



# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## DECISION NO. 1449/09

**BEFORE:** R. Nairn : Vice-Chair  
B. Wheeler : Member Representative of Employers  
J. A. Crocker : Member Representative of Workers

**HEARING:** July 20, 2009 at Hamilton  
Oral

**DATE OF DECISION:** December 8, 2009

**NEUTRAL CITATION:** 2009 ONWSIAT 2836

**DECISION UNDER APPEAL:** WSIB ARO decision dated June 30, 2008

### APPEARANCES:

**For the worker:** Ms. R. Puzzo, Paralegal

**For the employer:** Closed

**Interpreter:** None

## REASONS

### (i) Introduction

- [1] At the time of the accident under consideration here, the worker was employed as a foreman for a roofing company. On November 8, 2000, the worker experienced a gradual onset of pain in his low back while moving roofing shingles. The Physician's First Report dated November 22, 2000, completed by his family physician, Dr. F. Rouse, provided a diagnosis of "low back strain & sciatica." The WSIB (the "Board") recognized the worker's back injury as compensable and he received various periods of temporary compensation benefits.
- [2] Subsequently, the Board determined that the worker had suffered a permanent back impairment and in a letter dated February 1, 2005, he was advised that he was being granted a 20% Non-Economic Loss ("NEL") award for his compensable back condition. The NEL award was granted in the form of a lump sum in the amount of \$13,394.36. As noted in a decision dated August 12, 2005, the worker's NEL award was subsequently increased to 21%, following the submission of further medical reporting.
- [3] Information on file indicates that by approximately 2004, the Board determined that the worker would be unable to return to his pre-accident employment and therefore, he was referred for Labour Market Re-entry ("LMR") assistance. The worker underwent an LMR assessment in approximately September 2004 and in December 2004, an LMR plan was devised with a Suitable Employment or Business ("SEB") of "Machinist and Related Occupations." The plan called for the worker to undergo some academic upgrading followed by a college apprenticeship program.
- [4] As noted in Memo #91, dated June 8, 2005, the worker was incarcerated as of May 21, 2005, and his benefits and LMR plan were suspended given his "inability to participate in his program."
- [5] In Memo #100 dated July 8, 2005, a Board Manager noted:
- I spoke with [the worker] today. Informed him it was unlikely LOE would start until he was back in a school program. That decision would be made next week.
- Regarding the SEB, I question whether [the worker] would be successful in a four-year program. His aptitude is borderline for a college program and he has had attendance problems. He has also complained of back pain.
- On the LMRA it was noted [the worker] has previous experience as a forklift operator. NOC 7452.2 may be easier on his back than a tool and die operator and the course would be much shorter. [The worker] worked as a forklift operator for six months in 1999-2000 before the November 8, 2000 accident.
- [...]
- Please consider discussing the SEB of forklift operator with provider and determine if it would be within the worker's functional abilities.
- The LMR provider determined [the worker] was fit for the tool and die job which is considered a medium strength job. The worker's current restrictions are no heavy lifting, repetitive bending, twisting and prolonged standing.
- [6] Further discussions took place between the LMR service provider, the Claims Adjudicator and the worker. As a result, the worker's SEB was eventually changed to "Technical Operations in Architecture, Drafting, Surveying and Mapping." In Memo #102, dated July 13, 2005, the Adjudicator indicated that he "advised [the worker] that this is his third and final chance to participate in this program and that any further attendance problems would not be tolerated and will result in non-cooperation and closing of his benefits."

[7] Despite the warning from the Claims Adjudicator, the worker continued to have problems with his LMR plan and in January 2006, it was terminated by the Board. In Memo #113, dated January 25, 2006, the Claims Adjudicator noted:

[The worker] has repeatedly been in non-cooperation (non-coop letters issued)

- Worker withdrew from program on 09Jan2006
- Has not responded to PCM letter
- Has avoided meeting with LMR provider and has only communicated via email
- School confirmed worker withdrew on 09Jan2006
- Unofficial confirmation that worker failed all courses last semester
- I am closing the LMR program based on repeated non-cooperation and now non-participation
- Benefits closed as of 09Jan2006 – overpayment created \$275.56
- Letter to worker advising LMR program closed – SEB fully restores earnings no further wage loss

[8] As noted above, the worker was advised by the Claims Adjudicator that since his projected earnings in the selected SEB exceeded his pre-injury earnings, he was not entitled to any further LOE benefits.

