



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1204/18

BEFORE: K. Jepson : Vice-Chair
P. Greenside : Member Representative of Employers
M. Ferrari : Member Representative of Workers

HEARING: April 23, 2018 at Toronto
Oral

DATE OF DECISION: August 17, 2018

NEUTRAL CITATION: 2018 ONWSIAT 2674

DECISION(S) UNDER APPEAL: WSIB ARO decision dated May 18, 2016

APPEARANCES:

For the worker: R. Fink, Lawyer

For the employer: Not participating

Interpreter: A. Khan, Punjabi language

REASONS

(i) Background

- [1] The right-hand dominant worker was a machine operator. Prior to the claim at issue in this appeal, the worker had a previous claim in February 2006 for work-related soft tissue injuries to the 3rd and 4th fingers of his right hand. The worker lost no time from work and did not receive a permanent impairment award but the diagnosis at that time included a diagnosis of trigger finger.
- [2] On March 2, 2007 the worker reported pain in his right 4th finger which he attributed to lifting heavy rolls of an unspecified material. He was diagnosed with an aggravation of trigger finger in the right 4th digit. In July 2007 the worker underwent a right D4 trigger finger release procedure.
- [3] The Workplace Safety and Insurance Board (WSIB) (the Board) allowed entitlement for an aggravation of the right 4th trigger finger condition and flexor tenosynovitis as a result of the March 2, 2007 disablement injury. The worker was later determined to have a permanent impairment. He was subsequently granted a 3% non-economic loss (NEL) benefit for his permanent impairment (assessed in April 2010).
- [4] Following recovery from the July 2007 surgery the worker returned to work on modified duties. Although in this hearing the worker described these duties as “putting labels on,” a Board Memo recording a telephone call (dated August 14, 2009) with the worker indicates the worker at that time described his light duties as a variety of tasks that included cleaning tasks and driving a tow motor using one hand. The worker continued on these light duties until April 2008 when the accident employer closed and the worker was laid off. In or about August 2009 the worker approached the Board seeking further loss of earnings (LOE) benefits and health care benefits.
- [5] The Board determined the worker had an ongoing impairment and was entitled to further benefits and services. Labour market re-entry (LMR) services (now referred to in Board policies as Work Transition (WT) services) were initiated. An LMR plan was created with a Suitable Employment or Business (SEB) occupational goal of Couriers, Messengers and Door-to-Door Distributors (National Occupational Classification (NOC) 1463). The worker participated in an LMR plan, which included a work placement. However, the work placement was unsuccessful. LMR services were closed in April 2010. The worker remained unemployed but the Board initially determined that the worker was capable of working in the selected SEB and adjusted his LOE benefits on that basis.
- [6] In April 2010 the worker was awarded a 3% NEL benefit for his right 4th trigger finger.
- [7] The worker appealed the suitability of his LMR plan and the SEB of Courier. A November 2013 Appeals Resolution Officer (ARO) decision determined that the SEB of Courier was not suitable for the worker. The worker was awarded full LOE benefits from April 22, 2010 and entitlement to further LMR services.
- [8] A new round of LMR services was commenced following the November 2013 ARO decision. Following a psycho-vocational assessment a new LMR plan was developed with the SEB goal of Cashier, NOC Code 6611. The worker participated in this second LMR plan from March 2014 to August 2015. LMR was closed with the worker remaining unemployed. The

Board again adjusted the worker's LOE benefit as of August 17, 2015, basing his LOE benefits on his deemed ability to earn minimum wage working full-time hours.

[9] The worker now appeals to this Tribunal seeking full LOE benefits from August 17, 2015 on the basis that he is unemployable.

[10] The documentary evidence in this appeal consisted of the Case Record and three Addenda to the Case Record. At the hearing an additional document was accepted into evidence (Exhibit #6) which was a more legible copy of certain pages already contained in the Case Record. The Panel heard testimony from the worker and we heard submissions from the worker's representative. The employer did not participate in the appeal.

(ii) Issues

[11] The issue to be determined in this appeal is the appropriate quantum of the worker's LOE benefits as of August 17, 2015.

