

--SUMMARY--

Decision No. 1139/20

08-Feb-2022

R.Hoare - R.Ouellette - A.Signoroni

- Availability for employment (medical authorization)
- Loss of earnings {LOE} (employability)

No Summary Available

24 Pages

References: Act Citation

- WSIA

Other Case Reference

- [w1422n]a

Style of Cause:

Neutral Citation: 2022 ONWSIAT 234



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1139/20

BEFORE:

R.M.J. Hoare : Vice-Chair
R.G. Ouellette : Member Representative of Employers
A. Signoroni : Member Representative of Workers

HEARING:

October 6, 2020 and April 12, 2021 at Toronto
Oral by Videoconference
Post-hearing activity completed on November 19, 2021

DATE OF DECISION:

February 8, 2022

NEUTRAL CITATION:

2022 ONWSIAT 234

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO), dated November 29, 2018 and WSIB Vice President of the ASD (Appeals Services Division), dated August 6, 2019

APPEARANCES:

For the worker:

A. Sciacca, Lawyer

For the employer:

J. Gallagher Healy, Lawyer
A. Kassam, Lawyer

Interpreter:

Not applicable

505 University Avenue 7th Floor
Toronto ON M5G 2P2

505, avenue University, 7^e étage
Toronto ON M5G 2P2

REASONS

(i) Introduction

[1] The worker appeals decisions of the Workplace Safety and Insurance Board (WSIB) regarding the quantum of Loss of Earnings (LOE) benefits to which she was entitled for two periods of time during which she was offered modified work duties as the result of a compensable workplace injury to her right shoulder which occurred on July 15, 2017.

[2] First, the worker appeals the decision of the ARO, dated November 29, 2018, which denied her entitlement to full LOE benefits for the period, April 2, 2018 to June 18, 2018.

[3] Second, the worker appeals the decisions of a WSIB Case Manager (CM), dated April 11, 2019, and June 21, 2019, which denied her entitlement to full LOE benefits for the second time period, November 26, 2018 to May 14, 2019. Upon a request by the worker, the Case Manager's decisions in the Operating Area of the WSIB were deemed to be final decisions of the WSIB by way of a decision of the Vice President of the Appeals Services Division (ASD) of the WSIB, dated August 6, 2019. This ASD decision was requested in order to allow all the relevant WSIB decisions regarding the quantum of the worker's LOE benefits to be referred to the Tribunal for adjudication at the same time.

[4] All the relevant WSIB decisions under appeal were rendered after hearings in writing at the WSIB.

(ii) Issues

[5] The issues under appeal are as follows:

1. The quantum of the worker's LOE benefits for the period from April 2, 2018 to June 18, 2018;
2. The quantum of the worker's LOE benefits for the period from November 26, 2018 to May 14, 2019.

(iii) Synopsis of the appeal

[6] The now 47-year old worker came to Canada as a refugee from her native country when she was a teenager. She completed high school in Canada and then studied computer programming at a community college. Upon graduation, she worked for a federal law enforcement agency for several years as an interpreter/translator. In 2009, she began work as a police constable with the accident employer, a municipal police force.

[7] Prior to the compensable right shoulder injury at issue in this appeal, she experienced several prior injuries to her right arm and shoulder. She was involved in a non-compensable motor vehicle accident (MVA) in 2001, during which she sustained an injury to her right arm. In 2005, she required a non-compensable surgery to her right shoulder. In 2013, she was injured during her work as a police constable when a suspect tried to grab her gun and her right arm was wrenched in the ensuing struggle with the suspect. She was also injured at work in 2015 while trying to arrest a suspect who twisted her right arm. The worker returned to work after these compensable work-related incidents without any finding by the WSIB that she had permanent impairments arising from her injuries to her right arm or right shoulder.

[8] On July 15, 2017, the worker was injured while pursuing a break and enter suspect in the underground parking garage of a residential building. Due to his erratic behavior, the suspect was believed to be under the influence of drugs. At one point in the pursuit, the suspect turned to confront the worker and grabbed her. The worker's right arm was wrenched as she struggled with the suspect who then ran away. The worker continued the pursuit until the suspect was arrested by the worker and her partner. The worker experienced severe pain in her right arm after she was grabbed and after the suspect's arrest. The pain increased upon her return to her assigned police division to finalize the arrest. She went to the hospital to seek medical care very shortly after the incident.

[9] The worker underwent ongoing medical care for her right shoulder. The worker was determined by the WSIB to have entitlement for a right shoulder anterior dislocation with recurrent instability, scapular dyskinesia, myofascial strain, biceps tenosynovitis and right rotator cuff partial thickness tear. This entitlement was set out in a letter from a WSIB CM, dated January 18, 2018 and in WSIB Memorandum #A0024, dated March 26, 2018.

[10] The worker received full LOE benefits from July 16, 2017 until April 1, 2018. After that date, she received partial LOE benefits from April 2, 2018 to April 30, 2018, and no LOE benefits from May 1, 2018 to June 18, 2018.

[11] In the later half of 2017 and in the first half of 2018, the worker attended various doctors for treatment of her right shoulder. She received ongoing medical care. She also received physiotherapy treatment and massage therapy treatment. She engaged in a home exercise program to facilitate her recovery but continued to experience limited right shoulder mobility, spontaneous subluxations and instability in her right shoulder and related pain.

[12] The WSIB conducted a Return to Work (RTW) meeting with the workplace parties on March 20, 2018. As a result, a graduated RTW plan was devised and modified work duties with the employer were identified for the worker. On April 2, 2018, the worker was scheduled to return to work to attempt modified work duties with the Intake Area of the Community Investigative Support Unit (CISU) of the employer's police service. It was also determined that her pre-injury police constable duties were not suitable at that time, due to her ongoing right shoulder issues.

[13] The worker did not return to the modified work duties with CISU on April 2, 2018. She advised the WSIB and the employer that she was under medical care and that her treating physicians had not cleared her for a return to work. The worker did not attempt the modified work duties during any of the first time period at issue, April 2, 2018 to June 18, 2018.

[14] As a result, a WSIB CM determined in a decision, dated March 27, 2018, that the worker was not entitled to full LOE benefits for the first time period at issue. The worker was paid partial LOE benefits for the period of April 2, 2018 to April 30, 2018. She was not paid LOE benefits for the period from May 1, 2018 to June 18, 2018, based on the Graduated Return to Work Plan which indicated that she should have returned to working full time hours at modified duties by April 30, 2018, replacing any wage loss.

[15] This decision of the CM was upheld on reconsideration in a decision, dated May 30, 2018.

