WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 77/18

BEFORE:	C.J. Ramsay	: Vice-Chair
	K.J. Soden	: Member Representative of Employers
	S. Roth	: Member Representative of Workers
HEARING:	October 16, 2018 at Toronto Oral	
DATE OF DECISION:	November 6, 2018	
NEUTRAL CITATION:	2018 ONWSIAT 3474	
DECISIONS UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) dated May 27, 2013 and ARO dated July 20, 2016	

APPEARANCES:

For the worker:	R. Fink, Lawyer
For the employer:	M. Liberatore, Paralegal
Interpreter:	Y. Kabli, Arabic

REASONS

(i) Introduction

[1] The worker appeals a decision of the ARO dated May 27, 2013 which concluded that the worker was not entitled to a permanent impairment award and non-economic loss ("NEL") determination for his low back injury. The ARO also concluded that the worker was not entitled to loss of earnings ("LOE") benefits from June 25, 2011 onwards as he had been offered suitable modified duties by the accident employer. The ARO rendered a decision following an oral hearing.

[2] The worker also appeals another decision of the ARO dated July 20, 2016 which concluded that the worker was not entitled to benefits for Chronic Pain Disability ("CPD"). The ARO rendered a decision based on the written materials without an oral hearing.

[3] Preliminary issues arose at the hearing as the worker's representative sought to introduce three separate documents at the hearing. The Tribunal has a *Practice Direction* regarding the submission of evidence which requires parties to forward all documentation they are intending to rely on at a hearing of a matter more than three weeks prior to the hearing. In this case, the worker's representative did not provide the employer's representative or the Tribunal with the documentation more than three weeks prior to the hearing.

[4] The first document that the worker's representative sought to introduce to the evidentiary record were pay records for the period of 2005. He submitted that the relevance of these documents to the proceedings was that the Workplace Safety and Insurance Board (WSIB "the Board") has determined that the worker had a pre-existing back condition, and this evidence was being tendered to show that the worker had a regular work schedule in 2005 not affected by any back issues. The employer's representative had been provided with the documentation prior to the hearing, and had no objection to the admission of the document. The Panel ruled that the documents had relevance to the proceedings and admitted the document to the evidentiary record. The Panel indicated at the hearing that it was making no findings as to the weight to be placed on the documentation until it had an opportunity to hear the matter including the parties' submissions with respect to the relevance that should be placed on the documentation.

[5] The second document that the worker's representative sought to introduce to the evidentiary record was a report from the worker's treating rheumatologist dated October 2011. The worker's representative submitted that this was a follow-up report to a previous report that was already included in the records, and was inadvertently not included in the records. The document was one page, and was relevant to the issues under appeal as it referred to the worker's back injury. The employer's representative had been provided with a copy of the report, and had no objection to the document being included in the evidentiary record. The Panel ruled that the documents had relevance to the proceedings and admitted the document to the evidentiary record. The Panel indicated at the hearing that it was making no findings as to the weight to be placed on the documentation until it had an opportunity to hear the matter including the parties' submissions with respect to the relevance that should be placed on the document.

[6] The third document that the worker's representative sought to introduce to the evidentiary record was an article from a hospital that explained the pain management program that they provided in 2012. He submitted that it was relevant to the proceedings as the worker was not

provided with this program, and if he had been provided with the program, he may have recovered sufficiently to return to some form of employment. The employer's representative objected to the report being included in the evidentiary record as the issue before the Panel was initial entitlement to CPD, and the article was, therefore, not relevant as the worker had not received the specific treatment referred to in the article. The Panel did not accept the report into the evidentiary record. The Panel noted that the report was not produced in a timely fashion, and that the Panel was not satisfied that a generic article with respect to the type of pain management treatment offered by a hospital in 2012 had relevance to the proceedings when the issue was initial entitlement to CPD. The Panel noted that the parties were free to make submissions on the issue of entitlement to CPD, and question the worker as to the specific treatment he had received for pain, which the Panel would rely on in its deliberations.

(ii) Issues under appeal

[7] The issues under appeal are as follows:

1. Entitlement to a permanent impairment award and NEL determination for a low back injury.

2. Entitlement for CPD.

3. Entitlement to LOE benefits from June 25, 2011 onwards.

(iii) Background

[8] The following are the basic facts.

[9] The now 49 year old worker started as a cement finisher with the accident employer in 2001. He injured his low back on June 21, 2011 while shoveling concrete. Initial entitlement was allowed by the WSIB ("the Board") for a low back strain. The worker returned to work with the accident employer on June 24, 2011 to modified duties. He discontinued working following one day of working modified duties on June 24, 2011. He requested entitlement to LOE benefits. The Board denied entitlement to LOE benefits in a decision dated July 22, 2011 on the basis that the worker had been offered suitable modified duties. The worker objected to this decision.

