

**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
October 1 to December 31, 2008**

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Production Summary

- The active inventory totalled 4,018. This is a reduction from the third quarter active inventory of 4,049.
- The Tribunal's "steady state", target is an active inventory of 4,000 appeals. The Q4 active inventory of 4,018 appeals is a significant reduction from a high of 5,491 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 2009 and 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 979 of these, 833 were appeals from WSIB decisions and 146 appellants advised they were ready to proceed to hearing following a period of inactive status.
 - This compares to 718 new appeals and 115 reactivated appeals recorded in the third quarter of 2008.
 - In the 4th quarter of 2007 the Tribunal recorded 831 new appeals and 147 re-activations.
 - In 2007, the weekly average of hearing ready appellants was 59. For Q4 2008, the weekly average of hearing ready appellants is 50. This figure excludes cases reactivated from inactive status.
- Dispositions numbered 1,030; this includes 269 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 761 after hearing dispositions; of the after hearing dispositions, 734 followed from Tribunal decisions.
- In Q4-08, the inactive inventory was 3,817 cases (at the end of Q3-08, the inactive inventory was 4,059 cases).
- Overall in 2008, 84% of final decisions were released in 120 days; in 2007, 86% of final decisions were released within 120 days. In Q4-08, 86% 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 fourth quarter of 2008, the notice inventory included 1,212 dormant cases, the active inventory totalled 4,018 cases, and the inactive inventory totalled 3,817 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q2-2006	5416
Q3-2006	5493
Q4-2006	5227
Q1-2007	5171
Q2-2007	5045
Q3-2007	4956
Q4-2007	4651
Q1-2008	4533
Q2-2008	4228
Q3-2008	4049
Q4-2008	4018

B. Incoming Appeals

Period	Incoming Appeals
Q2-2006	1124
Q3-2006	1087
Q4-2006	1007
Q1-2007	1026
Q2-2007	950
Q3-2007	939
Q4-2007	978
Q1-2008	930
Q2-2008	920
Q3-2008	833
Q4-2008	979

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q2-2006	1131	477	654
Q3-2006	1083	426	657
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	1030	269	761

D. Inactive Inventory

Period	Inactive Inventory
Q2-2006	4350
Q3-2006	4303
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	3817

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q2-2006	1381	-105
Q3-2006	1308	-73
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

Community Activities

In December, Tribunal Director, Marsha Faubert, participated in a speaking engagement on “Best Practices for Paralegals before the WSIB and WSIAT” at a Continuing Legal Education program presented by the Law Society of Upper Canada, at Osgoode Hall in Toronto.

In 2008, the Tribunal Chair, Ian Strachan, continued his volunteer role on the executive of the Society of Ontario Adjudicators and Regulators (SOAR).

Judicial Review Activity

Fourth Quarter 2008

The fourth quarter of 2008 was both busy and successful in regards to judicial review activity at the Tribunal. A decision of the Court of Appeal granting the Tribunal's appeal was released in October. After twenty-three years and over forty-five thousand decisions, the courts have never ultimately quashed any of decision released by the Tribunal.

The status of applications for judicial review involving the Tribunal for the fourth quarter of 2008 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.

At the end of this quarter the Tribunal was served with the worker's application for leave to appeal to the Supreme Court of Canada.

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*.

By the end of this quarter the worker had filed an application for leave to appeal to the Court of Appeal.

3. Decisions Nos.893/06 (October 12, 2006) and 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 earnings should be based on the net average earnings, not the actual gross 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 filed its Record of Proceedings. The worker then discharged his counsel and is now representing himself. The Tribunal is currently waiting to receive the worker's factum.

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's co-respondent is in the process of retaining new counsel. The Tribunal has filed its factum for the judicial review application and is waiting for a hearing date.

5. Decision Nos. 832/04 (November 18, 2004) and 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. The worker has filed an affidavit alleging that comments made by the Vice-Chair prior to the hearing constitute an apprehension of bias. At the end of the quarter the Tribunal was waiting to receive the worker's factum. This case will be heard in French.

6. 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.

