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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Ontario

Workplace Safety and Insurance Appeals Tribunal

Quarterly Production and Activity Report

January 1 to March 31, 2015

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Production Summary

At the end of the first quarter 2015, the active inventory totaled 9,089 appeals. This is approximately 2.8 % higher than the active inventory at the end of 2014.

Incoming Appeals

Incoming appeals for Q1-2015 numbered 1,161; of these, 1,069 were appeals from WSIB decisions, and 92 appellants advised they were ready to proceed to hearing following a period of inactive status. In 2014, incoming appeals averaged 1,269 per quarter.

The weekly average of hearing-ready appellants in Q1-2015 is 87. This figure excludes cases reactivated from the Inactive status. In 2014, the weekly average of hearing-ready appellants was also 87, excluding reactivations.

Dispositions

Dispositions in the first quarter of 2015 totaled 1,002. This includes 331 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts, and 671 after-hearing dispositions; of the after-hearing dispositions, 659 followed from Tribunal decisions.

Inactive Inventory

At the end of Q1-2015, the inactive inventory was 2,005 cases. This is a decrease of approximately 4% from the inactive inventory at the end of 2014.

Decisions Released within 120 Days

For the year to date ending Q1-2015, 90% of final decisions were released within 120 days. Comparisons to earlier years can be found in section F: Production Charts.

The Notice of Appeal Process

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 2015, the notice inventory included 1,644 dormant cases, the active inventory totaled 9,089 cases, and the inactive inventory totaled 2,005 cases.

Production Tables and Charts

A. Active Inventory End of Quarter

Period	Active Inventory
Q1-2014	7971
Q2-2014	8395
Q3-2014	8667
Q4-2014	8835
Q1-2015	9089

B. Incoming Appeals

Period	Incoming Appeals
Q1-2014	1369
Q2-2014	1386
Q3-2014	1214
Q4-2014	1107
Q1-2015	1161

C. Dispositions

Period	Dispositions – Total	Pre-hearing	After Hearing
Q1-2014	934	304	630
Q2-2014	993	302	691
Q3-2014	895	266	629
Q4-2014	980	307	673
Q1-2015	1002	331	671