[12] In order to determine the worker's LOE benefits, we must determine if the SEB chosen for the worker was appropriate or, if not, what he was able to earn as of August 17, 2015 in suitable and available employment.

(iii) Law and policy

[13] Since the worker's injury has been assigned an accident date of March 2, 2007 (and no objection has been made to that accident date) the worker's entitlement to benefits is governed by the *Workplace Safety and Insurance Act, 1997* (the WSIA). All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[14] Subsection 43(2)(b) of the WSIA stipulates that the amount of a worker's LOE benefit is based on the difference between the worker's pre-injury earnings and "the net average earnings he or she earns or is able to earn in suitable and available employment."

[15] Where a worker is unable to return to work with the accident employer, under section 42 of the WSIA the worker is entitled to an LMR assessment and, where appropriate, LMR services. In either case, the Act provides that the Board must determine "the employment or business that is suitable for the worker." Earnings in this suitable employment or business (SEB) become the amount used to determine the worker's LOE benefits.

[16] In this case, the worker was unable to return to work with the accident employer since it had closed. In order to determine the quantum of LOE benefits payable, we must determine whether the SEB determined by the Board was suitable for the worker, and, if not, what the worker was able to earn in suitable and available employment.

[17] In addition to the provisions of section 42 cited above, Board *Operational Policy Manual* (OPM) Document No. 19-03-03, "Determining Suitable Occupation," provides further guidance on the determination of an SEB (referred to in the policy as a Suitable Occupation (SO)). The policy describes an SO (or SEB) as follows:

An SO represents a category of jobs suited to a worker's transferable skills that are safe, consistent with the worker's functional abilities, and that to the extent possible, restores the worker's pre-injury earnings. The SO must be available with the injury employer or in the labour market.

[18] The policy also sets out factors the Board will consider when selecting an SO. These include:

- a worker's functional abilities
- a worker's employment-related aptitudes, abilities, and interests
- what jobs are available with the injury employer through direct placement, accommodation, or retraining
- labour market trends, and the likelihood of the worker being able to secure and maintain work within the occupation with another employer, and
- in accordance with applicable human rights legislation, any pre-existing non-work-related condition(s) (e.g., including non-physical disabilities such as a learning disability) a worker may have, as well as any other human rights-related accommodation requirements.

[19] For its primary source of labour market information, the Board uses the National Occupational Classification (NOC) system developed by Human Resources and Skills Development Canada (HRSDC), and labour market information (LMI) from the Ontario government.

(a) The worker's physical restrictions

[20] Dr. A. Eckhaus, the surgeon who performed the trigger finger release, indicated in a follow-up report dated July 19, 2007 that the surgical wound had healed extremely well. He reported that the worker continued to work through a full range of motion and "has not had any triggering." He recommended no restrictions for work. However, the worker subsequently reported he was having ongoing difficulties. Dr. N. de Kleer (providing follow-up care for Dr. Eckhaus) indicated the worker's recovery was complicated by a post-operative infection. However, in a February 11, 2009 note Dr. de Kleer indicated the worker continued to make progress. She reported that the worker had some "mild stiffness as well as aching of the hand" but she expected good improvement. In a Health Professional's Progress Report dated October 29, 2009 Dr. de Kleer noted simply "stiffness, decreased range of motion" and indicated limitations simply as "limit use of right hand" without further elaboration.

[21] The worker underwent a Functional Capacities Evaluation (FCE) on March 11, 2014, conducted by J. Moore, an occupational therapist. Ms. Moore reported that the worker's results on testing indicated inconsistent effort. She reported, "there was not a link between the physical findings identified in the physical exam and the FCE performance." She commented that "similar activities did not result in similar performance" and the detailed testing report contains many references to the worker self-limiting his effort. The assessor concluded the test results did not represent the worker's full abilities. We observe that this FCE also includes notation of back pain and shoulder pain but the worker does not have any recognized impairments in these areas. With respect to the worker's right hand, the assessment concluded the worker had an approximately 25% decrease in range of motion in his right 4th finger MCP, PIP, and DIP joints, such that he had difficulty making a fist. He had reduced grip strength in both hands, although it was noted "there were no limitations in his left hand observed in physical testing to account for his low scores during the pinch and coordination testing" for that hand. The testing indicated that the worker could work within the Light Physical Demands Characteristic Level, although as noted the assessor cautioned that this might underestimate his capabilities. The worker was

noted to have no (or only slight) limitations on the following activities: sitting, standing, walking, crouching, stair climbing, and ladder climbing.

