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Contains the full text and headnotes of selected decisions of the
Workplace Safety and Insurance Appeals Tribunal



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In *Decision No. 1624/04R*, the decision to withdraw the worker's appeal was reopened and the appeal was allowed to proceed. In *Decision No. 1624/04R2* (July 27, 2006) [2006 ONWSIAT 1653], dealt with the merits of the appeal.



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The following is a list of abbreviations commonly used in the W.S.I.A.T. Reporter:

AMA GUIDES	American Medical Association Guides to the Evaluation of Permanent Impairment
BARC	Back Assessment and Rehabilitation Clinic
CABPM	Claims Adjudication Branch Procedures Manual
CD	Case Description
CSDM	Claims Services Division Manual
D1	Initial FEL Determination
DDS	Decision Digest Service
DRC	Downsview Rehabilitation Centre
ESRTW	Early and Safe Return to Work
FAE	Functional Abilities Evaluation
FAF	Functional Abilities Form for Timely Return to Work
FEL	Future Economic Loss
HRC	Hospital and Rehabilitation Centre
IDSP	Industrial Disease Standards Panel
LMR	Labour Market Re-entry
LOE	Loss of Earnings
MAPP	Merit Adjusted Premium Program
MMR	Maximum Medical Rehabilitation
NEER	New Experimental Experience Rating Plan
NAE	Net Average Earnings
NEL	Non-economic Loss
NOC	National Occupational Classification
ODP	Occupational Disease Panel
OEA	Office of the Employer Adviser
OWA	Office of the Worker Adviser
PSEM	Psychological and Social Evaluation Module
R1	First FEL Review
R2	Second FEL Review
REC	Regional Evaluation Centre
RMA	Regional Medical Adviser
SAB	Statutory Accident Benefits
SIEF	Second Injury and Enhancement Fund
TCO	Tribunal Counsel Office
TENS	Transcutaneous Electrical Nerve Stimulation
TNS	Transcutaneous Nerve Stimulation
TOJ	Training on the Job
TWP	Transitional Work Program
VR	Vocational Rehabilitation
VRC	Vocational Rehabilitation Counsellor
VRD	Vocational Rehabilitation Division
WBS	Workers' Benefit System
WCAT	Workers' Compensation Appeals Tribunal
WCATR	Workers' Compensation Appeals Tribunal Reporter
WCB	Workers' Compensation Board
WSIAT	Workplace Safety and Insurance Appeals Tribunal
WSIATR	Workplace Safety and Insurance Appeals Tribunal Reporter
WSIB	Workplace Safety and Insurance Board



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Sexual assault	<u>Decision No. 1113/03</u>
Sick building syndrome	<u>Decision No. 2227/05</u>
Stress, mental	<u>Decision No. 1113/03</u>
Suitable employment factors other than physical capability	<u>Decision No. 1050/05</u> <u>Decision No. 2436/05</u>
Supplements, transitional provisions calculation subsequent FEL award permanent wage loss	<u>Decision No. 1334/05</u> <u>Decision No. 1334/05</u>
Time limits appeal diligence of applicant diligence of representative length of delay return to work or labour market re-entry	<u>Decision No. 1524/03ER2</u> <u>Decision No. 1524/03ER2</u> <u>Decision No. 189/06</u> <u>Decision No. 189/06</u>
Tinnitus	<u>Decision No. 581/06</u>
Waiver right to compensation mediation Schedule 2 employer	<u>Decision No. 2227/05</u> <u>Decision No. 2227/05</u>
Worker deemed test	<u>Decision No. 940/05</u> <u>Decision No. 940/05</u>



Decision No. 413/06

Vice-Chair: Nairn

Decision — April 4, 2006

Neutral Citation: 2006 ONWSIAT 760

Access to worker file, statutory (issue in dispute) (time limits).

Employer had missed time limit to appeal decision regarding worker's benefits, and had not applied for extension of time – Employer was not entitled to access to worker's file.

The worker appealed a decision of the Board granting the employer access to the worker's file. The appeal was allowed.

The employer was considering an appeal of a decision of the Board regarding labour market re-entry. However, the employer had missed the time limit to appeal that decision. The employer had not applied for an extension of the time to appeal. Accordingly, there was no issue in dispute and, as such, the employer was not entitled to access.

Accès au dossier du travailleur, prévu par la loi (question en litige) (délais).

Le délai d'appel contre la décision concernant les prestations du travailleur avait expiré, et l'employeur n'avait pas demandé de prorogation – L'employeur n'avait pas de droit d'accès au dossier du travailleur.

La Commission avait donné accès au dossier du travailleur à l'employeur. Le travailleur a interjeté appel de cette décision de la Commission. Le Tribunal a accueilli l'appel.

L'employeur envisageait d'interjeter appel d'une décision de la Commission concernant la réintégration du travailleur sur le marché du travail. Le délai d'appel contre cette décision avait expiré mais l'employeur n'avait pas demandé de prorogation. Par conséquent, il n'y avait pas de question en litige et l'employeur n'avait pas de droit d'accès au dossier du travailleur.

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
 - s. 59

APPEAL by the worker from a decision of the Board granting the employer access to the worker's file.

April 4, 2006. THE TRIBUNAL: —

BEFORE: R. Nairn, Vice-Chair
HEARING: February 24, 2006 at Toronto, Written
APPLICATION: Access to the WSIB file

APPEARANCES:

For the worker: Unrepresented
For the employer: Ms. CG

REASONS

This is a written appeal by the worker from a decision of an Access Review Clerk dated September 23, 2005, denying the worker's objection to the release of certain documents to the employer.

The issue to be determined in this case is whether the employer has a right of access to the worker's WSIB file pursuant to section 59 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A.

By way of background, at the time of the events under consideration here, the worker was employed as a mechanic in the employer's environmental/petroleum maintenance business. On April 22, 2003, the worker experienced an onset of pain in his back while moving 45-gallon drums filled with soil. The worker's back injury, initially diagnosed as an acute lumbar strain, was recognized as compensable by the Board, and he received various periods of loss of earnings (LOE) benefits. In a letter dated February 10, 2004, the worker was advised that he was being granted an 18% non-economic loss (NEL) award for his compensable back condition.

In approximately July 2003, the worker and the Board established a labour market re-entry (LMR) plan, which would provide the worker with training and upgrading towards a recommended suitable employment or business (SEB) of "Electrical Engineering Technologist". In a decision dated July 31, 2003, the Claims Adjudicator notified the parties that the Board was accepting the LMR plan and the worker would be entitled to benefits while participating therein.

In a letter dated July 15, 2005, the employer advised the Board that they were "considering an appeal on the LMR Plan", and as such, requested access to the worker's file. In a letter dated August 25, 2005, the Claims Adjudicator advised the worker:

Your employer has raised an issue in dispute under this claim. As a result, I have referred your file to our access department.

Although the employer has missed the deadline to object to the decisions made on the file, the legislation still allows the employer to request a copy of the file as there has been an issue raised. A copy of the file, along with further instructions will be sent to you for your review.

The worker objected to granting the employer access and by means of a memo dated September 23, 2005, an Access Review Clerk referred the matter to the Tribunal for further consideration. The employer has not provided the Tribunal with any specific reasons for requesting access and the worker's reasons for denying access are only "several reports; will discuss with WSIAT or at later date; reviewing with worker".

Section 59 of the WSIA permits the employer access to all documents in a worker's Board file which are relevant to an issue

in dispute. This access is provided to allow the employer to assess the evidence relevant to the case and to prepare its arguments accordingly. Granting this access therefore requires that two conditions be met. First, an issue in dispute must be identified. Secondly, the documents sought by the employer must be relevant to the issue in dispute.

In the present case, I am not satisfied that the first condition has been satisfied. As acknowledged by the Claims Adjudicator in her August 25, 2005, letter, the employer has requested access to the worker's file, even though it missed the deadline for filing an appeal of the July 31, 2003, decision of the Claims Adjudicator. There is no indication in the material before me that a time extension has been granted by either the Board or the Tribunal. Given that the employer currently has not been provided with permission to proceed with its objection concerning the worker's LMR plan, I cannot conclude that there is an issue in dispute. As such, the employer is not entitled to access.

DISPOSITION

The worker's appeal is granted. The employer is not entitled to access to the worker's file.

Appeal allowed.



Decision No. 1519/04

Vice-Chair: Kenny

Decision — May 25, 2006

Neutral Citation: 2006 ONWSIAT 1153

Disablement (nature of work) – Arising out of employment (common activity) – Fasciitis (plantar) – Medical opinion (fasciitis) (plantar) – Medical report (Tribunal medical discussion paper) – Food industry (baker) – Evidence (epidemiological).

Recent epidemiological study found stronger statistical association between weight and plantar fasciitis than between weight-bearing activities and plantar fasciitis – Tribunal discussion papers raised possibility of association with weight-bearing activities, but walking and standing are normal aspects of daily living and would not be considered a workplace injuring process unless they differed from non-workplace activities – In circumstances, worker did not have entitlement for plantar fasciitis.

The worker was a baker. The worker appealed a decision of the Appeals Resolution Officer denying entitlement for plantar fasciitis, which she related to walking, standing and weight-bearing activities on hard floors in the workplace. The appeal was dismissed.

The Vice-Chair reviewed two medical discussion papers on plantar fasciitis, a recent study on the condition and Tribunal decisions.

Medical evidence has not established that hard flooring causes plantar fasciitis. Background medical evidence indicated that the primary cause of plantar fasciitis is age-related degenerative changes in the plantar fascia. The recent study provides epidemiological evidence but cannot establish causation in the individual case. It was a case control study with a small population. It did not provide a dose-response relationship between weight-bearing and incidence of plantar fasciitis. The study actually found a stronger statistical association between a person's weight and plantar fasciitis than between weight-bearing activities and plantar fasciitis. It found a dose-response relationship between weight and plantar fasciitis, with a stronger statistical association between a body mass index (BMI) exceeding 30 and plantar fasciitis.

The Vice-Chair found that the Tribunal discussion papers and the recent study raise the possibility that weight-bearing associated with walking and standing may contribute to the development of plantar fasciitis. However, walking and standing are normal aspects of daily living and, therefore, would not be considered a workplace injuring process unless they differed in some manner from non-work activities of standing and walking. The worker submitted that her workplace

activities were more sustained than her non-workplace activities. However, the Vice-Chair noted again that there was a lack of dose-response information regarding weight-bearing in the recent study.

The worker weighed 230 to 250 pounds at the time she developed plantar fasciitis. Her BMI exceeded 30. Plantar fasciitis is a common condition likely related to degenerative changes. The Vice-Chair concluded that workplace activity was not a significant contributing factor to the worker's plantar fasciitis.

Incapacité (nature du travail) – Du fait de l'emploi (activité ordinaire) – Fasciite (plantaire) – Opinion médicale (fasciite) (plantaire) – Rapport médical (document de travail médical du Tribunal) – Industrie de l'alimentation (boulangier-pâtissier) – Preuve (épidémiologique).

De récentes études épidémiologiques avaient permis de constater un rapport statistique plus étroit entre le poids corporel et la fasciite plantaire qu'entre les activités avec port de poids et la fasciite plantaire – Des documents de travail médicaux du Tribunal indiquaient la possibilité d'un rapport entre cette affection et les activités avec port de poids mais, la marche et la station debout étant des aspects normaux de la vie quotidienne, ces activités ne pouvaient pas être considérées comme des procédés dommageables liés au travail, à moins de prendre des formes différentes sur les lieux et hors des lieux du travail – Dans les circonstances, la travailleuse n'avait pas droit à une indemnité pour sa fasciite plantaire.

La travailleuse, une boulangère-pâtissière, a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de lui reconnaître le droit à une indemnité pour une fasciite plantaire qu'elle attribuait au fait de marcher, de se tenir debout et d'effectuer des activités avec port de poids sur des planchers durs sur les lieux du travail. Le Tribunal a rejeté l'appel.

La vice-présidente a passé en revue deux documents de travail médicaux du Tribunal sur la fasciite plantaire, une étude récente au sujet de cette affection et des décisions du Tribunal.

Il n'a pas été médicalement prouvé que les revêtements de sol durs causent la fasciite plantaire. La preuve médicale générale indiquait que la cause première de la fasciite plantaire était la dégénérescence de la fasciite plantaire due au vieillissement. Une étude récente fournissait des éléments de preuve épidémiologique sans toutefois permettre d'établir de lien de causalité dans un cas particulier. Il s'agissait d'une étude contrôle menée auprès d'une petite population et elle ne fournissait pas de relation dose-effet entre le port de poids et l'incidence de la fasciite plantaire. Cette étude avait en fait révélé un rapport statistique plus étroit entre le poids corporel et la fasciite plantaire qu'entre les activités avec port de poids et la fasciite plantaire. Elle avait indiqué une relation dose-effet entre le poids corporel et la fasciite plantaire, accompagnée d'un rapport statistique plus étroit entre la fasciite plantaire et un indice de masse corporelle (IMC) excédant 30.

La vice-présidente a conclu que les documents de travail médicaux du Tribunal et la récente étude indiquaient la possibilité que les activités avec port de poids associées à la marche et à la station debout puissent contribuer à l'apparition de la fasciite plantaire. Cependant, la marche et la station debout étant des aspects normaux de la vie quotidienne, ces activités ne pouvaient pas être considérées comme des procédés dommageables liés au travail, à moins

de différer d'une manière ou d'une autre sur les lieux et hors des lieux du travail. La travailleuse a soutenu que ces activités étaient plus soutenues sur les lieux du travail qu'elles ne l'étaient hors des lieux du travail. Cependant, la vice-présidente a noté de nouveau que la récente étude n'avait pas permis d'établir une relation dose-effet en ce qui concerne les activités avec port de poids.

La travailleuse pesait de 230 à 250 livres quand elle avait commencé à souffrir de fasciite plantaire, et son IMC excédait 30. La fasciite plantaire est une affection fréquente liée à la dégénérescence. La vice-présidente a conclu que les activités professionnelles de la travailleuse n'avaient pas contribué de façon importante à sa fasciite plantaire.

Tribunal Decisions Considered:

- *Decision No. 1262/02* (March 23, 2005) [2005 ONWSIAT 660] refd to
- *Decision No. 740/03* (July 9, 2003) [2003 ONWSIAT 1578] consd
- *Decision No. 1348/03* (October 28, 2003) [2003 ONWSIAT 2355] refd to
- *Decision No. 1925/03* (February 12, 2004) [2004 ONWSIAT 265] consd
- *Decision No. 1105/04* (October 29, 2004) [2004 ONWSIAT 2228] refd to
- *Decision No. 1508/04* (2005), 74 W.S.I.A.T.R. 101 consd
- *Decision No. 1969/04* (June 16, 2005) [2005 ONWSIAT 1354] consd
- *Decision No. 227/05* (March 4, 2005) [2005 ONWSIAT 513] refd to

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
 - s. 2(1) "accident"
 - s. 13(1)
 - s. 126(2)

APPEAL by the worker from a decision of the Appeals Resolution Officer denying entitlement for plantar fasciitis.

May 25 , 2006. THE TRIBUNAL: —

BEFORE: M. Kenny, Vice-Chair

HEARING: September 22, 2004 at St. Catharines, Oral
Post-hearing activity completed on September 8, 2005

DECISION(S) UNDER APPEAL: WSB ARO decision dated April 3, 2003

APPEARANCES:

For the worker: L. Hedderson, Representative from the United Food and Commercial Workers Union

For the employer: The employer did not participate in the oral hearing

REASONS

(i) Background

The worker started working part time in the bakery of a grocery store in 1992. In May 1998, she began working full-time as a baker. About one year later, she noticed that she had left heel pain. Her heel/foot pain got progressively worse. Her family doctor diagnosed bilateral plantar fasciitis.

After a period of treatment and modified work, the worker stopped working in April 2000. A couple of months later, she had

left foot surgery to release the plantar fascia and to remove a bone spur. She returned to modified work in January 2001 but went off work again in September 2002, when she had further left foot surgery for plantar fasciitis. She returned to modified work again about four months later, but the surgery did not eliminate her foot pain.

(ii) The issues

The issue in this appeal is whether the worker is entitled to benefits for impairment resulting from a condition that has been diagnosed as plantar fasciitis.

In this case, the Board ARO noted certain medical opinions as well as medical evidence that plantar fasciitis is the result of normal aging (degenerative) changes in the plantar fascia and she concluded that the evidence did not establish a medical relationship between the worker's ongoing foot disability and the work she performed.

However, the worker's representative argues that the worker's plantar fasciitis was caused, or exacerbated, by the standing, walking, weight-bearing activities the worker did working as a baker on hard floors, and that the worker is therefore entitled to loss of earnings benefits for the time she has been unable to work because of her foot problems, and for health care benefits.

It is therefore necessary to decide whether there was an injuring process associated with the worker's employment that made a significant contribution to the development of the foot condition from which her impairment results, or whether the worker's impairment results from a pre-existing degenerative condition that was neither caused nor accelerated by the worker's employment.

(iii) The Worker's Job

The worker was hired by the employer in 1992. She worked part-time. She fried donuts, decorated them, put them in the showcase, and then helped the baker. The job generally did not involve any heavy lifting. The flooring was plain cement with some areas covered with cardboard. Although much of the work she did as a donut fryer involved work standing in front of the fryer, the worker testified that she did not have foot pain when she did this job.

In May 1998, the worker started working full-time and she assumed the duties of baker. She prepared buns and bread, and cooked prepared buns and bread. She testified that, as a baker, she would only be stationary for about 15 minutes at a time. The rest of the time, she would be working with mixes, moving racks of buns/bread, and sometimes taking over duties (such as counter duties) when other employees were on break.

Some of the worker's job involved lifting racks of buns and bread, or dough mix. The maximum weight of the racks when full was 130 pounds, but the worker would not lift this by herself. She would lift it with the help of a co-worker. However, she testified that she lifted and carried 44-pound bags of dough mix periodically throughout the day. She would take these bags of dough mix to the mixer where she would add other ingredients and work with the dough. The worker stood or walked throughout her shift (except for a half hour lunch break and two 15-minute breaks). She testified that there was no "fatigue matting" where she worked.

After working as a full-time baker for about five months, the worker was transferred to work in the bakery of another store. She began working at this other store on November 1, 1998. Her duties as a baker remained the same but there were times

when there were fewer employees working in the bakery than there had been at the other location. The worker testified that this meant that she had more things to do and she had to “run around” to cover the counter, as well as baking. Also, the new location had a different type of flooring. It was a ceramic tile floor rather than plain cement.

(iv) The Worker’s Foot Condition

The worker testified that, in May 1999, she was at work when she first noticed pain in her left heel. After that, it “just kept getting worse.” She first saw her family doctor, Dr. T. Prince, about this in June 1999. She testified that she started limping in about June 1999.

In September 1999, the worker had an x-ray and bone scan. The left foot x-ray reportedly showed a “large calcaneal spur.” The bone scan reported mild intensity increased uptake in keeping with plantar fasciitis. Dr. Prince referred the worker for physiotherapy treatments.

The physiotherapist noted that the worker had started one hour walking “six months ago” (about March 1999) but that she had stopped this about “one month ago” (August 1999).

The worker agreed with the physiotherapist’s notation about taking one-hour walks. She testified that, although she had never set a program and she did not do this every day, she had been doing about 45 minutes to one hour of walking after work until it became too painful to do so. She testified that these after supper walks had not led to foot pain after the walk or to any problem with swelling or pain the next morning.

The worker continued to work and to attend physiotherapy until December 1999, when she took a vacation in Hawaii. The worker testified that, although she went sightseeing and walked around a lot while on vacation, her pain was not as severe when she was off work. However, she testified that, when she returned to work, within two days, her foot became swollen and painful – and this is when she began modified work. This is confirmed by a note made by her physiotherapist.

The worker’s family doctor, Dr. Prince, recommended that the worker be provided with a “sit down job if possible, one hour on, one hour off, or modified hours.” In December 1999, when he made this recommendation, he indicated that it was “unknown” whether this condition was due to the worker’s employment. He had not reported it to the Board. The worker’s employer agreed to provide her with work where she could alternate sitting and standing (one hour standing, one hour sitting). The worker testified that it was sometimes hard to arrange the sitting times when no one was around to do some of the work, and the employer acknowledged that there were “some difficulties in being able to provide work that would allow the employee to sit with her foot elevated.”

The worker continued to do modified work until April 10, 2000, when she stopped working. The worker testified that her foot became too painful to continue working. By the time she saw orthopaedic surgeon, Dr. Martin, in May 2000, she had tried orthotics, steroid injections, and physiotherapy, but she continued to have left foot pain.

When the worker stopped working in April 2000, she was 37 years old.

(v) Medical Treatment After the Worker Stopped Working in April 2000

In June 2000, orthopaedic surgeon, Dr. Martin, performed surgery to release the left foot plantar fascia and to remove the left

heel spur.

In September 2000, the worker's family doctor reported that the worker's left foot condition was still healing so she could not do a job with prolonged standing or walking. He also noted that she continued to have symptoms of chronic right plantar fasciitis. The worker testified that she had pain in both feet after May 1999, but the pain in her left foot was much worse than that in the right foot. She said that, when she had physiotherapy in 1999, the physiotherapist treated both feet, so her right foot continued to be less painful than her left foot.

About four months after her 2000 left foot surgery, Dr. Martin reported that the worker was doing well but she stood for two hours on the weekend and then complained of chronic pain again in the left heel area. He immobilized her foot in a cast for six weeks. When he removed her cast, he reported that she said she was much improved and had minimal discomfort when bearing weight. He recommended that she wear arch supports.

In January 2001, the worker returned to modified work at gradually increasing hours. Anti-fatigue mats were ordered for the bakery. However, the worker continued to experience foot pain, as well as left hip, knee, and back pain.

By October 2001, the worker reported that she had as much heel pain as she had had before her surgery. She consulted orthopaedic surgeon, Dr. T. Daniels. Among other things, on examination, Dr. Daniels noted that the worker stood with a slight flat foot deformity. He recommended an air cast to help decrease the stress to her inflamed tissues and to help decrease the pain. He later reported that the worker improved while in the air cast, but was not better when she was out of the air cast. He discussed the possibility of further surgery.

In September 2002, Dr. Daniels performed surgery to release the plantar fascia and decompress the tarsal tunnel. His operative note indicates that the plantar fascia was "extremely thick" and a portion of the plantar fascia was removed during the operation because it was so thick. Following surgery, the worker weight bore in an air cast. By December 2002, Dr. Daniels reported that the worker still had heel pain and she would likely always have some component of discomfort, but he encouraged her to increase her activities and to use an air cast intermittently. He also encouraged her to return to modified work.

The worker returned to modified work in January 2003 (although she subsequently had some time off work in 2003 because of additional foot problems). The worker testified that, since her 2002 surgery, she has had additional physiotherapy, used orthotics, had cortisone shots, taken anti-inflammatories and painkillers, but she still has foot pain. She has continued to work in spite of her ongoing problems.

She testified that she believes that her claim for plantar fasciitis should be accepted because she believes her condition was caused by the flooring at work. She has indicated that, as a baker, she was constantly on her feet, lifting heavy bowls, and constantly on the go, and this put a lot of stress on her feet and legs.

(vi) The Worker's Condition Before May 1999

The worker testified that she weighed 250 pounds when she was working as a donut fryer (beginning in 1992). She testified that she has been big all her life. She has gradually brought her weight down to about 225 to 230 pounds, but she stated that she has not weighed less than 225 pounds in a long time. She probably weighed between 230 and 250 pounds when her heel

pain began in May 1999.

The worker previously had right foot surgery for a bone chip that broke off in her right foot. She testified that she totally recovered from that surgery.

X-rays of the worker's left foot taken in September 1999 reported a "large calcaneal [heel] spur." Although heel spurs were formerly thought to cause the heel pain characteristic of plantar fasciitis, medical evidence suggests that this is not the case.¹ Instead, such a spur is considered to be an aging change.²

The worker testified that, before her heel pain began in May 1999, she enjoyed walks with her husband after work and swimming in the summer. She did not engage in strenuous activities such as jogging or hiking. She testified that she would be on her feet when she was not working, but "not steadily." For example, in the winter, every second or third night she would walk around the mall for an hour or two, but she was not rushing when she did so, and she could stop for coffee. Also, about once a month, she would spend a Sunday walking around car shows, but again, she could sit when she wanted to do so. She testified that, before May 1999, none of the activities she did outside of work brought on foot pain.

(vii) Medical Opinions about Causation

Although the worker's family doctor initially indicated that the cause of the worker's plantar fasciitis was "unknown," he later concluded that it related to her work. In 2002, he wrote that the worker became a full-time baker in August 1998 and "it was at that time that she began to develop plantar fasciitis." Although he noted that the worker had a heel spur that probably pre-existed the beginning of the plantar fasciitis, he concluded:

In August 1998 she became a full-time baker, working 39 hours per week... It was at that time that she began to develop plantar fasciitis. There were no other reasons why she would have developed plantar fasciitis previously... The plantar fasciitis and the [heel] spur are certainly consistent with the job that she does in terms of standing all day long. She has no other reason why this would have developed. She is not a runner, she had no injury and there was nothing at home that she was doing that would have aggravated the problem...

...in [the worker's] case, I believe it [the plantar fasciitis] is totally related to her work and standing on her feet carrying heavy weights, often up to 130 pounds, which would have created a great deal of stress on her feet at the time...

Several of the non-medical facts set out in the family doctor's letter are inaccurate. The worker became a full-time baker in May 1998, and she did not experience left heel pain until about one year later. Also, when the worker lifted racks weighing up to 130 pounds, she did so with the assistance of a co-worker, so she was not herself lifting that weight.

The surgeon who performed the surgery in 2000 (Dr. Martin) provided an opinion indicating that he could not state that her plantar fasciitis was caused by her job, but he indicated that it was reasonable to state that her job probably exacerbated her condition. He wrote:

It is impossible for me to state with certainty that [the worker's] plantar fasciitis has been caused by the nature of her job. Plantar fasciitis occurs in a broad spectrum of individuals with a variety of occupations and one therefore cannot state with certainty that her job has been the sole cause of her plantar fasciitis. However, given the nature of her job in that it requires prolonged standing and walking on hard floors, I believe that it is reasonable to state that her job has, on the balance of probability, exacerbated her condition...

On the other hand, in November 2000, Board doctor, Dr. Karr, wrote:

According to the Alberta guidelines on plantar fasciitis, which the WSIB subscribes to, plantar fasciitis is not caused merely by being on one's feet all day. The diagnosis is not compatible with job duties as described.

The Alberta guidelines on plantar fasciitis to which Dr. Karr referred are not incorporated into any Ontario Board policies, and the Board did not refer to them when it gave the Tribunal notice under section 126(2) of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) of the policy packages that would apply to the subject matter of this appeal.

In October 2002, Board Medical Consultant, Dr. Craven, reviewed the worker's family doctor's opinion about causation. Dr. Craven questioned the part of the family doctor's report that stated that the worker often carried up to 130 pounds. He also noted that, using the date the family doctor gave as the date when the worker began full-time work, the worker's foot pain did not begin until 10 months after she began work as a full-time baker. With respect to the family doctor's statement that he could identify no reason for the worker developing plantar fasciitis other than the job change, Dr. Craven wrote the following:

The causes of plantar fasciitis are not well understood, and are likely multifactorial. It is a common musculoskeletal condition, occurring in about 10% of the population at some point in their lifetime. Some is due to specific trauma; most is not. Some people get it after buying a new pair of shoes, and in this case it can develop within a couple of days. Often the pain develops with no obvious cause...

I would say it is unknown whether this worker's job played any role in her developing plantar fasciitis. While Dr. Prince argues that the development of symptoms after increasing hours to full time work supports the work relatedness, one could argue that the 10 month delay between going to full time work and developing symptoms supports the notion that [the] worker's feet adapted to full time work without difficulty and that, for reasons unknown, she developed foot pain and plantar fasciitis in May 99.

Once plantar fasciitis develops, it is symptomatic during most weight bearing activities. However, the fact that the worker noted symptoms at work does not mean that the work activities caused the condition or that the work activities aggravated the pathology responsible for the pain.

In giving his opinion, Dr. Craven referred to a Discussion Paper on Plantar Fasciitis that was prepared for the Tribunal by orthopaedic surgeon, Dr. Harris.

(viii) Background Papers on Plantar Fasciitis

Tribunal Discussion Papers on Plantar Fasciitis written by Dr. Harris in 1996, and by Dr. Daniels in 2003, were included in exhibits filed in this appeal. In addition, the worker's representative filed a draft report written by Dr. Roland Wong for the Occupational Health Clinics for Ontario Workers Inc. (OHCOW) in 2000. Also, after the hearing, Tribunal counsel provided the worker's representative with a copy of a study published after Dr. Daniels' 2003 Discussion Paper.[3](#)

The Discussion Papers and Dr. Wong's Paper have been thoroughly discussed and analyzed in a number of Tribunal decisions, and the more recent study (referred to in this decision as the "Riddle study") has been discussed in Tribunal *Decisions No. 1348/03* (October 28, 2003), *1969/04* (June 16, 2005) and *1508/04* (2005), 74 W.S.I.A.T.R. 101.

These Papers explain that the plantar fascia is a multilayered fibrous sheet of connecting tissue that originates from the bottom

of the heel bone and runs along the sole of the foot to the toes. In his Discussion Paper, Plantar Fasciitis (Heel Pain), Dr. Daniels describes the important role played by the plantar fascia in stabilizing the foot during the normal gait cycle.

According to these background papers, if the plantar fascia becomes inflamed, and the inflammation affects the entire plantar fascia, it is called “plantar fasciitis.”

Plantar fasciitis is a common condition. Both Board Medical Consultant Dr. Craven’s opinion and the Riddle study indicate that plantar fasciitis is a condition that will affect as much as 10% of the population during the course of a lifetime. It is a condition that is characterized by heel pain. According to Dr. Harris’ paper, this heel pain is worse when first taking weight and often accentuated by pushing the toes upward (which tightens the fascia). The pain is generally worse while weight-bearing. As indicated by Dr. Craven, “once plantar fasciitis develops, it is symptomatic during most weight bearing activities.”

In his Discussion Paper, Dr. Daniels describes some of the physical changes observed in patients with chronic heel pain. He described these changes (including increased thickness of the plantar fascia) as changes that are typically seen in areas with chronic inflammation and deficient blood flow.

Although the Discussion Papers and reports filed in this appeal indicate that there is no medical consensus about the cause of plantar fasciitis, they do describe evidence about the nature and incidence of the condition that is helpful in deciding whether there has likely been some work-related injuring process that has contributed to the development of plantar fasciitis in a particular case.

In his 1996 Discussion Paper, Dr. Harris wrote the following about the incidence and cause of plantar fasciitis [at pp. 1 and 4]:

Plantar fasciitis...is a common condition characterised by pain and tenderness under the heel.

...

Formerly the symptoms [of plantar fasciitis] were thought to be caused by a bony spur on the under surface of the heel bone. It is now thought that the spur is irrelevant and that the pain is caused by the inflammatory change in the fascia.

While the exact cause of the inflammation is unknown, most authorities agree that it is the result of normal ageing (degenerative) changes in the plantar fascia. As the fascia tightens during weight bearing, tears (micro ruptures) occur in the degenerated area. These are repaired by an inflammatory process which accounts for the pain. Lacerations and surgical incisions are repaired by the same inflammatory process. If you’ve ever cut your finger or had surgery you will remember that the pain while minimal at first becomes worse over the succeeding 48-72 hours as the healing process peaks and then gradually fades away. It is thought that the persisting pain of plantar fasciitis is the result of constant weight bearing causing new micro ruptures that prolong the healing process.

With respect to the argument that workplace floor surfaces contribute to the development of plantar fasciitis, Dr. Harris wrote [at p. 3]:

The majority of appeals arise because patients believe their symptoms result from having to stand and walk on hard surfaces at work. They do not recognise that the hardwood floor in their home or the cement sidewalk they walk upon on their way to work is not different than the floor at work... From the scientific viewpoint there is no evidence that the nature of the surface being walked on is a factor in causing the symptoms.

...

Many patients...think that walking on hard surfaces causes the pain. But there is no proof for this. The pain is aggravated by weight bearing whether it be on mud, grass, or cement.

In his 2003 Discussion Paper, Dr. Daniels provided a description of the inflammatory process which is similar to that given by Dr. Harris. Dr. Daniels wrote [at p. 1]:

It is theorized that the repetitive tensile forces created by walking or standing cause micro-tears in the fascia, leading to acute and eventual chronic inflammation. If the inflammation affects the entire plantar fascia, it is referred to as a plantar fasciitis...

With respect to the cause of inflammation of the plantar fascia, Dr. Daniels wrote that there is “no consensus regarding etiology.”

Dr. Daniels did, however, describe certain factors that had been associated with this or with aggravating the condition. He wrote [at p. 2]:

There is no consensus regarding etiology. Snook and Christman wrote, “it is reasonably certain that a condition which has so many different theories of etiology and treatment does not have valid proof of any one cause.” Factors associated with or aggravating this condition are better defined: age, sex, obesity, seronegative inflammatory disorders and activity levels. The average age is 45 years. Prevalence is twice [as high] in females vs. males. There may be a history of elevated stress to the foot as a result of increased activities, prolonged standing or weight gain. Physical activity certainly aggravates and can sometimes precipitate the heel pain...

Several studies have implicated body weight as a causative factor...

With respect to the argument that certain types of workplace floor surfaces contribute to the development of plant fasciitis, Dr. Daniels wrote [at p. 3]:

The consistency of the surface on which one walks has not been established as a causative or aggravating factor. This is likely because tension, rather than compression, is the primary force which precipitates injury and inflammation of the plantar fascia. The magnitude of the tensile forces placed through the plantar fascia is related more to the activity level, types of activities, body weight and stability of the medial arch rather than the consistency of the walking surface.

With respect to whether body weight contributes to the development of plantar fasciitis, Dr. Daniels wrote [at pp. 2-3]:

Several studies have implicated body weight as a causative factor... This makes intuitive sense given that heel pain is considered an over-use syndrome associated with advancing in age. Increased body mass elevates the forces on the aging soft tissues that are less capable of tolerating the stresses.

Dr. Daniels concluded [at pp. 3-4]:

It is generally accepted that the primary etiology of heel pain is the result of repetitive tensile forces placed through aging tissue that is no longer capable of tolerating the stresses. While associated factors for this condition have been identified, no one activity is known to be the cause of heel pain.

In his draft report for OHCOW, Dr. Wong reviewed literature on risk factors for the development of foot pain and plantar

fasciitis. He noted that heel pain may arise from many different causes besides plantar fasciitis and he did a literature review.

With respect to floor surfaces, Dr. Wong noted studies in which individuals perceived soft mats to be more comfortable than a hard concrete floor, and one study reporting a somewhat increased incidence of plantar fasciitis among patients who walked on hard floors (i.e., an odds ratio of 1.3).

With respect to the studies addressing the question of whether standing is a risk factor in the development of foot pain and plantar fasciitis, Dr. Wong found only three studies that met his inclusion criteria. Two of these measured “foot pain” (which would include pain not only from plantar fasciitis but also from other conditions that could cause foot pain). According to Dr. Wong’s report, the one study that examined factors associated with plantar fasciitis reported some increase of plantar fasciitis among a group of individuals who were “mostly on feet all day” when compared to a group of individuals who were “rarely on feet” (odds ratio/prevalence relative risk of 1.9) and when compared to a group of individuals who were “standing or sitting during day” (odds ratio/prevalence relative risk of 1.47). Dr. Wong concluded that there was evidence that prolonged standing and walking are risk factors for developing foot pain (including plantar fasciitis) and that further studies are needed to adequately define exposure levels as well as to control for confounding factors.

Decision No. 1925/03 (February 12, 2004) referred to the above discussed Discussion Papers and report by Dr. Wong and stated [at paras. 31-34]:

...two of the three studies simply assessed whether prolonged standing caused non-specific foot pain. Neither of those studies seems to me to constitute weighty evidence that prolonged walking or standing triggers a biomechanical change that likely causes or accelerates the development of plantar fasciitis.

The third report cited by Dr. Wong...appears to have studied the impact of prolonged standing on individuals who already had plantar fasciitis.

I could find nothing in Dr. Wong’s Paper that addressed the significant point made by Dr. Harris and Dr. Daniels in their Discussion Papers, which is that plantar fasciitis is an inflammatory process that results from degenerative or aging changes in the foot, the healing of which can be prolonged by prolonged standing or walking.

In my view, both Discussion Papers support the opinion that the development of plantar fasciitis in employment involving prolonged standing or walking is merely evidence of the presence of the underlying condition and not proof of a causal contribution. Dr. Wong’s Paper does not refute this opinion in any substantial way.

Decision No. 1508/04 also reviewed Dr. Wong’s Paper. In addition to the reasons that had previously been given by Dr. Wong and the Tribunal for not attaching significant weight to the OHCOW paper, *Decision No. 1508/04* noted that two of the three studies reviewed by Dr. Wong had not taken body weight into account as a confounding factor. *Decision No. 1508/04* found [at para. 26] that “[g]iven the strong evidence of a link between weight and plantar fasciitis,” the failure of the two studies to take body weight into account as a confounding factor undermined the validity of the findings of those studies and meant that there was only one study to support Dr. Wong’s conclusions.

The Riddle study used a case-control design (matching 50 patients with plantar fasciitis with 100 controls that were matched for age and gender), to study whether certain risk factors for plantar fasciitis could be identified. The risk factors the study examined were limited ankle dorsiflexion, obesity, and work time spent weight bearing. The study estimated the increased risk of plantar fasciitis associated with these risk factors by calculating odds ratios (the odds of exposure among the subjects

with plantar fasciitis compared with the odds of exposure among the controls). The more the odds ratio deviated from 1, the stronger the association between the exposure variable and the plantar fasciitis.

The study reported that, of the factors studied, reduced ankle dorsiflexion appeared to be the most important risk factor for plantar fasciitis but that individuals with a body mass index (BMI) of more than 30 kg/m² and individuals who reported that they spent the majority of their workday on their feet also had an increased risk for the development of plantar fasciitis.

The study found that limited ankle dorsiflexion on the involved side, increased the risk of plantar fasciitis (from an odds ratio of 1 for those with more than 10 degrees of dorsiflexion to an odds ratio of 23.3 for those with less than zero degrees of ankle dorsiflexion).

The study also found that individuals who had a BMI of more than 30 kg/m² had a significantly increased risk of plantar fasciitis. The study found an odds ratio of 1.0 for those with a BMI of less than 25, an odds ratio of 2.0 for those with a BMI of 25 to 30 and an odds ratio of 5.6 for those with a BMI of more than 30. This finding suggests that a person who has a BMI of more than 30 has a substantially greater risk of developing plantar fasciitis than does a person with a BMI of less than 25. Not only did the study report a significantly increased risk of plantar fasciitis associated with increased BMI, it also found a “dose-response” relationship between plantar fasciitis and BMI (i.e., the higher the body weight, the greater the incidence of plantar fasciitis).

The study also reported that subjects who said they spent the majority of their workday on their feet had a significantly increased risk of plantar fasciitis. The study reported an odds ratio of 3.6 for those who said they spent the majority of their workday on their feet. It is noteworthy that this odds ratio is less than the 5.6 reported for those with a BMI of greater than 30. Thus, the strength of the association between plantar fasciitis and standing the majority of the workday was less than that between plantar fasciitis and a BMI of greater than 30.

The study did not collect data on the actual number of hours spent weight-bearing so it did not find a “dose-response” relationship between plantar fasciitis and the hours spent weight bearing. It also did not collect data about the nature of the weight-bearing activity (i.e., whether it involved standing, walking, or some combination of activities).

The Riddle study suggested that there was a biologically plausible explanation for causality with respect to the risk factors they studied. With respect to obesity and weight bearing, it stated:

The three risk factors identified in this study all appear to have a biologically plausible explanation for causality...

Individuals who spend the majority of the workday weight-bearing and those who are obese also theoretically have increased tensile loads on the plantar fascia compared with those who spend less time weight-bearing and those who have a normal body weight...

The Riddle study noted some limitations in inferring causation on the basis of their findings, and it suggested additional studies that could be done to provide stronger evidence of causation. However, on the basis of their findings, the authors of the study concluded:

Within the framework of a case-control study, we found what we consider to be good evidence of an association between plantar fasciitis and the risk factors of limited ankle dorsiflexion, obesity, and work-related weight-bearing. We also found “dose-

response” relationships between plantar fasciitis and the risk factors of limited dorsiflexion and body-mass index and offered biologically plausible arguments for these relationships...

Tribunal *Decision No. 1508/94* thoroughly reviewed the Riddle study as well as the Tribunal Discussion Papers and Tribunal decisions. It concluded that, like other epidemiological evidence, the Riddle study cannot prove causation in an individual case, but it can provide some support for finding a relationship between weight bearing and plantar fasciitis. After noting some of the limitations and strengths of the Riddle study, the *Decision No. 1508/04* Panel concluded that the study is useful evidence that must be interpreted cautiously, and considered in light of all the other evidence and the facts of the particular case. Among other things, *Decision No. 1508/04* noted that the very strong association between plantar fasciitis and a BMI greater than 30 (found in the Riddle study) means that decision-makers should be very cautious in cases where the BMI is greater than 30. However, after weighing evidence about a number of factors in that case (including the fact that that worker’s BMI did not exceed 30), the *Decision No. 1508/94* Panel granted entitlement to benefits for plantar fasciitis in that case.

(ix) Law and Board Policy

Section 13(1) of the WSIA states that a worker “who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.” Section 2(1) of the WSIA defines “accident” to include “disablement arising out of and in the course of employment.” Thus, in deciding whether the worker is entitled to benefits, it is necessary to ask whether the worker’s disability/impairment from plantar fasciitis “arose out of” her employment.

A disablement will be found to have arisen out of employment if the evidence establishes that there was a workplace injuring process that significantly contributed to the development of the condition that disables/impairs the worker. It is not necessary to establish that the workplace injuring process is the only cause of such a condition. If a worker has an underlying age-related (degenerative) condition and some workplace injuring process significantly contributes to the worsening of that condition, the disability from that worsened condition may be found to have arisen out of employment. However, if the underlying condition is merely symptomatic at work, and there is no workplace injuring process that significantly changes the underlying condition, any disablement resulting from the symptoms of the non-compensable underlying condition is non-compensable. It does not arise from employment. Also, in some cases, the contribution of a non-compensable factor may be so large that it reduces the role of the workplace contribution to insignificance.⁴

The medical evidence suggests that the primary cause of plantar fasciitis is likely age-related/degenerative changes to the plantar fascia, and that heel pain is a symptom of plantar fasciitis (possibly associated with the process by which tears in the degenerative tissue are repaired). As indicated by Dr. Craven, once plantar fasciitis develops, it is symptomatic during most weight bearing activities, but the fact that the worker notes symptoms at work does not mean that the work activities caused the plantar fasciitis or that the work activities aggravated the pathology responsible for the pain.

This distinction between pain that occurs at work because a worker has an underlying pre-existing condition and pain that is caused by some workplace injuring process (including an injury/injuring process that worsens an underlying pre-existing condition) has been described in a number of Tribunal decisions dealing with plantar fasciitis. *Decision No. 740/03* (July 9, 2003) (quoted and applied in *Tribunal Decisions No. 1925/03* and *227/05* (March 4, 2005)) described this distinction as follows [at para. 47]:

The worker’s plantar fasciitis was likely caused by the natural ageing process... Walking and weight bearing afterwards only

prolonged the symptoms and this explains why the condition improved after the worker was removed from this type of employment. The situation is similar to the “worker with a weak back” often referred to in Tribunal jurisprudence. This is the worker with a weak back who accepts employment in a physically exerting position which causes pain in his back, but no structural damage. This worker is not fit for that employment but it cannot be said that the employment caused the back pain or his inability to continue in that employment.

Thus, evidence that a worker experiences pain in the workplace is not sufficient to establish that a worker’s plantar fasciitis has arisen from some workplace injuring process. In the case of a worker who suffers pain from plantar fasciitis, it is necessary to decide whether there was some workplace injuring process (such as a workplace activity) that made a significant contribution to the development of the condition (i.e., plantar fasciitis) that is producing the symptoms (i.e., heel pain). Did the worker’s work activities injure her feet or did the worker have an underlying degenerative foot condition that was symptomatic during work activities, but that was not worsened significantly by those work activities?

A number of Tribunal decisions have dealt with the issue of entitlement to benefits for disablement from plantar fasciitis. In June 2005, these decisions were summarized as follows by *Decision No. 1969/04* [at para. 69]:

The Tribunal has adjudicated many claims for entitlement to benefits for plantar fasciitis. Thirteen recent decisions consider generic evidence from Dr. Daniels...about the etiology of plantar fasciitis. Of these, seven decisions deny entitlement for plantar fasciitis⁵... Two decisions grant entitlement...⁶ I note that the two decisions granting entitlement involved other job-related factors in addition to standing or walking. The worker in *Decision No. 1262/02* injured his feet when he jumped a distance of 10 feet landing on concrete. Entitlement is limited in *Decision No. 1105/04* to the left foot, the foot that the worker twisted as she turned to the tables to serve customers. Four decisions grant entitlement for aggravation of a pre-existing condition.⁷

More recent decisions continue to reach differing results depending on the circumstances of the particular case and the interpretation of medical and epidemiological evidence presented.⁸ Panels consider the facts of the individual case – including evidence about the nature of the workplace activities and any non-work risk factors for the development of plantar fasciitis – in light of general medical evidence about the nature of the condition and opinions about causation based on the facts of the particular case.

(x) The Findings

I found the worker to be a credible witness. I accept that she accurately described the nature of her job and the history of her symptoms of foot pain.

I accept the worker’s evidence that, after she began working as a full-time baker in May 1998, she spent most of her workday on her feet. During her shift, she had a couple of coffee breaks and a lunch break, but other than during these breaks, she was either standing or walking.