- [16] The decisions denying entitlement to full LOE benefits from April 2, 2018 to June 18, 2018 were further upheld by the ARO in the decision under appeal, dated November 29, 2018.
- [17] The worker returned to modified work duties with the employer on June 19, 2018. These modified work duties consisted of sedentary office work at the police division where the worker had been posted in her pre-injury employment with the accident employer. She worked at these modified duties for several months.
- [18] On November 20, 2018, the worker experienced an exacerbation of her right shoulder injury. While engaged in her modified work duties for the employer, she reached across a desk to move some items and experienced a spontaneous subluxation of her right shoulder. On December 31, 2018, the WSIB determined that she had further entitlement for a recurrence of her compensable right shoulder injury, as a result of the incident on November 20, 2018.
- [19] On November 26, 2018, the worker was offered modified work duties by the employer at another location. The worker objected to these duties, indicating to the employer and the WSIB that she wished to remain at the location where she had been engaged in modified work duties up until that time and where she had been assigned pre-injury.
- [20] The worker ceased modified work duties in late November 2018, citing the advice of her treating medical specialist, Dr. T. Dwyer, orthopaedic surgeon. Dr. Dwyer indicated that the worker was not able to engage in further modified work duties until further diagnostic investigations were performed on her right shoulder to address the exacerbation experienced on November 20, 2018.
- [21] The WSIB determined that the modified work duties offered at the different location operated by the accident employer as of the worker's transfer on November 26, 2018 were suitable for the worker. In the CM's decision, dated April 11, 2019, the worker was denied entitlement to full LOE benefits for the period, November 26, 2018 to May 14, 2019. The worker received partial LOE benefits for this period in accordance with the decision of the CM. The worker's request for a reconsideration of this decision was also denied. The reconsideration decision by the WSIB CM was dated June 21, 2019.
- [22] Upon a request by the worker, the Vice President of the WSIB's Appeals Services Division made a decision, dated August 6, 2019, which deemed the CM's decisions to be final decisions of the WSIB regarding the quantum of LOE benefits payable for the second time period. This allowed all the WSIB decisions regarding the quantum of the worker's LOE benefits in the two time periods to be dealt with at the same time before the Tribunal. Therefore, in this appeal, there is no ARO decision before the Tribunal regarding the quantum of the LOE benefits to which the worker was entitled in the second time period at issue before the Tribunal; rather there is a decision of the Vice-President of the WSIB's Appeals Services Division which renders the Case Manager decisions dated April 11, 2018 and June 21, 2019, a final decision of the Board.
- [23] The worker appeals to the Tribunal the issue of the quantum of the LOE benefits payable in the first time period of April 2, 2018 to June 18, 2018 and in the second time period of November 26, 2018 to May 14, 2019.

(iv) Law and policy

[24] Since the worker was injured in 2017, 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.

[25] Specifically, sections 40 and 43 of the WSIA govern the worker's entitlement in this case. Section 40 of the WSIA provides in part:

40(1) The employer of an injured worker shall co-operate in the early and safe return to work of the worker by,

- (a) contacting the worker as soon as possible after the injury occurs and maintaining communication throughout the period of the worker's recovery and impairment;
- (b) attempting to provide suitable employment that is available and consistent with the worker's functional abilities and that, when possible, restores the worker's pre-injury earnings;
- (c) giving the Board such information as the Board may request concerning the worker's return to work; and
- (d) doing such other things as may be prescribed. 1997, c. 16, Sched. A, s. 40 (1).

(2) The worker shall co-operate in his or her early and safe return to work by,

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

...

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

43(1) A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins. The payments continue until the earliest of,

- (a) the day on which the worker's loss of earnings ceases;
- (b) the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury;
- (c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury;
- (d) the day on which the worker is no longer impaired as a result of the injury. 1997, c. 16, Sched. A, s. 43 (1).

...

(2) Subject to subsections (2.1), (2.2), (3) and (4), the amount of the payments is 85 per cent of the difference between,

- (a) the worker's net average earnings before the injury; and

- (b) the net average earnings that the worker earns or is able to earn in suitable and available employment or business after the injury. 2017, c. 8, Sched. 33, s. 3 (1).

...

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

- (a) his or her early and safe return to work; or
- (b) all aspects of a labour market re-entry assessment or plan. 1997, c. 16, Sched. A, s. 43 (3); 2000, c. 26, Sched. I, s. 1 (6).

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

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

...

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

- (a) in health care measures;
- (b) in his or her early and safe return to work; or
- (c) in all aspects of a labour market re-entry assessment or plan provided to the worker. 1997, c. 16, Sched. A, s. 43 (7).

[27] As noted above, the issue before the Tribunal is the worker's entitlement to LOE benefits. Under section 43(1) a worker who has a loss of earnings as a result of a compensable injury is entitled to LOE benefits. *Decision No. 2474/00*, 2004 ONWSIAT 1381 held that under section 43(1) a causal relationship between the injury and wage loss is a condition precedent to the payment of LOE benefits. A refusal of suitable work is not necessarily an act of non-cooperation, but it may lead to a conclusion that the worker's loss of earnings does not result from the injury. Section 43(2) operates to reduce a worker's benefits where the worker refuses suitable employment. Thus, a worker who refuses suitable employment at no wage loss is not entitled to LOE benefits because the loss of earnings is not caused by the injury, but caused by the refusal of the suitable employment.

[28] Tribunal jurisprudence applies the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. See, for example, *Decision No. 280*, 1987 CanLII 1996 (ON WSIAT).

[29] 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 # 78- LOE Benefits-as of January 1, 2018

Package # 232- Work Reintegration

Package # 300- Decision Making/Benefit of Doubt/Merits and Justice

[30] We have considered these policies as necessary in deciding the issues in this appeal. Where particular policies have been referenced, they will be quoted as necessary in the analysis which follows.

(v) **Analysis**

[31] The worker's appeal is allowed for the reasons set out below. The worker is entitled to full LOE benefits for the first time period at issue, April 2, 2018 to June 18, 2018. The worker is also entitled to full LOE benefits for the second time period at issue, November 26, 2018 to May 14, 2019.

(a) **The WSIB policy applicable to both periods of LOE benefits entitlement**

[32] *Operational Policy Manual* (OPM) Document No. 18-03-02 "Payment and Reviewing LOE Benefits (Prior to Final LOE Review)", dated January 2, 2018, explains the circumstances in which "Treatment with No Return to Work" is appropriate:

If the nature or seriousness of the injury completely prevents a worker from returning to any type of work, the worker is entitled to full LOE benefits, providing the worker co-operates in health care measures as recommended by the attending health care practitioner and approved by the WSIB. If the worker does not co-operate, the WSIB may reduce or suspend the worker's LOE benefits.

[33] The WSIB policy states that LOE benefits can be paid if the absence from work is clinically authorized and the worker is unable to perform the modified duties available. To consider entitlement to LOE benefits, the Panel must first consider the worker's level of impairment. If the medical evidence demonstrates the worker is unfit for work, there is no need to review the suitability of the available work.

(b) **The quantum of LOE benefits for the first relevant time period, April 2 to June 18, 2018**

[34] The Panel finds that the worker is entitled to full LOE benefits from April 2, 2018 to June 18, 2018.

[35] The Panel received extensive evidence and submissions from both parties to the appeal. The Panel reviewed these in coming to its decision.

[36] Regarding the first time period, the worker's representative submitted the following on behalf of the worker in the worker's final submissions:

The return to work plan dated March 20, 2018 required that the Worker return to modified work on April 2, 2018, return to full hours by the end of April, and return to full-duties as a first responder by July 2, 2018. The return to work plan was rejected by all of the treating doctors (Dr. Sheffield, Dr. Sattarian, and Dr. Dwyer). The Respondent's own doctor, Dr. Winsor, rejected the plan on June 7, 2018. The Worker returned to work in accordance with Dr. Winsor's recommendations (with different work and restrictions than the March 20 plan and severely reduced hours) which was unchallenged by the Respondent. Accordingly, the March 20, 2018 plan was inappropriate and the denial of FLOE benefits was not justified.

[37] The employer's representative submitted the following on behalf of the employer in their final submissions regarding the first period of LOE eligibility:

The crux of this issue is whether the worker could have returned to work as of April 2, 2018 for 2 or 3 days per week for 4 hours each day rather than her actual return

as of June 19, 2018. If she was capable of doing so and suitable work was available to her during that timeframe, then the partial wage loss for the time she could have worked is not due to her workplace injury and she should continue to be denied full LOE benefits.

