



# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## DECISION NO. 742/24

### BEFORE

C. Zehr: Vice-Chair  
R. G. Ouellette: Member Representative of Employers  
Z. Agnidis: Member Representative of Workers

### HEARING INFORMATION

**Date:** December 17, 2024  
**Location:** Toronto  
**Format:** Oral by videoconference  
**Post-hearing activity:** Completed on May 21, 2025

**DATE OF DECISION** August 19, 2025

**NEUTRAL CITATION** 2025 ONWSIAT 973

**DECISION(S) UNDER APPEAL:** Appeals Resolution Officer (ARO) D. Gowanlock decision dated January 29, 2021, and ARO M. Way decision dated August 19, 2022

### APPEARANCES

**For the worker:** B. Zevallos, Paralegal  
**For the employer:** In-house Counsel  
**Interpreter:** Not applicable  
**Tribunal Counsel Office:** Not applicable

## REASONS

### 1. Introduction

[1] The worker is appealing the decision of the Appeals Resolution Officer (ARO) of the Workplace Safety and Insurance Board (WSIB), dated January 29, 2021. The worker and employer are cross-appealing the ARO decision dated August 19, 2022. These decisions pertain to the worker's claim for a work-related injury to his right shoulder that he sustained in October 2009. The worker was also granted temporary entitlement for psychotraumatic disability for the diagnosis of Major Depressive Disorder (MDD).

[2] The AROs made the following findings:

1. The worker was denied initial entitlement for a neck injury.
2. The worker was denied entitlement for a permanent impairment related to his psychotraumatic disability.
3. The modified work of Escalator Check, which the employer provided in early July 2016, was not safe or suitable for the worker.
4. The worker was granted entitlement for a recurrence (i.e., worsening) of his right shoulder condition as of July 25, 2016.
5. The worker was granted entitlement for full Loss of Earnings (LOE) benefits from July 25, 2016 to November 15, 2017.
6. The worker was partially disabled and capable of a 20-hour work week.
7. The occupation of Customer and Information Services Representatives was a suitable occupation (SO) for the worker on a part-time basis.
8. The worker was entitled to partial LOE benefits as of November 15, 2017 to age 65 based on the earnings capacity of the minimum wage, the entry-level wage for the SO, at 20 hours per week.

## 2. Issues

[3] The issues under appeal are as follows:

1. The worker is seeking entitlement for a neck injury.
2. The worker is seeking entitlement for a permanent impairment and Non-economic Loss (NEL) award for psychotraumatic disability
3. The worker is seeking that the SO of Customer and Information Services Representatives be found unsuitable.
4. The worker is seeking entitlement for full LOE benefits from November 15, 2017 to age 65.
5. The employer is requesting that the worker's entitlement to partial LOE benefits from November 15, 2017 to age 65 be rescinded.

[4] In *Decision No. 742/24I*, 2024 ONWSIAT 889, this Panel determined that, in the event that the worker is granted initial entitlement for a neck injury, we may also consider the sequential issue of the worker's entitlement for a permanent impairment and NEL award for a neck injury.

## 3. Background

[5] The now 67-year-old worker, who had worked for the employer, a transit service, since 1998, was working as a Waste Management Operator, when, on October 19, 2009, he reported an injury to his right shoulder. The worker attributed his injury to the repetitive lifting of garbage bags into trucks and his increased workload on October 16, 2009 and over the subsequent days. The worker sought medical attention and was diagnosed with a sprain/tendonitis and a possible rotator cuff tear in the right shoulder. At the time of the injury, the worker also had a pre-existing condition, cerebral palsy (CP), which caused left-sided hemiparesis and limited use of his left arm.

[6] The worker filed a claim with the WSIB, and in November 2009, the worker was granted initial entitlement for a right shoulder injury. The worker initially remained off work and

received full LOE benefits until he returned to modified work on January 10, 2010, performing light janitorial work. The worker returned to his regular duties as a Waste Management Operator in June 2010; however, he stopped working again on December 6, 2010, citing a recurrence of his right shoulder injury. The WSIB granted the worker entitlement for the recurrence and full LOE benefits from December 6, 2010 to March 29, 2011, at which time the worker returned to alternate duties.

- [7] The worker underwent surgery for his right shoulder condition on July 21, 2011, and on January 30, 2012, the worker returned to modified duties. In June 2012, the employer offered the worker an opportunity to perform work as a Reservationist in the department that provides public transit for persons with disabilities; however, the worker stopped work on July 16, 2012, citing another flare-up of his right shoulder condition due to the computer work required for this position.
- [8] In September 2012, the worker was granted an 11% NEL award for the permanent impairment in his right shoulder, which had been diagnosed as a right shoulder Superior Labrum Anterior to Posterior (SLAP) tear, bursitis and rotator cuff tendinopathy. Noting the worker's permanent restrictions, the employer offered the worker a transitional work program, and the worker gradually returned to work, performing a temporary inventory position. By November 2013, he was performing modified transit vehicle cleaning duties. The worker reported a further worsening of his right shoulder condition in May 2014, but he eventually returned to the transit vehicle cleaning positions in August 2014. The worker resumed full-time work hours as a transit vehicle cleaner in September 2014, at a wage loss. As a result, the worker received partial LOE benefits from the WSIB for his ongoing loss of earnings.
- [9] The final review of the worker's LOE benefits, in accordance with section 44(2) of the *Workplace Safety and Insurance Act, 1997* (WSIA), was due on October 19, 2015, and the worker's partial LOE benefits were locked-in until age 65. However, the final LOE benefit review decision was not officially communicated to the worker until June 19, 2017.

- [10] In December 2015, the worker reported another recurrence/worsening of his right shoulder injury, and the WSIB approved the recurrence in a decision dated April 6, 2016. In the meantime, in February 2016, the employer offered a temporary modified customer service position to which the worker returned on February 29, 2016, commencing with part-time hours. The worker was subsequently transferred to the position of Escalator Check on July 5, 2016; however, the worker claimed another recurrence and stopped working on July 25, 2016. The worker did not return to work after this date.
- [11] In January 2018, the worker representative requested that the worker be granted entitlement for a NEL redetermination for a permanent deterioration in his right shoulder. The Case Manager granted the worker such entitlement; however, in March 2018, the WSIB's NEL Clinical Specialist determined from the medical evidence that the worker's right shoulder condition would warrant a NEL rating of 10%, if redetermined. Noting the minimal change in the NEL award, in a decision dated April 10, 2018, the WSIB confirmed the worker's original NEL award of 11%.
- [12] On January 2, 2019, the worker representative asked the WSIB to consider the worker's entitlement to Chronic Pain Disability, and to find the Escalator Check position unsuitable for the worker's condition. The representative also asked that the WSIB grant the worker entitlement for a recurrence/worsening of his right shoulder condition as of July 25, 2016, and full LOE benefits as of July 25, 2016 to age 65. In a decision dated March 27, 2019, the Case Manager found that the position of Escalator Check was suitable for the worker's compensable condition, and as such, the worker was denied entitlement for a recurrence and full LOE benefits as of July 25, 2016.
- [13] In May 2019, the Case Manager denied the worker entitlement for CPD, and a review of the worker's entitlement for psychotraumatic disability was subsequently undertaken. The Case Manager noted that the worker attended a psychological assessment with Dr. M. Oosterhoff, psychologist, in October 2012, and as a result of the assessment, Dr. Oosterhoff diagnosed the worker with Major Depressive Disorder (MDD). At that

time, the WSIB sponsored psychological treatment for the worker up to March 2013, after which the worker was discharged from psychological treatment.

- [14] In a decision dated December 5, 2019, the worker was granted entitlement for psychotraumatic disability for MDD, which the Case Manager found to be a result of the worker's extended disablement and factors related to the worker's right shoulder injury. However, the Case Manager found that the worker's psychological condition achieved maximum medical recovery (MMR) as of March 1, 2013, with no evidence of a permanent impairment.
- [15] In January 2020, the worker representative asked the WSIB to consider granting the worker entitlement for a neck injury. In a decision dated January 20, 2020, the Case Manager denied the worker entitlement for a neck injury on a secondary basis.
- [16] The worker objected to the decisions dated March 27, 2019, December 5, 2019 and January 20, 2020 and the worker's case was referred to the WSIB's internal Appeals Services Division. In a decision dated January 29, 2021, the ARO noted that the worker was claiming that his neck injury was a result of his pre-injury duties. The ARO denied the worker initial entitlement for a neck injury, noting the significant delay in the worker's reporting of the injury and the lack of compatibility between the worker's pre-injury duties and the working diagnosis identified by the physiotherapist, cervical mechanical disorder. Also, in the decision dated January 29, 2021, the ARO continued to deny the worker entitlement for a permanent impairment related to his psychotraumatic disability, beyond March 1, 2013.
- [17] However, in his January 29, 2021 decision, the ARO granted the worker entitlement to a recurrence of his right shoulder injury as of July 25, 2016, and the ARO found that the position of Escalator Check was not suitable for the worker. The ARO accepted that the Escalator Check position required the worker to walk a significant amount of time. The ARO noted that the medical evidence indicated that the worker's gait was affected by the CP on his left side, and as a result, the worker had to swing his right arm excessively as he walked. The ARO found that the increased walking requirement in the Escalator Check position re-aggravated the worker's right shoulder injury and

exacerbated the worker's left hip and left neck. Accordingly, the ARO found that the Escalator Check position was not suitable for the worker and caused a recurrence/worsening of the worker's compensable right shoulder injury.

