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

April 1 to June 30, 2016

The status of applications for judicial review involving the Tribunal for the second 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)

A County in Ontario decided to build an overpass bridge on a highway. MI was injured when the bridge collapsed while he was operating a cement smoothing machine on it.

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, as 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 could not sue because he was a worker.

At the hearing MI argued he was not a worker, because 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. *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.

In *Decision No. 2214/13*, released in March 2014, 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 April 2014, this worker, now self-represented, filed an application for judicial review of the Tribunal's decision in the Hamilton Divisional Court Office. The Tribunal served a Record of Proceedings. The worker took no steps to advance the judicial review. In 2015, the worker sent a letter stating that he intended to withdraw the judicial review, but threatened to commence a law suit against the Tribunal Chair. No law suit was ever served by the worker.

The worker took no steps to properly abandon his judicial review, despite a request from the Tribunal that he do so.

As more than a year had passed, in April of 2016, the Tribunal contacted the Hamilton Divisional Court Office to inquire into the status of the case. The Hamilton Divisional Court staff discovered the application had been erroneously entered into their system, so that no automatic dismissal had been generated. Divisional Court staff corrected the entry, and on April 7, 2016 sent a notice to the worker that the judicial review would be dismissed if it was not perfected by April 27, 2016.

In the meantime, the worker was pursuing another appeal at WSIAT on a different issue. This other appeal was dismissed on April 12, 2016, in *Decision No. 2801/15*.

As the worker took no steps to perfect his judicial review, on May 9, 2016, the Hamilton Divisional Court issued a notice dismissing the judicial review with costs.

3. *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 the Tribunal 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 car 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 2016.

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

In *Decision No. 645/11*, the worker was granted entitlement to Loss of Earnings (LOE) benefits after July 2004, and to benefits for psychotraumatic disability. The worker's claim was returned to the WSIB for implementation. The WSIB implemented the Tribunal's decision by paying the worker full LOE benefits only 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 for a writ of *mandamus* to compel the WSIB to implement *Decision No. 645/11* by granting her full LOE benefits to age 65.

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

Whether the WSIB's application for reconsideration/clarification should proceed, or whether the Tribunal should wait until the resolution of the worker's court application for *mandamus*, was considered by a different Vice-Chair 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. She held *Decision 645/11* did not grant full LOE benefits to the worker to age 65.

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

Following discussions between the Tribunal and the worker's counsel, the worker agreed to put the judicial review on hold in order to explore appeal options at the WSIB pertaining to the duration of psychotraumatic benefits. At the end of the quarter, the Tribunal had made inquiries about the status of judicial review.

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

In *Decision No. 1309/01*, the worker was denied entitlement to a s.147(2) supplement under the *pre-1997 Act*, but was granted entitlement to s.147(4) supplement.

The worker then appealed from a decision of the WSIB regarding the calculation of the 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 the Old Age Supplement limit in 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*.

The same counsel, representing a different worker, sought judicial review of *Decision No. 1858/08*, which involved an identical issue. Counsel had indicated a plan for a class action on s.147(4) supplements if the judicial reviews were successful. The Divisional Court heard the judicial review applications together in 2010, and dismissed them both.

The same worker as in *Decisions Nos. 1309/01* and *1387/07* appealed a WSIB decision concerning whether her s.147(4) supplementary benefits had been correctly calculated pursuant to s.147(13) at the 24 and 60 month reviews. The worker claimed this was a different issue than the initial determination of a s.147(4) supplement, which she alleged was all that was decided in the judicial review in 2010.

In *Decision No. 493/13*, the Vice-Chair referred to the Divisional Court's decision. The Vice-Chair held 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 amount. This additional amount would be calculated according to s.147(9) or (10), and would <u>not</u> exceed the Old Age Supplement cap pursuant to subsection (8).

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 made a clarification regarding a reference to the 2010

Judicial Review, 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. 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*. However the parties have agreed that the judicial reviews will be determined before any certification motion is considered.

