--SUMMARY--

Decision No. 2210/13 **16-Dec-2013** **L.Petrykowski**

- Deductions (severance pay)
- Loss of earnings {LOE} (termination of employment)

The worker suffered an elbow injury in 2007, for which he was granted a 19% NEL award. He was permanently laid off by his employer in March 2009, due to plant closure. He received severance pay and 16 weeks of pay in lieu of notice. The Board did not consider the severance pay to be earnings but did consider the 16 weeks pay in lieu of notice to be earnings. The Board deducted the amount of the 16 weeks pay from the worker's LOE benefits. The worker appealed.

The worker had been working for the employer since 1993. Pursuant to the Employment Standards Act, the worker was entitled to eight weeks pay in lieu of notice (also known as termination pay or statutory notice).

The Vice-Chair referred to Decisions No. 302/11 and 748/13, and concluded that those decisions were compelling in support of the position that pay in lieu of notice made under the Employment Standards Act is not considered earnings for the purpose of LOE benefits following termination of employment. Therefore, the statutory eight weeks of pay in lieu of notice should not be considered as earnings and should not be deducted from the worker's LOE benefits. However, the other eight weeks of notice was part of a negotiated agreement relating to the closure of the plant and should be considered as earnings. The worker's LOE benefits should be offset by the amount of pay in lieu of notice that was not paid pursuant to the Employment Standards Act.

The appeal was allowed in part.

10 Pages

References: Act Citation

- WSIA 2(1) "earnings", 43(1)

Other Case Reference

- [w0514s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Document No. 18-03-02
- OTHER STATUTES CONSIDERED: Employment Standards Act, 2000, S.O. 2000, c. 41
- TRIBUNAL DECISIONS CONSIDERED: Decision No. 302/11, 2011 ONWSIAT 574 consd; Decision No. 748/13 consd

Style of Cause:
Neutral Citation: 2013 ONWSIAT 2670

2013 ONWSIAT 2670 (CanLII)

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2210/13

2013 ONWSIAT 2670 (CanLII)

BEFORE:	L. Petrykowski: Vice-Chair
HEARING:	November 25, 2013 at Toronto Written
DATE OF DECISION:	December 16, 2013
NEUTRAL CITATION:	2013 ONWSIAT 2670
DECISION UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) dated September 27, 2012

APPEARANCES:

For the worker:	Self-represented
For the employer:	Not participating
Interpreter:	None

Workplace Safety and Insurance Appeals Tribunal

505 University Avenue 7th Floor
Toronto ON M5G 2P2

Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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REASONS

(i) Introduction to the appeal proceedings

[1] The worker appeals a decision of the Appeals Resolution Officer ("ARO") of the Workplace Safety and Insurance Board ("Board"), dated September 27, 2012, which was decided upon the written record and without an oral hearing. That decision concluded that the worker's receipt of pay in lieu of notice was taxable earnings and was correctly used to calculate the worker's Loss of Earnings ("LOE") benefits.

[2] The worker represented himself in the Tribunal proceedings. The employer was notified of the proceeding but chose not to participate.

[3] The Tribunal selected this hearing to proceed by way of the written submissions process in accordance with its Practice Direction entitled "Written Appeals".

(ii) Issue

[4] The only issue to be decided is whether the worker's pay in lieu of notice from March 27, 2009 to July 16, 2009 should be used to determine his entitlement to LOE benefits for that period?

(iii) Background

[5] The following background facts are briefly noted.

[6] On August 3, 2007, the now 59 year old worker picked up a dylo-box and went to plug in a cord when he felt a sharp pain in his right elbow. The worker was employed as a production worker at the time of the accident. The Board's operating level allowed the claim for a right elbow injury and entitlement was later extended to include a left elbow strain. The Board's operating level later granted the worker a 19% Non-Economic Loss ("NEL") award for the permanent impairment that he sustained to both elbows as a result of his compensable injury.

