

**Workplace Safety and Insurance
Appeals Tribunal**

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

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Workplace Safety and Insurance Appeals Tribunal

Quarterly Production and Activity Report

April 1 to June 30, 2009

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Production Summary

- The active inventory totalled 3,844. This is a reduction from the first quarter 2009 active inventory of 3,915.
- The Q2 active inventory of 3,844 appeals is a significant reduction from a high of 5,492 active appeals at the end of the third quarter of 2006. With this progress in appeal inventory reduction parties are beginning to see decreases in the time to schedule hearings. Additional improvements are anticipated as 2009 continues and in 2010. The Tribunal's target is to offer a hearing date within four months of an appeal being confirmed as hearing ready.
- Incoming appeals numbered 993, of these 846 were appeals from WSIB decisions and 147 appellants advised they were ready to proceed to hearing following a period of inactive status.
 - This compares to 845 new appeals and 158 reactivated appeals recorded in the first quarter of 2009.
 - In the 2nd quarter of 2008 the Tribunal recorded 762 new appeals and 158 re-activations.
 - In 2008, the weekly average of hearing ready appellants was 55. For Q2 2009, the weekly average of hearing ready appellants is 56. This figure excludes cases reactivated from inactive status.
- Dispositions numbered 999; this includes 341 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 658 after hearing dispositions; of the after hearing dispositions, 641 followed from Tribunal decisions.
- In Q2-09, the inactive inventory was 3,594 cases (at the end of Q1-09, the inactive inventory was 3,695 cases).
- In Q2-09, 85% of final decisions were released within 120 days. In 2008, 84% of final decisions were released within 120 days.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the second quarter of 2009, the notice inventory included 1,316 dormant cases, the active inventory totalled 3,844 cases, and the inactive inventory totalled 3,594 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q4-2006	5226
Q1-2007	5170
Q2-2007	5044
Q3-2007	4955
Q4-2007	4650
Q1-2008	4532
Q2-2008	4227
Q3-2008	4047
Q4-2008	4008
Q1-2009	3915
Q2-2009	3844

B. Incoming Appeals

Period	Incoming Appeals
Q4-2006	1007
Q1-2007	1026
Q2-2007	950
Q3-2007	939
Q4-2007	978
Q1-2008	930
Q2-2008	920
Q3-2008	832
Q4-2008	969
Q1-2009	1003
Q2-2009	993

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q4-2006	1161	362	799
Q1-2007	1149	383	766
Q2-2007	1132	366	766
Q3-2007	1031	370	661
Q4-2007	1219	427	792
Q1-2008	1173	386	787
Q2-2008	1213	375	838
Q3-2008	1025	299	726
Q4-2008	1028	269	761
Q1-2009	1056	347	710
Q2-2009	999	341	658

D. Inactive Inventory

Period	Inactive Inventory
Q4-2006	4235
Q1-2007	4119
Q2-2007	4109
Q3-2007	4073
Q4-2007	4067
Q1-2008	4067
Q2-2008	4085
Q3-2008	4059
Q4-2008	3816
Q1-2009	3695
Q2-2009	3594

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q4-2006	1420	112
Q1-2007	1353	-67
Q2-2007	1297	-56
Q3-2007	1294	-3
Q4-2007	1358	62
Q1-2008	1233	-125
Q2-2008	1245	12
Q3-2008	1232	-13
Q4-2008	1212	-20
Q1-2009	1251	39
Q2-2009	1316	65

3. Community Activities

Sarah Atkinson, associate Counsel to the Chair, chaired a workshop program for SOAR's Administrative and Management Network (S.A.M.N.). The June workshop was called Human Rights 101. Staff at a variety of agencies, Boards and tribunals learned basic concepts of human rights legislation and how to identify human rights issues. In addition, a staff person from the Human Rights Commission spoke about how to incorporate human rights legislation into day to day work and thinking.

In May, the Ontario Bar Association's Workers' Compensation Section held their annual continuing legal education session. The topic this year was "Current Issues in Workplace Safety and Insurance Law. The Tribunal Chair, Ian Strachan, spoke as part of the opening panel. In June, the Chair was also a speaker at the Ontario Bar Association's Workers' Compensation Section's Ron Ellis Award Dinner. John Slinger, Chief Operating Officer at the WSIB, was presented with the award.

Thanks to the Tribunal's generosity and its canvassing team's dedication, the Tribunal met its goal to raise at least nine thousand dollars to support the work of the 16 fundamental health charities through the Federated Health Campaign.

Judicial Review Activity

Second Quarter 2009

The second quarter of 2009 was busy in regards to judicial review activity at the Tribunal. The status of applications for judicial review involving the Tribunal for the second quarter of 2009 is set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. Most applications for judicial review are handled by General Counsel and the lawyers in the Tribunal Counsel Office.