[38] Regarding the first period of time at issue, the employer further submitted that Dr. J. Lobo's assessment of the worker is the most thorough and objective medical documentation in the claim.

[39] The issue to be determined by the Panel is whether or not the medical evidence regarding the worker's right shoulder during this period indicated that the worker was not medically approved to return to work. If the evidence supports a finding that the worker was unable to return to work for medical reasons and was complying with the treatment regime suggested by her treating physicians, the suitability of the modified work duties offered to her during that period is not a relevant consideration. The worker is entitled to full LOE benefits under OPM Document No.18-02-03 if the nature or seriousness of her injury completely prevented her from returning to work and she was complying with treatment.

[40] After a consideration of the evidence, the Panel finds that the preponderance of the medical evidence indicated that several doctors, including both a family doctor and two orthopaedic specialists, found the worker was not ready to return to work during this period, April 2 to June 18, 2018.

[41] The medical evidence from the date of the workplace accident (July 15, 2017) to the proposed return to work date (April 2, 2018) is significant with regard to the planned return to work in April 2018 for the following points:

- The worker saw her family doctor, Dr. B. Sheffield, on July 17, 2017, two days after the workplace accident. He had been her doctor for approximately 20 years. He noted that her right shoulder had been dislocated. He wrote in his clinical note, "advised modified duties unable to return [sic]...hx [sic-history] of previous dislocations...unable to return to work."
- The worker was referred through the emergency department where she sought urgent care to Dr. T. Dwyer, orthopaedic surgeon. Dr. Dwyer saw her on July 17, 2017 and wrote, "We discussed with her that she will likely need at least six weeks off active duty in order to let things settle down." Dr. Dwyer saw the worker again on August 23, 2017, noting that her pain was worse and not improving. He reported that "[s]he tried to do some physiotherapy, but unfortunately had increased pain and had mechanical popping and clicking symptoms."
- An MRI conducted on September 26, 2017, ordered by Dr. Dwyer, found mild supraspinatus tendinosis and a low grade partial thickness articular sided tear of the supraspinatus and infraspinatus tendons. Dr. Dwyer ordered further testing and maintained his opinion that the worker could not return to work.
- It was apparent in documentation in the appeal record that Dr. Dwyer was also an orthopaedic specialist who evaluated injured workers for the WSIB through the auspices of a WSIB Specialty Clinic and Altum Health, specializing in the evaluation of injuries to the upper extremities.
- On October 26, 2017, the worker attended a different WSIB Shoulder and Elbow Specialty Clinic, operating through a large hospital located near the worker's home. She was seen by Dr. J. Lobo, orthopaedic surgeon and L. Mayer, physical therapist. In his physical examination of the worker, Dr. Lobo reported the following:

[The worker] has had recurrent sensations or episodes of subluxation or dislocation in the right shoulder with physical therapy and prior orthopaedic assessments. According to a note provided by her family physician, she did actually dislocate during an examination with "vigorous range of motion". Because of her apprehension today, extreme shoulder ranges were avoided, as were special tests for dislocation because of the potential for re-dislocation of her right shoulder.

Observations

[She] appears very apprehensive and protective of her right upper extremity, keeping it close to her body to avoid pain and episodes of snapping or subluxation.

- Dr. Lobo also reported that the worker “[reports] medical advice not to return to work currently.” This was with reference to her regular duties as a police constable. Dr. Lobo further reported:

I think that [she] has a dyskinetic right scapula with a snapping scapula on today's examination and sensation of subluxation/dislocation of the right shoulder...

This is therefore a mixed picture of scapular snapping/dyskinesia... recurrent subluxation or dislocation of her right shoulder.

...

Prognosis

We anticipate that [the worker] will have further recovery, but full recovery is uncertain and not expected. The constellation and chronicity of her symptoms...along with her inability to participate fully in a physiotherapy program because of pain limitation will likely limit the options for her surgically, as there is potentially a risk for worsening of her pain or symptomatology even if a structural solution is employed in the form of surgery to solve dislocation.

- On November 14, 2017, the worker underwent a MRI arthrogram diagnostic test on her right shoulder, using an injectable contrast dye. She developed an allergic reaction to the dye, causing a rash on her face and arms, swelling of her right arm, bruising, and increased right shoulder pain and tenderness. She visited Dr. Sheffield on November 17 and November 27, 2017, to seek treatment for the increased symptoms caused by the dye reaction. She was prescribed a brief five day course of steroids to address the inflammation.
- The worker saw Dr. Dwyer on November 29, 2017. He noted that the MRI “showed a right supraspinatus tendinopathy with insertional tear.” She was advised to start physical therapy to treat her stiffness before surgery was further considered.
- WSIB Memorandum #A00015, dated January 18, 2018, indicated that Dr. Lobo deferred further comments on the worker’s recovery to her follow up appointments with Dr. Dwyer.
- The worker also saw Dr. J. Sattarian, orthopaedic surgeon, on January 18, 2018. This doctor had earlier operated on the worker in 2005 for a right shoulder issue. The doctor noted “loud clunking with movement” in the worker’s right shoulder. He noted the following:

Based on her pervious [sic] injuries and also the new MRI study, she has indication of rotator cuff tear and she also has instability of the shoulder and I feel that the shoulder sublucses....The shoulder is unstable and has rotator cuff problem [sic] and I feel that at this stage she is not fit to return to work. She may not ever be able to return to her job driving a cruiser and tackling suspects as there is a risk of shoulder dislocation. At this

stage I suggest massage therapy and resting the shoulder. I will be reassessing her in three months time.

- Dr. Dwyer saw the worker on February 26, 2018 and noted that she had suspected “coracobrachialis snapping”. He further wrote, “At this stage, she is unable to work. She needs massage therapy. I will see her in 3 months.”
- The worker saw Dr. Sheffield on several occasions during this period, commencing in February 2018, when the WSIB contacted the workplace parties regarding a possible return to modified work duties for the worker. On each of the worker’s visits to Dr. Sheffield on February 5, February 27 and March 27, 2018, the worker complained of ongoing right shoulder pain. It was noted by her family doctor that she was receiving physiotherapy and continuing with home exercises, as well as seeking ongoing specialists’ care.
- The worker saw Dr. Sheffield on March 27, 2018, after the WSIB RTW meeting with the workplace parties on March 20, 2018 at which meeting it had been concluded that the worker would try modified work duties consisting of office work commencing on April 2, 2018. Dr. Sheffield provided the worker with a note that she was unable to return to work due to pain and limited range of motion (ROM) in her right shoulder.
- The worker had a further follow up visit with Dr. Sattarian on April 5, 2018. The doctor reported that the worker was experiencing continuing symptoms of “loud clicking noises and pain with movement of the right shoulder”. He also referred to pain in non-compensable areas of the worker’s body, including her neck and her right wrist, relating them to her shoulder condition. He mentioned that she was not fit for a return to her regular work as a police constable, driving a cruiser. He also opined on the modified work duties offered, “In view of her shoulder pain and also having tendinitis of the right wrist and hand, I do not feel that she would be able to do repetitive work such as typing or desk work at this stage. I have advised her to take at least six weeks off and then we will reassess her at that time.”
- The worker saw Dr. Sheffield, family doctor, again on April 11, 2018. He noted in his clinical notes, “...pain from shoulder...unable to work...wants her to return to desk job...seen by Dr. Sattarian-advised not able to return to work...unable to sit at desk and type, write...”
- The worker returned to see Dr. Dwyer, orthopaedic surgeon, on April 16, 2018. He reported “ongoing problems with her right shoulder, continued pain and clicking... She is unable to work for another 3 months. I asked her to get her family doctor to refer her to the Pain Clinic at [local hospital named]. She should continue physiotherapy and massage therapy.”
- The worker returned to see Dr. Lobo at the WSIB Specialty Clinic on April 26, 2018. Dr. Lobo noted the visits to Dr. Dwyer and Dr. Sattarian and noted that all the treating orthopaedic specialists had advised against surgery on the right shoulder. He recommended a continuing massage therapy program for a further two months, as well as a home exercise program. He also indicated that a Functional Abilities Evaluation (FAE) should be conducted in eight weeks to determine permanent restrictions, as well as an ergonomic assessment should sedentary work be recommended as a result of the FAE. Although he did not report specifically about the proposed return to work offered to the worker for

April 2, 2018, he described right shoulder restrictions pending FAE completion to be no heavy lifting, carrying, pushing or pulling; above-chest level work; or repetitive use of the right arm away from the body.