[22] In a Physician Case File Review by Dr. G. Gelman dated April 7, 2014 Dr. Gelman noted the inconsistent effort on the FCE, noting that this made it very difficult to extract what the worker's actual limitations were. Based on the nature of the injury and "some information that can be obtained from the [FCE] report, Dr. Gelman concluded that:

It is reasonable to assume that [the worker] would have difficulty with grip strength, and he should be limited from activities that require repetitive or excessive gripping with the right hand. As well, it would reasonable to infer that he will have difficulty with heavy lifting because of the restrictions in his right fourth finger. He should have permanent precaution against heavy lifting or carrying above the Light Physical Demands Level.

[23] Dr. Gelman noted that there would be no other restrictions.

[24] The worker testified that his right fingers are always stiff and he has pain in the middle of his palm. He also noted numbness in his fingertips when in cold conditions. He indicated that his hand becomes sore if he engages in heavy work or gripping; he suggested he is able to engage in physical exertions with his right hand for between five and 15 minutes before pain forces him to stop. He then takes a break for about five minutes and massages his right hand with his left and the pain subsides. He stated he does not have pain if he does not engage in activities with his hand. He takes Tylenol for pain once or twice a week.

[25] Taking into account the FCE report, the other medical reporting, and the worker's testimony, we find that Dr. Gelman's suggested restrictions are accurate. The worker has restrictions on repetitive or excessive gripping or pinching with the right hand, must accommodate reduced grip strength in that hand, and avoid heavy lifting. We would observe that there is nothing in the medical evidence to support a finding that the worker has no use at all of his right hand. Instead, he has some limits on the use, as described above.

(b) LMR and the worker's personal and vocational characteristics

[26] The worker was educated in his native country. He has self-reported that he completed Grade 6 in that country. As reflected in the LMR assessments, the worker's past vocational experience is as a press operator prior to becoming a machine operator, the position he occupied when injured. We accept that the worker's vocational experience is in manual jobs and he has no experience in customer-facing roles.

[27] Testing in connection with his LMR programs included a November 2009 Transferrable Skills Analysis, done in connection with the first LMR program, as well as several assessments in connection with his second LMR program: a December 2013 Work Transition Specialist Initial Interview, a January 2014 psycho-vocational assessment done by psychologist Dr. B. Tomini, and an Academic Screening done in January 2014 (the Academic Screening was repeated on May 5th and 9th, 2014). The worker's second LMR plan consisted of one year of ESL and computer training, followed by job search training (JST) and employment placement services (EPS).

[28] In his testimony the worker has emphasized his weak English skills. The worker's representative also emphasized this barrier as a significant barrier to employment.

[29] The worker testified that upon arrival in Canada he took two or three months of ESL training. He worked with English speaking co-workers and stated that he learned English

slowly. Later, after his injury, the worker testified that he took further ESL classes on his own for eight or nine months. A letter dated October 23, 2013 from the Centre for Skills Development and Training confirms that the worker was enrolled in September 2013. In the January 2014 psycho-vocational assessment Dr. Tomini rated the worker's English language skills as "fair." Testing reporting in the psycho-vocational assessment indicated the following Academic levels: Word Reading – Grade 2.4; Sentence Comprehension – Grade 0; Spelling – Grade 1.8; Math Computation – Grade 4.5. An initial Academic Screening done on January 9, 2014 to assess the worker's ESL needs concluded the worker had some basic communication skills in English but suggested he would benefit from ESL training.

