



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 773/22

BEFORE

A. Kosny: Vice-Chair
K. J. Soden: Member Representative of Employers
Z. Agnidis: Member Representative of Workers

HEARING INFORMATION

Date: May 12, 2025
Location: Toronto
Format: Oral
Post-hearing activity: Completed on May 22, 2025

DATE OF DECISION July 29, 2025

NEUTRAL CITATION 2025 ONWSIAT 882

DECISION(S) UNDER APPEAL: Appeals Resolution Officer (ARO) S. Di Carlo decision dated May 28, 2021 and ARO S. Waters decision dated January 3, 2023

APPEARANCES

For the worker: B. Zevallos, Paralegal
For the employer: Not participating
Interpreter: Not applicable
Tribunal Counsel Office: Not applicable

REASONS

1. Introduction

[1] The worker appeals two decisions of an Appeals Resolution Officer (ARO) of the Workplace Safety and Insurance Board (WSIB), dated May 28, 2021 and January 3, 2023. In the decision dated May 28, 2021 the ARO made the following findings:

1. The worker has entitlement to psychotraumatic disability for a diagnosis of Adjustment Disorder with Disturbance in Anxiety and Mood.
2. From a psychological perspective the worker is partially impaired and there are no psychological restrictions for the Adjustment Disorder with Disturbance in Anxiety and Mood.
3. The worker fully recovered from his cervical sprain/strain as of June 11, 2018, without evidence of an ongoing work-related impairment.
4. The worker achieved MMR (maximum medical recovery) as of March 23, 2021, for his lumbar strain injury with evidence of an ongoing impairment and permanent restrictions that include him to work at a sedentary/limited PDC level with respect to his lumbar spine. He should task rotate, self-pace, reposition and take micro-breaks as needed for symptom management. Walking, sitting and standing should be performed on an occasional basis with microbreaks and pacing as needed for symptom management. The worker is entitled to a NEL (Non-Economic Loss) Evaluation review for his lumbar strain injury.
5. The employer has entitlement to 50% SIEF (Second Injury Enhancement Fund) cost relief in this claim.
6. The modified work offered by the employer remains suitable for the worker's accepted restrictions.

[2] The worker appeals the decisions made not in his favour.

[3] In the decision dated January 3, 2023, the ARO made the following findings:

1. There is no entitlement to cervicogenic neck pain.
2. The right shoulder permanent impairment is confirmed with an MMR date of February 12, 2021.
3. The head injury permanent impairment is confirmed with an MMR date of March 22, 2021.
4. The NEL benefit for the head injury is increased to 25%.
5. The NEL benefit for the psychological impairment is confirmed.
6. The worker is entitled to partial LOE [Loss of Earnings] benefits (not full LOE benefits) effective January 4, 2021.
7. The worker is not entitled to LOE benefits from December 10, 2021 onward.
8. CPPD (Canadian Pension Plan Disability) benefits should not be offset from the worker's LOE benefits effective March 6, 2021.

[4] The worker appeals the decisions made not in his favour.

2. Background

[5] On November 21, 2017, the worker was exiting a forklift and a 30 pound bag of insulation fell from a height and hit his head, neck, right shoulder and arm. Entitlement was accepted for a concussion, neck sprain/strain, an upper and lower back sprain/strain, a right shoulder, right arm and right elbow sprain/strain. Subsequently, the worker was also granted entitlement to benefits for psychotraumatic disability for depression, PTSD and anxiety disorder.

[6] The worker was paid full LOE benefits from December 13, 2017 to February 21, 2018. Partial LOE benefits were paid from February 22, 2018 to September 18, 2018. Full

LOE benefits were paid as of September 19, 2018. On September 5, 2019 an ARO confirmed that the modified work offered by the worker had not been suitable and confirmed the LOE payments.

- [7] The employer offered the worker another modified job, that of a surface cleaner, on December 14, 2020. The graduated modified work plan was to begin on January 4, 2021 and continue until the worker returned to regular hours on July 5, 2021. The worker declined the offer of modified work and as of January 4, 2021, his LOE benefits were adjusted to partial LOE benefit payments, based on the graduated RTW plan.
- [8] In a decision dated March 3, 2020, entitlement to benefits for psychotraumatic disability was reconsidered and entitlement was limited to adjustment disorder only. Entitlement to major depressive disorder, generalized anxiety disorder and PTSD was denied. It was found that the worker did not have psychological restrictions. This was reconsidered and confirmed in a decision dated July 21, 2020.
- [9] In a decision dated August 5, 2020, the Case Manager determined that the worker had reached MMR for the cervical strain as of June 11, 2018, without a permanent impairment. The Case Manager determined the worker was entitled to an exacerbation of a previously asymptomatic right shoulder rotator cuff tendinopathy/partial thickness tearing in the context of an acute sprain/strain type injury.
- [10] In a decision dated August 31, 2020, the Case Manager granted the employer 50% SIEF cost relief.
- [11] In a decision dated December 10, 2020, the Case Manager determined that the worker reached MMR for his upper and lower back with no permanent impairment. It was determined that the worker had ongoing entitlement for his head (concussion, post-traumatic headache, transitioned to chronic migraine).
- [12] In a decision dated December 23, 2020, the Return to Work Specialist determined that the modified work offered by the employer on December 14, 2020 was suitable for the worker.

- [13] The worker was granted CPP disability benefits on March 6, 2021, retroactive to December 2019.
- [14] In an April 7, 2021 letter, the Case Manager determined the worker's right shoulder condition reached MMR with a permanent impairment on February 12, 2021, and the worker's head injury reached MMR with a permanent impairment as of March 22, 2021. The worker received a 15% NEL benefit for his head impairment on April 9, 2021, and a 1% NEL benefit for his right shoulder impairment on May 3, 2021.
- [15] The ARO, in the decision dated May 28, 2021, found the worker had entitlement to benefits for psychotraumatic disability for the diagnosis of Adjustment Disorder with Disturbance in Anxiety and Mood; however, the worker was partially impaired due to this psychological impairment and had no psychological restrictions. The ARO found that the worker fully recovered from his cervical sprain/strain as of June 11, 2018, without evidence of an ongoing work-related impairment. The ARO found that the worker achieved MMR as of March 23, 2021, for his lumbar strain injury with evidence of an ongoing impairment and permanent restrictions. It was determined that the worker was entitled to a NEL determination for his lumbar strain injury. The ARO determined that the modified work offered by the employer remained suitable for the worker's accepted restrictions. The employer's entitlement to 50% SIEF relief was confirmed.
- [16] The WSIB determined that the worker's psychological condition reached MMR on July 22, 2021. The worker was granted a 30% NEL award for psychotraumatic disability which was reduced to a 23% whole person impairment.
- [17] The worker also received a 7% NEL award for his low back on June 8, 2021.
- [18] The worker requested entitlement for cervicogenic neck pain. This was denied in a decision dated February 9, 2022.
- [19] The worker requested full LOE benefits from December 10, 2021 onward after the employer terminated the worker's employment. On June 13, 2022, the Case Manager denied entitlement to LOE benefits from December 10, 2021 onward.