[9] Subsequently, the worker objected to the Board's decision to terminate his LMR assistance, suggesting that his non-participation and non-cooperation had been due to a drug addiction. The worker asked that his benefits be reinstated on the grounds that he had recovered from that addiction and was willing to cooperate once again. The worker's objection was eventually forwarded to an Appeals Resolution Officer ("ARO") and in a decision dated June 30, 2008, the ARO denied the worker's appeal and concluded:

Considerable flexibility has been shown by the Operating Area in continuing the LMR plan despite significant non-cooperation prior to the escalation of the worker's drug abuse.

In reviewing all information on file, and that received through testimony, I have determined that there is insufficient evidence to establish that the worker's pre-existing addiction was the sole or main contributor to the closure of LMR services. The evidence supports that the worker demonstrated non-cooperation throughout his LMR plan, apart from his drug addiction. I have determined that LMR services were appropriately closed for non-cooperation and as such the worker is not entitled to further LMR services.

**(ii) Issue on appeal**

[10] The issue to be determined in this case is whether the worker is entitled to the reinstatement of LMR assistance.

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

[11] In his testimony, the worker indicated that prior to his compensable accident, while he had used marijuana on a recreational basis, he had never had any problem maintaining steady employment. He had completed a Grade 12 education and worked on a full-time basis from about age 17 until he was injured at age 32.

[12] The worker advised that following his compensable accident, he made an attempt to return to the accident employer in May 2001 but found he was no longer physically capable of working in the roofing business. He secured alternate employment however, with a concrete forming company. While this was also heavy work, he was able to continue for about two years because there was not a lot of bending and lifting involved. While he frequently had to carry heavy loads, this was not the same as having to bend and lift. Unfortunately, about two years after starting the job, he woke up one day and had difficulty getting out of bed. He visited Dr. Rouse who told him he had aggravated his back condition and he had to stop working once again.

[13] The worker recalled being referred for an LMR assessment by the Board. It started with some academic upgrading at which he did quite well. Even though it had been a while since he had been in school, the worker found the college courses fairly easy.

[14] The worker testified that while he had been off work and waiting for the Board to sponsor him in some type of upgrading, his recreational drug use escalated. With the extra time on his hands, financial burdens and stress from being unemployed, he started to use cocaine. In addition to cocaine, he was also taking a variety of prescription medication including Percocet and OxyContin.

[15] The worker's substance abuse problems increased to the point that he was using cocaine on a daily basis. The worker indicated that in late 2004 and early 2005, his substance problems were at their peak. He recalled receiving his lump sum NEL award in February 2005 and spent the entire \$13,000 in less than a month to support his addiction.

[16] The worker acknowledged information on file which indicated that he failed the first semester of his college courses in the fall of 2005. He also confirmed that he decided not to enrol in the second semester of the college course in January 2006 since he knew he was going to be incarcerated late that month because of an assault conviction. In fact, on approximately January 27, 2006, the worker was sent to jail for a period of about 70 days on that charge. He admitted that he was using cocaine and taking his prescription medication right up until he was sent to jail. He acknowledged that the various excuses he had provided for not attending classes from late 2004 into 2005, were all a cover up for his drug use.

[17] The worker testified that while he continued to be provided with his prescription medication while in jail, it was during his incarceration that he stopped his cocaine use. He testified he has not used cocaine since January 27, 2006. While he had been an alcoholic as a teenager, he also noted he has had only two drinks in the last 10 years. According to the worker, his incarceration gave him an opportunity to consider his life and his future. He decided that he needed to straighten up and get clean. Subsequently, he also decided to stop taking his prescription medication.

[18] When the worker was released from jail, he went to live with his parents and continued to do that until November 2008. After stopping his intake of medication, the worker was sponsored in a life skills program with Ontario Works that lasted for about 12 weeks and provided some general training on a variety of topics including interviewing and computer use. He also obtained his forklift driver's licence but found that work in that field aggravated his back condition. He also found various labouring jobs through a temporary placement agency but generally found that this work was too heavy for his compensable back condition.

[19] In December 2008, the worker was able to find employment as a "fire watcher" with a welding company. This employer performed welding services on ships and the worker's job was to patrol the work areas and watch for and extinguish any fires that might develop. He worked on a full-time basis, Monday to Friday from 7 a.m. to 5:30 p.m. (with occasional Saturday and Sunday work) until April 2009 at which point he was laid-off because the work was finished.