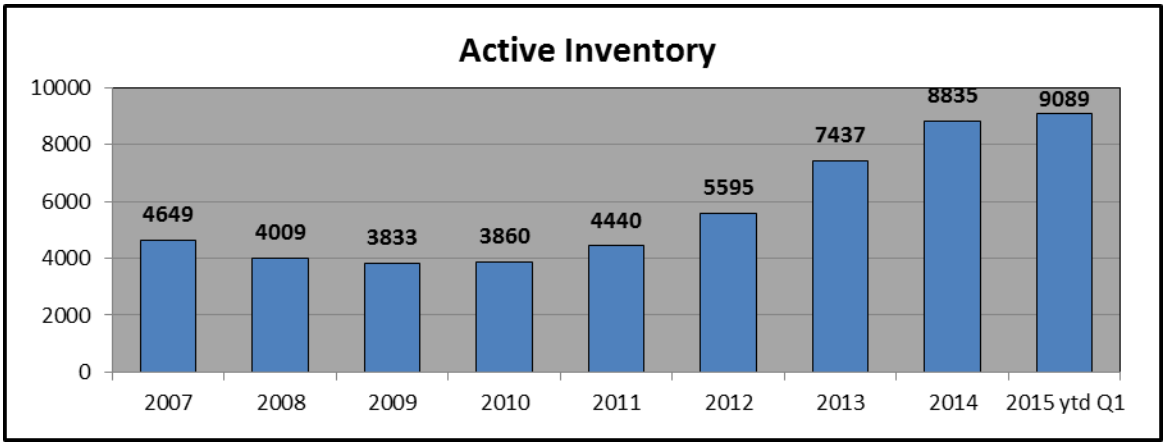
D. Inactive Inventory

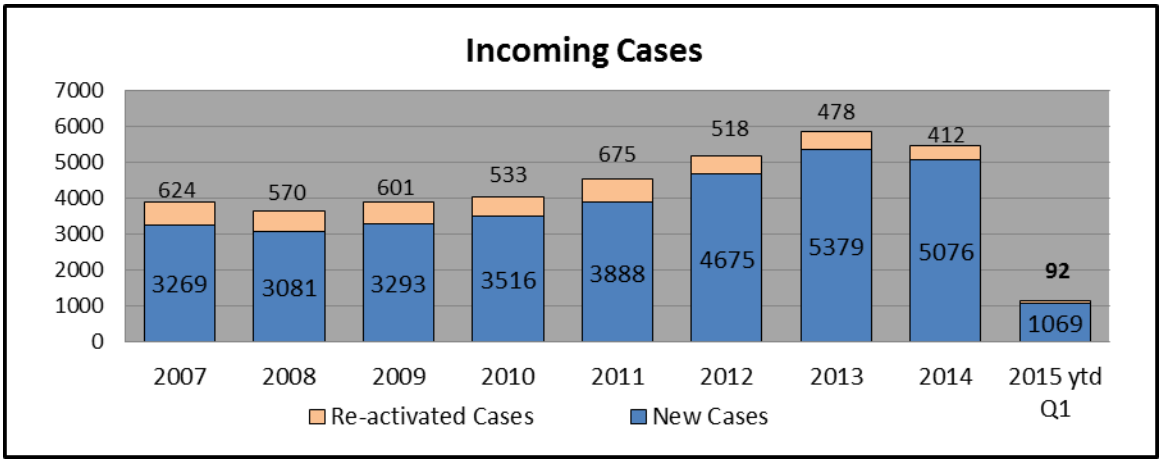
Period	Inactive Inventory
Q1-2014	2271
Q2-2014	2219
Q3-2014	2147
Q4-2014	2090
Q1-2015	2005

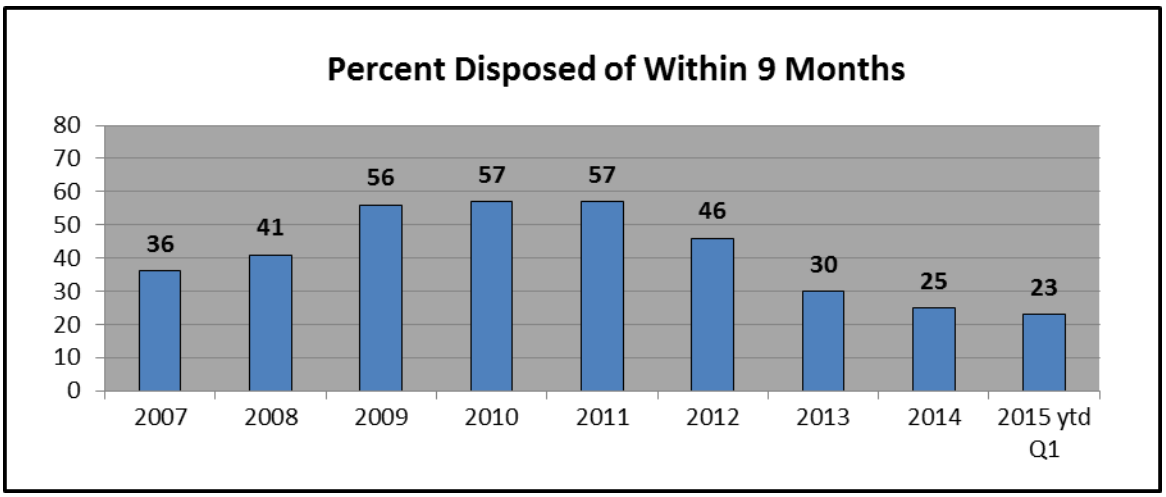
E. Notice of Appeal (Dormant cases)

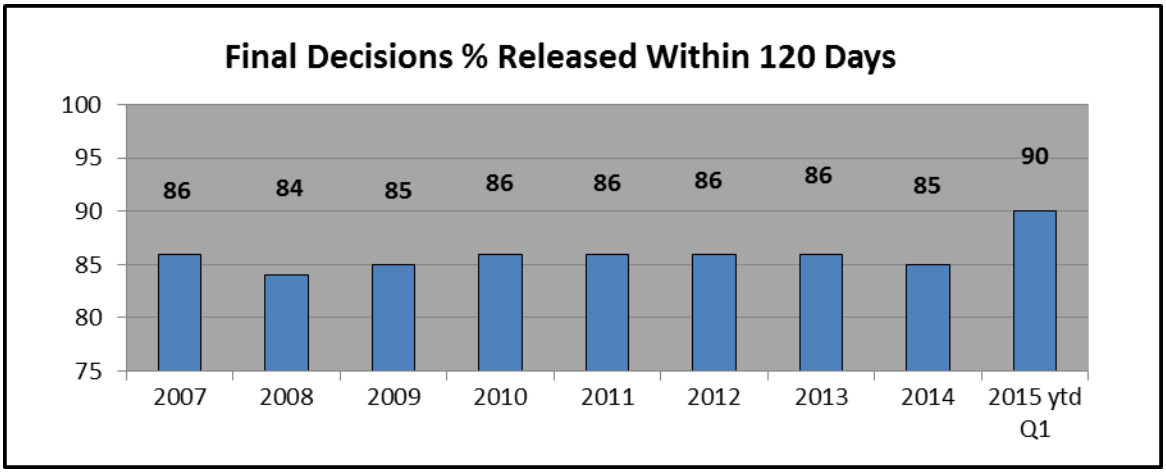
Period	Total Dormant	Change from Previous Quarter
Q1-2014	1764	-98
Q2-2014	1733	-31
Q3-2014	1780	47
Q4-2014	1739	-41
Q1-2015	1644	-95