- [20] The worker appealed these decisions and the ARO, in a decision dated January 3, 2023, found there was no entitlement to cervicogenic neck pain. The right shoulder permanent impairment was confirmed with an MMR date of February 12, 2021. The ARO determined that the quantum of the head injury permanent impairment was 25% with an MMR date of March 22, 2021. The NEL benefit for the worker's psychological impairment was confirmed at 30%. The ARO found that the worker was entitled to partial LOE benefits (not full LOE benefits) effective January 4, 2021. The worker was not entitled to LOE benefits from December 10, 2021 onward.
- [21] The worker now appeals the ARO decisions dated May 28, 2021 and January 3, 2023 to the Workplace Safety and Insurance Appeals Tribunal (WSIAT).

3. Issues

- [22] The issues under appeal were discussed at the hearing. The Worker's Representative submitted that the worker was requesting that the psychotraumatic entitlement be extended to include PTSD, major depressive disorder and anxiety disorder. The Worker's Representative was requesting a finding that the worker was totally impaired from a psychological perspective. The Worker's Representative withdrew the issue pertaining to the employer's SIEF award. The issue of the MMR date of February 12, 2021 for the right shoulder was withdrawn as well. We advised the Worker's Representative that where an appellant withdraws an issue, if the party wishes to appeal the issue at a later date, they must file a new appeal. Since the time limit will generally have expired, the party can only appeal if the party satisfies the Tribunal that a time extension should be granted. See *Practice Direction: Adjournments and Withdrawals*. The Worker's Representative confirmed that he understood and that this had been discussed with the worker. The issues were withdrawn.
- [23] The Panel noted that the worker was pursuing entitlement for a permanent impairment of the cervical spine and also entitlement for cervicogenic neck pain. Arguably, these are not two distinct issues since they both involve the neck which was injured during the November 21, 2017 accident. The Worker's Representative indicated that he is

pursuing a finding that the worker has a permanent neck impairment, which would include cervicogenic neck pain. The Worker's Representative agreed that essentially the issue is whether the worker has ongoing entitlement for the neck arising from the November 2017 work-related accident.

[24] In the issues under appeal, the worker seeks the following:

1. Entitlement to benefits for PTSD, anxiety disorder and major depressive disorder under the WSIB's psychotraumatic disability policy and an increase in the NEL quantum currently rated at 30%.
2. A finding that the worker is totally impaired from a psychological perspective.
3. Entitlement to benefits for a permanent impairment of the cervical spine which includes cervicogenic neck pain.
4. A finding that the appropriate MMR date for the worker's head injury is August 28, 2020 (rather than March 22, 2021) and that the worker is entitled to a higher NEL quantum for the head injury, currently rated at 25%.
5. A finding that the surface cleaning job offered by the employer on December 14, 2020 is not suitable.
6. Entitlement to full LOE benefits from January 4, 2021 and from December 10, 2021.

4. Outcome

[25] We find as follows for the reasons set out below:

1. The worker does not have entitlement to PTSD, anxiety disorder and major depressive disorder under the WSIB's psychotraumatic disability policy. An increase in the NEL quantum currently rated at 30% is not warranted.
2. The worker is not totally impaired from a psychological perspective.

3. The worker has entitlement for a permanent impairment of the cervical spine which includes cervicogenic neck pain.
4. The appropriate MMR date for the worker's head injury is August 28, 2020 (rather than March 22, 2021). The worker is not entitled to a higher NEL quantum for the head injury, currently rated at 25%.
5. The surface cleaning job offered by the employer on December 14, 2020 is not suitable.
6. The worker has entitlement to full LOE benefits from January 4, 2021 and from December 10, 2021, subject to statutory reviews.

5. Law and policy

- [26] Since the worker was injured in 2017, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA), applies to this appeal. All legislative references in this decision refer to the WSIA, as amended, unless otherwise stated.
- [27] Decisions of the Workplace Safety and Insurance Appeals Tribunal (WSIAT) apply the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance (*Decision No. 280*, 1987 CanLII 1996 (ON WSIAT)). It does not need to be the only contributing factor (*Decision No. 915*, 1987 CanLII 1258 (ON WSIAT)).
- [28] The standard of proof in workers' compensation proceedings is the balance of probabilities as modified by the benefit of the doubt provisions in the WSIA (*Decision No. 2096/18R*, 2019 ONWSIAT 1482). As stated in section 124(2) of the WSIA, the benefit of the doubt is resolved in favour of the claimant where it is not practicable to decide an issue because the evidence for and against it is approximately equal in weight.

6. Analysis and conclusion

[29] The worker provided testimony at the hearing. The Worker's Representative provided oral submissions, which were supplemented with his written submissions dated April 22, 2025. The Worker's Representative also provided written submissions after the hearing regarding the NEL quantum of the worker's psychotraumatic disability. The Panel has considered these submissions, the documentary evidence and the worker's testimony in reaching our conclusions.

a. Entitlement to PTSD, general anxiety disorder and major depressive disorder under the WSIB's psychotraumatic disability policy

[30] We find that the worker does not have entitlement to benefits for PTSD, general anxiety disorder and major depressive disorder.

[31] The worker underwent a psychological assessment, conducted by Dr. Fiati, psychologist. In the report dated May 14, 2018. Based on the results of the assessment, the worker was diagnosed anxiety, adjustment disorder, depression and Posttraumatic Stress Disorder. Psychological therapy was recommended to address these conditions.

[32] It was noted in subsequent reports from Dr. Fiati, for example in the report dated August 31, 2018, that the worker continued to report a presence of PTSD symptoms and found these symptoms emotionally draining.

[33] Temporary entitlement to benefits for Depression, Anxiety and PTSD was allowed under the psychotraumatic disability policy by the WSIB on May 17, 2019. On-going entitlement was to be reviewed in the future.

[34] While Dr. Fiati indicated the worker had presence of PTSD symptoms, during the September 24, 2018 Neurology Specialty Program assessment the worker denied symptoms of PTSD. He reported having some anxiety which felt like a panic attack occasionally.

[35] The worker was assessed on December 12, 2018 by psychiatrist, Dr. Razmy, and again the worker denied symptoms of PTSD. The worker was diagnosed with adjustment disorder and mood disturbance.