1. Decision No.855/03 (November 15, 2005)

The worker was a member of a union. Pursuant to the collective agreement, the employer made contributions on the worker's behalf to a benefit plan that provided health and dental care coverage, as well as pension plan coverage. The employer's contributions were based on the hours worked by the worker. Under the terms of the plan, part of the contributions were used to continue the worker's benefits and pension contributions for up to a year after an injury.

The worker was injured. He alleged that the employer's contribution to his benefits should be included in the calculation of his earnings for the purposes of workplace safety and insurance benefits. The worker's appeal was denied. The Vice-Chair held that Board policy did not include benefit payments and pension plans in earnings basis. There was no direct relationship between the employer's contributions and the benefits the worker received. The Vice-Chair also held that the Legislature did not intend to include contributions from all

employers in Ontario in the earnings of workers, or that some workers would receive non-taxable income.

The worker commenced an application for judicial review. The Board successfully brought a motion to intervene in the judicial review. The judicial review was heard by the Divisional Court on June 27, 2007.

The Divisional Court Panel of Jennings, Swinton and Lederman released its decision on September 10, 2007. The majority of the Panel, consisting of Justices Jennings and Lederman, held the Tribunal's decision was patently unreasonable because it failed to consider the evidence of legislative history contained in submissions made to the Tribunal Vice-Chair. They ruled the decision should be referred back to the Tribunal for a re-hearing in accordance with the findings of the majority.

In her dissenting reasons, Justice Swinton held that a failure to refer to legislative history did not render the Tribunal's decision patently unreasonable. She noted this had not been raised before the Board, and was not a major issue referred to in other submissions, and moreover a failure to refer to certain evidence is not necessarily fatal to the decision of an administrative tribunal. Justice Swinton also observed that legislative history plays a limited role in the interpretation of legislation because of concern about its reliability. She held that the Tribunal's conclusion in this case was within its specialized expertise.

The Tribunal filed a notice of motion for leave to appeal to the Court of Appeal. In January the Court of Appeal granted leave to appeal (Winkler, Rosenberg and Lang). The Workplace Safety & Insurance Board again intervened.

The Court of Appeal Panel of Borins, Rosenberg and Gillese heard the appeal on September 11, 2008. The decision was released on October 21, 2008. In a majority decision (Gillese dissenting), the Court allowed the Tribunal's appeal. The majority agreed with Justice Swinton that the Tribunal's decision was not unreasonable. The Tribunal fulfilled its task to determine the meaning of earnings according to the Act and Board policy. The Tribunal's failure to refer to legislative history did not render its decision patently unreasonable. The majority held the Tribunal considered the proper evidence, and applied Board policy in finding the employer's contributions for employment benefits should not be included when calculating pre-accident earnings.

The majority also noted that the privative clause in the legislation is the "toughest" known to Ontario law. Although the standard of review after *Dunsmuir* is reasonableness, existing jurisprudence demonstrates that reviewing courts can only interfere if they find there are no lines of reasoning supporting the decision that could have reasonably led the Tribunal to reach the decision that it did.

The worker applied for leave to appeal to the Supreme Court of Canada. On May 7 the application for leave to appeal was dismissed by Chief Justice McLachlin and Justices Abella and Rothstein.

2. Decision No.1118/07 (January 18, 2007)

The plaintiff was allegedly injured while employed at a nuclear generating station. He brought an action against his employer. The employer's application to the Tribunal for an order taking away the plaintiff's right to sue was granted. The Vice-Chair found that although the employer was a federal undertaking, this did not take away the Tribunal's jurisdiction. He found that the *Nuclear Liability Act* did not limit the right to claim compensation.

The plaintiff commenced an application for judicial review. The Tribunal and his employer filed responding factums. The judicial review was heard on October 17, 2008.

The plaintiff's application for judicial review was unanimously dismissed by the Panel of Ferrier, Wilson and Lederman. Although the Tribunal argued the standard of review was reasonableness, the Court found the Tribunal's decision was correct so it was not necessary to decide whether the reasonableness standard applied. The Court agreed with the Tribunal's conclusion that *NLA* did not create a new statutory tort, that federal jurisdiction over nuclear power did not oust the provincial jurisdiction over employee compensation, and that section 12 of the *NLA* preserved the rights under the provincial *WCA*.

The worker filed an application for leave to appeal to the Court of Appeal. The worker's counsel then got off the record and the worker began representing himself. The Tribunal and the Tribunal's co-respondent consented to extend the time for the worker to file his leave materials until March 15. The worker failed to file his materials by that date, and the Court of Appeal dismissed the leave application for delay.

The worker indicated he would again seek to extend the date to file his materials. The Tribunal, and the Tribunal's co-respondent, both advised the worker that they would not consent to a further extension, and would take no position should the worker bring a motion to extend. At the end of the quarter the Tribunal had not been contacted by the worker.

