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 Judicial Review Report

January 1 to March 31, 2016

The status of applications for judicial review involving the Tribunal for the first quarter of 2016 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. 1959/14* (May 20, 2015) and *1959/14R* (November 4, 2015)

MI was injured while working with IB, when the County bridge he was working on collapsed. The County had hired BM as consulting engineers, and AH, as the general contractor. AH hired IB to do the concrete finishing. GBL was a subcontractor. GBL hired EF to supply falsework and formwork. EF hired McG, its own engineer.

MI sued AH, BM, GBL, the County and McG. MI's wife made a claim under the *Family Law Act*. EF and McG brought a section 31 Application on the grounds that MI was a worker.

At the hearing MI argued he was not a worker, he was either an independent operator, or an executive officer. MI and his brother LI testified. At the end of the hearing, after the witnesses had testified, MI's lawyer attempted to submit additional material. The new material was excluded.

After the hearing, MI discharged his lawyer and hired a new lawyer. MI's new lawyer, and the lawyer for the s.31 applicants, each made post-hearing written submissions.

After the hearing, the Vice-Chair understood that MI had conceded that he was not an independent operator, so the only issue was whether MI was a worker or an

executive officer of IB. The Vice-Chair determined that although MI was nominally an officer of the company, the substance of his role showed he was not a directing mind of IB. The Vice-Chair concluded that MI was a worker. As a result, the action of MI and his wife was deemed to be barred.

MI's request for reconsideration was denied. MI argued he had not conceded he was not an independent operator, only that he was not an independent contractor. The Vice-Chair found this was a distinction without a difference. MI also submitted a number of records that had not been produced for the original hearing. The Vice-Chair reviewed the new material in the context of the reconsideration test and found MI had failed to provide substantial new evidence that had not been available at the time of the original hearing that would have likely resulted in a different decision.

MI commenced an application for judicial review. The Tribunal, and the s.31 Applicant, have filed responding factums. The case is scheduled to be heard in October 2016.

2. *Decisions Nos. 1135/12* (May 9, 2013) and *1135/12R* (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 third parties, applied to the Tribunal under s. 31 of the *WSIA* for a determination of whether the worker's right 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, which was heard on April 15, 2015 by the Divisional Court Panel of Lederer, Corbett and Lederman. In a decision released on January 6, 2016, the Divisional Court unanimously dismissed the judicial review. Justice Corbett, writing for the Panel, stated:

"The question for this court is whether the WSIAT's decision was reasonable.

It was.

….The Vice-Chair's conclusions … were supported by the overwhelming weight of the evidence. They were reasonable. And there was no procedural unfairness…."

3. *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 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.

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. The worker has not filed any other documents, but has now commenced an unrelated appeal with the Tribunal.

4. *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 Loss of Earning (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 agreed the judicial review would not proceed until the worker had obtained a ruling on psychological/chronic pain entitlement. The WSIB denied the worker's appeal on these issues, so the worker has now appealed to the Tribunal. A hearing has taken place and post-hearing work is in progress. Following the Tribunal's decision on these new issues, the worker will either abandon the judicial review, or request that the judicial review proceed on all issues.

5. *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 SABs. 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 WSIB 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. Pursuant to an agreement between the parties, counsel for B has filed a Record, rather than the Tribunal. B and the Tribunal have filed their factums. The Tribunal's co-respondent has not. The judicial review was scheduled to be heard in London in April 2016, but the court has rescheduled it for November.

6. *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 filed its Record of Proceedings and received the worker's factum. However, following discussions with counsel for the worker and counsel for the Tribunal, it was agreed the judicial review would be held in abeyance until March 2017, without the need for the Tribunal to file a factum, while the worker returned to the WSIB for a further decision.

7. *Decisions Nos. 645/11* (June 14, 2012) and *645/11R* (March 23, 2015)

The issue in *Decision No. 645/11* was whether the worker should be granted further LOE benefits after July 2004, and whether the worker should be granted entitlement for psychotraumatic disability. In *Decision No. 645/11*, the worker was granted entitlement to both LOE benefits after July 2004 and to benefits for psychotraumatic disability. The worker's claim was returned to the WSIB for implementation. The WSIB paid the worker full LOE benefits until October 2006 and then partial LOE benefits until the worker reached age 65 in 2012.