- [36] The Neurology psychology assessment report, based on assessments on April 9, 10, and May 6, 2019 found that the worker was reporting PTSD-like symptoms which had arisen due to perceived mistreatment by his employer. It was reported that the worker had adjustment disorder with work/behavioural inhibition, somatic preoccupation, episodic emotional discontrol, social withdrawal, apathy/anergia, depression and anxiety.
- [37] The worker was assessed again on July 30, 2019. The Specialty Clinic consultation assessment report indicated that the worker denied PTSD symptoms.
- [38] We acknowledge that Dr. Fiati, the worker's treating psychologist, in the report dated May 14, 2018, indicated that the worker had symptoms consistent with depression, anxiety disorder and PTSD (as well as chronic pain disorder and insomnia). Dr. Fiati provided this opinion on the basis of the post-traumatic stress disorder symptom scale, where the worker reported depression, irritability, apathy, increased anxiety especially when driving, difficulties coping with pain, physical limitations, persistent sleep disturbances, fatigue, recurrent and intrusive thoughts about the accident and nightmares. Dr. Fiati continued to diagnose the worker with PTSD based on the worker's responses to the PTSD check list, for example, in the report dated March 27, 2020.
- [39] It appears to the Panel that the diagnosis of PTSD was made largely on the basis of the worker's response to the PTSD checklist. However, the checklist includes symptoms such as difficulty coping with pain, fatigue and sleep disturbance. These can arguably be symptoms of other mental health conditions, such as adjustment disorder. While it appears that Dr. Fiati reviewed the specialty clinic reports as part of her evaluation of the worker for the report dated August 24, 2021, she did not address the psychological assessments which indicated that the worker reported no symptoms of PTSD such as flashbacks, avoidance behaviours or intrusive memories of the accident to the specialty clinic clinicians. For this reason we give the opinion of Dr. Fiati less weight than the Specialty Clinic clinicians who evaluated the worker.

- [40] We note that the specialty clinic reports confirmed that the worker had symptoms of anxiety and depression and some PTSD-type symptoms mainly related to interpersonal conflict with the employer, but that these were part of the worker's compensable adjustment disorder. The Panel's decision to deny entitlement for general anxiety and depressive disorder is unrelated to the worker's entitlement under this claim for symptoms of anxiety and mood that are part of the worker's compensable adjustment disorder. The matter of the worker's compensable adjustment disorder is not an issue before this Panel and we make no findings that would disturb or vary the worker's entitlement in that respect.
- [41] We give more weight to the specialty clinic assessment reports, as outlined above, because the assessments were multidisciplinary and comprehensive. The Neuropsychology assessment of April 9, 10, and May 6, 2019, for example, took place over three days and involved a comprehensive review of the prior reports pertaining to the worker's concussion and psychological condition. The assessment involved a mental status examination, behavioural observations and a battery of tests which pertained to the worker's cognitive and psychological function. The tests were interpreted by a psychometrist and by Dr. Fulton who is a clinical neuropsychologist. We find that as a neuropsychologist, Dr. Fulton has the experience and training to provide an accurate diagnosis of the worker's psychological condition which arose as a result of the worker's concussion. While Dr. Fiati provided psychological treatment to the worker, we find that she does not have a neurology background and her assessments did not appear to be as comprehensive as the ones performed by the specialty clinic. For this reason we give more weight to the specialty clinic assessments and resulting opinions than to the opinion of Dr. Fiati.
- [42] There is no dispute that the worker had symptoms of depression, anxiety and, as reported in the 2019 psycho-neurology assessment report, PTSD. However, based on the reasons outlined above, we accept the worker's diagnosis was that of "adjustment disorder with work/behavioural inhibition, somatic preoccupation, episodic emotional discontrol, social withdrawal, apathy/anergia, depression, anxiety, some PTSD-like symptoms, financial strain, and loss of sense of self-efficacy." We find that these

symptoms are part of the worker's adjustment disorder. The worker is not entitled to benefits for separate diagnoses of major depressive disorder, anxiety and PTSD.

b. Should the worker's NEL award for psychotraumatic disability be higher than 30%?

[43] We find that the worker's permanent, psychological impairment was rated correctly at 30%.

[44] The Worker's Representative submitted that the quantum of the worker's NEL benefit for psychotraumatic disability ought to be 35-45%, the mid to top end of the Class 3 moderate impairment (20-45%) category, based on Dr. Fiati's reports that are dated near the MMR dated of July 22, 2021. According to the March 27, 2020 report, the worker was irritable, tense/nervous, sad/depressed, angry, frustrated, fatigued and unable to cope. The worker had low energy, less interest in previously enjoyed activities and changes in appetite.

[45] In the September 13, 2021 report, Dr. Fiati indicated that the worker was severely depressed and anxious. The worker identified noise and light sensitivity and indicated that he refrained from going to social events.

[46] The Worker's Representative submits that these are features of a higher level of the Class 3 level of impairment.

[47] According to Operational Policy Manual (OPM) Document No. 18-05-11 "Assessing permanent impairment due to mental and behaviour disorders," (Policy 18-05-11) the Class 3 (20-45%), moderate impairment category is described as follows:

Impairment levels compatible with some but not all useful function

There is a degree of impairment to complex integrated cerebral functions such that daily activities need some supervision and/or direction. There is also a mild to moderate emotional disturbance under stress.

In the lower range of impairment the worker is still capable of looking after personal needs in the home environment, but with time, confidence diminishes and the worker becomes more dependent on family members in all activities. The worker demonstrates a mild, episodic anxiety state, agitation with excessive fear of re-injury, and nurturing of strong passive dependency tendencies.

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

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

- [48] As outlined above, the higher range of the Class 3 category is characterized by moderate anxiety, a deterioration in family adjustment, severe noise intolerance and phobic or bizarre behaviour patterns. Workers whose impairment falls in the top end of the Class 3 category are frequently home or roombound.
- [49] We find that worker's impairment generally does not fit these higher range criteria. We find that the worker is not homebound or roombound. The worker testified that he sees his children almost daily. He drives to his girlfriend's house or his children come to visit. He does some cooking (albeit slowly and with some difficulties). The worker leaves his house for short walks. This is consistent with the information he provided to the neurology program clinicians on April 21 and 22, 2021. The worker's typical day during this period was described as follows:

Typical day/Functional Status:

- Wakes up, get ready in the morning
- Eat breakfast (likely cereal)
- Home exercises for shoulders and back, may watch some TV, may talk with his mom/sister
- May organize what he will eat for lunch (i.e. sandwich)
- will spend time with daughters in the afternoon
- He reports he tries to help his daughter with online school during the day
- During the day he is typically surrounded by family
- He reports his daughters and girlfriend live in a different home. His daughters are 7 years old and 1.5 years old

- His mom and girlfriend assist with laundry and cleaning.
- He reports he assists with groceries, but is only able to lift lighter loads due to difficulty lifting/headaches. His dad will assist with heavier items.
- He says he will make simple meals such as cereal, soups or sandwiches however his mom or girlfriend will primarily make meals
- He states his mom will do the finances as "things can be overwhelming for me"

