

**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  
July 1 to September 30, 2009**

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## Production Summary

- The active inventory totalled 3,916. This is an increase from the second quarter 2009 active inventory of 3,844.
- The Q3 active inventory of 3,916 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 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 963, of these 806 were appeals from WSIB decisions and 157 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 843 new appeals and 149 reactivated appeals recorded in the second quarter of 2009.
  - In the 3rd quarter of 2008 the Tribunal recorded 717 new appeals and 115 re-activations.
  - In 2009, incoming appeal numbers are higher than the 2008 experience.
  - In 2008, the weekly average of hearing ready appellants was 55. For Q3 2009, the weekly average of hearing ready appellants is 63. This figure excludes cases reactivated from inactive status.
- Dispositions numbered 971; this includes 337 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 634 after hearing dispositions; of the after hearing dispositions, 617 followed from Tribunal decisions.
- In Q3-09, the inactive inventory was 3,478 cases (at the end of Q2-09, the inactive inventory was 3,592 cases).
- In Q3-09, 82% 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 third quarter of 2009, the notice inventory included 1,238 dormant cases, the active inventory totalled 3,916 cases, and the inactive inventory totalled 3,478 cases.

## Production Charts

### A. Active Inventory

Period	Active Inventory
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	3914
Q2-2009	3844
Q3-2009	3916

### B. Incoming Appeals

Period	Incoming Appeals
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	1002
Q2-2009	992
Q3-2009	963

### C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
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	1057	347	710
Q2-2009	997	341	656
Q3-2009	971	337	634

#### D. Inactive Inventory

Period	Inactive Inventory
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	3592
Q3-2009	3478

#### E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
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	1318	67
Q3-2009	1238	-80

# Judicial Review Activity

## Third Quarter 2009

The third quarter of 2009 was again busy in regards to judicial review activity at the Tribunal.

The status of applications for judicial review involving the Tribunal for the third 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. **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 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 it had been agreed by all counsel that the judicial review application would be heard first.

### 2. **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 above, has joined it with a class proceeding. As with Decision 351/07, the judicial review application will be heard first.

### 3. **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 joined a judicial review application with a class proceeding. In all three cases the judicial review application will be heard first.

### 4. **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.

## **5. 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 commenced an application for judicial review in April 2004.

Following discussions with her former counsel, in November 2002 it was agreed that the judicial review application would be adjourned to allow the worker to pursue an application to reconsider Decision 1509/02.

In her reconsideration application the worker alleged the Panel had failed to consider that she had suffered a recurrence of a 1992 injury. Decision 1509/02R was released on September 27, 2006. In that decision the Tribunal found that although the worker had raised a cross-appeal in *Decision 1509/02*, the worker had not raised entitlement on the basis of a recurrence of the 1992 injury as an issue in that cross-appeal. Consequently, there was no error in *Decision 1509/02* and the application for reconsideration was denied.

However, the Vice-Chair in *Decision 1509/02R* noted that it was still open to the worker to bring an appeal on the recurrence issue to the Tribunal, though it would be necessary to make an application to extend the time to appeal that issue.

The worker retained new counsel, and commenced an application to extend the time to appeal the Board decision. In *Decision 2021/07E*, the worker's application to extend the time to appeal the issue of recurrence in the June 4, 2001 ARO decision was denied.

The worker commenced an application to reconsider *Decision 2021/07E*. In *Decision 2021/07ER*, released July 22 2009, the Tribunal allowed the reconsideration and also granted an extension of time to appeal the recurrence aspect of the ARO Decision. The judicial review remains adjourned pending the further Tribunal decision on entitlement for the recurrence.

**6. 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 hearing of the judicial review application was in September 2009 and by the end of the quarter the Divisional Court had not yet released its decision.

**7. 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 both parties' factums have been served and filed. At the end of the quarter no date had yet been set for the hearing of the judicial review.

**8. 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. The further reconsideration was denied by way of Decision No. 1791/07R2 (September 21, 2009). At the end of the quarter the Tribunal had not been notified if the applicant is proceeding with the judicial review application.

#### **9. 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 there were discussions about whether the judicial review would be settled and discontinued.