[10] The worker then underwent an MRI in August 2011. The worker requested entitlement for the MRI findings as related to the June 2011 workplace accident. The Board confirmed in a decision dated October 3, 2011 that the worker's entitlement was limited to a low back strain arising out of the June 2011 workplace accident, which the Board considered had recovered with no permanent impairment. The worker objected to this decision.

[11] An ARO in a decision dated May 27, 2013 denied the worker's appeals for a low back permanent impairment and LOE benefits from June 25, 2011 onwards.

[12] The worker then claimed entitlement to benefits for CPD as arising out of the June 2011 workplace accident. The Board denied entitlement to benefits for CPD in a decision dated November 19, 2015. The worker objected to this decision. An ARO in a decision dated July 20, 2016 denied the worker's appeal.

(iv) Law and policy

[13] Since the worker was injured in 2011, the *Workplace Safety and Insurance Act, 1997* (the WSIA) is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[14] Specifically, section 13(1) of the WSIA provides:

> **13 (1)** A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.

[15] Sections 40 and 43 of the WSIA govern the worker's entitlement to LOE in this case. Section 40 of the WSIA provides in part:

> **40(1)** The employer of an injured worker shall co-operate in the early and safe return to work of the worker by,
>
> (a) contacting the worker as soon as possible after the injury occurs and maintaining communication throughout the period of the worker's recovery and impairment;
>
> (b) attempting to provide suitable employment that is available and consistent with the worker's functional abilities and that, when possible, restores the worker's pre-injury earnings;
>
> (c) giving the Board such information as the Board may request concerning the worker's return to work; and
>
> (d) doing such other things as may be prescribed. 1997, c. 16, Sched. A, s. 40 (1).
>
> **(2)** The worker shall co-operate in his or her early and safe return to work by,
>
> (a) contacting his or her employer as soon as possible after the injury occurs and maintaining communication throughout the period of the worker's recovery and impairment;
>
> (b) assisting the employer, as may be required or requested, to identify suitable employment that is available and consistent with the worker's functional abilities and that, when possible, restores his or her pre-injury earnings;
>
> (c) giving the Board such information as the Board may request concerning the worker's return to work; and
>
> (d) doing such other things as may be prescribed. 1997, c. 16, Sched. A, s. 40 (2).
>
> …

[16] Section 43 of the WSIA provides in part that:

> **43(1)** A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins. The payments continue until the earliest of,
>
> (a) the day on which the worker's loss of earnings ceases;
>
> (b) the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury;
>
> (c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury;
>
> (d) the day on which the worker is no longer impaired as a result of the injury. 1997, c. 16, Sched. A, s. 43 (1).

…

(3) The amount of the payment is 85 per cent of the difference between his or her net average earnings before the injury and any net average earnings the worker earns after the injury, if the worker is co-operating in health care measures and,

(a) his or her early and safe return to work; or

(b) all aspects of a labour market re-entry assessment or plan. 1997, c. 16, Sched. A, s. 43 (3); 2000, c. 26, Sched. I, s. 1 (6).

(4) The Board shall determine the worker's earnings after the injury to be the earnings that the worker is able to earn from the employment or business that is suitable for the worker under section 42 and is available and,

(a) if the worker is provided with a labour market re-entry plan, the earnings shall be determined as of the date the worker completes the plan; or

(b) if the Board determines that the worker does not require a labour market re-entry plan, the earnings shall be determined as of the date the Board makes the decision. 2007, c. 7, Sched. 41, s. 2 (2).

…

(7) The Board may reduce or suspend payments to the worker during any period when the worker is not co-operating,

(a) in health care measures;

(b) in his or her early and safe return to work; or

(c) in all aspects of a labour market re-entry assessment or plan provided to the worker. 1997, c. 16, Sched. A, s. 43 (7).

[17] As noted above, one of the issues before the Tribunal is the worker's entitlement to LOE benefits. Under section 43(1) a worker who has a loss of earnings as a result of a compensable injury is entitled to LOE benefits. *Decision No. 2474/00* held that under section 43(1) a causal relationship between the injury and wage loss is a condition precedent to the payment of LOE benefits. A refusal of suitable work is not necessarily an act of non-cooperation, but it may lead to a conclusion that the worker's loss of earnings does not result from the injury. Section 43(2) operates to reduce a worker's benefits where the worker refuses suitable employment. Thus, a worker who refuses suitable employment at no wage loss is not entitled to LOE benefits because the loss of earnings is not caused by the injury, but caused by the refusal of the suitable employment.

[18] 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*.