- [50] As outlined above, in a report authored three months before the MMR date for psychotraumatic disability, the worker continued to have a relationship with his family, including his girlfriend, parents and children. He stated that he would make simple meals, watch TV and help with online school as much as he could. The evidence does not support that the worker is homebound or roombound and he is able to perform some tasks around the home. The evidence does not support that he exhibits bizarre behaviour.
- [51] We acknowledge that the August 28, 2020 Neurology Specialty clinic report indicates that the worker has noise sensitivity and that his headaches are aggravated by noise. It does not appear, however, that this noise sensitivity relates to the worker's psychological impairment; rather, it relates to his concussion and headaches.
- [52] A number of the worker's limitations, for example, helping with heavier groceries, or being noise sensitive, are due to the worker's headaches, rather than his psychological condition.
- [53] In the report dated August 24, 2021, Dr. Fiati indicated that the worker reported fatigue, sleep dysfunction and that he was easily irritated. These symptoms however were described as characteristic of a concussion injury rather than a psychological impairment.
- [54] The worker has a NEL award for his concussion (migraines), back and right shoulder. We note a number of the worker's limitations are due to these impairments and it would not be appropriate to consider these limitations twice, for example, under the concussion and psychotraumatic NEL award and duplicate the worker's permanent impairment benefit.

- [55] When considering the criteria in Category 3 of Policy 18-05-11, we find that the worker does not meet the higher end of this category. We find that 30% is the appropriate rating for the worker's NEL for psychotraumatic disability.

c. Is the worker totally impaired from a psychological perspective?

- [56] We find that the worker experienced challenges with his relationship with the employer and this was a barrier to return to work with that employer. The worker, however, is not completely impaired from a psychological perspective.
- [57] The Worker's Representative has submitted that the worker is totally impaired due to his psychological condition. In doing so he has relied on the December 20, 2018 Neurology Specialty Program psychiatric assessment by Dr. Razmy.
- [58] As part of this assessment, the worker reported that his mood has been depressed with fragmented sleep and anhedonia. The worker's energy, concentration and appetite were poor. The worker was not homicidal, suicidal or manic. He did not have hallucinations or delusional thinking. He reported no symptoms of obsessive-compulsive disorder or PTSD. He experienced some anxiety with occasional panic attacks. The worker was cooperative and had a normal rate, rhythm and volume of speech. His thought form was coherent. He indicated that he was appreciative of the help he had received. There were no perceptual disturbances. His insight and judgment were fair.
- [59] The report indicated that the worker reported a hostile work environment and was not interested in return to work.
- [60] Dr. Razmy provided the following diagnosis:

His current constellation of symptoms is suggestive of a diagnosis of Adjustment Disorder With Mood Disturbance.

Importantly, there are no safety concerns with respect to suicidal or homicidal ideation. I do not believe at this particular juncture that any antidepressant medications are indicated but continued psychotherapeutic support in the form of cognitive behavioural therapy should be considered. I do believe that ongoing funding for continued psychotherapy in this case would be beneficial

- [61] Dr. Razmy indicated that with continued psychotherapy the worker would continue to show good improvement. However, return to work may not be possible due to the work environment which the worker described as toxic. However, Dr. Razmy indicated that a return to modified duties with a different employer could be possible.
- [62] At the hearing, the worker explained that after the accident the company nurse and safety manager kept calling him. At one point, when the worker did not answer his phone, they left a letter at his home. The worker stated this made him feel uncomfortable. The worker testified that when he attempted a return to work and was not feeling well he was told not to leave. He testified that he was made to spend the day in the nurse's office. He stated that he was accused of fraud and that the employer asked that the WSIB conduct surveillance on him.
- [63] While Dr. Razmy acknowledged the conflict between the employer and worker, and that this was a barrier to return to work, we find that Dr. Razmy did not indicate that the worker had psychological restrictions or that his psychological condition totally impaired the worker. Rather, Dr. Razmy indicated that modified work may be possible with another employer.
- [64] The worker underwent a comprehensive neuropsychological assessment on June 5, 2019 by Dr. Fulton, clinical neuropsychologist. No return to work was recommended. The Panel notes that there were no psychological restrictions provided, rather the issues with the employer were raised as a barrier to return to work.
- [65] Dr. Fulton recommended that the worker work on strategies to help his symptoms of anxiety, depression, low mood, sleep and hopelessness. The worker continued to have issues with anger management. Dr. Fulton indicated that the worker was to work on his focus, concentration, memory and processing speed in the next six months. He was to take breaks when overwhelmed. He was to avoid situations where he would be required to respond rapidly. Tasks were to be familiar and routine (no complex problem solving and multi-tasking). It was recommended that there should be no performance of tasks where attention to details for safety was required. These restrictions were to be in place for six months.

- [66] While Dr. Fulton recommended no return to work at the time of the June 5, 2019 report, the report did not indicate that the worker was totally impaired due to his psychological condition. Rather, there were a number of factors which were barriers to return to work. Some were psychological (low mood, anger, anxiety), others related to the interpersonal tension between the employer and worker, others were cognitive in nature (difficulty with focus, concentration and memory). Dr. Fulton recommended certain restrictions for the worker for a duration of six months.
- [67] We find there is a distinction in the term restriction versus limitation or barrier. A restriction refers to an activity that a doctor has advised against performing because of the risk of aggravating a person's symptoms and there is risk of harm to the individual. A limitation refers to an activity that cannot be performed due to a lack of physical or psychological capacity.
- [68] Based on the evidence before us, we have come to the conclusion that the worker has no psychological restrictions. However, it is evident that the worker has limitations caused by his psychological condition such as decreased energy, concentration difficulties, decreased temper and impulse control to name a few examples.
- [69] The question before the Panel is whether the worker was partially impaired from a psychological perspective, or whether the worker was completely impaired. In the report dated September 13, 2021, Dr. Fiati indicated that the worker's depression and emotional functioning negatively impacted the worker's functional abilities. Dr. Fiati also identified other factors, such as poor judgement and cognitive impairment, which made the worker unable to work. However, the Panel finds that the weight of the evidence, including the medical evidence, indicates that the worker was not fully impaired from a psychological perspective alone and we did not find, nor were we directed to specific psychological restrictions. For these reasons, we find that the worker was partially impaired from a psychological perspective. While the worker had psychological limitations which had to be considered with regard to return to work, he did not have any specific psychological restrictions.

d. Does the worker have entitlement for a permanent impairment of the cervical spine?