I also accept the evidence that she first experienced heel pain about one year after she became a full-time baker.

When she first experienced heel pain, she had also been doing some additional walking after work. Otherwise there was no evidence to suggest that the worker engaged in recreational activities that were more stressful to her feet than her work activities. Before May 1999 (when she experienced heel pain at work) she had not experienced heel pain while doing activities outside of work.

I accept the medical opinions that the diagnosis for the worker's foot condition is plantar fasciitis (although she also had a left heel spur that was removed at the time of her first left foot surgery). The doctors who have treated the worker have consistently diagnosed plantar fasciitis and the findings at the time of the 2002 surgery (that the fascia was "extremely thick"), are consistent with that diagnosis.

I find, however, that the evidence does not establish that it is probable that there was a workplace injuring process that significantly contributed to the development or worsening of the plantar fasciitis that was the source of the worker's heel pain.

This is not a case in which the worker sustained a traumatic injury to the foot that developed the plantar fasciitis (such as in *Decision No. 1262/02* (March 23, 2005) or in which the unilateral nature of the symptoms could be associated with more work-related activity involving the affected foot (such as in *Decision No. 1105/04* (October 29, 2004)).

This is also not a case in which the worker suffered some temporary symptoms of heel pain after she engaged in work activities that put unusual stresses on her feet (such as in the Tribunal decisions that have granted benefits for a temporary aggravation of pre-existing plantar fasciitis). This worker had been a full-time baker for one year before she first experienced heel pain and Board Medical Consultant Dr. Craven felt that this was significant. His opinion suggests that this delay in the onset of symptoms supports the notion that the worker's feet adapted to full-time work without difficulty. Moreover, even though the worker went on modified work for about four months (with reduced weight-bearing) several months after her condition was diagnosed, and even though she stopped working for a couple of months, her foot pain did not resolve and she had foot surgery. In spite of two surgeries, she continues to have ongoing foot pain problems resulting from plantar fasciitis.

Thus, the issue in this appeal is not an issue of whether there was some temporary worsening of the worker's plantar fasciitis. Instead, it is an issue of whether the worker's work activities significantly contributed to the development of her plantar fasciitis – the foot condition that has led to two surgeries and ongoing foot pain since May 1999.

In my view, the evidence does not support a finding that this worker's plantar fasciitis was caused by the type of flooring she walked and stood on at work. Although the surgeon who performed the 2000 surgery referred to the fact that the worker stood on hard floors in expressing the opinion that it would be reasonable to state that the worker's job would "exacerbate" (but not cause) her plantar fasciitis, he does not explain what he means by the term "exacerbate." It is therefore not clear whether he felt the worker's job exacerbated her condition in the sense that she experienced more pain while working, or in the sense that the job materially worsened the underlying condition of plantar fasciitis. His opinion does not provide a basis for concluding that standing on hard floors changed the underlying pathology of the condition that was causing her heel pain.

In my view, the general background medical evidence does not establish that there is a causal relationship between standing/walking on a hard surface and the development of plantar fasciitis.

There was some evidence that workers perceive softer flooring to be more comfortable, but that evidence does not establish that hard flooring causes plantar fasciitis. Both Dr. Harris and Dr. Daniels address this issue in their Discussion Papers. Dr. Harris notes the similarity between work and non-work walking surfaces. Dr. Daniels indicates that the consistency of the surface on which one walks has not been established as a causative or aggravating factor in the studies he reviewed. He also expresses an opinion as to why this would be the case. He noted that the type of force that is most likely associated with the development of plantar fasciitis (tensile forces placed through aging plantar fascia tissue) is related more to activities, body weight and stability of the arch than to the consistency of the walking surface. And the study cited in Dr. Wong's report

reported only a weak statistical association between hard flooring and plantar fasciitis.

In my view, the weight of the evidence is against a finding that the hardness of the floor surface the worker walked on at work significantly contributed to the development of her plantar fasciitis.

I also find that the evidence does not establish that the walking, standing, or lifting activities that the worker did at work significantly contributed to the development of her plantar fasciitis.

As indicated in the background medical evidence, the primary cause of plantar fasciitis is age-related/degenerative changes of the plantar fascia. According to Dr. Daniels, it is generally accepted that the primary etiology of heel pain is the result of repetitive tensile forces placed through aging tissue that is no longer capable of tolerating the stresses.

Both Dr. Harris and Dr. Daniels describe how weight-bearing (particularly with the tensile forces associated with walking) can lead to inflammation of the plantar fascia because the aging/degenerative tissue is no longer capable of tolerating the stress.

I agree with *Decision No. 1508/04* that the Riddle study provides some useful evidence that can be considered in conjunction with all the other evidence available when deciding a particular appeal, but the study must be “interpreted cautiously.” The Riddle study provides epidemiological evidence and it therefore cannot establish causation in the individual case. It studies statistical associations between possible risk factors and plantar fasciitis. It is a case-control study, and the population it studied was small (50 individuals with plantar fasciitis and 100 controls) relative to the large number of people with plantar fasciitis in the general population. None the less, even if the findings of that study are accepted as providing evidence of an association between plantar fasciitis and work-related weight-bearing, this does not establish that this worker’s plantar fasciitis arose from her employment.

Because the Riddle study simply asked subjects whether they spent the majority of their workday on their feet, it did not collect data on the actual number of hours spent weight bearing at work (or outside of work) or on the nature of weight-bearing activities involved (i.e., whether the weight-bearing consisted largely of walking rather than standing). It does not provide evidence of a “dose-response” relationship between time spent weight bearing and any corresponding increase in the incidence of plantar fasciitis.

On the other hand, the study found a stronger statistical association between weight exceeding 30 kg/m² and incidence of plantar fasciitis than it did between work-related weight bearing and plantar fasciitis, and it found a dose-response relationship between weight and the incidence of plantar fasciitis. The risk of plantar fasciitis increased with increasing body weight. And the study proposed a biologically plausible explanation for how body weight could cause plantar fasciitis (by increasing the tensile load on the plantar fascia).

In my view, both the Tribunal Discussion Papers and the Riddle study raise the possibility that weight-bearing associated with walking and standing may contribute to the development of plantar fasciitis. Walking and standing are normal aspects of daily living and, as such, they would not be considered to be a workplace injuring process unless they differed in some manner from non-work activities of standing and walking. In this case, the worker’s representative argued that the workplace activities did differ because they were more sustained at work than outside of work.

As indicated in the above discussion of the lack of dose-response information in the Riddle study, and the limited number of studies that appear to have directly addressed this issue at this time, there appears to be little evidence available about the type or quantity of weight-bearing that may be associated with the development or worsening of plantar fasciitis. On the other hand, the evidence with respect to body weight and its association with the development of plantar fasciitis is stronger, and it shows a dose-response relationship between increasing body weight and increased incidence of plantar fasciitis.

In my view, even if causal inferences can be made from the statistical findings of the Riddle study, they would suggest that the predominant risk factor the worker had for the development of plantar fasciitis was her body weight. The worker weighed 230 to 250 pounds at the time she developed plantar fasciitis. Her BMI exceeded 30. She had weighed more than 225 pounds for many years. Although she did some lifting at work, the weights she lifted at work added to the weight she bore for only brief and intermittent periods of time. When compared to the sustained impact of the worker's normal body weight, such intermittent additions to her weight-bearing load would, in my view, likely be insignificant.

Although it does appear that the worker stood and walked more at work than she did in the course of a normal non-work day, I am not persuaded that the currently available evidence linking "excess" workplace weight bearing to the development of plantar fasciitis is sufficiently strong for me to find that the worker's plantar fasciitis arose out of her employment – especially in the face of stronger evidence about the role of body weight in excess of 30 kg/m² (a BMI of more than 30).

In my view, the worker's BMI of more than 30 suggests an alternate non-work-related cause of the worker's plantar fasciitis – a cause that could well have resulted in the development of plantar fasciitis with the weight bearing associated with normal activities of daily living. I also note that, although the worker was younger than average when she developed plantar fasciitis, there was evidence that she had other age-related/degenerative changes affecting her left foot. An x-ray taken several months after she first developed the pain of plantar fasciitis reported that she had a large left heel spur.

In view of the evidence that plantar fasciitis is a common condition that is likely associated with aging/degenerative changes to the plantar fascia; evidence that plantar fasciitis occurs in a broad spectrum of individuals with a variety of occupations (including sedentary occupations); evidence that this worker had other degenerative changes affecting her foot (i.e., the heel spur); and evidence that raised the possibility that the contribution made by the worker's (non-compensable) body weight was so great that it was either an alternate cause of the worker's condition or it reduced the contribution of standing, walking or lifting at work to insignificance, I find that the worker's plantar fasciitis did not arise from her employment.

In my view, the evidence did not establish that there was a workplace injuring process that significantly contributed to the development of the worker's plantar fasciitis. The evidence for and against work-relatedness was not approximately equal in weight.

DISPOSITION

The worker's appeal is denied.

Appeal dismissed.

1. Harris, W. Robert. Tribunal Discussion Paper on *Plantar Fasciitis*, July 1996.

2. *Id.*

3. Riddle D.L., Pulisic M., Pidcoe P., Johnson R.E. Risk Factors for Plantar Fasciitis: A Matched Case-Control Study. *The Journal of Bone and Joint Surgery*, 2003 Vol. 85-A (5) 872-7 with Erratum Vol. 85-A(7): 1338.
4. Tribunal *Decision No. 915* (1987), 7 W.C.A.T.R. 1 at 142 and *Decision No. 652/87* (1988), 10 W.C.A.T.R. 75.
5. *Decisions No. 316/05* (April 14, 2005), *227/05* (March 4, 2005), *1077/04* (February 18, 2005), *218/05* (January 31, 2005), *769/04* (December 23, 2004), *633/04* (July 29, 2004), *1925/03* (February 12, 2004).
6. *Decisions No. 1262/02* (March 23, 2005), *1105/04* (October 29, 2004).
7. *Decisions No. 85/05* (January 21, 2005), *84/98R* (May 12, 2004), *1942/00* (April 27, 2004), *1348/03*.
8. *Decisions No.1508/04, 1526/05* (January 20, 2006) and *2111/05* (November 29, 2005) allowing entitlement; *Decisions No. 1064/05* (July 15, 2005), *1681/05* (November 17, 2005)and *1160/04* (November 9, 2005) denying entitlement.



Decision No. 105/06

Panel: Peckover (Vice-Chair), Christie, Crocker

Decision — May 19, 2006

Neutral Citation: 2006 ONWSIAT 1118

Assessment of employers (retroactivity).

Date between audit and notification to employer of result was too long for original audit notice to have effect – Date of notification letter should be used, with retroactivity of reclassification to January 1 of that year.

The employer was a property management company that began operation in 1998. It also did engineering consulting. The employer was originally classified in Rate Group 905 for operation of apartments and Rate Group 958 for offices of engineers. The Board audited the employer in November 2000. As a result of the audit, the Board classified all the employer's operations in Rate Group 905, retroactive to January 1, 2000. The employer appealed a decision of the Appeals Resolution Officer regarding the retroactivity of the classification change. The appeal was allowed.

The auditor made the recommendation to change the classification in August 2001, but that was not communicated to the employer until May 2002 and was not confirmed in writing until June 2002. The Board blamed the length of time on the employer for not responding to requests by the auditor for further information. However, the Panel found no reasonable explanation for the auditor's lack of follow-up with the company between July 2001 and December 2001 when she finally addressed her inquiries to an appropriate person at the employer. There was also no reasonable explanation for failing to supply to the employer a copy of the auditor's memo in August 2001. Had the employer had notice of the impending change in 2001, it could have passed on costs to the end user. The absence of notification of the impending change had a major detrimental effect on the employer.

The Panel concluded that the delay between the audit date in November 2000 and the notification date in 2002 was too long for the original audit notice to continue to have effect. The date the notification letter was sent in June 2002 should be utilized as the notification date. In accordance with Board *Operational Policy Manual*, Document No. 14-02-06, the classification change should be retroactive to January 1 of the year of the notification date, which is January 1, 2002.

Cotisation des employeurs (effet rétroactif).

L'intervalle entre la vérification et la transmission des résultats à l'employeur était trop long pour utiliser l'année de l'avis initial de vérification – La nouvelle classification devait entrer en vigueur le 1^{er} janvier de

l'année de la lettre de transmission des résultats.

L'employeur était une entreprise de gestion immobilière dont l'exploitation avait débuté en 1998. Cette entreprise offrait aussi des services de consultation en génie. La Commission avait commencé par placer l'entreprise dans le Groupe 905 (Services d'appartements et de condominiums) et dans le Groupe 958 (Services techniques/aux entreprises). La Commission avait procédé à une vérification en novembre 2000. À la suite de la vérification, la Commission avait placé l'entreprise dans le Groupe 905 rétroactivement au 1^{er} janvier 2000. L'employeur a interjeté appel de la décision du commissaire aux appels concernant la date d'entrée en vigueur rétroactive du changement de classification. Le Tribunal a accueilli l'appel.

La vérificatrice avait recommandé le changement de classification en août 2001; cependant, cette recommandation avait été communiquée à l'employeur en mai 2002 et confirmée en juin 2002. La Commission soutenait que l'employeur avait causé le long retard en ne répondant pas aux demandes de renseignements de la vérificatrice. Le comité ne voyait toutefois aucune raison valable pouvant expliquer pourquoi la vérificatrice n'avait pas fait de suivi auprès de l'entreprise entre juillet 2001 et décembre 2001, quand elle avait fini par adresser ses demandes de renseignements au contact voulu au sein de l'entreprise de l'employeur. Il n'y avait pas non plus de raison valable pouvant expliquer pourquoi l'employeur n'avait pas reçu une copie du mémo d'août 2001 de la vérificatrice. Si l'employeur avait été informé du changement à venir en 2001, il aurait pu récupérer les coûts supplémentaires qui en découleraient auprès de ses clients. L'absence d'avis au sujet du changement à venir avait été très nuisible à l'employeur.

Le comité a conclu que l'intervalle entre la vérification de novembre 2000 et la transmission des résultats à l'employeur était trop long pour utiliser l'année de l'avis initial de vérification. La Commission avait avisé l'employeur des résultats de la vérification par lettre en juin 2002. Conformément au document no 14-02-06 du *Manuel des politiques opérationnelles* de la Commission, le changement de classification devait être rétroactif au 1^{er} janvier de l'année de cet avis, à savoir le 1^{er} janvier 2002.

Tribunal Decisions Considered:

- *Decision No. 1193/04I* (2004), 70 W.S.I.A.T.R. 199 apld

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
 - Document No. 08-01-02 (December 21, 1994) (since superseded)
 - Document No. 11-01-03 (April 6, 2001)
 - Document No. 14-02-06 (August 18, 2000)
 - Document No. 14-02-07 (January 31, 2002)

APPEAL by the employer from a decision of the Appeals Resolution Officer regarding retroactivity of a change in the employer's classification.

May 19, 2006. THE TRIBUNAL: —

BEFORE:

S. Peckover, Vice-Chair
M. Christie, Member Representative of Employers
J. A. Crocker, Member Representatives of Workers

HEARING:

January 19, 2006, at Toronto, Oral

DECISION(S) UNDER APPEAL:

WSIB ARO Decision dated November 17, 2003

APPEARANCES:

For the worker: Not participating
For the employer: Robert Cronish, Lawyer

(i) Introduction

The employer, a property management company which also did engineering consulting, began operations in late 1998. It was advised on October 20, 2000 that it would be the subject of an audit on November 17, 2000. The property management division focussed on the management of residential, single and multi-family residential rental properties across the province. The firm also provided engineering consulting, including energy studies for owners of apartments, technical building audits, and management consulting for reserve funds.

Prior to the audit, the firm was classified partly in Rate Group (RG) 905, Classification Unit (CU) 7511-001, for operators of apartments, and partly under RG 958, CU 7752-000 for offices of engineers.

As a result of the audit, the auditor determined, and recorded in an Auditor's Memo dated August 14, 2001, that RG 958 was to be deleted with respect to this employer, and those employees previously classified under RG 958 were to be reclassified into RG 905. The rationale for the change was that the firm was a property management company that hired superintendents and maintenance individuals. Under the scope of CU 8851-001, all property management companies were included under RG 905. The change was to be effective January 1, 2000, based on the retroactive policy from *Operational Policy Manual*, Document No. 14-02-06.

The Board documented its activities during 2001, in respect of the employer's audit, as follows:

- An additional audit visit occurred on February 6, 2001, to verify payroll segregations for years during which the employer and others in the group had multiple classifications.
- The Panel notes that this meeting was with the payroll person handling the affiliated companies' payroll. Although the information was obtained with respect to the affiliated companies, the Case Record documents that the payroll person was unsure as to where the information could be obtained for the employer, as the employer had begun handling its own payroll in 2000. PS of the employer testified that he was unaware that this visit had occurred.
- The auditor wrote to the controller for the affiliated companies in March 2001, after leaving him several telephone messages about the employer which were unanswered. In the letter, she advised him that she would need to view various minute books. She wrote a follow-up letter on May 2, 2001, again requesting access to the minute books.
- On July 10, 2001, the auditor wrote to the employer, asking specific questions to verify the firm's business activities, and requesting a response by August 1, 2001. PS testified that, to the best of his knowledge, no-one in the company have ever received this letter.

- The auditor indicated there was verbal communication with the affiliated companies' controller, but no response to her inquiries with regard to this employer, until October 2001. On November 13, 2001, she sent a letter identical to the July 10, 2001 letter, but addressed it specifically to the affiliated companies' controller.
- At some unspecified time, the controller provided the auditor with the name and telephone number of RW, one of the two partners of the employer firm, but the number was incorrect. The auditor obtained the correct number in November 2001. She claimed she left RW a message, but received no response.
- On December 27, 2001, the auditor sent RW a letter, and attached a copy of the November 13, 2001 letter. RW responded with the requested information in a letter dated January 16, 2002, which the audit department received on January 28, 2002.

The final results of the audit were communicated orally to the company in a meeting on May 13, 2002, and were confirmed in a letter dated April 22, 2002, but mailed on June 27, 2002.

The employer objected to the reclassification, and to the retroactivity to January 1, 2000. In a letter dated August 28, 2002, the auditor responded to the objection as follows:

The firm is in the business of managing properties while hiring maintenance technicians and superintendents. The Employer Classification Manual (ECM) scope of rate group (rg) 905, classification unit (cu) 7511-000 states:

"Property management companies employing maintenance help to maintain apartment buildings are also included.... (under rg 905)".

The WSIB has in place a retroactive policy on classification changes. Classification changes are limited to the period from the notification date back to the beginning of the calendar year which includes the notification date. For audit purposes, the notification date is the date of the audit visit indicated on the initial audit notice. In this firm's situation, the notification date was November 16, 2000. Therefore, any classification change is effective January 1, 2000. This is based on Operational Policy Manual (OPM) document number 14-02-06.

The employer appealed in a letter dated August 28, 2002, arguing that the employer properly belonged within RG 958, and had been improperly placed within RG 905, resulting in a liability of \$109,956.11. Further, the retroactive reclassification to January 1, 2000 was disputed. The employer felt that the arguments relating to business activity were best dealt with at the Appeals Tribunal, and therefore it requested that a final decision of the Board be issued so that an appeal could be formulated to the Tribunal.

In a decision letter dated January 13, 2003 in response to the employer's objection, the auditor reiterated and confirmed her previous decision. The file was referred to the Appeals Branch. At the Appeals Branch, the employer agreed to proceed by way of written submissions.

The employer's submissions sought reinstatement of RG 958 with respect to the management performed on behalf of third parties, given the segregation of payroll from RG 905 (the RG for the Property Management staff employed to maintain apartment buildings on behalf of a third party). Also, it was submitted that, since the date of the Auditor's Memo was August 14, 2001, the date of reclassification should be January 1, 2002, to allow the employer to recoup the costs charged by the Board to third parties in the current year. Since the Board Auditor did not complete the audit until sometime after March 10,

2002, it was submitted that an audit date effective January 1, 2002 was in accordance with the real merits and justice of the issues in dispute, as well as with Board policy. The employer also sought interest on money paid to the Board arising from the Auditor's decision.

In a decision dated November 17, 2003, the ARO ruled as follows:

- There was no payroll segregation, and no evidence that payroll segregations were in fact maintained for any administrative work done in support of the engineering services. Therefore, no proportion of ancillary payroll could be attributed to the engineering classification. The engineering rate therefore was not applicable to any of the employer's payroll relating to engineering.
- Property management employers who directly hire janitorial or maintenance staff are excluded from RG 958. As the employer had specifically indicated that it hired its janitorial and maintenance staff, she concluded that the Auditor had correctly allocated the entire payroll of the employer to RG 905.
- On the retroactivity issue, the ARO chronicled the delays in obtaining information from the employer, which resulted in the audit being incomplete until early 2002. While the audit department did acknowledge a two-month delay between April and June 2002, the ARO found that this two-month delay was inconsequential, after several months of delay which she attributed solely to the employer. Therefore, the audit department's delay had no prejudicial effect on the employer.
- On the issue of when the employer had notice of the change in the Rate Groups, the ARO had the following to say:

The audit process exists to uncover mistakes and correct them. In the case under review, it became evident to the WSIB when it conducted the first audit visit in November of 2000 that the employer was probably classified incorrectly. It was made evident to the employer as well, by way of a series of requests for information geared toward determining how the employer's payrolls should have been classified. So, as of at least December of 2000, when the auditor wrote to [payroll employee], the employer was made aware that it should not continue to rely on being able to report in the way it had been doing.

...

Conclusion

The relevant retroactivity policy mandated a January 1, 2000 effective date for the classification change. There were no exceptional circumstances to justify applying any other effective date.

The employer appeals from this decision.

(ii) The Issues

The Hearing-Ready letter identified the issues before us to be the following:

1. reclassification of a portion of the employer's operations from RG 958 (CU7752-000) to RG 905 (CU7511-001);
2. retroactivity of the reclassification to January 1, 2000, rather than January 1, 2002; and
3. payment of interest on any overpayment of premiums resulting from the allowance of either of the above issues.

At the hearing, Mr. Cronish indicated that the main issue before us was the retroactivity of the reclassification to January 1, 2000, although if successful, the employer would like interest on the overpayment in accordance with Board policy. He indicated that he was withdrawing the appeal or the reclassification issue. The reclassification issue therefore was not before us.

(iii) The Employer's Testimony

PS, a part-owner of the company, testified that his company was included under the umbrella of a very large construction and property company with many organizations within its ambit. He and a partner, RW, held a minority interest in the employer; the balance was held by two families who had an interest in the other organizations. The employer's audit formed part of a massive auditing undertaking of all of the companies in this group.

PS testified that there was no indication, up until the May 2002 meeting, that the audit would result in a reclassification into a RG with higher premiums. At that time, the Board told them that, because of the employment of property management people within the organization, they would be placing everyone in the company in the higher RG. Prior to that, they had used their own interpretation of the best fit. They had been of the opinion that they were entitled to two RG classifications. The company still engages in professional engineering as part of the business, as well as property management.

PS referred to a contract in the case materials with a not-for-profit organization within the province. His company had quoted on the Request for Proposal (RFP), and because other companies within the umbrella group had previously done some work for this organization, his company was the successful bidder. The contract contained a fixed price commitment which became the annual budget. Any additional costs which came along during the term of the contract, therefore, had to be absorbed until the renewal date, at which time a new fixed price would be negotiated, and the additional fixed costs would be passed along to the not-for-profit organization. The fees were not subject to negotiation from April 1999 to December 31, 2001. Thereafter, there were renewals as of January 1, 2002 and January 1, 2003. As of the January 1, 2003 renewal, the employer was able to include the higher premiums in the budget, as it had been notified in May 2002 of the change. However, they were unaware of the adverse result at the January 1, 2002 renewal, and therefore were unable to include the additional costs in the budget. The retroactive charge in 2002 dealt with a contract period that had already closed, and they could not go back to the client and talk to them about it. Had he been made aware of the intended change at the time of the August 14, 2001 audit memo, he could have incorporated the changes into the negotiations for the January 1, 2002 renewal. He stated that the \$109,000 increase in premiums was a lot of money which he, his partner, and the two families had to fund from their own pockets.

PS indicated that, as the company had begun operations in late 1998, at the time, this was the company's primary contract, although the company continued to conduct engineering and consulting work as well. They have since entered into another contract with another government agency. The bulk of the work is in the NFP leasing sector.

PS also indicated that the auditor had told his partner, RW, that everything looked fine, and there was nothing to be concerned about. Therefore, the May 13, 2002 meeting and its revelation of a \$109,000 liability was a very large shock.

With respect to the Board's allegations that the employer had failed to respond to the auditor's inquiries, or to supply necessary information, PS testified that his organization was in the same building as the other related companies were, although they have since moved to other premises. The employer had its own full-time receptionist, and the auditor could have come to visit him or anyone else at any time. She did not do so, but attempted to obtain the required information from

other sources within the umbrella group. Her letters were addressed to the controller and the payroll person for the parent company. When the employer began operations in late 1998, there were only a few employees, so the parent company handled its payroll. However, as of 2000, the employer handled all of its own payroll and human resources issues, and was completely independent of the other companies, in terms of its internal operations. The auditor therefore was seeking information from the wrong people during 2001.

While the ARO attributed the delay in responding (from March 14, 2001 until January 28, 2002) to the employer, PS testified that his company was not aware of any request for information until it received a letter dated December 27, 2001 addressed to RW

When the auditor did finally contact RW in late 2001, she received a response very quickly. A response to the December 27, 2001 request was sent on January 16, 2002, which the audit department received on January 28, 2002. The auditor had claimed that the parent company's controller at some point in time in 2001 had given the auditor RW's telephone number, but it was incorrect. PS indicated that the company's name and suite number were posted in the lobby of the building, and the auditor could simply have walked in and asked either the receptionist, PS, or RW for any information she required. She chose not to do so.

In summary, PS reiterated that, if the Auditor's Memo dated August 14, 2001 had been communicated at that time, the company was locked in to the fixed rates until December 31, 2001, but could have renegotiated as of January 1, 2002. The Board knew they were wrongly classified, but never told them.

(iv) The Representative's Submissions

Mr. Cronish argued that the Auditor's Memo, dated August 14, 2001 and entitled "Recommendation/Issue Sheet", clearly established that the auditor intended to reclassify the employer into the new RG. However, this information was not communicated to the employer until the meeting on May 13, 2002. The oral notification was followed by a letter dated April 22, 2002, but which the Board did not actually post until June 27, 2002. Since the Notice of Audit was dated October 20, 2000, this consisted of a period of time in excess of 20 months during which the Board knew that the RG would change, but did not communicate this information to the employer.

In support of his argument, Mr. Cronish referred to WSIAT *Decision No. 1193/04I* (2004), 70 W.S.I.A.T.R. 199, as well as a number of others, all of which deal with whether the period of time between the issuance of a Notice of Assessment and completion of the audit was reasonable. He submitted, on the basis of the analysis in *Decision No. 1193/04I*, that a 20-month period is too long, and that therefore, the date of audit should not be used for the determination of the retroactivity date. He argued that the Board policies are all discretionary regarding the date of retroactivity, and that the Board had made no representations regarding retroactivity. He submitted that the fact that it did not participate in the hearing indicated that it had no evidence to assist in the explanation of the delay.

He also submitted that the Board had real reservations about changing the rate grouping, or it would not have taken so long to issue the April 22, 2002 letter (which came out in June 2002). Also, the fact that the auditor kept asking for additional information throughout 2001 (albeit to the wrong people), was further evidence of the Board's concern as to whether changing the rate group would be correct. On this basis, he submitted that it was patently wrong not to communicate the August 14, 2001 Auditor's Memo outlining the concerns. Further, it was wrong not to attend at the premises to obtain the

required information, especially when the premises were in the same building as the other four companies they were auditing.

Mr. Cronish further submitted that the auditor's explanation for the delay in responding to the letter, which the ARO accepted, was incorrect, and that there was nothing that was not within the Board's control at all times.

On the doctrine of detrimental reliance, Mr. Cronish argued that the employer was unable to mitigate its liability at the renewal of the contract, as it was unaware of the changes until two years after the fact. The Board knew that the changes were coming as early as November 2000, but failed to communicate this fact so that the charges could be passed along to the end user.

Mr. Cronish argued that the other side of not communicating was that the Board created a paper trail to justify that its employees did not do what they were mandated to do, which was to attend at the employer's premises to get the information they needed.

On the issue of applicable Board policy, Mr. Cronish indicated that Board *Operational Policy Manual* (OPM) Document No. 08-01-02 states that the Board may apply back premiums, when changing rate groups, for the current year and up to two years in the past. Document No. 14-02-06, however, the newer policy, limits retroactivity to the current year only. The latter document was in effect as of July 1, 2000.

Mr. Cronish submitted that an employer has a reasonable expectation that an audit will be completed in a timely manner, or within a reasonable time period thereafter. He argued that making the entire period of the delay subject to the reclassification is not in accordance with the merits and justice of the case. He again referred to *Decision No. 1193/04I*, and argued that the periods in question in the employer's case were even longer than those in that decision. In the interests of consistency in decision-making, he submitted that the audit notice was moot. He asked that the Panel make the first classification as of 2002. While this result would not be perfect, as it still would result in some liability to the employer, it would substantially reduce the \$109,000 due. He stated that, if there was a way to move it to 2003, he would ask us to consider that.

(v) The Law and Policy

Board OPM Document No. 14-02-06 "Employer Premium Adjustments" reads as follows with respect to the issues before us:

POLICY

In general, the WSIB makes debit or credit premium adjustments to employer accounts

- from the notification date back to the beginning of the second full calendar year prior to the notification date (two prior years),
or
- from the notification date back to the actual date that the change giving rise to the adjustment took place, if the change occurred within the two prior year period.

The four exceptions to this general two-year rule are

- classification changes...

GUIDELINES

...

Exception rules

Classification changes

For classification changes, premium adjustments are generally limited to the period from the notification date back to the beginning of the calendar year which includes the notification date.

...

Notification dates

...

For WSIB's audit area the notification date for a premium adjustment is the date of the audit visit indicated on the initial audit notice.

Application date of the policy

This policy applies to all classification decisions made on or after July 1, 2000 on cases with a notification date of May 15, 2000 or later.

Also of interest is Document No. 11-01-03, "Merits and Justice", the relevant portions of which read as follows:

Exceptions to the relevant policies

There may be rare cases where the application of a relevant policy would lead to an absurd or unfair result that the WSIB never intended. Therefore, a decision-maker may depart from a policy if it can be shown that the case has exceptional circumstances that justify doing so.

The decision-maker must clearly identify the exceptional circumstances and explain in the decision why the relevant policy is not applicable.

The question which arises is the appropriate "notification date". The Board found that the notification date was the date of the audit visit. The issue for this Panel is whether that date is appropriate in all the circumstances of this particular case. We find that it is not, in light of the exceptional factors of this case.

On this issue, Mr. Cronish referred to *Decision No. 1193/04I*. The decision dealt with a fact situation not unlike the one before us. The employer in that case was notified in January of 1999 that it would be audited on March 1, 1999. It was informed of the results of the audit by letter dated July 6, 2000. Mr. Cronish, who was counsel for the employer on that file as well, argued that a Notice of Audit will be considered no longer in effect if there is excessive delay between the date of the audit visit and the time that the audit results are communicated to the employer. He submitted that the delay of 16 months in this case brought it within the ambit of those findings. *Decision No. 1193/04I* contains an overview of a number of Tribunal

decisions which deal with the date of notice of an audit, as compared to the date on which the audit concluded. The following excerpts from that decision are instructive in the matter [at paras. 103-113]:

We adopt the reasoning of *Decisions No. 1161/03I2* and *485/04*. In *Decision No. 1161/03I2*, the panel found [at paras. 49-50]:

The Board's policies on retroactivity contemplate that there must be reasonable limits on the periods of time during which a classification change will be applied retroactively. On its face, Document No. 14-02-06 suggests that the Board intended that a shorter period of retroactivity should apply than had previously been considered appropriate under Document No. 08-01-09. The older policy stated a general rule that classification changes would be retroactive in the relevant "current year" and for two prior years. Document No. 14-02-06 provides that classification changes will be retroactive only from the notification date back to the beginning of the calendar year that includes the notification date.

We read this wording to be based on an assumption, implicit in the wording, that the audit will commence on the date stipulated and will be completed within a period of time thereafter that is reasonable in the circumstances of the audit. We do not read the policy to imply that the Assessment Branch may send a Notice of Audit merely stipulating a date, and may then delay the commencement or completion of the audit indefinitely, for years or even for decades, with the effect that the full period of the delay is subject to retroactive classification. We do not consider such an interpretation consistent with the likely intent of the policy or with the merits and justice of the case.

The panel found the notice of audit to have been "spent" for the purposes of the application of Document No. 14-02-06. In *Decision No. 485/04*, the panel applied similar reasoning.

On the facts of *Decision No. 1161/03 I2*, the delay between the audit visit and communication of the audit decision letter was 18 months. There was also the special circumstance that the employer had been explicitly informed that it was to be given a more advantageous classification, at the time of the audit, but that, when the decision letter was issued, its classification was instead changed with negative effect.

...

In *Decision No. 1161/03I2* the panel found [at para. 51]:

In this case we consider the delay between the audit visit on January 27, 2000, and the final communication of the audit results in August 2001, too long for the Notice of Audit sent on January 7, 2000, to continue to have effect, for the purposes of the application dates set out in Document 14-02-06, or for the purposes of establishing the commencement date for the reclassification under that policy. This is especially the case given the Board's initial oral communication to the employer that the audit would result in its reclassification into a partially lower Rate Group, rather than a higher Rate Group, and given the period of time during which the audit did not proceed.

We consider that reasoning also applicable to the delay between the audit visit of March 1, 1999, and the letter of July 6, 2000, in this case. We consider that there are also exceptional circumstances in this case. The assessments that have been processed against the employer as a result of the audit decision are very significant and have resulted in a windfall for the Board. The employer should have been aware that it might be liable for the assessments owed by the contractors, given that it had not obtained clearance certificates. However the effect on the allocation of common costs of the Board's decision to act under section 141(2), rather than under section 141(6), has resulted in a significant additional cost to the employer, and benefit to the Board, because common costs have been allocated in respect of deemed workers. This is not a cost that would have been imposed upon the TPIs if the matter had proceed[ed] in the normal course and is not an impact that the employer was likely to have expected.

...

On these facts, we consider the delay too long for the date of the audit visit to be considered to be the relevant notification date for the purposes of Document No. 14-02-06, such that Document No. 08-01-09 will continue to apply. We find that the notice of audit visit had ceased to have effect for the purposes of Document No. 14-02-06, by the time that the results of the audit were communicated to the employer. We consider that any other finding would result in manifest unfairness. ... Given the absence of any applicable audit notice, the effective notification date is the date of the decision letter. Applying Document No. 14-02-06, the changes determined by the auditor have effect from January 1, 2000.

Applying the above criteria to the case before us, we note that the employer was notified on October 20, 2000 of an impending audit on November 17, 2000. While the auditor prepared an Auditor's Memo, dated August 14, 2001, which indicated her intention to eliminate the lower-rate RG and place all of the employer's workers into the higher category, this was not communicated to the employer until the meeting of May 13, 2002. Written confirmation was supplied in the form of a letter dated April 22, 2002, but mailed on June 27, 2002. As the Board advised the employer that the six-month limitation period for appealing the decision would run from June 27, 2002 (the date of mailing of the decision letter), the Panel finds that this is the applicable date for purposes of calculating the time in this case. The time period between the initial audit date (November 17, 2000) and the date of completion of the audit (June 27, 2002), therefore, was approximately 19 months. On the face of it, this time period appears to be too long. However, we need to look at the reasons for the delay in completing the audit before we can say definitively that this is the case.

The auditor and the ARO both blamed the employer for not responding to the auditor's requests for further information in order to complete the audit. While the auditor apparently attempted to obtain additional information with respect to the company which would assist her in making a final decision, she did not direct her inquiries to the appropriate persons until December 27, 2001. Prior to that, she contacted persons in the parent companies, with whom she was dealing on an ongoing basis with respect to the audits of the related companies. Those individuals were unable to assist her with respect to this company. She claimed to have attempted to contact RW at some unspecified time in 1991, but was given the wrong telephone number, and was unable to obtain the correct one until November 1991. There also is a copy of a letter on file dated July 10, 2001, addressed to the corporation rather than to an individual, and requesting specific information to verify the company's business activities. PS testified that, to the best of his knowledge, this letter never was received at the employer's premises. The Panel accepts that this was the case, as, once the December 27, 2001 letter, addressed to RW, was sent, the company supplied the requested information by letter dated January 16, 2002. We find the employer responded diligently and promptly to the December 27, 2001 letter.

Given that the auditor was in the building on an ongoing basis with respect to the audits of the other companies, it seems to the Panel that, if she truly was concerned about obtaining the information and about the ostensible lack of response to her queries in a timely manner, she could have attended at the employer's office and made appropriate inquiries in person. While it is true that this company was affiliated with the others being audited, and therefore the other companies could have notified this company of the auditor's requests for further information, PS indicated that, other than being aware that an audit was ongoing for the affiliated companies, he had heard nothing from the other companies with respect to anything to do with this company's audit. It is also true that, while the company had originally used the services of the controller and the payroll service provider for the affiliated companies, it had begun handling all of these matters internally as of the year 2000. It ought to have been clear to the auditor as early as February 6, 2001, when the additional audit visit occurred to verify payroll segregations in all of the affiliated companies, that this corporation had begun handling these matters internally in the year

2000, as the affiliated companies would not have had this information from 2000 and on. It therefore would have been more appropriate to deal with individuals within the company itself as a point of first reference, rather than the employees of the affiliated companies, to obtain documentation with respect to this company. While she did address her initial letter of July 10, 2001 to the company itself, which would indicate that she was beginning to follow this route, when no response was received, she returned to the affiliated companies' controller to attempt to obtain a response. There is no indication that she attempted to follow up with the company itself to obtain a response to her July 10, 2001 letter, or that she attempted to communicate the August 14, 2001 memo to the company during 2001. While the controller was able to supply the requested information for the affiliated companies, he was unable to do so with respect to this one. On November 13, 2001, the auditor wrote to the controller to reiterate that she did not have the requested information with respect to this company. It is unclear as to what unfolded next, but the auditor then wrote to RW at the company on December 27, 2001 requesting the information. As we noted above, the company responded to this letter on January 16, 2002. We also note that it would have been a very simple matter to obtain RW's telephone number, as the company was and is listed in the telephone book. The auditor's actions in following up with the affiliated company's controller, rather than with the company itself, ultimately resulted in a delay in obtaining the information from July 2001 to early 2002, when the company received the December 27, 2001 letter.

The Panel finds that there does not appear to be a reasonable explanation for the auditor's lack of follow-up with the company itself at some point between July 10, 2001, and December 29, 2001, when she finally addressed her inquiries to the appropriate person at the employer, or for not supplying a copy of the Auditor's Memo, dated August 14, 2001, with the employer during 2001. It also is unclear as to why the auditor waited from February 6, 2001, the date of the second audit visit to the affiliated companies, until July 2001 to ask for the additional information. Further, we find that the absence of notification of the impending change in 2001 had a major detrimental effect on a fledgling company. That adverse effect could have been avoided in its entirety had the employer been notified of the impending change in 2001, as it could have passed the costs along to the end user.

We therefore find that, due to the long delay and the exceptional circumstances, the audit date is not the appropriate notification date. The delay was too long for the original audit notice to continue to have effect. June 27, 2002, the date that the decision letter was mailed, is to be utilized as the notification date. Under OPM Document No. 14-02-06, quoted above, premium adjustments for classification changes are retroactive only to January 1 of the year of the notification date. The employer's change in rate group therefore is retroactive to January 1, 2002. We agree with Mr. Cronish's observation that, given a notification date of June 27, 2002, a retroactivity date to January 2003 is not possible, given the wording of this policy.

(vi) Interest on the Overpayment

According to the ARO, audit adjustments relating to 2000, 2001, and January to May of 2002 were processed on June 25, 2002. The employer paid the 2000 and 2001 premiums by the due date of July 31, 2002. Since we have found that the effective date of the retroactivity clause is January 2, 2002, rather than January 1, 2000, the employer is entitled to a refund of the premiums paid with respect to that two-year period, and also to interest in accordance with OPM Document No. 14-02-07, "Employer Non-compliance Interest and Charges".

DISPOSITION

The appeal is allowed. The reclassification is retroactive to January 1, 2002, rather than January 1, 2000. The employer is entitled to interest on the overpayment for the period between January 1, 2000 and January 1, 2002, in accordance with

Document No. 14-02-07.

Appeal allowed.



Decision No. 873/04

Vice-Chair: Moore

Decision — February 14, 2006

Neutral Citation: 2006 ONWSIAT 723

Accident (occurrence) – Delay (reporting injury) – Early and safe return to work (co-operation) (worker) – Availability for employment (vacation).

Worker suffered injury at end of shift on Friday, and took scheduled vacation for one week – Worker should have reported accident on Monday – Decision to remain on vacation precluded employer from initiating ESRTW process – Worker was not entitled to LOE benefits for that week.

The worker appealed a decision of the Appeals Resolution Officer denying entitlement for an accident that the worker claimed she suffered when she slipped and fell on ice at the end of her shift on Friday, February 23, 2006. The appeal was allowed in part.

The worker was off work the following week on a scheduled vacation. She reported the accident on March 5, 2006. The Board originally granted entitlement for the accident and allowed benefits from March 5 to March 16. On appeal by the employer, entitlement was reversed.

On the evidence, the Vice-Chair was satisfied that the worker suffered the accident as claimed. The worker was entitled to the benefits as originally granted by the Board from March 5 to March 16.

It was not unreasonable that the worker failed to report the accident on February 23. However, the worker should have reported the accident on Monday, February 26. In effect, the worker chose to remain on vacation rather than return to work and report the accident. This precluded the employer from initiating the ESRTW process. It was clear from the evidence that the employer had an aggressive ESRTW program. It is possible that medical authorization may have permitted the worker to be off work during that week but no such authorization was obtained. The worker's loss of earnings during that week resulted from her decision to take vacation, not from the compensable injury. The worker was not entitled to LOE benefits during that week.

Similarly, the worker was not entitled to benefits for May 17. At the time she took the day off as a personal day and did not report a recurrence, thus preventing the employer from offering modified work.

Accident (événement imprévu) – Retard (rapport de lésion) – Retour au travail rapide et sécuritaire (collaboration) (travailleur) – Disponibilité pour prendre un emploi (vacances).

La travailleuse avait subi une lésion à la fin de sa période de travail un vendredi avant de partir pour une semaine de vacances déjà prévue pour la semaine suivante – La travailleuse aurait dû faire rapport de l'accident le lundi – En décidant de demeurer en vacances, la travailleuse avait empêché l'employeur de mettre en marche le processus de RTRS – La travailleuse n'avait pas droit à des prestations pour PG pour cette semaine.

La travailleuse a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de lui reconnaître le droit à des prestations pour un accident qu'elle disait avoir subi quand elle était tombée après avoir glissé sur de la glace à la fin de sa période de travail le vendredi 23 février 2006. Le Tribunal a accueilli l'appel en partie.

La travailleuse avait pris des vacances déjà prévues la semaine suivante et avait fait rapport de l'accident le 5 mars 2006. La Commission avait commencé par lui reconnaître le droit à une indemnité pour l'accident et à des prestations du 5 mars au 16 mars. L'employeur a interjeté appel, et la Commission a annulé cette décision.

Compte tenu de la preuve, le vice-président était convaincu que la travailleuse avait bien subi l'accident allégué. Il a conclu que la travailleuse avait droit à des prestations du 5 mars au 16 mars, comme la Commission l'avait déterminé initialement.

Il n'était pas déraisonnable de la part de la travailleuse de ne pas faire rapport de l'accident le 23 février; cependant, elle aurait dû le faire le lundi 26 février. La travailleuse avait choisi de demeurer en vacances plutôt que de retourner au travail et de faire rapport de l'accident, ce qui avait empêché l'employeur de mettre en marche le processus de retour au travail rapide et sécuritaire (RTRS). La preuve indiquait clairement que l'employeur avait un vigoureux programme de RTRS. La travailleuse aurait peut-être pu obtenir un billet de médecin l'autorisant à demeurer en congé pendant cette semaine mais elle n'en avait pas obtenu et sa perte de gains résultait de sa décision de prendre des vacances, et non de la lésion indemnisable. La travailleuse n'avait pas droit à des prestations pour PG pour cette semaine.

La travailleuse n'avait pas non plus droit à des prestations pour le 17 mai. Elle avait pris une journée de congé pour raisons personnelles et elle n'avait pas fait rapport d'une récurrence, ce qui avait empêché l'employeur de lui offrir du travail modifié.

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
- s. 43(1)
- s. 43(7)

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
- Document No. 18-03-02 (October 12, 2004)
 - Document No. 19-02-02 (October 12, 2004)

Cross-References:

- *Decision No. 873/04E* (June 15, 2004) [2004 ONWSIAT 1222]

APPEAL by the worker from a decision of the Appeals Resolution Officer denying entitlement for an accident.

February 14, 2006. THE TRIBUNAL: —

BEFORE: J.P. Moore, Vice-Chair
HEARING: February 14, 2006 at Toronto, Oral
DECISION UNDER APPEAL : WSIB ARO Decision dated October 12, 2001

APPEARANCES:

For the worker: W. Nash, Canadian Union of Postal Workers
For the employer: S. Postill, Lawyer

REASONS

(i) Introduction

On March 5, 2001, the worker reported to her employer that she had slipped on ice in the course of her employment on February 23, 2001, injuring her neck and right shoulder. As a result of the injury, the worker missed two weeks of work, from March 5 to March 16, 2001. The worker sought entitlement to loss of earnings (LOE) benefits for this lost time.