- The worker saw Dr. Sheffield on May 2, 2018 and May 29, 2018. She continued to report ongoing symptoms of pain and restricted movement in her right shoulder to Dr. Sheffield during those visits.
- The worker was seen by Dr. Winsor, a doctor with the accident employer's Medical Advisory Services (MAS), on June 7, 2018. Dr. Winsor reported:

The WSIB reports included diagnoses of a right shoulder anterior dislocation, recurrent instability, scapular distention, myofascial strain, biceps tenosynovitis, and rotator cuff partial-thickness tear. Despite these, they have cleared her for accommodated duties.

...

On examination today, she appears to easily dislocate her shoulder. This was notable with small movements with audible clunk. She then had to pop the shoulder back into place. This appeared to be quite significant.

...

We have offered some accommodated duties of about four hours for three days a week. We will look into some options to reduce her commute during rush hours, no use of right arm and hand, no public contacts; and still with non-enforcement duties.

[42] The Panel makes the following findings regarding the first period of time for which the worker seeks entitlement to full LOE benefits.

[43] First, the Panel has reviewed the extensive medical evidence regarding the worker's injury from the date of the accident into the first period of time at issue. This provided a context for a consideration of the worker's medical condition at the point of her involvement in RTW activities.

[44] Initially, the worker's family doctor, Dr. Sheffield, stated she could not return to work as a police constable immediately after her injury on July 15, 2017. One of the worker's treating orthopaedic surgeons, Dr. Dwyer, who began treating the worker two days after her compensable injury, thought she would be back to work in six weeks. Nevertheless, by August 23, 2017, the worker's pain was worse, not better as expected. She was also beginning to experience the "popping" and "clicking" sounds in her right shoulder with movement which the medical opinions indicate were due to activity-related subluxation of the right shoulder. After an MRI on September 26, 2017, Dr. Dwyer maintained the worker should not return to work.

[45] The worker visited the WSIB Specialty Clinic for the first time on October 26, 2017. Dr. Lobo examined the worker, providing information on her range of motion and providing temporary restrictions. These were the most detailed and specific findings regarding the worker's condition in the medical reporting as a whole, as Dr. Lobo's reporting provided detailed measurements of the worker's range of motion. Dr. Lobo noted the worker's marked apprehension about and guarding of her right shoulder. He noted that, "She could voluntarily sublux her right shoulder, which has also occurred on any attempts at range of motion." He described his examination of her "as limited by pain." Dr. Lobo provided temporary restrictions to the worker as follows:

Temporary restrictions for the right upper extremity until reassessment, with no lifting, carrying, pushing, pulling, above chest level work, repetitive use or use of the arm away from the body beyond her available comfortable range. Permanent restrictions may ultimately be required.

[46] Dr. Lobo also indicated that the worker intended to follow up with Dr. Dwyer for “ongoing management”. He also noted that the WSIB Case Manager was requesting updated restrictions from the Specialty Clinic once further MRI testing was completed.

[47] The Panel finds that the medical evidence throughout 2017 and into early 2018 indicated that the worker was undergoing medical and rehabilitative treatment but was not progressing as well as anticipated. There were conclusions expressed by several treating doctors that she was unable to return to work, and we place significant weight on those medical opinions since they were provided by health care practitioners who were qualified to provide an opinion in the worker's case, and since they had seen and examined the worker prior to providing their opinions.

[48] Second, the WSIB memoranda in the appeal record indicated that in January and February, 2018, after the worker had been off work for approximately six months, the WSIB began to take steps regarding Early and Safe Return to Work (ESRTW) processes for the worker. There was an indication in the claims file that the WSIB Case Manager evaluated the worker's claim and concluded that she had surpassed the expected timeframe for the resolution of a shoulder condition as experienced by the average person with a similar injury. Dr. Lobo noted that there was no Return to Work (RTW) information available from the WSIB when he assessed the worker in October 2017. He also noted that the worker had told him that Dr. Dwyer had not cleared her for a return to work as of October 26, 2017.

[49] Despite the WSIB initiating ESRTW processes for the worker, the medical information was clear at that point that the worker had not been medically cleared for a return to work. As indicated by the medical evidence quoted above, the worker continued to experience spontaneous subluxation and “snapping” in her shoulder. The worker's right shoulder was “clunking” and “popping” as she was being examined by her doctors. Dr. Sattarian, an orthopaedic surgeon, reported in January 2018 that she was unable to return to work. Dr. Dwyer saw her on February 26, 2018 and reported she was unable to return to work and that he wanted her to continue with massage therapy. He planned to see her again in three months.

[50] The Panel concludes from this evidence that the WSIB initiated ESRTW activities at a time when the medical reporting indicated that the worker was not yet medically able to return to work.

[51] Third, the worker testified that she advised her various doctors of the treatments and testing she was undergoing as she saw her different doctors. This aspect of the evidence was not always detailed in the various medical reports. Nevertheless, the Panel finds that there are numerous references in the medical reports to the worker's problems with ongoing right shoulder pain and instability and her fear and concern created by the condition of her right shoulder, as well as the fact that she was seeing a number of doctors. The Panel infers from statements in the various medical reports that the worker's doctors were aware that she was seeking treatment from several specialists and the majority of these agreed she was unable to work during the first time period at issue.

[52] Fourth, the Panel finds that the employer was contacted by the WSIB with regard to a Return to Work (RTW) plan for the worker in February 2018. This led to the RTW meeting among the workplace parties on March 20, 2018. The employer's witness at the appeal hearing, Inspector S.T., attended this meeting. The worker testified that she advised the employer and the WSIB at this meeting that her doctors, specifically Dr. Dwyer, had advised her not to return to work. The worker also advised the workplace parties that she required help with transportation to work as she was having trouble driving because of her shoulder. She also requested a headset so she would not have to use her right arm to handle a telephone when performing modified work duties. The worker testified that her shoulder popped out of place during this meeting.

[53] During that meeting, the WSIB RTW Specialist also identified April 2, 2018 as a return to work date. The worker advised that she had an appointment with Dr. Dwyer on April 16, 2018 and wanted to delay her return to modified work duties until after that appointment. The employer's witness, Inspector S.T., could not recall a discussion about the worker having a further specialist's appointment on April 16, 2018 and whether or not return to work dates should be postponed until after the April 16 specialist's appointment.