[30] A May 2014 Academic Screening was done after 12 weeks of training. It concluded the worker "has relatively strong oral communication skills, although accuracy in grammar, sentence structure, and pronunciation can hinder the listener understanding at times." The Academic Screening found the worker's writing skills to be "considerably weaker." The May Academic Screening assessment placed the worker's Speaking level at Grade 5, Listening at Grade 5-6, Reading at Grade 3, and Writing at Grade 1-2. As the worker's LMR plan progressed, further LMR progress reports indicate the worker made good progress in his ESL training, although they also noted the worker's reluctance to acknowledge the progress. The worker's representative urged us to view these reports as suspect, suggesting they do not accurately reflect the worker's true gains. However, we see no reason to do so. We place weight on the reporting from the LMR service provider regarding the worker's progress.

[31] The worker's testimony, in our view, demonstrated that he tended to overstate not only his physical but also his vocational limitations. For example, the worker received computer training in the LMR program and LMR progress reports indicate the worker learned some basic computer skills. For example, a report dated March 13, 2015 indicates that the worker could accomplish certain tasks independently including the following: "start and exit Windows style application," "navigate web browser," "create, receive, reply to, forward and save electronic mail," "operate a mouse," and "[understand] the parts of a keyboard." However, when asked in his testimony what he was able to do on a computer the worker stated that he "can't even turn on a computer." We do not find this assertion credible. In our view this statement is consistent with the worker's pattern of overstating or exaggerating his limitations, just as he did in the FCE with respect to physical limitations.

[32] In April 2015, a potential work placement was found for the worker with a dry cleaner. The worker attended an interview for this position with the potential employer, who spoke the worker's native language. The Employer Client Coordinator (ECC) for the LMR service provider, the March of Dimes (MOD), was present at the meeting. An MOD report dated May 15, 2015 indicates that the ECC reported the worker expressed a lack of interest in the position, and also raised barriers such as non-compensable problems with his left hand and with his shoulder. The report records that when this information was put to the worker he denied that he presented himself as described but also that the worker stated he was "not interested in factory work." The worker's version of these events, as provided in his testimony, was that he was under the impression the job at the dry cleaner was a cashier position, but when he arrived at the interview it proved to be "factory work." He said the work consisted of placing clothes in the washing machine and removing them. He stated he did not think he would be able to do that work. However, when specifically asked, he testified he did not tell the prospective employer he could not do the work. Instead he stated that he told the employer he needed "modified duties"

and the employer responded by indicating that the job may not be appropriate for him because they needed someone who was “quick.” The evidence includes a letter from the employer dated April 17, 2015 stating that they interviewed the worker the letter goes on to state:

We would have given [the worker] a job offer but he had a poor demeanour during the whole interview. He seemed quite disinterested during the interview and left the impression that he did not really want the job.

[33] As a result, the employer withdrew its offer.

[34] We find the contemporaneous MOD reporting and employer’s letter to be more reliable than the worker’s version of these events. The version in the written record is more in keeping with the surrounding probabilities. Moreover, it also aligns with the worker’s pattern of erecting barriers to employment as discussed elsewhere in these reasons.

[35] At the end of the second LMR plan the worker was receiving assistance with the job placement. The reporting from the Job Placement Specialist (JPS) contains numerous references to concerns about the worker’s apparent lack of motivation to find a work placement. The worker ultimately did participate in a work trial with a printing company starting on July 7, 2015. The employer’s stated intention was to offer the worker a paid position commencing August 5, 2015. However, the service provider memoranda indicated that the employer expressed concerns with the worker’s motivation and initiative. The employer also expressed concerns about the worker’s communication skills and for this reason confined his work to copying jobs rather than customer interactions. The worker testified that the placement failed because he pressed an incorrect button and broke a machine. He stated that as a result of this mistake the employer terminated the placement. As with many other instances in the worker’s reporting, the contemporaneous documentation suggests a slightly different story. Those memoranda indicate that the employer reported that the worker was assigned a printing job to complete independently and he did it incorrectly, forcing the employer to repeat the job at considerable cost. However, this was not the employer’s sole or even main stated concern with the worker. The employer provided a letter dated August 17, 2015 confirming that the paid job was ultimately not offered because the “[the worker’s] level of productivity did not meet the needs of my business” and the worker “lacked motivation and initiative to learn the processes and procedures of the business.” The worker’s representative submitted that both this letter, as well as the letter from the potential cleaner employer cited above, were in fact ghost-written by the EPS service provider rather than the two potential employers who signed the letters. He provided no evidence for this allegation and we reject it. Again, as with the potential position with the dry cleaner, we place more weight on the contemporaneous EPS reporting and the printing employer’s letter than the worker’s less plausible testimony and reporting. We find that the printing placement experience serves more as evidence of the worker’s lack of motivation than it does as evidence of an inability to sustain employment.