Following the WSIB's implementation, the worker brought an application in the courts for a writ of *mandamus* to compel the WSIB to implement *Decision No. 645/11* fully by granting her full LOE benefits to age 65.

The WSIB sought clarification and/or reconsideration of *Decision No. 645/11* at the Tribunal.

The question of whether the application for reconsideration/clarification should proceed or whether the Tribunal should wait until the resolution of the worker's court application was considered in *Decision No. 645/11R*.

The Vice-Chair determined that the WSIB's application for clarification should proceed without waiting for the resolution of the court proceeding, as the Tribunal was in the best position to understand the nature of the dispute and could provide the most efficient resolution of the dispute.

The Vice-Chair clarified *Decision No. 645/11* by stating that the decision granted further LOE benefits to the worker, with the nature and duration of those benefits to be determined by the WSIB. The decision did not grant full LOE benefits to the worker to age 65.

After the release of *Decision No. 645/11R*, the worker amended her application for judicial review and added the Tribunal as a party. In addition to seeking a *mandamus* order, the worker is also arguing that *Decision No. 645/11R* is unreasonable.

Following discussions between the Tribunal and the worker's representative, the worker has agreed to put the judicial review on hold in order to explore appeal options at the WSIB pertaining to the implementation of *Decision No. 645/11*.

8. *Decisions Nos. 493/13* (April 29, 2013) and *493/13R*

In *Decision No. 1309/01*, the worker was granted entitlement to s.147(4) supplementary benefits under the *pre-1997 Act*. The worker then appealed a decision of the WSIB regarding the calculation of the s.147(4) supplement.

In *Decision No. 1387/07*, the Tribunal upheld the decision of the WSIB and determined that the amount of benefits owing under s.147(4) is subject to subsections (8), (9) and (10). Therefore, it was determined that the WSIB had correctly based the supplement on the maximum payable pursuant to s.147(8). The worker's subsequent request for reconsideration of *Decision No. 1387/07* was denied in *Decision No. 1387/07R*. The worker then applied for judicial review of *Decisions Nos. 1387/07* and *1387/07R*. At the same time, a judicial review of *Decision No. 1858/08* was also initiated, which was a decision concerning an identical issue. The same worker's counsel represented both workers at judicial review. The Divisional Court upheld both Tribunal decisions, and dismissed both judicial review applications.

In *Decision No. 493/13*, the same worker as in *1309/01* appealed a WSIB decision concerning whether the 147(4) supplementary benefits had been correctly calculated at the 24 and 60 months reviews. The Vice-Chair referred to the Divisional Court's prior decision in *1858/08* and *1387/07* and concluded that the intent of s.147(4) was not to provide income replacement, but instead to provide workers who were either unemployable or unable to benefit from vocational rehabilitation services with an

additional benefit. This additional benefit would be calculated according to s.147(9) or (10), and would not exceed the Old Age Security cap pursuant to subsection (8).

The Vice-Chair noted that subsection (13) is a supplement given under subsection (4), and that on a plain reading of the section, subsection (4) is always subject to subsection (8). Therefore, the Vice-Chair determined that the WSIB had correctly determined the amount of the supplement benefits at the 24 and 60 months reviews, and the appeal was dismissed.

The worker then sought clarification of two issues arising out of *Decision No. 493/13*. First, the worker sought clarification that *Decision No. 941/94* dealt with a different issue than the issue before the Vice-Chair in *Decision No. 493/13*. The Vice-Chair noted that the review in *Decision No. 941/94* was thorough and had been relied upon in numerous other Tribunal decisions, and declined to grant this request for clarification. The Vice-Chair did clarify a reference to the *Rustum Estate v. Ontario (Workplace Safety and Insurance Appeals Tribunal)* decision but generally found that the worker was essentially trying to reargue issues raised and already addressed in *Decision No. 493/13*.