[54] Inspector S.T. testified that she was aware of the worker's general situation caused by her injury and that the employer was trying to devise an accommodated work arrangement for her. Inspector S.T. testified that she had not read the specific medical reports about the worker as those details were handled by the employer's Wellness Unit and Medical Advisory Services (MAS). She also testified that she was not aware of the specifics of the other services offered to the worker with a view to helping her return to work, such as possible taxi transportation or the provision of a headset. Inspector S.T. testified that she would not have objected to such accommodations as she often approved such matters to assist injured workers with their return to modified work duties. These aids were the subject of further discussions with the WSIB and the employer but were not provided to the worker as the worker did not return to work during this period.

[55] The Panel concludes that the testimony of both the worker and Inspector S.T. indicated that there were several areas where the parties needed to resolve ESRTW issues before the worker returned to modified work duties. Nevertheless, the workplace parties did not appear to have a full picture of the relevant medical reporting at the meeting of March 20, 2018. In addition, further medical evidence became available after that meeting which maintained the conclusions of various doctors that the worker was not medically ready to return to work.

[56] Fifth, the Panel finds that the worker's treating physicians did not change their opinions that the worker should not return to work at any time during the relevant period, particularly after the RTW meeting of March 20, 2018. Dr. Sheffield, the worker's family doctor, saw her on March 27, 2018 and April 2, 2018 and reported she was unable to return to work due to pain and continuing symptoms in her shoulder. Dr. Sattarian saw her on April 5, 2018. He referenced continuing pain and "popping" in her shoulder. He reported that she could not return to her regular police constable duties. He also opined that modified work duties or "desk work" were not suitable for her at that time either, especially if they had any aspect of repetitive work, such as typing or writing. He advised a further six weeks off work before he would see the worker for another appointment.

[57] Dr. Dwyer saw the worker on April 16, 2018. He stated she was experiencing pain and "clicking" in her shoulder with movement. He recommended she be off work for another three

months at that point. As three months from April 16, 2018 would be July 16, 2018, which was approximately a month after the worker returned to modified work duties, this recommendation would have had the worker off work on a treating doctor's recommendation for a period of time beyond the period of time for LOE entitlement at issue in the first time period under appeal.

[58] Sixth, the worker returned to the WSIB Specialty Clinic to see Dr. Lobo on April 26, 2018. Dr. Lobo produced a report which is quoted above. Both the employer and the WSIB (through the decisions of the Case Managers and the ARO decision before the Panel on appeal) relied on Dr. Lobo's reporting from April 26, 2018 to support the worker's return to modified work duties on April 2, 2018. The Panel finds that Dr. Lobo did not specifically address the modified work duties offered to the worker for the period April 2 to June 18, 2018 in the report of the visit on April 26, 2018.

[59] Dr. Lobo's reporting from April 26 addressed the likelihood that the worker would require permanent restrictions due to her right shoulder injury. He recommended that a Functional Abilities Evaluation (FAE) be conducted to determine these permanent restrictions. He also recommended that a further ergonomic assessment be performed if sedentary job duties were provided to the worker. He confirmed his earlier temporary restrictions but did not consider these in light of the modified work duties offered to the worker commencing on April 2, 2018, as a result of the RTW process.

[60] Dr. Lobo reported that the worker had improved about 35% since her date of accident. He also acknowledged that she was continuing treatment with Dr. Dwyer. Dr. Lobo noted the following:

She has not worked since the date of injury. She had a return to work specialty meeting on March 20, 2018 where a sedentary job was proposed but one of her treating doctors recommended her [sic] not return to work to any type of work [sic]. When asked about further detail [the worker] was not able to elaborate about the rationale [sic] of this decision.

[61] Dr. Lobo concluded the following in his report of April 26, 2018:

Although her clinical course has improved following the MRI arthrogram, the mixed picture of pain and instability place her at significant risk for continued pain, and significant worsening of her right shoulder dislocations.

...

We recommend right shoulder restrictions pending FAE completion of no heavy lifting, carrying, pushing or pulling; above chest level work; or repetitive use of the right arm away from the body.

[62] Also in this report, Dr. Lobo noted that he, Dr. Dwyer and Dr. Sattarian were not recommending shoulder surgery for the worker. He also saw improvement in her shoulder kinetics and recommended a two month course of massage treatment and continuing home exercise program to be followed by the FAE.

[63] Considering the totality of Dr. Lobo's report, dated April 26, 2018, the Panel concludes that Dr. Lobo was recommending the continuation of a cautious approach to the worker's ability to return to work, particularly regarding the need to further evaluate any permanent restrictions. He also acknowledged the continuing involvement of other treating professionals who were continuing to recommend that the worker remain off work. He did not specifically endorse the worker's return to work at that point in time.

[64] The Panel notes that the conclusions in this report were referenced in the decision of the ARO under appeal where it was stated that Dr. Lobo had provided “objective” conclusions which indicated the worker could return to modified work duties in the first relevant period of time. The Panel finds that Dr. Lobo did not specifically address the proposed modified work duties with the employer’s Community Investigation Support Unit (CISU) in his April 26, 2018 report.

[65] In a subsequent WSIB Memorandum, #A0035, dated April 27, 2018, it is noted that the WSIB Specialty Clinic contacted the WSIB Case Manager. The following notes were produced, based on a voicemail left for the Case Manager by the Specialty Clinic, “RTW meeting desk job-specialist recommended no RTW that is why FAE recommended.”

[66] The Panel notes that Dr. Lobo recommended that the FAE not take place until after a two month timeframe had elapsed from the date of the appointment to allow for his further recommended treatment of a course of massage therapy. There is no mention if the desk job referred to in this note was the job proposed in the March 20, 2018 RTW meeting. The Panel has noted above that Dr. Lobo did not turn his mind specifically to an analysis of those proposed modified work duties in the April 26 report.

[67] Also in WSIB Memorandum #A0035 was the following further notation:

Call to SC:

- If job fits within restrictions provided above, worker can do it immediately
- Recommend FAE -she said that another doctor said that she was not ready to go work
- ROM was limited to pain an [sic] instability
- Worker suitable for sedentary job
- Scapular dyskinesia has improved
- Continue with HEP [Home Exercise Program-sic], FAE in 8 weeks

[68] The substance of the conversation between the WSIB Case Manager and the WSIB Specialty Clinic which led to this note indicated that if modified work duties fit the worker’s temporary restrictions as set out in the April 26, 2018 report, she could begin that modified job immediately. Nevertheless, it was not specified in this note regarding the follow up telephone call to the Specialty Clinic whether the WSIB spoke directly to Dr. Lobo about the nature of the modified work duties immediately available as of the date of the telephone call or available as of April 2, 2018.

[69] As indicated above, Dr. Lobo’s report did not explicitly state that he considered the nature of the modified work duties offered and did not address those modified work duties specifically. The ensuing notes in the file did not indicate to the Panel that Dr. Lobo specifically considered whether the worker could perform the modified work duties offered, especially in light of the fact acknowledged in the note, that “another doctor said she was not ready to go work [sic]”. Therefore, the Panel finds that Dr. Lobo did not consider the specific modified work duties offered to the worker for April 2, 2018 and correspondingly, he did not indicate that these modified work duties were suitable and that the worker could undertake such duties.

[70] Seventh, in the relevant period, the worker saw Dr. Sheffield twice in May 2018 for ongoing shoulder pain. She was also referred to Dr. Winsor, a doctor with the employer’s Medical Advisory Services. In his report, Dr. Winsor noted that “despite” the worker’s

“...diagnoses of a right shoulder anterior dislocation, recurrent instability, scapular distention, myofascial strain, biceps tenosynovitis, and rotator cuff partial-thickness tear”, the WSIB had still cleared her for work. Dr. Winsor noted that the worker could easily dislocate her shoulder with an “audible clunk. She then had to pop the shoulder back into place. This appeared to be quite significant.” He indicated that accommodated duties had been offered at four hours a day for three days a week. He indicated that the employer was going to look into ways for the worker to reduce her commute during rush hours.