- [18] As well, in his January 29, 2021 decision, although acknowledging the July 25, 2016 worsening of the worker's right shoulder, the ARO found that this worsening was temporary and that the worker resumed his NEL level of impairment as of November 15, 2017. Accordingly, the ARO granted the worker full LOE benefits from July 25, 2016 to November 15, 2017, and referred the case back to the Operating level for further adjudication and to determine if the worker could return to work.
- [19] In a decision dated June 30, 2021, the Case Manager found that the worker had not worked since July 26, 2016, and the employer had not offered further modified work on or after this date. Noting the ARO's ruling that the right shoulder recurrence was temporary, the Case Manager found that the worker remained partially disabled as of November 15, 2017 and capable of full-time work in the suitable occupation (SO) of Customer and Information Services Representatives in the general labour market, without any additional training. As a result, the worker's partial LOE benefits as of November 15, 2017 to age 65 were adjusted to reflect an earning capacity of the minimum wage (i.e., the SO entry-level wage) at 40 hours per week.
- [20] The worker objected to the Case Manager's decision dated June 30, 2021 and the worker's case was returned to the Appeals Services Division. In a decision dated August 19, 2022, the ARO found that the worker had the skills and abilities to secure an entry-level position in the field of customer services, and therefore, the ARO found that the SO of Customer and Information Services Representatives continued to meet the criteria for a SO. However, noting the numerous recurrences that the worker had experienced, and having regard for the fact that the worker's pre-existing CP limited the use of his left arm, the ARO concluded that the worker was likely limited to working 20 hours of work per week. As such, the ARO found that the worker's partial LOE benefits as of November 15, 2017 to age 65 should be based on the earning capacity of the minimum wage (i.e., the SO entry-wage) at 20 hours per week.

[21] The worker objected to the ARO decisions dated January 29, 2021 and August 19, 2022. The employer also objected to the ARO decision dated August 19, 2022 and the appeal issues noted above are now before us.

**4. Decision No. 742/24I and post-hearing activity**

[22] As set out in *Decision No. 742/24I*, the parties appeared before this Panel at a hearing on May 27, 2024, and at that time, the Panel agreed to the employer's request to adjourn the hearing, to allow the gathering of outstanding information pertaining to the worker's Long-term Disability (LTD) claim and clinical notes from the worker's family physician, Dr. Hsieh, from March 1, 2013 to the end of November 2017, as the Panel found that this evidence may be arguably relevant.

[23] In addition, at the hearing in May 2024, this Panel agreed with the worker representative that, if we granted the worker initial entitlement for a neck injury, we had the jurisdiction to consider whether the worker had a permanent impairment related to the neck injury, noting that this was a reasonable sequential issue to the issue of initial entitlement for a neck injury. At the hearing in May 2024, the employer representative indicated that she was not prepared to deal with the issue of a permanent impairment for a neck injury, as it was not listed on the WSIAT's Hearing Ready Letter. However, the Panel noted that since the employer's request for an adjournment of the hearing was being granted and the hearing would reconvene in the future, the employer would now have time to prepare for the additional appeal issue.

[24] The outstanding information was received by the WSIAT and the hearing reconvened on December 17, 2024, at which the worker provided his testimony. As the hearing was approaching the end of the day, there was insufficient time for the parties' representatives to effectively provide closing submissions. As such, a schedule for the receipt of written closing submissions was determined.

[25] The final and reply submissions were received from both parties by February 21, 2025. However, in additional correspondence dated February 21, 2025, and in response to specific arguments made by the employer representative in her final submissions, the

worker representative made two requests that are set out below. Upon review of the worker representative's request and the employer representative's objection and reply, the Panel made the following rulings.

- [26] First, the worker representative requested that the issue of entitlement for the exacerbation of pre-existing left hip and neck pain as a secondary condition resulting from the modified work in July 2016 be added to the issue agenda and the parties be provided with the opportunity for further submissions. The Panel provided the following ruling:

The issue of entitlement for an exacerbation of a left hip and neck condition, as a secondary condition resulting from the modified work offered by the employer in July 2016, is not an issue on the issue agenda for this appeal. The issue agenda is noted in the Hearing Ready Letter dated September 27, 2023, which was provided to both representatives prior to the hearing. The issue agenda was also confirmed with both parties at the commencement of the hearing for this appeal.

The Panel notes that, at no point during the hearing on December 17, 2024, did [the worker representative] raise this as an issue, or request such an addition to the issue agenda, and this is despite the fact that the employer representative indicated in her opening statement that it was the employer's position that the worker's conditions in July 2016 were non-compensable. The Panel concludes, therefore, that the worker's representative had notice of the employer's position at the outset of the hearing. The appropriate time to discuss the issue agenda is at the commencement of the hearing, since the issue agenda determines the nature of the evidence that will be heard during the hearing. The time period for requesting the addition of issues to the issue agenda for this hearing has passed.

In addition, at the end of the hearing on December 17, 2024, [the worker representative] did not raise this issue and both representatives agreed to a process for the WSIAT's receipt of final written submissions. That process is now complete, and in their submissions, both representatives provided their interpretation of the evidence which the Panel will consider. The period of time for providing new evidence is now closed.

The Panel notes that, in any event, the issue of how to interpret the findings in the ARO's decision dated January 29, 2021 is an issue for the Panel to determine, according to Tribunal case law. The Panel will consider this as necessary in light of the wording of the ARO decision and the submissions of the parties.

Accordingly, [the worker representative's] request to add another issue to the issue agenda is denied

- [27] Second, the worker representative requested that the Panel recall the worker to allow further *viva voce* testimony from the worker regarding an injury that he sustained while lifting a hood of a bus in June 2003, because the employer representative, in her written

submissions, had incorrectly referred to this accident history (i.e., an accident involving a hood of a bus) as being the worker's "wildly false account of [the] injury" to a doctor in October 2012. The Panel provided the following ruling:

In her written submissions, the employer representative referred to documentary evidence that was in the file materials that was provided to the Panel and the parties, including the worker representative, prior to the start of the hearing. The fact that the employer representative has made written closing submissions concerning a document in evidence is not unusual or inappropriate, and we see no sound reason to grant a request to re-open the hearing and recall a witness, since there was no surprise to the worker representative concerning the content of the document in question, which is Dr. Oosterhoff's report dated October 12, 2012. The worker representative was at liberty to question the worker about this document when the worker provided his testimony at the hearing. The principles of procedural fairness would indicate that there has been no unfairness to the worker, and the employer may provide written submissions with respect to any of the evidence before the Panel. The Panel does not require any further testimonial evidence. It is within the Panel's discretion as to how to weigh the evidence, and whether to agree with either of the representative's submissions.

In addition, the Panel observes that the case materials contain the claim file information for the June 27, 2003 accident claim, and the Panel will review and consider this information as necessary.

We note that both parties have provided their submissions as to how the evidence, including Dr. Oosterhoff's October 12, 2012 report, should be viewed for our consideration. The Panel finds that further evidence is not required to adjudicate this appeal. Accordingly, [the worker representative's] second request to recall the worker to provide further testimony is denied.

[28] As such, since we have received the closing submissions from both parties on the merits of the appeal, we are now proceeding with the final adjudication of this appeal.

## 5. Law and policy

[29] Since the worker sustained a work-related injury in 2009, the *Workplace Safety and Insurance Act, 1997* (the WSIA) is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated. Pursuant to section 126 of the WSIA, the Board advised that the following *Operational Policy Manual* (OPM) Policy Packages, Revision #9, are applicable to the subject matter of this appeal:

- Package #12 – Adjudicative Process
- Package #31 – Secondary Conditions

- Package #212 – Determining MMR and PI
- Package #215 – Final LOE Review – benefits as of January 1, 2015
- Package #235 – Work Reintegration Principles, Concepts, and Definitions, Decisions December 1, 2012 to November 30, 2020
- Package #300 – Decision Making/Benefits of Doubt/Merits and Justice
- Package #311 – Recurrences, decision January 1, 2018
- Package #317 – RTW Assessments and Plans, November 30, 2020
- Package #354 – RTW Assessments and Plans, November 30, 2020

[30] All of the Board policies within these packages will be considered when rendering our decision.

## **6. Analysis and conclusion**

[31] The appeal is allowed in part for the reasons set out below.

### **a. Initial entitlement for a neck injury**

[32] General entitlement to benefits is governed under section 13 of the WSIA, which indicates that a worker who sustains a personal injury by accident arising out of and in the course of their employment is entitled to benefits.

[33] Operational Policy Manual Document No. 11-01-01, “Adjudicative Process” (Policy 11-01-01), provides a five-point check system that decision-makers can use to decide initial entitlement to benefits. Under this system, an allowable claim must have:

- an employer
- a worker
- a personal work-related injury
- proof of accident; and
- compatibility of diagnosis to accident or disablement history.

[34] To determine proof of accident, Policy 11-01-01 provides the following guidelines:

- Does an accident or disablement situation exist?
- Are there any witnesses?
- Are there discrepancies in the date of accident and the date the worker stopped working?
- Was there any delay in the onset of symptoms or in seeking health care attention?

[35] In his submissions, the worker representative states that the worker is claiming "initial entitlement to a work-related neck injury as emerging gradually over time and as an unexpected result of his working duties in various roles [with the employer], especially the role as a Waste Management Operator." However, to clarify, the ARO, in the decision dated January 29, 2021, explicitly indicated that "it is the position of the worker representative that the worker's neck injury is related to the job process in waste management" and that "the neck and shoulder injuries are distinct injuries." We observe no reference to the worker claiming that other employment positions caused a neck injury and the duties as a Waste Management Operator is the basis on which the ARO considered the worker's initial entitlement for a neck injury.

[36] Therefore, to clarify, the scope of this appeal, in regard to the worker's neck, is whether the worker developed a neck injury by October 19, 2009, the designated date of accident in this case, and from the same mechanism of injury that caused the right shoulder injury, that being the worker's Waste Management duties in October 2009. According to the Worker's Report of Injury (Form 6) dated November 5, 2009, the worker described the accident history as:

On October 16, 2009, I was working and I loaded a lot more garbage than usual. A lot of bags were overweight, some of them exceeded over 50 lbs in weight. All day long, I did repetitive work and when I threw 50+ lbs bag into the truck it felt like muscle pulling in my shoulder, and felt like my right arm and shoulder was being pulled off at the end of my shift... I went home and I don't know if it's my age with pains and aches or an actual injury. On that day, all I know I had a lot of discomfort and pain. The next day the pain subsided a bit and I continued to do the same work, and aggravated it worse.