In June 2015, the worker commenced an application for judicial review of *Decisions Nos. 493/13* and *493/13R*, as well as *Decisions Nos. 827/13* and *827/13R*, which are discussed below. In this application, the worker is seeking an interlocutory order certifying the judicial review as a class proceeding on behalf of all persons whose benefits pursuant to s.147(13) of the *Workers' Compensation Act* have been subjected to a maximum cap pursuant to section 147(8) of the *Workers' Compensation Act*. The Tribunal will be filing its factum.

9. *Decisions Nos. 827/13* (May 13, 2013) and *827/13R* (December 16, 2014)

In *Decision No. 827/13*, the worker appealed a WSIB decision regarding whether supplementary benefits had been correctly calculated at the 24 and 60 months reviews. The issue in this decision was the same as the issue raised in *Decision No. 493/13*.

The worker submitted that the calculation on the reviews should not be capped by the Old Age Security limit in s.147(8). The Vice-Chair disagreed with the worker's argument and noted that this argument had been considered and rejected in several previous Tribunal decisions, including *Decision No. 621/12*. The reasons for rejecting the argument were carefully reviewed in *Decision No. 621/12*, and it was determined that s.147(8) applies in calculating a worker's benefits on reviews as well as on the initial determination. The Vice-Chair agreed with the reasoning in *Decision No. 621/12* and the appeal was dismissed.

The worker then sought clarification of *Decision No. 827/13*. The worker's request for clarification was denied as it was determined that the original Vice-Chair had made a thorough and persuasive review of the issue raised in *Decision No. 827/13*.

In June 2015, the worker initiated an Application for Judicial Review of *Decisions Nos. 827/13* and *827/13R*, as well as *Decisions Nos. 493/13* and *493/13R*, which are discussed above. In this application, the worker is seeking an interlocutory order certifying the judicial review as a class proceeding on behalf of all persons whose benefits pursuant to s.147(13) of the *Workers' Compensation Act* have been subjected to a maximum cap pursuant to s.147(8) of the *Workers' Compensation Act*. The Tribunal will be filing its factum.

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 suitable employment or business (SEB) was found to be correct.

Three days prior to the release of *Decision No. 691/05*, the worker wrote to the Tribunal alleging he had been threatened by one of the panel members. Although the Tribunal informed the worker about the appropriate complaint procedures, no response was received from the worker for two and a half years. In September 2010, the worker made further allegations of panel misconduct, and requested a reconsideration.

In July 2013, the Tribunal and the WSIB 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 commenced proceedings in the wrong court. 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 again 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 of one of the Panel's caucuses.

The Tribunal and the WSIB each brought a motion to dismiss the worker's action. The motions were scheduled to be heard October 22, 2014. The worker advised that he wanted to adjourn the motions. The motions were scheduled to be heard on February 23, 2015. These motions were also adjourned at the worker's request, and were scheduled to be heard in October 2015. The motions were again adjourned as a result of a potential conflict concerning the assigned judge. It has now been scheduled to be heard in May 2016.

Action in Superior Court – *Decision No. 531/12* (March 11, 2015)

In *Decision No. 531/12*, released in March 2015, the Tribunal granted most, but not all of the items the self-represented worker had appealed. The worker sought a reconsideration of her decision, which is currently being processed. However, in January, 2016 she commenced an action in Superior Court against the WSIB and WSIAT, seeking damages of twenty million dollars.

Counsel for the Tribunal submitted a written request to the court asking that the Statement of Claim be dismissed pursuant to Rule 2.1 on behalf of both the Tribunal and the WSIB.

On February 8, 2016, the Court issued an order directing the Registrar to notify the worker that the Court was considering making an order dismissing her action. An attempt by the worker to file another motion in court was disallowed on the grounds her action had been stayed pending resolution of the Rule 2.1 matter.

On March 10, 2016, Justice Myers found the action against the WSIB and WSIAT should be dismissed with costs, on the grounds it could not succeed and was frivolous.

WSIAT
[April 2016]