- [70] We find that the evidence before us supports that the worker has a permanent impairment of the cervical spine as a result of the November 2017 work-related injury, which includes the symptom of cervicogenic pain. The worker has entitlement to a NEL determination for the cervical spine.
- [71] The ARO, in the decision dated May 28, 2021, found that the worker's cervical strain fully resolved as of June 11, 2018. This date corresponded to a mild traumatic brain injury (MTBI) follow-up assessment narrative report, which found that the worker had a normal physical examination. The diagnosis for the neck provided was cervical sprain/strain (full functional recovery). The Panel notes, however, that this report indicated that the worker continued to have residual neck discomfort. The clinicians recommended that the worker participate in a self-directed exercise program focused on advanced/progressive neck strengthening, stretching and stabilization exercises. The worker was also provided with restrictions from a MTBI/neck perspective which included lifting/pushing over 20lbs and avoiding repetitive bending and twisting. The Panel interprets the report from the MTBI follow up assessment in June 2018 to mean that the worker's neck condition had not fully resolved.
- [72] Shortly after this assessment, Dr. Teelucksingh, the worker's family doctor, completed a Functional Abilities Form dated June 28, 2018, which identified restrictions for the worker's neck including no bending/twisting or repetitive movement.
- [73] The worker returned to work in July 2018 and correspondence in the case materials indicates that he continued to report neck pain to the Case Manager and Return to Work Specialist, particularly when he did tasks that involved looking down at paperwork and keyboarding.
- [74] The worker underwent a WSIB Neurology Specialty Clinic assessment on October 3, 2018. The report indicated that the worker's neck pain was present most of the time, ranging in intensity from 8-9/10 with an average of 5/10 on a visual analog scale. It was reported that the worker's neck pain was aggravated by lifting, reaching,

prolonged positions and repetitive movement, particularly repetitive neck flexion and extension.

- [75] On October 9, 2018, the worker participated in a cognitive work capacity assessment. This report also identified that the worker reported neck pain while performing heavy pushing, pulling, gripping and carrying. Lifting with his upper extremities was limited by right shoulder and neck pain.
- [76] The worker also continued to report neck pain to his family doctor as noted in the clinical notes of Dr. Teelucksingh on April 23, 2019, May 14, 2019, June 12, 2019, and July 17, 2019.
- [77] The July 10, 2019 Neurology Specialty Program follow up report recommended neck range of motion and strengthening exercises as well as limitations against repetitive neck movements and sustained positioning of the neck.
- [78] An August 8, 2019 physiotherapist extension request identified ongoing cervical pain and stiffness since first treatment in December 2017. The request identifies cervical strain/sprain flexion and left side flexion and rotation limited by 10% and extension limited to 30% due to pain and stiffness.
- [79] The worker continued to report neck pain to his family doctor and to his physiotherapist in 2019.
- [80] The worker underwent an occupational therapy functional assessment on January 2, 2020, and it noted the worker's neck pain, which was aggravated by prolonged sitting and turning movements, and attempts to lift items such as groceries. The pain restricted the worker's range of motion.
- [81] An August 28, 2020 follow up neurology report indicated that the worker had neck, right shoulder and upper back pain. Dr. Cohodarevic indicated the worker had achieved a marginal functional recovery despite the passage of time and treatment. It was anticipated that some residual symptoms would persist on a long-term basis. A diagnosis of sprain/strain with residual neck pain and hypomobility was provided. It was

anticipated that at the end of treatment the worker will have reached MMR for the cervical strain with some symptoms and mild residual functional limitations.

- [82] On October 16, 2020, the Upper Extremity Specialty Program comprehensive report indicated that the worker continued to report neck pain aggravated by extension, awkward positions, prolonged positions, repeated flexion/extension and use of the right upper extremity. The worker had an abnormal range of motion with 35 degrees flexion, 40 degrees of extension with sharp pain in the neck, 50 degrees right and left rotation with neck tightness at end range.
- [83] On October 30, 2020, Dr. Teelucksingh completed a medical report for the worker's CPP disability application. This report identified the worker's neck pain as an impairment, commencing at the time of the work-related accident.
- [84] The December 1, 2020 Back and Neck Specialty Program comprehensive assessment report indicated that the worker had intermittent posterior neck pain, rated as 7/10 on the NPRS (numeric pain rating scale) on average. Aggravating factors included extension, awkward positions, prolonged positions, repeated extension/rotation and use of the right upper extremity. The worker had an abnormal range of motion with extension at 25 degrees with sharp central neck pain, right and left side flexion at 35 degrees and right rotation at 50 degrees with neck tightness at end range. Treatment was recommended to improve the worker's range of motion and the worker was able to work at a sedentary/limited PDC level with respect to his cervical and lumbar spine.
- [85] Subsequent assessments continued to document the worker's neck pain and range of motion deficits including the January 4, 2021 Back and Neck Specialty Program treatment progress report, the February 12, 2021 Upper Extremity Specialty Program, the February 13, 2021 Neurology Specialty Program, the March 3, 2021 and March 23, 2021 Back and Neck Specialty Program reports.
- [86] In the February 13, 2021, the Neurology Specialty Program assessment report the work-related accident was outlined and the report indicated that the worker's ongoing

neck pain (and headache) was due to the accident. The diagnosis included posttraumatic cervicogenic neck pain and headache.

[87] The worker testified that he had no neck pain prior to his 2017 work-related accident. This is also confirmed in the worker's employment health file. The evidence before us indicates that the worker developed neck pain as a result of the work-related injury, as recognized by the WSIB. The worker continued to report neck pain after June 11, 2018, the date the WSIB determined he had reached MMR without a permanent impairment. After this date the worker reported ongoing neck pain to his Return-to-Work Specialist, Case Manager and family doctor. The comprehensive assessments pertaining to the worker's neck, as outlined above, indicated the worker had a range of motion deficit in the cervical spine and continued to report neck pain especially with certain types of activities.

[88] While the worker has requested entitlement to a permanent cervical impairment and post-traumatic cervicogenic neck pain, the Panel finds that these are not two distinct impairments. Rather, the Panel finds that the worker has a permanent neck impairment as a result of the work-related accident, and this impairment includes both neck pain and a functional impairment. The neck pain itself is not an injury, rather it is the permanent neck strain that has resulted in cervical pain. Given the consistency and duration of the worker's neck symptoms, as well as, his range of motion limitations, the worker has a permanent neck impairment arising out of the November 2017 accident and he is entitled to a NEL determination.

e. What is the appropriate NEL quantum and MMR date for the worker's head injury?

[89] The evidence before us supports that the correct quantum of the worker's head injury is 25% and the correct MMR date is August 28, 2020.

