

**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, 2009

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Production Summary

- The active inventory totalled 3,835. This is a decrease from the third quarter 2009 active inventory of 3,910
- The Q4 active inventory of 3,835 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 significant 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 948, of these 810 were appeals from WSIB decisions and 138 appellants advised they were ready to proceed to hearing following a period of inactive status.
 - This compares to 801 new appeals and 157 reactivated appeals recorded in the third quarter of 2009.
 - In the 4th quarter of 2008 the Tribunal recorded 823 new appeals and 146 re-activations.
 - In 2008, the weekly average of hearing ready appellants was 55. For Q4 2009, the weekly average of hearing ready appellants is 62. This figure excludes cases reactivated from inactive status.
- Dispositions numbered 1060. This includes 367 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 693 after hearing dispositions; of the after hearing dispositions, 659 followed from Tribunal decisions.
- In Q4-09, the inactive inventory was 3,388 cases (at the end of Q3-09, the inactive inventory was 3,479 cases).
- In Q4-09, 88% 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 fourth quarter of 2009, the notice inventory included 1,201 dormant cases, the active inventory totalled 3,835 cases, and the inactive inventory totalled 3,388 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
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	3843
Q3-2009	3910
Q4-2009	3835

B. Incoming Appeals

Period	Incoming Appeals
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	958
Q4-2009	948

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
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	267	761
Q1-2009	1056	347	709
Q2-2009	997	341	656
Q3-2009	971	337	634
Q4-2009	1060	367	693

D. Inactive Inventory

Period	Inactive Inventory
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	3479
Q4-2009	3388

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
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
Q4-2009	1201	-37

Judicial Review Activity

Fourth Quarter 2009

The status of applications for judicial review involving the Tribunal for the last 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.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, closing benefits on August 5, 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. He alleged that there were breaches of natural justice during the hearing in the questioning of witnesses. The worker also contested the conclusions reached by the Tribunal on medical evidence and the assessment of competing facts. The judicial review was heard on September 24, 2009, and the Divisional Court Panel of Jennings, Wilson and Corbett reserved its decision. The Court released its decision on October 27, quashing the Tribunal's decision.

Although rejecting the worker's objections about procedural fairness, the Court held the Tribunal's decision to terminate benefits on August 5 was unreasonable. The Court disagreed with the Tribunal's factual determination that the worker's ongoing problems were not medically substantiated. The Court further opined that if the Tribunal was not satisfied with the evidence it could require the worker to undergo an examination by a medical health professional, which would apparently be able to shed light on the medical state of the worker at a particular point in time five years earlier. The Court directed that the matter should be referred to a differently constituted Tribunal panel to determine the date when the worker no longer had a work-related injury.

The Tribunal filed an application for leave to appeal to the Court of Appeal, on the grounds that in wading into the facts on a matter squarely within the Tribunal's exclusive jurisdiction, the Divisional Court failed to apply the reasonableness standard of review. The Court's decision has created considerable uncertainty in how the Tribunal should conduct its hearings, and whether it is now required to have workers examined by health professionals in every case. At the end of the quarter the Tribunal was waiting to see if leave to appeal had been granted.

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

The worker, a backhoe operator, was called in to repair a broken water main at night by his employer. After completing the repairs, the worker was injured in a motor vehicle accident when he fell asleep while driving home. The Board held the worker was not in the course of his employment. The worker appealed to the Tribunal.

The Vice-Chair reviewed Board policy and prior Tribunal decisions. The general rule is that a worker is not considered to be in the course of employment when driving home from work. However the Panel held the worker was responding to an emergency call and so would be considered to be a worker under Board policy at the time of his car accident.

The employer commenced an application for judicial review of the Tribunal's decision. Counsel for the employer alleged the Tribunal had no standing as a party in this judicial review application, and also that the Tribunal should have no right to appeal if the judicial review application were granted.

The judicial review was heard on December 14, 2009 before the Divisional Court panel of Lederman, Jennings and Swinton. The Court reserved, releasing its decision to dismiss the judicial review on December 21.

The Court held the Tribunal gave clear reasons why the Board policy applied in these circumstances, and this conclusion was reasonable. Further, the Court rejected the worker's argument that the Tribunal should have found the Board policy was inconsistent with s. 126(4) of the WSIA. This argument had not been made by the worker at the Tribunal hearing, and it was therefore not unreasonable for the Tribunal not to have dealt with it.

Since the judicial review application was dismissed, the Court did not have to decide whether the Tribunal would have had the right to appeal. However the Divisional Court noted that it would have ruled that it did not have the jurisdiction to determine this, as it would have been for the Court of Appeal to determine if the Tribunal had standing to appeal to that Court.