[19] The standard of proof in workers' compensation proceedings is the balance of probabilities.

[20] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages 1; 10; 107; 223; 232; 261; Revision #9, would apply to the subject matter of this appeal:

[21] We have considered these policies as necessary in deciding the issues in this appeal, and will refer to particular policies below.

(v) Worker's testimony

[22] The worker testified that he came to Canada in 1984. He has a Grade eight education. He began working in 1987. His work history since 1987 is in physical labour positions such as moving, working in a slaughterhouse and in construction. He has had other jobs that were less labour intensive in a restaurant setting, and in sales.

[23] The worker testified that he started working for the accident employer in 2001 as a cement finisher. He primarily worked as a concrete cutter, but also did concrete forming, and shoveling concrete. He worked every year for the accident employer from 2001 to 2008. The work was seasonal, but he could work the whole year if the employer was busy enough.

[24] The worker testified that he first injured his back in 2005. He was lifting a ramp and felt back pain. He attended the emergency room where he was given medication. He did not miss any time from work, and the pain subsided. He next sought medical attention for his back in 2008. He experienced pain in his back at that time as well as his left hip pain. He experienced pain for two-four days and then sought treatment from a chiropractor. After this back pain started, he saw the chiropractor two-four times per year from 2008-2011 when his back would seize. He testified that he missed two days from work in 2009 while working for another employer due to back pain.

[25] The worker testified that he discontinued working for the accident employer in November 2009 due to a work slowdown. He worked for the other employer until January 2010 as a concrete finisher. He then travelled to his home country for the period of February 2010 to June 2010 as his mother was ill and he accompanied her. He returned to his home country in 2011 when his mother passed away.

[26] The worker testified that he returned to working for the accident employer in 2011 as a concrete finisher. He was injured on June 21, 2011. He was pouring a concrete curb and shoveling concrete backwards when he experienced pain in his back which radiated down his left leg. He testified that he had pain in his back leading up to June 2011, but this pain was much worse.

[27] The worker testified that he attended the chiropractor the next day. He did not return to work until June 24. He performed modified duties when he returned to work which included cleaning shelves, driving a van, picking up materials, delivering the materials to a job site, dropping off cheques, and then returning to the shop to clean the van. He found the duties difficult due to the pain he was experiencing. He was not able to bend down to clean the bottom shelves, driving was difficult due to the prolonged sitting, and cleaning the van required bending that he was not able to do. After June 24, 2011 he did not return to work with the accident employer.

[28] The worker testified that he attended the hospital on June 26, 2011 due to pain all over his body, including his back, shoulders, and neck. He feels that since June 24, 2011 his back has deteriorated. He cannot lay on his left side due to the hip and left leg pain. The pain is also migrating to the right side of his body. He also continues to have neck pain and pain in both of his shoulders.

[29] The worker testified that he met with the employer and the WSIB in August 2011 to discuss a return to work. At that time he did not feel physically capable of returning to any work because of pain. He was offered modified duties following the meeting, but could not return to work due to pain. In answer to a question from the employer's representative he testified that he has not called his employer since August 2011 with respect to work as he does not feel capable of working.

[30] The worker testified that he started experiencing psychological symptoms of depression and anxiety two to three months after the June 21, 2011 accident. He began arguing with his family, had diminished contact with his friends, and discontinued playing soccer which he played before the accident. He saw a psychologist for three or four appointments in 2011 or 2012 but was charged a no show fee for an appointment and did not return.

[31] The worker testified that he went back to his home country in 2014 for a death in the family. His wife managed the luggage. He was able to walk on the plane which helped, and he brought a cane. While in his home country he visited the emergency and received a pain shot in his back. In 2015 he went on a camping vacation with his family. The vacation was supposed to last a week, but he left after two or three days because of an argument he had with another family. He also made a religious trip in 2015. He did minimal walking and physical activities while there, and had three days to complete the necessary requirements of the pilgrimage. He made a trip in 2016 to see his father in his home country. He stayed for three months.

[32] The worker testified that he returned to school in 2017 to learn English. The classes were two hours per day. He discontinued this after six-seven weeks as he felt humiliated by the teacher. He attempted volunteer work for two hours per day four-five days per week. He was responsible for seating people. He had a disagreement with someone after volunteering for two-three months and discontinued the work.

[33] The worker testified in answer to a question from the employer's representative that he cannot lift anything without pain, he can force himself to sit for an hour, and he if he stands for any period of time his pain increases.

(vi) Testimony of S.G.

[34] S.G. testified that he is the Vice-President of the accident employer. He has known the worker since 2001.