[90] The ARO decision dated January 3, 2023 found that the worker's NEL award for his permanent head impairment (concussion) was 25%, rather than 15%. Subsequently, on January 19, 2023, a NEL determination outlined the worker's entitlement to a 25% NEL award for "concussion: post-traumatic headache transitioned to chronic migraine." The

NEL evaluation stated that post-concussive headaches are rated under the category of central and spinal nervous system disorder. The 25% rating corresponds to moderate interference with daily living. The MMR date for the worker's impairment was determined to be March 22, 2021. The NEL evaluation noted that the Neurology Specialty Program reports from February 2021 indicated that the worker had headaches 4 to 5 times per week (20 to 25 days per month). The headaches lasted all day and were both intense and sharp, rated 10/10 on a visual analog scale. Aggravating factors were bright lights, sounds and strong smells. Relieving factors were retiring to a quiet, dark room. The worker had failed a number of migraine medications including a high dose of topiramate and a number of triptans. The reports noted that the worker's headaches prevented him from being active at all and produced photophobia, hyperacusis (sensitivity to normal sounds) and smell sensitivity. The headaches contributed to the worker's chronic pain and affected his memory, concentration and focus.

[91] AMA Guides Chapter 4.1a titled, "the Brain," Episodic Neurological Disorders states:

Episodic Neurological Disorders

Episodic neurological disorders include, but are not limited to, syncope, epilepsy, and the convulsive disorders. Criteria for evaluating such impairments are based on the frequency, severity, and duration of attacks as they affect the patient's performance of the activities of daily living.

These criteria are:

Description

1. An episodic neurological disorder is of slight severity and under such control that most of the activities of daily living can be performed 5-15%
2. An episodic neurological disorder is of such severity as to interfere moderately with the activities of daily living. 20-45%
3. An episodic disorder is of such severity and constancy as to limit activities to supervised or protected care or confinement. 50-90%
4. An episodic neurological disorder is of such severity and constancy as to totally incapacitate the individual in terms of daily living. 95%

[92] The ARO determined that the worker's impairment fell in the 25% range.

- [93] The Worker's Representative submits that the appropriate MMR date for the worker's concussion (post-traumatic headaches transitioning to chronic migraine) is August 28, 2020, the date of the Neurology Specialty Program follow-up assessment report. The Worker's Representative argues that subsequent progress reports do not indicate that the worker's headache severity changed after this date.
- [94] The Panel acknowledges that during the August 28, 2020 Neurology Specialty Clinic assessment it was indicated that the worker was nearing rather than at MMR and functional improvement and recovery was possible for the worker's migraines. However, subsequent reports indicate that the worker's condition did not improve with the usual migraine treatment and neurological intervention would not have a significant impact. On October 21, 2020, the Neurology Specialty Clinic neurologist indicated that some improvement could be possible with nerve block/Botox therapy. The worker chose not to pursue this treatment.
- [95] The August 28, 2020 Neurology Specialty Clinic report confirmed that the worker had daily chronic headaches/migraine, dizziness, lightheadedness, decreased balance, photophobia, hypersensitivity to loud noises, fatigue, and cognitive/memory difficulties. These symptoms did not improve despite treatment. Considering the medical reporting in the case materials after the August 28, 2020 report, there was no reported change in the worker's concussion symptoms and headaches.
- [96] According to Policy 11-01-05, "Adjudication Principles," Maximum Medical Recovery means that plateau in recovery has been reached and it is not likely that there will be any further significant improvement in the work-related injury/disease.
- [97] We find that the worker's permanent head injury reached MMR on August 28, 2020 as there was no further significant improvement in the worker's concussion after this date.
- [98] Turning to the issue of the quantum of the worker's impairment, which was determined to be 25% by the ARO, we find that 25% is the correct NEL rating for the worker's concussion impairment. This level of impairment corresponds to the following category in the AMA Guides Chapter 4.1a titled, "the Brain," Episodic Neurological Disorders:

2. An episodic neurological disorder is of such severity as to interfere moderately with the activities of daily living. 20-45%

- [99] The Worker's Representative submitted that the worker's concussion symptoms included chronic headaches approximately 20 to 25 days per month, as well as cognitive issues of decreased memory, concentration and focus, photophobia, fatigue, dizziness, lightheadedness, decreased balance, hyperacusis and smell sensitivity. The Worker's Representative submits that at the date of MMR the worker's symptoms reflected an impairment in the upper end of category 2 (45%).
- [100] The Worker's Representative also referred to the CPP disability form completed by the worker which indicated that the worker had a cognitive impairment and was unable to problem solve, multi-task, and was unable to be in light or around noise. The worker had incapacitating headaches.
- [101] However, considering the evidence in the Neurology Specialty Program report dated August 28, 2020 we find that the worker's concussion symptoms moderately interfered with function. We find that the worker's impairment falls at the lower end of Category 2, as was determined by the ARO. The August 2020 report indicated that the worker is able to prepare meals, albeit slowly and with some difficulty (e.g. he burns things easily), the worker makes himself breakfast, showers and gets dressed. While these activities take longer, he is able to do them. The worker is able to go for short walks.
- [102] The April 22, 2021 Neurology Specialty Program report indicated that while the worker is aggravated by noise and light, he is able to watch TV for 30 minutes to an hour. He does not wear sunglasses at home. The worker is able to drive and drives to see his children at his girlfriend's house regularly. His children also come over to spend the night at his home at times. In the Panel's view, driving is a complex activity requiring attention, planning, observation and multi-tasking. The worker's continued ability to drive indicates that he is not at the higher end of Category 2. The worker also reported playing with his children and helping them with homework (which he found somewhat difficult). The worker testified that he sometimes meets with teachers as needed on the phone. He can attend school events with difficulty. It appears that despite being exposed to light and noise, the worker is able to carry out these activities.

[103] We acknowledge that the worker reported to his clinicians having headaches four to five times per week. He indicated that when present, his headaches were there all day and prevented him from being active at all. However, this evidence is at odds with the worker's testimony that he sees his children virtually every day, including that he drives to his girlfriend's house to see them and that he spends time with them and takes care of them (with the support of his parents and girlfriend).

[104] Further, the Panel must consider that in addition to his concussion impairment, the worker has a permanent psychological impairment which affects his ability to function, including his concentration, sleep and fatigue. It would not be appropriate to consider and compensate these types of impairments equally under both the head injury and psychotraumatic disability NELs as this would result in the worker being compensated for each impairment twice. As such, we find that the evidence supports that the worker's NEL rating for the head injury was correctly determined to be 25%.

f. Was the surface cleaning job offered by the employer on December 14, 2020 suitable?

[105] Policy 19-02-07, "RTW Overview and Key Concepts," and 19-02-01, "Work Reintegration Principles, Concepts and Definitions," defines suitable work as post-injury work (including the worker's pre-injury job) that is safe, productive, consistent with the worker's functional abilities, and that restores the worker's pre-injury earnings to the greatest extent possible.