3. 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. The same counsel has commenced judicial reviews with class actions in two other cases - Decision 1387/07 and Decision 1858/08, as noted below.

Linking a class action with a judicial review is a novel remedy so far as the Tribunal is concerned. All parties agreed that the judicial review application would be heard first. At the end of the year the Tribunal had filed its factum. This judicial review, along with the judicial review of Decision 1387/07 and 1858/08, will be heard together on February 3 and 4 in Toronto.

4. 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 before the class action. It is scheduled to be heard on February 3 and 4.

5. 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, on February 3 and 4 2010.

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

The worker fell at work and injured his wrist. He was paid benefits for almost a year. The worker's appeal for ongoing entitlement for organic and psychological disability was denied by the Tribunal. He filed an application for judicial review challenging the Tribunal's finding that he was not entitled to benefits for a psychological disability.

In reaching its decision the Tribunal applied the Board policy on Psychotraumatic Disability. After assessing the evidence the Tribunal found the worker failed to establish on the balance of probabilities that the injury was a significant factor in the development of the disability. There was no medical diagnosis that the worker suffered from post-traumatic stress disorder. Although the worker did suffer from depression, the Tribunal found this was caused by a number of non-work-related factors.

The parties have filed factums. The judicial review is scheduled to be heard in Toronto on February 25, 2010.

7. Decisions Nos.1791/07 (August 28, 2007) 1791/07R (March 3, 2008) and 1791/07R2 (September 21, 2009)

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. 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 pursued a further reconsideration. The further reconsideration was denied by way of Decision No. 1791/07R2 (September 21, 2009). The worker revived his application for judicial review before the end of the quarter. The Tribunal will be filing its factum in January 2010 and the application is scheduled to be heard in March 2010.

8. 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 retained counsel and commenced an application for judicial review. The Tribunal 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. A date of June 14 has been set for the hearing of this judicial review before Divisional Court in Ottawa. This case will be heard in the French language.

9. 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 judicial review was scheduled for January 2010. However the plaintiff and defendant reached an agreement and in October the judicial review was dismissed with the consent of all parties.

10. 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.

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 both parties' factums have been served and filed. The judicial review will be heard in Ottawa. At the end of the quarter no date had yet been set for the hearing of the judicial review.

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.

Following the release of Decision 1921/06R, the applicant and Tribunal agreed that the judicial review would be dismissed by the Divisional Court registrar.

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 1357/03.

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 still waiting for a date to be scheduled for the judicial review in Ottawa. The most recent information was that it would be heard in Ottawa in the summer or fall of 2010.

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. Following discussion with the worker's representative, it was agreed that the judicial review would be adjourned while the Tribunal commenced a reconsideration on its own motion in conjunction with the worker commencing a reconsideration of another Tribunal decision. During this quarter counsel for the worker filed his reconsideration application. Both reconsiderations were assigned to a new Tribunal Vice-Chair.

15. 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 attempted to file an appeal of the Tribunal's decision. Subsequently the worker retained counsel, who commenced an application for judicial review. The worker's counsel advised that she was revising the materials filed with the Court, but at the end of the quarter the problems had not been resolved. Tribunal counsel was following up to require the appropriate documents be filed prior to the judicial review proceeding.

16. 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.

17. 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.

18. 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 filed its factum. The Applicant, who is self-represented with the assistance of her son, had originally demanded an early date for the judicial review. However at the end of the quarter the Tribunal was still waiting for the Applicant to agree to a hearing date.

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

The worker brought an appeal for initial entitlement for respiratory irritation from workplace exposure to paint odours. He was granted initial entitlement and loss of earnings benefits for a few weeks. His appeals for permanent impairment and for psychological entitlement for stress were denied. The worker made a request for reconsideration which was denied.

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings and the worker filed his factum.

The Tribunal then determined that it should reconsider its decisions on its own motion. The worker's counsel agreed to place the judicial review on hold pending the outcome of the Tribunal's reconsideration. At the end of the quarter the Tribunal's reconsideration decision had not yet been released.

20. Decision 1766/09 (September 29, 2009)

The worker was denied entitlement for chronic pain and LOE benefits after July 2001 by the Board. Her appeal to the Tribunal was granted, the Vice-Chair holding that the worker has entitlement to chronic pain, entitlement to wage loss benefits from April 2001 to June 27, 2002, and full LOE benefits from June 27 2004 to August 23, 2004. The Board was directed to determine if there was an ongoing LOE entitlement after August 23, 2004.

The employer served an application for judicial review in December 2009. At the end of the quarter the Tribunal was preparing its Record of Proceedings.