F. Production Charts: From 2007 to 2015






Percent Disposed of Within 9 Months
80
70
60
50
40
30
20
10
0
36
41
56
57
57
46
30
25
23
2007
2008
2009
2010
2011
2012
2013
2014
2015 ytd Q1


Final Decisions % Released Within 120 Days
100
95
90
85
80
75
86
84
85
86
86
86
86
85
90
2007
2008
2009
2010
2011
2012
2013
2014
2015 ytd Q1

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the first quarter of 2015 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. 512/06I* (January 19, 2007), *512*/06 (November 2, 2011) and *512*/*06R* (December 10, 2013)

This was the first case where a Tribunal decision on the *Canadian Charter of Rights and Freedoms* (Charter) was subject to judicial review.

The worker injured his back in 2001, when he was 63 years of age. The Board paid the worker loss of earnings (LOE) until May 31, 2002, when the worker turned 65, which was also the mandatory retirement date set by the employer.

The worker appealed to the Tribunal for LOE benefits after May 31, 2002 for his back, and also for benefits for a right shoulder injury. In *Decision No. 512/06I*, a single Vice-Chair denied the appeal for the worker's right shoulder, but granted the worker entitlement to LOE benefits from May 31, 2002 until February 5, 2003, (which was two years after the injury) pursuant to s.43(1)(c) of the *Workplace Safety and Insurance Act* (WSIA).

The worker then alleged that limiting entitlement to LOE to two years post-injury for those workers over age 63 contravened s.15(1) of the Charter.

The Ontario Attorney General participated in the Tribunal hearing. The Office of the Worker Adviser (OWA) and the Office of the Employer Adviser (OEA) were invited to participate as interveners. The OWA accepted, and became co-counsel with the worker's representative. The OEA withdrew from the appeal.

The hearing reconvened with a full Panel to consider the Charter issue. In *Decision No. 512/06*, the majority of the Panel found there was no breach of the Charter. The Vice-Chair dissented and found there was a breach of s.15(1) the Charter.

The majority considered the historical context of workers' compensation law, the background to the dual award scheme, and the evidence of expert witnesses. It found the workplace insurance plan operates primarily as an insurance scheme, rather than a social benefits program.

The majority characterized the test for whether the Act violates s.15(1) of the Charter to be (a) if the Act creates a distinction based on an enumerated ground and (b) if there is a distinction, whether it is discriminatory in that it perpetuates disadvantage or stereotyping. The worker alleged there was a discriminatory distinction based on age. The majority agreed that there was a distinction on an enumerated ground, but did not agree that the distinction perpetuated disadvantage or stereotyping.

The majority noted there had been no Charter decision in a Canadian court which had successfully challenged the termination of benefits at age 65. The majority also noted that age 65 is still when most people retire and that it was reasonable for an insurance plan to rely on actuarial probabilities and terminate benefits at age 65 rather than continuing payments for life. The worker himself had not demonstrated that he would

have worked after age 65 or had any expectation of being employed after age 65, and in fact did not work after age 65.

Although the worker was not disadvantaged himself based on age, the majority went on to consider the comparator group as a whole. It noted that almost all workers injured after age 61 return to work, meaning most are not disadvantaged by the two year statutory limit. Further, a two year limit takes into account the life circumstances of those persons in their sixties, as opposed to those in their twenties. Workers at age 65 are eligible for other sources of income, such as the Canadian Pension Plan (CPP). Viewed contextually, the majority found the two year limit does not perpetuate prejudice of workers aged 63 and older. Even if section 43(1)(c) did violate s.15(1) of the Charter, it constituted a reasonable limit under s.1 of the Charter.

In his dissent, the Vice-Chair found that the workplace insurance scheme was both an insurance scheme for employers and a social benefits program for workers. He found that s.43(1)(c) was discriminatory as it failed to consider the disadvantaged position of older workers, and limited their entitlement to benefits they might be entitled to if they had been younger. The Vice-Chair found that s.43(1)(c) was not saved under s.1 of the Charter. The Vice-Chair would have allowed the worker LOE benefits until age 71.