[7] The worker was permanently laid off from his employment on March 5, 2009 due to a plant closure, although the employer accorded March 27, 2009 as the official closure/layoff date. The Board's operating level consequently allowed the worker's entitlement to LOE benefits at the maximum rate, 85% of the maximum net average earnings ("NAE"), or $905.56/week. The worker's entitlement to LOE benefits was then adjusted to partial LOE benefits as of December 11, 2009 based on the worker's deemed earnings ($10.50/hour over a forty hour work week) in the suitable employment or business ("SEB") of Dispatcher.

[8] The Board's Case Manager completed an annual case review of the worker's claim around September/October 2010. In a decision dated October 5, 2010, she noted that the worker received severance pay and pay in lieu of notice of termination for March 27, 2009 to July 16, 2009 after the employer's plant closed. The worker's pay in lieu of notice payments, totaling $17,729.28, were considered earnings and the worker's LOE entitlement was adjusted for that period, which resulted in a recoverable debt against the worker in the amount of $9,857.28. The decision correspondence stated:

> This letter will confirm the information I provided to you in our telephone conversation this morning.

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> I have now received confirmation from the payroll division of [the employer] regarding the severance pay you received in the 2009 tax year. Specifically, you received $17,729.28 representing 16 full weeks of wages in lieu of termination, for the period between March 27, 2009 and July 16, 2009. The remainder of the severance was vacation and pension payouts.
>
> As discussed with you, since you received full wages for 16 weeks during the same period of time you received loss of earnings (LOE) benefits from WSIB, it is considered duplication of earnings and benefits. In other words, you received pay from two different sources for the same period of time, which is not permitted under the *Workplace Safety and Insurance Act*… [sic]

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[9] This decision was reconsidered by the Board's Case Manager on February 22, 2012 and the decision correspondence stated:

> …I am writing in response to your January 3, 2012 letter, in which you requested that I reconsider my October 5, 2011 [sic] decision regarding the adjustment of [the worker's] loss of earnings (LOE) benefits. You stated there was no basis for WSIB to consider severance pay as duplication of earnings and WSIB benefits, citing the *Employment Standards Act*, and WSIB policy 14-02-08, and requested that the decision to create the overpayment be overturned.
>
> Based on your written submission, I feel I must clarify that my October 5, 2011 [sic] decision. The retroactive adjustment of [the worker's] LOE benefits, and the creation of a recoverable overpayment, stemmed only from the monies he received which represented 16 weeks of pay in lieu of termination. The other monies that [the worker] received (i.e. vacation payout and severance) did not factor into this decision.
>
> WSIB considers pay in lieu of termination to be employment earnings, the same as if [the worker] had worked and been paid for those additional 16 weeks. Therefore, receiving such monies at the same time as WSIB benefits is considered a duplication of employment earnings and benefits, which is not allowed. This was the reason for the creation of, and pursuing recovery of the $9857.28 overpayment. Severance pay is not considered as employment earnings, and is never used to offset a person's LOE benefit entitlement.
>
> The Ontario Ministry of Labour website confirms they also differentiate between severance and termination pay:
>
>> Severance pay is compensation that is paid to a qualified employee who has his or her employment "severed." It compensates an employee for loss of seniority and job-related benefits. It also recognizes an employee's long service.
>>
>> Severance pay is not the same as termination pay, which is given in place of the required notice of termination of employment.
>
> WSIB policy 18-02-02 provides the guidelines for what types of earnings are taken into account where calculating an earnings basis, or as post-injury earnings. The chart at the end of the policy document confirms that termination pay is taken into account, whereas severance pay is not…

[10] Thereafter, the worker pursued an objection to these decisions to the Board's Appeals Branch. The Appeals Resolution Officer then denied the worker's objection on September 27, 2012, and included the following analysis and conclusions:

> …ASSESSMENT OF THE EVIDENCE
>
> I have carefully considered all of the available information, legislation and relevant operational policies in reaching this decision.