The Tribunal has filed its responding factum. The judicial review is expected to be heard in November 2016.

6. *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 for each review 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 each review of a s.147(4) supplement, as well as on the initial 147(4) determination. The Vice-Chair agreed with the reasoning in *Decision No. 621/12* and dismissed the worker's appeal.

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 discussed in the preceding section, a different worker also seeks to judicially review *Decisions Nos. 493/13* and *493/13R*. This worker is also 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). This judicial review, as well as the judicial review of *Decisions Nos. 493/13 and 493/13R* will be heard together.

The Tribunal has filed its responding factum. The judicial review will be heard in November, 2016.

7. *Decisions Nos. 2329/10* (June 11, 2012), *2329/10R* (December 17, 2013), and *2329/10R2* (November 25, 2015)

The worker, an off-duty paramedic, was injured while assisting a person who had collapsed. The WSIB denied the worker entitlement on the grounds he was not in the course of employment at the time of the accident.

In *Decision No. 2329/10*, the majority of the Panel allowed the appeal. The worker, while off-duty, assisted other paramedics who were on duty at their request. The majority found it was when the on-duty paramedics requested the worker's help that he became in the course of employment. The employer member stated in his dissent that the worker was not involved in employment at the time of the accident.

The employer's request for reconsideration was granted by a different Vice-Chair in *Decision No. 2329/10R*, on the grounds there had been a breach of procedural fairness. The Vice-Chair found the employer had not been provided with the opportunity to make submissions on the novel theory of work-relatedness which had been adopted by the majority in granting the appeal, and which had not been argued by the worker.

The same Vice-Chair re-heard the appeal. In the reconsidered *Decision No. 2923/R2*, the Vice-Chair applied the relevant Board policy and found the worker was in the course of employment. The Vice-Chair found the policy criteria of "activity" was satisfied because the worker was providing assistance in a medical emergency, which was what his job required, and not engaged in a personal activity when he was injured. The "place" criteria was satisfied because, like the paramedics he assisted, the location for a paramedic is never fixed.

The "time" criteria was the most challenging aspect, because although the prevailing culture was for paramedics to render assistance when off-duty, the worker was not legally required to do so. The Vice-Chair found it was significant that the worker followed the employer's policy about not using the defibrillator while off duty, which demonstrated he was acting pursuant to the employer's direction at the time of the accident. Here, the worker's assistance to the other paramedics in the emergency medical situation, drawing on his professional skill and training, provided a benefit to the employer.

The employer has commenced an application for judicial review. However, the WSIB has requested the Tribunal clarify *Decision No. 2329/10R2*. At the end of the quarter, the parties were awaiting the release of the Tribunal's decision on the WSIB's clarification request, so a Record of Proceedings may be filed with the Court.

8. *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 June 2006, the worker's PD award was increased from 10% to 15% between October 1988 and August 2001; and then 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. The worker has filed his factum. However, following discussions with counsel for the worker, 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.

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

The worker's appeals for entitlement to non-economic loss (NEL) benefits for his low back, and to LOE benefits from August 17, 2010, were denied in *Decision No. 959/13*.

The worker had been a foreman with a paving company. He 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 non-compensable factors were responsible for the worker's 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. Following a discussion, counsel for the worker 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 appealed to the Tribunal. A hearing before a different Panel has taken place, and post-hearing work has recently been completed. Following the Panel's decision on these new issues, the worker will either abandon the judicial review, or request the judicial review proceed on all the Tribunal's decisions.

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 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. The reconsideration was denied by a different Vice-Chair in *Decision No. 691/05R*, which was released in June 2013.

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 worker's claim contains allegations against the WSIB, but his 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 matter is now scheduled to be heard in August, 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 and the WSIB submitted a written request to the court, asking that the Statement of Claim be dismissed pursuant to Rule 2.1

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.

A decision in the worker's reconsideration is pending.

WSIAT
[July 2016]