3. Decision No.556/03 (June 27, 2008)

In September 1997 the worker suffered a workplace injury and initially received benefits for his low back and head, including a non-economic loss award of 57%. He also received loss of earnings benefits until the fall of 1999, when the Board ended benefits after videotape surveillance. The Board also reversed the NEL awarded as it related to the head injury and reduced the NEL award for the back to 5%. In related court proceedings, the worker was prosecuted for failure to report a material change in circumstances and pled guilty.

The employer appealed to the Tribunal seeking cessation of loss of earnings benefits after September 3, 1997 and revocation of the 5% NEL award for the low back. The worker cross appealed, seeking to reinstate benefits for his head and neck, ongoing wage loss benefits beyond April 21, 1998 and entitlement for chronic pain disability and/or psychotraumatic disability.

In Decision 556/03 the Panel allowed the employer's appeal and denied the worker's appeal. The Panel referred to the surveillance videotapes, which showed the worker, among other things, moving 50 lb flagstones and using a pick to remove a tree from his property. The Panel found that this was heavy work that a person would be unable to do if they had any serious back injury.

The worker had been in four car accidents before the workplace accident. The Panel noted that the Board had not had all the medical reports relating to those accidents when it made its decisions. The Panel also noted that, prior to the workplace accident, the worker had complained to his insurance companies of headaches, dizziness, cognitive disturbances, depression, neck pain, and low back pain. When he saw his specialists after the 1997 injury he did not tell them about his car accidents. The Panel also found that, based on the evidence as a whole, it was unlikely that the worker lost consciousness or suffered a skull fracture in the workplace injury. The Panel found that the worker was entitled only to four weeks' of loss of earnings benefits for the low back, and no benefits for the head and neck.

The worker commenced an application for judicial review. The judicial review was heard on May 14 by a Panel of Jennings, Pardu and Low. The Tribunal was represented by Dan Revington and Carol Zimmermann. The application for judicial review was dismissed.

Justice Pardu, writing for a unanimous Court, stated:

"There was ample evidence before the Tribunal which justified its decision. It concluded an exhaustive review of the extensive evidence before it and made decisions about credibility and the weight to be accorded to conflicting medical evidence before it. It is not the function of this Court to re-weigh that evidence."

4. Decisions Nos.1132/02I (September 20, 2002), 1132/02 (July 13, 2004), and 1132/02R (June 15, 2005)

The worker appealed to the Tribunal for initial entitlement for a low back injury, which he alleged was caused by work incidents in 1996 and 1997. The Tribunal hearing took place over two days in 2003 and 2004.

The Panel found the worker to be a very poor historian and that his recollections of many events were in conflict with the case materials and not consistent with the medical reporting or the Board's extensive investigation report. The Panel found that there was insufficient evidence to support that the worker sustained a work-related low back problem in November 1996. The Panel found that the worker had initial entitlement on an aggravation basis for an accident on January 18, 1997, but was entitled to health care benefits only as he did not lose any time off work or suffer any permanent impairment. The Panel found that the worker had long-standing ongoing back problems since at least 1998 and that any ongoing problems were more likely a result of the natural aging processes of the worker's back rather than a result of the January 1997 accident.

The worker, who was representing himself, brought an action in damages against the Vice-Chair which was dismissed by the Court in October 2006.

The worker subsequently retained counsel and commenced an application for judicial review against the Tribunal and the employer. He alleged the Tribunal had erred in basing its decision on a Tribunal Medical Discussion Paper, that the Tribunal should have obtained an opinion from a Board doctor, and that the Tribunal's conclusion that the worker did not have an impairment was unreasonable.

The judicial review was heard on April 28, 2009, by the Divisional Court panel of Wilson, Lederman and Low. Gillian Shaw represented the Tribunal. The Court reserved, and released its decision on May 18.

The Court dismissed the application for judicial review. The Court found that it was clear from the decision that the Panel had based its decision on all the evidence, and not just on the Discussion Paper. The Court made the following statement about Discussion Papers:

“As part of its practice, WSIAT commissions medical discussion papers to provide general background information on medical issues which may be raised in appeals. They are intended to provide a broad and general overview of a topic and are written to be understood by lay individuals. The Tribunal is not bound by the information in a discussion paper in any particular case. Rather, the discussion papers provide a repository of medical knowledge in a variety of areas that both the Tribunal and parties may look to. As well, it is always open to parties to adduce their own medical evidence to challenge or to distinguish the information in a discussion paper. In the instant case, the discussion paper in question was provided to the applicant well in advance of the hearing in order to allow him to respond to it as he saw fit. However, no response or objection was forthcoming.”

The worker argued the Tribunal should have obtained the opinion of a Board medical advisor pursuant to Board policy. The worker was apparently confused, as this policy did not apply to the Tribunal. The Court also found that the Tribunal did not need to exercise its discretion to refer questions to an assessor because it was able to reach its conclusion without seeking an assessor's assistance. Finally, the Court refused to re-weigh the evidence, as this is not the role of a Court on an application for judicial review. There was ample evidence for the Tribunal to conclude that the worker did not lose time from work because of the injury, that he could do the work offered to him by the employer, and he did not suffer a permanent impairment.

