitable Occupation ("SO") of heavy equipment operator. The WT Plan included 2 weeks of Job Search Training and 10 weeks of Employment Placement and Retention Services. The worker was to be paid full LOE benefits while he participated in the WT Plan which was expected to conclude on about March 27, 2015.

[12] The worker did not agree that the SO of heavy equipment operator was suitable. In March 2015 the worker found work with a new employer as a loader/operator/industrial painter, earning \$17 per hour over a 40 hour week. The worker was granted partial LOE benefits from March 11, 2015, the date he started working with the new employer.

[13] On July 29, 2015 the worker was laid off from the new employer after having provided them with a medical note on July 20, 2015. According to the decision on appeal, the new employer advised the worker that “in order to return to work he would have to provide a doctor’s note that said he was able to perform 100 percent of his duties”. The worker did not return to this employer nor has he worked since.

[14] Subsequently, the worker asked that the Board grant him ongoing LOE benefits from July 20, 2015. In a decision dated September 15, 2015 the Case Manager denied the worker’s request, noting in part:

(...)

January 23, 2015 the Work Transition Specialist (V/VTS) had reviewed your claim and determined that the Suitable Occupation (S.O.) of Heavy Equipment Operator was determined to be suitable. Job Search and Employment Placement Services were offered to you. You secured employment within the above S.O., with a new employer and partial LOE benefits were paid from March 11, 2015 to current date based on actual earnings of \$17.00 per hour.

Per correspondence dated July 29, 2015 you were temporarily laid-off, from the new employer, due to illness. In our discussion, you reported that you were taking too much medication due to pain and this caused drowsiness.

Your claim was reviewed by a case manager on the recurrence team, who determined there are no objective medical findings to suggest a worsening below your NEL level.

(...)

Decision

(...), in review of your claim, there is no clinical evidence to support that you are functioning below your current level of impairment, nor are you considered to be totally disabled. You are considered partially impaired and the S.O of Heavy Equipment Operator remains suitable. Your request for full LOE benefits from July 21, 2015, is denied. You will continue to receive partial LOE benefits based on the identified S.O., which calculates to \$298.24 biweekly.

[15] In July 2016, the worker asked that he be granted entitlement for Chronic Pain Disability (“CPD”) under this claim. In a decision dated November 10, 2016 the Case Manager denied the worker entitlement for CPD. The Case Manager found that not all of the necessary criteria set out in Board policy had been satisfied. For example, the Case Manager was not satisfied that the worker’s degree of pain was inconsistent with the organic findings or that the chronic pain was caused by the compensable injuries.

[16] In Board Memorandum (“Memo”) No. A0032 of May 7, 2018 the Case Manager conducted the worker’s final (72 month) LOE review. While noting that the worker remained unemployed, the Case Manager determined that until age 65, the worker would be entitled to partial LOE benefits based on entry level wages of \$19.10 per hour in the SO of heavy equipment operator.

[17] The worker disagreed with a number of the decisions made by the Board’s operating level including those decisions that his temporary psychological condition had resolved by

April 29, 2014; that the SO of heavy equipment operator was appropriate and the denial of entitlement for CPD. These objections were referred to an ARO and in a decision dated January 17, 2019 the ARO granted the worker's appeal in part. The ARO found:

1. The worker is not fit for pre-injury work with accommodation. The SO of heavy equipment operator is not suitable.
2. The worker's psychological impairment had not resolved by April 29, 2014.
3. Chronic pain disability is granted. 'Maximum medical recovery was reached by March 11, 2015. A NEL determination is in order.
4. The worker is not entitled to full LOE benefits from July 21, 2015.
5. The worker is entitled to partial LOE benefits from July 21, 2015 based on starting wages in the alternative SO of retail sales, NOC 6232.

[18] With regards to the issue of the worker's entitlement to full LOE benefits, the ARO indicated in part:

The worker seeks full LOE benefits from July 2015, on the basis that he is unable to work. I find the evidence does not support that he is unable to work. I have considered the medical reporting as a whole in reaching this conclusion. I have taken into account the change in entitlement from an organic impairment to CPD.

(...)