[35] S.G. testified that if a worker is injured, he is advised of the injury by a supervisor. The accident employer has a health and safety program which all employees are trained on annually. They are advised to seek medical attention. Following which the return to work program is discussed. The type of modified work is tailored to the particular injury and restrictions the worker presents with following an accident.

[36] S.G. testified that he called the worker the day after the incident to advise him what work was required that day. The worker did not return his phone call, and he was not aware at the time that the worker had been injured as it had not been reported yet. The worker reported the injury on June 23, 2011 but did not perform any work. He returned to work on June 24 and was provided with modified duties. The worker did not return to work following June 24, 2011. If the worker had voiced a concern with a particular duty, other light work could have been provided.

[37] S.G. testified that he was not at the August 2011 meeting with the worker, but he was aware that the worker felt he could not perform any work.

[38] S.G. testified that he was not aware that the worker had previous back problems in 2005 or 2008. The worker was provided with overtime when they were busy.

(vii) Worker's representative's submissions

[39] The worker's representative submitted that the medical documentation supports that the worker injured his low back with radiating pain following the June 21, 2011 incident. The worker had previous back pain, but he only missed two days from work, and worked his regular duties for 10 years with the accident employer.

[40] The worker's representative submitted that the medical documentation supports that the worker was unable to work following the June 21 accident. He submitted that there is conflicting medical documentation concerning the nature of the worker's back injury as some doctors indicate that the worker has a herniated disc with nerve root irritation, whereas others refer to mechanical back pain. However, the medical documentation supports that the work injury was a significant contributing factor to the worker's back condition.

[41] The worker's representative submitted that the worker then began having psychological issues shortly after the back injury. Had he received pain management treatment he may have recovered sufficiently to return to work. He submitted that the worker meets the requirements for CPD, which is supported by the medical documentation.

[42] The worker's representative submitted that the modified duties offered by the accident employer may be suitable for someone with a back injury alone. However, the worker was psychologically unable to cope with his pain and did not receive the proper treatment for the pain, and therefore was unable to do any work since the accident.

(viii) Employer's representative's submissions

[43] The employer's representative submitted that the worker had a pre-existing non-compensable back condition that can account for his ongoing back symptoms. He also had a thoracic tumor that was discovered after the June 2011 accident that was removed and could explain the worker's pain complaints.

[44] The employer's representative submitted that the worker was offered suitable modified duties taking into consideration the medical documentation and the worker's restrictions. She submitted that the worker has had inconsistent reporting of his abilities since 2011. He has been able to travel since the June 2011 accident which is evidence of his ability to have returned to modified work.

[45] The employer's representative submitted that the worker does not meet all of the criteria for CPD. He had a non-compensable pre-existing back condition, as well as a non-compensable tumor removed after the accident. He was also offered suitable modified work, therefore, his earning capacity was not impaired.

(ix) Analysis

(a) Entitlement to CPD

[46] The worker is seeking entitlement for CPD as arising from an organic injury occurring on June 21, 2011 where he injured his back while shoveling.

[47] The Panel finds that the worker has entitlement for CPD for reasons that will be explained below.

[48] *Operational Policy Manual* ("OPM") Document No. 15-04-03 "Chronic Pain Disability" sets out five criteria to assist adjudicators in determining entitlement for CPD. For a worker to qualify for compensation for CPD, all of the following conditions must exist, and must be supported by the evidence:

Condition	**Evidence**
A work-related injury occurred.	A claim for compensation for an injury has been submitted and accepted.
Chronic pain is caused by the injury.	Subjective or objective medical or non-medical evidence of the worker's continuous, consistent and genuine pain since the time of the injury, AND a medical opinion that the characteristics of the worker's pain (except for its persistence and/or its severity) are compatible with the worker's injury, and are such that the physician concludes that the pain resulted from the injury.
The pain persists 6 or more months beyond the usual healing time of the injury.	Medical opinion of the usual healing time of the injury, the worker's pre-accident health status, and the treatments received, AND subjective or objective medical or non-medical evidence of the worker's continuous, consistent and genuine pain for 6 or more months beyond the usual healing time for the injury.
The degree of pain is inconsistent with organic findings.	Medical opinion which indicates the inconsistency.
The chronic pain impairs earning capacity.	Subjective evidence supported by medical or other substantial objective evidence that shows the persistent effects of the chronic pain in terms of consistent and marked life disruption.