During the workweek between the accident date and the reporting date, the worker was on pre-scheduled vacation. The worker did not initially claim entitlement to benefits for that lost time.

The worker was treated with physiotherapy for approximately six weeks after the injury. She was able to return to modified duties on March 19, 2001, and eventually returned to regular duties.

On May 16, 2001, the worker experienced a recurrence of her injury. She took the following day off work. She did not formally report the recurrence or the day off as work-related, but took a “lieu day”.

After investigating the worker’s claim, the worker’s Claims Adjudicator allowed the worker initial entitlement and granted the worker to entitlement to health care benefits and LOE benefits from March 5 to March 16, 2001, inclusive. The Adjudicator did not make any determination with respect to the worker’s entitlement during the period of vacation from February 26 to March 2, 2001, nor did the Adjudicator make any decision regarding the worker’s entitlement to LOE benefits on May 17, 2001.

The employer objected to the Adjudicator’s decision. The employer’s objection was allowed by the ARO in the decision noted above. The ARO denied initial entitlement, and ruled that the worker was “not entitled to benefits for the period from March 5 to 16, 2001”. The worker appealed that decision to the Tribunal.

(ii) The Issues

The principal issue in this appeal is whether the worker has initial entitlement for an accident that she claims occurred at work on February 23, 2001. If that initial entitlement is allowed, there are secondary issues concerning the nature of the entitlement the worker has as a result of the allowance of the claim itself.

(iii) The Decision

I am persuaded, on a balance of probabilities, that the worker likely suffered an injury in the course of her employment on February 23, 2001. The worker is entitled to health care benefits for this injury. She is also entitled to LOE benefits during some, but not all, of the periods in issue.

(iv) Analysis

(a) Initial Entitlement

The worker claims that, at the end of her shift on Friday, February 23, 2001, she slipped and fell on an icy sidewalk. According to the worker, she returned to her central workstation and intended to report the injury. However, upon arriving at the station, the worker noticed that a co-worker had also slipped and fallen and suffered a significant laceration. According to the worker, her supervisors were busy dealing with that particular injury. She testified that she decided not to report her injury immediately, because she had experienced previous similar falls with no significant injury and was planning to be off on vacation the following week, during which time she felt she would recover from any ill effects from the fall.

The material before me included a written statement from a co-worker indicating that he suffered a significant laceration injury on Friday, February 23, 2001.

The worker testified that she informed a co-worker of her accident as they drove home together at the end of their shift on February 23, 2001. A written statement by the co-worker confirms that the worker did mention that she had fallen at work on that date.

The worker testified that on the morning after the fall, she experienced significant pain in her neck and right shoulder. She stated that she made an appointment to see a massage therapist for treatment that same day. A written statement from a massage therapist, C. Koschir, dated December 3, 2001, confirms that the worker sought therapy on February 24, 2001. The therapist's handwritten note states: "Her pain was located in her upper trapezius muscle resulting from a fall she had at work Friday, February 23rd 2001."

The worker testified that she continued to experience pain over the weekend and, on Monday, February 26, 2001, contacted the office of her family physician to arrange for an appointment. According to the worker, the physician's receptionist informed her that the physician was away for a week. The worker stated that she then made an appointment to see the physician upon his return on Monday, March 5, 2001.

The worker stated that, during the week of February 26, 2001, she rested and took medication, but continued to experience disabling pain.

The worker was scheduled to return to work on Monday, March 5, 2001. Because of continuing pain, she contacted her supervisor and informed him of the accident of February 23, 2001, and stated that she would be off work in order to seek medical attention. She saw her family physician, Dr. G. Pontarini, that same day. Dr. Pontarini diagnosed a "twisted cervical spine at work". Dr. Pontarini authorized the worker to be off work and prescribed physiotherapy.

The worker was off work until March 19, 2001, when Dr. Pontarini authorized her to return to modified duties. In a conversation with the worker's Claims Adjudicator, on May 22, 2001, Dr. Pontarini confirmed that he authorized the worker to be off work from March 5 to March 19, 2001. The Adjudicator's note of that conversation reads as follows:

I asked him how long he had felt the worker would be absent from work, and he told me he had initially thought she would be off between 10 days and 2 weeks. I asked him if he had felt she could return to any type of modified, light duties at that time, and he told me he didn't feel she had been able to return to light duties, as she was in severe pain and needed to rest her neck and shoulder.

As I noted above, the worker eventually returned to full duties. However, on May 16, 2001, she experienced a recurrence of shoulder pain and asked her supervisor for the next day off as a "lieu day". She saw her family physician on that day and was authorized to return to work on her next workday, Monday, May 20, 2001.

On May 22, 2001, the worker informed her Adjudicator of these events. With respect to the alleged recurrence on May 16, 2001, the Adjudicator's notes read as follows:

The worker told me that on 16-May-01 during her shift at work, she noticed her neck getting progressively more sore. By the end of her shift, she couldn't even move her neck. She went to a walk-in clinic that day and the doctor prescribed anti-inflammatories and muscle relaxants for her. The worker told me these have helped quite a lot. The doctor also sent her for an x-ray. She suffered from a severe muscle spasm, according to the doctor. The worker told me she took 17-May-01 off work, using a lieu time day that was owed to her. I asked her if she had told her employer about the flare-up, and she said she had when she asked for the day off.

I note that there is no documentation supporting the worker's assertion that she received medical treatment on or around May 17, 2001.

I am persuaded, on a balance of probabilities, that the worker likely had an accident at work on February 23, 2001. The worker's testimony regarding the events surrounding the accident appears to be corroborated by other evidence.

The worker testified that, when she returned to her workstation to report her accident, her supervisors were busy with another co-worker who had been injured. The injured co-worker provided a written statement indicating he did, in fact, injure himself on that date and noticed the worker waiting "behind him" to see their supervisor.

The worker testified that she informed another co-worker of her injury on their drive home that evening. That co-worker has provided a written statement confirming that this occurred.

Most significantly, in my view, the worker stated that she sought massage therapy treatment the following day for the injury she experienced the day before. That fact has been confirmed by the massage therapist, a health professional, who has indicated in a handwritten note that she saw the worker on February 24, 2001, for an injury involving the right shoulder, which the worker attributed to a fall the day before.

In my view, the worker's failure to report the accident until March 5, 2001, has ramifications for the nature of the worker's entitlement, but does not refute the validity of the worker's claim that she suffered an injury at work on February 23, 2001. For these reasons, therefore, I find that the worker did have an injury by accident in the course of her employment on February 23, 2001. I also find that this accident resulted in an injury to the worker's right shoulder and neck, for which the worker required medical treatment. Consequently, I allow the worker entitlement for health care benefits for the injury.

(b) Entitlement to LOE benefits

The Board denied the worker entitlement to LOE benefits from March 5, 2001 to March 16, 2001, inclusive, on the basis of the absence of evidence of a workplace accident, as claimed by the worker. Having found to the contrary, I reverse the Board's decision regarding entitlement to LOE benefits during that period of time. I allow the worker LOE benefits from March 5 to March 16, 2001, inclusive.

Ms. Postill submitted on behalf of the employer that the worker ought not to be granted full LOE benefits during that period of time, because the worker was only partially disabled and likely capable of performing modified duties. Ms. Postill noted evidence on file that the worker was sent a notice on March 6, 2001, indicating that modified duties would be provided to her.

However, I am persuaded by the medical evidence that the worker was likely fully disabled during that two-week period. In my opinion, this fact is established by Dr. Pontarini's statement to the worker's Adjudicator, on May 22, 2001, that he did not feel the worker could return to "any type of modified, light duties at that time". His reasons for this conclusion were that the worker "was in severe pain, and needed to rest her neck and shoulder".

I also note, in this regard, that a Functional Abilities Form prepared by Dr. Pontarini, on March 6, 2001, indicated that the worker required rehabilitative treatment and was not capable of returning to work without restrictions. Dr. Pontarini then left blank the portion of the form that asked him to describe what the worker was capable of doing. I infer from this that he did not believe the worker was capable of working in any capacity at that time.

I find, therefore, that the worker was unable to work from March 5 to March 16, 2001, inclusive, and was entitled to full LOE benefits during that period of time.

With respect to the worker's entitlement during her week of vacation, and for the day lost following the claimed recurrence of May 16, 2001, I note that Ms. Postill took the position that the Tribunal did not have jurisdiction over that issue because the ARO's ruling had been limited to a reversal of the Adjudicator's decision allowing entitlement from March 5 to March 16, 2001.

It is not clear to me from the record why the Claims Adjudicator, in her initial determination, did not consider the worker's entitlement to benefits during the week from February 26 to March 2, 2001, or for the day lost from work on May 17, 2001. It appears that the Adjudicator was aware that the worker was off work on these occasions but simply failed to consider the worker's entitlement on those dates.

In fairness to the Adjudicator, it is not clear that the worker formally requested entitlement to benefits for those dates.

The ARO ruled on the correctness of the Adjudicator's decision and, in the absence of a decision by the Adjudicator, made no ruling with respect to the vacation week or the lieu day.

Tribunal decisions have generally taken the position that the Tribunal has jurisdiction over final decisions made by the Board on issues that the Board either considered or ought to have considered in the course of its adjudication. In my opinion, the issue of the worker's entitlement to benefits from February 26 to March 2, 2001, and on May 17, 2001, were matters that the Claims Adjudicator ought to have addressed. Had she done so, the ARO would also have considered the worker's entitlement

during those periods of time and issued a final decision. As Tribunal decisions have noted, the Board's failure to adjudicate an issue that was exclusively or implicitly before the Board cannot deprive the Tribunal of jurisdiction.

Consequently, I am persuaded that the issues of the worker's entitlement to benefits from February 26 to March 2, 2001 and on May 17, 2001, were implicitly before the ARO and ought to have been the subject of the ARO's "final decision" on the worker's entitlement as a result of the injury of February 23, 2001.

Having so ruled, however, I am persuaded that the worker is not entitled to LOE benefits during each of those time periods.

Section 43 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) stipulates that a worker who has a loss of earnings as a result of the compensable injury is entitled to LOE benefits. Document No. 18-03-02 of the Board's *Operational Policy Manual* stipulates that, during any period in which a worker has a loss of earnings, the Board will pay LOE benefits for a full or partial loss of earnings provided that the worker cooperates in the early and safe return to work process with the accident employer.

I also note, in this regard, that section 43(7) of the WSIA stipulates that the Board may reduce or suspend payments to a worker during any period "when the worker is not co-operating" in the ESRTW process. Document No. 19-02-02 of the Board's *Operational Policy Manual* summarizes the co-operation requirements imposed on the worker and the accident employer by section 40 of the Act as:

- maintaining communication with each other
- working toward identifying a suitable and available job for the worker, and
- fulfilling reporting obligations to the WSIB...

In the present case, while accepting that the worker might reasonably have delayed reporting her accident on February 23, 2001, I am not persuaded that it was reasonable of her not to report the accident on the following Monday, February 26, 2001. The worker's reasoning was that, although her condition was significantly worse than it had been on February 23, 2001, she thought she would wait to report her injury until she was next expected to be at work. In making that choice, in my view, the worker chose, in effect, to remain on her vacation, rather than returning to work during that week. And although the worker may have felt that she was incapable of returning to work that week, the fact is that, by not reporting the accident on February 26, 2001, she precluded the accident employer from initiating the early and safe return to work process stipulated in the legislation.

It is clear from the evidence that the employer has an aggressive ESRTW program. That program was initiated immediately upon the employer learning of the worker's accident. That process would, no doubt, have been initiated had the worker reported her injury on February 26, 2001 rather than on March 5, 2001. At that time, the worker would have had to engage in the ESRTW program rather than taking vacation. It may well have been that medical authorization would have permitted the worker to be off work during that week, but no such authorization was obtained. In essence, the worker made a choice to take vacation rather than participate in the ESRTW program.

That being the case, in my opinion, it cannot be said that the worker's loss of earnings during that week was the result of her compensable injury; it was, rather, the result of a pre-arranged decision to take vacation.

Moreover, even if the loss of earnings during that week could be said to be the result of the compensable injury, the worker failed in two respects to meet the co-operation requirements under the legislation, in that she failed to maintain communication with the employer, and failed in her reporting obligations to the Board. In the absence of any communication on the worker's part with either the employer or the Board during the week of February 26 to March 2, 2001, the worker has failed to comply with the co-operation requirements imposed on her under the legislation and would not be entitled to any benefits during that time.

I conclude, therefore, that the worker was not entitled to any LOE benefits from February 26 to March 2, 2001.

With respect to the day lost on May 17, 2001, the same reasoning applies. Although the worker indicated that she informed her supervisor that her injury had worsened on May 16, 2001, the worker again made a personal decision to treat the day she took off on May 17, 2001 as a personal day rather than as lost time associated with her compensable injury. Had the worker reported the recurrence on May 16, 2001 as a compensable matter, again the employer would likely have offered her modified duties. Instead, the worker made a personal decision to take a day off.

The worker testified that she sought medical treatment on either May 16 or May 17, 2001, for the alleged recurrence. However, there is no evidence of such treatment. Consequently, the worker took May 17, 2001 off without medical authorization and without giving her employer an opportunity to reinstate the ESRTW process.

Consequently, I deny the worker entitlement to LOE benefits on May 17, 2001.

DISPOSITION

The worker's appeal is allowed in part.

The worker has initial entitlement to benefits for an injury affecting her neck and right shoulder and is entitled to loss of earnings benefits from March 5, 2001 to March 16, 2001.

Appeal allowed in part.



Decision No. 971/06

Vice-Chair: Dimovski

Decision — June 5, 2006

Neutral Citation: 2006 ONWSIAT 1228

Health care (clothing allowance) – Health care (appliances or apparatus) (back brace) – Health care (independent living) (severely disabled worker) – Board Directives and Guidelines (health care) (independent living).

Board clothing allowance policy allows exemption from annual application for severely injured workers – Definition of “severely impaired” in Board independent living allowance policy could not be imported into clothing allowance policy, which has different objective – In circumstances, worker with 30 % pension was entitled to exemption from annual application for clothing allowance.

The worker suffered a compensable back injury for which he has been wearing a lumbosacral support since 1984. In 2002, his pension was increased to 30%. The Board had been paying a clothing allowance since 1984. The worker asked for an exemption from the requirement in Board policy of applying annually for the clothing allowance. The worker appealed a decision of the Appeals Resolution Officer denying the exemption. The appeal was allowed.

Board *Operational Policy Manual*, Document No. 17-07-03, provides that workers must apply annually for a clothing allowance. There is an exemption from the requirement of annual application for severely injured workers whose need for the device is unlikely to change from year to year. The Appeals Resolution Officer noted the definition of “severely impaired” in Document No. 17-06-02 regarding independent living allowances. That document provides that workers are severely impaired if they have pensions totalling at least 100%. The Appeals Resolution Officer found that the worker in this case did not qualify as a severely injured worker.

The Vice-Chair found that the definition of “severely impaired” in the independent living allowance policy could not be imported into the clothing allowance policy, which has a different objective. There was no indication in either policy that the definition in the independent living allowance policy should be used for clothing allowances. There was no definition of “severely injured.” In this case, the worker was 78 years old with a significant back condition and a need for the lumbosacral support that is unlikely to change from year to year.

The Vice-Chair concluded that the worker was a severely injured worker and that he was entitled to the exemption from applying annually for the clothing allowance.

Soins médicaux (allocation vestimentaire) – Soins médicaux (accessoires ou appareils) (corset orthopédique) – Soins médicaux (autonomie) (travailleur atteint de déficience grave) – Directives et lignes directrices de la Commission (soins médicaux) (autonomie).

La politique de la Commission sur les allocations vestimentaires prévoit que les travailleurs gravement blessés peuvent être exemptés de l'obligation de présenter chaque année une demande – La définition de « travailleurs atteints d'une déficience grave » de la politique de la Commission sur les allocations de soutien à l'autonomie ne pouvait pas être importée dans la politique sur les allocations vestimentaires, laquelle avait un objectif différent – Dans les circonstances, le travailleur qui avait droit à une pension de 30 % avait le droit d'être exempté de l'obligation de présenter chaque année une demande d'allocation vestimentaire.

Le travailleur avait subi une lésion indemnisable au dos en raison de laquelle il devait porter une ceinture lombaire depuis 1984. En 2002, sa pension avait été portée à 30 %. La Commission lui versait une allocation vestimentaire depuis 1984. Le travailleur avait demandé d'être exempté de l'obligation de présenter chaque année une demande d'allocation vestimentaire. Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels refusait de lui accorder l'exemption demandée. Le Tribunal a accueilli l'appel.

Le document no 17-07-03 du *Manuel des politiques opérationnelles* prévoit que les travailleurs doivent présenter chaque année une demande d'allocation vestimentaire. Les travailleurs gravement blessés dont les besoins ne sont pas susceptibles de changer en ce qui concerne l'utilisation de l'appareil en question sont exemptés de l'obligation de présenter chaque année une demande d'allocation. Le commissaire aux appels a noté la définition de « travailleurs atteints d'une déficience grave » dans le document no 17-06-02 sur l'allocation de soutien à l'autonomie. Ce document prévoit que, pour être réputé atteint d'une déficience grave, un travailleur doit avoir des pensions totalisant au moins 100 %. Le commissaire aux appels a conclu que le travailleur en l'espèce ne remplissait pas les critères voulus pour être réputé atteint d'une déficience grave.

Le vice-président a conclu que la définition de « travailleurs atteints d'une déficience grave » dans la politique sur les allocations de soutien à l'autonomie ne pouvait pas être importée dans la politique sur les allocations vestimentaires, laquelle avait un objectif différent. Il n'y avait rien dans l'une ou l'autre des politiques indiquant que la définition de la politique sur les allocations de soutien à l'autonomie devait être utilisée pour la politique sur les allocations vestimentaires. Il n'y avait pas de définition de « gravement blessé ». Âgé de 78 ans et atteint d'importants problèmes de dos, le travailleur en l'espèce avait besoin d'une ceinture lombaire et il était improbable que cela changerait d'année en année.

Le vice-président a conclu que le travailleur était un travailleur gravement blessé et qu'il avait le droit d'être exempté de l'obligation de présenter chaque année une demande d'allocation vestimentaire.

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
 - s. 102
 - s. 126

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
 - Document No. 17-06-02 (October 12, 2004)
 - Document No. 17-07-03 (January 3, 2006)

APPEAL by the worker from a decision of the Appeals Resolution Officer denying the worker an exemption from the requirement of annual application for a clothing allowance.

June 5, 2005. THE TRIBUNAL: —

BEFORE: J. Dimovsk, Vice-Chair
HEARING: May 16, 2006, at Toronto, Written
DECISION(S) UNDER APPEAL: WSIB ARO decision dated March 31, 2005

APPEARANCES:

For the worker: Mr. DC, Consultant
For the employer: Did not participate

REASONS

(i) Introduction

The worker appeals an Appeals Resolution Officer (ARO) decision dated March 31, 2005. That decision concluded that since the worker received a 30% permanent disability (PD) award for his low back, he was not severely impaired and therefore not exempt from applying annually for his clothing allowance. Thus the issue in dispute is whether the worker is exempt from annually applying for a clothing allowance.

In a decision dated October 27, 2004, the ARO concluded that the worker was entitled to retroactive clothing allowance for a one-year period from November 2002. The ARO concluded:

In November 2002, [the worker's] low back condition was found to have deteriorated and as a result, his pension award was increased to 30%. Noting this and Dr. Song's note of March 2004, I am satisfied he continues to need a lumbosacral support. In addition the evidence supports [the worker] continues to wear the lumbosacral support with the same frequency as was prescribed.

The Board had provided the worker a yearly clothing allowance from 1984 to November 2002.

In his Clothing Allowance Application Form dated October 28, 2002, which was referenced by the ARO, the worker confirmed he had been wearing a lumbosacral support since September 1984. He also noted that he continued to wear his support from ten to fourteen hours per day, seven days per week. The worker stated that his support wears down his clothing at the contact areas.

In a letter dated February 23, 2005, the worker's representative writes the following in part, in response to the ARO decision dated October 27, 2004:

Please note a second issue of appeal was my argument the worker's 30% PD would consider him a severely injured worker who received an initial clothing allowance for an approved device and whose need for the device is unlikely to change from year to year.

He should therefore be exempted from the requirement to re-apply for the allowance each year. This is supported by Dr. Song's reports dated November 11 & 18, 1999.

This issue was not addressed in your decision therefore the worker is required to re-apply each year for the clothing allowance. I therefore ask you to reconsider your October 27, 2004 decision with a view to incorporating a decision regarding the worker's level of severe impairment and exempt him from the requirement to re-apply for the allowance. Please note WSIAT Decision NO. 3059/00 [sic] which considered the worker severely injured with a 25% PD for his low back.

In a letter addressed to the Tribunal dated February 7, 2006, the worker's representative noted that the worker's need for lumbosacral support would not likely change and therefore, his continuing need for clothing allowances would not likely change and thus the worker should be exempt from applying for such benefits yearly.

(ii) Reasons

On January 1, 1998, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) took effect. However, pursuant to section 102 of the WSIA, the *Workers' Compensation Act* continues to apply to pre-1998 injuries. Since the worker's accident occurred on January 13, 1983, the pre-1985 Act [R.S.O. 1980, c. 539] continues to apply, as amended by the WSIA.

Pursuant to WSIA section 126, the Board has identified certain policies applicable to this appeal. I have considered these policies as necessary in deciding this appeal. In particular, I have considered *Operational Policy Manual* (OPM) Document No. 17-07-03, "Clothing Allowance," which states in part:

POLICY

The WSIB

- may authorize clothing allowances for workers with permanent impairments, to replace or repair clothing worn or damaged by the wearing of an assistive device or prosthesis (device)
- determines what are devices within the meaning of the *Workplace Safety and Insurance Act* (the Act). Use of these devices may entitle a worker to a clothing allowance when all entitlement criteria are met
- determines the maximum annual clothing allowance based on the usual patterns of damage caused by the devices and reasonable replacement costs for the clothing
- does not pay for more than two clothing allowances per year
- may request evidence of the actual damage caused to clothing by the use of an authorized device.

GUIDELINES

To be considered for a first clothing allowance

- the worker must have reached maximum medical recovery (MMR), and have a permanent impairment/disability that results in

either a non-economic loss (NEL) benefit, or a permanent disability (PD) benefit

- the WSIB must have authorized and/or supplied the device
- the worker must have worn the device one full year after receiving the permanent impairment/disability benefit.

Applying for the allowance

Workers must apply annually for a clothing allowance by submitting a written application and information indicating the type of damage to the clothing.

Exception

Severely injured workers who receive an initial clothing allowance for using an approved device, and whose need for the device is unlikely to change from year to year, may be exempted from applying annually for the allowance.

Entitlement criteria

Workers applying for a clothing allowance must annually submit a report from the treating health professional indicating

- the objective clinical findings confirming the continuing need for the device, and
- that the worker is wearing the device with the same frequency as was prescribed.

NOTE

The WSIB retains the right to determine the appropriateness of all health care and to request the report be completed by an orthopaedic specialist when necessary.

Exceptions

Exceptions may be made for workers who do not meet the entitlement criteria, and

- began using the device before November 1, 1996, and
- continue to be dependent on the device.

Entitlement to the device and the related clothing allowance continues as long as the treating health professional's clinical report authorizes the continued use of the device.

When exceptions are made, the WSIB may recommend other types of treatment to help reduce dependency on the device. This treatment must be designed to return the worker to MMR after the use of the device is reduced or discontinued.

A clothing allowance restored under the exceptions category is payable as of the worker's 1999 NEL/PD anniversary date for the preceding 12 months only.

In her decision dated March 31, 2005, the ARO referred to the definition of "severely impaired" as found in OPM Document No. 17-06-02, entitled "Independent Living Allowance" which states in part:

POLICY

Severely impaired workers are entitled to an annual independent living allowance to

- help them function as independently as possible where they work, where they live, and in society, and
- improve their quality of life.

GUIDELINES

Severely impaired

Workers are considered severely impaired if their disabilities/impairments are

- permanent and have been rated for either permanent disability (PD) benefits totalling at least 100%, or non-economic loss (NEL) benefits totalling at least 60%, or
- likely to be permanent in the opinion of a WSIB medical consultant, and are likely to meet one of the criteria above.

To determine whether workers who have both PD and NEL benefits are severely impaired, the WSIB must review these benefits under one rating schedule (i.e., either the PD or the NEL rating schedule, whichever is most appropriate). Once the benefits are reviewed under one schedule, the WSIB applies the rule described above.

Essentially, the ARO found that since the worker's condition did not fit the definition of *severely impaired* as found in the Independent Living Allowance (ILA) policy, the worker could not fall within the Clothing Allowance policy, which provides that *severely injured* workers may be exempt from annually applying for their clothing allowances.

I do not accept that the definition of *severely impaired* as defined in the ILA policy can be imported into the policy, with a different objective. There is no indication from the ILA policy that it is supposed to be imported to other Board policies or that the Clothing Allowance policy is defined in relation to the ILA policy. Additionally, there is no statutory definition of *severely injured* and as such, it is left to the discretion of a decision-maker to determine on a case-by-case basis. In this case, this now 78-year-old-worker has a significant PD pension for his low back. In the worker's circumstances, his disability is severe. I find that he is a "severely injured worker" under the Clothing Allowance policy.

The evidence indicates that the worker's usage of his lumbar support has been significant since his accident and that he has had his clothing allowances approved annually since 1984. There is no indication from the file that the worker's use of the device will change from year to year and it is unlikely to change. As such, I am persuaded the worker's need for a clothing allowance will remain the same as well. I therefore exempt him from applying annually under the Clothing Allowance policy.

DISPOSITION

The appeal is allowed.

Appeal allowed.



Decision No. 581/06

Vice-Chair: Ryan

Decision — April 21, 2006

Neutral Citation: 2006 ONWSIAT 888

Hearing loss (flat audiometric curve) – Hearing loss (deterioration after removal from exposure) – Tinnitus – Merits and justice – Board Directives and Guidelines (hearing loss) (individual susceptibility).

Worker met noise exposure criteria but not hearing loss criteria in Board policy – Exception in policy for individual susceptibility only applied where worker met hearing loss criteria but not exposure criteria – Worker was entitled to health care benefits for hearing loss based on merits and justice, considering long work history and medical opinions – Since worker now had accepted claim for hearing loss, he also had entitlement for tinnitus.

A construction ironworker appealed a decision of the Appeals Resolution Officer denying entitlement for noise-induced hearing loss and tinnitus. The appeal was allowed.

The worker retired in 1990 at age 57. He had sufficient noise exposure for entitlement within Board guidelines. The first audiogram was not performed until 1992. That audiogram indicated hearing loss of 23.75 decibels in the right ear and 21.25 decibels in the left ear. A second audiogram in 1995 indicated hearing loss of 37 decibels in the right ear and 35 decibels in the left ear.

The hearing loss did not meet the minimum Board requirement of 25 decibels (or even 22.5 decibels) in each ear for health care benefits. There is an exception in Board policy for individual susceptibility. However, the Vice-Chair noted that this exception applies to a situation where a worker meets the hearing loss criteria but not the exposure criteria, whereas in this case the worker met the exposure criteria but did not meet the hearing loss criteria.

The Vice-Chair found that there were unique circumstances in this case warranting the granting of entitlement on the real merits and justice of the case. The worker had been a construction ironworker for 28 years. Two otolaryngologists concluded unequivocally that the hearing loss was noise-induced.

The Appeals Resolution Officer also found that the pattern of hearing loss was not typical of occupational hearing loss. The Vice-Chair noted that Tribunal decisions have accepted entitlement for noise-induced hearing loss even when the pattern of hearing loss is not clearly consistent with occupational noise. In this case, the two otolaryngologists concluded that the

worker suffered from noise-induced hearing loss. Neither of them suggested that the pattern of hearing loss was inconsistent with noise-induced hearing loss.

The Vice-Chair concluded that the worker had entitlement for hearing loss and was entitled to health care benefits for that condition.

The Vice-Chair also concluded that the worker had entitlement for tinnitus. He fulfilled the Board policy requirement of an accepted claim for occupational noise-induced hearing loss.

Déficience auditive (courbe audiométrique plane) – Déficience auditive (détérioration après retrait du lieu où se produit l'exposition) – Acouphène – Bien-fondé et équité – Directives et lignes directrices de la Commission (déficience auditive) (prédisposition individuelle).

Le travailleur remplissait le critère d'exposition au bruit de la politique de la Commission mais non celui relatif à la déficience auditive – L'exception relative à la prédisposition individuelle prévue dans la politique s'appliquait seulement quand le travailleur remplissait le critère relatif à la déficience auditive mais non celui de l'exposition – Le travailleur avait droit à des prestations de soins de santé pour déficience auditive en fonction du bien-fondé du cas et de la justice compte tenu de ses longs antécédents professionnels et des opinions médicales – Étant donné l'acceptation de sa demande pour déficience auditive, le travailleur avait aussi droit à une indemnité pour acouphène.

Un métallurgiste du secteur de la construction a interjeté appel de la décision par laquelle le commissaire aux appels refusait de lui reconnaître le droit à une indemnité pour déficience auditive et acouphène causées par le bruit. Le Tribunal a accueilli l'appel.

Le travailleur avait pris sa retraite en 1990 à l'âge de 57 ans. Son exposition au bruit cadrait avec le critère prévu dans la politique de la Commission. Son premier audiogramme, qui datait seulement de 1992, indiquait une déficience auditive de 23,75 décibels dans l'oreille droite et de 21,25 décibels dans l'oreille gauche. Son deuxième audiogramme, qui datait de 1995, indiquait une déficience auditive de 37 décibels dans l'oreille droite et de 35 décibels dans l'oreille gauche.

Le travailleur ne remplissait pas le critère de 25 décibels (ou même de 22,5 décibels) dans chaque oreille ouvrant droit à des prestations de soins de santé. La politique de la Commission prévoit une exception pour tenir compte de la prédisposition individuelle. Le vice-président a toutefois noté que cette exception s'appliquait aux cas où le travailleur remplit le critère relatif à la déficience auditive mais non celui de l'exposition, alors qu'en l'espèce le travailleur remplissait le critère d'exposition mais non celui relatif à la déficience auditive.

Le vice-président a conclu que le cas présentait des circonstances exceptionnelles justifiant de reconnaître le droit à une indemnité en fonction du bien-fondé du cas et de la justice. Le travailleur avait été métallurgiste dans la construction pendant 28 ans, et deux otolaryngologistes avaient conclu sans équivoque que sa déficience auditive avait été causée par le bruit.

Le commissaire aux appels a aussi conclu que le profil de la déficience auditive n'était pas typique d'une déficience auditive professionnelle. Le vice-président a noté que le Tribunal avait déjà reconnu le droit à une indemnité dans des cas où le profil de la déficience auditive n'était pas clairement compatible avec une déficience auditive professionnelle. En l'espèce, les deux otolaryngologistes avaient conclu que le travailleur souffrait d'une déficience auditive due au bruit, et ni l'un ni l'autre n'avait semblé indiquer que le profil de déficience auditive n'était pas compatible avec une déficience auditive due au bruit.

Le vice-président a conclu que le travailleur avait droit à une indemnité pour déficience auditive et qu'il avait droit à des prestations de soins médicaux pour cette affection.

Le vice-président a aussi conclu que le travailleur avait droit à une indemnité pour acouphène. Il respectait le critère de la politique ouvrant droit à une telle indemnité puisqu'il avait droit à une indemnité pour déficience auditive causée par le bruit.

Tribunal Decisions Considered:

- *Decision No. 96/93* (March 16, 1993) consd
- *Decision No. 704/97* (February 8, 2000) [2000 ONWSIAT 335] consd
- *Decision No. 2992/00* (November 30, 2000) [2000 ONWSIAT 3355] consd
- *Decision No. 400/04* (March 17, 2004) [2004 ONWSIAT 523] consd
- *Decision No. 1909/04* (November 25, 2004) [2004 ONWSIAT 2450] consd

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
 - s. 124(1)

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
 - Document No. 16-01-04 (October 12, 2004)
 - Document No. 16-01-08 (October 12, 2004)

APPEAL by the worker from a decision of the Appeals Resolution Officer denying entitlement for hearing loss and tinnitus.

April 21 , 2006. THE TRIBUNAL: —

BEFORE:	S. Ryan, Vice-Chair
HEARING:	March 22, 2006 at Toronto, Written
DECISION(S) UNDER APPEAL:	G. McCaffrey, Appeals Resolution Officer, January 16, 2003

APPEARANCES:

For the worker:	T. Lowe, Building Trades Workers' Services
For the employer:	Closed

REASONS

(i) Introduction

On March 1, 1993, the worker's union wrote to the Board on his behalf requesting entitlement for noise-induced hearing loss (NIHL) and tinnitus. The worker had been employed in the construction industry for approximately 28 years as an

ironworker. He retired at age 55 in 1990.

Following an investigation, the Board's Operating Branch accepted that the worker met the policy criteria for exposure to hazardous noise, but denied the worker entitlement for NIHL on the basis that his hearing loss did not meet the minimum threshold criteria in Board policy for entitlement.

In the decision of January 16, 2003, the Appeals Resolution Officer confirmed the Operating Branch's decision to deny entitlement. The Appeals Resolution Officer determined that the first audiogram, which was conducted two years after the worker's retirement, did not demonstrate sufficient hearing loss to meet the policy criteria for entitlement and that the pattern of hearing loss did not demonstrate the expected "notch" at the 2000 to 3000 hz levels which he noted was characteristic of NIHL. The Appeals Resolution Officer acknowledged that an audiogram conducted in 1995 demonstrated increased hearing loss, but concluded that the increased hearing loss was non-compensable because it occurred during a period after the worker's retirement. The Appeals Resolution Officer's decision of January 16, 2003 is now the subject of the worker's appeal to the Tribunal.

In correspondence dated August 5, 2005, Ms. Lowe confirmed that in addition to the issue of NIHL, the worker wished to appeal the issue of entitlement for tinnitus. Although the Appeals Resolution Officer did not expressly rule on the issue of tinnitus, I am satisfied that the Tribunal has jurisdiction to consider it. I note that the issue of tinnitus was identified in the March 1, 1993 correspondence from the worker's union giving rise to this claim. I also note that the evidence required to determine entitlement for tinnitus is closely connected to the evidence required to determine entitlement for NIHL.

I accept that I am to decide whether the worker has entitlement for NIHL and tinnitus as a result of his employment as a construction ironworker.

(ii) Background

There is no substantial dispute regarding the facts of this case.

On March 30, 1996, the worker completed an Occupational Noise-induced Hearing Loss report and advised that he was employed with the same employer as an ironworker from 1962 to 1990. He advised that during this period he was exposed to noise, eight hours per day, generated from air compressors, air impact tools, welding machines, cranes and riveting tools. Information collected by Ms. Lowe from the Construction Safety Association of Ontario indicates that these tools generated noise at levels above 85 and 90 dB(A). Information in the Case Record indicates that the worker stopped working in 1990 due to medical reasons that are not related to his hearing loss.

The Board accepted that the worker met the exposure criteria in Board policy for entitlement to NIHL which is a minimum of five years of continuous exposure to 90 dB(A) of noise for eight hours per day or the equivalent.

The first audiogram in the Case Record is dated December 15, 1992, and was conducted by Dr. R.B. Tatham, specialist in otolaryngology. At that time, the worker was 57 years old. In a report of that date, Dr. Tatham advised:

This gentleman complains of severe tinnitus of many years duration. Recently it has become more troublesome and he is unable to sleep at night. He uses sleeping pills. There [are] no other otologic complaints. He did work in a noisy environment for years. There is no history of recurrent ear infections or exposure to ototoxic drugs. Past history is otherwise healthy.

Dr. Tatham did not find any abnormalities upon examination. He noted that the audiogram demonstrated bilateral high frequency sensorineural hearing loss which was “most overt at 6000 Hz”. Impedence audiometry demonstrated normal middle ear functions. The otolaryngologist opined: “This gentleman has tinnitus related to the high frequency hearing loss. This was discussed and a handout on tinnitus was provided.”

A Claims Adjudicator of the Board calculated the average of the worker’s hearing loss over the four speech frequencies to be 23.75 dB(A) in the right ear and 21.25 dB(A) in the left ear. The Claims Adjudicator concluded that the level of the worker’s hearing loss over the four speech frequencies did not meet the threshold criteria for entitlement under Board policy.

On September 14, 1995, the worker underwent a second audiogram. At that time he was 60 years old. The audiogram demonstrated a hearing loss of 37 dB(A) in the right ear and 35 dB(A) in the left ear.

In a decision dated April 18, 1996, a Board Claims Adjudicator advised the worker that his claim for NIHL would not be reviewed because the December 15, 1992 audiogram demonstrated insufficient hearing loss to warrant entitlement and that the September 15, 1995 audiogram indicated further hearing loss while he was away from occupational exposure.

In a report dated July 18, 1996, Dr. A.M. Crontin, specialist in otolaryngology, advised that the worker’s tinnitus was being helped by a hearing aid in the right ear and his hearing impairment was being helped with binaural hearing aids. With respect to the audiogram, Dr. Crontin opined:

Audiometry revealed a bilateral symmetrical sensorineural hearing loss mild in the low and mid frequencies, and severe to profound in the high tones with notching at 6 KHz in both ears.

These findings are consistent with noise-induced hearing loss due to occupational noise exposure.

In April 2002, the worker retained Building Trades Workers’ Services to represent him in his claim for NIHL. In correspondence dated September 12, 2002, Ms. Lowe wrote to the Operating Branch and emphasized the worker’s 28-year history of exposure to occupational noise. She requested health care benefits for the worker’s hearing loss based upon the 1992 audiogram. The request was denied and the matter was referred to the Appeals Branch.

In his decision of January 16, 2003, the Appeals Resolution Officer upheld the determinations of the Operating Branch. In so doing, he stated:

...I find the worker’s hearing loss at the time of his retirement did not approach the minimum required for acceptance of a NIHL claim. Secondly, the pattern of loss was not typical of what occurs in occupational hearing loss cases. Since his retirement the worker’s hearing loss has increased due to presbycusis, which is non-compensable, and that is why he now uses hearing aides.

(iii) The Submissions

Ms. Lowe offered seven pages of detailed written submissions on December 16, 2005. She noted that the issue of exposure to hazardous noise was not in dispute.

With respect to the level of hearing loss in the four speech frequencies, the worker’s representative expressed doubt about the correctness of the Appeals Resolution Officer’s interpretation of bone conduction values and air conduction values as

demonstrated on the December 15, 1992 audiogram. The Appeals Resolution Officer stated that bone conduction thresholds were more “reflective of the compensable component of the hearing loss”. The bone conduction values depicted on the December 15, 1992 audiogram appear to be lower than the air conduction values. Ms. Lowe submitted that, in any event, the otolaryngologist at that time did not identify any other type of hearing loss and that it was the Board’s practice to use air conduction values in determining entitlement for NIHL. She stated that the same practice should apply to the adjudication of this case.

The worker’s representative submitted that Board policy indicates “that frequencies as low as 22.5 dB(A) are rated at 25 dB (A)”. Thus, she argued, the worker’s hearing loss in 1992 measured at 21.25 dB(A) in the left ear “would be considered 25 dB (B)(A).” Ms. Lowe submitted that Panels of the Tribunal have concluded that an audiogram alone is not sufficient to deny entitlement to NIHL “when all things are equal”.

Ms. Lowe emphasized the audiogram of September 15, 1995 which demonstrated a hearing loss of 35 dB(A) in the left ear and 37.5 dB(a) in the right ear. She also emphasized the medical opinions of Drs. Tatham and Crotin, two specialists in otolaryngology, that indicate the worker’s hearing loss resulted from exposure to occupational noise. Ms. Lowe submitted:

The audiogram of 1992 shows a NIHL pattern similar to the 1995 audiogram. It is reasonable to conclude that the [hearing] loss is sensorineural in keeping with his noise exposure.

With respect to the pattern of hearing loss, which the Appeals Resolution Officer found to be atypical of NIHL, Ms. Lowe submitted:

Considering his prolonged exposure it is more likely than not that the typical pattern associated with occupational noise would be altered. Individual susceptibility to noise varies and the duration of exposure to continuous noise is an added dimension. Regardless of the pattern, Dr. Tatham and Dr. Crotin confirm that his pattern of hearing loss is consistent with noise-induced hearing loss.

Ms. Lowe submitted that decisions of the Tribunal that have allowed entitlement to NIHL even when the pattern of hearing loss atypical. She cited *Decisions No. 96/93* (March 16, 1993), *704/97* (February 8, 2000) and *400/04* (March 17, 2004).

Ms. Lowe acknowledged that even the air conduction values demonstrated on the December 15, 1992 audiogram fell short of the threshold requirements for entitlement under Board policy. She emphasized, however, that the audiogram in 1995 demonstrated average hearing loss in the four speech frequencies that exceeded the policy thresholds for entitlement.

With respect to the issue of tinnitus, Ms. Lowe emphasized the medical opinions of Drs. Tatham and Crotin both of whom link the condition to the worker’s NIHL and expressly rule out other possible causes such as family history, recurrent ear infections or exposure to ototoxic drugs. She noted the medical reporting from the two otolaryngologists confirm the worker’s tinnitus “of many years duration”. Ms. Lowe asked that I consider *Decision No. 1909/04* (November 25, 2004) and grant the worker entitlement to a NEL assessment for tinnitus even if I deny the worker entitlement for NIHL.

(iv) Analysis

I have carefully considered all of the available evidence in the Case Record and submissions of Ms. Lowe.

(a) Does the Worker Have Entitlement for NIHL?

Operational Policy Manual Document No. 16-01-04, “Long Term Exposures – Disablements – Noise-Induced Hearing Loss [NIHL], On/After January 2, 1990” has been identified by the Board under section 126 of the WSIA as an applicable policy in this appeal. The policy sets out the criteria for entitlement at page 1:

Workers with occupational NIHL that is sufficient to cause a hearing impairment may be entitled to benefits. Entitlement to health care and rehabilitation benefits begins with a hearing loss of 22.5 dB in each ear when the hearing loss in the 4 speech frequencies (500, 1000, 2000, and 3000 Hertz) are averaged.

The following is persuasive evidence of work-relatedness in claims for sensorineural hearing loss

- continuous exposure to 90 dB(A) of noise for 8 hours per day, for a minimum of 5 years, or the equivalent

and

- a pattern of hearing loss consistent with noise-induced sensorineural hearing loss.

There is no dispute that the worker met the exposure criteria in Board policy for entitlement to NIHL. The controversies in this case centre on the level and pattern of the worker’s hearing loss as demonstrated on the audiometry.

The level of the worker’s hearing loss in the left ear as measured on the December 15, 1992 audiogram falls short of the policy criteria for entitlement to health care benefits by 1.25 dB(A). Ms. Lowe submits that Board policy indicates “that frequencies as low as 22.5 dB(A) are rated at 25 dB(A)”. On this basis, she argued that the worker’s hearing loss in 1992 measured at 21.25 dB(A) in the left ear “would be considered 25 dB(A).

Ms. Lowe appears to be speaking to the “Exceptions” part of the policy which begins at page 4, and reads:

Since individual susceptibility to noise varies, if the evidence of noise exposure does not meet the above exposure criteria, claims will be adjudicated on the real merits and justice of the case, having regard to the nature of the occupation, the extent of the exposure, and any other factors peculiar to the individual case.

For accident dates “on or after January 2, 1990”, the policy states:

A worker is entitled to health care and rehabilitation benefits when the minimum level of bilateral hearing loss is 25 dB in each ear (readings as low as 22.5 dB are accepted as 25 dB)

The exception described here pertains to a situation where a worker has a hearing loss of 25 dB(A) in each ear (thus meeting the threshold requirements of 22.5 dB(A) described earlier in the policy), but “does not meet the above exposure criteria”. In this circumstance, the Board will have regard to the nature of the occupation, the extent of the exposure and any other factors peculiar to the individual case. When the Board is satisfied that there are unique circumstances of a particular case to warrant the application of this exception, it accepts readings as low as 22.5 dB(A) as 25 dB(A).

The circumstance contemplated in the “exception” part of Board policy is not identical to the circumstance here. In this case, the worker met the exposure criteria, but fell short of the level of hearing loss in one ear.

Board policy states that claims will be adjudicated on the real merits and justice of a case where a worker's exposure to hazardous noise falls short of the minimum requirements. There is no basis to limit consideration of the real merits and justice of NIHL cases to the one exception described in Board policy. Section 124(1) of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, requires the Tribunal to make its decisions based upon the merits and justice of each case.

In considering the real merits and justice of this case, I am satisfied that there are unique circumstances that ought to be taken into account in determining entitlement. The worker was employed in the construction industry as an ironworker for 28 years. He was exposed to noise from air compressors, air impact tools, welding machines, cranes and riveting tools. I acknowledge that as of December 15, 1992, the worker had been removed from exposure to hazardous noise for about two years. However, he was only 57 years old. Two otolaryngologists examined the worker and concluded unequivocally, after ruling out other possible causes, that his hearing loss was NIHL. There are no contravening medical opinions in the Case Record. These facts, in my view, form a sufficient basis to consider the real merits and justice of this case rather than engage in a mechanical application of the threshold requirements in Board policy.

The Appeals Resolution Officer emphasized the apparent increase in the worker's hearing loss between 1992 and 1995. The audiogram in 1995 demonstrates significantly more hearing loss than that which was demonstrated on the 1992 audiogram even though the worker was not exposed to hazardous noise. The Appeals Resolution Officer determined that the increased hearing loss was non-compensable. The difficulty I have in agreeing with the Appeals Resolution Officer is that Dr. Crontin found that the September 15, 1995 audiogram was consistent with noise-induced hearing loss due to occupational noise exposure. He did not suggest any alternative explanation for the hearing loss. The large discrepancy between the two audiograms arguably brings into question the reliability of each. However, in the context of all of the available evidence, especially the medical opinions of two otolaryngologists, I remain satisfied that the worker's hearing loss in 1992 and 1995 was the result of NIHL.