The worker commenced an application for judicial review. After the Tribunal filed its Record, counsel for the worker attempted to submit new evidence for the judicial review. As the respondents objected, counsel for the worker then attempted to commence an application to reconsider *Decision No. 512/06*, while the judicial review was still pending. As the respondents objected to this approach as well, the worker decided to withdraw the judicial review and pursue a further reconsideration at the Tribunal. The respondents consented to the withdrawal, though the Tribunal insisted on payment of costs incurred from producing the Record.

The worker then filed a request for reconsideration of the WSIAT decision. Since the original Tribunal Vice-Chair had passed away, a new Vice-Chair had to be assigned to hear the reconsideration.

The reconsideration was denied in *Decision No. 512/06R*. The new Vice-Chair did not accept the worker's argument that there was substantial new evidence not available at the time of the hearing which would likely have changed the outcome of the decision.

In January 2014, the worker filed a new application for judicial review, this time of *Decisions Nos. 512/06 and 512/06R*. Factums were filed by the worker, the employer, and the Attorney General, as well as by two interveners: the Industrial Accident Victims Group of Ontario (IAVGO), and the Schedule 2 Employer's Group. The judicial review was heard on December 1, 2014 by Marrocco ACJ, Nordheimer, and Horkins JJ.

The Divisional Court unanimously dismissed the judicial review. In the decision dated December 17, 2014, the Court agreed with the majority of the Tribunal that the WSIA is not a social benefits scheme. The Court also found the two year limit on LOE benefits in s.43(1)(c) was not discriminatory and not contrary to s.15(1) of the Charter. Benefits were not denied to workers because of a stereotypical attitude, but because of the evidence before the Tribunal that 90% of workers retire by age 65, and 90% of injured workers over 61 recover within two years.

As the Court noted, if the WSIA provided that injured workers were to receive LOE benefits until they died, that would imply people would work until they die. "Both intuitively and statistically this seems incorrect."

The Court said that even if they were wrong about that, s.43(1)(c) was saved by s.1 of the Charter. This was because it accepted the majority's finding that any limitation on rights here was justified by a pressing and substantial objective of paying LOE for wage loss resulting from injury, in a financially responsible way. Not paying benefits past the age workers would likely have retired was in accordance with this objective.

Referring again to the evidence before the Tribunal that 90% of workers retire by age 65, and 90% of injured workers over 61 recover within two years, the Court agreed that s.43(1)(c) minimally impairs entitlement for injured workers over age 65.

The Court was not persuaded that it should follow more generous approaches in other provinces, because Ontario is entitled to deference on how it wants to compensate injured workers.

Although the standard of review for WSIAT decisions on constitutional questions is correctness, the Court affirmed that it will give deference to WSIAT Charter decisions on underlying matters, such as the nature of the workers' compensation scheme, the balancing of competing interests, and the purpose of its home statute.

The worker subsequently filed a motion for leave to appeal to the Ontario Court of Appeal in February 2015. In March 2015, the Tribunal filed a factum stating that the worker's motion for leave to appeal should be dismissed. Factums were also filed by the employer and the Attorney General of Ontario.

2. *Decisions Nos. 959/13* (June 13, 2013) and *959/13R* (October 31, 2013)

The worker's appeal for entitlement for non-economic loss (NEL) benefits for his low back, and to LOE benefits from August 17, 2010, was denied by the Tribunal Panel.

The worker was a foreman with a paving company who injured his back at work in April 2009. The Panel found that the worker's compensable condition resolved by the time the WSIB terminated LOE benefits in 2010, as the worker's non-compensable factors were responsible for his complaints. Further, the Panel found the worker had been offered suitable work at no wage loss.

The worker's application for reconsideration was denied. In the reconsideration decision, the same Vice-Chair clarified that there had been no ruling on the worker's potential psychological entitlement, so there was nothing that would preclude the worker from pursuing entitlement at the WSIB pursuant to the Chronic Pain or Psychotraumatic policies.

In December 2013, the worker commenced an application for judicial review. Counsel for the worker and the Tribunal have agreed the judicial review will not proceed until the worker has obtained a ruling on psychological/chronic pain entitlement. The WSIB issued a decision in December 2014 denying the worker entitlement for chronic pain disability and psychotraumatic disability. The worker has initiated an appeal at the Tribunal.

3. *Decision No. 1357/13* (September 12, 2013)

A family services worker became upset when she received a telephone call advising her of the death of a three year old client. The worker had an emotional reaction to the news

and claimed she was unable to return to work. The Board denied entitlement for traumatic mental stress. The worker appealed to the Tribunal.

