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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Quarterly Production and Activity Report

January 1 to March 31, 2010

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Production Summary

- At the end of the first quarter 2010, the active inventory totalled 3,872. This represents the sixth consecutive quarter where the level has remained relatively stable. During this period, the inventory has fluctuated very little (+/- 5%) as compared with its current level.

- Incoming appeals numbered 1042, of these 870 were appeals from WSIB decisions and 172 appellants advised they were ready to proceed to hearing following a period of inactive status.

    - This compares to 807 new appeals and 138 reactivated appeals recorded in the fourth quarter of 2009.
    - In the 1st quarter of 2009 the Tribunal recorded 844 new appeals and 158 re-activations.
    - In 2009, the weekly average of hearing ready appellants was 59. For Q1 2010, the weekly average of hearing ready appellants is 59. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 1018. This includes 327 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 691 after hearing dispositions; of the after hearing dispositions, 673 followed from Tribunal decisions.

- At the end of Q1-10, the inactive inventory was 3,320 cases (at the end of Q4-09, the inactive inventory was 3,389 cases).

- In Q1-10, 86% of final decisions were released within 120 days. In 2009, 85% 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 first quarter of 2010, the notice inventory included 1,185 dormant cases, the active inventory totalled 3,872 cases, and the inactive inventory totalled 3,320 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
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	3832
Q1-2010	3872

B. Incoming Appeals

Period	Incoming Appeals
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	957
Q4-2009	945
Q1-2010	1042

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
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	970	337	633
Q4-2009	1060	367	693
Q1-2010	1018	327	691

D. Inactive Inventory

Period	Inactive Inventory
Q3-2007	4074
Q4-2007	4068
Q1-2008	4068
Q2-2008	4086
Q3-2008	4060
Q4-2008	3817
Q1-2009	3696
Q2-2009	3593
Q3-2009	3480
Q4-2009	3389
Q1-2010	3320

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q3-2007	1294	-3
Q4-2007	1358	64
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
Q1-2010	1185	-16

Judicial Review Activity

First Quarter 2010

The status of applications for judicial review involving the Tribunal for the first quarter of 2010 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. On February 3, 2010 the Court of Appeal Panel of Laskin, Lang and Doherty dismissed the Tribunal's motion for leave to appeal. Since this decision poses some potentially significant issues for the Tribunal, at the end of March the Tribunal was preparing an appeal for leave to appeal to the Supreme Court of Canada.

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 that its 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.

On January 5, 2010 the employer filed a motion for leave to appeal to the Court of Appeal. The Tribunal has filed a responding factum. At the end of the quarter the leave application was with the Court of Appeal.

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

The worker was paid temporary partial disability benefits at the rate of 50% based on his self-directed vocational rehabilitation plan. He appealed for total disability benefits for a ten year period. The appeal was denied by the Tribunal. The worker commenced an application for judicial review of the Tribunal's decisions.

In addition the worker sought 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 represents worker who have commenced judicial reviews with class actions in two other cases - Decision 1387/07 and Decision1858/08, 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.

This judicial review, along with the judicial review of Decision 1387/07 and 1858/08, were heard consecutively on February 3 and 4 in Toronto. The Panel of Cunningham, Ferrier and McCombs reserved its decision.

On February 12 the Panel released its decision, unanimously dismissing this judicial review. The worker had argued that a self-directed vocational rehabilitation program was not authorized by the WSIA or by Board policy. Although the worker argued that the standard of review was correctness, the Court affirmed that the standard of review was reasonableness. The Court held that the Tribunal's decision, which upheld Board policy that required an effort to return to work in a self-directed plan to be eligible for full

benefits, was reasonable. As the Court stated, “An interpretation designed to encourage partially disabled workers to return to the workforce or face the risk of a reduction in their compensation entitlements can hardly be characterized as unreasonable.”

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

The worker had a claim in 1978. He was granted a s.147 (4) supplement that did not exceed the amount of the Old Age Supplement. The worker subsequently passed away due to 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 Tribunal denied the worker’s appeal.

The worker commenced an application for judicial review, and as in Decision 351/07 above, joined it with a class proceeding. As with Decision 351/07, it was agreed that the judicial review application would be heard before the class action.

This judicial review, along with the judicial review of Decision 1387/07 and 351/07, were heard consecutively on February 3 and 4 in Toronto. The Panel of Cunningham, Ferrier and McCombs reserved its decision.

On February 12 the Court released its decision, which dealt with both Decision 1387/07 and 1858/08 in the same judgement. The Court unanimously dismissed both applications for judicial review.