21. Decision 1110/07I (May 16, 2007), Decision 1110/07 (September 12, 2008), and Decision 1110/07R (March 10, 2009)

The worker appealed for entitlement for interstitial lung disease and for polymyocitis, which she alleged were conditions that resulted from her workplace exposure as a nurse. The Tribunal Vice-Chair sought the opinion of a Tribunal assessor, a respirologist with expertise in interstitial lung disease. The Vice-Chair reviewed the medical evidence and concluded that while an association with work was possible, on the balance of probabilities it was not likely that her condition arose from work and more likely it was idiopathic in origin.

The worker commenced an application for judicial review. The Tribunal is contesting the admissibility of some of the worker's materials. At the end of the quarter the Tribunal had served its Record of Proceedings and was waiting for the worker's factum.

22. Decision 1976/99I (November 30, 1999), Decision 1976/99 (December 12, 2002), and Decision 1976/99R (September 2, 2005)

The worker was granted entitlement on an aggravation basis for benefits from March 1991 until February 1992. The worker did not seek medical treatment from November 1991 until September 2004. The hearing Panel found the worker was suffering from regional myofascial pain, rather than fibromyalgia.

The Vice-Chair in the reconsideration decision held the hearing Panel may have been mistaken in making this determination, and also that this distinction in diagnosis was not sufficient to disqualify the worker from entitlement. However, he also held that even if the worker suffered from fibromyalgia, she would still not be entitled to benefits because it was not clear the worker suffered from a work injury, the medical reporting did not relate her condition to work, there was significant discrepancy in the medical reporting, and her allegation of significant worsening from 1991 to 1994 suggests another intervening cause of her disability.

The worker has commenced an application for judicial review. However she was represented by a paralegal from Quebec, who would not have the status to represent her at Divisional Court. At the end of the quarter the Tribunal was preparing its Record of Proceedings.

Recent Decisions

Constitutional Challenges

Challenges under the *Canadian Charter of Rights and Freedoms* and the *Ontario Human Rights Code* against workers' compensation legislation came before the Tribunal in two recent cases.

Decision No. 1657/07 found that the reduction of a worker's NEL award through the use of the Combined Value Chart (CVC) of the *AMA Guides* did not contravene the *Canadian Charter of Rights and Freedoms* or the *Ontario Human Rights Code*. *Decision No. 141/08I* found that the worker's appeal for benefits for mental stress would be allowed under the pre-1998 legislation but not under section 13(4) and (5) WSIA. The decision then allowed a reconvening of the hearing if the worker wished to pursue the challenges to s. 13(4) and (5) WSIA pursuant to the *Charter* and the *Code*.

In *Decision No. 1657/07* the worker argued that the use of the CVC violated s.15 of the *Charter* and the *Code*, because it discriminates against workers who suffer more than one workplace injury, and discriminated against this worker on the basis of his prior disability. The effect of combining NEL awards under the CVC in certain cases may result in a reduction, rather than an increase, of the overall NEL award.

The Panel, following previous case law that the Tribunal has the jurisdiction to apply the *Charter* and *Code*, accepted that there was differential treatment based on an enumerated ground in s.15. However, the Panel held that there was no substantive discrimination.

Firstly, the differential treatment in the CVC was with respect to the quantum rather than the access to benefits. The scheme did not preclude ongoing entitlement to the NEL award but sometimes possibly resulted in a worker receiving a smaller award. No evidence was presented in this case of the smaller amount of the NEL award resulting from the application of the CVC. Secondly, unlike the situation in *Nova Scotia (Workers' Compensation Board) v. Martin* [2003] 2 S.C.R. 504, the smaller NEL award did not preclude access to other benefits found in the workers' compensation scheme.

The Panel found that the NEL award was an individualized assessment of the worker's impairment under the *AMA Guides*, taking into account personal circumstances. In this respect, it was also different from the situation in *Martin*, where the benefit scheme did not take into account the actual needs and circumstances of the claimants under that scheme. The objective of the *AMA Guides* in combining prior ratings of impairment in the CVC was to assess physical impairment on a whole person basis. As such, the use of the CVC was not unfair or demeaning to the worker but rather was an attempt to assess impairment in a holistic manner.

The Panel noted further that the NEL award was based on a rating of impairment rather than disability. A reduction in a NEL award through an application of the CVC was not perpetuating prejudicial or stereotypical concepts of disability. Rather, the reduction reflected the physical and functional abnormality or loss of impairment on a whole person approach.

Tribunal Jurisdiction- Right to Sue- Statutory Accident Benefits

Decision No. 897/09I addressed the question of the Tribunal's jurisdiction with respect to a right to sue application under section 31 WSIA brought by an insurer where the worker had received statutory accident benefits (SABs) under the *Insurance Act* and there was no court action.