[106] Considering the totality of the worker's impairments, we find that the surface cleaning job offered by the employer on December 14, 2020 was not suitable.

[107] A return to work meeting was held on December 14, 2020. The WSIB accepted limitations as set out in the August 20, 2020 Neurology Specialty Program report.

[108] The limitations, were as follows:

- Walking- 100-200 metres
- Standing- 15-30 minutes
- Sitting- Full abilities

- Stair climbing- Full abilities (rare)
- Lifting floor to waist- 0-5kg (rare)
- Lifting waist to above shoulder- 2lbs (rare)
- No ladders
- Front Carry- 0-5kg
- Self pacing and micro-breaks
- No working at heights (ladders and step stools) due to dizziness

[109] At the time of the December 2020 return to work meeting, restrictions of bending/ twisting, repetitive movement for the back and neck and avoidance of repetitive or awkward and sustained positioning of the neck were not accepted as there was no ongoing entitlement for the neck. However, in this decision we have granted ongoing entitlement for the neck, and as such these restrictions would have to be considered in return to work planning.

[110] Further limitations outlined in the return-to-work meeting memo included:

- Able to concentrate for some of the work day
- Decreased ability to remember information and apply to work tasks
- Decreased ability to think analytically during work tasks.
- Able to perform more than one task with clear instructions on how each task should be performed with increased time; may require repetition of instructions.
- May achieve greater success if working on only one task at a time.
- Poor ability to work quickly or under time pressure
- Able to plan and organize a limited amount of work tasks and materials
- Benefits from increased time to adapt to changing demands; may benefit from support as required
- Requires ability to leave work area for breaks
- Able to carry out tasks independently once instructions are understood, however would benefit from support as required i.e. repetition of verbal instructions
- Working with NOC limited

- Tasks should be routine and familiar in nature (no complex problem solving, multi-tasking)

- Allow use of ear and eye protection as required (encouraged to gradually expose self to triggers)

- Allow rest in a quiet room

- Allow extra time for tasks

- Allow use of memory aid as required

It would be reasonable for [the worker] to attempt working 2 hours, 3 days per week (not consecutive) and increase by 1 hour every 2 weeks

- Avoid situations where rapid response is required

- No walking on uneven ground (due to dizziness)

[111] The Upper Extremity Specialty Report dated October 16, 2020 provided the following restrictions for the worker's right upper extremity which were considered in the return to work meeting:

- Lifting floor to shoulder - up to 5lbs

- Lifting above shoulder - none

- Pushing/Pulling - none

- No ladders

- Bending/twisting repetitive movement - avoid repetitive movements with the right UE

- Able to perform duties within the sedentary PDC level

- Avoid overhead activity and away-from-body-reaching

[112] The surface cleaning job was reviewed at the return to work meeting. The job involved using a paper towel and small squirt bottle. Standing and walking was required to clean surfaces in the workplace. It was noted that the job could be performed with the left hand. The job was described as self-paced and the worker was able to take micro breaks as needed. The worker could wear eye and ear protection as needed. A quiet room was available as needed. The worker was not required to interact with others to perform the job. A checklist memory aid was to be provided of surfaces that required cleaning. The employer indicated that this job was being completed by cleaners on site

twice daily, and given the COVID-19 pandemic the employer wished to increase the frequency of the cleaning.

[113] The gradual return to work plan would commence with two hour shifts, three times per week on non-consecutive days, to allow for rest in between working days.

[114] The worker expressed concerns with the modified job in light of his ongoing symptoms and restrictions.

[115] A January 12, 2021 return to work memo outlined the hours and dates of the return to work plan. The modified work was to start on January 4, 2021 (2 hour shifts, 3 days per week, on non-consecutive days) with the hours of work increasing gradually until the week of June 7, 2021 (the last week of modified duties before the worker returned to full hours).

[116] We find that the surface cleaner job was not suitable for the worker for the following reasons.

[117] First, neuropsychologist Dr. Fulton, did not recommend a return to work on August 28, 2020. This was due to both conflicts in the work environment but also due to the worker's cognitive and emotional functioning. While the surface cleaning job was offered several months after this report, we find the worker continued to experience regular headaches, cognitive and psychological issues which were barriers to return to work.

[118] Second, in this decision we have determined that the worker has ongoing entitlement for a cervical spine impairment. The worker's restrictions for the cervical spine included bending/twisting, repetitive movement for the back and neck, avoidance of repetitive or awkward and sustained positioning of the neck. We find it likely that the surface cleaning position would involve these types of movements since it involved cleaning doors, tables, faucets, desk top shields and armchairs. Accordingly, the surface cleaning position was not likely suitable for the neck restrictions.

- [119] Third, the November 20, 2020 Upper Extremity Specialty Program report indicated that the worker had restrictions with regard to bending/twisting and repetitive movement with the upper extremity. It was noted that the work duties should be within the sedentary PDC level, the worker should avoid overhead activity and reaching away from the body. The worker was not to lift more than 2.5 pounds. Sedentary work is defined as follows:

Occasional lifting up to 10lbs maximum; occasionally exerting up to 10 lbs of force or frequently exerting a negligible amount of force to lift, carry, push, pull or move objects such as dockets, ledgers or small tools. Sedentary level work primarily involves sitting but may also involve an occasional amount of brief walking & standing in order to carry out job duties.

- [120] We find that the surface cleaning job was not sedentary in nature and as such it was not suitable for the worker. Even if the worker performed the wiping with the left hand instead of the right, the job would have required the worker to walk around the workplace to wipe surfaces and the worker would likely have to reach with his right hand to spray surfaces. Walking and standing were not occasional with the surface cleaning job, rather they were a key feature of the modified job. We find this likely that this would have exceeded the worker's functional limitations.
- [121] Finally, the worker has both a permanent brain injury and a permanent psychological condition. The worker has frequent headaches which are aggravated by noise, strong smells and light. While the return to work meeting notes indicate the worker was able to wear hearing protection and glasses the worker testified that when he first attempted modified work after his injury he found the bright lights, noise and interactions with people would make his migraines worse. He indicated that the production site was loud and there were lots of people around. The worker testified that the cafeteria where he was to clean is open to the main warehouse where there are conveyer belts, saws and HVAC lines. He stated that a blade chops materials every 30 seconds. The worker testified that foam air plugs do not eliminate the noise from the workplace and there is a constant hum and vibration which aggravates his concussion symptoms. The medical evidence in the case materials (see for example the March 23, 2021 Back and Neck Specialty Program assessment report) indicates that the worker has difficulty with memory, concentration and focus, especially when he experiences a migraine. We find

that this also would have made the modified work unsuitable given that the worker had to keep track of the areas and surfaces he cleaned.

[122] We accept the worker's testimony and find it likely this type of environment would have aggravated the worker's migraines, which are part of his permanent head injury impairment.