With respect to the issue of the pattern of hearing loss, the Appeals Resolution Officer concluded that it was not "typical of what occurs in occupational hearing loss cases". Ms. Lowe cited three Tribunal decisions on this issue.

The Panel in *Decision No. 96/93* noted that some medical reports indicated that testing showed the worker had a flat audiometric curve which was not compatible with NIHL. The Panel accepted the medical opinion of a specialist solicited by the worker that a flat hearing loss would not vary more than 15 decibels from the best to worst frequency. In that case, the worker did not have the classic audiometric curve for noise-induced hearing loss. However, the curve was clearly not flat and could best be described as sloping. The Panel concluded that there was sufficient evidence on file to find that the worker's bilateral hearing loss was causally related to his exposure to noise in the course of his employment with the accident employer. Unfortunately, *Decision No. 96/93* did not discuss the degree of hearing loss measured on the audiograms.

The Panel in *Decision No. 704/97* accepted that the worker's hearing loss, using bone conduction thresholds, was 29 dB in the right ear and 26 dB in the left. In that case, there was controversy over the pattern of the worker's hearing loss and whether it was indicative of NIHL. On the benefit of the doubt, the Panel accepted the opinion of a Tribunal Medical Assessor, Dr. J. Rutka, associate professor of otolaryngology at the University of Toronto, who was quoted at paragraph 58:

...Although I agree the configuration of (the worker's) hearing loss is atypical for classic occupational NHL we know that:

- A) It is accepted that he was exposed to noise levels potentially injurious to hearing from 1968 to 1992.
- B) His loss is symmetric and sensorineural in nature.
- C) No pathologic causes otherwise have been identified to account for his loss especially in the absence of a pre-employment audiogram with which to compare.

...

It therefore stands to reason that (the worker) is given the benefit of the doubt I think he could certainly receive good use from a hearing aid(s). Taking into account his audiogram of December 6, 1993 his WSIB weighed puretone loss for compensation purposes (at 500, 1,000, 2,000 and 3,000 Hz) using the best bone conduction thresholds available would be approximately 29 dB in the right ear and 26 dB in the left ear...

Ms. Lowe represented the worker whose appeal was considered by a Vice-Chair in *Decision No. 400/04*. In that case, the worker also had as much as 28 years of exposure to occupational noise and the Board had accepted the worker met the minimum policy requirements of five years continuous exposure to noise levels at 90 dB(A), eight hours per day. Unfortunately, *Decision No. 400/04* does not indicate the level of hearing loss measured in audiometry. The dispute in that case, however, appears to have centred on the absence of the typical notch around the 4000 Hz frequency associated with NIHL. The Vice-Chair accepted Ms. Lowe's arguments that the absence of the typical notch should not, in and of itself, preclude entitlement. The Vice-Chair quoted Dr. Wong, physician with the Occupational Health Clinics for Ontario Workers (OHCOW), whose evidence he found persuasive [at para. 14]:

Even if individual variation is not taken into account, it is very clear that, given [the worker's] heavy exposure to noise, that he will likely have significant hearing loss. The pattern of this worker's hearing loss is consistent with what is found in the literature among construction workers.

The Vice-Chair also cited the medical opinion of Dr. Cosolo, whose specialty is not known [at para. 19]:

The typical text book case of noise-induced hearing loss has a decrease of 4000 Hz with a recovery in high frequencies. As Dr. Wong reported in his letter of May 19, 1999, to WSIB, research has shown that with increased use of exposure, the notch effect disappears and there is no recovery in high frequencies. While [the worker] may not have the typical textbook case of noise-induced hearing loss, it is important to remember that the text book case is just a typical example of what results you would get with noise-induced hearing loss. The individual cases which went into the research to come up with a typical case would have results with various types of losses.

The Vice-Chair cited *Decision No. 2992/00* (November 30, 2000) in which the Panel granted entitlement even though the audiogram did not have the classic notch. The Panel took a holistic approach in its analysis to grant entitlement for hearing loss when the audiogram was not typical and reasoned as follows [at para. 46]:

The worker's audiogram is one factor to be taken into consideration when evaluating the worker's claim, however this Panel finds that in addition to the audiogram, the worker's history of exposure and the lack of other plausible causes of the worker's hearing loss also need to be taken into account. This Panel accepts Dr. Finkelstein's "global or holistic approach" to evaluating the cause of the worker's hearing loss over that of Drs. Thakur and Pigeon who only appear to take into account the worker's audiogram.

Tribunal decisions have accepted entitlement for NIHL even when the pattern of hearing loss is not clearly consistent with NIHL. There is no reason for me to depart from the analyses described in these decisions because in this case the worker was exposed to 28 years of hazardous noise as an ironworker and two otolarygologists have concluded that he suffers from NIHL.

Neither otolaryngologist suggested that the pattern found on audiometry was somehow inconsistent with NIHL.

Considering the real merits and justice of this case, I find that the worker has entitlement for NIHL and should be granted healthcare benefits for that condition.

(b) Does the Worker Have Entitlement for Tinnitus?

Operational Policy Manual Document No. 16-01-08, “Long Term Exposures – Disablements – Tinnitus, Post-January 2, 1990” states:

Claims for tinnitus are eligible for compensation under the following circumstances

- there is an accepted claim for occupational noise-induced hearing loss,

and

- there is a clear and adequate history of 2 or more years of continuous and severe tinnitus,

and

- the condition has been confirmed by a specialist with facilities for testing tinnitus.

Permanent impairment

Permanent impairment from tinnitus is assessed using the rating schedule prescribed in section 18(1), O.Reg 175/98. According to the prescribed rating schedule, tinnitus is not measurable, and therefore, the physician "should assign a degree of impairment that is based on severity and importance, and is consistent with established values." A permanent impairment of 2% for tinnitus is judged to be consistent with established values. Permanent impairment ratings for NIHL and tinnitus are added using the AMA combined values chart.

The Vice-Chair in *Decision No. 1909/04* accepted a mediated settlement between the parties that while the worker had insufficient hearing loss to attract healthcare benefits for NIHL, he was nevertheless entitled to a non-economic loss (NEL) assessment for occupational tinnitus. In so doing, she noted the Tribunal Discussion Paper entitled, “Hearing Loss and Tinnitus,” prepared by Dr. Rutka who wrote [at para. 10]:

Tinnitus (from the Latin, to “ring a bell”) by definition is unwanted head noise. It is a common problem that affects an estimated 20% of the population at any given time. Tinnitus can be either *subjective* or *objective*.

Subjective tinnitus can only be appreciated by the affected individual, is usually associated with a sensorineural hearing loss of some type and is the most common type noted. It is usually described as a constant sound (i.e. ring, buzz, hum, etc.) that is worse in the absence of competing background noise (i.e. at night).

...

In the context of a NIHL claim, tinnitus is not infrequently noted...In general terms, when a claim for tinnitus exists the medical assessor would ideally like to have the following criteria...present before an NEL award is made:

1. The claim for tinnitus should be unsolicited.
2. The claim for tinnitus must accompany a compensable level of hearing loss (i.e. a tinnitus match audiometrically).
3. The tinnitus should be present for at least two years
4. The individual affected has undergone treatments to try to alleviate their perceived unwanted head noise...
5. Evidence to support a personality change or sleep disorder as a result of the tinnitus.
6. No history of substance abuse.
7. A history of tinnitus supported by statements from the family.

The Vice-Chair concluded that worker met the majority of the criteria outlined by Dr. Rutka. She was satisfied that a NEL assessment for tinnitus was warranted. At paragraph 11, the Vice-Chair noted:

I acknowledge that in the majority of cases, there needs to be entitlement for NIHL before a tinnitus claim is accepted. However, in this case, it is accepted that the worker did have some (and the exact amount cannot be known or reasonably ascertained) hearing loss before his retirement as a result of noise exposure. It is further accepted that the tinnitus condition manifested itself before his retirement, has been present for a number of years and was diagnosed by an otolaryngologist. While the worker's situation may not, strictly speaking meet all the criteria set out in Board policy, I am satisfied that it falls within the general criteria and should be allowed.

In this case, I have found, based on the real merits and justice of the case, that the worker has entitlement to healthcare benefits for NIHL. Thus, he fulfils the policy requirement of an accepted claim for occupational noise-induced hearing loss. I am satisfied that Dr. Tatham's December 15, 1992 report fulfils the policy requirement of a clear and adequate history of two or more years of continuous and severe tinnitus. Dr. Tatham advised that the worker complained of "severe tinnitus of many years duration". Although it is not clear whether Dr. Tatham had the proper facilities to test for tinnitus, I have no reason to doubt his opinion. I find that the worker has entitlement to a NEL assessment for tinnitus.

It is not necessary for me to adjudicate the question of whether bone conduction thresholds are more "reflective of the compensable component of the hearing loss" because I have granted entitlement to NIHL on other grounds.

DISPOSITION

The worker's appeal is allowed. The worker has entitlement to healthcare benefits for NIHL. The worker has entitlement to a NEL assessment for tinnitus.

Appeal allowed.



Decision No. 624/06

Vice-Chair: Ryan

Decision — May 3, 2006

Neutral Citation: 2006 ONWSIAT 978

Hearing loss – Pensions (assessment) (hearing loss) – Board Directives and Guidelines (hearing loss) (individual susceptibility) – Merits and justice.

Worker met exposure requirements of Board policy for hearing loss but not hearing loss requirement – Provision in policy for individual susceptibility applied only to exposure requirements – Margin of error in audiometry of 5 to 10 decibels should not be interpreted as favouring worker in absence of other supporting evidence.

The Board granted the worker health care benefits for hearing loss in 1977. The worker appealed a decision of the Appeals Resolution Officer denying a pension for hearing loss. The appeal was dismissed.

The worker met the exposure requirements of Board policy. However, he did not meet the hearing loss requirement of at least 35 decibels in the worse ear and 25 decibels in the better ear. Two audiograms taken one year apart showed identical hearing loss of 30 decibels bilaterally.

Board policy allows for consideration of individual susceptibility in cases where workers do not meet the exposure criteria. In this case, that provision would not apply because the worker met the exposure criteria. None the less, the Tribunal still had authority to consider the case on the real merits and justice.

The worker submitted that there was a margin of error of between 5 and 10 decibels that is expected to occur in audiometry. The Vice-Chair noted that this variation of plus or minus 5 or 10 decibels should not be interpreted as favouring the worker without the existence of other supporting evidence. In this case, the absence of discrepancy in the two audiograms was compelling evidence that the audiograms were accurate and reliable.

There were no unique circumstances warranting entitlement to a pension based on the real merits and justice of the case.

Déficiencia auditiva – Pensions (évaluation) (déficiência auditiva) – Directives et lignes directrices de la Commission (déficiência auditiva) (prédisposition individuelle) – Bien-fondé et équité.

Le travailleur remplissait le critère d'exposition de la politique de la Commission mais non celui relatif à la déficience auditive – La disposition relative à la prédisposition individuelle prévue dans la politique s'appliquait au critère d'exposition – Il ne fallait pas interpréter la marge d'erreur audiométrique de 5 à 10 décibels en faveur du travailleur en l'absence d'autres éléments de preuve à l'appui.

La Commission avait reconnu au travailleur le droit à des prestations de soins de santé en 1977. Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de lui reconnaître le droit à une pension. Le Tribunal a rejeté l'appel.

Le travailleur remplissait le critère d'exposition de la politique de la Commission mais il n'avait pas une déficience d'au moins 35 décibels dans la mauvaise oreille et de 25 décibels dans la bonne oreille. Deux audiogrammes pris avec un an d'intervalle indiquaient une déficience auditive identique de 30 décibels dans chaque oreille.

La politique de la Commission permet de tenir compte de la prédisposition individuelle dans les cas où le travailleur ne remplit pas le critère d'exposition. En l'espèce, cette disposition ne s'appliquait pas parce que le travailleur remplissait le critère d'exposition. Néanmoins, le Tribunal pouvait examiner le cas en fonction de son bien-fondé et de la justice.

Le travailleur soutenait qu'on s'attend à une marge d'erreur de 5 à 10 décibels en audiométrie. Le vice-président a noté que cette variance de plus ou moins 5 à 10 décibels ne devait pas être interprétée en faveur d'un travailleur en l'absence d'autres éléments de preuve. En l'espèce, l'uniformité des résultats des audiogrammes indiquait fortement qu'ils étaient exacts et fiables.

Il n'y avait aucune circonstance exceptionnelle justifiant de reconnaître le droit à une pension en fonction du bien-fondé du cas et de la justice.

Tribunal Decisions Considered:

- *Decision No. 614/89* (November 4, 1991) distd
- *Decision No. 1081/00* (September 1, 2000) [2000 ONWSIAT 2500] distd

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
 - s. 124(1)

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
 - Document No. 16-01-03 (October 12, 2004)

APPEAL by the worker from a decision of the Appeals Resolution Officer denying entitlement for psychological disability.

April 21 , 2006. THE TRIBUNAL: —

BEFORE: S. Ryan, Vice-Chair

HEARING: March 24, 2006 at Toronto, Written

DECISIONS UNDER APPEAL: L.M. Franchi, Appeals Resolution Officer, June 8, 2005

APPEARANCES:

For the worker:	J. West, John West & Associates
For the employer:	Did not participate

(i) Introduction

On November 22, 1977, the Board granted the worker entitlement to healthcare benefits for noise-induced hearing loss (NIHL). Board Operating Branch decisions dated February 5, 1986 and November 16, 2004 denied the worker entitlement to a pension award for NIHL on the basis that the worker's hearing loss did not meet the minimum threshold requirements in Board policy.

The June 8, 2005 decision of the Appeals Resolution Officer upheld the Operating Branch decisions and is now the subject of the worker's appeal to the Tribunal.

(ii) Background

There is no substantial dispute regarding the facts of this case.

In an Employee's Report of Industrial Deafness dated November 14, 1977, the worker advised that beginning in 1965 he was exposed to excessive noise generated from broaches, boring machines and air blow off systems. At the time of filing for entitlement, the worker was 37 years old and employed as an assembler for a manufacturer of automobiles.

In an Employer's Report of Industrial Deafness dated November 10, 1977, the employer advised that the worker was exposed to noise levels averaging 93 dB(A) from June 1965 to May 1975 and 87 dB(A) from May 1975 to the date of its report.

The Board accepted that the worker met the exposure criteria in Board policy for entitlement to NIHL which is a minimum of five years to continuous exposure to 90 dB(A) of noise for eight hours per day or the equivalent.

The first audiogram in the Case Record is dated October 21, 1977 and indicates bilateral high frequency sensorineural hearing loss of 30 dB(A). These results were repeated in an audiogram conducted on February 9, 1978.

In a decision dated March 10, 1978, a Board Claims Adjudicator granted the worker entitlement to healthcare benefits including the provision of a hearing aid. The Claims Adjudicator denied the worker entitlement to a permanent partial disability award on the basis that the worker did not have a measurable loss of 35 dB(A) in both ears.

On August 14, 1984, the worker underwent an audiogram conducted by the employer's medical department. It showed an average hearing loss of 27.5 dB(A) in the left ear and 23.75 dB(A) in the right ear.

In a report dated January 8, 1986, Dr. R. Lan, otolaryngologist, advised that the worker presented with complaints of hearing loss which had gradually become worse. He reviewed the audiometry and noted that his hearing loss was almost symmetrical. He confirmed the diagnosis of NIHL.

The decision to deny the worker entitlement to a pension award was confirmed by a Claims Adjudicator in a decision dated

February 5, 1986.

(iii) Submissions

In correspondence addressed to the Board dated December 17, 2004, the worker's representative submitted that Board policy requires 32.5 dB(A) bilateral hearing loss for entitlement to a pension award. He submitted that the worker's hearing loss was 2.5 dB(A) short of the Board policy requirement and asked that a margin of error of "plus/minus 10" decibels be taken into consideration under the real merits and justice of the case.

In correspondence addressed to the Tribunal dated January 11, 2006, Mr. West advised that the issue in this appeal is whether or not the worker has entitlement to a permanent partial disability award based upon a hearing loss of 30 dB(A) in both ears. He submitted:

It is our position that the Workers' Compensation Board in a background paper on hearing loss determined that audiogram results have a margin of error of plus or minus 5 decibels.

The worker's representative cited *Decision No. 1081/00* (September 1, 2000) and *Decision No. 614/89* (November 4, 1991) and asked the Tribunal grant the worker's appeal by accepting the margin of error in favour of the worker.

(iv) Analysis

I have carefully considered all of the available evidence in the Case Record and submissions of Mr. West.

There is no dispute that the worker met the exposure criteria in Board policy for entitlement to NIHL. The controversy in this case centres on the level of the worker's hearing loss and whether consideration should be given to a margin of error of between 5 and 10 dB(A) that is apparently expected to occur in the audiometry.

Operational Policy Manual Document No. 16-01-03, "Long Term Exposures – Disablements – Occupational Noise-Induced Hearing Loss", has been identified by the Board under section 126 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) as an applicable policy in this appeal. The policy sets out the criteria for entitlement to a permanent disability benefit at page 2:

Permanent disability

Entitlement to health care and/or permanent disability benefits will be considered:

- 1) when the average hearing loss of the four speech frequency levels (500, 1,000, 2,000, and 3,000 Hertz) in the ANSI or ISO audiometer standards is at least 35 decibels in the worse ear **and** at least 25 decibels in the better ear.
- 2) for asymmetrical hearing loss when the average hearing loss is 35 decibels in at least one ear **but** less than 25 decibels in the other, **and** when the pattern of hearing loss is clearly consistent with occupational noise exposure.

The policy also states at page 2 that because individual susceptibility to noise varies, claims that do not meet the exposure criteria are to be individually judged on their own merit having regard to the nature of the occupation, extent of exposure, and any other factors peculiar to the individual case.

The circumstance contemplated in the “exception” part of Board policy is not identical to the circumstance here. In this case, the worker met the exposure criteria, but fell short of the minimum level of hearing loss required in Board policy for a permanent disability award.

Board policy states that claims will be adjudicated on the real merits and justice of a case where a worker’s exposure to hazardous noise falls short of the minimum requirements. There is no basis to limit consideration of the real merits and justice of NIHL cases to the one exception described in Board policy. Section 124(1) of the WSIA requires the Tribunal to make its decisions based upon the merits and justice of each case.

In considering the real merits and justice of this case, I am satisfied that there are no unique circumstances that support entitlement to a permanent disability award. The discrepancy of plus or minus 5 or 10 decibels in the accuracy of audiometry should not, in my view, be interpreted in favour the worker without sufficient reasons to do so such as the existence of other supporting evidence. In this case, two audiograms taken one year apart produced identical results: a bilateral high frequency sensorineural hearing loss of 30 dB(A). The absence of a discrepancy in the results of these two audiograms conducted one year apart is compelling evidence that the audiograms are accurate and reliable. The audiogram conducted on August 14, 1984 revealed less hearing loss than the two conducted in 1977 and 1978 with average hearing loss of 27.5 dB(A) in the left ear and 23.75 dB(A) in the right ear. The 1984 audiogram was conducted by the employer’s medical department and may not be an accurate reflection of the worker’s hearing loss. In any event, that evidence does not indicate that the earlier tests under-measured the worker’s hearing loss.

The facts of this case are distinguishable from the facts described in *Decisions No. 1081/00* and *614/89*.

In *Decision No. 1081/00* a Vice-Chair of the Tribunal granted the worker entitlement to a permanent disability award on the benefit of doubt. In so doing, he noted that the worker’s hearing loss did not meet the specific requirements of Board policy by a “minimal amount”. He determined that there was no other cause to explain the worker’s hearing loss other than hazardous occupational noise and that a background paper on hearing loss indicated audiogram results have a margin of error of plus or minus 5 decibels. As emphasized above, I note that in the present case an audiogram conducted in 1976 and another one conducted in 1977 produced identical results. Accordingly, I have no reasonable basis to assume that both under measured the worker’s hearing loss by identical amounts.

The worker in *Decision No. 614/89* had been granted a permanent disability award for NIHL dating back to 1981 because audiometry at that time confirmed that he met the requirements of Board policy. The issue before the Panel was whether there was sufficient evidence to grant the worker entitlement to a pension award prior to 1981. The panel accepted the opinion of a Tribunal medical assessor that the worker’s hearing loss could have reached a permanent disability level as defined in Board policy as of 1976. I do not find this case at all similar to the case before me. The degree of the worker’s hearing loss in *Decision No. 614/89* met the minimum requirements specified in Board policy in 1981. The Panel found, in the absence of evidence to the contrary, that the worker likely met the minimum requirements in Board policy for a pension award earlier than 1981. The worker in the present case has never met the requirements for permanent disability benefits in Board policy.

DISPOSITION

The worker’s appeal is denied. The worker does not have entitlement to a permanent disability award for NIHL.

Appeal dismissed.



Decision No. 51/06

Vice-Chair: Keil

Decision — April 21, 2006

Neutral Citation: 2006 ONWSIAT 882

Psychotraumatic disability – Board Directives and Guidelines (psychotraumatic disability) (five-year guideline).

Worker developed psychological disability after significant deterioration of his compensable organic disability 11 years after accident – Deterioration was analogous to provision in Board policy regarding effects of surgery – Worker had entitlement for psychological condition.

The worker suffered a low back injury in 1990, for which he was granted a 17% NEL award, later increased to 37%. The worker appealed a decision of the Appeals Resolution Officer denying entitlement for psychological disability. The appeal was allowed.

It was clear that the worker had a psychological condition. The main reason entitlement for the psychological condition was denied by the Board was that the condition did not manifest itself within five years of the accident or most recent surgery, as required by Board policy.

The worker experienced a significant deterioration of his condition in 2001, which was about 11 years after the accident. The worker developed the psychological disability as a result of the deterioration. The Vice-Chair noted that the worker's orthopaedic surgeon recommended surgery but the worker refused. It was ironic that, if the worker had undergone the surgery, there likely would have been no dispute that the psychological condition was compensable.

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
 - Document No. 05-06-06 (September 4, 1991) (since superseded)
 - Document No. 15-04-02 (March 15, 2005) (since superseded)

APPEAL by the worker from a decision of the Appeals Resolution Officer denying entitlement for psychological disability.

April 21 , 2006. THE TRIBUNAL: —

BEFORE: Keil, Vice-Chair

HEARING:	January 9, 2006, at London, Oral
DECISIONS UNDER APPEAL:	WSIB Appeals Resolution Officer T. McDonald decision dated August 26, 2004. That decision concluded that the worker did not have entitlement for a psychological disability claimed to have resulted from his 1990 compensable back injury.
APPEARANCES:	
For the worker:	R. McGill, Lawyer
For the employer:	Not participating

(i) Background

The now 52-year-old worker started with the accident employer in 1977 as a plastic fabricator and suffered a compensable low back injury on December 4, 1990. He was unable to return to regular work and, consequently, the Board initiated vocational rehabilitation services in the summer of 1991. The worker received a 17% non-economic loss (NEL) award in August 1992. Vocational rehabilitation services were closed in March 1995 on the basis that the worker had obtained employment with his brother in the financial investment field and was progressing well.

Notwithstanding a motor vehicle accident in February of that same year, the worker continued employment with his brother for a year and, then, in 1996 started his own business. This continued for a number of years. In early 1991 the worker sustained two accidents (on March 26 and April 23), when his back gave out. In addition to sustaining fractures during these falls, the worker's back condition worsened dramatically. Although the Board initially concluded there had been no significant deterioration, Board Medical Consultant Dr. W. Thorpe reviewed the file in December 2003 and gave his opinion that there had been a permanent worsening of the worker's condition. He also suggested that the worker might be "developing some psychotraumatic disability resulting from the chronic pain suffered as a result of his original injury."

The worker eventually went on to receive a 37% NEL award (consisting of a 30% impairment for his low back and an additional impairment for his legs) in 1994. It should be noted that this was delayed because the Board requested a second assessment. Flowing from this, the Board also determined the worker was unemployable – given his significant deterioration – and granted him a full future economic loss (FEL) award from January 17, 2002 (the date deemed to represent the permanent worsening of the worker's condition) onwards. As the worker was in receipt of Canada Pension Plan disability benefits, the Board offset these but only by 50%, in recognition that there were other non-compensable factors at play (cervical pain and bilateral carpal tunnel syndrome).

The worker had started receiving psychological counselling in November 2003. Treatments were sponsored by the Board to reflect the worker's adjustment period but entitlement for psychological disability was denied. The worker's treating psychologist, Dr. J. McKillop, has provided a number of reports. In the first, from November 26, 2003, he described the worker as "being in the beginning of stages a major depressive episode," with chronic pain and adjustment disorder with depressed mood as the clinical disorders cited. At this time, he described the worker as being troubled by moderate to severe depression. In his report of May 31, 2004, Dr. McKillop made the same observation, noting that the worker felt he had let down his family and was a burden upon them.

In her decision of August 26, 2004, the ARO found that the worker's psychological condition had not commenced within five

years of the date of accident (as prescribed by Board policy) and therefore, entitlement was not in order. The worker now brings this issue to the Tribunal for a final decision.

(ii) Testimony

The worker testified that, after the accident, he had gone for college upgrading to go into financial planning. In 1995 he started working for his brother. This company had gone bankrupt in 1996, but then the worker started his own. He did this successfully, on a full time basis, for five years until 2001. In early 2001 he and his family moved into a new home. He was standing on a riser, hanging a wall border, when his back gave out and he fell. A month later, his back gave out again; this time he fell down the stairs fracturing bones in his ankle, foot and leg.

The worker explained that after this he was unable to work at all and his life changed drastically. Because it took the Board so long to recognize that his condition had deteriorated, he suffered financially, losing his house and having to move into an apartment. He had two children living at home and did not know how he would take care of them. His wife was not working either, as she had been a secretary with his company.

The worker sought psychological counselling in 2003 because he was having “negative thoughts” he was not thinking well and had bad thoughts about “this being the end.” The worker stated he would talk to Dr. McKillop about being depressed and anxious, worrying about his family situation. He said he has continued to see the psychologist, approximately once a month, for one hour sessions.

In response to questions from his representative, the worker explained his activities of daily living had been adversely affected. He has trouble performing personal needs – his wife has to help him wash his hair, button his shirts and do up his belt; he explained this was because of having no strength in his hands. The worker does not sleep through the night because of back pain. He cannot do household chores for the same reason. He does not go out, engage in sports or socialize as he was able to do before 2001. The worker explained that he used to be a professional drummer and acted as a lay pastor; he has not been able to continue with either of these activities since the deterioration of his condition.

The worker does not drive as his license was revoked because of leg instability. He uses a scooter to get around, as well as a walker. The worker takes 10 mg. of Oxycontin four to five times daily and 20 mg. of Oxycontin four to five times daily. The worker takes seven to eight tablets of Percocet a day for breakout pain and three to four tablets of Clomazapen daily.

When questioned by the Vice-Chair, the worker agreed he had had a motor vehicle accident in 1995 but stated it was minor and had not interfered with his ability to work. There had been neck pain but it was off and on. He also confirmed he had bilateral carpal tunnel syndrome and had difficulty with his hands. He also confirmed the psychologist’s note that he had sought counselling in his 20s because of anxiety over his brother’s attempted suicide.

When asked, the worker agreed that he did try to get out daily for brief periods but often could not when his back flared up and the pain became unbearable. He described his relationship with his family as close, saying he did not know what he would have done without his wife and his sons. He added that it got tiring always having to be dependent on other people. The worker also explained that he had rekindled his relationship with his brother who lives in London and was now close to him and his sister-in-law.

When questioned by the Vice-Chair, the worker explained that he had a neighbour with whom he spoke on a daily basis. His wife was home with him most of the time and they would talk and watch television together.

The Vice-Chair questioned the worker concerning some of the notes from the psychologist. When asked about his anger with the Board, the worker explained that he had been frustrated that he had had to pursue and fight for the extra entitlement, instead of the Board just accepting that his condition had worsened. This also applied to Canada Pension Plan disability benefits as he needed to appeal that as well. Additionally, this had caused much financial stress before things got sorted out. The worker testified that he now received approximately \$3,000 monthly and was able to afford the necessities. Consequently, he acknowledged there was less financial stress and he no longer had ongoing problems with the Board.

When asked what he thought the major obstacle was for him, the worker replied that it was the physical pain. He explained that he could feel good for an hour and then he would feel terrible from the physical pain; he wanted to be able to do something worthwhile with his life and not be a burden. The worker concluded by saying he was “looking for glimmers of hope.”

(iii) Relevant Law and Policy

Board *Operational Policy Manual*, Document No. 15-04-02, entitled “Psychotraumatic Disability”, states that a worker is entitled to benefits when impairment/disability results from a work-related personal injury by accident. Disability/impairment includes both physical and emotional disability/impairment. The policy goes on to note:

If it is evident that a diagnosis of a psychotraumatic disability/impairment is attributable to a work-related injury or a condition resulting from a work-related injury, entitlement is granted providing the psychotraumatic disability/impairment became manifest within 5 years of the injury, or within 5 years of the last surgical procedure.

Psychotraumatic disability/impairment is considered to be a temporary condition. Only in exceptional circumstances is this type of disability/impairment accepted as a permanent condition.

Psychotraumatic disability/impairment resulting from organic brain damage is assessed as a permanent disability/impairment.

The policy goes on to state that entitlement for psychotraumatic disability may be established when the following circumstances exist or develop:

- Organic brain syndrome secondary to
 - traumatic head injury
 - toxic chemicals including gases
 - hypoxic conditions, or
 - conditions related to decompression sickness
- As an indirect result of a physical injury
 - emotional reaction to the accident or injury
 - severe physical disability/impairment, or
 - reaction to the treatment process
- The psychotraumatic disability is shown to be related to extended disablement and to non-medical, socioeconomic factors, the majority of which can be directly and clearly related to the work-related injury.

The policy also notes that in all cases where history of a prior psychiatric condition is shown to exist, the question of allowance on an aggravation basis is considered, having regard for the emotional effect of the occupational occurrence and a condition resulting from the work-related injury. The policy also states the following:

In some cases, psychiatric disability/impairment may become apparent in an otherwise uneventful case, and enquiry establishes its origins to other factors (such as family crisis), having no relationship whatsoever to the accident.

In rating permanent impairment for psychotraumatic disability for accidents occurring after January 2, 1990, it is Board Document No. 05-06-06, entitled, “Assessing Impairments Due to Mental & Behavioural Disorders, Post-January 2, 1990” which sets out the following categories:

Class 1 – No Impairment (0%) – No impairment noted ...

Class 2 – Mild Impairment (5% – 15%) - Impairment levels compatible with most useful function

There is a degree of impairment of complex integrated cerebral functions, but there is ability to carry out most activities of daily living as well as before. There is also some loss in personal or social efficacy and the secondary psychogenic aggravations are caused by the emotional impact of the accident.

There is mild to moderate emotional disturbance under ordinary stress. A mild anxiety reaction may be apparent. The display of symptoms indicate a form of restlessness, some degree of subjective uneasiness and tension caused by anxiety. There are subjective limitations in functioning as a result of the emotional impact of the accident.

Class 3 – Moderate Impairment (20% – 45%) – Impairment levels compatible with some but not all useful function

There is a degree of impairment of complex integrated cerebral functions such that daily activities need some supervision and/or direction. There is also mild to moderate emotional disturbance under stress.

In the lower end of the impairment the worker is still capable of looking after personal needs in the home environment but, with time, confidence diminishes and the worker becomes more dependent on the members of the family in all activities. The worker demonstrates a mild, episodic anxiety state, agitation with excessive fear of re-injury, and nurturing of strong passive dependency tendencies.

The emotional state may be compounded by objective physical discomfort with persistent pain, signs of emotional withdrawal and depressive features, loss of appetite, insomnia, chronic fatigue, low noise intolerance, mild psychomotor retardation and definite limitations in social and personal adjustment within the family. At this stage, there is clear indication of psychological regression.

In the higher range of impairment, the worker displays a moderate anxiety state, definite deterioration in family adjustment, incipient breakdown of social integration, and longer episodes of depression. The worker tends to withdraw from the family, develops severe noise intolerance and a significant diminished stress tolerance. A phobic pattern or conversion reaction will surface with some bizarre behaviour, a tendency to avoid anxiety-creating situations, with everyday activities restricted to such an extent that the worker may be homebound or even roombound at frequent intervals.

Class 4 – Marked Impairment (50% – 90%) – Impairment levels significantly impede useful function

There is a degree of impairment of complex integrated cerebral functions that limits daily activities to directed care under confinement at home or in other domicile. The worker clearly displays chronic limitation of adaptation and function in the home

and outside environment that ranges from moderate to severe. The worker is withdrawn, forgetful, unable to concentrate, and needs continuous emotional support within the family setting. The worker is incapable of self-care and neglects personal hygiene.

There is moderate to severe emotional disturbance under ordinary to minimal stress, which requires sheltering. There may be an obvious loss of interest in the environment and the worker becomes extremely irritable, showing significant emotional liability, changes of mood and uncontrolled outbursts of temper. The worker may be severely depressed with outstanding features of psychomotor retardation and psychological regression.

Class 5 – Extreme Impairment (95%) – Impairment levels preclude useful function

There is such a degree of impairment of complex integrated cerebral functions that the individual is unable to care for self in any situation or manner. There is severe emotional disturbance that continually endangers self or others.

(iv) The Vice-Chair's Findings

In reviewing the file documentation there is fundamentally no dispute that the worker has a psychological disability; the real issue is whether it has resulted from the worker's compensable injury and its sequelae.

In my view, the evidence is clear on this point. I accept that the worker underwent psychological counselling over 20 years ago; however, I also note that the worker had an unbroken work record with the accident employer for almost 15 years – from 1977 to 1991. Therefore, the worker continued to work while undergoing counselling for a discrete period of time. There is no evidence that his problems ever affected his ability to work or that any anxiety he may have had was present as an ongoing disability.

I also accept that the worker rebounded from the initial effects of his compensable injury to the extent that he could fully participate in vocational rehabilitation training for over three years and then was gainfully employed for over five years. The evidence demonstrates that the worker's original disability – as reflected by his 17% NEL award – was not a bar to his leading a rewarding and successful life.

The worker's life underwent a dramatic transformation following his two falls in 2001 and the subsequent, significant deterioration of his condition, as manifested in the increase of his NEL award to 37%. The worker could no longer retain his financial planning business, or indeed obtain any employment; the Board has accepted this by providing him with a full FEL award. I have had regard for the in-home occupational therapy assessment (carried out at the Board's request in January of 2004). The therapist recommended several assistive devices in light of the worker's restrictions and later recommended the Board authorize the purchase of a scooter, given the worker's very limited mobility. I also note the worker's own testimony to the effect that his non-compensable hand problems have contributed to other problems to do with manual tasks, limiting his activities even further.

All of these events conspired to render the worker depressed, as documented by his treating psychologist and as suggested by the Board's own medical consultant. The overwhelming preponderance of the evidence points to the worker experiencing emotional difficulty in adjusting to the new realities of his deteriorated medical condition.

The stumbling block to entitlement for the ARO was the fact that the worker's condition did not manifest itself within five years of the accident or the most recent surgery. However, it is necessary to consider the policy in its totality and with reference to the particular facts of the instant case. I infer that the five-year requirement stands to ensure that the

psychological problems do not manifest themselves at a time so remote from the original injury as to make causality suspect. Life and its myriad difficulties continue to exist after a compensable injury and, at a certain point, say after five years, one might reasonably assume in most cases that any psychological problems that arise would more likely be related to some more proximate cause and not the remote injury. I also assume that is why there is an exception for surgery. A worker could have an accident in 1985, a deterioration that leads to surgery in 1999, psychological problems coping with that surgery, and such a worker would still potentially have entitlement for psychotraumatic disability. One might reasonably infer that this is so because the surgery causes the compensable injury to come to the forefront again, that is, it is no longer remote in time and effects of the compensable injury can arguably be precipitating psychological problems.

In my view, this is analogous to the effects of a significant deterioration some 11 years after the original accident. In this case, the worker's compensable condition worsened by over 100% in 2001-2002. His condition was such that the treating orthopaedic surgeon recommended surgery but the worker refused. It seems unintentionally ironic that, if the worker had agreed to the surgery, there would probably be no dispute as to the compensable nature of his psychological problems. The Board has recognized the impact of the worker's deterioration by granting him a full FEL award and several significant health care measures. Since the Board has accepted the adverse impact of the worker's unexpected deterioration on his earning capacity, how can one reasonably state that this could not have an impact on his psychological condition.

If one looks to the other requirements in the Board policy, the worker's compliance is transparent. As required, he has had an emotional reaction to the accident and to his increased disability; further, the psychotraumatic disability can be linked to extended disablement and to non-medical, socio-economic factors, the majority of which can be directly and clearly related to the work-related injury. For proof of the latter, one has only to reference Dr. McKillop's notes spanning the period from April 2004 to May 2005. In these, one can see several references to the extent of the worker's compensable pain and the effects on him. One will also see several references to financial concerns.

The bulk of the worker's expressed concerns in therapy, over an extended period, relate, first, to pain and reduced abilities and, secondly, to financial concerns directly related to his inability to be employed. As noted, the Board has already acknowledged that the worker's unemployable status is related to the deterioration in his compensable condition. The fact that the Board made the FEL award retroactive speaks to the period during which the worker was without funds, and the resulting anxiety caused.

With respect to the worker's appeal, I agree with Mr. McGill, there is a lacuna in the Board's policy that does not specifically address the possible effects of a significant deterioration in a worker's condition over time (and beyond the five-year limit). Again, I find that in the instant case, the significant deterioration can be seen as analogous to the effects of a surgery. The psychological developed within five years of the severe worsening of the worker's back problems (extending to his legs); in fact, it became evident within a year of the date fixed by the Board as evident of a permanent worsening.

In this case, I find that the worker fits generally within the Board policy requirements and the intent of the policy. Moreover, it is not, strictly speaking, accurate to say that the worker's psychological disability did not come on within five years of his accident. It did come on within five years of his recent accidents, although they were accepted as recurrences. In fact, each of his falls was a discrete accident with physical repercussions. Viewed in this light, the worker would fall squarely within the parameters of the Board policy.

On a related matter, I find it appropriate to discuss the nature of the worker's entitlement. Mr. McGill devoted considerable

time to eliciting testimony from the worker as to the change in his activities of daily living. While the categories for psychotraumatic disability are the same as those for chronic pain disability, I would point out that only chronic pain disability mandates the need to establish marked life disruption. This is so because, for chronic pain disability, the disability is not clearly explicable on the basis of an organic basis and, thus, one looks for evidence of pain through marked life disruption.

I do not grant psychotraumatic disability in this case because of the worker's marked chronic pain, as understood under entitlement for chronic pain disability. Since the worker has a 37% permanent impairment award to reflect severe back and bilateral back pain, it would, in my opinion, naturally follow that he has significant and physical pain that is chronic. This is not the same as "chronic pain" as understood by chronic pain disability. Entitlement for psychotraumatic disability is not intended to compensate the worker twice for the same symptoms. In other words, while I accept that the psychologist has diagnosed the worker was having chronic pain, within the context of this appeal, I understand that to mean the worker has ongoing and debilitating physical pain of a chronic nature. This increased physical pain has resulted in the worker being assessed as having very little functional range of motion in his spine, for which he has been compensated by a considerable increase in his original permanent impairment award, and for significant nerve root impairment in both legs, for which he has now also received a NEL award.

The worker's anxiety and depression are compensable. In looking at the categories of impairment it would seem to me that, based on this and mindful of his supportive family system, he has a minor psychological disability based on these elements. My review of the evidence, considering both the worker's testimony and the file documentation, satisfies me that, while for instance, the worker may be homebound for frequent periods, that is because of his physical limitations and not because he does not wish to engage with the world. It was a recurring theme in the worker's testimony that he wished he could participate in his former activities and that the reason he did not lay in his physical pain, not in his desire to withdraw emotionally from life. I make these findings to set out the nature and extent of my findings. Similarly, while the worker demonstrated some loss of memory and poor concentration, I would attribute this to the substantial amount of narcotics he takes for pain management. I do not wish to prescribe what the NEL assessor should do, but I do wish to provide clarity and structure for my reasons and decision regarding the worker's entitlement.

There is one final issue and that is whether the worker's condition is temporary or permanent as discussed in Board policy. It does appear that the worker's psychological condition is a permanent one. He has been seeing Dr. McKillop for over two years and there is no evidence before me that would suggest the psychologist is of the opinion that the worker will ever fully recover. Consequently the worker is entitled to a NEL assessment. It is also my opinion, based on the worker's own testimony, that his psychological condition has somewhat improved over time. He testified that he experiences less frustration and financial worry than he did previously. The Board may wish to discuss with his psychologist whether increased therapy visits might further ameliorate his condition.

To summarize, I find that the severe 2001-2002 deterioration in the worker's compensable physical condition significantly contributed to the worker's development of a psychological condition in 2003 of "adjustment disorder with depressed mood" as diagnosed by Dr. McKillop. The diagnosis of chronic pain is explicable on the basis of the physical pain experienced by the worker as a result of his deterioration and, as such, is already reflected in his organic NEL award.

DISPOSITION

The worker's appeal is allowed. He has entitlement for his adjustment disorder with depressed mood as diagnosed by his

treating psychologist. Consequently, he has entitlement to a NEL assessment.

Appeal allowed.



Decision No. 2436/05

Panel: Peckover (Vice-Chair), Young, Ferrari

Decision — March 30, 2006

Neutral Citation: 2006 ONWSIAT 738

Suitable employment (factors other than physical capability) – Board Directives and Guidelines (suitable employment) (health and safety risks) – Correctional officer.

Correctional officer had necessary skills to perform modified work offered by employer but could be subject to inmate retaliation if perceived that he was injured – In circumstances, return to modified work would have resulted in health and safety risk.

A correctional officer at a maximum security prison suffered a thumb injury on September 21, 2001, while breaking up an inmate action. The Board initially granted LOE benefits until October 2, 2001, but, on appeal by the worker, extended benefits until November 12, 2001. The employer appealed a decision of the Appeals Resolution Officer granting benefits from October 2 to November 12. The appeal was dismissed.

The employer offered modified work on October 2. The worker had the necessary skills to perform the modified work and it was within his functional abilities. However, the Panel was satisfied that there was a health and safety risk to the worker within the meaning of Board policy. The worker was a member of a tactical team. As such, he was subject to retaliation if it was perceived that he was injured and, therefore, somewhat vulnerable. In the circumstances of this case, where the worker was a member of a tactical team at an overcrowded maximum security prison, a return to work would have resulted in a health and safety risk to the worker because he would not have been able to defend himself or others adequately in the event of an emergency.

The worker was entitled to LOE benefits during the period in question.

Emploi approprié (facteurs autres que la capacité physique) – Directives et lignes directrices de la Commission (emploi approprié) (risques pour la santé et la sécurité) – Agent des services correctionnels.

L'agent des services correctionnels avait les compétences pour effectuer le travail modifié offert par l'employeur mais les détenus auraient pu exercer des représailles contre lui s'ils s'étaient rendu compte qu'il était blessé – Dans les circonstances, un retour à un emploi modifié aurait entraîné des risques pour la santé et la sécurité.

Le travailleur, un agent des services correctionnels employé dans une prison à sécurité maximale, avait subi une lésion à un pouce le 21 septembre 2001 en intervenant auprès de détenus. La Commission avait commencé par lui reconnaître le droit à des prestations pour perte de gains (PG) jusqu'au 2 octobre 2001. Le travailleur avait contesté cette décision et la Commission avait prolongé ses prestations jusqu'au 12 novembre 2001. L'employeur a interjeté appel de la décision par laquelle le commissaire aux appels a reconnu le droit à des prestations du 2 octobre au 12 novembre. Le Tribunal a rejeté l'appel.

L'employeur avait fait une offre de travail modifié le 2 octobre. Le travailleur avait les compétences nécessaires pour effectuer le travail modifié et ce travail cadrait avec ses capacités fonctionnelles. Le comité était toutefois convaincu que le travail offert présentait des risques pour la santé et la sécurité au sens de la politique de la Commission. Le travailleur faisait partie de l'unité tactique d'intervention. De ce fait, les détenus auraient pu exercer des représailles contre lui s'ils s'étaient rendu compte qu'il était blessé et quelque peu vulnérable. Dans les circonstances entourant le cas en l'espèce, où le travailleur était membre de l'unité tactique d'intervention dans une prison surpeuplée à sécurité maximale, un retour au travail aurait entraîné des risques pour la santé et la sécurité parce que le travailleur n'aurait pas pu se défendre, ni défendre autrui, de façon adéquate dans une situation d'urgence.

Le travailleur avait droit à des prestations pour PG pendant la période en question.

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
 - Document No. 19-02-02 (June 15, 1999) (since superseded)

APPEAL by the employer from a decision of the Appeals Resolution Officer granting loss of earnings benefits to the worker during a specific period.

March 30, 2006.THE TRIBUNAL: —

BEFORE:	S. Peckover, Vice-Chair B. M. Young, Member Representative of Employers M. Ferrari, Member Representatives of Workers

HEARING:	December 19, 2005, at Toronto, Oral
DECISION(S) UNDER APPEAL:	August 31, 2004

APPEARANCES:	
For the worker:	S. Linarello, Union Representative
For the employer:	J. Campbell, Lawyer CD, Witness

REASONS

(i) Introduction

This right-handed worker, now age 42, worked for the accident employer as a corrections officer (CO) in a maximum security prison. On September 25, 2001, he injured his left thumb while breaking up an inmate action in the prison. He went to the Emergency department of the local hospital on September 26, 2001, where an x-ray showed that he had a possible fracture of the left thumb. After the swelling went down, he was placed in a cast for three weeks and referred to the Plastic Surgery department. In early November 2001, the worker's cast was removed, after which he underwent five days of physiotherapy. He was off work from September 25, 2001 to November 13, 2001.