The Court confirmed the standard of review was reasonableness for the reasons set out in the judgement regarding Decision 351/07. The Court held the Tribunal’s decision was reasonable. The Board’s interpretation of s. 147, which the Tribunal upheld, was that s.147(8) capped supplements at the worker’s Old Age Supplement level. The Court stated:

> **“**We do not agree that there is any ambiguity or uncertainty in the relevant provisions under s. 147 of the Act. It is an axiom of statutory interpretation that a statute should be read harmoniously in accordance with its plain language and in a manner that gives meaning to all of its provisions. On the Applicants' interpretation, ss. (8) would be superfluous - if the formulas contained in ss. (9) and (10) were to prevail in all cases, there would be no need to provide for a maximum supplement equal to the worker's OAS amount. The Board policy gives s. 147(8) its plain meaning: that permanent supplements under s. 147(4) are to be capped at the worker's OAS level. It certainly cannot be said that such an interpretation is unreasonable.”

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 joined the judicial review application with a class proceeding. This judicial review, along with the judicial review of Decision 1387/07 and 351/07, were heard consecutively on February 3 and 4 in Toronto. The Panel of Cunningham, Ferrier and McCombs reserved its decision.

On February 12 the Court released its decision, which dealt with both Decision 1387/07 and 1858/08 in the same judgement. As set out above under Decision 1858/08, the Court unanimously dismissed both applications for judicial review.

6. Decisions Nos. 2835/07 (December 17, 2007) and 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 was scheduled to be heard in Toronto on February 25, 2010, but was adjourned at the last minute at the request of the worker. The judicial review has been rescheduled for April 22.

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 June 2010.

8. 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 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 during the week of June 14 has been set for the hearing of this judicial review before the Divisional Court in Ottawa. This case will be heard in the French language.

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

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

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

However, Sister #2's claim had been allowed by the Board. The employer appealed to the Tribunal. A Panel of the Tribunal allowed the employer's appeal, reversing initial entitlement for the worker (Decision 1509/02). Sister #2 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. The Tribunal hearing has been scheduled for October.

10. Decisions 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. 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.

11. 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 within the next few months.

12. 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, and a pre-hearing conference has been held.

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) 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 the application materials became muddled. The Ottawa Divisional Court had set a date for the judicial review to be heard on February 17, but after discussions it was agreed the judicial review would be adjourned on consent. Counsel for the worker was to abide by a time-line to have the materials submitted by a specific date.

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 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.

At the end of the quarter the Tribunal received a notice of abandonment from the worker.

16. 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.

17. Decisions Nos. 1233/08 (June 9, 2008) and 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.

18. Decision No.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. The Tribunal noted that the worker had not been named as a party in the application. Following discussions, the applicant's counsel advised that she would take steps to add the worker as a party. At the end of the quarter the Tribunal was preparing its Record of Proceedings.

19. 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. Discussions with the worker's counsel have been ongoing. At the end of the quarter the Tribunal had served its Record of Proceedings and was waiting for the worker's factum.

20. 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 had served its Record of Proceedings. The Tribunal has notified the worker of its concern with the delay in commencing this judicial review application.

21. Decision 1007/08 (May 9, 2008) and Decision 1007/08R (October 20, 2008)

The worker, a police officer, was granted entitlement for a back and shoulder injury in 1975. In 1979 he suffered injuries to his chest, neck, upper back and left shoulder, for which he was granted a 10% permanent disability. He injured his back in 1986, for which he was granted two weeks of entitlement. In 1999 an ARO granted the worker entitlement for a stomach ulcer caused by his pain medication, but denied ongoing entitlement for his low back from the 1986 injury. In a 2003 ARO decision the worker was denied an increase to his 10% pension. In a 2006 ARO decision the worker was denied ongoing entitlement for his shoulder and neck from the 1975 accident, a permanent disability award arising from that accident, and also denied a pension assessment for his ulcer.

The worker appealed to the Tribunal for:

- ongoing entitlement and a pension assessment for the 1975 left shoulder and neck injury;
- entitlement for a stomach ulcer and stomach surgery from the 1979 injury,
- a pension award for neck and shoulder injury under the 1979 injury;
- an increase in the 10% pension award for his back and shoulder from the 1979 injury;
- a pension assessment for a back condition from the 1986 injury.

The worker's appeals were denied. The Vice-Chair found that there was no on-going entitlement for a shoulder and neck injury, and no entitlement for a pension assessment from the 1975 accident. The medical evidence indicated there were no on-going problems that were related to this accident.

Similarly there was no entitlement for the worker's stomach ulcer or stomach surgery from the 1979 accident because there was no ongoing disability related to his stomach. There was no entitlement for a pension for his neck and left shoulder because there was no objective evidence of an organic impairment. The 10% award for the thoracic spine and intrascapular left shoulder were appropriate as it reflected the worker's level of disability.