I considered the following in concluding the worker is able to work at the medium strength level with functional limitations:

- The worker demonstrated the ability to work at the medium strength level at the FAE completed in May 2014. He did not demonstrate any non-organic signs during the testing. He demonstrated consistency of effort. His subjective reports of range of motion and positional tolerances were consistent with observed tolerances. The occupational therapist concluded his subjective reports were an accurate reflection of his status.
- The FAE was not job specific. The assessor noted that in the absence of specific job demands information, testing was completed at a minimum of five minutes. The worker was unable to complete kneeling or squatting for this duration. She concluded the worker would have difficulty sustaining work at kneeling/ squatting and stooped positions for a longer period of time. The worker reported his condition was aggravated by walking too much and being on his foot more than one hour. I conclude the worker has functional limitations for low level work.
- The worker found work with a new employer in March 2015 and testified to enjoying this work. He was able to manage working in the yard. He was able to mark the material requested. He was able to spray paint the beams. He was able to file the beams. He lost this job when his new employer learned that he took Percocet for his compensable condition. He performed this job for over four months. This is evidence that he was able to work with his compensable condition using his brace.
- The worker testified to performing useful activity during the day. This is consistent with being capable of work.
- The worker testified that he relies on his cane for support. He said he probably used it to get to the FAE, but not during testing. The worker did not testify to using the cane when he worked for [the new employer]. He used his brace. I conclude the worker does not require his cane, and that he can use his brace for support. As noted, if his back condition has worsened such that he must use his cane for this condition, this is unrelated to the worker's injury and would represent a post-accident change.

[19] On the issue of the worker's entitlement to partial LOE benefits, the ARO agreed that the SO of heavy equipment operator was unsuitable but concluded:

I conclude the worker is capable of returning to direct entry level work in retail sales, ideally, in a home improvement setting where he could use his some of his transferrable skills. Retail sales was identified as an alternative SO during the WT process and the worker was encouraged to look for this work as well as work as a heavy equipment operator while he was participating in EPRS. The worker testified that he did apply for retail sales positions while he was job searching during the WT plan. He stopped looking for retail sales work once he found work with [the new employer] He has not applied for this work since then.

Given the worker's lack of experience in retail sales (NOC 6232), I conclude the worker is entitled to partial loss of earnings benefits based on starting wages in this SO from July 21, 2015, when he was let go from [the new employer].

[20] Following the release of the ARO's decision, the worker was granted a NEL determination for his CPD. In a decision dated July 30, 2019 a NEL Clinical Specialist determined that the worker had a 15% Whole Person Impairment related to his CPD (right lower leg). In the July 22, 2019 NEL Evaluation Report, the NEL Clinical Specialist indicated the following had been relied upon in reaching that decision:

**INFORMATION USED IN NEL RATING:**

-Specialty Clinic Comprehensive Assessment 26Nov2015

-Psychological Assessment report Dr. Roat 15Sep2014

While all relevant clinical reports on file were reviewed, the documents listed above provide the required information to meet the specific rating criteria as per the AMA Guides or applicable policy and were used to render the NEL benefit decision. In selecting the most appropriate documents, consideration was also given to the Maximum Medical Recovery (MMR) date.

[21] The NEL Clinical Specialist also noted:

In reviewing all of the available and relevant evidence, a Class 2 – 15% impairment best describes the worker's condition. The worker demonstrates overall a mild impairment level with respect to his work-related CPD and there is no evidence to suggest the worker would be rated higher than a mild rating at 15% noting the following:

□ There is a degree of impairment to complex integrated cerebral functions noting worker's sleep disturbance due to pain and self-reported difficulties with memory and concentration, exacerbation of pain with increased activity such as driving, inability to fully participate in previously enjoyed recreational activities such as fishing and limited ability to perform heavy household chores. However, reports note he is independent with self-care and tries to make an effort to complete small repairs around the house. During assessment, he was noted to be dressed appropriately and well- groomed and memory, concentration, thought process as well as content were normal. There is no indication of self-neglect, no indication of dependence with all activities of daily living, and no requirements for supervision or direction of activities to support a higher rating.

□ There is a degree of loss in personal and social efficacy noting he feels a complete loss of dignity and reportedly spends much of time crying as a result of his experienced loss. The worker spends much of his day isolated in the home, but will attempt to get outside the house for up to an hour daily. He also tries to go into town once a week with his partner. Reports note he has good family support and maintains good relationship with his son and daughter from a previous relationship. There is no evidence of him being completely house-bound or deterioration in family adjustment. In treatment, he remained highly motivated and willing to consider all the recommendations made.