The employer had also argued that the application for judicial review should have been dismissed for delay. As the Court found the judicial review could be dismissed on its merits, it did not need to consider this argument.

5. Decisions Nos. 351/07 (March 19, 2007) and 351/07R (March 6, 2008)

The worker's appeal for total disability benefits for a ten year period on the basis of his self-directed vocational rehabilitation plan was denied by the Tribunal. The

worker has commenced an application for judicial review of the Tribunal's decisions.

In addition the worker seeks an interlocutory order certifying the judicial review as a class proceeding on behalf of all persons who have had benefits under the *Workers' Compensation Act* or *Workplace Safety and Insurance Act* denied solely on the basis of an adverse finding on their self-directed vocational rehabilitation plan.

Linking a class action with a judicial review is a novel remedy so far as the Tribunal is concerned. At the end of the quarter the procedural issues raised by this proceeding were being discussed with Applicant's counsel.

6. Decision No.1858/08 (January 7, 2009)

The worker had a claim in 1978. He was granted a s.147(4) supplement. The worker subsequently passed away due from non-work related causes in 2004. The worker's estate appealed for a recalculation of s.147(4) benefits, alleging a supplement for a pre-1985 accident calculated under s. 147(9) could exceed the Old Age Supplement. The appeal was denied.

The worker has commenced an application for judicial review, and as in Decision 351/07, has joined it with a class proceeding. The Tribunal is preparing its record.

7. Decisions Nos.1387/07 (May 20, 2008) and 1387/07R (December 8, 2008)

The worker had an accident in 1988. She was awarded a supplement under s.147(4). Her appeal that her supplement should exceed the Old Age Supplement under s.147(10) because there is no limit for s.147(4) supplements for pre-89 injuries was denied.

As in Decision 351/07 and Decision 1858/08 (above) the worker has jointed a judicial review application with a class proceeding. The Tribunal is preparing its record.

8. Decisions Nos. 207/05 (April 11, 2005) and 207/05R (January 10, 2006)

The plaintiff was injured in a motor vehicle accident. The tractor-trailer was driven by the defendant driver, and owned by the defendant trucking company. The defendants applied to the Tribunal for an order that the plaintiff's right of action was taken away.

The Vice-Chair found both the plaintiff and the defendant driver were workers of the defendant Schedule 1 trucking company, and that they were in the course of employment at the time of the accident. The Vice-Chair held the plaintiff's right of action was taken away.

The plaintiff commenced an application for judicial review more than two years after the Tribunal's reconsideration decision was released.

The Tribunal filed its Record of Proceedings. The defendant, which is the Tribunal's co-respondent in the judicial review, brought a motion to strike the judicial review for delay. As the plaintiff had not provided an explanation for the delay, the Tribunal supported the motion. The motion was heard on August 15, 2008. Justice Low dismissed the motion, without prejudice to the respondents renewing their request to dismiss for delay to the Divisional Court Panel hearing the judicial review.

The Tribunal and the Tribunal's co-respondent have filed their factums. The judicial review is scheduled for January 2010.

9. Decisions Nos.1509/02 (February 2, 2004) and 1509/02R (September 27, 2006)

Two sisters were suspended at the same time for smoking in a non-smoking area at work. Sister #1 reported an accident within a few hours of returning after her suspension. Sister #2 reported an accident later that day, before the suspension took effect.

Sister #1's claim was denied by the Board. Her appeal to the Tribunal was dismissed (Decision 1384/03). She brought an application for judicial review. On April 6, 2005 the Divisional Court unanimously dismissed the application for judicial review. The Court stated "In our view, the Tribunal carefully reviewed the evidence and gave reasons for its decision. The decision it reached on the basis of the evidence was not patently unreasonable."

However, Sister #2's claim had been allowed by the Board. The employer appealed to the Tribunal. A Panel of the Tribunal allowed the employer's appeal, reversing initial entitlement for the worker (Decision 1509/02). Sister #2 also brought an application for judicial review.

Sister #2 then decided to adjourn the judicial review, to permit her counsel to file an application for reconsideration with the Tribunal. The Tribunal consented to the adjournment.

The basis of the reconsideration application was that the Panel had failed to consider the worker's alternative argument that entitlement could have been granted on the basis of a recurrence. Vice-Chair Crystal denied the reconsideration on the grounds that the worker had failed to explicitly appeal the recurrence issue to the Tribunal. However, Vice-Chair Crystal also noted that there was a final decision of the Board on the recurrence issue, and it was open to the worker to bring a time extension application should she still wish to pursue that issue at the Tribunal.

Following the release of Decision 1509/02R, the worker retained new counsel. Her new counsel filed a time extension application. In Decision 2021/07E, Vice-Chair Ferdinand denied the request for a time extension.