WSIA section 31 allows an insurer from whom statutory accident benefits were claimed to apply to the Tribunal for determination of whether the "plaintiff" was a person entitled to workers'

compensation. This provision slightly differs from its predecessor, section 17(2) of the pre-1997 *Workers' Compensation Act*, which uses the term "claimant" instead of "plaintiff".

In this right to sue application, the respondent worker was employed to inspect rolled steel at various storage yards. While driving from the main work premises to an inspection site, the respondent stopped at a convenience store to purchase a magazine and a sandwich. The respondent then resumed driving. He drove his vehicle the wrong way down a one way street, colliding with a motorcycle and killing the driver and passenger. The respondent pleaded guilty to two counts of dangerous driving causing death.

The respondent then claimed workers' compensation benefits and SABs. In order to receive the SABs, he was required to sign an assignment of workers' compensation benefits to the SABs insurer. The Board Claims Adjudicator turned down the respondent's claim, finding that he was not in the course of employment. The respondent did not appeal the Claims Adjudicator's decision and, given the facts, there was no one he could sue. Accordingly, s. 31(1)(a) was not applicable.

Following *Decision No. 1362/01 I*, the Vice Chair found that the Tribunal had jurisdiction under section 31 (1) (c) WSIA to hear the application even though no civil action had been commenced. Interpreting "plaintiff" as being limited to court proceedings would lead to strange and anomalous results which could not have been intended. In addition to agreeing with the reasons provided in *Decision No. 1362/06I*, the Vice Chair found that the drafters could not have intended that disputes about workers compensation law should be decided by the Financial Services Commission of Ontario (FSCO) arbitrators, rather than the Tribunal. The Vice-Chair also noted that this was consistent with FSCO caselaw which also indicated that the Tribunal has this jurisdiction.

Paralegal Exemption- Friend

Two recent decisions have considered the question of whether the worker's representative fell under the paralegal exemption of "friend" as provided under the by-law respecting licensing requirements for the Law Society.

In *Decision No. 1956/09I* the representative, had worked as a representative prior to the licensing requirements for paralegals coming into force. He claimed at the hearing that he was only finishing a number of open cases and that he was not receiving any remuneration for this appeal. He had met the worker only 10 or 12 years ago. He did not know the marital status or place of residence of the worker. The worker talked with her representative mainly about her compensation claim. The Vice-Chair concluded that the representative was attempting to use the exemption for friends to circumvent the paralegal licensing requirements. The representative was not allowed to represent the worker.

In *Decision 1614/08R* the representative was retired since 2002. He was neither a relative nor neighbor of the worker and there was only limited social interaction between them. He used to be a staff representative for a union. He met the worker at a worker support group in 2005, where he spent 15 hours a week working for the support group, albeit without remuneration. The representative was receiving no remuneration from the worker in this appeal. The Vice-Chair found that allowing the representative to assist the worker would not bring the administration of justice into question or disrepute. There was still some uncertainty however about whether the representative met the criteria for exemption from licensing requirements of paralegals, in particular whether the representative's activities could be characterized as an "occupation" under the by-law of the Law Society. The Vice-Chair referred the matter of the representative's status to the Tribunal Chair.

Cancer- Kidney

Decision No. 2390/07 denied the claim of the worker's estate for kidney cancer as arising from the worker's workplace exposure to asbestos between 1951 and 1991. The worker died of this condition in 2004.

The worker's representative relied on *Decision No. 1149/98* which accepted a claim for renal cancer as a result of exposures while a worker was employed as a chemist. This case however did not involve asbestos exposure. The same decision also noted medical evidence filed in that appeal that renal cancer was a "relatively rare" cancer and also noted a number of non-occupational risk factors associated with kidney cancer such as kidney disease, obesity, cigarette smoking, chewing tobacco, diuretic anti-hypertensive medications, high coffee or tea consumption, a low level of education, ethnic origin and use of acetaminophen and phenacetin analgesics.

In *Decision No. 2390/07* the worker had moderately intense but not continuous and repetitive asbestos exposure. The Panel concluded that the worker did not have the type of intense and continuous exposure that the medical literature finds may be associated with renal cancer. Even if the worker had that type of exposure, the epidemiological evidence of a causal connection was not that strong. Referring to *Decision No. 2825/01* (2004) 68 W.S.I.A.T.R. 53, the Panel noted that the SMR in this case ranged from 1.1 to 1.7, which was below the 2 level that the Tribunal generally requires for granting entitlement.

WSIAT
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