[71] The Panel notes that Dr. Winsor’s report contains indications in the quotations above that he was concerned regarding the significance of the worker’s dislocation of her shoulder during the course of his examination of her. This was still occurring spontaneously in early June 2018.

[72] Given all of the above points in evidence, the Panel concludes that the worker was engaged in an ongoing program of medical care which began with her compensable injury in July 2017. She saw several treating doctors with regularity during this period. She saw her family doctor, Dr. Sheffield. She also saw two orthopaedic surgeons, Dr. Dwyer and Dr. Sattarian. Dr. Sattarian had previously operated on the worker’s right shoulder for an earlier injury. All three doctors maintained throughout this period that the worker was unable to work. This was largely attributable to her pain and the instability of the right shoulder which could and did sublux and dislocate spontaneously. The doctors recommended various treatments such as physical therapy, home exercise and massage therapy. The worker followed her treating doctors’ orders with regard to these treatments. She also attended appointments and underwent diagnostic tests at various times in the relevant period.

[73] Given the preponderance of the medical evidence, the Panel places more weight on the reporting of Drs. Sheffield, Sattarian and Dwyer that the worker was unable to work during this period rather than relying on an interpretation of Dr. Lobo’s reporting as supporting a conclusion that she could work at the modified work duties offered on a part time basis during the period from April 2, 2018 to June 18, 2018. We do not agree that Dr. Lobo opined that the worker could return to the modified duties, in his reports; and in any event, we place less weight on the conclusions of Dr. Lobo regarding the worker’s ability to perform the modified work duties for the reasons set out above. The majority of the worker’s treating physicians concluded she was unable to return to work during the first time period at issue.

[74] Therefore, based on the applicable policy, OPM Document No. 18-03-02 “Payment and Reviewing LOE Benefits (Prior to Final LOE Review)”, the worker is entitled to full LOE benefits during this first period from April 2, 2018 to June 18, 2018, and the wage loss was fully as a result of the compensable injury.

(c) **The time period between the two periods of claimed entitlement to full LOE benefits - the worker’s modified work duties from June 19, 2018 to November 25, 2018**

[75] The Panel heard the following evidence regarding the worker’s initial return to work in mid-June 2018. Although the period of June 19, 2018 to November 25, 2018 is not before the Panel for any determination regarding entitlement to LOE benefits by the worker, evidence regarding this time period is relevant to provide context to the determination the Panel has made regarding the second period for which the worker seeks full LOE benefits.

[76] The Panel finds that the worker returned to modified work duties with the accident employer on June 19, 2018. The Panel heard extensive evidence from the worker and from Inspector S.T., the employer's witness, on the modified work duties provided to the worker during the period from June 19, 2018 to November 2018.

[77] The worker's restrictions for her return to work in June 19, 2018 were based upon her examination by Dr. Winsor, the employer's Medical Advisory Services Consultant, on June 7, 2018. These restrictions included a directive to determine some options to reduce the worker's commute during rush hours, no use of her right arm and hand, no contacts with the public and only non-enforcement duties. The worker was scheduled to work from 10:00am to 2:00pm, 2 days a week to avoid travelling during rush hour. Further restrictions were determined shortly after that return through a Functional Abilities Evaluation conducted with an occupational therapist on July 4, 2018. The worker did not use her right arm during the evaluation due to concerns that it could be injured, especially through spontaneous dislocation. Her restrictions after testing with the left arm only were as follows:

[The worker's] demonstrated strength abilities fall within the sedentary to light industrial work range with the left arm.

≠ Lifting waist to floor 5 kg left arm

≠ Lifting waist to shoulder 5 kg, left arm

≠ Carry unilaterally 2 kg, left arm

≠ Grip 14 kg left hand

≠ Ability to self-pace. Non-repetitive lifting/carrying recommended

≠ Where feasible minimize low level lifting

≠ Recommend completion of most tasks requiring reaching with arm close to body

≠ Ability to self-pace for forward reaching

≠ Frequent sitting and standing with ability to change positions

[78] The worker testified that she experienced numerous issues with the modified work duties upon her return to work. These included no provision by the employer of transportation assistance through a taxi to and from work. This possibility was discussed initially in March 2018 during WSIB RTW meeting with the workplace parties. The worker also testified that the parties had discussed provision of a headset which she did not receive. She also testified that there was no ergonomic analysis of her work environment as recommended by Dr. Lobo at the WSIB Specialty Clinic and no provision of a dedicated desk space.

[79] The worker testified that she was also concerned that she was in an area where she could have contact with the public in a way which might lead to re-injury of her right shoulder. Both the worker and Inspector S.T. testified that no contact with the public was a restriction on the worker's return to work. Inspector S.T. testified that her search for a position for the worker which would meet this no contact restriction was a major factor in her ongoing search for suitable modified work duties for the worker.

[80] Inspector S.T. testified that in the division where the worker returned to work, it was very difficult to find a desk location for the worker which did not have some element of possible contact with the public, whether through the worker's proximity to members of the public who entered the division to obtain services or her location at a desk in or near an area where police

personnel might meet with members of the public or bring through suspects or those in custody for questioning. Inspector S.T. testified that she contacted the employer's Labour Relations Unit to assist her in finding the worker a position where this restriction could be met and where the worker would feel safe.

[81] The Panel finds that a preponderance of the evidence indicated that the worker was able to perform the modified work duties provided by the accident employer during the period from mid-June to November 2018. The modified duties consisted of sedentary clerical duties at the division where the worker had worked for a number of years pre-injury. The worker was tasked to work for the Community Investigation Support Unit (CISU) as an intake officer. This involved taking telephone calls from citizens and detailing their complaints so that uniformed officers could then follow up in the most efficient manner possible. The worker testified that there was not enough work for her with the CISU. Therefore, upon her return to work after June 19, 2018, she also worked for the Criminal Investigation Branch (CIB) and the Major Crimes Unit (MCU). These were also sedentary desk jobs.

[82] Inspector S.T. testified that the worker was tasked to work modified job duties with CISU. She testified that the worker was moved to other modified work duties with CIB and MCU, also sedentary desk jobs, while the accident employer tried to find ongoing modified job duties which met the worker's restrictions, particularly those which addressed the restriction of no contact with the public. The positions with various sections at the division continued to raise issues in this regard as there was no physical space for the worker which could be set up in a way which met this restriction given the physical set up of the division.

[83] The Panel finds that the preponderance of the evidence indicated that Inspector S.T. worked to find suitable modified work duties for the worker. She liaised with her supervisory staff and various sections of the employer's operations to ensure that the worker's modified work duties were suitable. The Panel concludes, based on the evidence, that Inspector S.T.'s search for suitable modified work duties was conducted in good faith.

[84] The concern about finding modified work duties where the worker could avoid contact with the public led to the identification of a part of the employer's operations known as "P****" as a possible location where the worker could work. The P**** facility was a standalone police facility with no members of the public seeking access as the work performed there did not require interaction with the public. Inspector S.T. testified that she concluded that this location would meet the worker's restriction to avoid all contact with the public, as well as being a place where she could continue to perform suitable modified work duties. Inspector S.T. testified that she determined this with the assistance of the employer's Labour Relations Unit.