> The worker's representative argued that severance pay is excluded as insurable earnings and should not be deducted from the worker's LOE entitlement.
>
> On February 16, 2009 following surgery the worker returned to work performing modified duties. The worker contacted the Case Manager and reported that he had been laid off effective March 5, 2009. The employer confirmed the plant closure.
>
> The Case Manager conducted an annual review on October 1, 2010. The worker provided a copy his income tax information for 2009 and the plant closure agreement between the union and his employer.
>
> The worker's Income tax Return Information (also known as the option C print) from 2009 noted:
>
> • Line 101 T4 earnings of $22,223
>
> • Line 130 Other Income of $41,848
>
> The T4 slip for 2009 from [the employer] reported employment income as $22,223.36
>
> The letter from the employer dated February 16, 2009 Severance Payments and Investment Options noted: Total Severance payout of $41,807.46.
>
> The Case Manager questioned these earnings and spoke with… the employer on September 28, 2010 who advised that the worker did receive in addition to severance pay 16 weeks of full pay in lieu of termination in the amount of $17,729.28 plus vacation pay in the amount of $709.17. The official layoff date, which was also the official date of the plant closure, was March 27, 2009 and the 16 week period started after the layoff date.
>
> The worker received from his employer following the plant closure severance pay plus 16 weeks of full pay in lieu of termination notice was the amount of $17,729.28.
>
> I agree that severance pay is not considered earnings by the WSIB and should not be used in the calculation of LOE benefits. The Case Manager did not use the severance pay to calculate the partial LOE.
>
> The worker additionally received pay in lieu of notice (also known as termination pay in lieu of notice). This is taxable earnings as reported on the worker's T4 slip as employment income and is earnings used in the calculation of LOE benefits.
>
> CONCLUSION
>
> I find that the pay in lieu of notice that the worker received is taxable earnings and should be used to calculate the LOE benefit.
>
> The worker objection is denied. [sic]

[11] The worker appealed the ARO's decision to the Tribunal and this is the issue in dispute in the current appeal.

(iv) Law and policy

[12] Since the worker was injured on August 3, 2007, 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.

[13] Subsection 2(1) of the WSIA defines "earnings" or "wages" as "any remuneration capable of being estimated in terms of money but does not include contributions made under section 25 for employment benefits".

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[14] Subsection 13(1) of the WSIA states "a worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan".

[15] Subsections 43(1) and 43(2) of the WSIA governs the worker's loss of earnings entitlement in this case and states the following:

> 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.
>
> Amount
>
> (2) Subject to subsections (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 he or she earns or is able to earn in suitable and available employment or business after the injury.
>
> However, the minimum amount of the payments for full loss of earnings is the lesser of $15,312.51 or the worker's net average earnings before the injury.

[16] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages: 33, 37, 199 and 300 - Revision #8, would apply to the subject matter of this appeal. I have considered these policies, as necessary, in deciding the issue in this appeal.

(v) Submissions of the worker

[17] The Tribunal provided the worker with an opportunity to provide final submissions for this written appeal. The worker sent correspondence dated August 2, 2013, which stated:

> This letter is to appeal the Appeals Officer Decision dated March 9 2011 [sic]. In this decision the facts are correct as far as how the issue arose up to the point of my layoff from [the employer]. The issue I have is in reviewing the Policies used in the Decision I found none of the WSIB policies which actually reference in-lieu pay or that it is to be used as earnings prior to receiving WSIB loss of earnings pay.
>
> It is my position that the in-lieu pay is paid per the *Employment Standards Act* and is based on my length of service for my employer in the same respect as the severance portion. This is not a form of disability payment, nor is it ongoing wages; if I only worked one year with my employer before my injury I would have received nothing for this length of service under the ESA. In my position I worked approximately 16 years and now my entitlements under the ESA act for this long service is being used to subsidize the Accident Employers cost of my injuries and again using money owed to me for long service and not some form of disability payment.
>
> While on the surface it could be looked at as double dipping or receiving monies from 2 sources for the same weeks, I argue that this is farthest from the truth as the monies paid under the ESA, both the severance and the in-lieu pay, are calculated on my length