During this quarter the worker's counsel commenced an application to reconsider the denial of the time extension.

The judicial review application is still pending.

7. Decisions Nos. 2191/05I (July 28, 2006) and 2191/05 (November 5, 2007)

The worker appealed to the Tribunal for entitlement for multiple myeloma, which he alleged was caused by benzene exposure. After obtaining the opinion of an independent occupational hygienist, the Panel denied the appeal on the grounds that the worker's exposure to benzene in the workplace was insignificant.

The worker commenced an application for judicial review. The Tribunal was then informed by the worker's former counsel that the application would not in fact be proceeding. The worker subsequently advised that he was in remission, that he had discharged his counsel and was now representing himself.

The Tribunal filed its Record of Proceedings. The Tribunal is waiting for the worker to serve his factum. At the end of this quarter the Divisional Court Registrar had sent the worker a notice requiring him to perfect within 10 days or the judicial review application would be dismissed.

8. 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. At the end of the quarter the Tribunal was waiting for the worker to provide a copy of the transcript, so the Tribunal could file its Record of Proceedings with the Divisional Court.

9. 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 brought an action in damages against the Vice-Chair, which was dismissed by the Court in October 2006.

The worker has now commenced an application for judicial review. The employer is a co-respondent in the application. The Tribunal has served its Record of Proceedings and will file it with the Court in January 2009.

10. 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. However, the Panel found the worker had entitlement for chronic pain, which included entitlement for the dystonia and for a NEL for the right thumb, and would replace the 25% NEL award for the left thumb. 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. Once the Tribunal receives the transcript from the worker, the Tribunal will file its Record of Proceedings.

11. 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. At the end of the quarter the Tribunal had served its Record of Proceedings.

12. 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. As of October 2008 the Tribunal was awaiting transcripts from the applicant's counsel in order to prepare and file the Tribunal's Record of Proceedings.

13. Decision Nos.610/05 (September 23, 2005) and Decision 610/05R (June 8, 2006)

The worker, who was self represented, was denied entitlement for a cardiac condition. The worker commenced an application for judicial review, on which he is also representing himself. The worker is alleging numerous errors and breaches of natural justice by the Panel. At the end of the quarter the Tribunal was preparing its factum. It is anticipated this judicial review will be heard during the first quarter of 2009.

14. Decision 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. The worker commenced an application for judicial review. At this point the nature

of the worker's judicial review application is not clear. At the end of the quarter the Tribunal was preparing its Record of Proceedings.

15. Decision No. 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 Tribunal was preparing its Record of Proceedings.

16. Decision 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 nature of the worker's allegations are unclear. At the end of this quarter the worker had retained counsel to represent him on the judicial review, and the Tribunal was attempting to clarify the nature of the worker's application.

Highlights of Noteworthy Decisions

Occupational Stress

Decision No. 1602/08 (October 3, 2008) considered a claim for occupational stress alleged to have been caused by the criminal actions of a co-worker which compromised the worker at his place of employment. In this case the worker was accused of downloading pornographic material onto his work computer on a Sunday. The worker denied having been in the office on that day and an investigation by the employer disclosed that the worker's co-worker had been in the office for several hours that day. The worker kept a copy of his password beside his computer and the worker suspected that his colleague had downloaded the material using the worker's password and then sent the computer to a computer lab for upgrading, at which time the presence of the material was discovered, under the worker's password. This prompted the worker to conclude that his colleague had intentionally downloaded the pornographic material under the worker's password in order to embarrass the worker. The worker acknowledged that he had breached his employer's security guidelines by leaving his computer password posted on his computer. The employer imposed discipline on the worker for this security infraction.

The Vice-Chair concluded that the worker had been falsely accused of downloading pornographic material onto his workplace computer, and was persuaded that the worker's acute reaction was not a response to disciplinary action taken by the employer but, rather, due to the humiliation and embarrassment that the worker attributed to the actions of a co-worker. In this case, the employer's disciplinary actions were actually minimal. What triggered the worker's reaction was being put in the position by a co-worker where his employer was led to believe that he had engaged in an action that was at best a significant risk to his reputation and his employment and, at worst, a potentially criminal act. The worker was awarded LOE benefits for a period of lost time as a result of this disability.