[49] The policy goes on to provide further guidance on the interpretation of terms used in the adjudication of CPD claims:

> **Definitions**
>
> **Chronic pain disability (CPD)** is the term used to describe the condition of a person whose chronic pain has resulted in marked life disruption.
>
> **Chronic pain** is pain with characteristics compatible with a work-related injury, except that it persists for 6 or more months beyond the usual healing time for the injury.
>
> **Usual healing time** is defined as the point in time, following an injury, at which the worker should have regained pre-accident functional ability, or reached a plateau in physical recovery.
>
> **Marked life disruption** - Because pain is a subjective phenomenon, marked life disruption is the only useful measure of disability or impairment in chronic pain cases. Marked life disruption indicates the effect of pain experienced by the worker and the effect on the worker's activities of daily living, vocational activity, physical and psychological functioning, as well as family and social relationships.
>
> There must be a clear and distinct disruption to a worker's life, but there is no particular requirement for this disruption to be either major or minor. The disruption in the worker's personal, occupational, social, **and** home life must be consistent, though the degree of disruption in each need not be identical.
>
> The presence of "and" in the statement "social, occupational, **and** home life" suggests that all 3 must be present. However, there is no requirement that all 3 aspects of a person's life must be disrupted **to the same degree.**
>
> Initially, the fact that the worker has not returned to employment may be an indication of marked life disruption, the assumption being that other components of the worker's life are disrupted as well. As the 6 month period progresses, the decision-maker is obliged to obtain evidence of disruption to each part of the worker's life - personal, occupational, social, and home.
>
> A disruption to a worker's occupational life is also considered to exist if a worker has returned to employment, that has been modified to accommodate the CPD.
>
> The following list of typical expected disruptions of functional abilities due to chronic pain is to be used when assessing the extent to which a CPD is affecting a worker's life.
>
> **Marked life disruption - vocational aspects**
>
> The type and the duration of work may be restricted totally or to a limited degree, i.e., modified duties or part-time work only may be possible.
>
> **Marked life disruption - physical aspects**
>
> - constant, unremitting pain
> - pain upon movement or use of the "painful body part"
> - specific activities aggravate pain
> - sitting, standing, and walking are limited to short periods of time
> - walking is limited to short distances
> - restricted bending and lifting
> - difficulty getting out of bed in the morning due to stiffness and pain
> - sleep regularly disturbed by pain: difficulty falling asleep, premature awakening, repetitive awakening

- sleeping medication is required to initiate sleep
- change in appetite or weight (increase or decrease)
- increased or constant tiredness
- feeling of unsteadiness when standing
- dizziness
- headaches

[50] OPM Document No.15-04-04 "Chronic Pain Disability Rating Schedule," sets out the "no stacking" rule for awards for CPD and an organic condition where both arise from the same accident, causing an injury to the same body part. Where a worker has entitlement on an organic basis, and subsequently is granted entitlement for CPD arising from the same injury, the non-organic CPD award replaces the organic award. The reason for this is that for purposes of rating impairment for CPD, the worker's condition is assessed on a "whole person" basis. As this rating is holistic, any impairment related to the identified organic or psychiatric source will be accounted for in the global impairment rating. CPD entitlement is therefore intended to cover all aspects of the worker's CPD condition. See, for example, *Decision No. 379/05*.

[51] OPM Document No. 15-04-03 also provides that workers who are diagnosed with fibromyalgia syndrome will be considered for compensation benefits under the CPD policy. Features of this condition include: chronic diffuse pain of unknown etiology attributable to either undetected organic condition or psychogenic sources; the presence of "tender points" in predictable, and usually symmetrical, locations; and fatigue and sleep disorders. As with CPD however, workers suffering from fibromyalgia must fulfill all the criteria in this policy in order to be entitled to benefits. See, for example, *Decisions No. 238/13, 2090/09, 881/11, 478/09, and 35/06.* Since fibromyalgia, by definition, involves diffuse pain, the fact that a worker suffers from diffuse pain (as opposed to pain in the same area as the original injury) does not mean that the fibromyalgia was not caused by the accident. Thus, this alone would not bar a worker from entitlement for fibromyalgia under the CPD policy. See, for example, *Decision No. 1733/07*.

[52] According to the Board's CPD policy (OPM Document No. 15-04-03), various criteria must be satisfied for benefits to be granted under the CPD policy. With respect to the first CPD policy criterion, it must be shown that "a work-related injury occurred." It has already been accepted that the worker's compensable injury concerning his low back occurred on June 21, 2011. This meets the definition of a "work-related injury" for the purposes of the CPD policy.