**10. 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 1357/03.

The Applicant then brought an application to reconsider Decisions 1971/00, 1971/00R and 1357/03. He alleged there had been a misinterpretation of the Assessor's report in Decision 1357/03, and that if there had been a whole person approach taken the Applicant's appeals would have been allowed.

In Decision 1357/03R 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, 1357/03 and 1357/03R. At the end of the quarter the Tribunal was waiting for a date to be scheduled for the judicial review in Ottawa.

**11. 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. Following discussion with the worker's representative, it was agreed that the judicial review would be adjourned while the Tribunal commenced reconsideration on its own motion in conjunction with the worker commencing a reconsideration of another Tribunal decision.

**12. 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.

**13. 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. The Tribunal has been following up to obtain a commitment about the worker's intention. At the end of the quarter the Tribunal was waiting to receive the amended materials.

**14. 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. At the end of the quarter the Tribunal confirmed that the court records indicate the notice of application has not been properly served on the Tribunal.

**15. 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 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 June to perfect the judicial review application. He failed to perfect in time and at the end of the quarter the Tribunal had received no further communication from him.

**16. 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 commenced an application for judicial review, then decided not to proceed. In August the Tribunal consented to the worker abandoning the judicial review.

**17. 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.

The Tribunal has filed its factum, and at the end of the quarter was waiting for the Applicant to agree to a hearing date.

**18. 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 then discharged his lawyer. The worker filed his factum and a certificate of perfection. The Tribunal has filed its responding factum. At the end of the quarter the Tribunal was awaiting a hearing date before Divisional Court in Ottawa. This case will be heard in the French language.

**19. 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.

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings. At the end of the quarter the Tribunal was waiting for the worker's factum.

**20. 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.

The employer commenced an application for judicial review of the Tribunal's decision. Counsel for the employer alleges the Tribunal has no standing as a party in this judicial review application. The Tribunal filed its Record and at the end of the quarter was discussing with employer's counsel whether the issue of the Tribunal's standing would need to be resolved by way of motion.

**21. Decision No. 2454/03 (January 20, 2004) and Decision No. 2454/03R (September 15, 2004)**

The Tribunal found that the Applicant's work did not play a significant role in the development of his bilateral carpal tunnel syndrome, and denied him entitlement for benefits. After an unsuccessful reconsideration application, the Applicant commenced an application for judicial review. The Tribunal filed a Record of Proceedings and was preparing its factum, when it was noticed that the Applicant had improperly included a reference to evidence in his factum that was not part of the Record. A discussion with the representative about his factum led him to decide to adjourn the judicial review and attempt a further reconsideration.

However, instead of filing a new reconsideration, the worker filed a new appeal on a different issue. The worker was successful on this appeal. In July, the worker filed a notice of abandonment of the judicial review.

## Recent Decisions

### Roofers and Colon Cancer

*Decision No.2501/07* (June 15, 2009) illustrates the challenges the Tribunal faces in adjudicating occupational disease cases when there is scant evidence about workplace exposures. The worker worked as a roofer for thirty years. He was diagnosed with colon cancer and died shortly afterwards, before he could be questioned about his work activities. His medical records did not refer to his work history and very little information was provided by coworkers or by his employer. His estate's representative from his union provided evidence that he would likely have been exposed to asphalt, coal tar roofing pitch and some asbestos. The representative submitted several studies indicating an increased risk of lung and skin cancer in roofers.

Although some studies reported an increased incidence of skin and lung cancer associated with materials to which roofers may be exposed, they raised no more than some possibility of a causal connection between exposures and colon cancer. The studies did not report a sufficiently strong statistical association between the employment and colon cancer to support a conclusion that colon cancer is an occupational disease of roofers, or that the exposure was a probable cause of this worker's cancer. There was nothing about this particular worker's work history that suggested his exposures put him at a much greater risk for developing this cancer than the workers in the epidemiological studies. The evidence about his asbestos exposure did not meet the requirements of the Board's policy on gastro-intestinal cancer and asbestos exposure. Evidence indicated that colon cancer is one of the most common types of cancer occurring among the general population of males of his age. The worker's appeal was denied.