The worker's counsel is pursuing an application to reconsider the denial of the time extension. The reconsideration materials have been filed, and at the end of the quarter it was being considered by a new Tribunal Vice-Chair.

The judicial review application is still pending.

10. Decisions Nos.390/08 (February 22, 2008) and 390/08R (July 17, 2008)

The worker made a claim for an injury to his hand, arm and back after he had been terminated by his employer. The Board allowed benefits for two months in 2004. The worker appealed to the Tribunal for further benefits. The employer cross appealed, alleging no entitlement should have been granted at all. The Vice-Chair denied both the worker's appeal and the employer's cross appeal.

The worker commenced an application for judicial review, making allegations that there were breaches of natural justice during the hearing in the questioning of witnesses. The worker also contests the conclusions reached by the Tribunal on medical evidence and the assessment of competing facts. The Applicant's counsel has filed his factum and at the end of the quarter the Tribunal was preparing its factum. The hearing of the judicial review application is scheduled for September 2009.

11. Decisions Nos.832/04 (November 18, 2004) and Decision 832/04R (April 5, 2007)

The worker left work due to back pain. Two weeks later the worker alleged the pain was due to an injury at work. The Board denied entitlement on the grounds it was not shown that an accident occurred in the course of employment.

The worker's appeal was denied. The Vice-Chair noted the worker's pre-existing back condition, and the absence of any medical support for the position that the back condition was caused by disablement from the nature of the work. The worker's alternative explanation that there was an accident involving carrying a ladder was not supported by the evidence.

The worker commenced an application for judicial review. As this case will be heard in French the Tribunal has retained outside counsel. The worker has filed an affidavit alleging that comments made by the Vice-Chair prior to the hearing constitute an apprehension of bias.

The Tribunal has served and filed its record, and will be bringing a motion to strike the affidavit at the same time as the hearing of the judicial review application. At the end of the quarter the Applicant had filed his factum.

12. Decision No.1921/06 (March 4, 2008)

Mr K was driving four temporary workers from a personnel agency in his van. The van was struck by a GO train and Mr K and all the passengers were killed. The family members of two of the deceased, Mr B and Mr L, commenced an

action against the estate of Mr K. The insurer of the estate of Mr K applied for a determination that the right of action of the plaintiffs was taken away.

The Panel found the driver and passengers were all workers in the course of their employment at the time of the accident. The Panel also found that the family members of the two deceased passengers were not dependent on Mr B or Mr L, so their right of action was not taken away.

Following the release of Decision 1921/06, counsel for the insurer requested first a clarification, and then subsequently a reconsideration of the decision. He alleged that the Panel had failed to make a determination about whether the right of action of the estate of Mr B and Mr L was also taken away. The reconsideration was dismissed because it was opposed by counsel for Mr B and Mr L, and because it was made more than 40 days after the release of Decision 1921/06 (contrary to the Practice Direction on Right to Sue Applications).

Counsel for the insurer then brought a motion to dismiss the outstanding actions. The plaintiffs opposed the dismissal. In a judgment released on August 27, 2008, Justice Campbell noted the parties faced a dilemma in that they did not have a clear determination as to whether the right to sue by the deceased had been taken away. It was also clear that this matter could only be determined by the Tribunal. Justice Campbell stated:

“I appreciate the need on the part of the Tribunal for procedural efficiency. However, this should not trump the rights of the parties to know where they stand.

This Court on this motion is not in a position to direct the Tribunal to do what perhaps should have been done before. If there is such a right in the nature of mandamus, this can only be granted by the Divisional Court on a motion for judicial review of the Tribunal’s decision.

Counsel were agreed that a judicial review might be the most expeditious method of moving this matter forward. As a result, the motion for summary judgment is adjourned to a date to be fixed at a 9:00 a.m. appointment, if necessary, to permit either side as advised to pursue judicial review on the nature of *mandamus*.”

The insurer served the Tribunal with an application for judicial review. Following conversations with the parties, the Tribunal Chair commenced a reconsideration of Decision 1921/06 on the Tribunal’s own motion.

Decision 1921/06R, released on June 19, 2009, held that neither B or L or their estates were authorized to commence an action against the estate of K. The Panel reaffirmed that it had no jurisdiction to take away the rights of action of the non-dependent family members.

At the end of the quarter counsel for the insurer was considering whether it would still continue with the judicial review application on the issue of the Tribunal’s jurisdiction to determine the rights of action of non-dependent family members.

13. Decisions Nos. 1971/00 (January 24, 2001), Decision 1971/00R (December 11, 2001); Decision 1971/00R2 (April 24 2007); and Decision 1357/03I (September 26, 2003), Decision 1357/03 (November 19, 2004), and Decision 1357/03R (April 20, 2007)

In this application for judicial review, involving six decisions for the same worker, the worker was denied entitlement for his neck, right shoulder and carpal tunnel syndrome. The worker first appealed for entitlement based on two specific incidents allegedly occurring at work in 1994. The appeal was denied by Vice-Chair Loewen in Decision 1971/00. An application for reconsideration was also denied by Vice-Chair Loewen in Decision 1971/00R.