[53] With respect to the second criterion in the applicable policy, it must be shown that the "chronic pain is caused by the injury." The Panel finds on a balance of probabilities that there is evidence of the worker's continuous, consistent and genuine pain since the time of his compensable injury and that the characteristics of the worker's pain (except for its persistence and/or its severity) are compatible with the worker's injury, and as such the pain resulted from the injury. The Panel found the worker's testimony at the Tribunal hearing regarding his continuous pain experience to be forthright and consistent with the documentary record. In this regard, the evidentiary record before the Panel indicates that the worker was seen by his chiropractor after the accident. The Form 8 Health Professional's Report completed by Dr. Kobrossi, chiropractor dated June 23, 2011 for an "acute lumbosacral strain." The worker continued chiropractic treatment with Dr. Kobrossi following the accident. The worker was then seen in the hospital on June 26, 2011 for "lower back pain with radiation to legs" due to

shoveling concrete. Dr. Cohen, general practitioner, saw the worker on September 9, 2011 for "back and leg pain" and referred the worker to Dr. Amba, rheumatologist. From the evidentiary record, the Panel notes that the worker was being investigated consistently for his back pain. Of note:

- Dr. Kleinman, physiatrist, saw the worker on August 3, 2011 and diagnosed the worker was "mechanical back pain with myofascial strain" and recommended medication and physiotherapy.
- An MRI of the lumbar spine dated August 18, 2011 noted:

  > DDD changes L3-L4 and L4-L5 as qescribed, including a small - moderate right foraminal broad-based disc herniation potentially impinging the traversing right L4 nerve root, and left eccentric annular tear and disc protrusion at L4-L5, contacting the traversing left LS nerve root, potential impingement.

- Dr. Amba indicated in a report dated September 15, 2011 that the worker had reported "extensive pain" in his lumbar spine going towards his left leg. Dr. Amba diagnosed "mechanical back pain"
- Dr. Kleinman indicated in a follow-up report dated September 26, 2011 that the worker had a "lumbar myofascial strain with some evidence on MRI and clinically of possible nerve root irritation." This diagnosis was repeated in Dr. Kleinman's November 9, 2011 report.
- Dr. Amba indicated in a report dated October 25, 2011 that the worker had "symptoms…mainly on the left side with some correlation with the MRI findings."
- Dr. Aldridge, family medicine specialist, in his report dated November 30, 2011 diagnosed the worker with Fibromyalgia with 11/18 positive, trigger points, chronic mechanical back pain, and Major Depressive Disorder.
- Dr. Duncan, orthopaedic surgeon indicated in a report dated April 3, 2012 that the worker had "no evidence of nerve root compression" and was not a surgical candidate.
- Dr. Chapman, orthopaedic surgeon, indicated in a report dated July 9, 2012 that the worker had back pain with left leg radiation. He commented on the August 2011 MRI as follows:

  > In my view the only pathology is an annular tear. There really is no anatomic evidence of significant nerve root compression…this man does not have a surgical condition."

- Dr. Boulias physiatrist, indicated in a report dated November 21, 2012 that the worker had onset of back pain and leg pain in 2011. He indicated that the worker had "mechanical and non-specific back pain. There is no evidence of a radiculopathy…clinically…he does not have a radiculopathy in either of the lower extremities."

[54] The Panel has also considered that the worker was assessed by Dr. Lee, psychologist on November 4, 2014 at the request of the worker's representative. Dr. Lee indicated that the worker reported ongoing pain along his back shoulders and both legs. Dr. Lee concluded that the worker suffered from "chronic pain symptomatology stemming from labour intensive work as a concrete finisher." The Panel places weight on Dr. Lee's conclusions as they followed an assessment of the worker which included a number of psychometric tests which concluded that the worker had "high levels of pain catastrophizing…associated with chronic pain disability."

[55] Based on the foregoing evidence, the Panel finds on a balance of probabilities that there is evidence of the worker's continuous, consistent and genuine pain since the time of his compensable injury. While the Panel notes that the worker was being investigated for an organic back issue, including being referred to a rheumatologist, physiatrist, and orthopaedic surgeon, the results of investigations concerning an organic cause for the worker's back and leg pain were, in the Panel's view, inconclusive. The Panel will discuss further the underlying organic diagnoses in criterion four below. Accordingly, the Panel is satisfied that there are medical opinions that support that the characteristics of the worker's pain (except for its persistence and/or its severity) are compatible with the worker's low back injury, and that the pain resulted from the injury.

[56] The Panel acknowledges that the employer's representative submitted that the worker's non-compensable thoracic tumor was contributing to the worker's pain. The Panel does not accept this submission, and finds, rather that based on the totality of the evidence that the injury of June 2011 was a significant contributor to the onset of the worker's CPD. The tumor was not diagnosed until 2013 following an MRI of the thoracic spine, which was two years after the workplace injury. During that intervening period of two years, the evidence shows that the worker was complaining of and being investigated for low back complaints that were separate from the thoracic tumor. Further, the Panel was not directed to any medical opinions which connect the worker's ongoing pain complaints to the thoracic tumor. The Panel prefers the opinions of Dr. Aldridge and Dr. Lee who assessed the worker and concluded that the worker's ongoing chronic pain stemmed from the 2011 injury.