- [37] We note that the WSIB used the accident date of October 19, 2019 because this was the date on which the worker first reported the injury to the employer; however, as noted above, the worker first noted the symptoms on October 16, 2019.
- [38] There is no dispute that worker's duties at that time caused an injury to his right shoulder. The question is whether the worker also developed a neck injury at the same time. We observe that the worker did not indicate an injury to his neck on his Form 6, nor did he report a neck injury to the employer on October 19, 2009, according to the Employer's Report of Injury (Form 7) dated October 28, 2009. The worker did not request entitlement for a neck injury until January 2020, when his representative, in correspondence dated January 14, 2020, over 10 years after the date of accident, requested entitlement for a neck injury stemming from the same workplace accident.
- [39] The employer representative submits that a delay in reporting and claiming an injury to such an extent should weigh heavily against the finding of a neck injury, and in particular, preclude a finding of proof of accident. The employer representative referred to other WSIAT decisions in which the Panel/Vice-Chair denied initial entitlement for an injury based on the lack of contemporaneous evidence of an injury and the worker's significant delay in reporting an injury. One of those decisions was *Decision No. 395/98*, 1998 Can LII 15753 (ON WSIAT), dated November 9, 1998. In *Decision No. 395/98*, the worker experienced sporadic neck symptoms from the date of accident, but did not report the neck injury until 15 years after the workplace accident (i.e., a fall from a ladder). The Vice-Chair in *Decision No. 395/98* stated:
- [30] It is always difficult to assess a cause and effect relationship when there has been such a large gap between the accident and the claim. There are so many possible alternative causes that might have arisen in the 15 years between events, including simple aging. That is not to say that the worker is withholding information. There is always the possibility of other traumas that even the most honest witness may well have forgotten so long after the fact.
- [40] Similarly, in the case before us, we find that the lack of contemporaneous reporting of a neck injury on the Form 6 and 7, and the 10 year gap from the date of accident to the worker's reporting of a neck injury, does not support a temporal relationship between the worker's neck condition and the claimed mechanism of injury in this case. However,

we acknowledge that the medical evidence in this case refers to the worker experiencing neck symptoms sporadically throughout the years following the date of accident, including as early as 7 days after October 16, 2009. In addition, Policy 11-01-03, "Merits and Justice," stipulates that the WSIB shall make its decision based upon the merits and justice of a case and is not bound by legal precedent.

- [41] As such, we have examined the specific evidence in this case more closely. Ultimately, we find that, regardless of any risk factors related to the worker's Waste Management duties, the evidence does not support the existence of an injury to the worker's neck. Rather, the medical evidence supports that the worker's neck symptoms, which indeed the worker sporadically reported over the years, were, more likely than not, related to or manifesting from the compensable right shoulder injury and did not constitute a separate neck injury. As such, we find no evidence of a personal work-related injury to the worker's neck that can be associated with his duties in October 2009. We set out our reasons for this conclusion below, commencing with a review of the medical documentation subsequent to the October 19, 2009 date of accident.
- [42] The first notation of the worker's neck is noted on an ultrasound report dated October 22, 2009, which is 7 days after the worker first experienced his right shoulder symptoms. The ultrasound was of the right shoulder and ordered by Dr. Hsieh, the worker's family physician, and there are hand-written comments on this report, which refer to "other complications" of "radiating neck symptoms to right arm limit posture tolerance especially sitting lifting hand over head or extending neck up." It is unclear who wrote these comments; however, we accept that this report indicates that the worker experienced symptoms in the right side of his neck down the right arm with particular bodily movements/postures. This report does not indicate a diagnosis for the neck symptoms or explicitly indicate that the neck was injured.
- [43] We also note a company Supplemental Medical Information form, which was completed by Dr. Hsieh on the same day, October 22, 2009, and on this form, Dr. Hsieh noted that the primary diagnosis was right shoulder tendinitis. The form allows for other diagnoses;

however, Dr. Hsieh did not provide any further diagnoses other than for the worker's right shoulder.

- [44] We observe a report from Dr. W. Heslop, an internal medicine specialist, dated November 2, 2009, which is two weeks after the first right shoulder symptoms. Dr. Heslop noted that "[the worker] was driving and loading a truck with heavy bags and noted pain over the right shoulder radiating towards the right neck." Dr. Heslop indicates "it became quite stiff." We interpret Dr. Heslop to mean that the worker's right shoulder became stiff noting that the source of the pain in Dr. Heslop's statement is the right shoulder and that that pain was moving from the right shoulder to the right neck. Similar to the ultrasound report, Dr. Heslop indicates in the report that "[the worker] does experience pain when he moves his shoulder and neck." Dr. Heslop, in his November 2, 2009 report, does not provide a diagnosis for the worker's condition.
- [45] The worker representative refers us to the Health Professional's Report (Form 8) dated November 10, 2009 and the section of the form where the health professional, in this case a treating physiotherapist, notes the diagnosis or working diagnosis. In his submission, the worker representative indicates that the physiotherapist wrote "neck leaver scapular tear" as a working diagnosis on this form. Our view of the physiotherapist's working diagnosis differs from that which is suggested by the representative. Rather, we observe that the physiotherapist noted "right shoulder tendonitis ? tear" which we interpret to mean the physiotherapist is questioning whether there is a right shoulder tear. Above this phrase, the physiotherapist writes "neck leavtor scapulae." We view the reference to a "tear" as linked to the "right tendonitis," not the "neck leavtor scapulae."
- [46] Moreover, we find that the physiotherapist likely made a spelling error and the physiotherapist meant to write "neck levator scapulae." We note this spelling, "levator," in the WSIAT's Medical Discussion Paper, "Neck and Arm Pain and Related Symptoms: Cervical Spine Disorders," written June 2021 by Dr. J. Finkelstein, which is in the case materials. And, according to this Medical Discussion Paper:

The posterior muscles of the cervical spine can be divided into superficial, middle and deep layers. The most superficial of the cervical muscles are muscles of the shoulder girdle – upper trapezius, [rhomboids] and the levator scapulae.

- [47] Therefore, we find that the physiotherapist's reference to "neck levator scapulae" is a reference to the muscles in the worker's shoulder girdle, which are part of the posterior muscles of the cervical spine. As such, we find that the working diagnosis provided by the physiotherapist on the Form 8, dated November 10, 2009, relates to a right shoulder injury and not a neck injury. This is further supported by the fact that the physiotherapist, on the first page of this Form 8, where the areas of injury are identified, indicated an injury to the shoulder, and he did not indicate that the worker's neck was an area of injury.
- [48] We acknowledge that the same physiotherapist completed a different form, a Program of Care initial assessment form on the same day, November 10, 2009, and on this form the physiotherapist indicated that the worker's complaints were pain in the right shoulder and right side of the neck. He also noted "loss arm right shoulder + loss neck side bend left and extension." As a working diagnosis, the physiotherapist noted "rotator cuff injury + neck." We find that this reference to the "neck" is vague because the physiotherapist does not indicate a "neck injury" or a diagnosis for the neck. Moreover, noting the physiotherapist's Form 8 of the same day, we find that, when referring to the "+ neck," the physiotherapist is likely referring to the "levator scapulae" area, which is in the shoulder girdle.
- [49] We observe that the physiotherapist further wrote, in a progress report dated November 24, 2009, that the worker was experiencing radiating neck symptoms into the right arm; however, the only diagnosis provided on the same report was "right shoulder rotator cuff tendonitis."
- [50] From the above medical reports, we can establish that the worker experienced symptoms in the right side of his neck within a week of sustaining the right shoulder injury. However, we infer from the more contemporaneous medical reports that the pain in the worker's right neck was coming from the right shoulder, more specifically the right

shoulder girdle, given the references to "radiating pain" rather than a separate distinct neck injury.

- [51] We observe that the WSIAT's Medical Discussion Paper further describes the relationship between the shoulder and neck muscles and why a shoulder injury may cause pain in the neck. The Medical Discussion Paper states the following:

The interconnection between the shoulder and cervical spine musculature helps explain why neck and shoulder pain complaints are often described together by the patient. Special tests for the shoulder are needed to exclude an intrinsic shoulder injury and confirm that the patient's pain report is due to a cervical spine cause.

- [52] The Medical Discussion Paper goes on to say:

Pain from a degenerated or injured shoulder joint often mimics and may be mistaken for nerve root pain. Shoulder pain can be felt over the top of the shoulder and over the deltoid muscle. Shoulder joint pain may cause pain inhibition when testing muscle strength and should not be confused with true neurologic weakness. With shoulder joint pathology, there would be no other neurological findings of numbness or reflex change.

- [53] In our view, it is important to distinguish between neck pain that is a result of an intrinsic injury to the neck, and pain in the neck muscles that is a result of the interconnection between the neck and an injured shoulder. In his submissions, the worker representative diligently noted every medical report which noted the worker's neck and/or symptoms in the neck. These symptoms were either noted as pain in the neck, which travelled down the right arm or pain radiating from the right shoulder towards the base of the neck. There were notations of tightness in the right neck and symptoms in the trapezius and levator scapulae (i.e., shoulder girdle) with extension or left flexion of the neck. The notations of these neck symptoms, within the reports, occurred over the years subsequent to 2009 and up to 2018. We observe gaps of up to a year between the reports of neck symptoms. For example the worker representative noted that the worker's physiotherapist referred to cervical mechanical dysfunction in a report dated December 21, 2009, and the next reference of neck symptoms was in a report dated December 16, 2010.
- [54] The employer representative submits that, when summarizing the medical evidence in his written submissions, the worker representative incorrectly asserts that the

physicians identified an “ongoing neck injury;” when, in fact, the physicians did not use the word “injury” when describing the worker’s neck symptoms. As an example, in his submissions, the worker representative noted Dr. Hsieh’s clinical note dated December 21, 2015 and he stated that Dr. Hsieh “identifies the ongoing nature of the neck injury when [the worker] complains of right neck pain.” However, when we examine this clinical note directly, we observe that Dr. Hsieh’s only reference to the worker’s neck is stated as “[the worker] also complains of right neck pain.” We observe no reference to a “neck injury.” We also note that Dr. Hsieh concluded this clinical note by listing the worker’s conditions and this list contains right shoulder pain and five other non-compensable conditions. Dr. Hsieh did not list neck pain, a neck injury or a diagnosis for the right neck pain.

[55] We note that a representative is at liberty to assert how he believes the evidence should be viewed; however, we agree with the employer representative that it is incorrect for a representative to assert that the doctors referred to a neck “injury” when they did not, in fact, use such words. For instance, in the above example, we find that Dr. Hsieh, in his December 21, 2015 clinical note, confirmed the worker’s report of right neck pain; however, we observe no evidence of Dr. Hsieh opining on the existence of a neck injury.