[20] The worker hopes to be re-hired in September 2009. He noted that this employer has also suggested that he might wish to undertake some training as a welder. They have indicated that if he were to enrol in a welding course, they would be willing to provide him with a co-op placement. The worker testified that while he has made some inquiries about welding courses, he does not have the funds to enrol. He believes that despite his compensable back condition, he could perform this type of welding because the materials being welded are in a stationary

position and do not have to be lifted. He has had some hands-on training with the welding and believes he could complete the course if he were sponsored in it. He has also discussed the matter with his family doctor who believes he could probably work at this type of welding.

[21] In addition to his conviction for assault in 2005, the worker was also convicted of impaired driving in 2001 and has lost his licence for a period of 10 years. He has not had any further encounters with the justice system since 2005. Since being laid-off by the welding company in April 2009, the worker has made some attempts to find alternate employment. He has had three interviews for work in the shipping and receiving business but as soon as the potential employers find out about his compensable back condition, they are no longer interested in hiring him.

**(iv) Analysis**

[22] At the outset, it is important to note, as Ms. Puzzo confirmed, that this worker is not seeking retroactive employment to benefits nor is he claiming his drug use is somehow related to his compensable injuries. The worker's sole request is to have his LMR assistance reinstated.

[23] In considering this matter, the Panel has taken note of *Decision No. 2520/08I*. In that case, the Panel was faced with a somewhat similar situation where a worker's Early and Safe Return to Work ("ESRTW") process had been interrupted by the worker's abuse of alcohol. As is the case in the fact situation currently under appeal, the Panel in *Decision No. 2520/08I*, was faced with a situation where the worker's substance abuse led to the Board terminating his LMR assistance and LOE benefits on the grounds of non-cooperation.

[24] In *Decision No. 2520/08I*, the majority of the Panel was persuaded that:

1. the worker lost his job because he failed to report for duty from June 12 to June 15, 2006;
2. his reasons for doing so were not related to his workplace injury;
3. his absence from work was likely related to the combination of stress and alcohol abuse;
4. these were intervening, non-compensable factors that broke the chain of causation with the workplace injury;
5. suspension of benefits was appropriate because the subsequent loss of earnings did not result from the workplace injury;
6. the intervening event ended after the worker completed an alcohol rehabilitation program;
7. after the intervening event ended, the worker continued to have a loss of earnings as a result of the workplace injury, as was reflected in the continuing medical treatment he received;
8. the worker was not able to return to his modified employment with the accident employer after the intervening event ended because the employer refused to rehire him, thereby ending the ESRTW process.

[25] The majority of the Panel in *Decision No. 2520/08I* was satisfied that the worker's absence from work occurred as a result of his non-compensable personal stressors and the worker's attempt to deal with those stressors by abusing alcohol. The majority of the Panel concluded however:

(...)

In our view, this constitutes the introduction of intervening events into the ESRTW process. The loss of earnings that followed was related to this intervening event and not

to the workplace injury. We note in this regard OPM Document No. 15-05-04 (“Non-Work-Related Conditions – Reduction or Suspension of Benefits”):

If any non-work-related condition (e.g., pregnancy, hernia etc.) is preventing a worker from undergoing treatment for the work-related injury, compensation benefits may be reduced or suspended until the worker is available for treatment of the work-related injury.

If the non-work-related condition is not affecting or impeding the treatment of the work-related injury, it has no bearing on the level of compensation benefits payable to the worker.

If the non-work-related and the work-related conditions are **both** contributing to the ongoing disability/loss of earnings, full compensation benefits are continued until the level of work-related disability/loss of earnings is clinically determined, at which time continuing compensation is paid commensurate with the degree of remaining work-related disability/loss of earnings.

If it is clinically established that the sole cause of the continuing disability/loss of earnings is due to the non-work-related condition, and no permanent disability/impairment from the work-related condition exists, benefits cease.

Noting this policy, in the opinion of the majority, the worker’s benefits were appropriately suspended effective June 9, 2006 pursuant to subsection 43(2). The worker was absent from work as of that date. The employer rightly required the worker to attend an alcohol treatment program before considering rehiring the worker. The worker began and successfully completed such program. The program was treatment for a non-compensable condition and is an element of the intervening event. The worker was not able to participate further in the ESRTW process until the program was completed. But for the illness and the subsequent treatment, the worker would have had no loss of earnings. We are persuaded, therefore, that the worker’s benefits should be fully suspended during the duration of the period of treatment.