[57] With respect to the third criterion, that it must be shown that "the pain persists six or more months beyond the usual healing time of the injury," the Panel finds on a balance of probabilities that the worker's pain experience related to his compensable injury continued beyond the healing time associated with it. The worker was initially diagnosed with a sprain-type injury to his low back. However, later diagnostic evaluations revealed an intervertebral disc-related injury. The symptomology associated with this low back injury progressed in 2011 following the workplace accident and took on a non-organic shape by late 2011, as described earlier in this decision and specifically the report of Dr. Aldridge. The worker's experience of pain symptomology also persisted throughout 2012 and thereafter as described by Dr. Lee. As noted earlier, Dr. Amba, and Kleinman's reports support the fact that the worker had continuous pain since his workplace injury. This is also consistent with the preponderance of medical evidence and the worker's testimony at the Tribunal hearing that he experienced pain since the workplace accident on June 21, 2011. On the whole, the totality of evidence suggests that the worker was never pain-free following his workplace accident. The Panel therefore finds that this pain experience has "persisted" within the meaning of the Board's CPD policy, as evidenced by the preponderance of medical evidence, thus satisfying the third CPD policy criterion.

[58] With respect to the fourth criterion in the CPD policy that "the degree of pain is inconsistent with organic findings," as previously noted, the worker was diagnosed with a "chronic pain condition" by Dr. Lee and "fibromyalgia" by Dr. Aldridge which suggests that the worker's pain goes above and beyond normal findings. Having said that, the Panel acknowledges that a diagnosis of chronic pain disorder is not, in and of itself, sufficient to satisfy the criteria for CPD. Instead, the Panel has considered the objective organic findings to determine whether the extent of the pain is inconsistent with the organic findings. As noted above, the worker was investigated through an MRI of the lumbar spine and referrals to a rheumatologist, orthopaedic surgeon, and two physiatrists. The Panel finds it significant that

none of the aforementioned specialists conclude that the worker's back pain is attributable to the organic findings. Dr. Kleinman indicated that there was "possible nerve root irritation;" Dr. Amba indicated that the worker's symptoms had "some" correlation with the MRI findings; whereas Dr. Boulias, Dr. Chapman and Dr. Duncan concluded that the findings on the MRI did not correlate to the worker's symptoms. The Panel places significant weight on the findings of Dr. Chapman and Dr. Duncan given that they are orthopaedic surgeons who interpreted the MRI findings and concluded that there were no abnormalities that could account for the worker's symptoms. Even in considering Dr. Kleinman's reporting, Dr. Kleinman only notes a "possible" organic reason for the worker's ongoing impairment. In the Panel's view, a speculative possibility does not meet the balance of probabilities standard, which requires a fact to be more probable than not. Further, in considering Dr. Amba's reporting, the Panel finds that while the worker's ongoing symptoms may have had "some" correlation with the MRI findings, Dr. Amba does not then explain what other factors are contributing to the worker's ongoing pain symptoms. In further support of this the Panel finds persuasive the reports of Dr. Aldridge and Dr. Lee, both of whom underscore the psychological basis for the worker's ongoing pain complaints.

[59] The preponderance of medical evidence suggests that the worker's experience of chronic low back pain was in excess of what would be expected for his organic injuries (recognized by the Board as a back strain). In that vein, the possibility of corrective surgery for the worker's organic low back impairment was ruled out by Dr. Duncan and Dr. Chapman. Rather, Dr. Aldridge suggested the worker had "Fibromyalgia" by late 2011. In the Panel's view, this is a clear recognition that the worker's low back pain had taken on a nonorganic shape by that time and required specialized medical attention on that basis. The organic findings did not require additional investigation by Dr. Chapman or Dr. Duncan, nor could surgery correct any organic impairment. This again points to the existence of a non-organic condition affecting the worker. The Panel thus finds on a balance of probabilities that the worker's continuous experience of pain cannot be correlated to organic findings associated with his compensable injury and "that the degree of pain is inconsistent with organic findings" in this case.

[60] With respect to the fifth CPD policy criterion, it must be shown that "the chronic pain impairs earning capacity." The Panel finds on a balance of probabilities that the worker has sustained a "consistent and marked life disruption" as a result of his chronic pain experience. In this regard, the Panel has considered that the worker had pain-related problems which interfered with him from returning to the workplace later in 2011 and thereafter. The preponderance of medical evidence supported his inability to sustain any physical or laborious activities, including in his home following 2011. Following the accident, as noted in his testimony at the Tribunal hearing and referred to in the documentary record, he became substantially reliant on others for various domestic activities.