The Vice-Chair also held there was no ongoing entitlement for the 1986 accident, and hence no pension assessment was in order.

The application for reconsideration was also denied.

The worker commenced an application for judicial review. The Tribunal is preparing its record.

22. Decision Nos. 774/09 (April 21, 2009) and 774/09R (August 20, 2009)

This was a section 31 application to determine whether the right of action of the plaintiffs was taken away under the Act. The plaintiff was the manager of an apartment building. His regular hours were 8 to 5, Monday to Friday, but was on call outside of those hours. As a result of a flood in the parking garage, a plumber was called. The following day, while checking to see if the flooding problem was over, the plaintiff fell and injured himself.

Although the plaintiff at first claimed benefits from the Board, he subsequently decided to bring an action.

The Vice-Chair held the right of action was taken away. Although the was not scheduled to be on duty at the time of the accident, the plaintiff was a worker in the course of his employment when it occurred. He fell within the requirements for "time, place and activity" in Board policy. Checking the flooding situation was consistent with his workplace practices, which involved coming back on duty whenever there was a situation requiring him to perform his job duties.

The plaintiff commenced an application for judicial review. The plaintiff has ordered the transcript of the Tribunal hearing. Once that is received the Tribunal will files its record.

Recent Decisions

Laryngeal Cancer and Nickel Smelting

In *Decision No. 668/07 (January 22, 2010)* the worker's estate sought entitlement for laryngeal cancer due to exposure while working in a nickel smelter.

The applicable Board policy was the 1989 Board policy, *Operational Policy Manual Document No. 04-04-13*. It provides entitlement in the case of 15 years exposure to nickel aerosols through any process in the nickel industry which produces nickel in aerosol dispersion, including roasting, smelting and refining. It also provides entitlement in the case of 10 years exposure to asbestos dust. Evidence, including a report by Julian and Muir on the incidence of cancer in Ontario nickel workers, indicates that the Board policy on laryngeal cancer in asbestos/nickel workers may be outdated. The Panel did not have to decide this however, as the worker did not meet the exposure requirement in the policy regarding nickel aerosols. The worker also did not meet the exposure requirement for asbestos. The Panel noted that the worker would also not have met the exposure requirements in the newer 1999 Board policy.

Skin Cancer and Schedule 3

In *Decision No. 1294/05 (January 7, 2010)* the worker's estate appealed a decision of the Appeals Resolution Officer denying entitlement for a malignant melanoma, which the estate related to exposure as a firefighter or to exposure to lampblack with a tire manufacturing company. The Panel concluded that the worker's cancer was not the result of workplace exposure since epidemiological evidence did not establish a causal relationship between the worker's workplace exposure and the malignant melanoma, either from exposure as a firefighter or from tire manufacturing

The Panel then considered whether the presumption in Schedule 3 or 4 was applicable to this case. Schedule 4 did not apply since firefighting did not fall within the process of demolition in Column 2 of Schedule 4.

There were changes to the wording of Schedule 3 in 2001. Many of the descriptions of diseases in Column 1 of the schedule had the "due to" wording deleted. The Panel discussed the change in wording between the version of Schedule 3 prior to 2001 and the version of Schedule 3 in 2001. The Panel found the change in October 2001 to Schedule 3 had the effect of broadening the presumption so that it applies to both the question of medical causation and the role of the process in the medical condition. However, the nature of the medical condition (whether it falls within the wording of Column 1) and the nature of the process (whether it falls within the wording of Column 2), must still be established on the balance of probabilities.

Since the pre-2001 version of Schedule 3 applied, and Column 1 included the words "due to," the issue of medical causation was incorporated into Column 1. The question of whether the cancer is "due to" tar, pitch, bitumen, mineral oil or paraffin must be decided on the balance of probabilities. The Panel found that the cancer was not the result of the worker's workplace exposure.

The Panel noted that it was not clear that the post-2001 Schedule 3 would have applied because firefighting is not a process within the meaning of Column 2. Working with lampblack was also not working in a process that involved the handling or use of tar, pitch, bitumen, mineral oil or paraffin.

Pension Plan Contributions and Earnings Basis

In *Decision No. 2158/08 (February 16, 2010)* the worker argued that the employer's contributions to his union's welfare and pension plans should be included as part of his earnings

basis one year post-accident. “Earnings” in s.2 (1) of WSIA includes “any remuneration capable of being estimated in terms of money but does not include contributions made under section 25 for employment benefits”. The reference to employment benefits was added in 1990. Section 25 of WSIA requires employers to make contributions for employment benefits throughout the first year after a worker’s injury, or in the case of a multi-employer benefit plan, employers are not required to make contributions provided the plan continues to provide the worker with benefits during the first year after the accident. The employer participated in such a multi-employer benefit plan.