The Panel found the worker was entitled to benefits for traumatic mental stress, as she had suffered an acute reaction to a sudden and unexpected traumatic event while she was in the course of employment. Further, the way the worker learned of the death (through a phone call) exacerbated the shock. The worker was also concerned about her potential personal liability. Eventually, she was unable to continue working in her job.

The Panel applied Board policy and found the triggering event was identifiable, objectively traumatic, and unexpected in the normal course of employment. The Panel also found the worker's acute reaction led to a psychological injury, causing the worker's loss of earnings. The Panel directed the Board to assess the worker's entitlement to benefits.

In March 2014, the employer commenced an application for judicial review. Responding factums were filed by the Tribunal and the worker. The judicial review was heard on March 10, 2015 by Marrocco ACJ, Lederer, and Fitzpatrick JJ.

In an oral decision, the Divisional Court unanimously dismissed the judicial review. The Court noted that the Tribunal has consistently been recognized as a specialized and expert Tribunal and that the Tribunal's decisions are protected by a strong privative clause.

4. *Decisions Nos. 1135/12* (May 9, 2013) and *1135/13R* (December 16, 2013)

An apprentice who worked for an auto repair shop helped his employer deliver a derelict vehicle to a recycling/scrap dealer. This worker steered the vehicle down a public street while being pushed from behind by his employer's vehicle. Once they arrived at the scrap yard, the worker remained in the derelict vehicle while a bobcat pushed it on to a weigh scale. Due to a failure to communicate, when the bobcat pushed the vehicle off the scale it was immediately crushed by a crane while the worker was still inside. The worker suffered serious injuries.

The worker commenced an action against the scrap yard, and three employees of the scrap yard. These defendants then commenced a third party action against the worker's employer.

The worker received statutory accident benefits (SABs). The insurance company which provided these benefits, and the thirds parties, applied to the Tribunal under s.31 of the WSIA for a determination of whether the worker's rights of action was taken away. The only issue was whether the worker and the three workers of the scrap yard were in the course of their employment when the accident occurred.

The Vice-Chair found on the balance of probabilities that both the worker and the defendant's employees were in the course of their employment when the accident happened. The lawsuit brought by the worker was barred by s.28 of the WSIA, and the grounds for the third party action no longer existed. Consequently, the worker was entitled to benefits from the insurance plan.

The worker commenced an application for judicial review. Following the Tribunal's request for the worker to amend his proceedings to add the Tribunal as a party, the

Tribunal filed its Record of Proceedings. The Tribunal has filed its responding factum. The judicial review will be heard in April 2015.

5. *Decision No. 2214/13* (March 21, 2014)

In 1967, the worker, then employed as a police officer, suffered injuries to his upper body when he was attacked by a prisoner. He left the police force two years later. He then embarked on a career operating garages, working for a truck rental company, and as a millwright. He was involved in a motor vehicle accident in 1973, and suffered a number of work accidents including various low back injuries. The WSIB denied ongoing entitlement for the low back, and initial entitlement for the neck, shoulders and arms. The worker appealed to the Tribunal.

Due to the date of the 1967 accident, the pre-1985 Act applied to the worker's appeal.

The Panel held the worker did not have ongoing entitlement for the low back or shoulders as a result of the 1967 accident. However, the Panel found the 1967 accident caused a temporary aggravation of a pre-existing back and neck condition.

In May 2014, the worker, who is self-represented, commenced an application for judicial review. In June 2014, the worker asked the Tribunal to postpone its activities related to the judicial review application so that he could receive legal direction from the OWA regarding his application. In January 2015, the worker informed the Tribunal that he wished to move forward with his application. The Tribunal filed its Record of Proceedings in early March 2015 and is waiting to receive the worker's factum.

6. *Decisions Nos. 1769/11* (November 17, 2011) and *1769*/11R (March 14, 2013)

The worker was employed in two jobs, one in construction and one in a night club. He was injured on the construction job. He was initially granted WSIB benefits calculated on the short-term basis of his earnings from his concurrent employment with both employers.

The worker had an inconsistent employment history. When his long-term benefits were calculated, the benefits were based on a finding that the night club job was only short-term. The worker appealed, alleging that his long-term average earnings should be the same as his short-term earnings.

The appeal was denied. The Panel examined the worker's employment history, as well as the two concurrent jobs. It found the worker's employment pattern demonstrated short-term, non-permanent employment, which included both the worker's concurrent jobs. Board policy established that it was not fair to calculate long-term earnings on the basis of non-permanent jobs. The Panel agreed with the Board that the long term earnings should be calculated on the basis of average earnings from all concurrent employment during the recalculation period.