[56] From the medical evidence before us, we accept that the worker sporadically experienced symptoms in his neck subsequent to the date of accident and over the years; however, we find it notable that, even when aware of the worker’s reports of pain in the right neck, the treating physicians did not refer the worker for any investigations (i.e., testing or imaging) of his cervical spine. We also note that multiple physicians were involved in the assessment and treatment of this worker over the years, yet, these physicians did not provide a diagnosis indicative of a neck injury or condition.

[57] For example, Dr. Hsieh, when completing a medical form for the worker’s application for Canada Pension Plan (CPP) disability benefits in February 2015, noted the diagnoses of chronic right shoulder pain, stiffness, weakness and limited mobility, cerebral palsy with left hemiparesis, right shoulder surgery in 2011 and left arm muscle/tendon

transplantation for left hemiparesis. We note that Dr. Hsieh did not refer to the neck or a neck diagnosis when completing the CPP medical form.

[58] As noted above, the worker representative drew our attention to the form in which the physiotherapist noted "neck levator scapulae" in the diagnosis section. We note that the levator scapulae is an area of the body, not necessarily a diagnosis, and although this area is considered part of the cervical musculature, according to the WSIAT's Medical Discussion Paper, it is considered the shoulder girdle.

[59] The worker representative also drew our attention to a WSIB's Physiotherapist's Treatment Extension Request form dated December 21, 2009 on which the physiotherapist indicated a working diagnosis of "cervical mechanical disorder." In their submissions, the representatives argued over whether a physiotherapist has the authority and expertise to provide a diagnosis. The worker representative provided a copy of a section from the *Physiotherapy Act* and highlighted the scope of physiotherapy as:

The practice of physiotherapy is the assessment of neuromuscular, musculoskeletal and cardiorespiratory systems, the diagnosis of diseases of disorders associated with physical dysfunction, injury or pain and the treatment, rehabilitation and prevention or relief of physical dysfunction, injury or pain to develop, maintain, rehabilitate or augment function and promote mobility. 2009, c. 16, s.22(1)

[60] We accept that a physiotherapist is a health care professional that is involved in the assessment and treatment of an individual's physical condition, and that the WSIB's Physiotherapist's Treatment Extension Request form asks the physiotherapist to provide a "working diagnosis." This differs from the WSIB's forms for a physician within this case, which direct the physician to provide a "diagnosis." In any event, we note that, in the over 30 medical reports dated from October 2009 to August 2018 that the worker representative identified as supporting the worker's claim for a neck injury, we observe no reference to a diagnosis for the worker's neck symptoms, other than the working diagnosis identified by the physiotherapist in the extension request form in December 2009. The physiotherapist does not refer to this working diagnosis in other reports.

[61] In our view, had the worker sustained an actual injury to the neck, we would expect to see a diagnosis for a neck condition in more than one report, and by one of the many physicians that examined the worker, including specialists. As such, we have not placed weight on the physiotherapist's working diagnosis on the form dated December 21, 2009. Rather, we find that there is no substantive evidence of a diagnosis being given for the worker's neck symptoms for almost a decade after the date of accident.

[62] We are aware that past WSIAT's decisions have found that initial entitlement under the WSIA for an injury does not require a diagnosis. For instance, in *Decision No. 579/21*, 2021 ONWSIAT 740, the Vice-Chair states:

[38] Entitlement under the WSIA is for an injury; it is not entitlement for a diagnosis. A clear diagnosis is often very helpful in determining causation, but it is not an absolute requirement in every case, provided that causation is otherwise established on the evidence. In many cases, the initial diagnosis will ultimately be refined or revised. In such circumstances, the worker continues to have entitlement for the injury, provided that the new or revised diagnosis does not in itself suggest a different causal mechanism for the injury.

[63] As indicated in *Decision No. 579/21*, a clear diagnosis is not required for initial entitlement for an injury. However, we note that the issue within *Decision No. 579/21* and others such as *Decisions No. 2/22*, 2022 ONWSIAT 70, and *68/06*, 2007 ONWSIAT 1319, is that there was a lack of consensus as to the worker's diagnosis amongst the treating professionals earlier in the claim, and the issue was not an indefinite lack of diagnoses. In our view, although a diagnosis is not required for initial entitlement, there must be proof of an actual injury to the body part in question, and the diagnosis should not remain undetermined indefinitely.

[64] In the case before us, we find that the physiotherapist's one reference to a working diagnosis, in comparison to the lack of a diagnosis for the worker's neck in all the remaining medical reports, is not sufficient evidence to support the existence of an actual injury to the worker's neck. We note that, during his testimony, the worker occasionally noted his experience of neck symptoms, and we accept that he was genuine when providing this testimony. However, although we acknowledge that the worker indeed experienced sporadic symptoms in his neck subsequent to the

October 2009 workplace accident and over the years, based on our analysis above, we find that these symptoms were, more likely than not, radiating from and related to the accepted, compensable right shoulder injury, and not indicative of a separate personal work-related injury to the neck.

- [65] Finally, we note in his submissions, the worker representative provided a detailed assessment of the physical demands of the worker's pre-injury job and identified the risks that these physical demands posed to the worker's neck. We note that his submissions in this regard were to support the compatibility of a neck injury to the worker's duties. We note that the worker's job position may have had risk factors for the development of a neck injury; however, without the finding of an actual neck injury (i.e., a personal work-related injury), the analysis of the physical demands is a moot point.
- [66] The standard of proof in workers' compensable claims is not the possibility of an injury, but rather the probability of the injury. And based on our analysis above, we find that the worker did not sustain a neck injury. Policy 11-01-01 requires all 5 elements of an allowable claim exist for the entitlement to benefits, and we find that the evidence in this case did not support that the worker had a personal work-related injury to his neck.
- [67] Accordingly, we find that the worker does not have initial entitlement for a neck injury. As such, the worker also does not have entitlement for a permanent impairment or NEL award related to a neck injury. The worker's appeal on this matter is denied.

**b. Entitlement for a permanent impairment and NEL award for psychotraumatic disability**

- [68] Section 46 of the WSIA stipulates that, if a worker's injury results in permanent impairment, the worker is entitled to compensation for the non-economic loss. Section 2 of the WSIA has two definitions that apply to NEL awards:
- "impairment" means a physical or functional abnormality or loss (including disfigurement) which results from an injury and any psychological damage arising from the abnormality or loss
  - "permanent impairment" means an impairment that continues to exist after the worker reaches maximum medical recovery

- [69] Policy 11-01-05, "Determining Permanent Impairment," states that maximum medical recovery (MMR) of a condition occurs when "a 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."
- [70] In a decision dated December 5, 2019, the WSIB concluded that the worker had entitlement under Policy 15-04-02, "Psychotraumatic Disability," for Major Depressive Disorder (MDD) because "the majority of factors contributing to [the worker's] psychological condition are clearly and directly related to the work related injury." The Case Manager noted that the worker had been diagnosed with MDD on October 11, 2012 due to his prolonged recovery issues, perceived/actual physical limitations and pain related focus and frustration. The worker's depressive symptoms were reported as being anhedonia, low energy, fluctuating concentration and intermittent feelings of helplessness and sleep disruption. In the same decision, the Case Manager concluded that the worker's compensable MDD fully resolved as of March 1, 2013, the MMR date.
- [71] The worker representative submits that "all the unsolicited contemporaneous medical and documentary evidence as of March 1, 2013, [the] MMR date, and beyond identifies the ongoing and permanent nature of [the worker's] MDD diagnosis and symptoms." The worker representative refers to the worker's ongoing prescription for anti-depressants for sleep disturbance, which he submits was a symptom noted by the Case Manager as being a symptom of the worker's MDD in her December 5, 2019 decision. The worker' representative also submits that the worker's treating psychologist, Dr. Oosterhoff, in his discharge report dated March 1, 2013, predicted that the worker's depression would likely arise again in the future with expected functional challenges. The worker representative also submits that the worker's MDD symptoms beyond March 1, 2013 exhibit elements of a ratable impairment under the WSIB's Policy 18-05-11, "Assessing Permanent impairments due to Mental and Behavioural Disorders," which is the rating schedule used by the WSIB to determine NEL awards for psychotraumatic disability.

- [72] The employer representative submits that there is no evidence in the Case Record that supports that the worker had an ongoing psychological condition after March 1, 2013. The employer representative refers to Dr. Oosterhoff's discharge report as supporting the full resolution of the worker's psychological condition. In regard to the prescribed medications, the employer representative indicates that, although some of the worker's medications can be used to treat depression, in the case of this worker, they were prescribed for insomnia. The employer representative also submits that the worker's psychological condition was likely related to the cumulative effect of non-compensable stressors, and unrelated to the compensable right shoulder injury. The employer representative referred to non-compensable traumatic events in the worker's life that occurred between the date of accident and the diagnosis of MDD. By these submissions, we interpret the employer representative to be disputing the worker's claim for ongoing entitlement to psychotraumatic disability by inferring that the worker's psychological condition had been non-compensable all along.
- [73] In this case, Dr. M. Oosterhoff provided a diagnosis of MDD as a result of his assessment of the worker in October 2012. From the documentary evidence and the worker's testimony, we note that, indeed, the worker endured several non-work-related events/losses subsequent to the workplace accident and prior to the diagnosis of MDD in October 2012. For the purposes of this decision, the specific details regarding those non-compensable losses is not relevant other than to note they would undoubtedly be perceived as traumatic. However, we note that 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 for entitlement (*Decision No. 915*, 1987 CanLII 1258 (ON WSIAT)).
- [74] During his testimony, the worker noted that, after his surgery in July 2011, he was transferred to a senior's home because he could not take care of himself. Since the worker's right shoulder was immobilized post-operatively, and noting the hemiparesis on his left side due to the pre-existing CP, the worker was unable to manage his own

self-care, and he remained in a senior's home for six weeks while he recovered from the surgery. During the hearing, the worker testified that, at the time, he worried that this was how he "was going to end up." We note that this circumstance was directly related to the work-related injury, and prior to the diagnosis of MDD. The worker representative noted that this was a significant compensable stressor.