While the Ontario Court of Appeal in *Rodrigues* v. *Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 719 had confirmed a previous Tribunal decision’s finding that employer’s contributions should not be included as part of the worker’s earnings basis. The worker argued that several government documents showed that when the government added the reference to s.25 to the definition of “earnings”, it intended to limit the exclusion for one year. After one year the workers’ average earnings were to be recalculated to include employers’ contributions to benefits.

The Vice-Chair denied the appeal for similar reasons as the previous Tribunal decisions including: the contributions did not appear on the worker’s T4 and were therefore not taxable; they weren’t direct payments to the worker; and there was no direct relationship between the contributions made to the fund and the benefits or payments the worker received from the fund.

The Vice-Chair noted that legislative history evidence can play a limited role in interpreting legislation, provided that the decision–maker remains mindful of its limited reliability and weight. The proposed amendment did not in fact accomplish what the worker claimed its intention was. To require the Board to recalculate workers’ average earnings after 12 months would have been a fairly novel concept, and it was difficult to understand how the amendment would encapsulate this concept. On its face the definition of “earnings” excluded the types of contributions made under s.25. Also, the section 25 exclusion referred to the type of benefits, not to their duration. The legislation overrode any other publications.

The legislative history also needed to be weighed in the context of approximately 19 years of Board policy’s interpretation of the legislation as excluding these types of benefits from earnings basis. There has been ample opportunity to amend the legislation and this has not been done. No evidence was presented to show that the Legislature disagreed with the Board’s interpretation of the definition of earnings. Extrinsic evidence of legislative intent became less significant in light of the above, and in light of the judicial interpretation of the provisions, with leave to appeal to the Supreme Court denied.

Successor Employers

In *Decision No. 127/09 (March 23, 2010)* the issue to be decided was whether the employer could remain in its predecessor’s experience rating account or whether it was required to open its own account. The employer had purchased its predecessor through a series of five corporate transactions on the same day.

The Board held that two of the transactions were akin to an asset purchase/sale. Under an asset purchase/sale the predecessor’s account at the Board is closed and a new account is opened for the new employer. When the predecessor’s account is closed the new employer receives a new account without any experience rating record. The employer argued that the transactions were more like a merger. According to Board policy under a merger or sale of shares the new employer assumes all WSIB debts, and liabilities of the predecessor’s account. In this appeal, the predecessor’s account also included a favourable experience rating record.

The Vice-Chair allowed the appeal and found that the main business deal was a sale of shares. The Vice-Chair did not find that the remaining steps changed the characterization of the main

business deal, which was a share purchase. Accordingly, the employer could remain under its predecessor's account rather than open a new account at the Board.

The Vice-Chair also found that she did not require expert testimony from a law professor on corporate law principles. There is a general exclusionary rule against hearing opinion evidence on matters of domestic law as opposed to foreign law. Even though the Tribunal may admit evidence that might not otherwise be admitted in a judicial proceeding, that does not mean that the Tribunal should disregard general rules of evidence altogether. In this case, opinion evidence on corporate law principles was simply unnecessary. In any event, it is the role of counsel rather than a witness to make legal submissions.

HIV Entitlement

In *Decision No. 1220/09 (March 23, 2010)* the worker sought entitlement for HIV resulting from treatment for his compensable injury. The worker underwent multiple surgeries and various treatments, including acupuncture. The worker alleged that he was infected with the HIV virus as a result of the treatment.

The Panel would have preferred more definitive medical or scientific evidence but considered the evidence sufficient to support a conclusion in favour of the worker. The Panel allowed entitlement for HIV on the benefit of the doubt. Before the injury, the worker tested negative for HIV when applying for life insurance and during immigration blood screening. The worker tested positive in a further immigration screening test following the compensable injury and treatment.

The Panel obtained a medical report from a Tribunal assessor who was a specialist in internal medicine. While the risk of contracting HIV through acupuncture needles was low, no other personal risk factors were identified. The worker was credible and the Panel accepted his testimony that he was neither an intravenous drug user nor had multiple sexual partners. The worker only had one sexual partner, his wife, who tested negative for HIV. Between 2001 and 2004 the worker did not undergo any procedures unrelated to his workplace injury. For example, the worker did not have any tattoos and his ear was pierced many years before the negative HIV tests in 1999 and 2001.

WSIAT
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