The worker's application for reconsideration was dismissed by a different Vice-Chair.

In November 2014, the worker commenced an application for judicial review. It is not clear why there was a delay of almost three years in commencing the judicial review application. The Tribunal filed its Record of Proceedings in February 2015 and is waiting to receive the worker's factum.

7. *Decision No. 398/14* (March 11, 2014)

B was a passenger in a car driven by P, his co-worker. B was injured when P's car went off the road. B applied for, and received statutory accident benefits. The insurer of the driver of the car applied to WSIAT for an order that B's right of action was taken away.

Both B and P had been hired to work on a construction project at a cottage in a rural area. They were staying at a nearby motel, which was booked and paid for by their employer. P was paid some monies for mileage by the employer for the use of his car. Both B and P were given a per diem for food and other expenses while working remotely. While working at the cottage, they drove to a restaurant, located in the town closest to their worksite, for their lunch break. The accident occurred after lunch, on the way back to the worksite. The main issue was whether B and P were in the course of employment at the time of accident.

The Vice-Chair characterized the issue as whether B was involved in an activity that was reasonably incidental to employment at the time of the accident. He reviewed Board policy, and noted that although the general rule was that a person is not in the course of employment after leaving the worksite, there was an exception for workers travelling on their employer's business and who must stay overnight at a motel paid for by their employer.

Further, although a worker is often not in the course of employment during a lunch break, Tribunal decisions have taken a broader approach to what is reasonably incidental when travelling workers are staying overnight at accommodations paid for by their employer. Lunch breaks in this situation have been viewed to be reasonably incidental to employment.

The Vice-Chair noted that a worker can still take themselves out of the course of employment if he or she was engaged in a personal activity at the time of the accident that was not connected to his employment. The Vice-Chair found that in this case there was no personal activity other than going to lunch. The workers had eaten at the closest and only restaurant in the area. After lunch, the two workers proceeded directly back towards the worksite.

The Vice-Chair found that B's right of action was taken away.

In September 2014, B commenced an application for judicial review. An issue arose as to whether all of the appropriate parties had been named in the style of cause. This issue is being resolved and the Tribunal will be filing its factum shortly.

8. *Decisions Nos. 2175/10* (November 9, 2010) and *2175/10R* (July 5, 2011)

The worker appealed for initial entitlement for specific injuries to both knees. The employer claimed the worker had knee problems when the worker was hired, that the worker did not report the injury, and that his knee problems were not related to work. After hearing testimony from a number of witnesses and reviewing the medical evidence, the Vice-Chair denied the appeal. She found significant discrepancies about the date of the accident, whether the accident was reported, and the nature of the injuries.

The worker commenced an application for judicial review. The worker filed an affidavit with his factum, to which the Tribunal objected. The judicial review was scheduled to be heard on February 28, 2013.

However, following discussions with the worker's counsel, the judicial review was adjourned *sine die* on consent. *Decision No. 2175/10* explicitly made a finding based only on whether there was entitlement on the basis of a "chance event." The worker returned to the Board for a decision on whether there was entitlement on the basis of "disablement."

The Board denied entitlement for disablement. The worker appealed this issue to the Tribunal. An oral hearing took place on November 10, 2014 and on January 6, 2015 the Tribunal issued a decision allowing the worker's appeal, in part. The Tribunal is awaiting confirmation as to whether the judicial review application will be abandoned or whether it will proceed.

9. *Decision No. 797/14* (July 31, 2014)

The worker sustained a compensable injury to his low back in September 1986. In October 1988, the worker was awarded a 10% permanent disability pension (PD). In October 2005, the worker was re-assessed for his PD. In June 2006, the worker's PD award was increased from 10% to 15% between October 1988 and August 2001 and to 20% as of August 2001. The 20% PD award was upheld in a January 2013 decision of an Appeals Resolution Officer. The worker appealed this decision to the Tribunal. After a written hearing, the Vice-Chair denied the worker's appeal in a July 2014 decision.

In March 2015, the worker commenced an application for judicial review. The Tribunal has filed its Record of Proceedings and is waiting to receive the worker's factum.

10. *Decision No. 2324/13* (June 4, 2014)

The worker appealed to the Tribunal for initial entitlement for benefits for mental stress. The worker was employed as a correctional officer at a medium security prison and sought entitlement in relation to three specific incidents. The worker's claim for benefits for mental stress was allowed by the Tribunal in relation to one of the three specific incidents. The issue of the quantum and duration of benefits was referred back to the WSIB.