[75] From Dr. Oosterhoff's October 2012 assessment report, it is unclear whether Dr. Oosterhoff knew about the worker's 6-week stay in the nursing home. From his report, it is clear that Dr. Oosterhoff knew about the non-compensable stressors, yet he found that the work-related injury was also contributing to the worker's psychological condition. According to Dr. Oosterhoff's report:

[The worker] stated that over the last month [he] has been depressed, because of the loss of [activities of daily living] independence, which he had to work hard to gain in the past with his cerebral palsy. He reported a few good days with less pain. He reported several symptoms of depression including some anhedonia, low energy, fluctuation in concentration, and intermittent feelings of helplessness. He reported sleep disruption, both with initiation and maintenance, secondary to pain and nightmares about his wife.

With regard to anxiety, [the worker] reported frequent worry about his pain, recovery, work future, and finances, but no major symptoms of anxiety.

[76] As a result of his assessment of the worker, Dr. Oosterhoff opined, in his October 12, 2012 report, that:

Based on the interview and testing, [the worker] has symptoms of Depression consistent with that diagnosis, and some symptoms of a Pain Disorder and Anxiety. The symptoms of Pain Disorder and Anxiety appear subthreshold diagnostically at this time, and appear to be related to significant re-adjustment issues and pain-related frustration and distress..... The factors contributing to the Depression and Anxiety symptoms likely include prolonged recovery, cerebral palsy re-adjustment, pain related focus and frustration, perceived/actual physical limitations, and family issues.

[77] When applying the significant contribution test noted above, we note that the work-related issue need not be the only, or even the primary stressor, for entitlement to benefits. Rather the work-related stressor must simply be one of importance in the development of the MDD. Noting the timing of Dr. Oosterhoff's diagnosis of MDD (i.e., shortly after the right shoulder surgery and the worker's stay in a senior's home), and noting Dr. Oosterhoff's opinion in his October 2012 assessment, the WSIB determined

that the worker's compensable disablement was a significant contributing factor to the worker's MDD at the time, despite the existence and impact of non-compensable stressors.

- [78] In addition, we note that the WSIB confirmed the worker's initial entitlement for psychotraumatic disability in a decision dated December 5, 2019, and we observe from the case materials before us that the employer did not object to this decision. As such, the worker's initial entitlement to psychotraumatic disability is not in dispute and not an issue before us. The sole issue before us, in regard to the worker's psychotraumatic disability, is the worker's entitlement for a permanent impairment and NEL award. As such, we have disregarded the employer representative's inference that the worker's psychological condition was non-compensable from the start.
- [79] However, based on the evidence before us, we cannot establish that the worker has a permanent impairment related to his compensable MDD. Rather, we find that the worker's compensable MDD resolved, and as such, the worker is denied a NEL award for the MDD. We set out our reasons for this conclusion below.
- [80] We note that Dr. Oosterhoff, in his treatment discharge report dated March 1, 2013, explicitly indicated that the worker's MDD had fully resolved. Dr. Oosterhoff opined "[the worker] has made excellent progress in treatment, with resolution of the mood issues via adjustment efforts and use of treatment derived strategies." Dr. Oosterhoff further opined, "Diagnostically, the depression and pain disorder appears to have resolved."
- [81] In his submissions, the worker representative states that Dr. Oosterhoff, in the same report, "acknowledges that due to the expectable functional challenges that the worker will face, it is likely that exacerbations of his depression and pain disorder will arise in the future." We note that the worker representative has taken some liberties in interpreting Dr. Oosterhoff's prognostic statements, and we find this interpretation to not be completely accurate. Rather, in his March 1, 2013 report, Dr. Oosterhoff provided the following prognosis for the worker's psychological condition:

While there may be some exacerbation in future with expectable functional challenges they will likely be more manageable. The prognosis for [the worker] appears optimistic with his treatment participation, progress and [return to work].

- [82] We note that Dr. Oosterhoff was optimistic about the worker's prognosis, whereas the worker representative's interpretation of Dr. Oosterhoff's prognosis infers that the worker was expected to experience exacerbations. We prefer Dr. Oosterhoff's actual statement over the representative's interpretation, and we find that it does not support that the worker was at a high risk of recurrence for his psychotraumatic disability.
- [83] In any event, according to the legislation, a permanent impairment is an impairment that continues to exist after the worker reaches MMR. This definition stipulates that a permanent impairment is continuing and existing at the time of MMR. A permanent impairment is not based on the potential or risk of a condition redeveloping or returning. We note that Dr. Oosterhoff's opinion, including his prognostic statements, support that the worker did not have an ongoing psychological condition at the time of discharge from treatment on March 1, 2013.
- [84] In his submissions, the worker representative states that it is important to note "the accepted work-related MDD diagnosis and related symptoms that [the worker] first exhibited to the medical evidence identifying the same MDD symptoms that continue to exist beyond March 1, 2013." Those symptoms are noted as anhedonia, low energy, fluctuating concentration and intermittent feelings of helplessness and sleep disruption. We note that these symptoms were noted by the Case Manager in the decision dated December 5, 2019 that granted the temporary entitlement for psychotraumatic disability. However, we note that the worker representative has failed to draw our attention to the medical reports and evidence that confirmed the worker's experience of these symptoms subsequent to March 1, 2013. Subsequent to March 1, 2013, we observe no medical reports that refer to the worker's continued experience of these symptoms or the continuation of the clinical diagnosis of MDD. We also observed no evidence of the worker continuing with any specific treatment for his psychological condition. The only exception may be the worker's sleep disturbance and his use of medications for sleep, which we acknowledge are noted as continuing beyond March 1, 2013. We discuss this further below.

- [85] The worker representative has drawn our attention to the fact that the worker continued to be prescribed medication, which are known to be anti-depressants, beyond March 1, 2013. We note medical reports that refer to the medications that were prescribed to this worker beyond March 1, 2013, and we acknowledge that these medications are categorized as anti-depressants and physician's may prescribe these medications to treat depression. However, based on the medical evidence before us, we note that these medications were prescribed to this worker for sleep disruption, and subsequent to March 1, 2013, the medical evidence indicates that the sleep disruption was primarily due to the worker's physical pain.
- [86] For instance, according to Dr. Oosterhoff's October 2012 assessment, the worker reported sleep disruption, both with initiation and maintenance, secondary to pain and nightmares about his wife. We note that these nightmares pertain to a non-compensable traumatic stressor. The other noted stressor, pain, relates to the physical aspects of the worker's compensable condition. We observe from a surgical and rehabilitation program report for assessments on October 3 and 5, 2011 that the worker advised the assessors that he averaged approximately 5 hours of sleep per night, and he often woke during the night due to right shoulder pain. Other medical reports, such as Dr. Heslop's report dated November 2, 2009, noted that the worker was experiencing significant pain and had difficulty sleeping on the right side. We do not observe reports, nor did the worker representative refer us to a report, that indicated that the worker's sleep disturbance, particularly after March 1, 2013, was due to a psychological condition related to his workplace injury.
- [87] The worker representative states in his submissions that the worker testified that "Dr. Hsieh has been prescribing him anti-depressant and sleeping pills to treat his MDD symptoms" and that the worker has been taking these medications beyond March 1, 2013. The employer representative, in her submission, submits that, during his testimony, the worker referred to his medication as pain medication and sleeping pills, and he did not describe himself as taking anti-depressant medication.

- [88] The Panel reviewed the recording of the testimony, particularly around the timestamps noted by the representatives in their submissions. We agree with the employer representative on this matter, as we note that the worker never directly referred to his medications as anti-depressants, as suggested by the worker representative. Rather, it was the worker representative who referred to the medications as anti-depressants when posing his questions to the worker during his examination-in-chief, and the worker consistently referred to the medications as “sleeping pills” and “pain killers” when providing his testimony. The worker also testified that he did not take the medications every day/night and only when he had difficulties with pain or sleep.
- [89] We note the worker representative also asked the worker if the treatment from Dr. Oosterhoff helped him with his depressive symptoms. The worker initially said “yes,” but then said “somewhat,” followed by “but not a lot, I don’t think, as far as the thought and mind.” The Panel found the worker’s response to this question to be confusing and internally contradictory. Moreover, we note that prior to this question, the worker testified that he did not recall the treatment with Dr. Oosterhoff, and then he testified that he remembered the treatment “only vaguely,”
- [90] As such, we find that we cannot place weight on the worker’s testimony regarding his psychological treatment with Dr. Oosterhoff and its effectiveness. The Panel does not find the worker to be disingenuous at the time of providing this evidence. Rather, we find that he was not directly recalling the treatment and the nature of his condition at that time, which is understandable noting that he participated in the treatment over 12 years prior to the hearing date. However, for these reasons, we have placed more weight on the contemporaneous documentary evidence when considering his psychological state and symptoms.
- [91] Based on the case materials before us, we observe no substantive evidence to support that Dr. Hsieh or any other physician was prescribing the worker medication for depression subsequent to March 1, 2013. We observe no evidence of the worker receiving any further treatment for MDD in Dr. Hsieh’s clinical notes from 2013 to 2019. In addition, we observe that Dr. Hsieh, who was prescribing the worker his medications,

as indicated by the worker during his testimony, did not indicate the diagnosis of MDD or any other psychological condition when listing the worker's diagnoses on the medical form for the worker's CPP Disability benefit application in February 2018. This supports that the worker does not have an ongoing psychological condition.

- [92] We acknowledge that there is evidence of the worker experiencing difficulties with sleep beyond March 1, 2013, the MMR date; however, we find that these difficulties are primarily linked to the worker's physical pain and on occasion, nightmares related to non-compensable stressors. As such, we find that the worker's continued sporadic use of the prescribed medication, which may be classified as an anti-depressant, is not evidence of an ongoing compensable psychological condition.
- [93] Finally, we are aware that the assessors of a psychovocational assessment (PVA) that the worker completed in April 2013, one month after his discharge from psychological treatment, indicated that the worker was experiencing "minimal symptoms of anxiety and symptoms of depression at mild levels." At the hearing, the worker representative reminded the worker of the PVA and asked if he had continued to experience depression at that time. The worker similarly testified that he "vaguely" remembered and believed that he was "starting to gain confidence" at that time. For similar reasons as noted above, we have placed more weight on the contemporaneous documentary evidence.
- [94] From the PVA report, we note that the PVA assessor's finding of minimal anxiety and mild depression was based on the worker's self-reporting on the Beck Anxiety Inventory and Beck Depression Inventory-II tests. We note that the assessors applied and used these tests to assist in determining suitable occupations for the worker and identifying the worker's retraining needs and potential, and not to provide a clinical diagnosis. In addition, we note that the assessors, when identifying the worker's obstacles to employment success in their report, did not identify any psychological concerns or needs. This supports that the assessors did not perceive any psychological restrictions, which would interfere with training or work.