[61] The Panel also finds it significant that worker was able to be employed full-time without medical accommodations in physically-demanding work prior to the June 21, 2011 workplace accident but could not sustain such work beyond June 24, 2011. The worker's experience of pain thereafter was amplified, thus further interfering with the possibility of any work re-integration. This temporally suggests that the workplace accident was a significant contributing factor in his ensuing life disruption and CPD. The Panel is further satisfied on a balance of probabilities, based on the above-noted medical evidence that the worker's experience of chronic pain has impaired his earning capacity, and this is further supported by Dr. Lee's report of November 2014 which noted the worker was "not able to engage in any of the labour intensive tasks required for his job…," all amounts to a marked life disruption that satisfies the

fifth CPD policy criterion. As such, the Panel finds on a balance of probabilities that the worker has established entitlement to CPD benefits in his claim as related to his compensable injury on June 21, 2011.

[62] The Panel acknowledges the employer's representative's submission that the worker declined suitable modified duties and therefore he does not have an impaired earning capacity. The Panel notes, however, that the applicable Chronic Pain Policy Document indicates that "there must be a clear and distinct disruption to a worker's life, but there is no particular requirement for this disruption to be either major or minor… The type and the duration of work may be restricted totally or to a limited degree, i.e., modified duties or part-time work only may be possible." Thus, even if the worker was capable of modified duties, the worker's inability to carry on with his pre-accident duties as noted by Dr. Lee, would, in the Panel's view, therefore satisfy the fifth policy criterion of a "marked life disruption."

[63] The Panel further acknowledges the employer's representative's submission that the worker's ability to travel to his home country and with his family negates a finding of a marked life disruption. The Panel has considered this submission, and notes that the criterion for marked life disruption does not require a complete disruption in his social life for the criteria to be met. The Panel has considered the worker's testimony that he is more limited at home, cannot work, and does not socialize as much as before the accident. The Panel has also considered the medical documentation which supports the psychological effects the worker's pain has had on his life since the accident, notably, as reported following the assessment by Dr. Lee. The Panel finds, on a balance of probabilities, that the evidence supports that the worker has met the fifth criterion.

[64] For the above reasons, the Panel finds that the worker has met the criteria for CPD under the applicable Policy.

[65] With regard to a NEL award for a low back injury on an organic basis, since the Panel has found that the worker is entitled to benefits for CPD in relation to his low back injury of 2011, the Panel must deny this aspect of the appeal. In these circumstances, the Panel has determined that the worker's ongoing impairment is more appropriately recognized on a non-organic basis under the CPD policy. As indicated earlier in this decision, the Panel has also concluded that the pain the worker is currently experiencing is inconsistent with the relatively minor organic findings on file. The balance of evidence before the Panel establishes that the worker has no ongoing entitlement in this claim on an organic basis. Finally, in keeping with Tribunal jurisprudence and Board policy, where a worker is entitled to benefits for CPD, that entitlement replaces and supersedes entitlement for organic injuries caused by the same accident. As such, this portion of the appeal must be dismissed.

[66] We further note that given the length of time the worker has experienced CPD, as noted by the report of Dr. Lee in 2014 which was written three years after the June 2011 accident, the Panel finds that the worker is entitled to recognition of a permanent impairment and NEL determination for CPD.

(b) Entitlement to LOE benefits from June 25, 2011 onwards

[67] The Panel notes that the Board denied LOE benefits to the worker from June 25, 2011 onwards on the basis that the worker was offered suitable modified duties following his back strain injury of June 21, 2011. As such, the Board has not had an opportunity to rate the level of the worker's permanent CPD impairment and has not been able to assess how that impairment might affect his employability effective June 25, 2011. Accordingly, the Panel finds that the

most appropriate course of action would be to return the issue of the worker's entitlement to LOE benefits from June 25, 2011 onwards to the Board for further adjudication based on the conclusions reached in this decision. The worker would, of course, have the usual rights of appeal with respect to any decision subsequently made by the Board.

DISPOSITION

[68] The appeal is allowed, in part, as follows:

1. The worker is entitled to benefits under the Board's CPD policy as arising from the workplace accident occuring on June 21, 2011, including a NEL determination. The issue of the worker's level of entitlement to a NEL award for CPD is remitted back to the Board for determination.

2. The worker has no ongoing organic entitlement in this claim for the lower back.

3. The issue of the worker's entitlement to LOE benefits from June 25, 2011 onwards is returned back to the Board for further adjudication, subject to the usual rights of appeal.

[69] The nature and duration of benefits flowing from this decision will be returned to the WSIB for further adjudication, subject to the usual rights of appeal.

DATED: November 6, 2018

SIGNED: C.J. Ramsay, K.J. Soden, S. Roth