[36] Overall, we place more weight on the contemporaneous LMR reporting than the worker’s testimony in relation to the work placement and his vocational and language abilities. The LMR reporting indicates that the worker began the program with some basic English communication skills and was provided with further ESL training through which he improved those skills. We do find, however, that his English skills remained at a relatively basic level. The reporting also indicates that the worker gained some facility with basic computer operations such as use of the internet and email.

[37] As of August 17, 2015, the relevant date for determination of LOE benefits, the worker was 55 years of age.

(c) Conclusions: the worker's earning capacity

[38] Section 43 of the WSIA requires a determination of what a worker is able to earn in suitable and available employment; it does not mandate a determination of the precise job the worker might obtain. In keeping with this, under Board policy, an SEB is not one particular job but a category of jobs. However, even the choice of a particular SEB is a tool for guiding LMR programming and job search targeting. Ultimately, the quantum of a worker's LOE benefits is determined by what they are able to earn in any type of suitable and available employment in the open labour market. In the case of minimum wage occupations, this might encompass a very wide range of potential positions, as is partly represented by the breadth of NOC Code 6683 Other Elemental Services.

[39] The worker's representative argued that the worker might have been employable had the Board provided an adequate LMR plan. However, because the plan was inadequate, he submitted, the worker is unable to work in the selected SEB or in any other capacity. The representative further confirmed that the worker is not seeking further LMR but rather full LOE benefits to age 65. We note, however, that if Board-sponsored training does not result in a worker being able to work in the chosen SEB, there is nothing in the WSIA or Board policy that states such a worker is then automatically entitled to full LOE benefits. In some cases, consideration of further LMR may be appropriate. Where it is not—as here, where the worker is expressly claiming unemployability and not requesting further LMR—it is still necessary to determine under WSIA section 43(2) what the worker was and is likely able to earn in suitable and available employment. We are aware of no provision in either the Act or Board policy that provides that any failure on the Board's part results in an automatic grant of benefits. An examination of the worker's ultimate post-injury earning capacity is always required under section 43.

[40] The Board determined that the worker would work at minimum wage. We agree that the worker is employable. His physical restrictions, reviewed above, are not so significant as to preclude light or sedentary work. The worker's testimony about his symptoms and limitations indicates he develops some pain when he uses his right hand consistently, but when he rests it (and massages it with his other hand) the pain subsides. He takes relatively little pain medication. He has no compensable limitations on his left hand so he is able to use that to some extent to compensate for his right hand limitations. We acknowledge that some minimum wage jobs might be outside the worker's physical restrictions, but many would not be. In particular we are not persuaded that the worker's physical or vocational characteristics would prevent him from working as a cashier. The worker did not appear to claim that cashier positions exceeded his physical restrictions, but instead stated that the barrier was his level of English. He also suggested that he would be unable to do such tasks as processing credit card transactions or the purchase of lottery tickets. He appeared to suggest that this was beyond his intellectual abilities and he would require assistance. In light of the results reflected in the November 2009 Transferable Skills Analysis, the January 2014 psycho-vocational assessment and the May 2014 Academic Screening, we are not persuaded that the worker would be unable to do these types of tasks.