[95] We find that the reporting of mild depressive symptoms from a single self-reporting test does not supersede the opinion of Dr. Oosterhoff, who conducted a thorough psychological assessment of the worker in October 2012 and subsequently treated the worker. As such, we have placed weight on Dr. Oosterhoff's opinion that the worker's compensable psychological condition resolved as of March 1, 2013. We observe no substantive evidence of the worker continuing to seek or receive psychological treatment, reporting psychological symptoms related to the work-related injury or being diagnosed with a clinical degree of depression beyond March 1, 2013. Based on the above analysis, we find that the worker does not have entitlement for a permanent impairment or NEL award related to psychotraumatic disability. The worker's appeal on this matter is denied.

**c. Entitlement for and quantum of LOE from November 15, 2017 to age 65, and Suitability of the identified SO of Customer and Information Services Representatives**

[96] Section 43(1) stipulates that a worker who has a loss of earnings as a result of the workplace injury is entitled to benefits when the loss of earnings begins.

[97] Section 43(2) provides that the amount of the LOE payments is 85% of the difference between the net average earnings before the injury and the net average earnings that the worker "earns or is able to earn in suitable employment or business after the injury." A suitable employment or business is now referred to as a suitable occupation (SO). According to Policy 19-02-10, "RTW Assessments and Plans," a SO is:

....a category of jobs suited to a worker's transferable skills that are safe, consistent with the workers functional abilities, and that to the extent possible, restores the workers pre-injury earnings. The SO must be available, meaning it exists and is in demand to the extent that the worker has a reasonable prospect of obtaining employment in the occupation.

[98] The test for entitlement to full LOE benefits is whether the worker is capable of earning any income in suitable employment (i.e., any SO) (*Decision No. 1004/10, 2010 ONWSIAT 2055*). The key consideration in this test is whether the worker is employable and WSIAT's caselaw indicates that determination of a worker's employability is a multi-factorial assessment. This will be further discussed later in this decision.

- [99] In this case, the ARO, in the decision dated January 29, 2021, determined that the worker had entitlement for a recurrence of his right shoulder injury as of July 25, 2016, which was after the final LOE benefit review (i.e., the 72 month review of LOE benefits). In that same decision, and in accordance with Policy 18-03-06, "Final LOE Benefit Review," the ARO found that the worker's LOE benefits may be reviewed after the final LOE benefits review, noting the significant temporary deterioration. As a result, the ARO found that the worker was entitled to full LOE benefits from July 25, 2016 to November 15, 2017 and the ARO directed that the Operating level consider the worker's ability to return to work in any capacity as of November 15, 2017.
- [100] The worker objected to the subsequent Operating level decisions and the ARO, in the decision dated August 19, 2022, determined that the occupation of Customer and Information Services Representatives was suitable for the worker on a part-time basis as of November 15, 2017, and as such, the worker's LOE benefits as of November 15, 2017 to age 65 were based on an earning capacity of the entry-level wage for this SO (i.e., the minimum wage) at 20 hours per week.
- [101] Both workplace parties have objected to the ARO decision dated August 19, 2022. The worker representative submits that the SO of Customer and Information Services Representatives is unsuitable for the worker and the worker is unemployable as of November 15, 2017. Therefore, he submits that the worker should be granted full LOE benefits from November 15, 2017 to age 65.
- [102] The employer representative submits that the worker should have no entitlement to LOE benefits from November 15, 2017 to age 65, because the evidence does not support that the worker's right shoulder injury was the cause of the worker's loss of earnings or impairment as of November 15, 2017. In the alternative, the employer representative requests that the worker's LOE benefits be based on the wage for the SO of Customer and Information Services Representatives on a full-time basis.

**(1) Entitlement for LOE benefits of as of November 15, 2017 to age 65**

[103] As noted above, the employer submits that the worker's loss of earnings as of November 15, 2017 is not warranted, as the loss is not related to the compensable right shoulder injury. In her submissions, the employer representative refers to Policy 15-02-03, "Pre-existing Conditions," which sets out how a decision-maker considers the impact of a pre-existing condition on the worker's ongoing impairment when that pre-existing condition may affect the same body part or system as the work-related injury. The employer representative has referred to this policy because it is the employer representative's position that the worker's right shoulder function was diminished by his CP by the time of the original workplace injury in October 2009, and that the deterioration in the worker's right shoulder condition that was approved by the ARO in the decision dated January 29, 2021 was due to the worker's CP, and not the work-related injury. In her submissions, the employer representative refers to the recurrence of July 25, 2016 as the "alleged deterioration." The employer representative submits that "there is significant contemporaneous medical evidence that any deterioration in [the worker's] shoulder condition or shoulder pain was in fact related to his non-compensable [cerebral palsy]." And as such, this would support that the worker's loss of earnings as of that date, was not a result of the work-related injury.

[104] In her submissions, the employer representative refers to multiple medical reports, which described the impact of the worker's CP on his functional ability around and subsequent to July 2016 (i.e., the period of time he performed the Escalator Check position). Below we have noted some of those reports:

- Dr. Hsieh, in a clinical note dated August 15, 2016, indicated that this "58 year old male patient had left hemiparesis due to cerebral palsy. He favours his left side and over uses his right upper and lower extremities at work. He has arthralgia of the neck, shoulder, hip and knee."
- In a subsequent clinical note dated August 25, 2016, Dr. Hsieh indicated that the worker had complaints of arthralgia of his neck, right shoulder and right hip because he favours his left side.

- Dr. E. Kennedy, the worker's treating chiropractor, in an August 26, 2016 report, stated that the worker's CP on his left side causes him to swing his right arm excessively, and when the quality of his gait decreases with fatigue, the use of his right side increases even more for balance (we also note from a Functional Capacities Evaluation in February 2017 that the worker has a slight toe drag on the left with the foot in an inverted position). Dr. Kennedy opined that the increased walking in his work (i.e., the Escalator Check position) corresponded with the increased overuse of the worker's right side and this caused increased pain in the worker's right shoulder, left hip, and right neck.

[105] By referring to these medical reports and others, we interpreted the employer representative to be submitting that the deterioration in the worker's right shoulder in July 2016 was due to the CP, and the CP was the overwhelming disabling condition when the worker laid off in late July 2016.

[106] The employer representative notes that the worker applied for Long Term Disability (LTD) benefits through the employer's insurance carrier in July 2017, and these benefits were approved on August 14, 2017. The employer representative notes that the worker indicated the existence of multiple non-compensable conditions, in addition to his right shoulder condition since 2009, when applying for the LTD benefits. The employer representative also draws our attention to multiple medical reports in 2018 and 2019 that, she submits, noted deterioration in the worker's condition, despite the fact that he did not work past July 2016. The employer representative also notes the multiple conditions (non-compensable conditions and right shoulder condition) that warranted the continuation of LTD benefits beyond two years, and a stricter definition of disability for LTD benefits (i.e., total disability from any occupation).

[107] The employer representative in her submission makes statements such as, "indeed, it is apparent that the [worker's] [right] shoulder function was already diminished at the time of his 2009 injury and that an 11% NEL level may have represented [the worker's] pre-accident state." We interpret the employer representative to be disputing the worker's initial entitlement for a right shoulder injury and/or the worker's entitlement for a

compensable permanent impairment and NEL award. With this view of the evidence, specifically the significant role of the worker's CP on his use of the right arm to compensate for the left side hemiparesis, the employer representative states that "in the strict alternative, the [employer] respectfully submits that [the worker's] impairment caused by his non-compensable cerebral palsy had so entirely overwhelmed the 2009 shoulder injury by November 15, 2017 that it is no longer a significant contributing cause to [the worker's] impairment and alleged wage loss."

[108] We reviewed the employer representative's entire submissions on this matter; however, we have dismissed a large portion of these submissions because we note that many of the employer representative's arguments pertain to issues which are not before us, or, more specifically, rely on the dismissal of findings of fact that were made by previous decision-makers, and which the employer did not appeal.

[109] For instance, we observe that Policy 15-02-03 was not provided in the policy packages from the WSIB, which is consistent with the fact that the issue of whether the worker had a pre-existing right shoulder condition (i.e., a right shoulder condition resulting from his CP) is not an issue before us. We observe no decision from the WSIB on this matter and/or any final decisions from the WSIB on this matter that were appealed by the employer. In addition, the worker's entitlement for a permanent impairment for a compensable right shoulder injury is not in dispute, nor has the employer appealed this issue. As such, we cannot accept the employer representative's inference that the worker's NEL rating represent a pre-accident impairment.

[110] Moreover, we note that the employer did not appeal the ARO decision dated January 29, 2021 that found that the Escalator Check position was not suitable for the worker, and that the worker had entitlement for a significant deterioration (i.e., a recurrence) of his right shoulder condition as of July 25, 2016. We note, in her submissions, that the employer representative acknowledges that the employer did not appeal the ARO decision dated January 29, 2021, but then she proceeds to refer to the recurrence as an "alleged recurrence" and presents detailed submissions in which she argues that any deterioration in the worker's right shoulder, including in July 2016, was

due to the non-compensable CP, in order to dispute the worker's entitlement to any LOE benefits. In so doing, we find that the employer representative is attempting to subvert the appeal time limit provisions of the WSIA, and argue findings and rulings that the employer did not appeal.