□ There is a degree of emotional disturbance under ordinary stress evidenced by chronic pain. He experiences low mood and anger in relation to the current level of pain and reduced level of function. His concerns keep troubling him as he tends to keep the problems to himself. Reports note he has higher than average levels of anxiety and depression with improvement in many areas except for the level of physical pain. Through treatment, he has learned relaxation techniques for anxiety and pain control and self-reports that they were somewhat helpful in controlling his response to pain and reducing anxiety and irritability. Reports note that the pattern of improvement tended to fluctuate, becoming better at some points, but then showing increases in anxiety and negative thoughts after negative interactions with his workplace or disappointments in his medical treatment. There is no evidence of hallucinations, delusional thought process, distortions of reality or any active thought of self-harm. There is no indication of long episodes of depression, strong passive dependency tendencies, psychomotor retardation, noise intolerance, phobic pattern, conversion reaction, bizarre behaviour, or psychological regression to support a higher rating.

[22] In a decision dated May 14, 2020, the Board's Executive Director, Appeals Services, agreed to treat the July 30, 2019 decision of the NEL Clinical Specialist as a final decision of the Board for appeals purposes.

[23] The worker has appealed the January 17, 2019 ARO decision and the July 30, 2019 NEL Clinical Specialist decision to the Tribunal.

## **(ii) Issues**

[24] The issues to be determined in this appeal are:

1. Whether the 15% NEL award granted to the worker for CPD was correct and,
2. What is the appropriate quantum of LOE benefits payable from July 21, 2015?

[25] In addition to submitting that the 15% NEL award granted to the worker for his CPD does not adequately reflect his impairment, Mr. Evangelista takes the position that the worker ought to be granted full LOE benefits from July 21, 2015 on the grounds that he is competitively unemployable.

## **(iii) The worker's testimony**

[26] Under questioning from Mr. Evangelista, the worker testified that he left school around the age of 16, being a few classes short of completing a Grade 10 education. He worked for about a year pumping gas at a gas station and then found a job working underground in a mine, as a labourer. He worked in that position for about a year and then found work as an industrial spray painter. He had this job for about 14 years and was involved primarily with spray painting in large factories and warehouses. He operated large booms and scissor lifts and there was a lot of lifting and ladder climbing. The worker testified that given the current state of his health, he would not be able to work as a spray painter because of the standing, lifting and carrying involved.

[27] For about a four year period while the worker was employed as a spray painter, he was also working with a roofing company, removing and laying shingles. He would not be able to do that work today because of the climbing and working at heights.



[28] In about 2004, the worker found a job as a heavy equipment operator. He worked operating a loader. When he left that employer in 2009, he was self-employed as a carpenter for about 2 years. He worked at home renovations, installed decks and fences and various small jobs. He would not be capable of doing that work now because of the lifting and ladder climbing involved. In 2011 the worker began employment as a loader operator with a construction company and worked there for a few months before starting with the accident employer, in about August 2011, also as a loader operator. The worker testified he would not be capable of working as a loader operator now because he is “high all day” and his use of medication would restrict his ability to drive.

[29] According to the worker, he currently takes about 3 Percocet a day (down from 8 tablets previously) and smokes marijuana to help get some relief from his pain symptoms. He has also been prescribed an anti-depressant (Effexor) and Zyban, to help him stop smoking. With the exception of the marijuana (which he gets from friends and others), his medication is prescribed.

[30] The worker acknowledged that back in the 1990’s he was charged with offences relating to growing marijuana and because of this, he is not bondable.

[31] The worker testified he has no experience working in sales or customer service. He has very little computer knowledge. While he has a computer at home, he doesn’t use it for much more than playing games. He has a telephone which he can operate to send text messages. The Board never offered him any computer training or training in retail sales or customer service. He testified the Board never offered him any assistance getting back into the workforce. The Board never offered him the opportunity for any academic upgrading, even to obtain his Grade 12.

[32] The worker has not worked since his last employment ended in 2015. Applications for ODSP and CPP Disability benefits were denied. He has no current source of income other than the money he receives from the WSIB. The worker has not felt capable of looking for work since 2015. He testified his medication leaves him feeling “high” and dizzy and it is difficult for him to drive. He lives in a town of about 1200 people. The closest city is about a 25 minute drive away. There are very few retail stores in his small town. The nearest larger retail stores are located in the city. The worker does not believe he would be capable of working in a retail store because of the problems he would have standing and walking on concrete floors all day.

[33] The worker testified he experiences constant pain in his right ankle with symptoms into his right knee. He rated the level of his pain as a 6.5 or 7 on a scale of 1 to 10. Frequently during each day, he experiences a “jolt” of pain (like an electric shock) in his right ankle which increases the level of his pain to more than 10 on the scale of 1 to 10. On a “good” day, the worker’s level of pain would be rated as a 6.