At this point, the majority disagrees with the Board’s position. In our opinion, it was not appropriate under the legislation to terminate permanently the worker’s entitlement to LOE benefits. In the opinion of the majority, the worker’s benefits should have been suspended for the length of time that the intervening event disrupted the ESRTW program. In our view, that period of disruption began from the date the worker failed to attend the workplace, on June 12, 2006, until the date the worker completed his alcohol rehabilitation program. In our view, the intervening event in this case impeded the worker’s ability to earn until the worker completed that program. The ESRTW process did not cease to be disrupted until the worker successfully completed that program and was then available to return to his ESRTW program.

[26] The Panel in this case agrees with and adopts the reasoning of the Panel in *Decision No. 2520/08I*. Reviewing the material before us and considering the testimony provided by the worker, we accept that the worker’s participation in the LMR process was disrupted by his non-compensable substance abuse. Rather than deciding that the worker’s difficulties constitute a complete bar to the receipt of any further assistance from the Board, we find that these events are a non-compensable intervening condition which warranted suspending but not terminating the worker’s entitlement to LMR assistance. This position is consistent with Board policy (*Operational Policy Manual* Document No.15-06-06 “Incarcerated Workers”) which suggests that “injured workers who are incarcerated or otherwise sentenced for offences retain their rights to benefits under the *Workplace Safety and Insurance Act* or the *Workers’ Compensation Act*”.

[27] In his testimony which was delivered in a straightforward and credible manner, the worker, who acknowledged his past substance abuse, indicated that he believes he now has his life in order and wishes to become gainfully employed. In this regard, we note the worker’s

testimony that he has made some efforts on his own to seek employment and this includes completing the 12-week Ontario Works Life Skills program, obtaining his forklift driver's licence, obtaining a number of temporary labouring jobs through an agency and securing employment with the welding company in December 2008.

[28] There is also evidence before us which supports the worker's testimony that he has been able to get his substance abuse problems under control. For example:

- In a report dated January 4, 2008, the worker's family physician, Dr. F. Rouse, noted:

[...]

He is now living with his parents. His father does not believe that he is still using medications. I am not sure that Dr. Clarke believes that. In fact, I think he doesn't. I do not think he is fit to do the type of work he used to do. It is hard to tell if he is having his substance abuse under control, but his father thinks he is and he certainly has not asked me for pain medication, but he could of course get his substance elsewhere. If the father is correct, and I would think he should be, then he should be a good candidate for re-employment. [...] I would think he is probably worth a try of going to classes and to see how he does in an effort to re-educate himself.

- In a report dated June 10, 2008, Dr. Rouse advised:

[...] He was looked after by Dr. Clarke, who is of course a pain specialist. They came to the parting of ways because of a cold urine specimen. So far as I know, and according to his father, he is supposed to be off all drugs but I am not sure when that happened. I do note that the last time I saw him was December 17, 2007 so I can't really predict any further. His father is certain that he is trying.

I have since contacted the mother, whom you may call [...] she states that unequivocally he is living in the country with them and that she is sure he is not either using drugs or alcohol and he has been living with them for some time. She says that she would be aware if he were doing either. I therefore believe her. She neither drinks nor smokes but her husband of course did drink fairly heavily in the past. I think she is a very credible witness. I am going to get him to come down and I will re-test him at this time [...].

- Drug testing was conducted at the request of Dr. Rouse on approximately June 9, 2008. The reporting registered a "negative" result for cocaine, cannabinoids, barbiturates, opioids, benzodiazepines. Ethyl and alcohol were "not detected" in the worker's blood.
- Addendum No. 5 contains the results of drug testing conducted on approximately June 24, 2009 and the results are listed as "negative" for benzodiazepines, cocaine, cannabinoids, Oxycodone and ethanol.

[29] After considering the information before us, the Panel is satisfied that the effects of the non-compensable intervening condition which disrupted this worker's attempts to return to work, have ended and it would be appropriate to reinstate the worker's entitlement to LMR assistance because he has continued to experience a loss of earnings as a result of his compensable injury, it appears that his substance abuse problems are under control and has been cooperating in finding employment through self-directed efforts. That being said, however, while we find that the worker ought to be given another opportunity to receive LMR assistance, the Board's operating level will of course, have the authority to determine the worker's ongoing entitlement to LMR, should there be ongoing problems with the worker's cooperation.

**DISPOSITION**

[30]           The worker's appeal is allowed.

[31]           The worker is entitled to the restoration of his LMR assistance. The issues of the nature of this assistance and the benefits which flow from the worker's participation in the LMR process will be returned to the Board for further adjudication.

DATED: December 8, 2009

SIGNED: R. Nairn, B. Wheeler, J. A. Crocker