The Applicant, now represented by new counsel, brought a new appeal for entitlement based on disablement. This appeal was heard by Vice-Chair Carroll. After obtaining the opinion of an Assessor, Vice-Chair Carroll denied this appeal in Decision 1357/00.

The Applicant then brought an application to reconsider Decisions 1971/00, 1971/00R and 1357/00. He alleged there had been a misinterpretation of the Assessor's report in Decision 1357/00, and that if there had been a whole person approach taken the Applicant's appeals would have been allowed.

In Decision 1357/00R and 1971/00R2, Vice-Chair Moore denied the application for reconsideration. Vice-Chair Moore obtained a clarification from the Assessor, which confirmed that his report had not been misinterpreted by Vice-Chair Carroll. Vice-Chair Moore held there was no error in the Tribunal's decisions to attribute the worker's ongoing upper back/neck and right shoulder complaints to the progression of his degenerative condition of the cervical spine and not to the workplace incidents or disablement.

Counsel for the Applicant commenced an application for judicial review of Decision 1971/00, 1971/00R, 1971/00R2, 1357/00 and 1357/00R. At the end of the quarter the Tribunal was preparing its responding factum. The judicial review will likely be heard in the fall, in Ottawa.

14. Decisions Nos.397/05 (September 15, 2006) and 397/05R (February 20, 2007)

The worker injured his thumbs in 1999. He was granted LOE benefits until December 17, 2001 and a 25% NEL for the right thumb. He appealed to the Tribunal for LOE benefits after December 17, 2001, a NEL for his left thumb, or benefits for chronic pain or psychotraumatic disability. The worker also appealed for entitlement for benefits his shoulders, neck, low back, or dystonia, which he alleged arose out of the same injury.

The worker had a non-compensable injury in 1998. There were indications the worker had a pre-existing psychological problem which arose from the 1998 injury.

The Panel held that the worker had non-organic entitlement, but no organic entitlement for his various complaints. Consequently the Panel found the worker

had entitlement for chronic pain, which included entitlement for the dystonia. The Panel also found the worker was entitled to full LOE benefits from December 17, 2001 and continuing to date. Further, the worker was found entitled to an LMR assessment.

The worker commenced an application for judicial review. There were problems with the worker's materials. Counsel for the worker amended his materials as demanded by the Tribunal. At the end of the quarter the Tribunal was waiting for the worker's factum.

15. Decisions Nos.1791/07 (August 28, 2007) and 1791/07R (March 3, 2008)

The worker, a kitchen helper, injured his neck in November 2004. He was granted LOE benefits from May 9, 2005 until the end of 2010. Entitlement was extended to include his low back, shoulders, and chronic pain disability. The worker was also granted a 45% NEL award for chronic pain.

The worker appealed the denial of entitlement for carpal tunnel syndrome, entitlement for a psycho-traumatic disability, and the amount of a NEL for chronic pain. The Panel held the worker had no entitlement for carpal tunnel syndrome, he was not entitled to a psycho-traumatic award, and he was not entitled to an increase in his NEL.

The worker commenced an application for judicial review. Counsel for the worker mistakenly named the Board as the respondent instead of the Tribunal. The Tribunal consented to allow counsel to amend his materials, subject to conditions that protected the Tribunal's interests.

The Tribunal served and filed its Record, and was in the process of preparing its factum when it was noted that the worker's counsel had referred to evidence in his factum that was not before the Tribunal. After discussions with the worker's counsel, it was agreed that this judicial review would be put on hold while the worker pursues a further reconsideration. At the end of the quarter the reconsideration request was being processed and the judicial review was still pending.

16. Decisions Nos.2835/07 (December 17, 2007) and Decision 2835/07R (May 26, 2008)

The worker's appeal for ongoing entitlement for organic and psychological disability was denied. During the quarter the worker commenced an application for judicial review. The nature of the worker's judicial review application is not clear. The Tribunal has filed its Record of Proceedings, and at the end of the quarter was still awaiting receipt of the worker's factum.

17. Decisions Nos.717/08 (April 30, 2008) and 717/08R (October 23, 2008)

The worker appealed to the Tribunal for an increase to his long term earnings basis from May 2000 to January 2003, and for a change to the Board's finding of

a suitable employment or business (SEB) of a mail and message distribution which had resulted in a reduction to his loss of earnings benefits. The Panel allowed the worker's appeal, directing the Board to recalculate the worker's long term average earnings from May 2000 to January 2003, finding the SEB was not appropriate, and that his loss of earnings benefits should be based on a higher hourly wage.

However, the worker requested a reconsideration of the Tribunal decision, alleging the calculation of his long term earnings should have been higher, the Panel should have made the actual calculations rather than referring this to the Board, his short term earnings should have been higher, and taking issue with some procedural rulings made by the Panel during his hearing.