[34] With respect to his current medical treatment, the worker testified that he sees his family physician, Dr. Williams, every couple of months to renew his prescriptions. The doctor has been trying to wean him off his use of opioids. He is not seeing any other doctors. He recalled seeing a psychiatrist on a couple of occasions in the past and this was who prescribed the Effexor initially. He has no ongoing psychiatric treatment.

[35] The worker currently lives in a house with his 28 year old son who moved in with him in May 2020. He has a 30 year old daughter who lives in the nearby city. Prior to his son moving in, the worker was living on his own, having separated from his spouse. According to the worker,

the separation was the result of his spouse becoming frustrated with the worker not having any money; his constant pain and increased arguing and complaining.

[36] The worker testified that he has a good relationship with his children and they are very supportive. He comes from a family of 13 brothers and sisters and gets along well with all of them. One of his brothers lives in the home across the street. Prior to the COVID-19 pandemic, the worker would see a couple of his brothers and sisters each day. He believes that his family is growing tired of helping him out by lending him money (which he cannot afford to pay back) or helping him around the house. They still remain supportive though.

[37] Prior to his accident the worker liked to fish, hunt and work in his garden. Since the accident, he has had to restrict those activities. This past summer, he was only able to go fishing on two occasions – both off a pier – as the vibration from a boat bothers him.

[38] The worker described a typical day. He usually gets up around 7 a.m. He is often tired when he awakens because he does not sleep well during the night. He gets only a couple of hours of uninterrupted sleep. The “jolts” of pain wake him up. He seldom eats breakfast. He has not had much of an appetite since the accident. During the morning he will watch television or play games on his phone. He might fix himself a light lunch and then will spend the afternoon watching television and napping. His son, who lives with him now, usually makes dinner.

[39] The worker is able to take care of his own personal hygiene though he may only shower occasionally and shave one day a week instead of every day. He related these changes to his feelings of depression brought on by his lack of an income, no job and constant pain. He testified he feels “hopeless and useless” and a burden to others. He frequently feels sad and is frequently tearful.

[40] The worker estimated he spends 80% to 85% of his day in his home. When he leaves his home, he might go to visit his brother across the street or have his son drive him to visit his other brothers or sisters for a coffee. Before his son moved in, the worker would try and do some housework, though each task would take some time to complete. His son does most of the housework now. It is a new experience for the worker to need help with household chores.

[41] While the worker still has a driver’s license, he doesn’t often drive himself. He has driven himself to visit his family in the nearby city, 25 minutes away. He has a motorcycle which he drove on two occasions this past summer, making the drive to the nearby city.

[42] The worker talks to his family doctor about his depression but doesn’t believe much more can be done for him other than taking medication. He acknowledged having some suicidal thoughts in the past but would never act on them because of his family.

#### (iv) Analysis

[43] Since this claim has an accident date in 2012, the applicable legislation is the *Workplace Safety and Insurance Act, 1997* (the “WSIA”).

#### (a) The 15% NEL award for CPD

[44] Pursuant to section 126 of the WSIA, the Tribunal is required to apply applicable Board policy. In this case, the Board has notified the Tribunal that one of the policies that apply to this appeal is *Operational Policy Manual* (“OPM”) Document No. 15-04-02 entitled “Psychotraumatic Disability”. This policy provides that when workers with a permanent

impairment from their CPD are rated for the purposes of a NEL award, their impairment is rated into one of four categories – Category 1 – minor impairment of total person (10%); Category 2 – moderate impairment of total person (15%-25%); Category 3 – major impairment of total person (30%-50%) or Category 4 – severe impairment of total person (60%-80%). In this case, the Board rated the worker's impairment at 15% placing him at the bottom end of Class 2.

Mr. Evangelista submits that the worker ought to have been rated in the middle of Class 3. The applicable portions of the policy provide:

**Category 2- moderate Impairment of total person (15% - 25%)**

In this category, the worker is still capable of looking after personal needs in the home environment but, with time, confidence diminishes and the worker becomes more dependent on the members of the family in all activities which take place outside the home. The worker demonstrates a moderate, at times episodic, anxiety state, agitation with excessive fear of re-injury, nurturing strong passive dependency tendencies.

The emotional state may be compounded by objective physical discomfort with persistent pain, signs of emotional withdrawal and depressive features, loss of appetite, insomnia, chronic fatigue, low noise tolerance, mild psychomotor retardation and definite limitations in social and personal adjustment within the family. At this stage, there is a clear indication of psychological regression.