[41] The worker's physical restrictions would preclude him from unskilled labouring positions that required any heavy lifting, repetitive use of his right hand, or forceful gripping with his right hand. This would eliminate some minimum wage jobs, but not those that are within the light physical demands category. When asked, the worker acknowledged that he felt he could do a job such as stocking shelves provided that the items were not heavy.

[42] With respect to the worker's level of English, we acknowledge that English is his second language and his English is indeed limited. However, the evidence, in particular the LMR progress reports and Academic Screening, as well as a portion of the hearing in which he testified without full assistance from the interpreter, suggests the worker is able to engage in basic communication in English.¹ We find the worker has tended to over-emphasize this barrier. While we do find that his limited English would likely restrict the jobs available to him within the range of potential minimum wage positions, it would not reduce that range so significantly as to preclude employment. The worker's language skills would be adequate for some Elemental Services class jobs.

[43] The worker testified about his job search and the documentary evidence includes extensive job search logs showing employers purportedly approached for a job. The worker testified he would drive to potential employer locations and he would go into the business and provide his resume. His wife would accompany him and she would later record the employer contacts made to create the job search logs. The documentary evidence includes what purports to be a record of all the employers the worker contacted while searching for work from 2013 through to February 2018. The worker's representative prepared a helpful summary of the worker's job search logs charts. For the years 2015 and 2016, it indicates 2,193 employers were personally contacted. For 2017 the total is 1,248 resumes personally handed out. The worker stated he passed out four to five resumes per day. Asked if he utilized any other resources or techniques in job searching, he indicated that he visited the local government employment office just once.

[44] While an unsuccessful job search can constitute evidence of a worker's unemployability, in this case we do not find the job search evidence constitutes such evidence because we are not persuaded that the worker's job search was a serious, sincere and effective search. Nor are we persuaded that the ineffectiveness of the worker's search was due to a lack of job hunting skills. The evidence of the number of resumes the worker has recorded as having been passed out in person is so high as to be out of keeping with the surrounding probabilities; the number is more in line with a number that might be distributed via email or regular mail contacts, but the worker expressly denied using email or regular mail for almost all of these purported job applications. The Panel has significant doubts that the job search logs in evidence represent an accurate reflection of the worker's actual job search. They appear, in our view, to significantly overstate the number of employers that were genuinely contacted.

[45] Even if the worker actually provided resumes to the claimed number of employers, or to some lesser subset, his testimony about the manner in which he approached employers leads us

¹ At the worker's representative's request, the worker began his testimony with the interpreter who was asked to assist only on an "as needed" basis. However, part way into the worker's testimony the Panel instructed the interpreter to provide full interpretation. The Panel wanted to be certain, in this critical adjudicative context, that there were no misunderstandings. However, the context of a formal hearing is quite different from many workplace contexts where a more basic less nuanced communication can often be adequate. The Panel's desire to ensure very clear communication in the hearing does not equate to a finding that the worker is completely unable to communicate in English.

to conclude that the worker effectively undermined his own contacts with employers by presenting himself as more physically restricted than he actually is. Upon repeated and varied questioning about how he presented himself to employers, the worker repeatedly stated that he would tell prospective employers that he could do “nothing heavy and nothing fast” or very similar wording. In our view, this was a very broadly stated restriction that would likely be interpreted by prospective employers to mean not only that the worker must have very light duties, but that he could only work slowly—regardless of what he was doing, or what part of his body he was using. However, this is not an accurate description of the worker’s physical restrictions. The worker has no global restrictions on the speed with which he does all tasks. As noted above, the worker has restrictions on repetitive use of his right hand as well as forceful gripping and heavy lifting.

[46] With respect to speed, the worker’s only restrictions are on repetitive use of his right hand, forceful gripping, or heavier carrying/lifting. When the worker told employers he needed work that was not heavy and not fast such a representation would likely have been perceived as requiring a position in which the worker could do all tasks at his own pace and was restricted by more than just his right hand. This overstating of restrictions would very significantly limit opportunities. The worker’s stated approach to job applications indicates that he presented himself as significantly more disabled than he is and as a result significantly undermined his chances of obtaining employment. Because of this, as well as our finding that the worker’s serious job search was not likely as extensive as he has claimed, we do not find that his unsuccessful job search is persuasive evidence that he is not employable.