In the reconsideration decision, the same Vice-Chair, sitting alone, denied the request for reconsideration. She found that the relevant law and policy had been applied to determine the time periods on which the calculation of long-term earnings should be based. She found no error in referring the calculation of earnings to the Board. Further, the Tribunal had no jurisdiction to make findings on short term earnings because there was no final decision of the Board on that issue. She did not accept that the procedural allegations of the worker had any impact on the Panel's decision.

The worker has commenced an application for judicial review. The Applicant's counsel advised that she was revising the materials. At the end of the quarter the Tribunal was waiting to receive the amended materials.

18. Decision No.985/05 (August 6, 2008)

In this French language appeal, the worker was a nurse's aide at a long-term care facility. The worker appealed a decision of the Appeals Resolution Officer denying entitlement for fibromyalgia.

The worker claimed entitlement on a disablement basis, alleging her condition resulted from hard work. The Vice-Chair noted that hard work is not a medical condition and that there is no presumption that hard work causes injury, unlike occupational diseases where exposure to certain elements or conditions is recognized as causing injury. There was no objective evidence that the worker developed her fibromyalgia as a result of her employment. The rheumatologist who first diagnosed the worker's fibromyalgia indicated that that condition was not caused by employment-related physical stress.

The worker, who is self-represented, faxed the Tribunal a notice of application for judicial review. Since an originating process must be served personally, the Tribunal telephoned the worker to advise that the Tribunal would not accept service by fax. So far, the notice of application has not been properly served on the Tribunal.

19. Decisions Nos. 1248/98 (November 13, 2003), and Decision 1248/98R (October 11, 2007)

The worker appealed for entitlement to benefits for his injuries to his head, eyes, spine, chest, and ribs that the worker related to an accident in March 1993. The worker also sought payment of temporary total disability benefits after June 25, 1993. The hearing took place over four days, starting in August 1998 and concluding in July 2003.

The Panel had concerns about the worker's credibility. The Panel did not accept the worker's version of the accident, or that he suffered the injuries he alleged were caused by the accident. The Panel also found that any injuries suffered by the worker had resolved by June 25, 1993.

The worker commenced an application for judicial review. He is self-represented. The Tribunal filed its Record of Proceedings. The worker has refused to pay for the hearing transcripts he ordered, or to file a factum. As a result of telephone calls which the worker made to Tribunal staff, the Tribunal is not currently accepting further telephone calls from the worker.

The worker asked the Divisional Court for an extension of time in which to perfect his judicial review application. The Tribunal and the Tribunal's co-respondent took no position on the request. The Court granted the request and the worker had until the end of the quarter to perfect the judicial review application.

20. Decision No.1676/07 (July 23, 2008) and 1676/07R (May 1, 2009)

The worker alleged that following his compensable accident his employability was limited to twenty hours per week. The Tribunal denied the worker's appeal and found the worker could work for 40 hours per week at minimum wage. The worker's Future Economic Loss award was based on this finding.

The worker has commenced an application for judicial review. At this time the grounds for the application are not clear. The Tribunal has filed an appearance. At the end of the quarter the Tribunal was preparing its record.

21. Decision No.2305/08 (November 18, 2008)

The worker's appeal to the Tribunal for entitlement on the grounds she sustained a new injury, or aggravated a pre-existing condition at work, was denied. The Applicant commenced a judicial review alleging that the interpreter at the hearing did not properly interpret the proceedings for the Applicant.

At the end of the quarter the Tribunal was preparing its factum.

22. Decisions Nos.893/06 (October 12, 2006) and Decision 893/06R (November 15, 2007)

The worker's short term earnings were calculated based on his earnings of \$25.00 an hour, with no deductions, at the time of the injury. His average earnings were reduced after 13 weeks, at which point they were based on the worker's earnings over the prior 24 months as reported to the Canada Revenue

Agency through his income tax returns. The worker appealed to the Tribunal, alleging that his earnings should continue to be based on \$25.00 an hour.

The Vice-Chair denied the appeal. He found the worker to be a “non-permanent employee” within the meaning of Board policy, and it was appropriate to apply Board policy to recalculate the earnings after 13 weeks to reflect average earnings. The Vice-Chair held that the income tax records of the worker identified the true nature of the earnings of the worker. The same Vice-Chair denied the worker’s application for reconsideration.

The worker commenced an application for judicial review. The Tribunal has filed its Record of Proceedings. The worker discharged his lawyer. The worker has not filed his factum, but has filed a certificate of perfection. The Tribunal is currently awaiting receipt of the worker’s factum.

23. Decisions Nos.1233/08 (June 9, 2008) and Decision 1233/08R (May 29, 2009)

The worker was granted entitlement for respiratory irritation from workplace exposure to paint odours. His appeals for permanent impairment and for psychological entitlement for stress were denied.