[85] Inspector S.T. also testified that before she arranged a transfer for the worker, she consulted on several occasions with the various supervisors at the division where the worker was performing her modified work duties, trying to find a physical location for her work which would not place her in contact with members of the public but would allow her to remain at that division. The witness testified that this was not possible. The witness described several attempts to place the worker in different locations in the division. Inspector S.T. testified that she concluded that these locations would still have led to the worker having exposure to the public or would have led to the ongoing likelihood of interactions with the public as other police personnel led these members of the public through office areas to interview rooms. There was also the

ongoing possibility that the worker might meet members of the public in accessing other areas, such as the washrooms.

[86] The Panel heard extensive evidence from the worker that she experienced ongoing pain in her injured shoulder and experienced frustration about some of her modified work duties during this period. The Panel noted a distinction in the evidence between some instances of frustration with her immediate supervisors regarding tasks she was being asked to complete during her modified work duties and the worker's interactions with Inspector S.T. The Panel notes that the worker may have been asked to do some tasks by her immediate supervisors, such as transcribing a telephone call under a time deadline, which were difficult for her and likely not appropriate in the overall plan for her modified work duties. Nevertheless, she was able to overall perform her modified work duties during this period.

[87] The Panel also concludes that Inspector S.T.'s actions during her time identifying modified work duties for the worker did not show any negative animus towards the worker. The Panel finds that Inspector S.T. was a busy senior level manager with the employer who did her best to find suitable modified work duties for the worker. She reached out to the worker on several occasions by telephone and in person to ascertain her progress and to provide support. Inspector S.T. testified that she did this for many injured employees of the police force and considered it an important part of her job. The worker testified that she experienced some of these interactions as negative but the Panel cannot conclude that they were based on the preponderance of the evidence.

[88] Given these developments during the five or so months that the worker worked modified job duties, Inspector S.T. concluded that the worker should be transferred to P****. The worker was transferred there on November 26, 2018. This is the background to the worker's modified work duties when she experienced an exacerbation of her right shoulder injury, leading to the second period at issue.

**(d) The quantum of LOE benefits for the second relevant period,
November 26, 2018 to May 14, 2019**

[89] The Panel finds that the worker is entitled to full LOE benefits for the second relevant time period, November 26, 2018 to May 14, 2019, as will be detailed below.

[90] The worker's representative submitted the following regarding the worker's claimed entitlement during this period:

The Worker returned to modified hours and modified duties on June 19, 2018. The Respondent agreed that the Worker was a good Worker, and was capable of doing the modified work. The Worker did the modified work until she was unwillingly transferred from [identifying number removed-sic] Division to P**** [sic] on November 26, 2018. The only reason for the transfer was the Worker's alleged safety concerns. There was no evidence that the Worker could not have been accommodated at [identifying number removed-sic] Division. Management at P***** [sic] confirmed in a meeting on June 11, 2019 that there was no modified work available within the Worker's restrictions. Accordingly, there was no basis to deny FLOE benefits between the date of the transfer (Nov 26, 2018) and the date of the return to work meeting (June 11, 2019).

[91] The Panel notes that the WSIB authorized the payment of full LOE benefits to the worker from May 14, 2019 and the payment of LOE benefits for any period after May 14, 2019 is not at issue before the Panel in this appeal.

[92] The employer's representative submitted that the evidence of the employer's witness, Inspector S.T., indicated that the employer was flexible and attempting to meet the worker's issues with her modified work duties in order to facilitate her ongoing return to work throughout the second time period at issue. This flexibility was underlying motivation for the suggested transfer to P**** as it was a facility where the modified work duties could address the worker's restrictions regarding no contact with the public. It was submitted that if the worker had attempted these modified duties, she would not have had the wage loss claimed for the time period of November 26, 2018 to May 14, 2019.

[93] The employer's representative also submitted that the treatment plan for the worker's ongoing shoulder injuries, created by the worker's doctors during this period, was excessively cautious and that, had the worker attempted the modified work duties offered, the workplace parties could have determined their ongoing suitability and made adjustments as necessary. Therefore, the worker should not be entitled to full LOE benefits for this period as she did not attempt the suitable modified work duties offered.

[94] The Panel heard evidence that on November 20, 2018, the worker experienced an exacerbation of her right shoulder injury. She was performing her modified job duties when she reached across her desk space to rearrange some items. In doing so, her right shoulder spontaneously dislocated, causing the worker to experience increased pain and related symptoms.

[95] The medical treatment the worker undertook during this period after her return to modified job duties in June 2018 indicated that she had returned to work but continued to experience symptoms in her right shoulder. Her family doctor, Dr. Sheffield, on July 5, 2018, noted that she continued to experience numbness and tingling in her right shoulder, as well as in areas of her right arm and hand for which the worker did not have entitlement under the relevant claim. On October 22, 2018, she was seen by Dr. Dwyer, orthopaedic surgeon, who noted continuing "snapping shoulder" with recurrent instability. He recommended ongoing massage therapy and home exercises. On November 7, 2018, Dr. Sheffield noted that the worker had increased pain and was "very stressed" at work, experiencing feelings of anxiety and depression.

[96] While working at her modified job duties, the worker experienced the subluxation of her right shoulder on November 20, 2018. She received entitlement to a recurrence of her compensable right shoulder injury from the WSIB on December 31, 2018.

[97] The medical evidence indicated that the worker sought the following medical treatment with regard to the recurrence of her right shoulder injury:

- She visited Dr. Dwyer, orthopaedic surgeon, on an emergency basis on November 26, 2018. Dr. J. Cheng, Dr. Dwyer's resident, reported for him regarding the visit. Dr. Cheng reported that the worker had "...recurrent shoulder instability with decreased range of motion and a snapping shoulder. We would recommend that she continue massage therapy and home exercises."
- In a note to Dr. Sheffield, also dated November 26, 2018, Dr. Dwyer wrote, "I am ordering an MRA [sic] with contrast. She cannot work for 8 weeks."
- On January 18, 2019, Dr. Dwyer assessed the worker again. She was still awaiting the MRI arthrogram. Dr. Dwyer reported that the diagnostic test was "to better assess what her ongoing shoulder problem is. Until this is completed, we do not feel that she can return to

work, even on modified duties, as she is right-handed and is unable to type/write, etc. without audible/visible snapping and discomfort”.

- The worker experienced an allergic reaction to a contrast dye used for an earlier MRI arthrogram test, conducted on November 27, 2017. This had led to a worsening of her right shoulder symptoms. The worker advised the WSIB in early 2019 that she had serious concerns about MRIs and wished to follow Dr. Dwyer’s instructions about where and when and how the test was conducted.
- The worker and the WSIB had ongoing discussions about the MRI test which Dr. Dwyer ordered for the worker in early 2019. In WSIB Memoranda, # A0071, dated January 23, 2019; Memorandum #A0072, dated January 24, 2019 and Memorandum #A0074, dated February 12, 2019, the worker indicated that she was waiting for the MRI to be booked at the hospital indicated by Dr. Dwyer. The WSIB tried to find an expedited booking in the community. There is no definitive indication in the memoranda that such an expedited appointment was ever obtained for the worker by the WSIB. A WSIB Nurse Consultant wrote to Dr. Dwyer on January 24, 2019, requesting a written reply from him as to whether a MRI arthrogram test with dye was required or if a MRI performed with a 3T scanner machine would suffice as the WSIB could obtain an appointment sooner for the later test. The Nurse Consultant opined that a 3D test might alleviate some of the anxiety expressed by the worker about having another MRI requiring a contrast dye. There is no reply from Dr. Dwyer concerning this WSIB inquiry in the appeal record.
- The MRI was conducted on March 31, 2019 and was reported by Dr. L. White, radiologist. Although Dr. Dwyer had provided direction to proceed with an MRI arthrogram, the MRI eventually conducted on March 31, 2019 and reported on April 1, 2019, was a “[r]outine MRI examination ...utilizing a series of multiplanar fast spin echo MR imaging acquisitions...” Dr. White’s report confirmed the earlier diagnosis of “Tendinosis supra and infraspinatus tendons...”, as well as a newer finding of “subacromial subdeltoid bursitis...”
- Dr. Dwyer had a follow up visit with the worker on April 8, 2019. At this appointment, he analyzed the MRI results. He also provided a referral to a WSIB Specialty Clinic (Altum Health) for the worker as he was a care provider at that Specialty Clinic. He wrote to Dr. Sheffield that the worker “...continues to have right shoulder pain. MRI shows subacromial spur and a Hills-Sachs lesion and no Bankart tear. We discussed shoulder arthroscopy plus subacromial decompression plus anterior labral repair.”
- Dr. Dwyer also provided a note for the worker, dated April 8, 2019, that she “...cannot work for 8 weeks.” This was in addition to his earlier notes which stated the worker could not work as a result of the recurrence.
- On May 13, 2019, the worker saw Dr. Dwyer and L. Smale, Physical Therapist, at the Altum Health WSIB Upper Extremity Specialty Program. Dr. Dwyer assessed the worker in his capacity as the specialist affiliated with that WSIB Specialty Program. He reported the following:

[The worker] is appropriate for left-handed work only at this time, at the 3 months until follow up limited level [sic]. *It is recommended that she have a Return to Work Specialist as well as a Work Site Transition Specialist involved in her return to work.* The reason

for this is that she has had ongoing issues with her employer and reported another injury to her right shoulder while she was already working modified work duties. She has concerns with returning to work and not working on appropriate modified work duties. She also has concerns about a transfer in her workplace. It is felt that she needs some support in the workplace to return to work duties. As she had been off work for some time, graduated hours were recommended to help her build her tolerance...Estimated Timeframe...3 months until follow up [italicization present in the original]

[98] The Panel finds that the worker is entitled to full LOE benefits during the period November 26, 2018 to May 14, 2019. This is based on the application of the applicable WSIB policy, OPM Document No. 18-03-02 “Payment and Reviewing LOE Benefits (Prior to Final LOE Review)” and the findings which follow.

[99] First, the Panel notes that the appeal record indicated the worker went off work on November 26, 2018. Given the ongoing challenges in her recovery as shown by the extensive medical evidence regarding the first period of claimed LOE benefits entitlement detailed above, she saw Dr. Dwyer on an emergency basis on November 26, 2018, six days after the further injury to her right shoulder. He had been her treating orthopaedic specialist since July 17, 2017. Dr. Dwyer also had experience as an orthopaedic specialist performing assessments of upper extremities for the WSIB. He reported on November 26, 2018 that the worker should be off work for eight weeks, or until approximately January 26, 2018. Therefore, the Panel concludes that the worker had medical authorization to be off work during that timeframe due to the compensable recurrence of her workplace injury.

[100] Second, on January 18, 2019, Dr. Dwyer saw the worker again and reported that she should remain off work until she had an MRI test to see what was happening in her shoulder, given the ongoing symptoms she had been experiencing since November 20, 2018 and which she continued to experience despite her absence from modified work duties. Dr. Dwyer suggested another MRI arthrogram. There was also an indication that the worker might now be a surgical candidate when this had not been recommended before the recurrence. This indicated to the Panel the relative seriousness of the worker’s shoulder condition after she reinjured it on November 20, 2018. As a result, the Panel concludes that there was evidence that the worker had been further advised to remain off work by her treating physician so that he could have her undergo further diagnostic testing.

[101] Third, the Panel finds that there was some delay in the performance of the recommended MRI testing. Dr. Dwyer ordered the worker to remain off work until the MRI results were obtained.

[102] The evidence indicated that the WSIB suggested a MRI appointment at a community clinic where they could potentially schedule the worker to be seen sooner than at a hospital in the community. The worker advised the WSIB that she wanted to attend an MRI at the facility suggested by Dr. Dwyer. The worker anticipated that she was going to have a MRI arthrogram with contrast dye as this was what Dr. Dwyer recommended. As set out in the worker’s various telephone discussions with the WSIB detailed above, she was very concerned to avoid similar problems as those she experienced during the MRI arthrogram in November 2017 where the dye caused a painful allergic reaction in her shoulder which the worker experienced as a considerable setback in her recovery.

[103] The Panel was unable to locate any reply from Dr. Dwyer to the WSIB regarding the request to have the MRI expedited. The worker advised the WSIB that her MRI at the facility

recommended by Dr. Dwyer was booked for March 25, 2019. It was eventually conducted on March 31, 2019. For reasons which are unclear in any of the subsequent medical reporting, the MRI conducted did not use any contrast dye and was conducted with a 3D scanner.

[104] The Panel concludes that the worker was ordered by her treating specialist to remain off work until the MRI results were obtained. He indicated in January 2019 that she could not work at modified work duties during this time because of the condition of her right shoulder after the exacerbation in November 2018. The Panel finds this was reasonable given the worker's history of extensive problems arising from MRI testing. The Panel also noted that there was no competing medical advice indicating that the worker should not wait for the specific type of MRI ordered by Dr. Dwyer and indicating that the worker could return to modified work duties.

[105] Fourth, the Panel finds that Dr. Dwyer considered the nature of the modified work duties the worker had been performing after June 2018. He reported that he did not consider it suitable for the worker to work at even modified work duties until her shoulder was tested and diagnosed further. Dr. Dwyer indicated that he was concerned about the worker trying to limit her work to using only her left hand as some of that movement could be enough to cause her right shoulder to dislocate.

[106] Fifth, the evidence indicated that surgery was again being discussed as a possible treatment for the worker after the exacerbation of her shoulder in November 2018. This supported the medical opinion that her condition had worsened and she should remain off work.

[107] Sixth, the worker continued to seek medical treatment during the period from November 26, 2018 to May 13, 2019. She visited Dr. Dwyer and Dr. Sheffield. She sought out and underwent diagnostic testing. She continued with massage therapy, home exercises and physiotherapy as recommended by her doctors.

[108] Seventh, Dr. Dwyer further ordered the worker to be off work for eight weeks on April 8, 2019, after reviewing the MRI results. He also referred the worker to the WSIB Specialty Clinic for upper extremities where he could further review her condition in his capacity as a specialist in that program. He reviewed her condition on May 13, 2019 and then cleared her for a three month trial of left-handed modified work duties.

[109] The employer's representative submitted that the worker's doctors continued a course of treatment in this second period under appeal which was "overly conservative". The Panel does not agree with this submission. The Panel has analyzed the treatment approach and notes that there has not been presented to the Panel any contrary medical evidence supporting a less conservative approach as appropriate for the worker. In light of the evidence available, the Panel accepts the worker's treating physician's conclusion that she could not work during the second period at issue.

[110] Therefore, the Panel concludes that the worker is entitled to full LOE benefits during the period November 26, 2018 to May 14, 2019 as the nature of the worker's injury completely prevented her from returning to any type of work and she cooperated in health care measures as recommended by her treating doctors.

DISPOSITION

[111] The appeal is allowed as follows:

1. The worker is entitled to full LOE benefits from April 2, 2018 to June 18, 2018.
2. The worker is entitled to full LOE benefits from November 26, 2018 to May 14, 2019.

DATED: February 8, 2022

SIGNED: R.M.J. Hoare, R.G. Ouellette, A. Signoroni