[123] We recognize that on February 1, 2021, Dr. Douen, neurologist, indicated that the worker could attempt modified work (2 hours a day, 3 days a week, not consecutive) from the perspective of his headaches with the restrictions set out in the return to work meeting. However, the Panel must consider the totality of the worker's compensable impairments and the related functional restrictions, not just the restrictions related to the worker's headaches. We find that the evidence before us supports that taking into consideration the totality of the worker's restrictions for his compensable injuries, the surface cleaner modified job offered by the employer in December 2020 is not suitable.

g. Does the worker have entitlement to full LOE benefits from January 4, 2021 and from December 10, 2021?

[124] We find that the worker is entitled to full LOE benefits from January 4, 2021 and from December 10, 2021, subject to statutory reviews.

[125] Policy 18-03-02, "Payment and Reviewing LOE Benefits (Prior to Final LOE Review)," explains the circumstances in which full LOE is appropriate:

If the nature or seriousness of the injury/disease completely prevents a worker from returning to any type of work, or if the worker is able to return to some form of work but the WSIB determines no suitable work is available, the worker is generally entitled to full LOE benefits providing the worker co-operates in health care measures and all aspects of the return-to-work (RTW) process, see 19-02-08, RTW Co-operation Obligations, 19-02-09, Re-employment Obligations, and 22-01-03, Workers' Co-operation Obligations.

[126] The WSIB has published an Adjudicative Advice Document entitled, "Practice Guidelines for Ordering LOE Benefit Arrears Under WSIA," dated March 1, 2002. This document is not binding on the WSIAT, but it provides a helpful framework for considering entitlement to retroactive LOE benefits and the WSIAT has recognized it as a persuasive authority (*Decision No. 995/10*, 2010 ONWSIAT 1370). This document

states that a worker is entitled to 100% or full LOE when no suitable employment has been offered and the worker is “making reasonable efforts to secure suitable employment or engaging in other activities (for example, active health care treatment) reasonably aimed at improving employability during the retroactive period.”

- [127] In the present appeal, we have found that no suitable work was available with the employer. The evidence before us supports that during the period that the modified work was offered the worker continued to receive treatment for his back, neck, upper extremity, psychological condition and concussion symptoms. As such we find that the worker was cooperating in health care measures. The worker attended the return to work meeting but did not attempt the modified job as he did not believe the job to be suitable given his compensable injuries and restrictions. We have found the modified work not to be suitable. For this reason, we find that the worker is entitled to full LOE benefits from January 4, 2021, the date that the modified duties were to begin, less any partial LOE benefits received during the time period and less and earnings.
- [128] On December 10, 2021 the employer terminated the worker due to “an unauthorized absence from work since January 4, 2021.”
- [129] The case law is not entirely consistent regarding the question of entitlement to LOE benefits after employment termination. Some Tribunal cases focus on whether the worker was terminated for reasons due to the compensable injury. If so, the worker is generally entitled to LOE benefits. If the termination is not related to the compensable injury, LOE benefits are denied (see for example, *Decision No. 2520/08/R*, 2010 ONWSIAT 546 and *1349/11*, 2011 ONWSIAT 1950).
- [130] Another line of decisions states that it is not enough to determine whether the injury played a role in the worker’s termination and whether there was an anti-worker animus. The emphasis in the second line of decisions is on whether following the termination, the injury continues to make a significant contribution to the worker’s wage loss. This line of analysis also considers whether the termination of the worker’s employment was an intervening event that breaks the chain of causation. (see for example, *Decision No. 690/07*, 2009 ONWSIAT 2087)

[131] *Decision No. 690/07* provides a description of this approach and the test that should be applied when considering entitlement to LOE benefits after termination:

[51] As we interpret the provisions of section 43 of the WSIA, determining entitlement to LOE benefits after a worker's employment has been terminated requires a two-step analysis: (1) Did the workplace injury continue to make a significant contribution to any continuing loss of earnings (ss. 43(1))? (2) To what extent did the worker remain disadvantaged in his ability to match his pre-injury earnings (ss. 43(2))?

[132] Recent Tribunal decisions have preferred the analysis found in *Decision No. 690/07* (for examples see *Decision No. 1682/13*, 2013 ONWSIAT 2591; *904/14*, 2014 ONWSIAT 1597; *822/22*, 2022 ONWSIAT 1563). This approach focuses on whether the ongoing loss of earnings after a termination continues to be "as a result of" the injury under section 43 of the WSIA. The question is whether after the termination the workplace injury is continuing to make a significant contribution to any ongoing loss of earnings.

[133] The worker testified that he declined the modified work offered because it was not suitable as a result of the work-related injuries and related functional impairments, and the Panel accepts this testimony. We note, for example, that Dr. Fiati's report dated August 24, 2021 indicated that the cumulative effect of the worker's cognitive and emotional impairments as a result of the work-related head injury prevented the worker from safely returning to work and effectively performing the modified duties offered. Further psychotherapy was recommended.

[134] We find that after the termination, the work-related injuries continued to make a significant contribution to the worker's ongoing loss of earnings. The worker has a 52% whole person NEL award, including for a traumatic brain injury and his symptom of migraines. The worker has a permanent work-related psychotraumatic disability, a permanent back and right shoulder impairment, and we have granted the worker ongoing entitlement for the cervical spine. We find that the functional limitations due to these work-related injuries are a significant barrier to the worker obtaining and sustaining employment. We further find that the worker's termination from employment in December 2021 was not due to any conduct of the worker that could reasonably be interpreted as having broken the chain of causation between the work injuries and the

worker's loss of earnings after his termination. The employer terminated the worker for not returning to work, at a job that the Panel has concluded was unsuitable. The worker's conduct did not break the chain of causation and was reasonable in the circumstances.

[135] As such the worker is entitled to full LOE benefits after his termination on December 10, 2021, subject to statutory reviews.

DISPOSITION

[136] The appeal is allowed in part as follows:

1. The worker does not have entitlement to PTSD, anxiety disorder and major depressive disorder under the WSIB's psychotraumatic disability policy. An increase in the NEL quantum currently rated at 30% is not warranted.
2. The worker is not totally impaired from a psychological perspective.
3. The worker has entitlement for a permanent impairment of the cervical spine which includes cervicogenic neck pain.
4. The appropriate MMR date for the worker's head injury is August 28, 2020 (rather than March 22, 2021). The worker is not entitled to a higher NEL quantum for the head injury, currently rated at 25%.
5. The surface cleaning job offered by the employer on December 14, 2020 is not suitable.
6. The worker has entitlement to full LOE benefits from January 4, 2021 and from December 10, 2021, subject to statutory reviews.

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

DATED: July 29, 2025

SIGNED: A. Kosny, K. J. Soden, Z. Agnidis