- [111] The worker appealed two of the issues in the ARO decision dated January 20, 2021 (i.e., the worker's entitlement to a neck injury and permanent impairment for the psychotraumatic disability). The employer did not appeal the ARO decision dated January 20, 2021, and as such, the ARO's decision that the deterioration in the worker's right shoulder as of July 25, 2016 was compensable, and that the Escalator Check position was unsuitable for the worker, are findings of fact in this current appeal and cannot be disputed.
- [112] In addition, we acknowledge that the worker filed for LTD benefits in July 2017, and, when doing so, he reported pain in multiple bodily areas for which he did not have entitlement under the WSIB claim, such as his neck, right hip, and left knee, in addition to the CP and right shoulder condition. However, we note that the definition of disability and entitlement to benefits under an LTD plan will differ from that under the WSIA, and as such, we find that we are not bound by the insurance company's view of the medical documentation and the worker's condition.
- [113] We also find it notable that as of February 2018, Dr. Hsieh, on the CPP Disability Benefit medical form, did not indicate injuries or conditions to any other bodily areas that may have been viewed as conditions that developed after the workplace accident. As noted above, on the CPP medical form, Dr. Hsieh first listed the chronic right shoulder condition, followed by the left hemiparesis due to the CP, which was a long-standing condition prior to the workplace accident, the compensable right shoulder surgery in 2011, and a tendon transplant for the CP. Dr. Hsieh did not indicate specific injuries or conditions related to the left knee, neck or other non-compensable bodily areas. This supports that any deterioration in other, non-compensable bodily areas was either temporary or not significant.

[114] We have clarified the ARO findings in his January 29, 2021 decision and bolstered the reason for this decision below, since these findings are relevant to the issue of LOE benefits as of November 15, 2017 and our assessment of the worker's employability.

[115] The ARO, in January 2021, found that the Escalator Check position, which was the modified work offered by the employer and performed by the worker as of July 5, 2016, was unsuitable for the worker. The position required the worker to perform the duties on the night shift (i.e., when there was no operation of the transit) and as such, he had to walk for almost the entire shift. The ARO also accepted that the worker had to open and close heavy steel doors and use the handrails of the escalators to climb the escalators. This is of relevance because, as noted in the medical evidence and by the ARO, the dexterity in the worker's left hand was significantly compromised by the CP, and the worker would have had to use and extend the right arm (i.e., right shoulder flexion) to hang onto the handrail as he climbed the escalators that were non-operational during the night shift. The ARO wrote:

Dr. Kennedy explained the relationship between the significant increase in walking which in turn caused a dramatic decrease in right shoulder range of motion and increased pain. When observing the worker's gait, the CP on his left side causes the worker to swing his right arm excessively. As the worker fatigued, the quality of his gait decreased such that the use of the right arm, shoulder and neck increased in order to aid balance. The sudden increase in the amount of walking re-aggravated his right shoulder and exacerbated his left hip and left neck.

[116] As such, the ARO found that the Escalator Check position was not suitable and caused the worker to experience a recurrence (i.e., significant deterioration) in the compensable right shoulder.

[117] To understand this decision, it is important to note the definition of "suitable work" in Policy 19-02-07, "RTW Overview and Key Concepts." Policy 19-02-07 states:

**Suitable work**

Suitable work means post-injury work 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.

[118] The policy goes on to set out factors that should be considered when determining whether work is safe and one of those factors is:

The work does not pose a health or safety risk to the worker (e.g., should not cause re-injury or a new injury either physically or psychologically), to co-workers, or to third parties.

[119] In this case, the worker was placed in the Escalator Check position in an attempt to accommodate the worker's compensable right shoulder permanent impairment that was not in dispute. Although it was ultimately the worker's pre-existing CP condition that required him to swing his right arm excessively when walking, if it were not for the right shoulder injury, the worker would not have been placed in the Escalator Check position that required him to walk and excessively swing his right arm for most of the shift. The Escalator Check position was not considered suitable because it was not safe for the worker. The position caused re-injury of the right shoulder. The WSIA and WSIB's policy indicate that the goal of return to work efforts is to return the worker to suitable work as defined above, and if required, the accommodation of pre-existing conditions must be considered in accordance with human rights legislation; otherwise, the worker's work-related injury is considered a significant contributing factor to the worker's loss of earnings.

[120] We note that this is an important concept to understand when considering the worker's employability and entitlement to LOE benefits in this case, and it relates to the "thin skull" doctrine, which is a well-established, common law principle that is applied in matters of workers' compensation. The thin skull doctrine states that the worker must be taken as they are found at the time of the accident. As such, when considering what is suitable work for the worker, the worker's pre-existing condition must be considered and accommodated. Although not explicitly worded as such, the ARO, in the decision dated January 29, 2021, when finding the Escalator Check position unsuitable, found that the worker's pre-existing condition was not accommodated, and as such, the Escalator Check position was not suitable work and the aggravation of the worker's right shoulder injury was a compensable issue.

- [121] As will be similarly noted in the subsection below, the WSIB's policy, such as Policy 19-02-10, "RTW Assessments and Plans," stipulate that the worker's non-work-related impairments/disabilities and any other human rights-related accommodation requirements are considered when determining a SO. This is similarly applied when considering a worker's employability, although as we will explain below, post-accident deteriorations in the pre-existing condition are not considered.
- [122] In any event, the ARO correctly applied the thin skull doctrine when finding the Escalator Check position unsuitable, and we now turn back to the employer's appeal. It is a finding of fact that the Escalator Check position was not suitable work for the worker because it was not safe, and caused re-injury. We note that the employer did not offer the worker any other forms of modified work after the worker laid off from this position in late July 2016.
- [123] We observe that the employer representative, in her submissions, states that the reason why further modified work was not offered by the employer beyond 2016 was because the worker applied for LTD benefits. By this statement, the employer representative appears to place the responsibility of the employer's offer of suitable work on the worker. However, we find that the worker's application for LTD benefits does not absolve the employer's responsibilities under the WSIA, and although the WSIB's policy indicates that the parties should cooperate with each other to initiate and sustain a worker's return to work, in our view, the employer is the party in the position to offer the work.
- [124] In addition, within the case materials, we observe copies of emails between the LTD Disability Management Specialist and the employer in March 2017. According to these emails, upon review of the worker's restrictions, the employer advised the LTD Disability Management Specialist that the employer "[did] not have any work related functions that fit with the restriction criteria." The employer explicitly indicated in the email, "we will NOT be able to accommodate."
- [125] As there is no evidence to substantiate that the employer had or offered suitable work for the worker's compensable right shoulder injury after 2016, and noting that it had long

been established that the worker was unable to sustain his pre-injury work in Waste Management, we find that the worker's compensable right shoulder impairment was a significant contributing factor to the worker's loss of earnings as of November 15, 2017.

[126] To clarify, there may have been other factors affecting the worker's ability to work as of that date, but, as noted above, the significant contribution test does not require the compensable injury to be the sole contributing factor to a worker's loss of earnings for entitlement to LOE benefits. Accordingly, since we find that the worker's right shoulder injury was a significant contributing factor to the worker's loss of earnings, in accordance with section 43 of the WSIA, we find that the worker was entitled to LOE benefits as of November 15, 2017, and the employer's appeal on this matter is denied.

**(2) Quantum of LOE benefits from November 15, 2017 to age 65, and suitability of the SO of Customer and Information Services Representatives**

[127] As noted above, the worker representative submits that the worker is unemployable as of November 15, 2017, and unable to sustain work in the identified SO of Customer and Information Services Representatives, even on a part-time basis, and therefore, he submits that the worker is entitled to full LOE benefits as of November 15, 2017 to age 65. As an alternative position, the employer submits that the worker was capable to performing full time work in the identified SO, and therefore, the worker's LOE benefits should reflect such.

[128] As noted above, WSIAT's jurisprudence has established that the test for entitlement to full LOE benefits is whether the worker is capable of earning any income in suitable employment (i.e., SO) (*Decision No. 1004/10*, 2010 ONWSIAT 2055). Other decisions have discussed the concept of employability and how a worker may be partially disabled, but unemployable. For instance, *Decision No. 620/17*, 2017 ONWSIAT 1567, states:

Tribunal jurisprudence takes into account that employability and impairment are separate and distinct concepts. As stated in *Decision No. 563/08*:

A worker may only be partially impaired but competitively unemployable if he or she has no real prospect of being able to obtain or maintain employment in the labour market.

Competitive unemployability may occur for a number of reasons, including the worker's age, level of education, transferable skills, literacy or the nature of the compensable condition from which the worker suffers. Workers who become competitively unemployable have been granted full LOE benefits by Tribunal decisions.

[129] *Decision No. 1214/15*, 2015 ONWSIAT 1873, dated August 24, 2015, also notes the multi-factorial approach to assessing a worker's employability. In *Decision No. 1214/15*, Vice-Chair R. McCutcheon, as she then was, noted that, when considering the pre-existing factors/conditions that affect a worker's employability, those factors/conditions must be "stable," and therefore, the consideration of a worker's employability for the purpose of determining the quantum of LOE benefits, cannot consider post-accident changes in the pre-existing conditions or new conditions.

*Decision No. 1214/15* states:

[52] In assessing claims for full LOE benefits, some Tribunal decisions have addressed the "competitively unemployable" test and whether this standard ought to apply when considering LOE benefits. I agree with *Decision No. 740/12* that it is preferable to focus the analysis on the language of the WSIA and applicable Board policy. Current Board policy now provides some additional guidance in this area. Document No. 19-02-01 of the OPM states in this regard:

#### Employable

Refers to a worker having the necessary skill and training to be capable of obtaining and performing full-time or part-time employment on a regular basis in the labour market. Factors that influence a worker's employability include but are not limited to

- level of education/training (including special certificates/licenses)
- transferable skills/aptitudes and work experience
- work-related impairment(s)/disabilities, and
- other non-work-related impairment(s)/disabilities (e.g., including non-physical disabilities such as a learning disability).

[53] Other relevant factors to consider may include a worker's age and English language ability. With regard to the fourth factor, it is well-established in the Tribunal case law that the thin skull rule applies where the worker had a stable pre-existing condition (for example, a hearing impairment or learning disability); however, that rule does not apply where the pre-existing condition worsens following the accident or the worker develops a new non-compensable condition following the accident. Section 43 provides that a worker is entitled to benefits to compensate for the loss of earnings arising from the work-related injury; as such, it is necessary to show a causal connection between the workplace injury and the loss of earnings.

[54] In summary, the determination of a worker's employability is multifactorial, and includes consideration of factors such as the restrictions/limitations associated with the compensable injury; the worker's transferable skills, aptitude and ability; pre-existing stable medical conditions; English language ability/literacy; and age.