Claim and Consent

Decision No. 1711/08 (October 9, 2008) considered the provisions respecting the time to file a claim and consent under section 22 WSIA as well as Board policy and prior Tribunal caselaw. Section 22 of the WSIA provides that a worker shall file a claim for benefits as soon as possible after the accident that gives rise to the claim, but in no case more than six months after the accident. The Board may extend the time for filing the claim where it is just to do so. The decision also considered whether to apply the common law principle of discoverability (i.e., that time for filing a claim does not begin to run until the facts which form the basis of a claim are known).

In this decision the Vice-Chair explained that that portion of the Board policy (OPM Document No.15-01-03) that refers to a change in claim status should be interpreted as applying where the Board has previously had sufficient information from other sources to adjudicate the claim and pay some minimal benefits even though the worker has not filed the claim and consent. A change in status might constitute exceptional circumstances. The decision stated however that, depending on the circumstances, facts in which an initial injury required only very minimal medical attention, and there was later deterioration, might reasonably be taken into account by the decision-maker when deciding whether to exercise the discretion to extend the time.

In this case, it was found that there were no exceptional circumstances. The claim was made 2 years and 3 months late. The injury was sufficiently serious at its onset that the pattern of how the worker's symptoms arose was not an exceptional circumstance. The fact that a new representative wanted to make a new legal argument over 2 years late was also not

exceptional. All the facts that formed the basis for the new argument were known and the argument itself was not novel. A new legal argument might be a relevant consideration if the period of delay was short or if there were some reasonable basis for confusion about how the law or policy might apply.

SIEF- What Constitutes an Underlying Condition

In *Decision No. 2021/08* (October 14, 2008) the employer, in its claim for SIEF relief, submitted that the worker's immigrant status and inability to speak English was a pre-existing condition akin to prior life trauma, and that, if the worker had been more fluent in English, she would have obtained treatment more quickly and thus her claim would not have been prolonged or enhanced.

The Vice-Chair found that the worker's social condition had no bearing on SIEF relief. Board policy concerning an underlying condition referred to a medical condition, not a social condition. The Vice Chair found however that the worker had a co-existing neck condition that made a small contributing to prolonging the worker's disability and enhancing her claim and on this basis was entitled to SIEF.

Right to Sue Applications- Status of the Estate of a Worker

In *Decision No. 1396/08* (October 9, 2008) a worker's estate commenced an action against a rehabilitation hospital claiming that the worker died of complications from heat stroke and alleging negligence on the part of the rehabilitation hospital in assessing appropriate living conditions for the worker.

The hospital applied to determine whether the estate's right of action was taken away. The estate submitted that the Tribunal did not have jurisdiction in this matter, noting that the provisions of the WSIA do not address the right of action of an estate.

The Panel found that the legislation did not treat the worker's estate as a legal entity distinct from the worker in the sense of having separate and different rights. Rather, the WSIA treated the worker's estate as the legal entity through which an injured worker's rights and entitlements are fulfilled in the event of the worker's death (see, for example, ss. 45 and 61). This meant that the rights of a worker's estate were defined by the rights of the worker.

The Panel found that this conclusion was consistent with a purposive interpretation of s. 27. The Panel noted that provisions of the WSIA barring certain rights of action exist to support the underlying intent of compensation legislation, which is that injuries arising out of and in the course of the workplace will be addressed and compensated under the WSIA and will not be permitted to be taken to the court arena.

The Panel concluded that the Tribunal had jurisdiction to determine whether the right of action of the estate was taken away. Tribunal decisions have consistently held that injuries sustained in the course of seeking medical treatment for work-related injuries are considered compensable if they arose out of and in the course of employment.

Rheumatoid Arthritis

Decision No. 2924/07 (October 16, 2008) denied entitlement for rheumatoid arthritis to a worker who experienced symptoms following a minor slip and fall at work.