The employer wrote to the worker on September 28, 2001, indicating that it could accommodate him in modified work within his restrictions. A Functional Abilities Form (FAF) completed by plastic surgeon Dr. Hayashida, on October 2, 2001 indicated that the worker would have limited use of the left hand for six to eight weeks. An employer letter, dated January 17, 2002 (written as confirmation of an oral conversation on January 15, 2002), advised the Board that three positions had been identified as suitable: Outside Patrol, Catwalk, or assisting in the Control Room.

In a decision letter dated December 5, 2001, the Board advised the worker that, based on the FAF of October 2, 2001, he was capable of full-time hours with limited use of his left hand from that date. He had a responsibility to contact his employer and arrange a return to suitable work as of that date. Loss of earnings (LOE) benefits therefore were allowed only up to and including October 2, 2001.

The worker objected, claiming that the modified work offered was not safe, and violated his restrictions. At the Appeals Branch level, the ARO ruled that, while the worker was fit for work that did not involve the use of his left hand, his membership in the tactical unit placed him in a unique position. While the three positions offered as modified work would not pose any greater risk to him as compared to other staff at the facility, his membership in the tactical unit would lead to concern for his health and safety if he returned to modified work in the pre-accident workplace. He would more likely than not have been targeted by inmates for retaliation if they sensed that he was not able to defend himself adequately or assist his co-workers in the event of an emergency. He therefore allowed the worker's objection, and granted LOE benefits from October 3, 2001 through November 12, 2001.

The employer appeals from this decision.

(ii) The Issues

The sole issue before us is entitlement to LOE benefits from October 3, 2001 to November 12, 2001.

(iii) Analysis and Conclusions

Since the worker was injured on September 25, 2001, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) applies to the appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

(a) The Worker's Testimony

The worker testified that he had worked for the employer as a CO since 1991. He also had been a member of a crisis management tactical team, the goal of which was to put an end to inmate altercations and uprisings, since its inception in March 1999.

He testified that training to become a tactical team member, a voluntary position for which no extra remuneration is paid, consists of 80 hours of initial training, including the laws and legislation regarding the use of force to solve a problem. Team members undergo ongoing physical training, as well as annual training and testing. Recertification consists of 40 hours of training each year, as well as practical skills and munitions training. There are five members on each of two teams at this location. The team is activated as a last resort. Inmates are given three warnings before the team goes into action. Team members wear a special uniform, consisting of a grey shirt and pants, with weapons on the belt, and a bullet-proof vest. They also wear a helmet with a black-out shield on the front to conceal their identity.

The worker testified that, while the tactical team members' identities technically are concealed, they work out regularly in the prison gymnasium, which is reserved for COs. Their uniforms and gear are stored in the Ready Room. The latter is located down the hallway from the gymnasium, a hallway commonly used by inmate cleaners, who are able to see the comings and goings of the people in the tactical team's training room. While training, the tactical team members wear jogging suits with the tactical team letters on the back, and their identity is not concealed. To go from the Ready Room to the gymnasium, it is necessary to pass the visitors' area (which could contain up to 12 inmates at a time) and the laundry area (which could have up to 10 inmates), as well as the kitchen and inmate lunchroom. It is adjacent to the admitting area, the protective custody bullpen, and the intake bullpen, collectively known as Admitting and Discharge. It takes about a minute to get to the gymnasium from the Ready Room.

The worker testified that the maximum security facility in which he worked was built in the 1970s with the capacity to house 256 inmates. In the 1980s, they double-bunked many of the units, resulting in capacity for 468 inmates. In 2001, at the time of the worker's accident, they were putting inmates on the floor, and there were between 550 and 600 inmates at that time. The ratio of COs to inmates depended on the time of the day. From 7 a.m. to 9 p.m., there were between 35 and 40 COs on duty; from 9 p.m. to 7 a.m., there were 11.

He testified that he did not return to modified work after the accident because he did not feel that it was safe to be around the inmate population. He would be unable to defend himself with a cast on his arm. He felt vulnerable. There was a violent, unpredictable culture within the inmate population. The most respected inmate in the prison is one who has killed a police officer. The inmates know that he is a member of the tactical team, since he passes by all the above-identified areas to get from the locker room to the gymnasium to work out with the tactical team, and the team members' identities are not concealed when they are working out. He indicated that he has never received any actual threats from inmates, but he has been pointed out among the population as a tactical team member. He was not aware of anyone who had been targeted because of their membership on the tactical team. He admitted that female COs and administrative staff work in the identified areas, even when pregnant.

With respect to the modified jobs offered, the worker testified as follows:

- He had done the catwalk and outside patrol jobs before. He had been in the control room before to observe, but had never been trained on it. The control room contained monitors, and the controllers opened and closed sally port doors to let people in and out of different areas within the prison.
- With respect to the control room job, he indicated that no training was offered in the modified job program. In addition, he would have been in contact with inmates when he went to the lunchroom or the washroom. Generally, there were two COs in the control room on a shift. However, on lunch breaks, there was only one.

- The catwalk job consisted of walking on an elevated platform, 15 to 18 feet above the ground. There was a booth to sit in. He indicated that he could have done this work physically.
- The outside patrol job involved observing to see if anything has been thrown in, or to act as the first line of defence if an inmate breached the wall or the fence around the institution. He testified that walking about patrolling would not be a problem, but he would have been unable to do the defence work with a cast on.

The worker testified that all three jobs were done from a locked, secure part of the jail to which inmates had no access. However, to get to all three of the modified jobs, he would have had to cross the Admitting and Discharge area, where there were a good number of inmates. He indicated that he had asked the employer if they were prepared to put runners or posters in place when he would have to go to the lunchroom or the washroom, especially while doing the Control Room job. The employer refused, saying it was impractical, and would hold up the daily activities. He stated that the only offer of modified work was duties within the secure part of the jail.

The worker's family doctor, Dr. Hoffman, wrote a note dated January 15, 2002, which indicated that the worker was "ordered not to have inmate contact until November 13, 2001". The worker testified that he had asked the employer to give him information in writing regarding the three positions available for modified work, so that he could consult his doctor with respect to their suitability. The employer refused to do so. In the absence of that information, the doctor simply asked if there would be contact with inmates, and then wrote the note.

(b) CD's Testimony

CD testified on behalf of the employer. She indicated that she presently is the Provincial Emergency Response and Security Co-ordinator. Her responsibilities include emergency response team programs, including the tactical units, and a number of other crisis intervention programs. She stated that her role is largely administrative, in that she is responsible for policy, procedure, obtaining equipment, etcetera.

CD testified that tactical team members have more training on the use of force than regular COs would have. She herself was a member of a tactical team for approximately six years, when she was stationed at a medium/maximum security prison. During that time (i.e., around 1989 or 1990), she dropped a table on her foot, and was in a cast. She required accommodation in her employment. She was allowed to work in the staff training area of the facility, which was in the medium security part of the prison. There was inmate contact during this time period. To get to the staff training area, she had to walk down hallways where there were inmates, and the inmate "cleaning gang" was located next door. She testified that she was not expected to respond to tactical team calls while she was on modified duty. She did not feel her safety was in jeopardy during this time. She stated that cleaners are generally lower-risk offenders who have been cleared to work in that area. If there was a problem, she could always have called for backup in a situation. There was a backup system in place. Depending on the area, there were alarm buttons, telephones, or radios. In any scenario, a CO can assess the situation, determine whether they are capable of handling it, and can call for assistance. They can disengage (i.e., leave the immediate area) to get help. She indicated that, as a CO, one has to be cautious all the time.

(c) The Representatives' Arguments

Ms. Campbell, on behalf of the employer, submitted that there was no evidence that being a member of a tactical team

affected the worker's safety. Further, the employer had fulfilled its obligation to co-operate in the early and safe return to work (ESRTW) process, in that it had offered suitable modified work.

She submitted that there was no evidence of a safety risk from being in a tactical unit. Rather, the opposite was true: these individuals were highly trained, and were more aware of the options available to respond in a high-risk situation.

In terms of the modified work offered, she argued that it would not expose the worker to the inmate population, in that he would not be doing regular CO duties, and would not be on the floor with the inmates. The restrictions identified did not include lack of exposure to inmates. She submitted that the modified jobs were within his restrictions.

Ms. Campbell also argued that there was no evidence that the tactical unit members had ever been attacked by inmates, or of retaliation against them. On the contrary, the evidence from CD was that she had been accommodated without incident when her foot was in a cast. She argued that members of potentially more vulnerable groups, such as pregnant female staff members, used the same hallways as the prisoners, without incident. She also indicated that inmates do not move around the facility unescorted. Further, all three of the positions offered were in a controlled environment, in which backup was readily available. The worker would not be a member of the tactical team while on modified work. The worker had been deemed fit for return to modified work in the FAF dated October 2, 2002. Given that there was no medical evidence to support his being off work past that date, and that the modified jobs offered all were within his restrictions and contained no health and safety issues, the ARO decision should be overturned.

On behalf of the worker, Mr. Linarello argued that a "perfect safety environment" was impossible to achieve. He emphasized the context of the claim. He indicated that this is a correctional facility, and the job is based on supervising inmates who break the law. He argued that they would not need the tactical team if the inmates were predictable. The fact that ongoing training was required for tactical team members spoke to how dangerous it was. For example, the incident in which the worker was injured occurred while performing a tactical team intervention. He submitted that the worker, as a tactical team member, had greater information regarding what to do, and better training. This was exactly the reason why he chose not to do the modified work, as he had a heightened awareness of the dangers involved.

With respect to CD's testimony regarding her accommodation while in a foot cast, he submitted that the witness had been working at a different site, in a medium security area, at a different time. Her situation therefore was very different from that of this worker.

He also argued that the fact that something had not happened, in terms of an attack on a tactical team member, did not mean that it would not happen. In this particular situation, it was best to look at the worst-case scenario.

He submitted that there could have been more done to return the worker to a job where he had no inmate contact. There was only a short time period involved. The employer was the provincial government, and it was not limited to finding modified work within the prison system. It could have placed him elsewhere.

In summary, he submitted that the worker co-operated in terms of seeking medical attention for his injury, returning to doctors, and having physiotherapy after the cast was removed. He kept in contact with his doctors, and tried to keep in contact with the employer but was told, these are the jobs, like it or leave it. He was unable to obtain a written description of the jobs so that his doctor could determine their suitability. The worker had testified that the catwalk job likely was within his

restrictions, and he likely could have done the control room job if he had been offered training. However, all three jobs were unsafe, in that he would have to walk through areas containing inmates to get to them, and therefore he was at risk of retaliation as a wounded tactical team member. The jobs therefore were not suitable, as they were unsafe.

(d) The Law and Policy

Operational Policy Manual, Document No. 19-02-02 “The Goal of ESRTW and the Roles of the Parties” is instructive on the roles of the employer and worker in the return to work process. The relevant portions indicate as follows:

POLICY

The workplace parties (employers and workers) must co-operate and be self-reliant in returning the worker to suitable and available employment.

GUIDELINES

Definitions

Suitable work is work that

- is within the worker’s functional abilities
- the worker has, or is able to acquire, the necessary skills to perform
- does not pose a health or safety risk to the worker or coworkers, and
- if possible, restores the worker’s earnings.

...

The goal of ESRTW

The goal of the early and safe return to work (ESRTW) process is to return the worker to employment that

- is suitable
- is available, and
- if possible, restores the worker’s earnings.

...

Roles of the workplace parties

The workplace parties must co-operate with each other in the ESRTW process. Co-operation means

- maintaining communication with each other
- working towards identifying a suitable and available job for the worker, and
- fulfilling reporting obligations to the WSIB ...

...

Benefits while co-operating

Workers are eligible to receive benefits while co-operating in their medical rehabilitation and in the ESRTW process.

(e) Findings

From the above excerpt, it is clear that the work offered must be suitable. Looking at the definition of suitable work, we note that there is no question that the worker had the necessary skills to perform the work offered, and that it was offered at no wage loss. The worker acknowledged that the modified work was within his functional abilities, as he could work so long as the job did not involve using his left hand. His concerns were with respect to getting to and from the work location, for all three of the jobs. The Panel views this as a health and safety issue. The only issue, therefore, is whether the work offered posed a health and safety risk to the worker or his co-workers.

To begin, the Panel has some difficulty with the fact that, despite the worker's request for written confirmation of the jobs offered as modified work, and a job description for each, so that his doctor could assess their suitability in terms of his restrictions, none was ever provided. While the accident employer was very proactive in advising the worker, almost immediately after the injury, that modified work would be available, it would seem reasonable to provide job descriptions, so that any additional modifications required to suit a particular injured worker's circumstances could be addressed. The first mention of the actual modified jobs occurs on January 15, 2002, in Memo No. 5. It was followed by the employer's written confirmation, dated January 17, 2002, of the three jobs available.

Having said that, it is clear that the Board investigated the safety issues, and wrestled and grappled with them at length. The Claims Adjudicator reviewed the worker's arguments, and consulted with a number of other adjudicators on the issue. Later, her manager became involved, and consulted with the policy division. There are two lengthy memos on file from her detailing the issues and outlining her conversations with the worker. The second, dated February 8, 2002, indicates as follows:

It was agreed [with the worker] that the actual modified duties provided by the AE did meet the restriction of no inmate contact given that the work would be done in a protected, locked and controlled environment. The problem was getting to that locked environment. He would be required to walk through corridors and areas where inmate access is allowed. This then does not meet the restrictions provided.

The AE explained that inmates in these areas are screened prior to being granted access. Therefore, the likelihood of a safety hazard [sic] is reduced. Non-security personel [sic] use these corridors and areas.

The question is, has a "safe" return to work offer been made? The employer has made accommodations [sic] and it hasn't been demonstrated that the common areas would involve any actual person-to-person contact with those inmates granted access to these areas to carry out their own assigned duties.

[The worker] explained that he doesn't take his orders from [accident employer/supervisor], but rather his family dr. who specified no inmate contact whatsoever. I acknowledged that this restriction was given, however, was unable to provide supportive objective findings to validate the restriction. Inmate contact appears to have been minimized as much as possible by the employer with actual assignment of work for the IW within a locked no-inmate area.

The requirement of the IW to defend himself from an inmate within the corridors is possible but probability [sic] of this

requirement is not supported with any historical evidence. As well, it is already noted that the inmates in these areas are screened and therefore present a lower risk of incident and that emergency response teams are available to respond and diffuse any issues that might possibly arise.

This appears to the Panel to cover the issues in general, and provides a reasoned approach to the situation. It seems to us to be somewhat extreme to interpret “no inmate contact” to mean an absolute ban on an inmate even being in the worker’s vicinity. Inmates working at assigned jobs have been screened before doing so, and therefore pose less of a risk of harm than some of the other prisoners, who would not be in the common areas leading to the secure area where the worker would be working. While it is true that there might be other inmates around, for instance, in the lunch room, visiting room, or intake room, it is also true that none of them goes anywhere unescorted.

Having said all of that, we note that the manager’s memo does not deal with the worker’s specific concern, i.e., that as a tactical team member, he was subject to retaliation if it was perceived that he was injured, and therefore somewhat vulnerable. While there might not have been an immediate threat from the screened inmates, they had direct access to the more volatile types upstairs, who the worker testified could have reason to be in the A&D area if they had visitors. The Panel finds it far more likely that a known member of a tactical team would be targeted in this fashion than that an administrative staff member would be singled out for this type of retaliation, given the tactical team members’ direct responsibility for bringing inmates’ behaviour into line by the use of force.

It therefore comes down to a question of whether the worker’s perception of vulnerability was reasonable in the circumstances. A comparison of CD’s testimony, as a fellow CO in another jail, may be instructive.

Turning to CD’s testimony, the Panel notes that she was working in the medium-security section of a different prison while she was on accommodated work and just prior to it. Otherwise, her job as a CO and tactical team member appears to have been the same as that of the worker. She testified that she did not feel that her safety was in issue when she was doing modified work, and she had to walk through a similar area in which there was inmate contact in order to get to her modified job in the secure area of the prison. However, we note that we have no evidence with respect to the conditions in that prison at the time. Also, given that she was working in the medium-security part of that prison, one would presume that the inmates were somewhat less volatile, in terms of posing a danger to others, than those in a maximum security institution. The worker’s testimony was that, at the time of his injury and ensuing recovery, the prison in which he worked was extremely overcrowded, with rooms originally intended for one occupant housing up to three individuals. He testified that prisoners in maximum security jails tend to be violent and unpredictable at the best of times, and that this particular situation of overcrowding added a level of stress to the inmates’ situation. We find that in these circumstances, the worker was justified in feeling vulnerable to retaliation as a wounded member of the tactical team. We therefore are of the opinion that the worker’s return to work in the positions offered, in the particular circumstances of this case (i.e., the overcrowding situation that existed at the time in a maximum security facility where he was a tactical team member), would have resulted in a health and safety risk to the worker, as he would not have been able to defend himself or others adequately in the event of an emergency.

The Panel therefore agrees with the ARO’s conclusion, and finds in favour of the worker. He is entitled to LOE benefits from October 3, 2001 through November 13, 2001.

DISPOSITION

The employer's appeal is denied. The worker is entitled to LOE benefits from October 3, 2001 through November 13, 2001, as indicated in the ARO decision.

Appeal dismissed.



Decision No. 1608/05

Vice-Chair: B. Cook

Decision — April 19, 2006

Neutral Citation: 2006 ONWSIAT 850

Loss of earnings (lay-off) – Board policies (applicability of Board policy) – Retroactivity (policy change) – Second Injury and Enhancement Fund (pre-existing condition).

Board policy is not given retroactive effect, in absence of clear authority – Tribunal was not bound to apply Board policy that was adopted after circumstances of case – Considering policy as a helpful only, worker was entitled to maintain benefits during short-term annual employer shutdown.

The worker suffered a low back injury on June 17, 2000. The employer appealed a decision of the Appeals Resolution Officer granting the worker LOE benefits from July 3 to July 17. The employer also appealed denial of SIEF relief. The appeal was dismissed.

The worker's doctor had provided a medical certificate indicating that the worker was not fit to return to work from June 22 to June 30. The employer's plant was closed for its annual shutdown from July 3 to 17. The worker made a graduated return to work starting on July 24.

Board *Operational Policy Manual*, Document No. 18-01-08 (now 15-06-02) applies to entitlement following work disruptions (short-term and long-term lay-offs). This policy was adopted in 2003. In the absence of clear authority, legislation cannot be given retroactive effect. This is also true for policy that dictates rights and benefits. Since the policy was not adopted until after the circumstances of this case, the Tribunal was not bound to apply the policy.

The Vice-Chair noted, however, that the policy did not change a prior policy. Rather, prior to adoption of this policy, there was no specific policy directing adjudicators how to deal with such circumstances. Although the Vice-Chair was not bound to apply the policy, the Vice-Chair found it helpful as a guideline.

The policy provides that, in the case of short-term lay-offs of less than three months that affect the entire work force, workers should generally have their benefit status maintained. If a worker is in receipt of full LOE benefits at the time of such a work disruption, the full benefits should probably continue. Considering the policy as a guideline only, the Vice-Chair noted that the worker was under active treatment and that his employability was clearly affected by the compensable condition, and concluded that the worker was entitled to LOE benefits during the period in question.

The worker had suffered a prior back injury in 1977 but had experienced no further back problems since a recurrence in 1988. The Vice-Chair concluded that the worker did not have a pre-existing condition that prolonged or enhanced the effects of the work-related injury in 2000.

Perte de gains (mise à pied) – Politiques de la Commission (applicabilité de la politique de la Commission) – Effet rétroactif (modification de la politique) – Fonds de garantie pour travailleurs réintégrés (état pathologique préexistant).

À moins d'une autorisation claire, il n'est pas permis de donner un effet rétroactif à une politique de la Commission – Le Tribunal n'était pas tenu d'appliquer une politique de la Commission adoptée après les événements entourant un cas – Utilisée seulement comme guide, la politique menait à la conclusion que le travailleur avait droit au maintien de ses prestations pendant le congé annuel de l'usine de l'employeur.

Le travailleur avait subi une lésion à la région lombaire le 17 juin 2000. L'employeur a interjeté appel de la décision par laquelle le commissaire aux appels a reconnu au travailleur le droit à des prestations de perte de gains (PG) du 3 au 17 juillet. L'employeur a aussi interjeté appel de la décision de lui refuser un virement au Fonds de garantie pour travailleurs réintégrés (FGTR). Le Tribunal a rejeté l'appel.

Le travailleur avait reçu un billet médical indiquant qu'il était inapte au travail du 22 au 30 juin. L'usine de l'employeur était fermée pour le congé annuel du 3 au 17 juillet. Le travailleur avait effectué un retour au travail graduel à partir du 24 juillet.

Le document no 18-01-08 (maintenant 15-06-02) du *Manuel des politiques opérationnelles* concerne le droit à une indemnité à la suite de perturbations de travail. La Commission a adopté cette politique en 2003. À moins d'une autorisation claire, il n'est pas permis de donner un effet rétroactif à une loi, et il en va de même pour une politique dont dépendent des droits et des prestations. Le Tribunal n'était pas tenu d'appliquer cette politique puisque la Commission l'avait adoptée après les événements entourant le cas.

Le vice-président a toutefois noté que la politique n'en modifiait pas une ancienne. En fait, il n'y avait auparavant aucune politique particulière indiquant aux décideurs comment traiter un dossier dans de telles circonstances. Bien que le vice-président n'eût pas été tenu d'appliquer la politique, il a trouvé utile de s'en servir comme guide.

La politique prévoit qu'un travailleur devrait généralement maintenir sa situation en matière d'indemnité dans le cas d'une mise à pied générale temporaire de moins de trois mois. Si un travailleur touche des prestations pour PG totale au moment d'une telle perturbation de travail, ses prestations devraient probablement continuer. En se guidant sur la politique, le vice-président a noté que le travailleur se faisait traiter et que son employabilité était clairement réduite en raison de ses troubles invalidants. Le vice-président a conclu que le travailleur avait droit à des prestations pour PG pendant la période en question.

Le travailleur avait subi une lésion au dos avant 1977 mais il n'avait eu aucun autre problème de dos depuis une récurrence

en 1988. Le vice-président a conclu que les suites de la lésion professionnelle subie en 2000 n'avaient été ni prolongées ni accrues par des troubles préexistants.

Tribunal Decisions Considered:

- *Decision No. 463/97* (October 31, 1997) refd to
- *Decision No. 1625/97* (November 30, 1998) refd to

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
 - s. 126

o

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
 - Document No. 08-01-05 (September 4, 1991) (since superseded)
 - Document No. 18-01-08 (April 11, 2003) (since revised)

APPEAL by the employer from a decision of the Appeals Resolution Officer granting the worker loss of earnings benefits for a specific period.

April 19, 2006. THE TRIBUNAL: —

BEFORE: B.L. Cook, Vice-Chair
HEARING: December 8, 2005, at Toronto, Written
DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer A. Clark

APPEARANCES:

For the worker: Elizabeth Kosmidis, Lawyer
For the employer: Ray Wintermeyer, Union Representative

REASONS

(i) Introduction

The worker suffered a work-related low back injury on June 17, 2000. He was jolted while driving a fork lift truck that did not have any suspension. Dr. D. Haddad, the worker's family doctor, provided a medical certificate, dated June 22, 2000 that indicated that the worker was not fit to return to work for the period from June 22, 2000 to June 30, 2000. The worker was referred for physiotherapy.

The employer's plant was closed for an annual plant shut down from July 3 to July 17, 2000.

The worker returned to work on July 24, 2000. He returned to work on a graduated return to work basis, which had been recommended by the physiotherapist. He worked for four hours a day for the first two weeks, and then increased his hours until he was working full-time hours.

The issue in the appeal is whether the worker is entitled to loss of earnings (LOE) benefits for the period July 3 to July 17, 2000. Entitlement to benefits for this period was initially denied by the Claims Adjudicator on the grounds that the worker would not have worked in that period whether or not he had a work-related injury since he was off work on a previously scheduled plant shut-down. The Appeals Resolution Officer granted benefits for this period. She relied on the Board's *Operational Policy Manual* Document No. 18-01-08 ("Entitlement Following Work Disruptions: Short-term and Long-term

Layoffs”).

The employer submits that this policy does not apply to this case. The policy is dated April 2003. Previously the Board did not have any specific policy regarding entitlement to LOE benefits during following a short-term lay-off, although there was a previous policy regarding benefits under the pre-1997 *Workers’ Compensation Act* [R.S.O. 1990, c. W.11].

The employer’s previous representative had submitted to the Appeals Resolution Officer that in the alternative, the employer claimed entitlement to cost relief under the Board’s Second Injury and Enhancement Fund (SIEF) policy in the claim on the basis that the worker had suffered a prior work-related back injury in 1977. The Appeals Resolution Officer found that there was no evidence that this injury was a factor in regards to the injury of June 17, 2000.

Ms. Kosmidis’ submissions do not address the SIEF issue. The only issue that they address is whether it was appropriate for the Appeals Resolution Officer to apply *Operational Policy Manual* Document No. 18-01-08 to this case. I asked the Tribunal Counsel Office to obtain a copy of the worker’s prior claim from the Board and copies of this were shared with the parties.

Regarding the benefit issue, Ms. Kosmidis submits that the policy applied by the Appeals Resolution Officer cannot apply to the case since the circumstances that were the subject-matter of the Appeals Resolution Officer’s decision all occurred well before *Operational Policy Manual* Document No. 18-01-08 was adopted by the Board. She points out that it is a well-established principle that law cannot be retroactively applied without express authority.

(ii) The Application of the Board Policy

On the issue of the application of *Operational Policy Manual* Document No. 18-01-08 to the adjudication of this case, I find that the policy cannot be applied in a way that determines the outcome of the appeal, because it was not adopted as a policy of the Board until after the circumstances of the case giving rise to the appeal. The policy was adopted in 2003 and the issue is whether the worker was entitled to benefits in 2000.

As Ms. Kosmidis notes, in general, in the absence of clear authority, legislation cannot be given retroactive effect. Simply put, the rules governing rights and benefits cannot be retroactively changed. The same is generally true for policy that dictates rights and benefits. This point is made in the Tribunal decisions that the employer’s representatives have cited (e.g. *Decisions No. 1625/97* (November 30, 1998) and *463/97* (October 31, 1997)).^{[1](#)}

However, I do not see *Operational Policy Manual* Document No. 18-01-08 as an attempt by the Board to change the rules concerning how cases like the instant case are to be adjudicated. Prior to the adoption of *Operational Policy Manual* Document No. 18-01-08, the Board had no policy that provided any specific direction to adjudicators about what to do in cases like this. The only applicable policies were the general policies about entitlement to LOE and reviewing LOE benefits.

In other words, it was not the case that under the terms of an earlier policy the worker was not entitled to benefits and that he is only entitled to benefits because of the provisions of policy Document No. 18-01-08. When the injury occurred, and in July 2000, at the time of the two-week period that is in dispute, there was no specific policy directing adjudicators about how to deal with such situations. It was left to the discretion of the adjudicator. One of the purposes of Document No. 18-01-08 was to address this “policy vacuum” to try to ensure more consistency in decision-making.

Operational Policy Manual Document No. 18-01-08 is not a policy that applies to this case under section 126 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, which requires the Tribunal to apply applicable Board policy. Because of the general principles against retroactivity, the Tribunal is not required to apply the policy to the facts of the case, because the policy was not in effect at the relevant times.

However, in my view, the policy can nevertheless be helpful as a *guideline* in terms of how to address the types of circumstances that are described in the policy, even if it does not *determine* the result in the same way that it would if the circumstances in dispute occurred after April 2003 when the policy was adopted.

(iii) Analysis of the Facts of the Case

Turning to the facts of the case, I note that the worker was receiving physiotherapy treatments after the injury. The physiotherapist suggested that the worker required a graduated return to work program. According to the employer, the worker would have started this graduated return to work program on July 3, 2000 but did not because of the plant shut down. However, the plant shut-down ended on July 17 and the worker did not actually return to work and start the graduated return to work program, until July 24.

In her written submissions, Ms. Kosmidis submits that the worker should not be entitled to benefits for the period from July 3, 2000 to July 17, 2000 because the worker would not have worked in that period even if he had not suffered the injury. She notes that he had already received his vacation pay in regards to this period.

In his submissions on behalf of the worker, Mr. Wintermyer notes that the worker had a continuing impairment as a result of the injury in the period in question. In his view, it is not clear that the worker would have been physically capable of returning to work on July 3, 2000 if the shut-down had not been in effect. He notes that a Functional Abilities Form completed by the worker's doctor on June 30, 2000 indicated that the worker had continuing limitations that were expected to last for four to six weeks. Limitations included no lifting over 5 kilograms, and no repetitive bending or movement. I note that the worker participated in a physiotherapy program from June 26 to August 25, 2000. There is also a letter from one of the treating physiotherapists, dated May 3, 2001, which indicates that at the time of the initial assessment on June 26, 2000, it was felt that the worker "could not affectively return to modified duties immediately." The letter goes on to suggest that the graduated return to work program that the worker followed after the plant shut down was "best for him therapeutically."

The Board's *Operational Policy Manual* Document No. 18-01-08 (now published as 15-06-02) provides:

A worker who is unable to continue working due to a short-term or long-term layoff, and whose employability is clearly affected by his/her work-related impairment and associated medical restrictions, may qualify for

- additional loss of earnings (LOE) benefits, temporary total disability benefits (TT), future economic loss (FEL) supplement, or s.147(2) supplement, and possibly
- labour market re-entry (LMR) services.

A temporary plant shut down of less than three months is considered a short-term lay-off. The policy indicates:

Generally, workers involved in a short-term layoff that affects the entire workforce should have their benefit status maintained, i.e.:

- if the worker is **not** in receipt of LOE, FEL, or permanent disability (PD) benefits at the time of the work disruption, additional benefits/services should probably not be allowed
- if the worker is in receipt of **partial** LOE/FEL/PD benefits at the time of the work disruption, the partial benefits should probably continue, or
- if the worker is in receipt of **full** LOE/FEL/TT minus PD/TT benefits at the time of the work disruption, the full benefits should probably continue.

The policy indicates that it is appropriate to consider whether “the worker’s employability is clearly affected by the work-related impairment and associated medical restrictions”. One of the factors that may be considered in this regard is whether the worker is under active treatment.

It appears to me that under these guidelines, the worker is entitled to benefits for the period in question. He was in active treatment before and during the short-term lay-off and his employability was clearly affected by the work-related impairment and associated medical restrictions. As noted earlier, while the policy is not an applicable policy for the purposes of section 126 of the WSIA, it may nevertheless be considered as a guide in adjudicating cases because it serves to fill a policy vacuum that previously existed. In my view, the policy is useful in this case. Application of the principles set out in the policy to the case indicates that the worker is entitled to benefits for the period of the lay-off.

For these reasons, I conclude that the worker is entitled to benefits for the period from July 3, 2000 to July 17, 2000.

(iv) The SIEF Issue

Operational Policy Manual Document No. 08-01-05 sets out the Board’s policy regarding cost relief to employers. It provides:

If a prior disability caused or contributed to the compensable accident, or if the period resulting from an accident becomes prolonged or enhanced due to a pre-existing condition, all or part of the compensation and health care costs may be transferred from the accident employer in Schedule 1 to the SIEF.

In this case, the employer claims that the worker had a pre-existing condition. The employer points to an earlier claim for a low back injury as support for this. The prior claim was followed following a work-related low back injury that occurred on January 14, 1977 when the worker picked up a 35-pound ladder. The worker was off work until May 9, 1977. Contrary to the submissions of the employer’s representatives, the Board did not conclude that the worker had a permanent disability as a result of the accident but rather concluded that he fully recovered.

In September 1988, the worker claimed that he had suffered a recurrence of this injury. The worker claimed that he had been experiencing symptoms after 1977. The employer disputed this and claimed that there was no evidence that the worker had suffered any continuing back problems. The Board determined that the worker was not entitled to additional benefits on the grounds that there was no evidence of continuity after May 1977.

Having reviewed the medical records in the claim established for the 1977 injury and in the claim established for the injury in 2000, I can find no evidence that the worker had any further back problems subsequent to 1988. There is also no evidence that I can identify or that was identified in the employer’s submissions that establishes that subsequent to 1988, there was any pre-

existing condition that prolonged or enhanced the effects of the work-related injury of June 17, 2000.

For these reasons, I must conclude that the employer is not entitled to cost relief under the Board's SIEF policy.

DISPOSITION

The appeal is denied.

Board policy 18-01-08 (now 15-06-02) is not an applicable policy in this case within the meaning of section 126 of the WSIA because it was not in effect at the times relevant to the appeal. However, it may nevertheless be useful as a guide since there was previously a policy vacuum in regards to the adjudication of cases involving entitlement to benefits following a lay-off.

The worker is entitled to benefits for the period from July 3, 2000 to July 17, 2000.

The employer is not entitled to cost relief under the Board's SIEF policy as there is no evidence of a pre-existing condition that enhanced or prolonged the effects of the June 2000 work-related injury.

Appeal dismissed.

1. See, for example, *Decision No. 1647/04* (2005), 75 W.S.I.A.T.R. (online), for further discussion of this issue.



Decision No. 596/06I

Panel: Robeson (Vice-Chair), Robb, Timms

Decision — April 27, 2006

Neutral Citation: 2006 ONWSIAT 925

Death (maintenance of claim by estate).

When worker dies without a will, Tribunal does not normally require appellant to obtain Certificate of Appointment, provided that all immediate beneficiaries consent to appeal being brought on behalf of estate.

The worker's widow appealed a decision of the Board denying the worker entitlement for chronic obstructive lung disease. In this decision, the Panel considered whether the widow was authorized to bring this appeal on behalf of the worker's estate.

The worker divorced his first wife in 1983. He had five children with his first wife. He remarried in 1989. The Tribunal contacted the first wife and the five children and asked whether they wanted to participate in the appeal. There was only one response, and that was from a son who said he did not want to participate. The Tribunal contacted them again to ask if they consented to the worker's widow bringing the appeal. There was only one response again, this being from a daughter who did not consent on the basis that she and her brothers had not benefitted from the estate.

When a worker dies without a will, the Tribunal does not normally require the applicant to obtain a Certificate of Appointment (formerly known as Letters of Administration), provided that all immediate beneficiaries have consented to the appeal being brought on behalf of the estate.

In this case, the former wife and children did not want to participate in the appeal. Only one refused to consent but that was because she did not share in the estate. The Panel noted that if this appeal is successful, the matter would be remitted to the Board to determine the nature and quantum of benefits and who is entitled to receive them. Requiring the widow to obtain a Certificate of Appointment could prevent the entitlement to benefits from being determined at this stage and could result in additional costs and litigation. Other provincial and federal bodies have recognized the widow as representing the estate.

In the circumstances, the Panel was satisfied that the worker's widow was the representative of the estate. Accordingly, she could bring the appeal.

Décès (maintien de la demande par la succession).

Quand un travailleur décède sans testament, le Tribunal ne demande normalement pas que l'appelant obtienne un acte de nomination, à condition que tous les ayants droit acceptent que l'appel soit interjeté au nom de la succession.

La veuve du travailleur a interjeté appel de la décision par laquelle la Commission a refusé de reconnaître au travailleur le droit à une indemnité pour une maladie pulmonaire obstructive chronique. Dans cette décision, le comité a examiné la question de savoir si la veuve était autorisée à interjeter appel au nom de la succession du travailleur.

Le travailleur avait divorcé de sa première conjointe en 1983. Il avait eu cinq enfants avec sa première conjointe. Il s'était remarié en 1989. Le Tribunal a communiqué avec la première conjointe et les cinq enfants pour leur demander s'ils désiraient participer à l'appel. Seul un fils du travailleur a répondu au Tribunal pour l'informer qu'il ne désirait pas participer. Le Tribunal a communiqué avec eux de nouveau pour leur demander s'ils consentaient à ce que la veuve du travailleur interjette appel. Seule une fille du travailleur a répondu au Tribunal pour l'informer qu'elle ne consentait pas parce qu'elle-même et ses frères n'avaient pas profité de la succession.

Quand un travailleur décède sans testament, le Tribunal ne demande normalement pas que l'appelant obtienne un acte de nomination, (anciennement « lettres d'administration »), à condition que les ayants droit acceptent que l'appel soit interjeté au nom de la succession.

En l'espèce, l'ancienne conjointe et ses enfants ne voulaient pas participer à l'appel. Une seule personne avait refusé mais c'était parce qu'elle n'avait rien eu de la succession. Le comité a noté que, si l'appel était accueilli, le cas serait renvoyé à la Commission pour qu'elle détermine la nature et le montant des prestations et qui y avait droit. Le fait d'exiger que la veuve obtienne un acte de nomination pourrait empêcher le règlement de la question du droit à une indemnité à cette étape et pourrait entraîner plus de frais et de litiges. D'autres organismes provinciaux et fédéraux avaient accepté la veuve comme représentante de la succession.

Dans les circonstances, le comité était convaincu que la veuve du travailleur était la représentante de la succession. Par conséquent, la veuve pouvait interjeter appel.

Tribunal Decisions Considered:

- *Decision No. 148/87* (September 6, 1988) refd to
- *Decision No. 410/87* (July 20, 1989) refd to
- *Decision No. 104/89* (October 25, 1989) refd to
- *Decision No. 461/90* (August 15, 1990) refd to
- *Decision No. 667/93I* (1993), 29 W.C.A.T.R. 176 refd to
- *Decision No. 1268/97* (April 27, 1998) refd to
- *Decision No. 1517/97I* (April 21, 1998) refd to
- *Decision No. 1383/98I* (September 28, 1998) refd to
- *Decision No. 137/02I* (April 24, 2002) consd
- *Decision No. 524/04* (November 18, 2004) [2004 ONWSIAT 2376] refd to

DETERMINATION whether the worker's widow was authorized to bring an appeal on behalf of the worker's estate.

April 27, 2006. THE TRIBUNAL: —

BEFORE: V.R. Robeson, Vice-Chair
C.J. Robb, Member Representative of Employers
D.C. Timms, Member Representatives of Workers
HEARING: March 24, 2006 at Toronto, Pre-Hearing Conference Call
DECISION UNDER APPEAL: WSIB Appeals Resolution Officer dated July 11, 2000

APPEARANCES:

For the worker: C. Chenier, UFCW, Local 1000A
For the employer: Not participating
For Tribunal Counsel Office: G. Shaw, Tribunal counsel

REASONS

(i) Issue

The preliminary issue for us to decide is whether the worker's widow is authorized to bring this appeal on behalf of the worker's estate.

(ii) Appeal Proceedings

The worker's widow contacted the Board in 1997 and submitted a claim that the worker's chronic obstructive pulmonary disease (COPD) resulted from his employment for the accident employer, and that this condition contributed significantly to his heart attack and death in 1994.

The Claims Adjudicator denied the claim on December 23, 1997 and October 19, 1998. The Appeals Resolution Officer denied the claim by decision dated July 11, 2000. That decision concluded that the worker was not entitled to benefits for COPD resulting from his employment in the employer's uranium mine from 1962 to 1992.

The worker's widow, purporting to act on behalf of the worker's estate, filed an appeal of the Appeals Resolution Officer decision at the Tribunal.

The Tribunal advised the worker's former wife and their five children of the appeal and asked whether they wished to participate in the appeal. The Tribunal received a reply from only one person, a son, who indicated that he did not wish to participate in the proceedings.

The Tribunal later wrote to the worker's former wife and their five children and asked whether they consented to the worker's widow bringing the appeal of the Appeals Resolution Officer's decision in the name of the estate. The Tribunal received a reply from only one person, a daughter, who indicated that she did not consent for the following reason: "Since there is no will, I would like to benefit from his estate. My brothers and I never benefited from his estate, house, boat, etc."

Tribunal counsel spoke to the daughter who confirmed her opposition to the worker's widow bringing the appeal and advised that she did not want to travel from her home in Quebec to Ontario to attend a hearing and indicated that she would not be able to participate in a telephone conference call due to her full-time job.

Tribunal counsel asked the daughter to put her concerns in writing to the Tribunal. The Tribunal did not receive any written communication from the daughter by March 20, 2006.

The Panel then advised Tribunal counsel that the pre-hearing conference call would take place as scheduled on March 24, 2006 with no further steps taken to secure the attendance of the daughter.

(iii) Background

The following are the facts as we find them based on the documentary evidence and testimony before us.

The worker was born on April 12, 1939. He worked in the employer's uranium mine from 1962 to 1992 when the mine closed. The worker worked for another employer from 1992 to 1994.

The worker and his first wife divorced in 1983. They had five children born between about 1964 and 1977.

The worker and the applicant were married in 1989.

The worker and his first wife owned a property (house). Ownership of this property was transferred in 1990 from the worker and his first wife to the worker and his second wife, the applicant. The first wife received \$3,500 from the worker and his second wife in exchange for the transfer.

The worker suffered a heart attack on August 1, 1994 and died on August 10, 1994 at age 55. The worker did not have a will.

The applicant arranged and paid for the worker's funeral.

The worker and the applicant were living in their jointly owned house at the time of his death in 1994. The worker and the applicant were registered owners and joint tenants of this property. The applicant, being entitled to the land by right of survivorship, applied successfully in October 1994 to have the worker's name deleted from the parcel register. The applicant paid off the mortgage on the house in November 1994.

Ownership of the worker's car was transferred to the applicant after his death.

The worker and the applicant took out a loan in 1993 for the purchase of a boat. The applicant sold the boat following the worker's death and repaid the bank loan.

The applicant was listed as the worker's spouse on the 1992 wind-up documents for the employer's pension plan. The worker elected to receive a deferred pension beginning January 1, 1998. The pension provided for a pensioner's spouse to receive the pension if the worker predeceased his spouse. The applicant testified that, upon the death of the worker, she applied for his pension and continues to receive the pension.

The applicant applied for and received the Death Benefit for the worker from Health and Welfare Canada Income Security Programs. The cheque was made payable to the applicant "for the Estate" of the worker. The applicant testified at the Tribunal that she endorsed the cheque and gave it to the funeral parlour that handled the worker's funeral.

The applicant testified that she applied for and receives the surviving spouse's portion of the worker's CPP pension.

(iv) Submissions

Ms. Chenier made oral submissions. Tribunal counsel Shaw made written submissions and oral submissions, referring to *Decisions No. 148/87* (September 6, 1988), *410/87* (July 20, 1989), *104/89* (October 25, 1989), *461/90* (August 15, 1990), *667/93I* (1993), 29 W.C.A.T.R. 176, *1517/97I* (April 21, 1998), *1383/98I* (September 28, 1998), *1268/97* (April 27, 1998), *137/02I* (April 24, 2002) and *524/04* (November 18, 2004).

The Panel thanks Ms. Shaw for her efforts in contacting the worker's daughter and for her submissions.

(v) Conclusion

The preliminary issue for us to decide is whether the worker's widow is authorized to bring this appeal on behalf of the worker's estate.

Tribunal decisions have consistently held that a deceased worker's estate has the right to claim workers' compensation benefits that would have been payable to the worker during his lifetime. See, for example, *Decisions No. 148/87, 410/87, 104/89* and *461/90*. The Tribunal will determine who has authority to act for the estate and a deceased worker. Where a worker has a will, the Tribunal generally accepts the Estate Trustee as having the authority to act for the estate at the Tribunal. Where a worker dies without a will, the Tribunal does not normally require the applicant to obtain a Certificate of Appointment of Estate without a Will (formerly known as Letters of Administration), provided that all immediate beneficiaries of the worker's Estate have consented to the applicant bringing the appeal on behalf of the estate. See, for example, *Decisions No. 1383/98I* and *524/04*. In the absence of such consent, the Tribunal will determine who is the representative of the worker estate. In making this determination, the Tribunal may examine *inter alia* evidence as to how assets are held and evidence from other government bodies as to who is recognized as acting for the worker's estate.

This was the approach taken in *Decision No. 137/02I* where the worker's widow appealed a decision of the Appeals Resolution Officer denying the worker ongoing benefits for an elbow injury. The Panel considered the appellant's standing to bring the appeal. The worker died without leaving a will. The worker had been married previously and had two children from that previous marriage, but it appears that the children were not located and no consent was therefore obtained from them for the widow to proceed with the appeal before the Tribunal. The appellant provided a number of documents, including: a CPP death benefit notice of entitlement to the widow for the estate of the worker; a letter from a trust company making payments on behalf of the Board to the estate of the worker care of the widow; certificate of divorce between the worker and his first wife; separation agreement between the worker and his first wife; certificates from the lawyers of the first wife and the worker; and ownership transfer for the worker's car to the widow. The Panel was satisfied from the documentation provided that the appellant was the representative of the worker's estate.

Applying *Decision No. 137/02I* to the unique circumstances of this case, we are satisfied that the applicant, the worker's widow, is the representative of the worker's estate and can appeal the Appeals Resolution Officer's decision on behalf of the estate.

In reaching this conclusion we particularly rely on the following:

- The Tribunal notified the worker's former wife and children of the appeal, but none indicated a wish to participate in the proceedings.
- The Tribunal asked the worker's former wife and children whether they consented to the worker's widow bringing the appeal to the Tribunal. Only one of them objected. The basis of this objection is that the worker's former wife and children did not share in the worker's estate. Accordingly, this is not an instance where it is suggested the widow will not properly represent the estate, or where there are competing claims to represent the estate, or where a non-beneficiary seeks to represent the estate.
- Neither the worker's widow nor any of his children have appealed the Appeals Resolution Officer decision or indicated an intention to do so.
- The worker's assets were held jointly with his widow. These include a house, an automobile and a boat. The documentation discussed above indicates to us that other provincial and federal bodies have recognized the worker's widow as representing the worker's estate. The worker's widow received the death benefit and the CPP pension from the federal government. Ownership of the house and automobile were transferred to the worker's widow and the worker's widow paid off the bank loan for the purchase of the boat.
- The worker may be entitled to benefits for COPD resulting from his employment for the employer.