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> of service I would suggest that the ESA was not meant to subsidize WSIB or the accident employer.
>
> In reviewing the different decisions found in the WSIAT web site I have found *Decision No. 302/11* in which I believe the facts are the similar to my case and the reps arguments and the other decisions referenced argue my case and I ask if you please could review this decision for the specific legal arguments to why the in-lieu pay should be treated the same as the severance as they are both paid under the ESA and are not another form of disability payment and do not constitute earnings for the purpose of calculating LOE entitlements….
>
> In conclusion I ask that the Appeals Officer Decision dated September 27 2012 be overturned and the amount of in lieu pay deducted from my loss of earnings be returned to me. I thank you for your consideration of this matter. [sic]

(vi) Analysis and conclusions

[18] I begin my analysis of the issue in dispute by noting that the Board's operating level has determined that the worker's severance-related payment resulting from the plant closure in March 2009 were not earnings for the purposes of determining the worker's LOE benefits entitlement around and after that time. The Board's operating level did, however, determine that sixteen weeks of payment in lieu of termination was earnings that offset the worker's LOE benefits entitlement from March 27, 2009 to July 16, 2009, which resulted in a recoverable debt against the worker. These circumstances were only discovered by the Board around September/October 2010. The Board's ARO confirmed that determination in a decision dated September 27, 2012. Therefore the issue before me is whether the sixteen weeks of notice-related payment (not including "severance") received by the worker affects his LOE benefits entitlement for the material period in question, March 27, 2009 to July 16, 2009.

[19] I have further considered that the worker was still recovering from a compensable right elbow surgery which took place on October 31, 2008, when he returned to modified duties with the accident employer on February 16, 2009. The worker was then permanently laid off on March 5, 2009, due to a plant closure which had an official date of closure/layoff of March 27, 2009. According to a "closure agreement", which was referenced in correspondence dated February 16, 2009, the worker's seniority date was June 16, 1993, and he was entitled to two weeks of severance pay per year of service ($36,807.46) plus a lump sum payout of $5,000 for a total of $41,807.46.

[20] On September 28, 2010, the Board's operating level realized that the worker received additional plant closure-related monies around March 2009. The following conversation with the employer was documented by the Board's Case Manager on that day in Board Memorandum #61:

> I called [the employer] today to clarify the additional income received for the 2009 tax year.
>
> [The employer] reviewed [the worker's] severance payout and confirmed he did receive the full 16 weeks full pay [sic] in lieu of termination in the amount of $17,729.28. Vacation was paid out at $709.17.
>
> His official layoff date was 27Mar2009 which is the official date of the plant closure and the 16 week period would have spanned beyond 27Mar2009.
>
> He did receive a total severance of $41,807.46 as indicated in his letter plus the additional lump sum payment of $5,000.00 for a total award of severance in the amount of

> $46,807.46. This amount does not include the pay in lieu of termination noted above. That was a separate cheque issued. [sic]

[21] The Board's decision to adjust the worker's LOE benefits entitlement from March 27, 2009 to July 16, 2009 was based on the above-described information, namely that the worker received "16 weeks full pay in lieu of termination in the amount of $17,729.28" which disentitled him to LOE benefits for sixteen weeks as a result of the Board operating level's above-reproduced decision dated October 5, 2010.

[22] I find it significant that the worker's start-date with the employer was June 16, 1993, which for the purposes of the *Employment Standards Act*, *2000* would have entitled him to eight weeks of pay in lieu of notice (also known as "termination pay" or "statutory notice") in relation to the termination of his employment. This is a consequence of him working more than eight years with the accident employer and the applicable provisions of subsections 54(a) and 57(h) of the *Employment Standards Act, 2000*. Even though the minimum statutory notice concerning the worker's termination under the *Employment Standards Act, 2000,* was eight weeks of notice or pay in lieu of notice, the employer arranged to pay him "16 weeks full pay in lieu of termination", which I find to be in excess of the minimum statutory notice. I find on a balance of probabilities that the employer provided the worker with pay in lieu of notice for sixteen weeks, which was in excess of the eight weeks of pay in lieu of notice that was minimally required under the *Employment Standards Act, 2000*. This is a matter of consequence that will be further discussed in this decision. I also note that the ratio of "notice" to years of service was approximately 1:1 (16 weeks for approximately 16 years of service), which differs from the ratio in the "closure agreement" pertaining to "severance" that was referenced in the correspondence dated February 16, 2009 (the ratio there was 2:1 as above-explained: "2 weeks per year of service").