During this quarter the worker commenced an application for judicial review. At the end of the quarter the Tribunal was preparing its Record of Proceedings.

24. Decisions Nos.565/08 (June 11, 2008) and 565/08R (January 26, 2009)

The worker was called in to do repair work at night by his employer, a public utility. After completing the repairs, the worker was injured in a motor vehicle accident on the way home. The Vice-Chair held the worker was responding to an emergency call and so was considered to be a worker under Board policy.

During this quarter the employer commenced an application for judicial review of the Tribunal’s decision. The employer is alleging the Tribunal has no standing as a party in this judicial review application.

At the end of the quarter the Tribunal was preparing its record of proceedings.

Highlights of Recent Decisions – April 1 to June 30, 2009

Breast Cancer and Low Frequency Electromagnetic Fields

The issue of whether workplace exposure to low frequency electromagnetic fields (ELF) can cause breast cancer is a novel issue requiring analysis of complicated epidemiological evidence. In *Decisions No. 1778/03, 1779/03 and 1780/03 (June 17, 2009) (E. Smith, B. Wheeler, F. Jackson)* three workers who worked for the same employer developed breast cancer and sought entitlement on the basis of ELF exposure at work. After reviewing the medical and epidemiological evidence, the Panel denied all three appeals finding that the workers' level of exposure to ELF at work was not a significant contributing factor in the workers' development of breast cancer.

The Panel found that the workers' exposure to electromagnetic fields were below any association with cancer, particularly since the workers had less than 10 years of exposure. The Panel also relied on a number of international and research bodies which found inadequate evidence to link electromagnetic fields and breast cancer.

The Panel considered the argument that these cases amount to a cluster that demonstrates that workplace exposure results in breast cancer. The Panel found that while the cluster might raise the issue of whether there is an occupational cause, it does not answer the question (*i.e.*, whether the workplace exposure caused the cancer). The question must be answered by reference to the scientific and other evidence as a whole. The Panel found that the literature is consistent in stating that the causation of breast cancer remains unknown. The Panel found that the likelihood that the cluster was caused by chance or other unidentified factors was greater than the likelihood that the workers' cancers were caused, or aggravated by, exposure to electromagnetic fields.

Regulation of Paralegals – Representative not permitted to Represent Worker

In *Decision No. 2268/081 (April 16, 2009) (A. Morris)*, the worker sought entitlement for chronic pain disability. As a preliminary matter, the Vice-Chair considered the status of a representative who was not a licensed paralegal, but claimed an exemption from licensing under the exception for representation by relatives, friends or neighbours.

To come within the exemption for paralegals under the *Law Society Act* and relevant by-laws, a person must meet four requirements; 1, that the person's profession or occupation did not include the provision of legal services or practice of law; 2, the person provides legal services only occasionally; 3, the person provides the legal services for a relative, friend or neighbour; and 4, the person does not obtain any compensation, including a fee, gain or reward, direct or indirect for the provision of legal services.

The representative had various occupations over the years, including translator, insurance agent, real estate agent, mortgage investments, and workers' compensation representative. Since 1994, he had acted for 50 people in at least 50 claims at the Tribunal, not including services he may have provided claims at the Board or in relation to CPP benefits. The representative stated that he was not receiving money for his services in this case and that he was acting as a friend.

In this case, the representative did not meet at least 2 of the 4 requirements. Given the number of appeals in which the representative was involved, the Vice-Chair found that the representative's occupation was the provision of legal services, and that such provision was not occasional. Further, the Vice-Chair had concerns with his claim that he was a friend of the worker, since the representative had represented him previously at the Tribunal, and the Vice-Chair also had concerns about any potential indirect compensation. It was not necessary, however, to make findings on those areas of concern since the exemption was only applicable if all four requirements were met.

In the circumstances, the representative was not allowed to represent the worker. The hearing was adjourned to allow the worker to obtain new representation.

Loss of Earnings Benefits after Age 65

Decision No. 880/09 May 1, 2009 (S. Martel) addressed the question of whether a worker who is injured at age 63, and then retires at age 65, is entitled to LOE benefits for 2 years after the accident. The worker was injured on June 22, 2005 at age 63, and retired on June 23rd, 2006. He sought benefits from June 23rd, 2006, until 2 years after the accident. The Vice-Chair found that section 43(1) WSIA did not provide for an automatic right to benefits for two years after the injury when the worker is 63 years old or older at the time of the accident. Rather, it allows for the possibility of benefits for 2 years post injury, if other provisions in section 43 are not in play. In this case, the worker was injured at age 63 and returned to suitable modified work at no wage loss. Modified duties were available and the only reason that the worker retired was due to the employer's retirement policy which was enforced for all employees. Thus, the loss of earnings sustained by the worker after June 23rd, 2006, was not due to a compensable injury. Even if the worker was uninjured, the worker would have retired at age 65 and would have been unable to continue working with the accident employer with no intention to work for any other employer. The appeal was denied.

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