WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2366/18

BEFORE:	A.T. Patterson: Vice-Chair
HEARING:	August 13, 2018 at Toronto Oral
DATE OF DECISION:	August 21, 2018
NEUTRAL CITATION:	2018 ONWSIAT 2710
DECISION UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) F. Amorim dated June 28, 2017

APPEARANCES:

For the worker:	R. Fink, Lawyer
For the employer:	Not participating
Interpreter:	None

REASONS

(i) Introduction

[1] The worker appeals a decision of the ARO, which concluded that the worker could perform his pre-injury employment on a full-time basis as of December 8, 2014.

[2] By correspondence dated August 13, 2018, the accident employer advised that it was no longer participating in the appeal.

(ii) Issues

[3] The sole issue for my determination in this appeal is whether the worker could perform his pre-injury employment as of December 8, 2014.

(iii) Background

[4] The following are the basic facts.

[5] The now 59-year-old worker started as a labourer with the accident employer on April 25, 2014. He was employed in the construction of concrete windmill bases.

[6] On July 17, 2014, the worker attended a medical clinic and was seen by a nurse practitioner, S. Moore, for left elbow pain which he attributed to long hours of work using a vibrating tool to mix the concrete which had been poured. He was diagnosed with left elbow epicondylitis.

[7] The worker reported the condition to the accident employer on July 17, 2014 and was assigned to the "road crew" to control road traffic as a flagman until August 8, 2014, on which date he was laid off.

[8] Entitlement to left elbow epicondylitis was granted on a disablement basis. The worker was granted loss of earnings (LOE) benefits as of August 8, 2014.

[9] On August 20, 2014, the worker was examined by his family physician Dr. D. Noel, who confirmed the diagnosis and referred the worker to physiotherapy with M. Kleuskens. The worker attended physiotherapy twice a week beginning on September 4, 2014.

[10] The worker returned to flagman duties with the accident employer on October 6, 2014.

[11] The worker was referred to a Regional Evaluation Centre where his condition was assessed on October 15, 2014 by Dr. B. Death and occupational therapist M. Roth. The REC report, dated October 17, 2014, concluded that the worker could return to his "pre-injury job accommodated" at full-time hours with restrictions for four weeks. The restrictions were:

- Avoid the use of vibratory tools
- Avoid repetitive push/pull, gripping and twisting with the left upper extremity
- Avoid heavy lifting and avoid moderate repetitive lifting with the left upper extremity.

[12] A return to work plan involving a graduated return to "regular full/normal duties" was set out to start on October 18, 2014, and last until December 8, 2014. The worker did not, in fact, return to performing work with the "concrete crew" but continued working primarily as a flagman throughout the period in question and beyond December 8, 2014.

[13] The worker was seen by his family physician on November 19, 2014, and continued participating in physiotherapy until December 3, 2014.

[14] The worker was seen by his family physician on January 6, 2015, on which date a Functional Abilities Form (FAF) was completed. The worker again attended his family physician on April 7, 2015, and another FAF was completed.

[15] The worker continued performing modified work, principally as a flagman, until April 25, 2015, when he was laid off by the accident employer. On May 1, 2015, the worker contacted the Board, which investigated the lay-off in light of the employer's re-employment obligation.

[16] The worker found work through his union hall with a different employer at the beginning of May 2015. He indicated on May 22, 2015, that he would be willing to return to the accident employer if they offered to re-employ him "because the work is more long term and the hours are longer." He returned to work with the accident employer about June 1, 2015.

[17] The worker testified that he was diagnosed with leukemia in August 2015.

[18] Between June 1, 2015 and December 2, 2015, the worker performed work as a flagman with the accident employer. On December 2, 2015, the accident employer informed the worker that he was being laid off immediately, but that, to fulfill its re-employment obligations, he would be provided with his regular wages up to December 8, 2015.

[19] The worker testified that he has not worked since December 2, 2015, and that he is presently in receipt of Canada Pension Plan Disability Benefits due to his leukemia. The worker testified that his left elbow is "totally fine now".

(iv) Law and policy

[20] Since the worker was injured in 2014, 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.

[21] The standard of proof in workers' compensation proceedings is the balance of probabilities. Pursuant to subsection 124(2) of the WSIA, the benefit of the doubt is resolved in favour of the claimant where it is impracticable to decide an issue because the evidence for and against the issue is approximately equal in weight.

[22] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision #9, would apply to the subject matter of this appeal:

- Package # 136 – Re-Employment in the Construction Industry – DOA as of January 1, 2013
- Package # 300 – Decision Making/Benefit of Doubt/Merits and Justice.

[23] I have considered these policies as necessary in deciding the issues in this appeal.

(v) Analysis

[24] For the reasons which follow, I find that the evidence supports a finding that the worker's compensable left elbow lateral epicondylitis had not fully resolved by December 8, 2014.

[25] I note that the REC report dated October 17, 2014, indicated that the restrictions should be in place for "4 weeks, then reassess by GP". The worker continued to participate in physiotherapy for the left elbow condition until December 3, 2014. A report from the treating physiotherapist, dated January 19, 2016, indicates:

> He was last seen December 3, 2014 at our facility. During this time, [the worker] was able to commence light/modified job duties with ability to avoid heavy lifting/vibration tasks. His pain levels on palpation had improved as well as resistance in strength. However, he did continue to experience discomfort in the affected elbow with repetitive grip and grasp tasks.

[26] The evidence suggests, therefore, that the estimate outlined in the REC report of a full recovery within four weeks was not borne out. Less than a week before December 8, 2014, the worker continued to have left elbow symptoms.

[27] This finding is further supported by the FAF completed by Dr. Noel on January 6, 2015. On that form, the family physician indicated that the worker continued to have restrictions with respect to exposure to vibration. As the worker's duties on the concrete crew included operating the vibrating tool, I find that the worker had ongoing symptoms which precluded a return to his pre-injury duties.

[28] Some confusion was introduced into the claim file by an error committed by Dr. Noel. Dr. Noel subsequently, on April 7, 2015, completed a second FAF without changing the January 6, 2015 date on the form. This second, misdated, form indicated that the worker's condition had resolved and that the worker could return to work without restrictions. Dr. Noel subsequently provided two letters, dated June 11, 2015, and June 8, 2017, in which he identifies the error and re-iterates that the second, misdated form, should have been dated April 7, 2015. In addition to the two letters identifying the error, I note that Dr. Noel's clinical note for January 6, 2015, indicates that the worker had the following ongoing symptoms which warranted restrictions:

> Mild symptoms of left lateral epicondylitis
>
> o/e [on examination] very mild discomfort with left wrist extension against resistance, and with palpation
>
> normal neuro
>
> A/ resolving left lateral epicondylitis
>
> P/ cont[inue] to receive modified duties away from vibration tools

[29] On April 7, 2015, the worker was examined by Dr. Noel, who determined that the worker's left lateral epicondylitis was resolved and that the worker could return to full duties. On this occasion, Dr. Noel completed the second FAF, misdated as January 6, 2015.

[30] In light of the above, I conclude that the worker was not capable of returning to his regular job on the concrete crew on December 8, 2014. The evidence supports a finding that he was only medically cleared to return to his regular employment duties as of April 7, 2015, following the examination on that date by Dr. Noel.

DISPOSITION

[31] The appeal is allowed as follows:

1. The worker was not capable of returning to his regular job on December 8, 2014.

2. The worker was capable of returning to his regular job on April 7, 2015.

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

DATED: August 21, 2018

SIGNED: A.T. Patterson