**Category 3 - major impairment of total person (30% - 50%)**

In this category, the worker displays a severe anxiety state, definite deterioration in family adjustment, incipient breakdown of social integration, and longer episodes of depression. The worker tends to withdraw from the family, develops severe noise intolerance and a significant diminished stress tolerance. A phobic pattern or conversion reaction will surface with some bizarre behaviour, a tendency to avoid anxiety-creating situations, with everyday activities restricted to such an extent that the worker may be homebound or even room-bound at frequent intervals.

[45]

The issue before the Panel in this appeal is not whether the worker has suffered a significant deterioration in his CPD since he was assessed for his NEL award, and is therefore entitled to a redetermination. Rather, the issue for this Panel is whether (around the 2015 MMR date selected by the ARO) the 15% NEL award granted was appropriate. After reviewing all of the evidence before us, including the medical reporting referred to by Mr. Evangelista in his submissions, we find that the worker was appropriately classified in Category 2, in recognition of a moderate impairment of the total person. We also find however, that the worker ought to have been rated in the mid-range of Category 2, with a NEL award of 20%. In reaching that conclusion we have taken particular note of the following symptoms described by the worker's treating physicians:

- Dr. I. Smith (psychologist) Altum Health – WSIB Foot and Ankle Specialty Program August 13, 2013 - The worker reported “feeling sadness on a daily basis for most of the day”; “He stated that he often cries at work”; “His appetite is diminished and his energy level is low”; “He reported poor concentration”; “His sleep is disturbed by pain and limited to five hours per night”; “He denied obsessive thoughts or compulsive behaviours” and “He also denied specific phobia”.
- Dr. E. Roat (psychologist) October 16, 2013 – “[The worker's] mood appeared sad, affect was downcast and his body language was slumped. He appeared tired and discouraged. Rate and rhythm of speech was slightly slowed and tone was low. Attention, memory and

judgement were good. He was open throughout our interviews and appeared to be open, genuine and highly engaged with the process”.

- Dr. F. DiPaola – WSIB Medication and Substance Program, November 26, 2015 – The worker is “independent with self-care activities and is able to perform light housework”; “He spends much of his day isolated in the home and will attempt to get outside of the house for up to an hour daily, He experiences low mood and anger in relation to his current level of pain and reduced level of function and will keep troubling concerns or problems to himself”; “The household chores have begun being completed by his mother-in-law over the past month (...) He explained that many tasks would take him much longer to complete and would need to be spaced out over the week”; “He will occasionally have a small breakfast in the kitchen and then tends to watch TV for large portions of the day, He tries to go outside daily for anywhere between 30 to 60 minutes”; “[The worker] notes very poor sleep”; “he tends to limit his driving but when it is required, he is able to perform the task for between 30 to 60 minutes before feeling pain, He only goes into town once per week and will resort to having his wife drive him to places if possible”; “He has to modify the way he goes fishing as being on a boat is too painful for his foot He now fishes from the dock and despite this being mundane he finds it necessary, He will also attempt to ATV but his time spent on the vehicle is diminishing due to increased pain”; The worker “reports being alarmed by his declining memory”; The worker explained “his anger has developed as a result of him feeling unheard and treated unfairly, This has led to him having a short fuse with people he cares about He explained that his anger can take *over* at time and tends to escalate as matters compound”.
- Dr. DiPaola, WSIB Specialty Program, June 2, 2016 – “He describes a constant, aching pain inferior to the medial malleolus of his right ankle”; “During the assessment, while describing the pain, [the worker] became very frustrated, stating he should ‘just shoot his leg off’”; “[his] pain appears to have worsened”.

[46] The testimony provided by the worker at this hearing was consistent with the symptoms described above by the treating physicians. The worker described being in constant pain; feeling sad and depressed, often tearful; his sleep was poor; he had little appetite; while he was able to take care of personal hygiene, he seldom felt like doing so; he spends 80% of his time inside and can become angry and irritable for no reason.

[47] What the evidence does not reveal however, are findings such as low noise tolerance, mild psychomotor retardation and definite limitations in social and personal adjustment within the family or a clear indication of psychological regression. These are the type of symptoms which, according to Board policy, ought to be present to warrant a rating at the higher end of Class 2. As the worker acknowledged in his testimony, he continues to have a good relationship with his two children (his son now lives with him and helps with many of the household chores) and his many brothers and sisters. He visits with his twin brother almost daily and has made trips either by car or motorcycle to visit family in the nearby city. Similarly, we find ourselves in agreement with the Board that a rating in Class 3 would not have been appropriate. The evidence does not establish a “definite deterioration in family adjustment”; an “incipient breakdown of social integration”; a “phobic pattern or conversion reaction” or evidence of “bizarre behaviour”.