In March 2015, the worker, who is self-represented, initiated an application for judicial review in the Federal Court. The worker also initiated a motion seeking an extension of time to issue and serve his application, as the application was late. The Tribunal wrote to the worker and advised that the judicial review application had been commenced in the wrong court and that the application had not been properly served. The Tribunal informed the worker that if he wished to initiate a judicial review for a Tribunal decision, he was required to bring an application for judicial review in the Divisional Court.

Action in Superior Court - *Decisions Nos. 691/05* (February 11, 2008) and *691/05R* (June 13, 2013)

Following four days of hearing, the Panel allowed this self-represented worker's appeal in part. The worker was granted initial entitlement to benefits for his neck, and for various periods of temporary partial disability benefits. He was denied initial entitlement for an injury to his upper and mid-back; for a permanent impairment for his upper, mid-back and neck; for labour market re-entry (LMR); and for reimbursement of travel expenses. The WSIB's determination of the

worker's future economic loss (FEL) and his supplemental employee benefits (SEB) were found to be correct.

In July 2013, the Tribunal and the Board were served with a Notice of Application, issued out of the Superior Court of Justice, asking that *Decisions Nos. 691/05* and *691/05R* be set aside. The Tribunal wrote to the worker to advise that he had clearly commenced proceedings in the wrong court. The Tribunal informed the worker that if he wanted to challenge the Tribunal's decisions, he was required to bring an application for judicial review in the Divisional Court. The Tribunal further advised the worker that if he did not immediately file a Notice of Abandonment, the Tribunal would bring a motion to dismiss the application.

The worker abandoned his action in August 2013.

In February 2014, the worker commenced a new action against the WSIB and the Tribunal, this time claiming relief of over six million dollars. Much of the claim contains allegations against the WSIB, but the claim also takes issue with the Tribunal's decisions, alleging errors and bad faith. It alleged the worker had been threatened by one of the Panel members. The worker also served the Tribunal with what appears to be a surreptitious recording.

The Tribunal and the Board each brought a motion to dismiss the worker's action. The motions were scheduled for October 22, 2014. The worker subsequently advised that he wanted to adjourn the motions. The motions were subsequently scheduled to be heard on February 23, 2015. These motions were adjourned and have been scheduled to be heard on October 18, 2015.

Recent Decisions

Mental stress provisions and the Charter

Decision No. 1945/10 is the second Tribunal decision to consider a constitutional challenge of s.13(4) and (5) of the WSIA (the mental stress provisions). Prior to oral argument on the constitutional challenge, the Tribunal issued *Decision No. 2157/09* on the same issue. *Decision No. 2157/09* declined to apply s.13(4) and (5), and the Board policy issued under those provisions, because to do so would infringe the worker's right to equality under the Charter.

The parties did not raise any significant issues with respect to *Decision No. 2157/09* and the Panel was persuaded by the reasoning and analysis of the evidence in *Decision No. 2157/09.* In particular, the Panel found that the purpose of s.13(4) and (5) was to exclude certain types of injuries from entitlement; that the intent was to treat a claim for chronic stress injury resulting in mental disability differently from a gradual onset physical injury and from an acute onset mental injury; that the provisions thereby created a distinction between workers who suffer a work-related mental disability and those who suffer a work-related physical disability; that the distinction creates a disadvantage by perpetuating prejudice of stereotyping because it assumes that the work-relatedness of a gradual onset mental disability cannot be reliably established; that the distinction has no ameliorative purpose; and that there is no reasonable degree of correspondence between the differential treatment and the reality of individuals with mental disability.

The Panel concluded that s. 13(4) and (5) of the WSIA infringed s.15(1) of the Charter and that the provisions were not saved by s.1 of the Charter. The Panel did not need to consider the portion of s.13(5) dealing with an employer's decisions or actions relating to a worker's employment. It was also not necessary to address specific provisions of Board policy. The

Panel declined to apply s.13(4) and (5). Having previously found that the worker would have entitlement but for those provisions, the worker had entitlement for mental stress.

Zero rating for a permanent impairment award

In *Decision No. 2129/14*, the Vice-Chair confirmed a 0% permanent impairment (NEL) award granted for pleural plaques. Based on the worker's pulmonary function tests, the worker had a Class 1 impairment, which is rated at 0%, no impairment of the whole person, under the AMA Guides.

The worker's pleural plaques were a permanent physical abnormality, which was an impairment within the definition of impairment in s.2(1). The Vice-Chair noted, however, that s.46(1) of the WSIA, which provides that a worker with a permanent impairment is entitled to compensation, cannot be read as a stand-alone provision. It was clear from s.47(13), which provides that a worker is deemed not to have a permanent impairment if the degree of permanent impairment is determined to be zero, that the WSIA contemplates the situation in which a worker, who would otherwise be entitled to benefits for permanent impairment, is assessed with a zero rating and is then deemed not to have a permanent impairment. There is no inconsistency between s.46(1) and s.47(13). The Vice-Chair held the worker was properly rated with a zero NEL rating.