We also considered the implications of allowing the worker's widow to bring the appeal and of not allowing her to bring the appeal. Allowing the widow to bring the appeal means that the worker's initial entitlement to benefits will be determined. Not allowing the widow to bring the appeal means that the worker's entitlement to benefits will likely not be determined or paid, if due, since no one except the widow has indicated an interest in pursuing an appeal. Requiring the worker's widow to obtain a Certificate of Appointment may effectively prevent the worker's entitlement to benefits from being determined at this stage and may result in additional costs and litigation.

With respect to the objection raised by the worker's daughter, the Tribunal has identified and located the worker's former wife and children. If we conclude that the worker is entitled to benefits and remit the issue of the nature and quantum of benefits to the Board to decide, any dispute about who is entitled to receive any benefits flowing from entitlement can be taken up with the Board, including the entitlement of the appellant and the worker's children from his first marriage. The Board can contact any potential beneficiaries of the Estate in the event that a decision issues in favour of entitlement.

Having reviewed the documentary evidence and the widow's testimony, and considered submissions from the widow's representative and Tribunal counsel and the Tribunal's past authority, we are satisfied that the worker's widow is the representative of the worker's estate, and, accordingly, that she can bring the appeal she has filed with the Tribunal.

DISPOSITION

The worker's widow has authority to bring this appeal.

The hearing on the issue of whether the worker is entitled to benefits for chronic obstructive pulmonary disease resulting from his employment in the employer's uranium mine from 1962 to 1992 will proceed before this Panel as scheduled in Sudbury on June 2, 2006.

Worker's widow authorized to bring appeal.



Decision No. 1050/05

Vice-Chair: Keil

Decision — May 30, 2006

Neutral Citation: 2006 ONWSIAT 1186

Loss of earnings (deemed earnings) – Early and safe return to work (co-operation) – Labour market re-entry (assessment) – Suitable employment.

Truck driver was no longer able to drive due to post-traumatic stress disorder – Employer offered suitable modified work at about half of pre-accident wages – Refusal of job was not unreasonable in circumstances and did not amount to non-co-operation – Worker was entitled to LOE benefits based on deemed earnings at that job – Since employer was unable to offer work that restored pre-accident earnings, worker was entitled to LMR assessment.

In April 2000, a truck driver suffered a panic attack in response to witnessing two fatal traffic accidents. He was diagnosed with post-traumatic stress disorder. The worker appealed a decision of the Appeals Resolution Officer denying benefits and LMR assistance after February 2001. The appeal was allowed in part.

After a psychologist suggested a gradual return to work, the employer offered modified work at no wage loss to do local driving, but the worker had another panic attack. By February 2001, the psychologist suggested a warehouse or desk job. The employer then offered a customer service position. This job paid \$15 per hour, which was about half of what the worker had been earning prior to the accident. The worker refused the job. After speaking to a Claims Adjudicator, the worker asked the employer about accepting the job, but the job was no longer available.

The Claims Adjudicator reviewed possible SEBs for a truck driver who was no longer able to drive and determined that usual placement was as a dispatcher with wages from about \$12 to \$21 per hour. The Claims Adjudicator determined that the customer service position was within the acceptable range and concluded that the worker had turned down suitable modified work, that the worker was not entitled to further LOE benefits and that the worker was not entitled to an LMR assessment.

Section 42(1) of the *Workplace Safety and Insurance Act, 1997*, requires the Board to offer an LMR assessment if the employer is unable to provide work that restores a worker's pre-accident earnings. The wording of the section is mandatory. The customer service job did not come close to restoring pre-accident earnings. Therefore, the Board was obligated to provide an LMR assessment.

The actions of the Claims Adjudicator in reviewing possible SEBs did not constitute an LMR assessment. The Vice-Chair noted that the employer offered the worker a fixed \$15 per hour with no room for advancement, whereas the dispatcher wages had a range going up to a maximum of \$21. Further, the worker's situation was unique in that his inability to drive did not result from any physical restrictions, so that he might be capable of performing physically demanding jobs that would approximate his pre-injury earnings. A proper LMR assessment would be a means to make that determination.

As found in *Decision No. 2474/00*, failure of a worker to accept suitable employment is not necessarily an act of non-co-operation that would necessarily lead to a reduction of benefits. In this case, the employer offered suitable modified work as a customer service representative. The worker's decision to decline the offer was not unreasonable, considering that it paid only half of his pre-injury earnings and that no one had informed him of LOE top-up benefits. Other than this one refusal of work, the worker did what he was required to do. He kept in touch with the employer, followed medical rehabilitation, attempted to return to work as a truck driver and, when informed of the LOE top-up benefits, was willing to accept the customer service job (but which was no longer available). The Vice-Chair concluded that the worker did not fail to co-operate.

If the worker had accepted the customer service job, he would have earned \$15 per hour. The Vice-Chair concluded that the worker was entitled to partial LOE benefits based on the difference between the wages offered for the customer service job and his pre-accident earnings.

The worker was 35 years old at the time of the accident. Despite the passage of time since the accident, the worker was entitled to an LMR assessment, which may still enable him to secure meaningful employment. When LMR services are activated, benefits will change to reflect that activity.

Perte de gains (gains réputés) – Retour au travail rapide et sécuritaire (collaboration) – Réintégration sur le marché du travail (évaluation) – Emploi approprié.

Le conducteur de camion ne pouvait plus conduire en raison de troubles de stress post-traumatique – L'employeur avait offert du travail modifié approprié à environ la moitié du salaire d'avant l'accident – Le refus de l'emploi offert n'était pas déraisonnable dans les circonstances et ne constituait pas un manque de collaboration – Le travailleur avait droit à des prestations pour PG fondées sur ses gains réputés dans cet emploi – Étant donné que l'employeur ne pouvait pas offrir un travail permettant de rétablir les gains d'avant l'accident, le travailleur avait droit à une évaluation de ses possibilités de RMT.

En avril 2000, le conducteur de camion avait eu une crise de panique après avoir été témoin de deux accidents de la route mortels. Il avait reçu un diagnostic de troubles de stress post-traumatique. Il a interjeté appel de la décision par laquelle le commissaire aux appels refusait de lui reconnaître le droit à des prestations et à de l'aide en matière de réintégration sur le marché du travail (RMT). Le Tribunal a accueilli l'appel en partie.

Un psychologue avait suggéré un retour au travail graduel après quoi l'employeur avait offert du travail modifié sans perte de salaire consistant à conduire localement; cependant, le travailleur avait fait une autre crise de panique. En

février 2001, le psychologue avait suggéré un emploi d'entrepôt ou de bureau. L'employeur avait alors offert un emploi dans les services à la clientèle à un taux horaire de 15 \$, ce qui représentait environ la moitié du taux d'avant l'accident. Le travailleur avait refusé cet emploi. Après avoir parlé à l'agent d'indemnisation, le travailleur avait indiqué à l'employeur qu'il accepterait l'emploi mais il n'était plus disponible.

L'agent d'indemnisation avait examiné les entreprises et emplois appropriés (EEA) et avait déterminé que les conducteurs de camion qui ne pouvaient plus conduire se plaçaient habituellement comme répartiteurs à un salaire horaire d'environ 12 \$ à 21 \$. L'agent d'indemnisation avait déterminé que l'emploi dans les services à la clientèle était acceptable du point de vue salarial et avait conclu que le travailleur avait refusé un emploi modifié approprié, qu'il n'avait plus droit à des prestations pour perte de gains (PG) et qu'il n'avait pas droit à une évaluation de ses possibilités de RMT.

Aux termes du paragraphe 42 (1) de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail*, la Commission fournit au travailleur une évaluation de ses possibilités de RMT si l'employeur n'est pas en mesure de lui fournir un travail permettant de rétablir ses gains d'avant l'accident. Cette disposition a force exécutoire. Comme l'emploi dans les services à la clientèle était loin de rétablir les gains d'avant l'accident du travailleur, la Commission était tenue de lui fournir une évaluation des possibilités de RMT.

L'examen des EEA possibles par l'agent d'indemnisation ne constituait pas une évaluation des possibilités de RMT. La vice-présidente a noté que l'employeur avait offert un salaire horaire fixe de 15 \$ sans possibilité d'avancement alors que le taux de salaire horaire d'un répartiteur allait jusqu'à 21 \$. En outre, la situation du travailleur était unique du fait que son inaptitude à conduire ne résultait pas de troubles physiques et qu'il pourrait peut-être être en mesure d'effectuer du travail physiquement exigeant pouvant lui permettre de rétablir approximativement ses gains d'avant l'accident.

Comme le Tribunal l'a conclu dans la *décision no 2474/00*, le refus d'accepter un emploi approprié ne représente pas nécessairement un manque de collaboration devant entraîner une réduction des prestations d'un travailleur. En l'espèce, l'employeur avait offert un travail modifié approprié comme représentant des services à la clientèle. La décision de refuser cette offre n'était pas déraisonnable, compte tenu du fait que cet emploi était rémunéré à la moitié du salaire d'avant l'accident et que personne n'avait informé le travailleur au sujet du complément salarial différentiel pour perte de gains. Si ce n'était du fait qu'il avait refusé du travail, le travailleur avait fait tout ce qu'il devait faire : il était demeuré en contact avec l'employeur, avait participé à sa réadaptation médicale, avait essayé de recommencer à travailler comme conducteur de camion et avait été d'accord pour accepter l'emploi dans les services à la clientèle (qui n'était plus disponible) après avoir appris l'existence d'un complément salarial. La vice-présidente a conclu que le travailleur n'avait pas négligé de collaborer.

Si le travailleur avait accepté l'emploi dans les services à la clientèle, il aurait gagné 15 \$ de l'heure. La vice-présidente a conclu que le travailleur avait droit à des prestations pour PG partielle en fonction de la différence entre ses gains réputés dans les services à la clientèle et ses gains d'avant l'accident.

Le travailleur avait 35 ans au moment de l'accident. Malgré le passage du temps depuis l'accident, il avait droit à une évaluation en matière de RMT, laquelle pourrait peut-être lui permettre de trouver un emploi valable. Une fois que les services de RMT auront été rétablis, les prestations changeront pour refléter cette activité.

Tribunal Decisions Considered:

- *Decision No. 2474/00* (2004), 69 W.S.I.A.T.R. 57 apld

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
 - s. 40(2)
 - s. 40(6)
 - s. 40(7)
 - s. 42
 - s. 43(1)
 - s. 43(3)
 - s. 43(7)

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
 - Document No. 18-03-02 (June 15, 1999) (since revised)
 - Document No. 19-02-02 (June 15, 1999) (since revised)
 - Document No. 19-02-03 (June 15, 1999) (since revised)

APPEAL by the worker from a decision of the Appeals Resolution Officer denying ongoing loss of earnings benefits and labour market re-entry assistance.

April 21 , 2006. THE TRIBUNAL: —

BEFORE:	M.F. Keil, Vice-Chair
HEARING:	June 7, 2005 at Windsor, Oral
DECISION(S) UNDER APPEAL:	WSIB ARO decision dated January 28, 2003 denying the worker benefits beyond February 9, 2001 and LMR assistance

APPEARANCES:

For the worker:	J. West, John West & Associates
For the employer:	M. Warner, lawyer with Borden Ladner Gervais

REASONS**(i) Introduction**

The now 39-year-old worker started as a truck driver in 1996 with the accident employer. At the time of his compensable injury he had a gross weekly salary of \$1,310; as well there was mileage and overtime. On April 18, 2000, the worker suffered a panic attack in response to having witnessed two fatal traffic accidents occurring in close proximity. This was confirmed by family physician Dr. A Hammer on April 19; he noted the worker suffered “totally disabling panic attacks as soon as he drives.” He diagnosed the worker as having post-traumatic stress disorder (PTSD).

The worker was unable to work as a truck driver; in July 2000, he saw psychologist Dr. S. Plotnick, who confirmed that the worker was “overwhelmed with fears, relating to driving activities.” In a subsequent report from November of the same year, Dr. Plotnick recommended a gradual return to work but cautioned that, if the worker could not control his anxiety, his ability to continue in his line of work would need to be re-evaluated. The employer offered the worker local driving employment but the worker had a panic attack while doing so on January 24, 2001. By February of 2001, Dr. Plotnick was suggesting that a job in the warehouse or at a desk might be suitable for the worker.

By letter dated February 9, 2001, the employer's then Director of Human Resources wrote to the worker. The letter stated that the employer understood the worker to have declined being considered for the current open customer service (CSR) position. The Board Claims Adjudicator spoke to the employer on February 19. She was prepared to tell the worker he had to accept the offer but the employer informed her the position had already been filled. The employer also told the Claims Adjudicator that the worker was in Parry Sound. At the time, the Claims Adjudicator was unaware that the worker had not moved but was looking after his sick mother. The worker called the Claims Adjudicator on February 28 (when he returned to Windsor). He explained to her that the CSR job paid more than \$7 an hour less than his trucking job (and this was without considering the overtime, mileage and extra hours involved in his job as a truck driver). He further advised that, as he could not meet his mortgage obligations on such a reduced salary, he had turned it down. Documentation from the employer's file reveals that the worker talked to "R" on March 5, 2001 to ascertain his status and to suggest that he had made a mistake in turning down the employer's job offer. There was no response from R as to the possibility of any other positions with the company or of revisiting the CSR job.

In the meantime, the Claims Adjudicator reviewed possible SEBs for a truck driver (unable to drive). She found that the usual placement was a dispatcher, with wages from \$11.84 to \$21.25 hourly. She concluded that the CSR position was within the acceptable range. She therefore concluded that the worker had turned down suitable, modified work, no LOE benefits were in order, and neither was an LMR assessment. In her memorandum dated March 9, 2001, she stated she had advised the worker of this decision.

From the file documentation it would appear there was no further contact between the worker and the employer until the employer sent the worker a termination notice in May of 2002.

It should be noted that the worker went on to receive a 15% non-economic loss (NEL) award. The psychiatrist found the worker had a specific phobia resulting in an overall mild impairment.

(ii) Testimony

(a) The Worker

The worker testified to the following:

- He had a Grade 12 education and had worked primarily as a truck driver (tractor trailer) most of his working life. He had made \$21 an hour (at the top of his pay scale), worked 50-60 hours a week and was paid 44 cents mileage (on the highway). His annual income was close to \$70,000 and he had never worked as a CSR. He had discussed a supervisor's job with "B" a couple of years earlier and had been told he "wasn't suitable for the office."
- He had tried to return to work as a truck driver. Dr. Plotnick and the employer had arranged it so that he would only be driving locally and during the day. However, he had experienced a panic attack and could not continue.
- B had talked to him about the CSR job in a telephone conversation on February 9, 2001. He was told it paid \$15.38 an hour but there was no discussion of hours, training, skills needed or whether it would be permanent. His reaction was that it was not enough to pay all his expenses.
- He had also talked to the Director of Human Resources, R. R indicated it was a newly created position and the worker

should let him know within a few days. That conversation was businesslike, no conflict. At that time the worker had also agreed to have an independent medical examination (IME); he had initialled it and sent it back. He had told B that he was declining the job.

- He had been out of town for a few days visiting his mother in Parry Sound. He had also been incarcerated for two days as a result of his dispute with his wife. Even though he had changed his telephone number, the employer would have been able to contact him through his cell number.
- No one had explained to him that there would be a top-up to his wages if he had taken the lesser paying job. Neither the employer nor the Board had said anything about LOE benefits. He had learned about partial LOE benefits only after speaking to his representative in June 2002. Nor had the Board mentioned anything about mediation services.
- Eventually, he received a letter of termination from the accident employer. He started looking for work around the time of his termination. He got a construction job that lasted four months and paid \$16 an hour for 40-44 hours weekly. After that, he started his own business doing home renovations but has only made about \$15,000 annually for the last three years. He had looked into an engineering and a building inspection program at St. Clair College, but he did not have the money to do it. He has lost his house; he and his wife now rent. He would have taken the CSR job if he had known about the partial LOE benefits but, at the time, it was much less money and the employer had already told him he was unsuitable for office work.
- In cross-questioning he agreed he had told B that he couldn't handle the clothes and the office work as well when he turned down the CSR job. He agreed he had been paid LOE benefits until the time he turned down the CSR job. When asked if he had told R that he didn't like office work and had messed up when he didn't accept the CSR job, the worker could not remember having said that but did not disagree that he might have done so. He agreed that he had not asked about the duties involved in the CSR job. He had not called his Claims Adjudicator before turning down the job. He still cannot drive trucks and has no ongoing relationship with the accident employer. He thought when his benefits were terminated, the employer "had washed their hands of [him]." When referred to the Claims Adjudicator letter from April 2001, he agreed he must have known about partial LOE benefits at that point. He did not believe he had worked between May 2001 and May 2002, unless that was when he obtained the four month construction job.

(b) Testimony of R

R testified to the following:

- He was currently the Executive Vice-President of Operations for the employer, an American company with a Canadian subsidiary. At the relevant time he was the Human Resources Director, working out of Ann Arbor, responsible for the employment matters of 10,000 employees. He handled return to work issues for compensation claims. B was the local service centre manager, and the company had over 200 service centres.
- The issue of this worker's return to work had been referred to him and he had been involved from December 2000 to January 2001. The doctor had said the injured worker needed daylight, local hours; he had displaced another driver so that the worker could have a local run. That was the January offer. When that didn't work, he had talked to the worker on the telephone in February. The worker was frustrated with his life and the company was trying to figure out what to do.
- He had offered the worker the CSR job and told him to get back to him by Monday. The CSR was a real job and he had

had success in the past placing drivers in the position. The job involved dealing with customers and drivers, mostly over the telephone. There was a mentoring program where experienced CSRs help new ones. The worker would have been aware of this. The CSR was an indefinite job. He did not recall the worker asking questions about the job. He had been disappointed when the worker turned down the job. He had not mentioned partial LOE benefits; it wasn't his place to speak for the Board.

- With regards to the IME, his recollection was that the employer had been unsuccessful in getting in touch with the worker to set up the IME. He had no independent recollection of events; he would then rely on the, letter of February 28, 2001 (asking the worker to get in touch). There was a telephone call from the worker in early May but, again, he would have to rely on his notes. He did not speak to the worker again until after he was terminated in May 2002. At that point, he had been off work for over a year and B had indicated he was working elsewhere. In the end, he did not think the worker wanted to stay in the trucking environment and he believed that the WSIB would make other venues available. Nor was he satisfied with the hourly rate offered.
- In cross-questioning he stated that, as far as he knew, the CSR job was still in existence. It was a newly created job, five days a week but the hours had not been set. The position would have dealt with customer-related concerns, missing items, customer service, various manifests, liaising between other service centres and customers. As to specific knowledge required that would be influenced by the specific office, he thought the worker would be qualified for this job because he had experience dealing with customers, the routes and the equipment. The company would have trained him. Two to three days would have been an adequate introduction to the job and then he would have been mentored. He denied that the CSR job was created for the worker; it was an independent position. There was no written job description of the CSR job. It would have been the company's preference for him to return to work as a driver. The worker had been a very good driver. He reiterated that he did not think it was the employer's responsibility to inform the worker as to LOE partial benefits, nor did he believe the employer had an obligation to tell the worker to call the Board before making a decision. He thought it was the worker's responsibility to call the Board about a top up to his wages. There had been no involvement in mediation and he wasn't aware that the Board had been thinking of doing an LMR assessment. He could not recall when the CSR position was filled. While he agreed the worker had signed the consent for an IME, the ability to set up an appointment had been dependent on getting in touch with the worker.

(c) Testimony of B

B testified to the following:

- He was the manager of the Windsor office at the relevant time. He had known the worker on a personal basis and they had socialized. He recalled the worker asking about a supervisory job, but did not recall specifically saying the company would never hire him for that. He thought he might have said: "I'm not sure if it would work for you [the worker]." He recalled the accident in April 2000 and kept in touch with the worker. He had believed the worker could come back and drive locally during the day. However, the worker had an attack on his first day back driving; he came in to the office out of breath and said he couldn't work. Then he went off on medical leave again.
- On February 8, the worker came into the office to call R. He thought R had done most of the talking; he didn't really listen to the conversation. When the conversation ended, he and the worker discussed the general parameters of the CSR job: the manifests, telephones and some computer work. The worker had used a computer before. It had been his idea for the CSR job as the office required extra help. To the best of his knowledge it was a permanent position. There

was no job description for that particular job, although there is currently a generalized CSR description. He thought the worker was a smart guy, productive, who would have been capable of doing the job. He didn't remember much of the conversation he had with the worker; it was only 5-10 minutes. The worker could have asked questions if he wanted. The next day the worker called and said he could afford to take the pay cut and he would have to buy a new wardrobe. He had told the worker "okay" and said he'd let R know. He did not know about LOE partial benefits.

- One of the reasons for the worker's telephone call to R was to facilitate the IME, but he did not think he and the worker discussed the matter separately. He did receive the consent form from the injured worker but he was not able to get in touch with him; the phone was out of service. He heard, word of mouth, that the worker was in Parry Sound with his mother who was ill. He had known the worker was in jail because the worker had called and asked for assistance; he had told the worker he could not leave work. Because he could not get in touch with the worker, he needed to move on the CSR job and got someone from the trucking company next door. He did not have much contact with the worker after that and the worker never called about work after March 2001.
- In cross-questioning, he stated the CSR position would have paid the worker approximately \$15 an hour and there was no leeway to offer the worker more – that was the top tier. He had trained the person they did hire. The job involved about three hours a day of paperwork and the rest mostly on the telephone. He agreed he might have filled the CSR job within a week of the worker turning it down. He initiated the "paper" for WSIB cases but head office took care of the return to work matters. He did not pretend to be a WSIB specialist. He did not know anything about wage top ups or about providing a written job description. He agreed he had not been really specific about the CSR job with the worker; because the worker knew roughly how the office worked. He agreed there was a significant money difference between the CSR job and that of a truck driver. He agreed that he had been the one to tell R that the worker was employed elsewhere (prior to the worker being terminated in the spring of 2002).

(iii) Relevant law and policy

Section 43 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) states that a worker "who has a loss of earnings as a result of the injury" is entitled to LOE payments until the loss of earnings ceases or the worker is no longer impaired (or the worker reaches age 65). The amount of the LOE payments is 85% of the difference between the worker's pre-injury net average earnings and the net average earnings the worker earns or is able to earn in suitable employment after the injury. Section 43(3) states:

43(3) The amount of the payment is 85 per cent of the difference between his or her net average earnings before the injury and any net average earnings the worker earns after the injury, if the worker is co-operating in health care measures and,

- (a) his or her early and safe return to work; or
- (b) all aspects of a labour market re-entry assessment or plan.

Board *Operational Policy Manual* Document No. 18-03-02 (the "Payment of LOE Benefits policy") states that workers are entitled to full LOE benefits if "the nature or seriousness of the injury completely prevents a worker from returning to any type of work" providing that the worker co-operates in health care measures recommended by the attending health care practitioner and approved by the WSIB. The policy also states:

Workers are entitled to full LOE benefits if they

- co-operate in ESRTW activities, and
- continue to have a full loss of earnings.

Thus, a worker with a full loss of earnings who has an injury that does not completely prevent him/her from returning to any type of work may be entitled to receive full LOE benefits if he/she continues to be impaired as a result of the injury and he/she co-operates in ESRTW activities.

Section 43(7) of the WSIA states that the Board may reduce or suspend payments to the worker during any period when the worker is not co-operating in his or her early and safe return to work. Section 40 of the WSIA describes the duty of both an employer and a worker to co-operate in returning the worker to work. Section 40(2) of the WSIA describes a worker's duty to co-operate as follows:

40(2) The worker shall co-operate in his or her early and safe return to work by,

- (a) contacting his or her employer as soon as possible after the injury occurs and maintaining communication throughout the period of the worker's recovery and impairment;
- (b) assisting the employer, as may be required or requested, to identify suitable employment that is available and consistent with the worker's functional abilities and that, when possible, restores his or her pre-injury earnings;
- (c) giving the Board such information as the Board may request concerning the worker's return to work...

Section 40(6) provides that the employer or the worker shall notify the Board of any difficulty or dispute concerning their co-operation with each other in the worker's early and safe return to work. And section 40(7) states that the Board shall attempt to resolve the dispute through mediation and, if mediation is not successful, shall decide the matter within 60 days after receiving the notice or within such longer period as the Board may determine.

If the Board determines that a worker is not co-operating, Board *Operational Policy Manual* Document No. 19-02-03 (referred to in this decision as the "Workplace Party Co-operation policy") provides for the Board to give a worker notice of the Board's finding of non-co-operation. That notice is given verbally (if possible) and confirmed in writing. If, after giving that notice, a worker fails to demonstrate co-operation and does not have a legitimate reason for not co-operating, the Board may reduce or suspend benefits. Benefits may also be reduced or suspended if the employer and the Board are not able to identify suitable and available employment because of a worker's non-co-operation.

The following section sets out the provisions for labour market re-entry assessments:

42(1) The Board shall provide a worker with a labour market re-entry assessment if any of the following circumstances exist:

1. If it is unlikely that the worker will be re-employed by his or her employer because of the nature of the injury.
2. If the worker's employer has been unable to arrange work for the worker that is consistent with the worker's functional abilities and that restores the worker's pre-injury earnings.
3. If the worker's employer is not co-operating in the early and safe return to work of the worker.

(2) Based on the results of the assessment, the Board shall decide if a worker requires a labour market re-entry plan in order to enable the worker to re-enter the labour market and reduce or eliminate the loss of earnings that may result from the injury.

(3) In deciding whether a plan is required for a worker, the Board shall determine the employment or business that is suitable for the worker.

(4) The Board shall arrange for a plan to be prepared for a worker if the Board determines that the worker requires a labour market re-entry plan.

(5) The labour market re-entry plan shall be prepared in consultation with,

(a) the worker and, unless the Board considers it inappropriate to do so, the worker's employer; and

(b) the worker's health practitioners if the Board considers it necessary to do so.

(6) The plan shall contain the steps necessary to enable the worker to re-enter the labour market in the employment or business that is suitable for the worker.

(7) The worker shall co-operate in all aspects of the labour market re-entry assessment or plan provided to the worker.

(8) The Board shall pay such expenses related to the plan as the Board considers appropriate to enable the worker to re-enter the labour market.

Board *Operational Policy Manual*, Document No. 19-02-02, entitled, "The Goal of ESRTW and the Roles of the Parties," sets out the roles of the workplace parties as follows:

The workplace parties must co-operate with each other in the ESRTW process. Co-operation means

- maintaining communication with each other
- working towards identifying a suitable and available job for the worker, and
- fulfilling reporting obligations to the WSIB (see 19-02-03, Workplace Party Co-operation).

The role of the WSIB is also outlined:

The WSIB is not involved in the ESRTW process, except to

- monitor activities, progress, and co-operation of the workplace parties
- provide dispute resolution (see 19-02-06, Mediation Services)
- determine compliance with the obligations to co-operate
- determine compliance with the obligation to re-employ (see 19-04-02, Re-Employment Obligation), and
- suggest return to work resources that the workplace parties may choose to access (see 19-02-05, Resources and Evaluations).

Board *Operational Policy Manual*, Document No. 19-02-03, entitled "Workplace Party Co-operation," sets out the following:

If a dispute or disagreement is identified, or if there is evidence of difficulty, the decision-maker contacts both workplace parties to determine what assistance or information is required to initiate, maintain, or restore co-operative activities.

To facilitate self-reliance and remove barriers in the ESRTW process, the WSIB may provide

- information to assist in assessing the workplace in terms of the worker's functional abilities, skills, knowledge and fitness to work
- information regarding job/workplace accommodations
- information regarding the types of evaluations and assessments employers may wish to purchase from return to work service providers to facilitate the return to work process (i.e., functional abilities evaluations), and
- mediation services, if the workplace activities request mediation, or if the WSIB determines that mediation is necessary to initiate, maintain or restore ESRTW activities between the workplace parties (see 19-02-06).

(iv) The Vice-Chair's Findings

Understandably, the parties hold quite different perspectives on this case. Mr. West has submitted that the worker reasonably refused the lesser-paying CSR position, while Ms. Warner has proposed that the employer did all it could reasonably be expected to do in terms of having offered suitable, modified work that the worker then chose to refuse. Mr. West has argued that the worker was entitled to an LMR assessment and that he was not qualified to perform the functions of the CSR position. Ms. Warner has taken the position that the employer should not have been involved in any LMR assessment and that it fulfilled its requirements to participate fully in the ESRTW program and to offer the injured worker employment. In her view, half a salary was better than staying at home. Mr. West has pointed out that the Board did not inform the worker of the partial LOE wages nor did it perform an actual LMR assessment. Even if one were to accept that the CSR job was suitable, partial LOE benefits would be in order. On the other hand, Ms. Warner argued that the Act allows for reduction or suspension of benefits where a worker does not co-operate and, thus, partial LOE benefits need not be paid.

There are a number of issues to be determined in this case. One is whether the Board was obligated to provide the worker with an LMR assessment pursuant to section 42(1) and, if it was, whether the Claims Adjudicator's review would constitute such an assessment. There are then two separate but related issues that must be determined. Did the worker, under section 43(2) of the Act, refuse to accept suitable employment? The next distinct issue is whether or not the worker co-operated in an ESRTW as set out in section 40(2) of the Act.

One of the reasons that this case became complicated rests in the speed with which events unravelled in February 2001. Up to the beginning of February, things had been progressing reasonably well. The worker had kept in touch with the employer and had been participating in a medical rehabilitation program. While the employer had never come across a case of PTSD involving a truck driver before, it too was doing what it could to facilitate an ESRTW. The first return to work proved unsuccessful. Although the employer believed it was offering suitable employment and although the worker co-operated, truck driving of any kind was not possible for the worker. It is clear from the Claims Adjudicator memorandum from January 25, 2001 that she had some difficulty with the concept that the worker could drive other vehicles but not trucks. However, when Dr. Plotnick was queried on this, his report confirmed that the worker had a situational and specific phobia that ruled out truck driving of any kind. He suggested that the employer might want to accommodate the worker in warehouse or with a desk job; in the alternative he thought it would be prudent for the worker to look for employment elsewhere.

It was at this point and within a two-week span that all of the following took place: the employer offered the worker the CSR job; the worker refused it; the employer filled it within few days; the Claims Adjudicator did not find this out until the job was no longer available; and, the worker was out of town for a two-week period because his mother was ill. Because the Claims

Adjudicator could not get in touch with the worker for two weeks and because B informed her that “rumor had it that the worker had moved to Parry Sound”, she concluded that there had been a material change of which she had not been informed. When the worker did return to Windsor (and called the Claims Adjudicator promptly upon his return), he clarified that he was still living in Windsor and had only been visiting. The Claims Adjudicator then agreed she would need to have the worker assessed to ascertain if another SEB could have restored his earnings closer to his pre-accident earnings.

In my view, this is where issues became confused. In memorandum #43, the Claims Adjudicator told B that if the CSR job turned out to be the most suitable, that is, if another SEB would not bring him closer to his pre-accident earnings, then the CSR job would have been suitable and the worker would not need a “referral to LMR.” This seems to me to conflate activities; I am not clear how one can conduct an LMR review to determine whether an LMR referral is appropriate.

At this juncture, it is useful to pay close attention to what the law prescribes. Section 42(1) states the Board *shall* offer a LMR assessment if the employer is unable to provide work that restores the worker’s pre-accident earnings. The employer offered the worker a job that paid slightly over \$15 an hour. This works out to approximately \$32,000 a year or roughly half of the worker’s pre-accident earnings. This does not come close to restoring his pre-accident earnings. Therefore, in my view, the Board was obligated under the law to provide an LMR assessment. The section is mandatory, not discretionary in its language.

Having found this, I must consider whether the Claims Adjudicator’s actions constitute an LMR assessment. In referring to memorandum #46, the Claims Adjudicator reviewed “the possible SEBs for a truck driver who can no longer drive”; she discovered the usual placement was for a dispatcher. The job of dispatcher paid approximately the same as the CSR job. From this the Claims Adjudicator concluded that it was “unlikely that any job we could have trained the worker for would start him at the same wages he was getting while trucking.” This constitutes the totality of her actions.

I cannot find this constitutes a proper LMR assessment for several reasons. First, the rate the employer offered the worker for the CSR job was the maximum wage: there was no room for advancement. According to the Claims Adjudicator, dispatcher hourly wages ranged from a minimum of \$12 to a maximum of \$21. Accordingly, there was real potential for the worker to come much closer to approximating his pre-accident earnings in this kind of job.

Secondly, I would suggest that no attention was paid to the fact that the worker was uniquely situated in that his inability to drive did not result from any physical restrictions. While dispatcher might be the most likely job for someone in the trucking industry with physical restrictions, the worker was not thus limited. In other words, the worker would have been capable of performing any number of physically demanding jobs that might have been able to approximate his pre-accident earnings. We cannot know this for sure because a proper LMR assessment, by which I mean one that considered the worker’s particular situation and skill set, was not carried out.

Given these circumstances I find that the Board was, by law, obligated to provide the worker with an LMR assessment and this was never carried out.

I turn now to the issues of suitable employment and co-operation. Ms. Warner has argued that by failing to accept suitable employment, the worker failed to co-operate and, accordingly, a reduction in benefits is in order. The relationship between suitable employment and co-operation has been well discussed in Tribunal *Decision No. 2474/00* (2004), 69 W.S.I.A.T.R. 57. The Vice-Chair in that case first enumerated the various positions one might take in reference to the inter-relationship. She then provided a thoughtful and careful analysis of the fundamental distinctions, one that I quote in its entirety because of this

[at paras. 68-69]:

I do not consider the fact that a worker does not accept suitable work to be necessarily an act of non-co-operation, or that a consequential reduction in benefits should necessarily turn on a finding of non-co-operation. There may well be situations in which it is reasonable for a worker to decline suitable work after an accident, because he has decided it is not what he wants to do. For instance, a worker in a manual job may decide to go back to school after a back injury, rather than accept his employer's offer of clerical work. The Board may not be willing to support the worker in this choice, depending on its cost/benefit analysis of the facts. That may be the correct decision from the point of view of the Board. But the worker may still quite reasonably decide, as a personal matter, that this is what he wants to do.

Let us assume that the worker resigns his position, not on the basis that the clerical work was unsuitable, but on the basis that it is not the job he wants. Let us assume it takes some time for the Board to make an express determination that the work offered was suitable.

The analysis offered by counsel suggests that the only way benefits may be reduced prior to the date of the Board's determination is for there to be a finding of non-co-operation. Their reading of the policies is that they would provide for reduction of benefits only after the provision of notice. Benefits would be payable until notice was given.

I agree with the submissions that this result would be absurd. However the submissions identify only the difficulty arising from the requirement for notice. I also find it questionable that this fact situation would require a finding that the worker was failing to co-operate. He may well have co-operated, providing all reasonable information, until the point that he resigned. I do not read the Act as intended to restrict his free choice to resign. It simply limits the benefits payable in that situation. He was free to resign, but benefits will be adjusted to reflect the offer of suitable work.

I consider the situation to be the simple result of the types of choices that employers, workers and the Board must make in these types of situations. This is not an instance that involves non-co-operation.

In my view, the way the statute applies to these facts is that from the time that suitable work was available to this worker, his loss of earnings was no longer a result of the injury, under the wording of section 43(1). In my view these words must be considered as a condition precedent to any entitlement to loss of earnings benefits under any of the subsequent subsections.

A further example of this situation is a worker who takes a lengthy unpaid trip out of the country for a family emergency, with his employer's consent, after he has been offered suitable work, but prior to any determination by the Board about whether his work is suitable. Again, it would not be reasonable for him to be paid benefits during this period of absence. However, in my view, the reduction of benefits is not appropriately based on a finding that he failed to co-operate. It is based on the fact that his loss of earnings during the time he was away was not due to the workplace injury.

It would be absurd for this worker to be paid full benefits up to the date of a notice of non-co-operation, or even for him to be sent a notice of non-co-operation. But it would also be absurd for him to be entitled to full benefits until the Board made a determination about the modified work. In fact, assuming he returned to the suitable work after his absence, the matter might well never come to the Board's attention.

I consider that the Board's submission that declining suitable work is not a statutory act of non-cooperation is consistent with the wording of the statute. Section 40 uses the words "co-operate" and the heading is "duty to co-operate". There is no reference to a duty to accept an offer of suitable work or to continue to perform suitable work in this provision.

I accept the Board's clarification of this section despite the fact that Tribunal decisions, the submissions of a number of the parties, and even Board counsel, have fallen into the easy assumption that the refusal of suitable work is an act of non-co-operation. Certainly, in some circumstances, it may be relevant evidence about the other acts of non-cooperation. It may also be an act that affects benefits. However, the wording of section 40 refers to specific duties to cooperate, which do not include an express

obligation to accept offers of suitable work. I do not find this anomalous, given that I consider a decision to accept or decline employment must ultimately be a matter of personal choice.

I also find the Board's interpretation consistent with how the legislation has developed. The dual award system was introduced into the Act as of January 2, 1990. For the first time, separate awards were made to recognize the level of impairment, in the non-economic loss, (NEL) award, and the impact of that impairment on employment, in the future economic loss, (FEL) award. For the first time, employers were obligated by statute to re-employ injured workers in some circumstances. For the first time, also, benefits were set based on "deemed" earnings, which might at times be based on offers of employment from accident employers. However, the "deeming" provisions of the Act were not tied to any statutory duty to co-operate on the part of the worker.

The WSIA came into effect on January 1, 1998. That Act continued the dual award system, with certain changes. The FEL benefits and temporary benefits were replaced by a single loss of earnings (LOE) benefit. However the dual award system, based on "deemed" earnings and a separate award for non-economic loss, was continued. In addition, the WSIA introduced new duties to co-operate for both employers and workers. In my view, the new obligations were intended to assist workers and employers in return to work efforts by mandating co-operation. The Act provided for suspension or reduction of benefits for workers who did not co-operate.

Possibly in recognition of the fact that the duties to co-operate were new to workers, the Board introduced policy requiring that notice be provided to workers before suspension or reduction of their benefits as a result of these provisions.

But there would be no reason for the Board to have introduced a policy requiring notice prior to a reduction of benefits based on deeming. Deeming had been carried on since 1990 without any such provision.

Therefore, in my view, the Board's position that the "deemed" earnings provisions in section 43 are distinct from the effects of section 43(7) is consistent both with the words of section 40 and with the historical development of the provisions. This is despite the fact that the distinction is not easily apparent, intuitively, because these provisions are closely intertwined in the ESRTW process.

However in its direction the Board refers only to section 43(2). In my view section 43(1) and (2) must be read together. This is because, in my view, under the WSIA, there is a difficulty with the wording of section 43(2), if section 43(4)(b) is interpreted according to its "plain meaning" without reference to section 43(1).

Section 43(2) is stated to be subject to sections 43(3) and (4). Words have been used in section 43(4)(b) that mirror the words used in section 43(4) (a). In clause (a), the words are prospective. There is no question of retroactive application because the provision addresses a specific time: the completion of the labour market re-entry plan.

The same "prospective" words have been used in clause (b). However, in my view, they create a difficulty if interpreted literally, because they do not address how benefits may be set prior to the date of the Board's determination, if the worker has been offered suitable work prior to that date.

I find it unlikely that the legislature intended to introduce a new technical restriction, which required specific Board intervention before a determination of "deemed earnings" could begin to have effect, especially given the introduction in the WSIA of provisions intended to encourage self-reliance.

In my view, quite aside from the issues of co-operation and notice, section 43(1), (2) and (4)(b) are appropriately read together to authorize a reduction in benefits, based on "deemed" earnings, in the case of a worker who has declined suitable work in the time period prior to the Board's determination. I consider it reasonable to give the words of section 43(4)(b) a broad and liberal interpretation to avoid an absurd result. In any event, even if the deemed earnings from employment may not be included in the calculation under section 43(2) until the actual date of the Board's determination, because of the restriction of section 43(4)(b), I

consider that they may still be calculated to reduce the worker's loss of earnings by applying the principles of section 43(1). Section 43(4)(b) authorizes the reduction in benefits based on deemed earnings after the determination referred to, but does not prohibit a similar reduction, in the prior time period, if that reduction is called for under section 43(1). In my view, in the earlier time period also, the worker has no entitlement to benefits to the extent of the earnings available to him from suitable work, because the loss of earnings that flows from his decision to decline suitable work does not result from the workplace injury.

Mr. Revington states that he agrees with the statement in *Decision No. 1646/01* that if the worker refuses suitable and available work at no wage loss, the loss of earnings does not result from the compensable injury. However he states: "The problem is that if a worker does not co-operate in ESRTW, Board policy 11-01-07 and 19-02-03 create an additional unwarranted obligation in every case to require notice of non-cooperation before benefits may be reduced."

However, I read the policies to apply only to the reduction of benefits payable under the Act. If there is no loss of earnings under section 43(1), then there are no benefits payable under the Act, and nothing that can be subject to reduction or suspension under the policy. Therefore the question of notice prior to the reduction of benefits does not arise. That was the rationale of *Decision No. 1646/01*.

In summary, based on my interpretation of section 43, I agree with the Board's direction, and with *Decision No. 609/02*, that section 43 (2), when read together with section 43(1), provides a basis for the reduction of benefits separate and apart from the co-operation provisions referred to in section 43(7).

It follows from this reading of the Act that I read section 43(7) to authorize the Board to reduce or suspend only those benefits to which the worker is *otherwise entitled* under section 43(1) to (6).

(b) Documents No. 11-01-07 and 19-02-03

Mr. Revington submits that the Board's interpretation of section 43(2) does not address the full difficulty with the notice provision. He submits that it remains inconsistent with the Act for notice to be required in every case of non-co-operation. He notes that in *Decision No. 609/02* it was necessary for the panel to rely on the merits and justice provisions of the Act, to address the worker's non-co-operation, because notice had not been given. He submits that presumably there would be manifest unfairness in every situation where a worker does not co-operate in ESRTW, yet would be entitled to LOE benefits due to the absence of Board notice.

However Mr. Revington does not suggest that it is unreasonable that notice should be given in some situations of non-cooperation. I have found that the provision applies only to reduce benefits to which a worker is *otherwise entitled*. It is a serious matter to take away benefits to which a worker is otherwise entitled under the Act.

I agree with the submissions that the statutory requirement to co-operate applies from the date of injury, even in the situation in which the worker is "totally disabled", as that term used to be applied under the pre-1997 Act, i.e., even in the face of a finding that there is no work to which he can return. The worker's obligation to co-operate under section 40(2) involves contacting the employer as soon as possible after the accident and maintaining communication, as well as assisting the employer to identify suitable employment and providing the Board with the required information. The obligation is not dependent on the degree of injury. However, in my view, the timing of the initial contact and the frequency of communication will clearly be influenced by the severity of the injury. There are also situations in which there may be factors that complicate the facts surrounding the lack of co-operation, for instance a lack of English, or even how the worker's treating physicians address the issue of the worker's ability to work. The determination of what is reasonably required as co-operation will depend on the individual circumstances of the case.

Even when a worker is found to have failed to co-operate, I also consider that there is a spectrum of circumstances that may result in different findings about the seriousness of the breach. This is apparent from the decisions referred to above. In *Decision No. 609/02* the worker might have been able to return to work, but had impeded the employer's ability to offer suitable work by failing to provide medical information. On the other hand, *Decision No. 623/03* recognizes that the obligation to co-operate may be weighed differently when a worker is totally disabled, and cannot return to any work.

In my view section 43(7) may have the greatest application in situations in which the provision is used prospectively, in order to alert the worker to the requirements of the Act as well as to enforce compliance when deemed appropriate. This has been recognized by Board counsel and by prior Tribunal decisions. In this situation, notice may be appropriate, because it would be of particular assistance to the parties in understanding their obligations.

Section 43(7) provides discretion to the Board about whether benefits are to be reduced or suspended for non-co-operation. Under the prior legislation, benefits were payable, if due, even when a worker had failed to communicate with the employer or to provide needed information. Now, the worker is required by statute to co-operate in these ways, but the Board has the discretion under section 43(7) to determine the effect of a breach. I consider it within the Board's authority to decide that notice is to be given before benefits are reduced under these provisions of the WSIA.

I do consider that it would be helpful for the Board policies to be clarified to make it clear that the Board does not intend the notice provision to apply to a refusal of suitable work. However I do not consider the Board's policy, as the Board interprets it, to be beyond its authority or inconsistent with the Act. The Board has determined that notice is required to establish an element of procedural fairness in the exercise of the Board's discretion under section 43(7). It is not unusual for the Board to issue policy to structure its discretion. I understand the policies to contemplate that, in the usual case, the employer will request assistance from the Board if a worker is not co-operating, and that the Board will then proceed to deal with the situation as is appropriate. The merits and justice provisions of the Act and of Board policy are available when, for whatever reason, the facts do not develop as contemplated by the policy, such as in the circumstances addressed in *Decision No. 609/02*.

In my view, the above represents a compelling and persuasive analysis of the relationship between the relevant sections of the Act relevant to the instant case. Accordingly, I accept and adopt the reasoning set out in *Decision No. 2474/00*.

Having accepted the above analysis, it remains to explain its application to the instant facts. First, I accept that the employer offered suitable, modified work. There might have been a learning curve involved for the worker to become proficient, but I do not doubt the testimony to the effect that it would have been hands on as the worker performed the job. I acknowledge the job paid considerably less than the worker's pre-accident employment but that does not make it unsuitable. Section 40(1) obligates the employer to attempt to provide suitable employment that is consistent with the worker's functional abilities and, where possible, restores the worker's pre-accident earnings. The employer's first offer did both. The employer's second offer did not restore the worker's earnings but, at that point, given the worker's restrictions, it may well not have been possible for the employer to do so.