[48] We find that there are sufficient findings present in the medical reporting referred to above to justify rating the worker's impairment from his CPD in the mid-range of Category 2 at 20% as of the MMR date in 2015.

**(b) LOE benefits from July 21, 2015**

[49] Pursuant to section 43(1) of the WSIA, a worker who has a loss of earnings "as a result of" his or her injuries is entitled to receive LOE benefits beginning when the loss of earnings starts and continuing, among other things, until the loss of earnings ceases.

[50] As noted earlier in this decision, after the worker's employment with his new employer ended in July 2015, he asked the Board that he be granted full LOE benefits. The Board's operating level denied that request, taking the position that he was entitled to only partial LOE benefits that would be calculated on the basis that he was capable of earning about \$17 an hour, working on a full-time basis as a Heavy Equipment Operator. The worker, who never returned to work again after leaving that new employer, did not agree with the operating level's conclusion and appealed the issue to an ARO. In the January 17, 2019 decision on appeal, the ARO agreed with the worker that the position of a Heavy Equipment Operator was unsuitable and decided that the worker was capable of earning entry level wages, over a full work week, in retail sales. Having had the opportunity to consider all of the evidence before us however, the Panel finds that it is led to a different conclusion. We find that the balance of evidence supports a conclusion that from July 21, 2015 the worker ought to have been granted full LOE benefits on the grounds he was incapable of any employment or of earning any income from suitably modified employment. In reaching that conclusion, we have taken particular note of the following:

- In 2015 the worker was 53 years of age.
- The worker did not complete a Grade 10 education.
- The worker underwent a psycho-vocational assessment in June 2013. Despite the suggestion by Dr. P. Duhamel (psychologist) and the assessing team that the worker "would benefit from obtaining his Grade 12", the worker was never sponsored in any academic upgrading.
- The worker lives in a small town, about a 25 minute drive from a small city thereby limiting the availability of potential retail sales openings.
- The worker is not bondable.
- The worker has virtually no transferable skills, having spent his entire working life performing physically demanding jobs. As he indicated in his testimony, heavy equipment operation was "all I know how to do".
- The worker has no customer service or retail sales experience. As he noted in his testimony, the worker was never provided with any training in customer service or retail sales.
- The ARO decided that the worker was capable of working in retail sales because this was "identified as an alternative SO during the WT process". The psycho-vocational report of June 2013 set out 10 "potential suitable occupation (SO) options". No explanation was provided concerning why a goal of work in retail sales would be any more realistic than any of the other options suggested in 2013.

- The Board has recognized the worker has a permanent impairment related to his CPD. This Panel has decided that he is entitled to a 20% NEL award for that impairment. The Board has acknowledged, as noted in the psycho-vocational report, that the worker's compensable injuries have left him capable of performing only sedentary duties and his restrictions include "limited standing and walking up to 15 minutes". As Mr. Evangelista indicated in his submissions, it is difficult to envisage the worker being able to find or maintain employment in retail sales with significant limitations in standing and walking.
- The worker has virtually no computer skills.
- In reaching its conclusion that the worker remained employable, the Board appears to have placed significant weight on the fact that in March 2015 he was able to find work with a new employer. That employment however, lasted only a few months, until July 2015 and the end of that employment appears to have been largely due to the worker's chronic pain and his need to take medication for it.
- The worker's employability is affected by the fact he has been out of the workforce altogether since 2015.
- In the June 2, 2016 Specialty Program Report, Dr. DiPaola and the evaluating team concluded that the prognosis for the worker returning to work was "guarded".

[51]

For the reasons noted above, after considering all of the worker's personal and vocational characteristics and taking into account the limitations imposed by his compensable CPD, we find that from July 21, 2015 the worker is entitled to full LOE benefits on the grounds that he is competitively unemployable or incapable of earning any income from suitably modified duties.

**DISPOSITION**

[52]           The worker's appeal is allowed.

[53]           The worker is entitled to a 20% NEL award for CPD.

[54]           The worker is entitled to full LOE benefits from July 21, 2015, subject to statutory reviews.

DATED: November 9, 2020

SIGNED: R. Nairn, C. Sacco, M. Ferrari