[130] We agree with the principles noted in the caselaw above and have applied them when considering this worker's employability as of November 15, 2017. In addition, we do not interpret *Decision No. 1214/15* to mean that, if a pre-existing condition worsens post-accident, that condition is completely disregarded. Rather, in accordance with the thin skull doctrine and our reading of *Decision No. 1214/15*, we find that we may consider the impact of the worker's CP condition on his functional abilities prior to the workplace accident, and any post-accident deterioration in his CP will not be considered when determining the worker's employability. We have also applied the same principles when considering the suitability of the identified SO of Customer and Information Services Representatives, to which we now turn.

[131] According to the Case Manager's June 30, 2021 decision, when implementing the ARO's decision dated January 20, 2021, the Case Manager concluded that the worker could have sustained employment in the occupation of Customer and Information Services Representative as of November 15, 2017, without any additional training. From the Case Manager's decision letter, we note that the Case Manager turned to the National Occupational Classification (NOC) resources to determine the suitability of this SO. Customer and Information Services Representatives is categorized as NOC 6552 under these governmental resources.

[132] The Case Manager gathered the following information from the NOC, regarding NOC 6552:

That unit group includes customer and information services representatives who answer enquiries and provide information regarding an establishment's goods, services and policies and who provide customer services such as receiving payments and processing requests for services. They are employed by retail establishments, contact centres, insurance, telecommunications and utility companies and other establishments throughout the private and public sectors.

The following is a summary of main duties for some occupations in this unit group:

Customer service representatives in retail establishments

- Answer, in person or on the phone, enquiries from customers
- Investigate complaints regarding the establishment's goods, services and policies
- Arrange for refunds, exchange and credit for returned merchandise
- Receive account payments
- Receive credit and employment applications

Contact centre agents

- Take customer orders for goods or services
- Promote goods or services
- Respond to enquiries and emergencies
- Investigate complaints and update accounts

Customer service representatives in insurance, telecommunication, utility and similar companies

- Explain the type and cost of services offered
- Order services
- Provide information about claims or accounts
- Update accounts, initiate billing and process claim payments, and receive payment for services.

Information services representatives provide information to customers and the public concerning goods, services, schedules, rates, regulations and policies in response to telephone and in-person enquiries.

The related employment requirements include:

- Completion of secondary school is usually required
- Completion of some college or other post-secondary programs may be required
- Clerical or sales experience may be required

[133] According to the Case Manager, the NOC indicated that strength requirements for NOC 6552 involved handling loads up to 5 kg; sitting was the primary body position, although standing and walking may occur; and co-ordination of upper limbs was required.

[134] For ease, we repeat the definition of a SO from Policy 19-02-10 as follows:

...a category of jobs suited to a worker's transferable skills that are safe, consistent with the workers functional abilities, and that to the extent possible, restores the workers pre-injury earnings. The SO must be available, meaning it exists and is in demand to the extent that the worker has a reasonable prospect of obtaining employment in the occupation.

- [135] Policy 19-02-10 goes on to identify a number of factors that are considered when determining a SO, including, but not limited to, the worker's functional abilities, transferable skills, education, aptitudes and interests, work-related and non-work-related impairments/disabilities and any other human rights-related accommodation requirements, pre-injury earnings and hours, labour market trends and the likelihood of the worker being able to secure and maintain employment within the SO.
- [136] When we review the worker's specific restrictions, the impact of the worker's pre-accident CP on his functional ability and his personal and vocational characteristics, we find that the SO of Customer and Information Services Representatives, NOC 6552, is not suitable. We explain below.
- [137] According to the PVA in April 2013, the worker had completed high school and started, but did not finish, college level training. He had basic computer skills, primarily using the internet and email. Full scale IQ testing indicated that he was "high average." However, we note that his employment history was limited to physical labour. He had worked 16 years for the accident employer in various cleaning and manual positions. Based on the PVA and the worker's testimony, we note that, prior to working for the employer, the worker worked in a security position, as a shipper-receiver, performed autobody work, worked on boilers as a station engineer and in production for insulation for houses.
- [138] From this work history, we find that the worker had limited transferrable skills for administrative and customer service positions. Although he may have performed some basic administrative functions as a shipper-receiver, the extent of these skills was not defined, and we note that they would not have been considered current skills by 2017. We note that the worker had brief assignments with the accident employer after sustaining the injury. It is noted that he worked for 3 months in 2012 in the accounting department of the accident employer, completing general office duties and running

errands. He also worked 3 days in the reservations department, working on telephones and a computer. He advised the PVA assessors that he was unable to continue in this position due to the “overwhelming pain as a result of overusing his right arm and hand.” In March 2013, he performed work in the storage area, repacking parts for inventory. We find that these periods of administrative work were not substantial, and particularly because they were not sustained, we find that these brief experiences do not constitute marketable administrative skills and experience. Accordingly, we find that the worker had limited transferrable skills in administration, customer service and computer usage and his work experience was primarily related to physical labour.

- [139] During his testimony, the worker explained how his CP affected his ability to use a keyboard/computer and limited his walking ability, prior to the workplace accident. The worker testified that he was diagnosed with CP at age 8, and he has undergone surgeries over the years, including muscle transplants. He testified that the CP affects his left hands, fingers, foot and toes. He testified that he cannot grasp things with his left hand, but he will awkwardly use the left hand to assist his right hand. He testified that he felt he still had some strength in the left hand, but he did not have the dexterity in his fingers. He confirmed that this was his pre-accident state. He also testified that he has always had to slightly drag his left foot. He testified that he did not let this affect his ability to work, and he grew up on a farm performing physical work. We interpreted the worker to mean that, although he had to perform physical tasks differently because of his CP, and his gait and walking ability was affected, he always found ways to accommodate his condition and work.
- [140] The worker testified that he could not perform tasks on a computer/keyboard with his condition because he does not have the dexterity in his left hand to do so. He testified that he has had no computer training. He testified that he does math in his head so that he does not need to use a keyboard.
- [141] The worker representative draws our attention to documentary evidence that is dated prior to the workplace accident that described the effect of the worker’s CP on his functional abilities. From these medical documents, we note that the worker’s CP limited

his use of the left arm. There was a history of spastic paraparesis in the left arm, decreased leg length on the left, and weakness in the left forearm, left face and left leg. As noted above, testing also noted a slight drag in the worker's left toe, which would be consistent with CP and the other evidence. We accept that this represents the effect of the worker's pre-accident CP on his functional ability, in its stable form, prior to the workplace accident. We observe no evidence that supports that the worker's CP condition, as stated above, was deteriorating at the time of the accident.

[142] Further, and in regard to the worker's physical ability by November 2017, we observe that the list of physical restrictions, which were discussed during the employer's conversation with the LTD Disability Specialist in March 2017, were based on the result of a Functional Capacity Evaluation in February 2017. Those restrictions were:

- No lifting waist to floor.
- Lifting waist to crown up to 5 pounds on an occasional basis with the right hand (34-66% of his shift).
- No carrying.
- Can perform chest height work with the right hand only on an occasional basis (34-66% of his shift).
- Forward bending stand position on an occasional basis (34-66% of his shift).
- Standing work on an occasional basis (34-66% of his shift).
- Crouching work on an occasional basis (34-66% of his shift).
- Kneeling work on an occasional basis (34-66% of his shift).
- Stair climbing on a rare basis (1-5 % of his shift).
- Walk on a rare basis, self-paced (1-5% of his shift).
- Sitting on a frequent basis (34-66% of his shift).

[143] We also note that Dr. Hsieh indicated similar restrictions on an LTD Sick Benefits Association Form on November 23, 2016, and he indicated that the worker had no ability to do keyboarding.

[144] Noting the job titles and duties of NOC 6552 and the upper limb co-ordination required, as set out by the Case Manager in her decision dated June 30, 2021, we find that many of the positions under NOC 6552 would not have been within the worker's functional abilities, particularly noting his CP condition and the lack of dexterity in his left hand. The employer representative, without actual labour market evidence, indicates that some customer service positions would not require keyboarding. Although this may be true for some customer service positions, we find, based on the general duties above, that suitable employment options within NOC 6552 would have likely been limited. And, when we consider his limited transferrable skills and lack of work experience beyond physical labour, we find that the likelihood of the worker securing and sustaining employment within NOC 6552 was slim. As noted above, the definition of a SO includes that a worker has a reasonable prospect of obtaining employment in the occupation.

[145] As such, even though the occupation of Customer and Information Services Representatives may have involved sedentary work, we find that due to his limited transferrable skills and physical restrictions for his compensable and pre-existing CP condition, the occupation of Customer and Information Services Representatives was not suitable for the worker.

[146] Similarly, when we examined the general employability of the worker, we find that he would have had significant barriers to employment as of November 15, 2017. Those barriers are as follows:

- He had limited transferrable skills beyond physical labour, including no or outdated administrative, customer service and monetary management skills.
- He had a limited ability to physically operate a computer and keyboard.

- He had physical restrictions for his compensable right shoulder as noted above.
- His walking ability was limited to brief periods of time and he had no left hand dexterity due to his CP prior to the workplace accident.
- The worker was 59 years of age in November 2017 (i.e., 3 months away from turning age 60).
- In addition, the worker was not provided with any work transition services to update any skills, and more importantly, provide current job search skills. In 2017, it had been 20 years since the worker had searched for work outside of the accident employer.

[147] While applying the multi-factorial analysis as set out in *Decision No. 1214/15*, and noting all of the factors above, we find that, more likely than not, the worker was unable to earn income in any occupation from November 15, 2017 to age 65. As such, we find that the worker is entitled to full LOE benefits from November 15, 2017 to age 65.

DISPOSITION

[148] The worker's appeal is allowed in part and the employer's appeal is denied as follows:

1. The worker does not have entitlement for a neck injury.
2. The worker does not have entitlement for a permanent impairment and NEL award for psycho-traumatic disability.
3. The worker is entitled to LOE benefit as of November 15, 2017 to age 65.
4. The SO of Customer and Information Services Representatives is not suitable for the worker as of November 15, 2017.
5. The worker is entitled to full LOE benefits from November 15, 2017 to age 65.

DATED: August 19, 2025

SIGNED: C .Zehr, R. G. Ouellette, Z. Agnidis