There was evidence of rheumatoid arthritis within weeks of the accident. The Vice-Chair accepted the opinion of a Tribunal medical assessor that the rheumatoid arthritis was in evolution at the time of the accident. The onset of rheumatoid arthritis was coincidental with the minor trauma suffered by the worker in the compensable accident. There was no more than a remote possibility of a causal connection between the accident and the rheumatoid arthritis.

Personal Care Allowance (PCA)

Decision No. 205/081 (October 17, 2008) allowed entitlement for a personal care allowance (PCA) for a period prior to the effective date of a NEL award of 60% where there was evidence that during that period the deterioration to the level reflected in that subsequent award was a likely outcome.

The Panel referring to Board policy(OPM Document #17-06-05) noted that there were actually two threshold entitlement criteria for allowing entitlement for a PCA: a NEL award of 60% or more; and where there is evidence that a worker's impairment is "likely to be permanent in a opinion of a WSIB Medical Consultant, and meet one of the criteria above"

The Panel interpreted the latter criterion as implying that the Board may grant a PCA where a NEL award has not yet been established at 60% but, in the Board's opinion, a 60% NEL award is likely. In other words, once the Board determines that there has been a deterioration that will likely lead to a 60% NEL award, a PCA may be granted. The Panel found that such an approach was consistent with the purpose of the PCA which is to recognize severe impairment, which is something that could happen well before a NEL award actually recognizes that impairment.

Expert Evidence

Decision No. 2082/071 (October 24, 2008) considered the worker's request to admit expert evidence in support of his claim for tonsillar cancer. The evidence was a report from the Research Director with Physicians for a Smoke-Free Canada. The author of the report had a Master of Arts degree in Sociology. He had extensive experience in the field of public policy and advocacy, but his experience was not relevant to the issue of causation in this case. He did not have credentials to qualify as an expert in medical or epidemiological causation. He had been involved in cancer research but did not have a medical degree or doctorate in any other specialty. The Panel concluded that the author of the report did not qualify as an expert witness. However, his report was accepted into the Record to be treated as submissions on behalf of the worker about how evidence in the case should be interpreted.

Subrogated Actions

Decision No. 1988/081 (December 12, 2008) addressed the question of whether a surplus arising from an award in a Board's subrogated court action, arising from a May 1985 accident, could be applied to offset benefits already received by the worker. In determining the quantum of the surplus, the Board calculated benefits paid on the worker's behalf and added an additional 10% of these payments, to cover the Board's administrative expenses.

After the worker's pension was increased, the Board informed the worker that the Board would retain this additional benefit as an offset against the surplus previously paid to the worker, as the worker had previously agreed. The worker then appealed the Board's decision to use the surplus to offset his benefits.

The Vice-Chair found that the Tribunal had jurisdiction over this issue noting that the Tribunal's jurisdiction over the predecessor sections of section 30 of the WSIA had been considered in several prior Tribunal decisions (see, for example, *Decisions No. 1788/98* (49 WSIATR 163), *476/99* and *1903/98*). In each of those decisions, it was concluded that the jurisdictional limitation set out in subsection 123(2) applied only to decisions made by the Board under section 30 of the WSIA and did not, in law, apply to predecessor sections of section 30.

Section 8 of the pre-1989 Act applied to the accident in this case. This section was neither repealed nor amended by WSIA and therefore continued to govern the worker's claim. The Tribunal consequently continued to retain its jurisdiction with respect to this section under the pre-1989 Act.

The Vice Chair then denied the worker's appeal with respect to this issue, finding no reason to reverse or vary the Board's determinations regarding the surplus. The Vice Chair did not accept the argument of the worker's representative that subsection 8(4) of the pre-1989 Act limited the Board's power to deduct only future payments and not past awards from a surplus. The Vice Chair found that the phrase "all amounts expended by the Board" in subsection 8(4) meant that the amount that was to be set off against a surplus included all subsequent payments, including payments that are awarded retroactively. The Vice Chair found further that the definition of a surplus contained in subsection 8(4) was broad enough, on its plain meaning, to encompass also administrative costs as well as the actual amount of compensation paid out to a worker.

WSIAT
27 January 2009