Right to sue and estoppel due to representation

In *Decision No. 934/14*, a statutory accident benefits insurer applied to determine whether a truck driver involved in a motor vehicle accident was entitled to claim benefits under the WSIA.

The truck driver submitted that the insurer was estopped from bringing this application because it led the driver to believe that he was not entitled to claim workplace insurance benefits. However, the Vice-Chair agreed with previous Tribunal decisions that estoppel cannot interfere with the Tribunal's statutory authority to determine whether a person is a worker within the meaning of the WSIA and cannot interfere with the determination of the parties' statutory status under the WSIA. In any event, the Vice-Chair found no persuasive evidence that the insurer made representations to the driver with the intent of inducing him to act in a way that was detrimental to him.

On the evidence, the truck driver was a worker, not an independent operator, and he was in the course of his employment at the time of the accident. The Vice-Chair found that the driver was entitled to claim benefits under the WSIA.

Experience rating (NEER) calculation for related companies

In *Decision No. 2135/14*, the employer was a corporate entity with two unincorporated divisions under which it carried on business. Both divisions had accounts with the Board. One of the divisions had a performance index for 2008 of 6.64. This led to a NEER surcharge of $70,000. The employer appealed a decision of the Appeals Resolution Officer confirming the Board's calculation of the employer's cost limit for 2008.

Board Operational Policy Manual (OPM) Document No. 13-02-02, on NEER, provides for a limit on a firm's total claims for a year. Beginning in 2006, the firm cost limit was four times the expected claims cost. The employer submitted that the performance index of 6.64 was well above the limit of 4, and that, using the limit of 4, the surcharge would have been much less.

The Board found that the corporation was the legal entity and that, in accordance with the NEER policy provisions regarding multiple account organizations, it performed the calculations for the rating factor, expected cost factor and the firm's cost limits with reference to the overall operations of the employer. Calculated at the organization level rather than the individual account level, the performance index for the corporate employer was less than 4. Thus, the Board's calculation was in accordance with the NEER policy.

The Vice-Chair noted that OPM Document No. 12-01-01, on who is an employer, provides that the person in law who is legally responsible for the operation's liabilities is the registered employer and that divisions of employers are not themselves employers for the purpose of assigning liability. If a division is itself incorporated and registered with the Board, it is treated as a distinct person in law.

Further, OPM Document No. 13-02-02 provides that, as of 1996, calculations are performed with reference to the overall operations, so that where an employer has multiple accounts containing a common rate group, the premiums and costs are combined for the purposes of calculating the rating factor, expected cost factor and firm cost limit.

In this case, the divisions had their own accounts with the Board, but they were not separate legal incorporated entities. The Vice-Chair found that the Board correctly made the calculations in accordance with the provisions of OPM Documents No. 13-02-02 and 12-01-01 and denied the employer's appeal.

Necessary health care and the Board's drug formulary

Decision No. 2159/14 is of interest for its discussion of the Board's Drug Formulary in the context of a request for payment for the medication Cesamet, which is not covered by the Drug Formulary.

The Board's drug formulary indicates that Cesamet does not have clinical or economic advantages in the treatment of pain as compared to other covered alternatives. The Vice-Chair noted information from the Tribunal's Medical Liaison Officer that the only approved use of Cesamet is for treatment of nausea and vomiting associated with cancer chemotherapy.

The Vice-Chair agreed that the use by the Board of an expert Drug Advisory Committee to review medical literature on the efficacy, safety and cost-effectiveness of prescription medication is a reasonable method to determine the general necessity, appropriateness and sufficiency of medication. It is also incumbent on the Board to consider both clinical expertise and best available evidence from medical literature. The use of Cesamet for pain is an unapproved use, with common side effects, and an absence of controlled clinical trials. There are a number of available alternatives. The Vice-Chair accepted the Board's determination that the type of use in this case is generally not necessary or appropriate.

A determination in the specific case to accept an off-label use would require more than a simple prescription from the worker's doctor. In this case, there was no indication that Cesamet was required for chronic shoulder tendonitis, that the doctor was aware of possible interaction with other medication being taken by the worker, or, that the doctor conducted an extensive evaluation before deciding to prescribe Cesamet.

In the absence of evidence explaining the necessity for off-label use of Cesamet, the Vice-Chair found that an exception to the rule against funding of Cesamet in these circumstances was not warranted and denied the worker's appeal.