### Common Law Spouses and Survivors' Benefits:

The issue in *Decision No. 2621/07* (September 9, 2009) was whether a person to whom the worker was not legally married fell within the definition of "spouse" in the *Workplace Safety and Insurance Act* for the purposes of claiming survivors' benefits. This is often a difficult determination involving weighing considerable testimony and documentary evidence. In determining the legal tests to apply, the Panel reviewed case law from the Courts and concluded that the parties' intention as to the nature of their relationship is to be given great weight. The test for determining if a couple has cohabitated continuously as required by the Act is both subjective and objective. Whether there is a conjugal relationship within the meaning of the Act does not depend merely on the question of whether the parties are boyfriend and girlfriend or whether they are living together, or whether they are in a sexual relationship. Among other things, the Panel considered the way the couple in issue filed their tax returns; the way the worker bought the house where they lived; the fact that the couple used separate addresses for mail and that they had no joint bank accounts or common financial commitments. The Panel concluded that these parties were careful to structure their relationship in such a way as to attempt to avoid the status of spouses. The appellant was not in a conjugal relationship with the worker and accordingly was not the worker's spouse at the time of the worker's fatal workplace accident.

### Rapidly Deteriorating Conditions and NEL Determinations and Redeterminations

The question of when a worker with a rapidly deteriorating condition is entitled to determination or redetermination of a non-economic loss award (NEL) for permanent impairment is a difficult one, which has arisen only a few times. *Decision No. 1398/09* (September 29, 2009) refines what constitutes a permanent impairment for NEL purposes, and discusses the Act and Board policy concerning NELs and earlier cases. The case is also of interest for its analysis of whether any additional benefits are payable if a worker develops a secondary cancer as a result of a fatal, compensable primary cancer.

The case involved a worker with compensable laryngeal cancer who was awarded a 35% NEL. Unfortunately his condition deteriorated rapidly and he died under a year later. Approximately two months before his death, possible secondary lung cancer was identified, but investigations were not completed and no diagnosis was made.

Section 47(10) of WSIA states that a worker is not entitled to request a redetermination of a NEL award until 12 months elapse since the Board's most recent NEL determination. Board OPM Document 18-05-09 provides that in exceptional cases a NEL may be reviewed within 12 months. One of these is where a worker has cancer which spreads to other parts of his body and he is considered terminally ill. However, the policy also requires that the permanent worsening date, that is when the worker's condition stabilized and no further significant improvement was likely, be determined.

*Decision No. 1398/09* agreed with prior case law that, under the Board policy, there must be a plateau to some extent in the worker's symptoms. In this case, there was no evidence of a plateau - there was not even a sufficient plateau in symptoms to allow the possible diagnosis of a secondary cancer to be investigated before the worker died. The worker's death was compensated by survivors' benefits. No further benefits were payable beyond the 35% NEL for the laryngeal cancer, the loss of earnings benefits and the survivors benefits already paid.

### **Independent Contractors and Workers**

Whether or not a person is a worker as opposed to an independent operator is an important issue because it is workers who are entitled to coverage under the Act. This is often a challenging determination involving the consideration of legal tests in Tribunal case law, court cases and Board policy, and detailed, complex evidence about work arrangements. *Decision No. 799/09* (June 19, 2009) contains a useful, concise summary of the legal tests to be applied in making these decisions. The issue was whether sales agents of a steel roofing manufacturer were workers or independent contractors. The Panel concluded that the Tribunal has attempted to ascertain the "prevailing character" of the business relationship between parties. Where there is substantial capital investment and a clear intention to have an independent arrangement, usually an employment relationship is not found to exist. The parties' stated intention of relationship is given significant weight, but must be consistent with and supported by objective factors. Other criteria, such as, market mobility, control over operations, and deductions and withholdings are to be weighed in determining the prevailing character of the relationship. Case law indicates that two parties can have an exclusive relationship which is not an employment relationship as there is a distinction between integration of one party into another's operations, and interdependent relationships of mutual benefit to both parties.

The sales agents were not workers because they were not significantly integrated into the manufacturer's business, they had a significant opportunity for profit and loss, they held themselves out to the public and government as independent agents, and the manufacturer exercised minimal control over them. The clear intention of the parties was that they were independent operators.

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