Given this analysis, it follows that the worker turned down suitable employment. However, flowing from the reasoning advanced in *Decision No. 2474/00*, it does not follow that the worker failed to co-operate. I find that the worker made a not unreasonable decision to decline this job offer. It paid considerably less than his pre-injury work and, further, no one informed him of the LOE top-up. Contrary to the employer's position, the worker could not reasonably be expected to ask the Board about benefits (partial LOE wages) of which he was unaware. The worker was also under the impression that a LMR assessment would be in order for him. In hindsight, it might have been prudent for the worker to accept the CSR offer; however, this does not constitute non-cooperation.

In general, non-co-operation constitutes an ongoing process whereby a worker or an accident employer frustrates an ESRTW. If it is a single event, it must be of a magnitude that frustrates other efforts. In this case, the worker turned down a job that paid approximately half the wages he had been receiving prior to his injury. Other than that, he had done what he was required to do. He had kept in touch with the employer; he had followed his medical rehabilitation plan; and, he had attempted a return to work as a truck driver. Further, when he was informed that his wages could be topped up, he agreed that he could do the

job. His subsequent conversation with the employer suggests that he would have been open to such a job. At this point, the job was not available because the employer had filled it. If one looks at the worker's actions in their totality, there is no sense of his refusing to co-operate. He did what the statute prescribed. Therefore, while the worker failed to accept suitable employment, he did not fail to co-operate.

What do these findings signify in terms of benefits? The worker would have made approximately \$15 an hour if he had accepted the CSR job. Therefore, that specific wage loss (the \$15 an hour) is not related to his compensable injury. However, according to section 43, even if he had accepted the CSR job, he would have been entitled to partial LOE wages to reflect the difference between the pre-injury and post-injury earnings. Since I have found that the worker co-operated, there are no grounds for reducing or suspending benefits. Thus, the worker is entitled to partial LOE benefits.

Is this the extent of the worker's benefits? Let us consider how the worker's situation might have played out if the Board had conducted an LMR assessment. Had the worker accepted the job, his wages and benefits would have continued until the Board fulfilled its statutory obligation to carry out an LMR assessment. At this point, the Board might have determined an LMR plan would help the worker approximate his pre-accident earnings. The worker would have been given the opportunity to participate and full benefits would have been paid for the duration. If the Board were to conclude an LMR plan was not warranted, the worker's LOE would have been deemed, presumably based on the CSR job and partial LOE would be in order. Assuming the worker refused the CSR job, he would still have been entitled to an LMR assessment with the possible outcomes as set out above.

However, the Board did not carry out an LMR assessment at the time. Given the worker's age (35 at the time of injury) and lack of physical restrictions, this is regrettable. However, the worker is not yet 40 and an LMR assessment and plan may still enable him to secure meaningful employment and approximate his pre-accident earnings. Following from my analysis the Board was obligated to do so and still is. Accordingly, notwithstanding the passage of time and given the significant loss of earnings the worker has suffered as a result of his compensable injury (and this would be the case even if he had accepted the CSR job), the Board is now to carry out an LMR assessment. In determining appropriate SEBs and in considering any LMR plan, the Board is to take into account that the wages offered by the employer for the CSR job constituted the maximum earnings for the worker in that job. I would direct the Board to expedite this process.

Until such time as the worker is offered LMR assistance by the Board, he is entitled to 85% of the difference (within statutory limits) between what his earnings would have been had he accepted the CSR job and his pre-accident earnings. The partial LOE benefits are to be paid from February 9, 2001 until such time as LMR services are instituted.

DISPOSITION

The worker's appeal is allowed in part. The worker is entitled to LMR services in the nature and to the extent set out in the body of the decision. The worker is entitled to partial LOE benefits to reflect 85% of the difference (up to the statutory limit) between the wages offered had he taken the CSR job and his pre-accident earnings. Partial LOE benefits are in order from February 9, 2001 (when his benefits were terminated) until such time as LMR services are activated. At the point where the worker is participating in the LMR plan, his benefits will change to reflect that activity.

Appeal allowed in part.



Decision No. 913/06

Vice-Chair: M. Butler (Vice-Chair), Wheeler, Timms

Decision — June 7, 2006

Neutral Citation: 2006 ONWSIAT 1249

Earnings basis (learner).

Inclusion of learner in Workplace Safety and Insurance Act, 1997, was intended to ensure coverage for person who is undergoing training or probationary work and who might not ordinarily be covered for an accident – Worker in this case was not a learner during probationary period of employment, as he had full-time employment and was already a worker under Act and covered for accident.

The worker began working for the employer in November 1998 as an auto mechanic, at \$15 per hour. He was injured just before completion of a four-month probationary period. The worker appealed a decision of the Appeals Resolution Officer regarding the earnings basis for calculation of benefits. The appeal was dismissed.

The Board based benefits on the worker's earnings of \$15 per hour. The worker submitted that he was a learner and that his benefits should be based on earnings of \$20 per hour.

According to the definition in s. 2(1) of the *Workplace Safety and Insurance Act, 1997*, learner means a person not under a contract of service or apprenticeship who becomes subject to the hazards of an industry for the purpose of undergoing training or probationary work. Tribunal decisions have determined that the purpose of including a learner under the WSIA is to ensure that a person who is undergoing training or probationary work and who might not ordinarily be covered for an accident is covered in such an event. The term "probationary" is used in the definition in the same context as learner. As used in s. 2(1), the term does not relate to the period of time during which an employer has to determine whether an employee merits being hired on a regular basis.

In this case, the worker was employed as a full-time mechanic at the time of the accident. He was not a learner within the meaning of the WSIA. He was a worker under the WSIA and already covered for the accident. The fact that he was learning more about high-end European vehicles did not make him a learner within the meaning of the WSIA.

The Board correctly based benefits on the worker's actual earnings of \$15 per hour at the time of the accident.

Base salariale (stagiaire).

L'inclusion des stagiaires dans la Loi de 1997 visait à assurer une protection aux personnes en période de formation ou de travail à l'essai qui pourraient normalement ne pas en avoir en cas d'accident – Le travailleur en l'espèce n'était pas un stagiaire pendant sa période de travail à l'essai étant donné qu'il détenait un emploi à plein temps, qu'il était déjà un travailleur au sens de la Loi et qu'il bénéficiait d'une assurance contre les accidents.

Le travailleur avait commencé à travailler pour l'employeur en novembre 1998 comme mécanicien à 15 \$ de l'heure. Il avait subi une lésion juste avant l'expiration d'une période de probation de quatre mois. Le travailleur a interjeté appel de la décision du commissaire aux appels relative à la base salariale devant servir au calcul de ses prestations. Le Tribunal a rejeté l'appel.

La Commission avait calculé les prestations du travailleur en fonction de son salaire de 15 \$ de l'heure. Le travailleur soutenait qu'il était stagiaire et que ses prestations devaient être calculées à partir d'un salaire de 20 \$ de l'heure.

Au paragraphe 2 (1) de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997), « stagiaire » est défini comme une « personne qui, bien qu'elle ne soit pas visée par un contrat de service ou d'apprentissage, est exposée aux risques pouvant exister dans un secteur d'activité dans le cadre d'une formation ou d'un travail à l'essai ». La jurisprudence du Tribunal indique que l'inclusion des stagiaires dans la Loi de 1997 visait à assurer une protection aux personnes en période de formation ou de probation qui pourraient normalement ne pas en avoir en cas d'accident. « Travail à l'essai » est utilisé dans le même contexte que stagiaire dans la définition. Son utilisation au paragraphe 2 (1) indique que ce terme ne fait pas référence à une période au cours de laquelle un employeur doit déterminer si un employé mérite d'être embauché sur une base régulière.

En l'espèce, le travailleur avait un emploi à plein temps de mécanicien au moment de l'accident. Il n'était pas un stagiaire au sens de la Loi de 1997. Il était un travailleur en vertu de la Loi de 1997 et il avait déjà une assurance contre les accidents. Le fait qu'il en apprenait plus au sujet des véhicules européens de luxe ne faisait pas de lui un stagiaire au sens de la Loi de 1997.

La Commission avait correctement calculé les prestations du travailleur en fonction de son salaire réel de 15 \$ de l'heure au moment de l'accident.

Tribunal Decisions Considered:

- *Decision No. 1059/94* (1995), 34 W.C.A.T.R. 257 consd
- *Decision No. 59/96* (June 21, 1996) consd
- *Decision No. 244/01* (February 28, 2001) [2001 ONWSIAT 618] consd
- *Decision No. 2105/05* (December 6, 2005) [2005 ONWSIAT 2729] consd

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
 - s. 2(1) “learner”

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
- Document No. 18-03-02 (December 24, 2003) (since revised)

APPEAL by the worker from a decision of the Appeals Resolution Officer regarding the earnings basis for calculation of benefits.

June 7, 2006. THE TRIBUNAL: —

BEFORE: M. Butler, Vice-Chair
B. Wheeler, Member Representative of Employers
D.C. Timms, Member Representative of Workers
HEARING: May 9, 2006 at Toronto, Oral
DECISION(S) UNDER APPEAL: WSIB Decision dated December 11, 2002

APPEARANCES:

For the worker: Self-represented
For the employer: Not participating

REASONS

(i) Introduction

In her decision dated December 11, 2002, the Appeals Resolution Officer (ARO) concluded that the worker was not a “learner” according to the criteria established by Board policy and that his earnings basis of \$15 per hour had been appropriately calculated.

(ii) The Issues

The issues on appeal are:

1. the quantum of the pre-accident wages used to establish the loss of earnings (LOE) and
2. whether the worker should be deemed a “learner” and be entitled to base earnings on an average wage of \$20 per hour.

(iii) Background

The worker was born in 1958. He began working for the accident employer as an auto mechanic on November 16, 1998. At the time of the accident he was earning \$15 per hour.

On March 5, 1999, the worker was using a hand wrench to tighten a bolt on the automobile he was working under when the socket slipped off the bolt. The wrench handle struck the worker in the left eye.

The worker was seen in the Emergency Department at St. Joseph’s Health Centre by Dr. Selwyn L. Abel, an ophthalmologist, on March 5, 1999. A globe rupture was diagnosed and repaired that evening. Dr. Abel filed a Doctor’s First Report on March 9, 1999 in which he diagnosed traumatic rupture of the right (*sic*) eye.

On March 11, 1999, Dr. James H. Oestreicher, an ophthalmologist, performed a left enucleation with an 18 mm coral implant.

The worker has been involved in a labour market re-entry (LMR) plan since 2000.

(iv) Analysis

In coming to a decision in this case, we considered the following.

We gave weight to the worker's testimony and accept the following:

- He obtained an interprovincial automotive technician's licence in November 1998 following 2.5 years in a community college program. He has achieved a diploma from Centennial College and a diploma from Mohawk College. He has completed 9,000 hours as an apprentice.
- He started working for the employer, an automobile used car dealer/repair shop in November 1998, working on high-end European vehicles. He was paid \$15 per hour. The arrangement was that after a probationary period of three months (according to the worker) and four months (according to the employer) he and the employer would renegotiate his wages. Because of the accident, that never took place.
- He was offered \$16 per hour by his former employer to stay but he wanted to expand his area of expertise and took the opportunity to learn about high-end European vehicles, which he had not had any experience on. He thought that experience would enable him to earn more money.
- Following the accident, he returned to working for the employer but he noticed that he was having trouble finding the sockets because of a lack of depth perception. He also tripped on the stairs and skinned his shins because he was having trouble discerning the background of the walls, as they were all one colour. He returned to work for a week and a half.
- The worker confirmed that the employer paid him \$15 per hour and that he never earned \$20 per hour. He noted that a national auto repair company pays up to \$27 per hour for their mechanics.
- He stated that the learning never stopped for him. He was willing to take the Drive Clean Certification course.
- He stated that he was so close to the end of his probationary period. He therefore asked that his earnings be considered at what they would have been after the probationary period – about \$20 per hour. He stated that the accident occurred just before he could reap the benefits of his experience.
- He acknowledged that he had never been paid as a licensed mechanic. He was paid as an apprentice. When he started with his previous employer he was making \$10 per hour. When he left previous employer, he was making \$14 per hour.

We considered the worker's submissions at the hearing and his written submissions to the Board. Essentially the worker has argued that:

- Ah the earnings issue in *Decision No. 244/01* (February 28, 2001) very closely parallels his own case, the worker in that decision was hirelthoughd as a permanent employee at a specified rate of pay. The worker's position in this case is that he was still a probationary employee working at a probationary rate under terms set out in the employer's letter of August 10, 2000 when the accident occurred.

- Both the letter from his former employer dated August 8, 2000 and the letter from the accident employer confirm the reasons for changing employers was the opportunity for training that was not available with his former employer.
- The training he was receiving at the accident employer would have enabled him to qualify for additional certification.
- He had agreed to work as a probationary employee until March 16, 2000 (*sic*) at which time the accident employer agreed to pay an increase if they decided to hire him permanently.
- Being asked to participate in the Drive Clean Certification process is further evidence that he was a “learner” within the meaning of applicable Board policy.

Finally, we considered the following policy set out in Document No. 18-03-02 of the Board’s *Operational Policy Manual* (OPM) for the payment of LOE benefits:

LAW

s. 43(1)

A worker who has a loss of earnings as a result of a work-related injury is entitled to payment of loss of earnings (LOE) benefits beginning when the loss of earnings begins. The payment continues until the earliest of

- the day on which the worker’s loss of earnings ceases
- the day on which the worker reaches 65 years of age, if the worker was less than 65 years of age on the date of the injury
- two years after the date of injury, if the worker was 63 years of age or older on the date of the injury, or
- the day on which the worker is no longer impaired as a result of the injury.

POLICY

LOE benefits are based on 85% of the worker’s pre-injury net average earnings (NAE) subject to the legislated minimum and maximum amounts of compensation, see 18-02-07.

A full LOE benefit is 85% of the worker’s pre-injury NAE. A partial LOE benefit is some portion of 85% of the worker’s pre-injury NAE.

Employers are responsible for paying workers their full wages for the day of injury, see 15-01-08. LOE payments begin the day after the date of injury. LOE payments may begin on a later date if the worker’s loss of earnings does not begin immediately following the injury.

GUIDELINES

...

Payment of partial LOE

Post-injury employment earnings

If a worker has returned to work or is participating in ESRTW activities, the WSIB calculates the LOE benefit by taking 85% of

the difference between the worker's pre-injury NAE and post-injury NAE.

$85\% \times (\text{pre-injury NAE} - \text{post-injury NAE}) = \text{LOE benefit}$

Section 2(1) of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, defines "learner":

2(1) In this Act,

...

"learner" means a person who, although not under a contract of service or apprenticeship, becomes subject to the hazards of an industry for the purpose of undergoing training or probationary work.

In *Decision No. 1059/94* (1995), 34 W.C.A.T.R. 257, the Panel considered the status of a learner as follows [at p. 264]:

Having regard to the intent of the legislation, we conclude that the basis for the inclusion of learners in the definition of "worker" under the Act is to ensure for individuals who, although not subject to the usual terms of employment with an employer, are none the less subject to the hazards of an employer's industry while undergoing training or probationary work that is specified by an employer as a preliminary to employment. In our view, the simulation of a work activity in the confines of the controlled environment of a community college or other training agency is not the same as subjecting an individual to the hazards of an industry as described in the definition of learner in the Act.

In *Decision No. 59/96* (June 21, 1996), the Panel majority determined that a councillor in training (CIT) who was undergoing training in a highly-structured program was subject to the hazards of the employer's industry. The Panel considered that Board policy distinguishes between classroom training and placement. Although the accident in that case took place within the so-called classroom portion of the program, in fact the appellant was in the exact same work environment as he would have been when he began the actual placement. He was with a group of campers in a supervised activity. He was wearing his CIT T-shirt which clearly identified him in the eyes of the campers as more than a fellow camper. The Panel found that the appellant was subject to the same hazards as a paid counsellor and concluded that the appellant was a learner within the definition of accident.

In *Decision No. 1059/94*, the Panel considered the case where the applicant was unemployed and collecting unemployment insurance benefits. He wanted to enrol in a community college course for heavy equipment operator training. The Canada Employment Centre (CEC) sometimes sponsors enrolment in this course but there is a long waiting list. The worker accepted the CEC's suggestion that he enrol in the course himself without sponsorship. The applicant was excused from a job search for the duration of the course. The course involved two days per week of classroom work and two days per week working in the field with heavy equipment on land owned by the community college. The work in the field was simply for practice and was of no benefit to the college. The applicant was injured when he slipped while getting off a bulldozer. The applicant appealed a decision of the Hearings Officer finding that he was not a worker within the Act and, accordingly, was not entitled to benefits.

The Panel found that the basis for inclusion of learners in the definition of worker is to ensure coverage for individuals who, although not subject to the usual terms of employment with an employer, are nonetheless subject to the hazards of an employer's industry while undergoing training, or specified probationary work. Simulated work activity in the controlled environment of a community college or other training agency is not the same as subjecting an individual to the hazards of an

industry. The Panel concluded that the applicant was not a worker within the meaning of the Act.

In *Decision No. 2105/05* (December 6, 2005), the worker submitted that she was a learner in the sense that she was on a learning curve to become an assistant deli manager and that, accordingly, her benefits should be based on earnings of an assistant manager. The Vice-Chair found that the purpose of including a learner under the WSIA was to ensure that a person undergoing training or probationary work, who might not ordinarily be covered for an accident, is covered in such an event. In that case, the worker was employed as a deli clerk at the time of the accident. She was not a learner within the meaning of the WSIA. Rather she was a worker and already covered for her accident. The fact that she was learning more about her deli job did not make her a learner within the meaning of the WSIA.

Thus, Tribunal decisions have determined that the purpose of including a “learner” under the WSIA is to ensure that a person who is undergoing training or probationary work and who might not ordinarily be covered for an accident is covered in such an event.

In *Decision No. 244/01*, the case which the worker cited in his submissions to the Board, the Panel determined that although the worker in that case was hopeful that his earnings would increase once he achieved permanent status with the employer, this expectation did not create an entitlement to benefits based upon his anticipated improvement in earnings. The Panel noted [at para. 27] that, “The Act [WSIA] is clear in requiring that the payment of loss of earnings benefits be based upon earnings paid *before* the injury and not expected earnings after the injury.”

In this case, we find that the worker was employed as a full-time mechanic at the time of the accident on March 5, 1999 and that he was not a “learner” within the meaning of the WSIA. He was a “worker” under the WSIA and was already covered for his accident. We do not accept that because the worker was learning more about high-end European automobiles that he was a “learner” within the meaning of the WSIA. The term “probationary” used in section 2(1) of the WSIA is in the same context as learner. The term as used in section 2(1) of the WSIA does not, in our view, relate to that period of time which usually ranges from three to 12 months during which an employer has the opportunity to determine whether an employee merits being hired on a regular basis. It is generally accepted that during, or immediately following, the so-called “probationary period”, the employer can release the employee without any further obligations.

In this case, the accident employer seemed to want to confirm that the worker would “fit” in their establishment on a long-term basis. At the end of the “probationary period”, the worker anticipated a raise in pay. Unfortunately for the worker, he was injured shortly before the probationary period ended and it does not appear that any further discussions were held regarding a raise in pay for the worker.

As noted above, OPM Document No. 18-03-02 stipulates that LOE earnings are based on 85% of the worker’s *pre-injury net average earnings*, subject to the legislated minimum and maximum amounts of compensation. A full LOE is 85% of the worker’s pre-injury net average earnings. In this case, the worker’s net average earnings were \$15.

Accordingly, we conclude that the Board had appropriately determined the worker’s earnings basis for the payment of LOE benefits at the pre-accident rate of \$15 per hour.

DISPOSITION

The worker's appeal is denied:

1. The worker was not a "learner" within the meaning of the WSIA. He was a "worker" under the WSIA and was already covered for his accident.
2. The Board had appropriately determined the worker's earnings basis for the payment of LOE benefits at the pre-accident rate of \$15 per hour.

Appeal dismissed.



Decision No. 2282/05 (Shatohin v. Kranc)

Indexed as: Decision No. 2282/05

Panel: Crystal (Vice-Chair), Robb, Jackson

Decision — May 17, 2006

Neutral Citation: 2006 ONWSIAT 1093

Right to sue – Employer (acting in personal capacity) – In the course of employment (assault) – In the course of employment (takes self out of employment).

Defendant was one of partners who employed plaintiff – Right of action against defendant regarding alleged sexual assault of plaintiff was not taken away – Act of sexual assault was entirely outside scope of employment relationship – Defendant could not be considered to be an employer at time of assault.

The plaintiff in a civil case was a chambermaid at a motel. She claimed that she was sexually assaulted by one of the owners of the motel on six occasions during February and March 1993, at which time she stopped working at the motel, and, after she returned to work at the motel in May 1995, about three times per week until 2003. The plaintiff brought an action against the defendants, who were the partners who owned the motel. The defendants applied to determine whether the plaintiff's right of action was taken away.

The defendants denied the allegations in the statement of claim. However, for the purposes of this application, the allegations are considered to be true.

The plaintiff was a worker of a Schedule 1 employer. The sexual assaults were accidents within the meaning of the *Workers' Compensation Act*.

The Panel found that the specific defendant who committed the alleged sexual assaults could not be considered to be an employer at the time of the assaults. The acts of sexual assault were entirely outside the scope of employment and inconsistent and antiethical to the employment relationship.

The right of action was not taken away as against the defendant who committed the assault. The right of action was taken away as against the other defendants, who were employers of the plaintiff.

Droit d'intenter une action – Employeur (agissant en sa qualité personnelle) – Au cours de l'emploi (voies de fait) – Au cours de l'emploi (perte du statut de travailleur).

Le défendeur était un des partenaires qui employaient la demanderesse – La Loi ne supprimait pas le droit d'action pour agression sexuelle de la demanderesse contre le défendeur – Les actes d'agression sexuelle n'entraient absolument pas dans le cadre de la relation d'emploi – Le défendeur ne pouvait pas être considéré comme un employeur au moment de l'agression.

La demanderesse dans une action civile était femme de chambre dans un motel. Elle soutenait qu'elle avait été agressée sexuellement à six reprises par un des propriétaires du motel en février et mars 1993, quand elle avait cessé de travailler au motel. Elle était retournée au motel en mai 1995 et y avait travaillé environ trois fois par semaine jusqu'en 2003. La demanderesse a intenté une action contre les défendeurs, qui étaient copropriétaires du motel. Les défendeurs ont demandé au Tribunal de déterminer si la Loi supprimait le droit d'action de la demanderesse.

Les défendeurs ont nié les allégations faites dans la demande introductive; cependant, aux fins de cette demande, les allégations étaient considérées comme véridiques.

La demanderesse était une travailleuse d'un employeur de l'annexe 1. Les agressions sexuelles étaient des accidents au sens de la *Loi sur les accidents du travail*.

Le comité a conclu que le défendeur qui avait commis les agressions sexuelles ne pouvait pas être considéré comme un employeur au moment des agressions. Incompatibles avec une relation d'emploi et contraires à une telle relation, les actes d'agression sexuelle ne cadraient absolument pas avec l'emploi.

La Loi ne supprimait pas le droit d'action contre le défendeur qui avait commis les agressions mais elle le supprimait contre les autres défendeurs, qui étaient des employeurs de la demanderesse.

Tribunal Decisions Considered:

- *Decision No. 286/96* (1996), 40 W.C.A.T.R. 122 consd
- *Decision No. 77/97* (1997), 42 W.C.A.T.R. 225 refd to
- *Decision No. 1536/98* (2000), 54 W.S.I.A.T.R. 91 consd
- *Decision No. 36/00* (2002), 63 W.S.I.A.T.R. 20 refd to
- *Decision No. 712/90* (June 26, 1992) refd to
- *Decision No. 36/00* (2002), 63 W.S.I.A.T.R. 20 refd to
- *Decision No. 786/03* (May 27, 2003) [2003 ONWSIAT 1197] consd
- *Decision No. 977/03* (July 14, 2003) [2003 ONWSIAT 1606] consd
- *Decision No. 1668/03* (June 4, 2004) [2004 ONWSIAT 1103] refd to

Other Decisions Considered:

- *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 (S.C.C.) refd to

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
 - s. 2(1) "accident"
 - s. 2(1) "employer"
 - s. 2(1) "worker"
 - s. 12(1)
 - s. 12(7)

- s. 26(2)
- s. 28(1)
- s. 28(3)

APPLICATION by the defendants in a civil case for a determination of whether the plaintiff's right of action was taken away.

May 17, 2006. THE TRIBUNAL: —

BEFORE:	M. Crystal, Vice-Chair C.J. Robb, Member Representative of Employers F. Jackson, Member Representative of Workers
HEARING:	November 25, 2005 at Toronto, Oral hearing
APPLICATION:	For order removing the right to sue

APPEARANCES:	
For the applicants Harry Kranc and Concordian Motel:	Mr. Robert MacDermid, legal counsel
For the respondent:	Mr. Igor Ellyn, legal counsel
For the defendant Sarah Kranc:	Mr. Frank Oster, legal counsel
For the defendants the Estate of Lejb Schwartzberg also known as Leo Schwartzberg, deceased:	Ms. Loretta Merritt, legal counsel

REASONS

(i) Introduction

This is an application under section 31 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, by the defendants Harry Kranc and Concordian Motel, in an action filed in the Ontario Superior Court of Justice as No. 04-CV-272771CM2. The defendants, Sarah Kranc, and the Estate of Lejb Schwartzberg, also known as Leo Schwartzberg, deceased, are described in the case materials, alternatively as “co-applicants” and “interested parties.”

The respondent to the application is the plaintiff in the action, Olga Shatohin.

Mr. Robert MacDermid, legal counsel, represented the applicants Harry Kranc and Concordian Motel. Mr. Frank Oster represented the co-applicant Sarah Kranc. Ms. Loretta Merritt represented the co-applicant the Estate of Lejb Schwartzberg, also known as Leo Schartzberg, deceased. Mr. Igor Ellyn represented the respondent/plaintiff, Olga Shatohin.

The parties agreed that no testimony would be adduced at the appeal hearing and that the application would be determined on the basis of facts as pleaded by the plaintiff in the Statement of Claim. Submissions were made by Mr. McDermid, Ms. Merritt, Mr. Oster and Mr. Ellyn.

(ii) The Issue on the Application

The parties agreed that the issue to be determined in this application was whether the Act has taken away the right of action

by the respondent (plaintiff) against any of the applicants (defendants) for sexual assault, battery, intentional infliction of mental distress, breach of fiduciary duty, breach of contract, or any other action (excluding an action for wrongful dismissal), for which damages are claimed by the plaintiff in the Statement of Claim. The parties agreed that this application would have no effect upon any right of action by the plaintiff for wrongful dismissal.

(iii) The Facts as Alleged in the Statement of Claim

The defendants have taken the position in this application that, for the purposes of the action, most of the substantive allegations included in the Statement of Claim are denied. However, *solely for the purposes of this application*, the allegations shall be considered to be true. The following facts are alleged by the plaintiff in her Statement of Claim.

The defendants Harry Kranc, Sarah Kranc and Lejb Schwartzberg were partners in a business which operated under the name and style of Concordian Motel. The purpose of the business was to operate the Concordian Motel which was a motel in the Greater Toronto Area. The partners had responsibility for control over the business. Harry Kranc and Lejb Schwartzberg worked at the motel full-time. Sarah Kranc was also involved in the operation of the motel, but was present at the workplace less frequently.

The plaintiff worked as a chambermaid at the motel in February and March 1993 and again from April 25, 1995 to November 21, 2003. She was born in the U.S.S.R. in the region which is currently Ukraine. In 1992 she emigrated to Canada with her son, her sisters and their children. Upon arriving in Canada, she applied for refugee status.

The plaintiff was a guest at the motel for one week in 1992, upon her arrival in Canada. She became friends with a woman who was working at the motel as a chambermaid. In or about February 1993, the plaintiff agreed to temporarily replace her friend as a chambermaid at the motel, while the friend returned home to Europe for a holiday. The plaintiff began her employment at the motel on February 10, 1993.

On February 12, 1993, Harry Kranc instructed the plaintiff to clean a few rooms after which he told her to come into a TV room located behind the motel office. Harry Kranc communicated with the plaintiff in Russian. While in the TV room, Harry Kranc used force to commit a sexual assault upon the plaintiff. The plaintiff resisted the sexual assault and did not consent to the actions committed by the defendant Harry Kranc. The worker continued to work at the motel after the sexual assault because she felt that she had an obligation to her friend to continue filling in for her. She also believed that the incident could negatively affect her refugee and immigration status.

The Statement of Claim alleges that the plaintiff was sexually assaulted by Harry Kranc on five additional occasions in February and March 1993. According to the allegations, on all of those occasions, Harry Kranc used force and coercion to commit the assaults and the plaintiff did not consent to his actions.

The plaintiff left her employment with the motel in March 1993. Between March 1993 and April 1995, Harry Kranc telephoned the worker on many occasions, however the plaintiff refused to speak with him or see him. In April 1995, the plaintiff's friend again asked her to replace her for two months while the friend visited relatives. The plaintiff was apprehensive about returning to work at the motel, given her previous experiences. However, the friend advised the plaintiff that Harry Kranc was suffering from prostate cancer for which he had undergone radiation treatment, and that he was seldom at the motel. Given that the plaintiff was in need of money and had difficulty obtaining other employment due to her poor

English language skills, with the assurance that Harry Kranc would not interfere with her, and in fact, would assist her with her immigration and refugee issues, the plaintiff returned to her employment as a chambermaid at the motel. She worked at the motel for the period agreed upon with her friend, and she continued to work at the motel beyond that date, until November 2003.

Notwithstanding the assurances of Harry Kranc, he began sexually assaulting her again in May 1995. The Statement of Claim alleges that, between 1995 and 2003, Harry Kranc used force or coercion to sexually assault the plaintiff about three times per week. During this period of time he also harassed her with unwanted touching at the workplace.

The worker was paid \$10 per hour when she began working at the motel. Her wages were periodically increased so that by November 2003, when she ceased working at the motel, she was paid \$13 per hour. The plaintiff was also provided with a two-bedroom apartment from 1995 until 2003. The apartment was compensation for the hours that the plaintiff worked at night. The plaintiff was paid her hourly wage for the number of hours she worked during the day. The plaintiff did not pay any rent or for any utilities in the apartment. The rental value of the apartment was \$900 per month.

As noted above, in the context of the action, the defendants Harry Kranc and Concordian Motel, deny the plaintiff's allegations, however they agree that the allegations shall be deemed to be true for the purposes of this application. The Statement of Defence of Harry Kranc and Concordian Motel states in part:

5. At all material times, the plaintiff was an employee of the defendant Concordian Motel. All of the alleged incidents described in the statement of claim, which incidents are not admitted but specifically denied by the defendants Harry Kranc and Concordian Motel, occurred while the plaintiff was on her employer's premises and at all times while she was in the course of her employment.

6. The defendant Concordian Motel is a Schedule 1 employer within the meaning of Ontario Regulation 175/98 made under the Workplace Safety and Insurance Act, 1997 S.O. 1997 c.16 ("the Act").

7. At all material times, the defendant Harry Kranc was an executive officer of the defendant Concordian Motel, the plaintiff's employer, within the meaning of the Act.

8. The defendants Harry Kranc and the Concordian Motel plead that the plaintiff's action is statute barred by virtue of Sections 26 to 28 of the Act...

(iv) Submissions

It is the submission of Mr. MacDermid, on behalf of the applicants Harry Kranc and Concordian Motel that the plaintiff's right of action is taken away by the Act.

Section 26(2) of the Act provides that benefits under the insurance plan are in lieu of all rights of action against employers or executive officers of employers for or by reason of an accident happening to the worker. The provision states:

26(2) Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.

Section 28 of the Act provides:

28(1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. Any Schedule 1 employer.
2. A director, executive officer or worker employed by any Schedule 1 employer.

...

(3) If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

It was Mr. MacDermid's further submission that the partners in the motel and Concordian Motel itself are Schedule 1 employers, or alternatively, that the individual partners are executive officers of the motel.

Section 2(1) of the Act provides a definition of the term "employer." It states, in part:

2(1) In this Act,

...

"employer" means every person having in his, her or its service under a contract of service or apprenticeship another person engaged in work in or about an industry...

Schedule 1 to the Act, which sets out "Industries the employers in which are liable to contribute to the Insurance Fund" and includes:

CLASS I – OTHER SERVICES

...

12. Operation of hotels, motels, cottage sites, camp sites and trailer sites where not operated in or for another industry included in this Schedule or Schedule 2.

It was Mr. MacDermid's further submission that it was implicit in section 12 of the Act, that because the Concordian Motel was a partnership, that the employer in the instant case was the partnership. Section 12 provides, in part:

12(1) Upon application, the Board may declare that any of the following persons is deemed to be a worker to whom the insurance plan applies:

...

3. A partner in a partnership carrying on business in an industry in Schedule 1 or Schedule 2.

...

(7) For the purposes of the insurance plan, while a declaration with respect to a person is in force the following person shall be deemed to be his or her employer:

...

2. In the case of a partner, the employer is the partnership.

This section addresses the circumstances where an application is made to have the Board declare a person, who might otherwise be considered to be an employer, a worker. According to the submission, where a partner in a partnership seeks such a declaration, section 12(7) states that the employer shall be deemed to be the partnership. It was the submission of Harry Kranc and Concordian Motel that it is implicit in that section that, in the ordinary circumstances where no application is made to declare a person a worker, in the case of a business carried on by a partnership, the partnership must also be the employer. Since a partnership is not a legal entity separate from the legal identities of the partners, it follows from the submission that in the instant case, the partners in the motel, namely, Harry Kranc, Sarah Kranc and Lejb Schwartzberg were employers.

Section 2(1) of the Act also defines the term “worker.” In that regard, the section states:

2(1) In this Act,

...

“worker” means a person who has entered into or is employed under a contract of service or apprenticeship ...

It was noted that the Statement of Claim characterized the plaintiff as a worker, in that it stated that she “worked as a chambermaid at the Concordian Motel.” Since it was agreed that the facts as alleged in the Statement of Claim would be deemed to be true for the purposes of this application, there was agreement that the plaintiff should be considered to be a “worker” under the Act, for the purpose of this application.

The issue also arose as to whether the sexual assaults alleged by the plaintiff, and which are deemed to have occurred for the purpose of this application, could be considered to be an accident or a series of accidents, occurring in the course of employment. Section 2(1) of the Act also defines accident. It states in part:

2(1) In this Act,

“accident” includes,

(a) a wilful and intentional act, not being the act of the worker,

(b) a chance event occasioned by a physical or natural cause, and

(c) disablement arising out of and in the course of employment.

In addition to the fact that, according to the agreed upon factual basis of this application, the sexual assaults committed by Harry Kranc were “wilful and intentional act[s], not being the act of the worker,” and should therefore be deemed to be accidents according to the Act, it was also Mr. MacDermid’s submission that there are a number of Tribunal decisions which

stand for the proposition that assaults, sexual harassment, or intentional infliction of harm are “accidents” for the purpose of the Act.

In *Decision No. 286/96* (1996), 40 W.C.A.T.R. 122, the worker was a cleaner in a restaurant who alleged that she was the subject of sexual assault and harassment by a cook in the restaurant and brought an action against the restaurant and the cook. The decision determined that the action against the restaurant was taken away by the Act, but that the action against the cook should be allowed to continue. On the issue of whether the sexual interference should be considered to be an accident, the decision stated in part [at p. 132]:

Ms. Zapton claims that she was the victim of a sexual assault. It is now accepted in Tribunal jurisprudence that a sexual assault falls within the meaning of an accident under the Act. The hearing panel in *Decision No. 712/90* (June 26, 1992), cogently addresses this very issue:

However, in the opinion of the Panel, a logical analysis of injuries sustained as a result of sexual assault compared with injuries sustained from any other assault, leads to the conclusion that, for purposes of the Act, there should be no legal distinction.

The Act was intended to provide no-fault compensation benefits to workers for work-related injuries. The legislation deals with the work-relatedness element through the use of the phrases "arising out of and in the course of" in subsection 3(1) [R.S.O. 1980]. If a worker sustains a personal injury by accident arising out of and in the course of her employment, it matters not whether the injury results from an assault (sexual or otherwise) or a faulty piece of production machinery.

In our view, the Plaintiff was involved in an "accident" which, under subsection 1(1)(a) includes a "wilful and intentional act, not being the act of the worker". The attack by the unknown assailant is a wilful and intentional act. Relying upon the above definition, we are satisfied that, under the Act, the Plaintiff sustained a personal injury by "accident".

This Panel agrees with the above analysis and finds that it applied to the instant case. Accordingly, we find that Mr. Munroe's alleged assault would constitute a “wilful and intentional act” and that Ms. Zapton would therefore have suffered an “accident” within the meaning of the Act.

The decision found that the action against the cook could proceed, given the Panel's finding that the cook was not acting in the course of his employment when he sexually assaulted the worker, in that case. It should be noted that section 28(3) of the Act, set out above, provides that the protection provided by section 28(1) will only be afforded to workers who are acting in the course of their employment.

There are several other Tribunal decisions which stand for the proposition that sexual assault, sexual harassment, and other intentional infliction of harm, including murder, should be considered as accidents for the purposes of the Act. These decisions include *Decision No. 77/97* (1997), 42 W.C.A.T.R. 225, *Decision No. 36/00* (2002), 63 W.S.I.A.T.R. 20, *Decision No. 712/90* (June 26, 1992), and *Decision No. 1688/03* (June 4, 2004).

It was also Mr. MacDermid's submission that the facts as alleged in the Statement of Claim support a finding that the sexual assaults occurred in the course of the plaintiff's employment at the motel. The Statement of Claim alleges that the plaintiff worked at the motel as a maid, that the sexual assaults occurred on the motel premises, that the sexual assaults occurred at times when the plaintiff was working, and that Harry Kranc used influence derived from the employment relationship to

continue with the sexual assaults over a period of several years.

Mr. MacDermid's submissions also addressed the question of whether a worker's right to sue his or her employer is taken away in circumstances when a worker is injured as a result of the actions of an employer who is performing work in the workplace, in the role of a worker. *Decision No. 1536/98* (2000), 54 W.S.I.A.T.R. 91, concerned a respondent who was working for a construction company on a construction site as a traffic control flagman. He was injured by the applicant who was driving a dump truck. The applicant was a sole proprietor who had contracted his services to the construction company. The respondent was not an employee of the sole proprietor. The sole proprietor employed other individuals in the sole proprietorship and paid premiums to the Board for their coverage, but he had not taken out personal coverage for himself. The issue in application was whether the respondent's right to sue the sole proprietor was taken away by the Act. *Decision No. 1536/98* determined that, in the circumstances of that case, the injured worker's right of action against the sole proprietor was taken away by the Act. One of the issues in that decision was whether the fact that the sole proprietor had not elected for personal coverage affected his protection against civil action. The reasons for that decision emphasized the importance of ensuring that small employers who "work at" their jobs "in ways that large corporations and employers, as a rule, do not" maintain their protection from civil action.

Mr. MacDermid's submissions took the issue a further step, by addressing the question of whether an employer's protection from legal action could survive when it was the employer's own deliberate and malicious actions which caused the injuries of the plaintiff/respondent. It was noted that where a worker's malicious and deliberate actions cause injury to another worker, section 28(3) explicitly allows for the removal of the protection provided by section 28(1) *vis-à-vis* the malfeasant worker, where that worker is not acting in the course of his employment. One would expect that, in the ordinary case, workers who commit deliberate and malicious acts of interference with co-workers will not be acting in the course of their employment. Mr. MacDermid asserted that there is no explicit provision in the Act for removal of protection *vis-à-vis* employers whose malicious and deliberate interference with workers might equally be judged to be outside of the scope of the employment relationship.

Two Tribunal decisions which might have a bearing on this point are *Decision No. 977/03* (July 14, 2003) and *Decision No. 786/03* (May 27, 2003).

In *Decision No. 977/03*, the plaintiff was a worker of a Schedule 1 employer. The plaintiff was assaulted by a defendant who was an executive officer, director, shareholder and worker of the employer. The action was against the individual who committed the assault, another individual who was also an executive officer, director, shareholder and worker of the employer, as well as the employer corporations. The decision expressed the view that the protection from civil action provided to employers by section 26(2) was not subject to a "not in the course of employment" exception to protection, and that such exception applied only to the protection from civil action provided to workers by section 28(1), as a result of section 28(3). The decision did go on, however, to find that the action against the executive officer who had committed the assault, Mr. Chaytor, was not taken away. *Decision No. 977/03* stated in part [at paras. 39-40]:

In my view, the effect of subsection 26(2) of the WSIA is the same as that of section 16 of the pre-1997 Act. The language is essentially the same except to the extent that the entire WSIA was rewritten and reorganized and that subsection 26(2) now specifically lists the members of the worker's family who are likewise not entitled to sue. If the legislators had intended to limit the application of subsection 26(2), then they would have done so by clearly indicating that subsection 28(3) applied to subsection 26(2) as well as subsection 28(1). Rather, subsection 28(3) clearly only restricts subsection 28(1). To interpret subsection 28(1) as applying to any Schedule 1 employer including a worker's own employer is to essentially render subsection 26(2) meaningless. In

my view, a plain language interpretation of subsection 26(2) is that it provides for benefit entitlement under the insurance plan in lieu of all rights of action. It maintains the historical trade off between employers and employees by providing broad protection to the employer of the worker who is injured and qualified protection to other Schedule 1 employers. I therefore find that given that Mr. Taylor is entitled to benefits under subsection 13(1), his right of action as well as that of his spouse as the *FLA* claimant is barred by virtue of subsection 26(2). Ms. Tessier indicated that her clients were only requesting a determination regarding the general damages claim. She advised that the applicants were not requesting a determination with respect to the other causes of action such as the wrongful dismissal claim. I also note that in their Statement of Claim, the plaintiffs seek damages for the intentional infliction of mental suffering and nervous shock. Since I did not hear any submissions concerning these specific causes of action, this decision only applies to the general damages claim, as requested.

One of Ms. Ballagh's submissions was that the intent of workers' compensation legislation was not to allow employers to assault their employees with impunity. This decision only removes the plaintiffs' right of action against Efco, Pascal and Altilia. The evidence presented in this application was that Mr. Altilia played no part in the assault of Mr. Taylor. I agree with both counsel that even though Mr. Chaytor was an executive officer of Mr. Taylor's employer, the action against him is likely in a different category given that he was probably sued in his personal capacity rather than as an executive officer. In a right to sue application, the onus of proof is on the applicant trying to avoid civil liability. I do not find that the co-applicant Chaytor has discharged that onus in this case. The action against him may therefore continue.

In *Decision No. 786/03* the plaintiff was injured when he was attacked by a dog. The plaintiff was a worker employed by a Schedule 1 employer. He attended at the premises of ABS Woodworking Limited which was owned and operated by the defendant Yegendorff. The dog was the pet of Yegendorff and the dog was on the premises of ABS as a companion of Yegendorff. The dog was not a watchdog or guard dog, and was not connected to the business purposes of ABS or Yegendorff. The action which was the subject of the application was by the plaintiff against the defendants ABS and Yegendorff.

The Vice-Chair who heard the application considered whether the plaintiff and the defendant Yegendorff were acting in the course of their respective employment. The Vice-Chair found that the plaintiff was acting in the course of his employment at the time of the accident. He found [at para. 53], however, that Yegendorff was not in the course of his employment because "the nature of the accident itself, involving Bonnie [the dog], removed the accident from being within the course of employment." On this basis, it was determined that the plaintiff maintained his right of action against both Yegendorff and ABS. In relation to ABS, the decision stated that:

While ABS would be entitled to immunity from suit for an accident which occurred that was within the course of employment, the protection of the Act does not apply for an accident that is outside of the course of employment.

Brief submissions were also made by Ms. Merritt on behalf of the Estate of Lejb Schwartzberg. Her submissions were substantially similar to those made by Mr. MacDermid on behalf of Harry Kranc and Concordian Motel. She submitted that the parties agreed that the plaintiff was a worker within the meaning of the Act and that the motel was a Schedule 1 employer. She further submitted that the other defendants should also be considered to be Schedule 1 employers. She submitted further that as the assaults occurred at the workplace, during work hours, and were closely associated with work, the assaults must be considered to have occurred in the course of the worker's employment.

It was Ms. Merritt's submission that these factors brought the plaintiff within the scope of section 26(2) and that, accordingly, the plaintiff's entitlement to benefits was in lieu of her right of action against the defendants. She noted the decisions in which an individual's actions took them out of the course of their employment, and thereby denied them protection from civil action applied only to workers, noting that section 28(3) did not apply to employers.

Brief submissions were also made by Mr. Oster, on behalf of Sarah Kranc. His submissions were similar in their general direction to those made by Mr. MacDermid and by Ms. Merritt. His main submission was that the partners in the motel were all employers for the purposes of the Act and should be afforded protection against action pursuant to section 28 and 26. He noted that his submissions did not apply to an action for wrongful dismissal.

Mr. Ellyn made submissions to the Panel on behalf of the plaintiff, Olga Shatohin. His submissions focussed on the “historic compromise” by which workers have a right to benefits through a system of no-fault insurance and employers receive protection from legal action by injured workers. It was his submission that a case involving a deliberate, malicious and egregious sexual assault committed by an employer upon a worker was not a circumstance contemplated by the “historic compromise.” He submitted further that the conduct of Harry Kranc could not be of the type for which the Act provides protection to employers against civil action by injured workers.