[23] I must further assess on a balance of probabilities whether the sixteen weeks of "notice" paid by the employer disentitles the worker to LOE benefits entitlement from March 27, 2009 to July 16, 2009. Having reviewed Tribunal caselaw about similar circumstances, I note that the Vice-Chair in Tribunal *Decision No. 302/11* found the following:

> …I have carefully reviewed all of the decisions submitted by Mr. Drury, as well as a number of additional Tribunal decisions, and find that Tribunal case law has consistently supported the worker's position in this appeal. I have concluded that a payment in lieu of notice made by the employer to a worker pursuant to the *Employment Standards Act* does not constitute "earnings" for the purposes of determining a worker's LOE entitlement.
>
> An ARO decision dated September 24, 2009 is appended to Mr. Drury's submission. This decision was made in an unrelated claim that did not involve this worker or employer. In that case, an employer's objection came before an ARO. In the decision, the following appears:
>
>> Termination benefits, including both severance and lieu pay are distinct from payment for hours worked. They are, in my view, analogous to vacation pay. In Policy Document 18-01-11, Compensation Advances by Employer, there is recognition that there are circumstances in which workers are entitled to both LOE benefits and employer-paid benefits. The policy document states, in part, "Workers are entitled to receive both full compensation benefits and employer advances, without deduction, during those periods when they are taking holidays…" **Severance, termination, and statutory pay do not represent periods of paid employment and would not disentitle the worker from LOE benefits**. The employer's request for reversal of LOE for periods represented by severance,

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> termination, and statutory pay is denied. (Emphasis in bold lettering only has been added)
>
> Having reviewed Tribunal case law addressing situations similar to the one before me, I find that the approach taken by the Tribunal over time is well-summarized in the following, which appears in paragraph 32 of *Decision No. 1151/05*:
>
> > The worker received vacation pay and severance pay when the employer terminated his employment. According to Board policies, vacation pay and severance pay are not benefits that are offset by workers' compensation benefits.
>
> I further note that the Tribunal's approach has been consistent under both the pre-1997 future economic loss (FEL) scheme and the provisions providing for the payment of LOE benefits pursuant to the WSIA. The following decisions provide examples of the Tribunal's reasoning and all conclude that amounts such as payments in lieu of notice and severance payments are not deducted from FEL or LOE benefits: *Decisions Nos. 323/10, 1796/01, 3109/00, 1242/97* and *285/96*.

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[24] In that decision, the Vice-Chair provided the following disposition: "the employer's payment to the worker of two weeks' pay in lieu of notice pursuant to the *Employment Standards Act* does not constitute "earnings" for the purposes of calculating his LOE entitlement and is not to be deducted from his LOE benefits." I also note that *Decision No. 302/11* was recently followed by another Vice-Chair in Tribunal *Decision No. 748/13,* dealing with whether statutory notice entitlements should be deducted from WSIB re-employment payments/benefits made to a worker, as follows:

> I adopt the Vice-Chair's reasoning in *Decision No. 302/11* as accurately reflecting the line of Tribunal decisions which have found that a worker's severance benefits should not be factored into the calculation of her LOE benefits because they are not earnings from post-injury employment.
>
> Accordingly, I accept the worker's submissions and conclude that the termination pay of $11, 120, i.e. 8 weeks of "pay in lieu of notice" benefits, paid as severance benefits should not be deducted from the re-employment payments paid to him.