[47] The worker's representative relied on a report from M. Bachman, a Vocational Rehabilitation Consultant, dated January 21, 2016. The report was solicited by the representative for the worker’s appeal. Mr. Bachman concludes that the worker is unemployable. While we have considered this report, we do not find that Mr. Bachman’s conclusions outweigh the other evidence in the file. In particular, we note that Mr. Bachman appears to have interviewed the worker only by telephone, with his assessment otherwise relying on a documentary review. By contrast the psychologist who conducted the 2014 psycho-vocational assessment, Dr. Tomini, interviewed the worker in person on two separate days, and concluded the worker could work. In addition, Mr. Bachman’s report accepts statements by the worker that our findings are not accurate. For example, the worker told Mr. Bachman that he was unable to make in-person cold calls, while the worker has presented in this appeal that he made literally thousands of such cold calls. Mr. Bachman also necessarily relied on the worker’s other self-reports of his limitations and his vocational training as these were reflected in the documentation, but, as described above, we find the worker’s self-report is not consistently reliable. This undermines the persuasiveness of Mr. Bachman’s conclusions. The 2016 Bachman report does not persuade us that the worker is unemployable.

[48] Through a freedom of information request, the worker's representative obtained certain internal reporting from the Board regarding the placement rates following LMR programs. He made submissions in relation to this reporting, arguing that it showed that the Board’s programs are ineffective at retraining workers. He noted for example, that statistics for 2017 (to October 2017) for LMR plans with an SEB goal of Cashier showed 18 closed plans with only 17% of those worker's employed. He also pointed to the relatively low rate of employment following LMR plans targeting a number of other SEBs. We do not find this evidence of any significant relevance in this appeal. The question before us is whether *this* worker, with *his*

particular physical restrictions and personal and vocational characteristics, and *his* particular re-training and his response to that re-training. The general statistics about other workers and their programs do not speak to this earning capacity; we have no information about those other workers' particular impairments, their personal and vocational characteristics, their motivation and level of participation in the work reintegration process, and many other factors. Moreover, the high-level statistics do not necessarily support any broad conclusions about the efficacy of the Board's "programs" in general. More information would be required. Many other variables could influence these results other than the effectiveness of the LMR programs themselves. We place no weight on the general data about employment rates following LMR plans targeting certain SEB goals.

[49] We agree that, in addition to his physical restrictions precluding entry level jobs with greater physical demands, the worker's English language skills would be a factor limiting some employment opportunities. We also acknowledge that the worker's work experience is only in manual labour positions rather than customer-facing positions. As of August 17, 2015 the worker was 55 years of age. All of these barriers together would tend to reduce the range of potential positions the worker could successfully obtain. The types of jobs that fit within the above parameters are, in our view, more likely to be at the unskilled, entry-level end of the labour market, such as certain customer service type positions (including some cashier positions) or jobs within the NOC Code Other Elemental Service Occupations, attracting only minimum wage. In addition, we take notice that many such minimum wage positions are part-time positions, such that with the narrowing of potential options for the worker due to the barriers stated above, the likelihood of obtaining full-time employment is significantly diminished. The estimation of earning capacity is not an exact science, however, taking into account all of the above-noted factors, we conclude that as of August 17, 2015 the worker was likely to be able to earn minimum wage working 20 hours per week. Applying section 43 of the WSIA, his LOE benefits as of August 17, 2015 shall be calculated based on that deemed earning capacity.

DISPOSITION

[50] The appeal is allowed in part.

[51] The worker's LOE benefits as of August 17, 2015 shall be based on his ability to earn minimum wage working 20 hours per week.

[52] The matter is returned to the WSIB for implementation of these determinations and further adjudication as necessary flowing from this decision, subject to the usual rights of appeal.

DATED: August 17, 2018

SIGNED: K. Jepson, P. Greenside, M. Ferrari