[25] I find that the above-noted cases to be compelling in support of the position that pay in lieu of notice made to an individual under the *Employment Standards Act, 2000* should not be considered as earnings for the purposes of adjusting a worker's entitlement to WSIB-related benefits following their termination from employment. I also note that for the purposes of consistency in decision-making, a particular set of facts in an appeal before the Tribunal should give rise to a particular legal outcome and that the principles of fairness mean that cases with similar facts should be similarly decided. As such, I find on a balance of probabilities that the pay in lieu of notice made to the worker under the *Employment Standards Act, 2000* should not disentitle him to LOE benefits entitlement for the overlapping period following March 27, 2009. Both the WSIA and Board policy do not explicitly exclude a scenario where a worker can receive LOE benefits entitlement for a period of time where severance or pay in lieu of notice made under the *Employment Standards Act, 2000* is provided to a worker.

[26] However, as was noted above, the worker in the instant case received sixteen weeks of notice in addition to his severance-related entitlement around March 2009 but I have already found that *only eight weeks* of that notice was statutory notice that would properly fall under the auspices of the *Employment Standards Act, 2000* while the remainder of the payment (another eight weeks of "notice" as described by the employer on September 28, 2010) was made

pursuant to the parameters of a closure agreement arranged between the employer and its workforce (represented by a union in the closure-related negotiations).

[27] Therefore, having considered the totality of evidence before me, I find on a balance of probabilities that the employer's payment to the worker of eight weeks of pay in lieu of notice (the minimum pursuant to the *Employment Standards Act, 2000* for workers with at least eight years of service with an employer, such as the worker in this case) does not constitute "earnings" within the meaning of subsections 2(1) and 43(1) of the WSIA for the purposes of calculating his LOE entitlement following March 27, 2009 and should not be deducted/offset from his full LOE benefits entitlement for that period. As such, the worker's appeal is allowed (in part) and the worker is entitled to eight weeks of full LOE benefits from March 27, 2009 not to be deducted/offset by his entitlement to eight weeks of in lieu of notice payments made pursuant to the *Employment Standards Act, 2000*.

[28] I have earlier found on a balance of probabilities that the remainder of the sixteen weeks of payment (another eight weeks of "notice" as described by the employer on September 28, 2010) was *not* made pursuant to the *Employment Standards Act, 2000*, but rather due to the terms of a negotiated closure agreement related to a plant closure. The above-referenced cases, Tribunal *Decision Nos. 302/11* and *748/13*, only dealt with the statutory pay in lieu of notice (two and eight weeks, respectively) and did not extend their analysis to additional notice in excess of the statutory minimum under the *Employment Standards Act, 2000*. I find on a balance of probabilities that the additional eight weeks of "notice" pay was "earnings" for the purpose of subsection 2(1) of the WSIA as they were "remuneration capable of being estimated in terms of money" as it relates to subsections 43(1) of the WSIA, and were not within the LOE-related exclusion of minimum statutory notice payments made under the *Employment Standards Act, 2000* which has been accepted in the aforementioned Tribunal jurisprudence.

[29] Since the worker was paid these "earnings" for an eight week period (although the exact date of this earning period cannot be demarcated since the sixteen week "notice" payment from the employer was blended and not temporally demarcated along the lines of statutory versus non-statutory entitlement), there was no actual loss of earnings experienced by the worker "as a result of the injury" as required by subsection 43(1) of the WSIA or OPM Document #18-03-02 over this eight week period for LOE (loss of earnings) benefits entitlement to be granted. Therefore no LOE benefits entitlement would be in order to the worker for the period of eight weeks (half of the overall sixteen week "notice" period payment) when he was receiving notice/earnings from the employer that was not pursuant to his entitlement under the *Employment Standards Act, 2000*. The worker's appeal is denied (in part) in this regard.

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DISPOSITION

[30] The worker's appeal is allowed, in part, as follows:

[31] The worker is entitled to full LOE benefits from March 27, 2009 for eight weeks which is not to be deducted/offset by his entitlement to eight weeks of in lieu of notice payments made pursuant to the *Employment Standards Act, 2000*.

DATED: December 16, 2013

SIGNED: L. Petrykowski

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