Mr. Ellyn also submitted that *Decision No. 977/03* was properly decided, in that the defendant Chaytor took himself out of the employment relationship by committing an assault upon the plaintiff. He submitted that Chaytor’s status, as an executive officer of the plaintiff’s employer, did not afford Chaytor protection from action, given that his conduct was outside of the employment relationship. He submitted that, in the instant case, the sexual assaults committed by Harry Kranc took him outside of the employment relationship and that the Act should not afford him protection against action. He noted that the instant case was also similar to *Decision No. 786/03*, in which the involvement of the Yegendorff’s dog took Yegendorff outside of the employment relationship, and he was thereby denied protection under the Act from civil action.

Mr. Ellyn further submitted that the defendants Sarah Kranc and the Estate of Lejb Schwartzberg should also be denied protection under the Act, from civil action. He noted that the pleadings stated that those defendants knew or ought to have known about the ongoing sexual assaults and, on that basis, they also ought to be denied protection under the Act along with the defendant Harry Kranc.

Mr. Ellyn also noted that Harry Kranc worked at the motel as a manager and, in that sense, could be considered to be a worker. Mr. Ellyn added, however, that this fact ought not to be a basis of affording protection from civil action. Mr. Ellyn also submitted that the plaintiff pleaded and relied upon on the *Occupiers’ Liability Act*, R.S.O. 1990, c. O.2, which was the basis of a separate right of action against the defendants to maintain and protect the safety of the worker, in their capacity as owners of the motel premises.

(v) Analysis

In the circumstances of this application, the submission of the defendants is relatively straightforward. All of the defendants submit that they should have protection against civil action by the plaintiff, and that the plaintiff’s action against the defendants is taken away by the Act, due to the following factors:

- the plaintiff is a worker within the meaning of the Act;
- the sexual assaults committed upon her by Harry Kranc between 1993 and 2003 were, for the purposes of the Act, workplace accidents which occurred in the course of the plaintiff’s employment; and
- the defendants were all Schedule 1 employers.

We agree that these factors apply, except that we do not agree that Harry Kranc was a Schedule 1 employer at the times the sexual assaults occurred. In our view, the acts of sexual assault are entirely outside the scope of, inconsistent with, and antithetical to the employment relationship between Harry Kranc and the plaintiff. This causes us to conclude that, at the times the assaults occurred, Harry Kranc cannot be considered to be the plaintiff's employer, and that he does not derive benefit or protection from the Act in relation to any status associated with his being an employer.

We have considered Mr. MacDermid's submissions concerning the interpretation of section 12(1) of the Act. Those submissions do not affect our finding that at the times the sexual assaults occurred, Harry Kranc cannot be considered to be the plaintiff's employer.

In light of the description of the plaintiff's duties as set out in the pleadings we find that she was a worker within the meaning of the Act at the time the assaults occurred.

Although it is counter-intuitive to consider a sexual assault to be an accident as that word is used in regular parlance, when the word accident is given its special meaning under the Act, as defined in section 2(1), and as considered in the various Tribunal decisions referred to above, we must conclude that the assaults were accidents within the meaning of the Act. As noted above, there are a number of decisions where the Tribunal has concluded that deliberate and malicious acts of interference committed against a worker are indeed "accidents" in the context of the Act. Such acts include assault, sexual assault, sexual harassment and murder. We are also satisfied that the time and place of the assaults, and the connection of the assaults to the plaintiff's employment demonstrate that the accidents occurred in the course of the plaintiff's employment.

Although we agree that the plaintiff was a worker within the meaning of the Act, and we agree that the sexual assaults were workplace accidents that occurred in the course of the plaintiff's employment, we do not find that Harry Kranc was a Schedule 1 employer at the time that those accidents occurred.

Section 28(3) provides that the protection from action afforded to workers of a Schedule 1 employer by section 28(1) does not apply to workers who are not acting "in the course of their employment." Section 28(3) has no application to employers, and we have taken that into account.

Although there is no provision in the Act which takes away section 28 protection from employers or excepts them from such protection, we find that Harry Kranc is not entitled to such protection. This is not based on a finding that he had protection which was taken away. Rather, it is based on our finding that the Act simply does not afford such protection to an employer while committing the acts which, for the purposes of this application, the parties have agreed Harry Kranc has committed. During the time a sexual assault is committed by a person who would otherwise be considered to be an employer, such person cannot be considered to be a Schedule 1 employer within the meaning of the Act. As such, Harry Kranc is not entitled to the protection afforded to employers by section 28(1) or section 26(2).

We have also considered the question of whether, for the purposes of this application, Harry Kranc, should be considered to be a worker within the meaning of the Act, given that he was ostensibly in the role of manager when he committed the assaults.

In our view, the question of whether Harry Kranc was ostensibly acting in a "work capacity" at the time that the sexual assaults were committed does not affect the outcome of this application. Apart from the effects of electing to take personal

coverage, a critical issue in *Decision No. 1536/98*, if the day to day duties of Harry Kranc were such that he should be deemed to be a worker for the purposes of the Act, the commission of the sexual assaults was outside of the course of his employment, and protection from civil action would not apply as a result of section 28(3). We have already expressed the basis for our view that Harry Kranc is not entitled to the protection from civil action that is generally provided to employers.

In our view, the two Tribunal decisions which are most applicable to the circumstances of this application are *Decision No. 977/03* (assault upon a worker by an executive officer of the employer company) and *Decision No. 786/03* (worker attacked by the pet dog of a Schedule 1 employer). In both cases the plaintiff was a worker who suffered injury as a result of acts of a Schedule 1 employer or executive officer of a Schedule 1 employer. In both cases the acts were determined to be beyond the scope of the employment relationship. The plaintiffs were allowed to proceed with their actions and protection was not afforded to the employer or executive officer. We agree with the outcomes in those two decisions.

In *Decision No. 977/03* the Vice-Chair determined [at para. 40] that the action against Chaytor, who had personally committed an assault upon the plaintiff, was not taken away because “he was probably sued in his personal capacity rather than as an executive officer.” In *Decision No. 786/03* the Vice-Chair determined that the action against Yegendorff was not taken away because “[t]he nature of the accident itself, involving Bonnie [the dog], removed the accident from being within the course of employment.” In a similar manner, we find that the sexual assaults alleged to have been committed by Harry Kranc were beyond the scope of the employment relationship he had with the plaintiff. In fact, as stated above, the act of sexual assault is entirely outside the scope of, inconsistent with, and antithetical to the employment relationship. During the time a sexual assault is committed by a person who would otherwise be considered to be an employer, such person cannot be considered to be a Schedule 1 employer within the meaning of the Act, and is not entitled to the protection from civil action afforded to employers by section 28(1) or section 26(2).

In their submissions, all of the parties referred to the “historic trade-off” which is the basis of Ontario’s worker’s compensation system. That “trade-off”, discussed in the Supreme Court of Canada’s decision in *Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*, [1997] 2 S.C.R. 890, cited in *Decision No. 1536/98*, is one in which workers receive the benefit of a no-fault insurance plan to cover workplace injuries. In return, employers receive protection against civil action by injured workers. In our view, the “historic trade-off” was never intended to cover deliberate and malicious assaults committed by employers against workers who are victimized by such acts. The “historic trade-off” should not be the basis of protection afforded to employers who commit such acts against workers.

Accordingly, we find that the plaintiff’s action against the defendant Harry Kranc is not taken away by the Act, and that the action against Harry Kranc may continue.

We find, however, that the civil action against the defendants Sarah Kranc and the Estate of Lejb Schwartzberg, is taken away by the Act, even if they were aware of the sexual assaults and were negligent in allowing the assaults to occur.

We find that Sarah Kranc and Lejb Schwartzberg were Schedule 1 employers or executive officers of a Schedule 1 employer. As such, protection from civil action by a worker of a Schedule 1 employer is afforded to them by section 28(1) and 26(2). The reasoning which was the basis for our finding that Harry Kranc was not a Schedule 1 employer within the meaning of the Act, does not apply to Sarah Kranc or Lejb Schwartzberg. We find that they did not commit deliberate or malicious acts to the detriment of the plaintiff. If they were negligent, the Act provides protection from civil action in relation to such negligence.

As for the plaintiff's action against Concordian Motel, on the basis of the evidence before us, we conclude that Concordian Motel is a business carried on as a partnership, and as such, it does not possess a legal identity which is separate from that of the three individual partners, namely Harry Kranc, Sarah Kranc and Lejb Schwartzberg. We find that the action against Concordian Motel is taken away on the basis of the same reasoning as that by which the action was taken away against Sarah Kranc and Lejb Schwartzberg. In making this finding, however, it should be understood that the action against Harry Kranc can continue in relation to all aspects of his personal capacity.

We have considered the respondent's submission that the plaintiff's action against the defendants pursuant to the *Occupiers' Liability Act* should be allowed to continue as a cause of action independent from the workplace elements. Given that we have found that the action against Harry Kranc can continue in any event, the submission has no effect in relation to the action against him. In relation to the other defendants, we find that the occupiers' liability element of the plaintiff's action is closely intertwined with the workplace elements. Given our finding that the plaintiff's action against those defendants is taken away by the Act, the action against them cannot survive as an independent action based upon occupiers' liability. Therefore, the submission that the plaintiff's action is based, in part, upon the *Occupiers' Liability Act* does not affect the outcome of the application.

DISPOSITION

The application is allowed in part:

1. The plaintiff's action against Sarah Kranc and the Estate of Lejb Schwartzberg is taken away by the Act.
2. The plaintiff's action against Harry Kranc is not taken away, and such action may proceed.
3. The plaintiff's action against Concordian Motel is taken away by the Act. By way of clarification, such determination shall not affect the plaintiff's right of action against Harry Kranc.
4. The plaintiff's right of action for wrongful dismissal against any of the defendants is not affected by the disposition of this application.

Order accordingly.



Decision No. 2227/05

Panel: Gehrke (Vice-Chair), Christie, Crocker

Decision — April 28, 2006

Neutral Citation: 2006 ONWSIAT 939

Waiver (right to compensation) (Schedule 2 employer) – Waiver (right to compensation) (mediation) – Exposure (fibreglass) – Environmental hypersensitivity – Sick building syndrome – Medical report (certainty of diagnosis).

Worker resigned from employment after mediated settlement by Canadian Human Rights Commission – Waiver of benefits permitted under Workplace Safety and Insurance Act, 1997, only where worker of Schedule 2 employer agrees to accept specified amount, with Board approval – Settlement did not bar worker from receiving workplace insurance benefits – Worker had entitlement for workplace exposure to fibreglass, whether condition was diagnosed as environmental sensitivity or sick building syndrome.

The worker appealed a decision of the Appeals Resolution Officer denying entitlement for multiple symptoms, including headaches, ear infections, respiratory symptoms, nausea, dizziness and dermatological problems, which the worker related to exposure to fibreglass and dust in the workplace in April 1998. The appeal was allowed.

The worker was exposed to fibreglass and other dust that descended from holes in the ceiling above her desk, causing an immediate reaction necessitating her leaving work. A report from Health Canada investigators made clear that there was such exposure and that workers should be removed. Further, the Health Canada investigation found that the air balance and flow in the building was out of control, leading to blowouts of unfiltered air.

It was not necessary to determine whether the worker suffered from environmental sensitivity or sick building syndrome. The Panel was satisfied that the worker's symptoms were related to her workplace exposure.

The worker resigned from employment in 2001 after a mediated settlement by the Canadian Human Rights Commission. This settlement did not bar the worker's right to workplace insurance benefits. There was no evidence that the worker agreed to waive her workplace insurance benefits. Further, the only waiver of benefits permitted under the *Workplace Safety and Insurance Act, 1997*, is under s. 63, where a worker of a Schedule 2 employer may agree to accept a specified amount, but only with Board approval. There was no evidence of Board approval in this case.

Renonciation (droit à une indemnité) (employeur de l'annexe 2) – Renonciation (droit à une indemnité) (médiation) – Exposition (fibre de verre) – Hypersensibilité à l'environnement – Syndrome des édifices hermétiques – Rapport médical (certitude du diagnostic).

La travailleuse avait démissionné de son emploi après être parvenue à un règlement par voie de médiation avec l'aide de la Commission des droits de la personne – Aux termes de la Loi de 1997, il est permis de renoncer à une indemnité seulement quand un travailleur d'un employeur de l'annexe 2 accepte un montant déterminé avec l'approbation de la Commission – Le règlement n'empêchait pas la travailleuse de toucher des prestations d'assurance contre les accidents du travail – La travailleuse avait droit à une indemnité pour exposition à de la fibre de verre, peu importe que le diagnostic posé fasse état d'hypersensibilité à l'environnement ou de syndrome des édifices hermétiques.

La travailleuse a interjeté appel de la décision par laquelle le commissaire aux appels refusait de lui reconnaître le droit à une indemnité pour des symptômes multiples, y compris des maux de tête, des infections aux oreilles, des problèmes respiratoires, des nausées, des étourdissements et des problèmes dermatologiques qu'elle attribuait à une exposition à de la fibre de verre et à de la poussière sur les

lieux du travail en avril 1998. Le Tribunal a accueilli l'appel.

La travailleuse avait été exposée à de la fibre de verre et à d'autres poussières qui passaient par des trous dans le plafond au-dessus de son bureau et causaient une réaction immédiate la forçant à quitter le travail. Un rapport d'enquête de Santé Canada confirmait clairement une telle exposition et indiquait que les travailleurs devaient être retirés des lieux. Ce rapport indiquait également que l'équilibre et la circulation de l'air dans l'édifice n'étaient pas contrôlés, ce qui entraînait des poussées d'air non filtré.

Il n'était pas nécessaire de déterminer si la travailleuse souffrait d'hypersensibilité à l'environnement ou d'un syndrome des édifices hermétiques. Le comité était convaincu que les symptômes de la travailleuse étaient liés à son exposition sur les lieux du travail.

La travailleuse avait démissionné de son emploi après être parvenue à un règlement par voie de médiation avec l'aide de la Commission des droits de la personne. Ce règlement n'empêchait pas la travailleuse de toucher des prestations d'assurance contre les accidents du travail. Rien n'indiquait que la travailleuse avait accepté de renoncer à ses prestations d'assurance contre les accidents du travail. En outre, la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* prévoit une seule possibilité en matière de renonciation, à savoir aux termes de l'article 63 un travailleur d'un employeur de l'annexe 2 peut accepter un montant déterminé mais seulement avec l'approbation de la Commission. Rien n'indiquait une telle approbation de la Commission en l'espèce.

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
 - s. 63

APPEAL by the worker from a decision of the Appeals Resolution Officer denying entitlement for workplace exposure.

April 28, 2006. THE TRIBUNAL: —

BEFORE:	L. Gehrke, Vice-Chair M. Christie, Member Representative of Employers J. Crocker, Member Representative of Workers
HEARING:	November 15, 2005 at Ottawa, Oral Post-hearing activity completed on February 28, 2006
DECISION(S) UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) decision dated December 28, 2001

APPEARANCES:

For the worker:	G. Myles, Union Representative
For the employer:	T. Goodall, Employer

REASONS

(i) Introduction

The decision under appeal denies the worker entitlement to benefits under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) for “sick building syndrome” as a result of exposures in the course of her employment. The worker claims that from April 1997 to April 1998, she was exposed to substances in her workplace, the employer’s office building, which caused her to develop sick building syndrome.

The worker was employed in an administrative capacity in the employer’s office building. She claimed that in April 1997, she started to develop multiple symptoms including headaches, ear infections, respiratory symptoms, nausea and dizziness, and dermatological problems that were related to exposures in her workplace. She stated that she lost considerable time from work during the period from April 1997 to April 1998.

In April 1998, she claims that she was exposed to fibreglass dust that was coming down from above the ceiling through holes in the ceiling tiles. She was at that time working on the eighth floor of the building. She became very ill. The nurse sent her home. From April to October 1998, she took a lot of time off, frequently being sent home by the nurse. She attempted a return to work twice in October 1998, but each time she suffered a recurrence of symptoms. The employer identified her as an environmentally sensitive employee and gave her a one-year paid leave of absence. She attempted a return to work on May 8 and 10, 2000 in an

adjacent building, but suffered a recurrence of symptoms. The worker claims she still suffers recurrences of symptoms on exposure.

The worker seeks the following remedies: reimbursement for leave credits without pay, medical expenses, day care and parking related to medical visits, retraining, and payment for the medical report of Dr. J. Molot.

The employer opposes the requested remedies because the worker resigned on March 2, 2001 and that there was a mediated settlement between the worker and the employer, as the employer would then be liable twice for the same remedies. The worker submitted in reply that the mediated settlement reached between the parties resulted from a complaint to the Canadian Human Rights Commission and was separate and apart from her claim for compensation under WSIA.

The employer urges the Tribunal to avail itself of all the relevant information, not just specific references made by the worker. The employer also submitted that the worker's final submissions were made out of time. The Panel ruled that it would receive the worker's submissions of November 17, 2005, with an opportunity to the employer to provide reply submissions. The employer chose not to file reply submissions.

(ii) The Panel's Conclusions

The Panel has concluded that the worker suffered a work-related injury through acute exposure to dust and fibreglass in her workplace in April 1998. As a result, the worker has entitlement to the benefits prescribed by WSIA.

(iii) Environmental Investigations of the Eighth Floor of the Worker's Building

The worker called a witness who was in a supervisory capacity in April 1998. She currently manages occupational health and safety programs in another department of the employer, and is a trained auditor of occupational health and safety programs. From 1992 to 1999, the witness co-chaired the Committee on Occupational Safety and Health (the committee), a management-labour committee in the worker's place of employment. She was a bargaining agent representative. As the committee co-chair, she ensured that health and safety problems or issues raised were properly investigated and resolved appropriately.

The witness testified that as co-chair, she received fairly constant complaints about the workplace environment from 1992 onward. Mainly these complaints were about indoor air quality, not about particulates but about unevenness of air distribution, heat and cold, dirt and the general environment of the building. A common list of problems experienced included headaches, respiratory problems, rashes, malaise and irritation of mucous membranes of the eyes. In the spring of 1998, the director asked the committee to investigate problems on the eighth floor, where the worker was located, because of a lot of problems. A lot of people were experiencing health problems – malaise, irritation and respiratory problems. Different people were reacting to different levels. The nurse brought concerns to the health and safety committee about the numbers of people that were contacting her. The committee monitored the situation.

An Indoor Air Quality Report dated February 1998 for the building in which the worker was employed was considered by the committee at its meeting of April 21, 1998. The April 21, 1998 minutes mentioned complaints from the first and second floors of the building as being the initiators of the report. Measurements were taken in February 1998 of temperature, relative humidity, and indoor contaminant levels of carbon monoxide, particulates, and microbials; as well as the ventilation rate and the performance of the heating, ventilating, and air conditioning (HVAC) system. The report stated that indoor air quality measurements were within health and safety regulations and standards. There were, however, several periods of low relative humidity. There was also a problem of smoking near building entrances, with migration of particulates and gases from outdoors into the lobbies and work areas. The report recommended minor adjustments to the system balance to ensure thermal comfort for each workstation, additional humidification during the winter, providing a smoking enclosure away from the main entrance and resampling of thermal comfort and microbials during the summer.

The April 21, 1998 minutes of the committee also mentioned that a fan had broken down causing heat to build up on the seventh and eighth floors. As a result, the system was switched to "free cooling", which pulls fresh air that is neither heated nor cooled into the building. The minutes state: "It was noted that most areas on the 7th and 8th floors were too hot and very uncomfortable."

The minutes of the committee dated May 19, 1998 noted that the witness made recommendations for further consideration of the heat in the building during the ventilation system changeover to "free cooling" in the spring. A departmental representative committee member reported that monitors would be installed in several areas of the building to ensure that the building is cleared of carbon dioxide ...by 7 a.m., and that temperature and humidity are within acceptable limits".

The June 16, 1998 minutes of the committee reported on a Health Canada Investigation of the eighth floor of the building where the worker worked. The minutes record the following:

At the request of the occupants of the 8th floor of the ...building, the Chairs asked the Occupational and Environmental Health Services Agency (OEHS) to assess conditions on the floor. OEHS asked [the employer] to take part in the investigation.

OEHSA (formerly EHSA Unit of Health Canada) Report

The preface to the report notes that “individuals sensitive to pollutants in the environment are an asset to the employer because they can signal possible system deficiencies in an occupancy long before they become a serious threat to all occupants.”

An Environmental Health Officer did an initial walk-through on May 14th. The following week, he returned with a Safety Engineer. They spent the entire morning doing a careful visual examination of all areas of the floor except for the machine room. This room was locked and no one was available to open it.

In their report, they made a number of observations, including the following:

- The tops of cabinets are covered with a thick layer of dust that includes carpet fibre, dust from new ceiling tile, fibre from old ceiling tile and grit from unknown sources.
- There is heavy dust and fibre load present on the ceiling grid. It is visible from the floor.
- The ceiling grid system is full of carpet fibre and fibreglass from old ceiling tile.
- Floor 8 in Building 5 has major pressure balance problems as well as flow balance problems.

Recommendations applied to the 8th floor and to the ...building generally. Key components include solving the pressure balance problems, cleaning the ceiling grid system, and ensuring that the building’s cleaning contractor does a proper job.

[The department representative] noted that many of the recommendations were being, or had been, acted upon already. There is a project underway...to ensure that the buildings are pressurized properly. The ceiling grid system on the 8th floor is being vacuumed by ...a firm that specialises in this type of cleanup. New hepa filters were installed in the vacuum cleaners used by our own cleaning contractor, and the job that the cleaners do is being more closely monitored.

PWGSC Air Sample

[The department representative] reported on the air particulate monitoring done by [the employer] on the 8th floor. The dust sample (from a swab) was taken from the exterior ceiling T-bar system. The air sample was taken over a 16.5-hour period at desk level.

...

Additional air sampling is underway. These reports and the reports from the air balancing contractor will be made available to the [committee].

[The department representative] expressed concern about some of the findings in the OEHSA report and stated that some of the conclusions reached were premature.

The Committee asked [the department representative] to set up a meeting between the engineers from Health Canada and [the employer] to discuss their respective reports and resolve any concerns.

Actions Taken to Rectify Problems, [8th floor]

The T-bar system is being cleaned both below and above the ceiling tiles. [...] did testing on the floor and made a number of adjustments [to airflow]. All items on the EHSA report will be looked at and dealt with.

Members noted a few problems with the cleanup effort on the 8th floor. The contractor vacuumed the underside of the ceiling support system and the air diffuser tracks first. This actually pulled a lot of the glass fibres into the air. Employees were very uncomfortable the following day, suffering from prickling skin, rashes, eye and throat irritation and respiratory problems. In future, the in-ceiling cleaning on other floors will be done first, with someone following immediately to clean the external surfaces.

On two other occasions, the contractor left bits and pieces of fibreglass littering the floor and work surfaces. People again suffered prickling skin, rashes, eye and throat irritation and respiratory problems. [A representative of the employer] first spoke to the contractor. The second time, she brought him to the site to view the mess. He ensured that the problem did not recur.

[The committee co-chair] noted that on the first of the above-mentioned occasions, fibreglass was cleaned from the surfaces on a Friday. The following Monday morning they were littered with it again although no work took place during the weekend. Facilities Management immediately sent people to the site to damp-wipe the surfaces. This is the most effective way to remove fibreglass particles that have settled.

As soon as all work in the ceiling is complete, the cleaners will thoroughly vacuum the floors and screens and damp-wipe all surfaces on the 8th floor.

[The committee co-chair] acknowledged the great work done by [...], Business Register Division's very knowledgeable and capable environment officer.

The committee's minutes of July 21, 1998 report reports further on the Health Canada Investigation as follows:

8. Follow-up Reports on Health Canada Investigation, [8th Floor]

[...] of Facilities Management reported on these jobs.

Cleaning Above Ceiling Tiles for Fibreglass Particles

As was recommended in the Health Canada report, all areas above the ceiling tiles and the ceiling tiles themselves were thoroughly cleaned, although not many "airborne" fibreglass particles were detected. As well, all cabinets were cleaned. Most of the 8th floor was redesigned, so a lot of cleaning occurred. Given the results of the post-move air quality measurements, the air quality seems to have improved. ...

The witness confirmed the content of the minutes quoted above. She testified that the nurse in the health unit reported visits for recurring illnesses related to eighth floor of the building. All employees who visited her suffered upper respiratory tract complaints. She provided numbers. The largest numbers of visits were from May 27 to June 11th, 1998. There were similar complaints from the worker. She went to the eighth floor with other members of the committee in the spring when they started receiving calls. The witness testified that she believed that the worker told her that she was having problems. The committee asked the eighth floor employees if they would like an environmental health investigation, and they said yes, so the committee wrote to Health Canada to request this. Health Canada made an initial visit and a more thorough exploration. The witness spent most a day with people from Health Canada. They went through the eighth floor and other floors, and looked at things outside. There were two investigators, an environmental technician specialist with Health Canada and an engineer specializing in indoor air quality. The witness went with investigators. She testified that they noted that dirt and fibreglass were really evident, the airflow was really uneven – in some areas almost none, other quite a bit, temperature variations from one spot to another, it would be uncomfortably hot in some offices, in some places there was gale force ventilation and other places were dead zones.

The witness testified that the June 1998 minutes record observations by OEHS of heavy fibre load. The witness testified that it was a lot, particularly in ceilings. The ceilings had an angle in them. The ceiling tiles were set in tracks. The tracks they sat in were full of particulates. The witness testified she could look up and see clumps of fibreglass. The witness thought the amount of dust was due to problems getting contractors to do what they were supposed to do. In the 1990s, the ceilings were changed because the old fibreglass ceiling tiles were deteriorating badly. The contractors never cleaned anything, because one could see pieces of old fibreglass ceiling tiles. Therefore she concluded that the contracting firm never cleaned up after itself. As a result, there was a lot of fibre loading. The new ceiling tiles were made of mineral fibre and were in pretty good shape. The old fibreglass tiles were never properly removed .

The witness testified that there were renovations going on all the time in the building.

The witness testified that carpet fibres were found in the ceiling tiles because the vacuum cleaners did not have proper filters, so vacuums were probably spewing carpet fibres up into the air. After this investigation, the filters were changed. The May 29, 1998 report of the Occupational and Health Safety Agency states that dust and fibres appear to recirculate. The following observations were made in that report of the investigation that was initially focussed on Floor 8 because of reports of health problems there:

FOLLOWING ARE SOME OBSERVATIONS:

1. Furnishings on Floor 8:

- i) The occupancy has carpet and furniture less than two years old.
- ii) The ceiling tile and lighting system has been replaced and is less than two years old.
- iii) The supply duct system was cleaned prior to re-occupancy.

2. Maintenance:

- i) There is a heavy dust and fibre load present on the ceiling grid. It is visible from the floor.
- ii) There appears to be a problem with removal of dust and carpet fibre. It appears to recirculate.
- iii) Fine dust normally captured by the return air and filter system of HVAC equipment is evident in the space, even clinging to select exterior ceiling surfaces.
- iv) Supply air diffusers have dust and fibre piled on the ceiling grid members in front of them.
- v) Return air openings have glass fibre piled on and in the ceiling grid.
- vi) The ceiling grid system is full of carpet fibre and fibreglass fibre from old ceiling tile.
- vii) The tops of cabinets are covered with a thick layer of dust that includes carpet fibre, dust from new ceiling tile, fibre from old ceiling tile, and grit from unknown source.
- viii) There appears to be an abnormally high dust and fibre load in the air of the occupancy, as well as dust and fibre lodged in the direct air path of HVAC system components.
- ix) The ceiling grid has holes where jiffy poles have been removed. These holes seem to be a favourite path for return air blowout (an indication of major HVAC control problem) complete with dirt dislodged from the rails.

The report stated further that there was a major air pressure balance problem in the building, particularly on floor 8, as well as flow balance problems, problems with airborne fibre, air flow reversal and shifting heating cooling patterns on floor 8. In particular, the report states, with respect to floor 8, the floor where the worker worked:

3. Indoor Environmental Control:

- i) [The building] has a major air pressure balance problem with respect to atmosphere.
- ...
- iv) Floor 8 in [the building] has major pressure balance problems as well as flow balance problems.
- v) Floor 8 has problems with airborne fibre that are not captured by vacuum cleaning or captured via the building filtration system.
- vi) Floor 8 experiences air flow reversal – air blows into occupied space from the return air plenum. Air flow reversal would be capable to remove dirt deposited on HVAC system filters and deliver the dirt to the occupied space via return air duct and ceiling plenum.
- vii) Floor 8 has shifting heating/cooling patterns and periodic no-flow conditions of ventilation air.
- viii) It appears that pressure balance and air flow balance on Floor 8 is not under control.
- ix) It appears that pressure balance and air flow balance in [the building] is not under control.
- x) ...
- xi) It appears that [the building] with its two main systems...[is] operating without attempt at building pressure balance causing windy conditions in basement corridors, shifting air currents, polluted air intake at loading dock, jammed elevator doors due to excessive differential pressure, amazing flow patterns on occupied floors where flow reversals dislodge debris from ceiling return air plenums, dumping debris and contamination into occupied space.
- xii) ...
- xiii) It appears that [an adjacent building] also affects air pressure ...in [the building].

The witness testified that the committee set up a worksheet with timelines to address the problems identified by the OEHSa report. The idea was to meet the recommendations in the report. The report made a number

of recommendations. There were imperative recommendations to balance the pressure and flow in the building. With respect to floor 8, where the worker worked, the recommendations were as follows:

D. Occupied Floor:

Seal all ceiling openings that had been cut to place jiffy poles (now removed).

Vacuum clean the ceiling support grid top and bottom, and conduit and duct inside the ceiling where dust, dirt, and fibre has settled. The contamination is evidence looking from floor level, and very obvious when viewed while standing on a ladder. Ceiling tile must be removed for this operation.

Replace damaged, cut, and soiled ceiling tile.

Clean all horizontal surfaces in the occupied space, including floor, tops of partitions, tall cabinets, desks, shelving, chairs.

Clean the partitions. Fabric covers on partitions also tend to catch dust and fibre, and should therefore also be vacuum cleaned.

Clean the underside of the ceiling components. Dust can be seen clinging to tiles and metal components.

Train the cleaning contractor staff- they were observed in action and seen to redistribute the dust and not remove it.

Check their vacuums for appropriate dust filters and suction/operation.

...

CONCLUSION:

...It is understood that cleanup of Floor 8 will be top priority and should be underway presently.

The September 1998 minutes show the action that was taken as a result of the EHSA Report and a further report by an airflow management consultant. Action taken on the eighth floor, where the worker was employed, included: replacement of the cleaning contractor’s vacuum filters, complete cleaning of the ceiling grid and T-bar system, complete cleaning of the plenum (the space above the ceiling tiles) and cleaning of all horizontal surfaces. As well, the minutes state: “Steps have been taken to close all jiffy openings around certain workstations. Facilities Management is currently in the process of sealing all jiffy pole holes on the eighth floor...”

The September 15, 1998 minutes also show a corrected report of a survey of particulates in June 1998 on the eighth floor, as follows:

Desk Sample

– Airborne Particulates

– Number of Particles per Cubic Foot

Nuisance Particulates	ppcf	Common Particulates	ppcf
Glass fragments	4.36	Inert organic dust	61.1
Fibrous glass	1.09	Skin fragments	15.3
Insects & Fragments	0.545	Cellulose	4.91
		Synthetics	1.09
		Hair	0.545
		Rust	0.545

Desk Sample

– **Airborne Particulates**

– **Number of Particles per Cubic Metre**

Nuisance Particulates	ppcm
Mould & fungi	115,000
Pollen	57,800

Ceiling Sample

– **Swab**

– **in Percentages**

Nuisance and Common Particles	Percentage
Cellulose (cotton)	70%
Inert organic dust	20%
Fibrous glass	2%
Mould & fungi	2%
Synthetics (nylon)	<1%
Pollen (grass)	<1%
Skin fragments	<1%
Rust	<1%
Unidentified organics	<1%

The report continues:

Particulate levels are low, and measure well within the Safety and Health guidelines.

Even low levels of certain airborne particulates can affect people over a long period of time. Facilities Management is being proactive and having the fibreglass residues from the old fibreglass ceiling tiles vacuumed from the ceiling support system.

The September 15, 1998 minutes also report on visits to the health unit by eighth floor employees as follows:

Visits to the Health Unit

[...] the nurse in the Health Unit, documented visits by employees from 8JT who felt that their recurring illnesses and discomfort were workplace-related. In a memo dated May 22nd, she reported that she was very concerned by the number of employees from this floor who visited her office complaining of no air, lack of circulation and variations in temperature. All of the employees suffered from upper respiratory tract complaints (i.e. itchy eyes, sore throat, headache and skin rashes). In this memo and two others dated June 15th and September 15th, she tallied the number of employee visits.

I. April 1 to April 30 12 employee complaints

II. May 1 to May 29 24 employee complaints

III. June 1 to June 23 15 employee complaints

The largest number of visits occurred on May 27 and June 11. The former was the day after the below-ceiling cleaning pulled large amounts of fibreglass into the air. The latter was a day when the workers hired to clean in the plenum got careless.

Hazardous Occurrence Investigation Reports

Fourteen occupants of the eighth floor submitted Hazardous Occurrence Investigation Reports between April 14th and June 11th.

The witness concluded that there were problems with the building, and that they tried very hard to fix those things. In 1999, people were still identifying problems related to air quality.

(iv) The Worker's Testimony

The worker testified that she started working on the eighth floor in an open concept plan in October 1995. She had previously worked in another building as a data entry clerk. In August 1997, her ill health in the workplace started with rashes and sore throat after the floor was changed from an open concept to cubicles. This change involved renovating the walls, installing new fabric dividers and desks, new computers, rewiring above the ceiling and changing the light fixtures in the spring and summer of 1998.

Before this, she had no experience of illness in the workplace. She had worked in several high-rise buildings and lived in apartment buildings without any noticeable ill effects.

In April 1998, she saw the nurse at work. The nurse was concerned and sent her home. She also complained about the air quality. In the spring of 1998, Health Canada investigators visited her desk on the eighth floor. The investigators noted seven holes above her desk. One of the investigators stood on a chair and sprayed a white powder in the area, which showed a stream of particles going down to her desk. The investigator said she was breathing unfiltered air, and had to be moved. She testified that in the summer of 1998, white particles appeared on her desk. Since April 1997 she had found it dusty, but the particles appeared in the spring of 1998. In the morning, there was a covering of dust on her desk. She was told it was fibreglass after they had the fibres analyzed.

The worker also testified that she saw her family doctor, Dr. Sade, starting in August 1997 for flu symptoms and rashes on monthly basis. Her doctor advised her to take frequent air breaks and then go back to work. In September 1997, Dr. Sade prescribed an anti-depressant because she could not concentrate at work. She was treated for chest infection and then referred to an allergist in February 1998. It was determined that her problem was not allergies.

In April 1998, the nurse sent her home from work. She then saw Dr. Ragan at a medical clinic near her home. Dr. Ragan is a family doctor with an interest in environmental medicine. Dr. Ragan felt the symptoms were becoming more severe and she was having difficulty recovering from them. He called Dr. Sade to discuss a diagnosis of sick building syndrome. Dr. Sade then referred the worker to Dr. Ragan and to Dr. Molot.

The worker described her symptoms from April to October 1998 as continuing and worsening. During this period they were changing the lights in the ceiling. Everyone there had eye problems, rashes, itchy scalps, and trouble breathing. The worker had problems with her eyes, sore throat, face and scalp numbness, joint pain, rashes, trouble concentrating, no energy, and felt like had she had a bad flu when she first saw Dr. Molot.

The worker testified that from April to October 1998 she took a lot of time off. The employer did not want her around the office in May or June 1998. If she didn't feel well, she would go to the nurse. The nurse would send her home and she would go to see Dr. Ragan. She was off work for a year starting in October 1998 because every time she returned she got sick. At one point the employer told her to stay home until they called her.

She remembered other people who worked in her area being sick. Her supervisor complained of the air quality and had some symptoms similar to hers. Her immediate work neighbours and many people around her and on the floor were sick and were sent home because they were sick.

From October 1998 to October 1999 the worker was off work with pay because she could not work there and they did not have an alternative site for her. She was assessed twice by Dr. Givens for the employer, who said in November 1998 that she had a condition that could be considered environmental sensitivity, and that she needed a clean environment with ventilation. The employer continued to pay her after this letter.

The worker testified that while out of the workplace, she was feeling better, not totally. She would suffer symptoms if she had an exposure to perfume, but never to the extent that she did at work. Out of work she would suffer irritated eyes and sore throat, but not nausea or dizzy spells.

Throughout 1998 and until her return to work, the worker saw Dr. Molot, who said she needed to work somewhere else or from home. She had her first child in November 1999 and took 6 months maternity leave. After this, she returned to work on May 8, 2000.

On her return to work, she was again assessed by Dr. Givens, with the same findings, that she needed a clean environment on a different floor, a different building, or from home. She testified that Dr. Givens diagnosed sick building syndrome with extreme cacosmia (multiple chemical sensitivities).

On her return to work on May 8, 2000, she was returned to the eighth floor of the same building, in the same area where she had worked before. She had a slightly bigger cubicle, beside the photocopier. She felt sick as soon as she returned. She had rashes, swollen glands, sore throat, was feeling unwell. She told her supervisor and went to the nurse. She was then sent home.

She returned to work again on May 10, 2000 to a different building. She was asked to attend a meeting in the main building. Upon her return from the main building she was not feeling well. In the afternoon she was asked to attend a meeting on the eighth floor of the building where she used to work. She felt very ill during the meeting. She left the building, went to the nurse and was sent home again.

The worker testified that she called Dr. Givens after this. He said he did not want her to return to that building, that her health could be in jeopardy because the nurse observed that her eardrum was bulging. She has been out of the workplace since May 10, 2000. She still has symptoms, but never to the extent of April 1998. Her symptoms now resolve quickly as soon as she leaves a situation that causes them. Since she left work she has felt much better.

(v) Forms and Medical Evidence

On May 9, 1998, the employer filed a Form 7 report of injury or disease. This states the date of injury as April 14, 1998, and gives the following history: “possible air quality problem, causing or aggravating respiratory system.” The Form 7 notes that the worker reported to the environment officer, supervisor and nurse in the employer’s health unit, and doctor.

The employer filed a subsequent Form 7 indicating the date of awareness of injury or disease as April 14, 1998. The employer’s Form 7 described the injury as follows:

- Respiratory problems & infections;
- Air quality in work area on 8th floor [...] Bldg.

The subsequent Form 7 states that the worker returned to work on different dates, and in a supplementary statement stated: “Employee came back to work, went back off, back to work, went back off several times.”

In a subsequent Form 7 dated November 11, 1998, the employer stated that the worker returned to work on September 3, 1998 after a re-occurrence suffered on July 20, 1998, as a result of air quality – that the employee had relapsed and was having difficulties even after accommodation at a new work area.

A further Form 7 indicates that the worker stopped work on September 9, 1998 and returned to work on October 10, 1998, due to a re-occurrence. A further Form 7 documents another recurrence on October 29, 1998.

The employer’s July 12, 2000 Form 7 report of re-occurrence indicates the date of onset of the worker’s injury or disease as April 14, 1998, and the last date worked as May 10, 2000. The description of what happened to cause the re-occurrence of injury or disease in May 2000 provided by the employer in the Form 7 is: “[The worker] felt that there was something in the air that was giving her physical discomfort. She had a stuffy nose, sore throat and a rash on the inside of both her arms.”

The worker stated in her initial report of injury (Form 6):

I believe that my illness began after being moved to another desk around April 97. I became ill gradually over time but I noted small changes shortly after relocation. It wasn’t apparent at the time that it was work related. I made numerous complaints to [my supervisor] who also found the air quality poor and [the employer’s environmental officer] who assured me the air had been tested and was fine. ... I had my first ‘rash’ & respiratory infection August 14/97. I had moved to another area on the floor around Apr/97. My supervisor sent me to the nurse at work who recommended I leave work and see Doctor...

The worker’s treatment record with the employer notes a visit for treatment by her on April 14, 1998 as follows:

Arrived [complaining of] environmental working conditions. States she is sick frequently when she comes to work. Complains of facial numbness, sinusitis, sore throat, headaches & nausea, rashes on arms & legs, irritated eye at times, numerous ear infections and states she had chest infection this year Jan-Feb states has been generally more sick since she has been working here. States she finds the air stagnant stale, no circulation and is very dusty. Since the past 2-3 wks it has been very warm when employees arrived and becomes unbearable when time to leave. States other employees have similar illness (i.e. strep throat, laryngitis, asthma). When she goes home feels better...

The treatment notes record further visits for environmental complaints and symptoms of redness and fluid in the ears, redness and congestion of the eyes, on April 16 and 21, 1998. On April 21, 1998, the notes indicate that the supervisor was notified that the worker would not be returning to work. On April 23, 1998, the worker left work sick with allergic symptoms. She appears to have been on leave after this. On April

27, 1998, she again attended the nurse complaining of air quality on her floor and the same symptoms. Complaints were again made on May 5, 6, and 13 and 15, 1998.

On April 29, 1998, Dr. Y.J. Patel, allergist, wrote to Dr. A. Sati, the worker's family doctor, stating that the worker had been experiencing recurrent bronchitis and occasional rhinitis. Allergy skin tests disclosed no significant reactions. Dr. Patel advised the worker to "remove her pets from the bedroom, avoid exposure to horses and the barn at her parent's place as well as to stop smoking." Dr. Patel also recommended a consultation with a respirologist for management of the recurrent bronchitis.

Dr. J. Molot, a family physician with practice restricted to environmental medicine, wrote reports in September and November 1998. On September 15, 1998, Dr. Molot noted that the worker had been off work since May 1998 and was noticing improvement in her symptoms. She reported significant reactions to chemical odours (cacosmia), that she smoked cigarettes and used acrylic paints. Dr. Molot stated an impression of sick building syndrome with significant cacosmia and recommended that she change work locations. On November 11, 1998, Dr. Molot reported that she had changed locations but there were a lot of dust fibres in her environment and she was in a small cubicle that she shared with two other women who wore scented products. She did not have symptoms on getting up or on weekends. At work, she gradually developed symptoms of congestion and burning in her eyes, nose and throat, a rash on her face, and decreased concentration and ability to work. Dr. Molot commented that the worker was giving a textbook description of sick building syndrome and diagnosed the same.

On November 12, 1998, Dr. John Given, M.D., Medical Officer for the Occupational Health and Safety Agency, assessed the worker at the request of the employer and reported to the employer:

Based on the information and our assessment, we wish to advise you of the following:

- 1) A condition has been identified by her treating physicians which cannot be objectively defined nor classified.
- 2) Her condition is also difficult to treat. Preventive measures are the only option. Unfortunately, these are not easily delineated.
- 3) It would be helpful for [the worker] to avoid contact with substances which render her ill (be they chemicals, particulate matter, fumes, etc.).
- 4) A trial of work in other environments, for example, a different floor, a different building or her home could be considered. Since identification of the trigger factors for her illness is extremely difficult, finding an appropriate environment is a trial and error process.
- 5) If [the worker] could be provided with a closed office rather than the open office concept, this might be helpful in 2 ways:
 - a) she can more effectively avoid scented products worn by co-workers.
 - b) an air purifier could be provided to reduce environmental sensitizers. (This purifier must be well maintained to prevent mould contamination.)
- 6) The objective would be an environment which is:
 - smoke free
 - scent free
 - well ventilated
 - adequate cleaning and maintenance of work site

File notes attached to Dr. Given's report record an "incident" on April 14, 1998 as follows:

INCIDENT

Fibreglass fibre fallen from ceiling tiles 8th floor

Sick leave since 15-4-98

Resp. Problems/Allergic reactions

– several attempts to return (failed) – Health problems

- certified sick leave 29-9-98
- “Sick Building Syndrome” – needs a cleaner alternative place to work.
- No 8th floor
- Not in building [...]

On June 11, 1999, the Board’s Occupational Medical Consultant reviewed the worker’s file, and concluded:

Based on the current information on file, it is noted that this worker’s varied symptomatology is not consistent with any specific clinical diagnosis. The information on file does not indicate any occupational exposure factors, triggering her symptomatology.

On June 8, 2000, a different Board Occupational Medical Consultant concluded:

1. The claimant has a diagnosis of chronic bronchitis but this appears to be related to the claimant’s exposure to cigarette smoking and it appears there may be aggravation from exposure to pets, danders and dust in bedroom and barn, work with acrylic paints.
2. The remainder of the symptoms are unrelated or non-specific, including complaints of chronic stress, rectal bleeding, flatulence etc.
3. It is more likely claimant’s symptoms are related to smoking & continuing depression rather than poor indoor air quality in the workplace.
4. I recommend to deny compatibility. ...

On February 22, 2000, Dr. Given wrote to the worker in response for a request to confirm her diagnosis. Dr. Given wrote :

...On October 6, 1998, at the time of your assessment, your medical condition was considered to be consistent with what is known as “ENVIRONMENTAL SENSITIVITIES”.

However, it should be noted that the above has not been universally accepted as a medical diagnosis. That is why in item no. 1 of my letter to your employer dated November 12, 1998, I wrote the following:

“A condition has been identified by her treating physicians which cannot be objectively defined nor classified.”

Furthermore, the reason that I am writing in my letter today that “your medical condition was considered to be consistent with...Environmental Sensitivities” is that there is no test nor investigation which proves or defines the condition.

Therefore, I cannot say that your diagnosis is “Environmental Sensitivities” since:

- 1) the diagnosis/condition is not universally accepted in the medical literature.
- 2) No exact criteria/definition for the diagnosis exists as yet.
- 3) There is no test/investigation which proves/defines the condition.

I can only say that your symptoms were consistent with what is believed to be “Environmental Sensitivities.”

The above was reviewed at our medical rounds. It is consistent with our current position with regard to the subject of “Environmental Sensitivities”.

Dr. Given wrote to the employer on April 25, 2000 confirming the recommendations in his letter of November 12, 1998.

(vi) Analysis

The issue to be determined in this appeal, in the Panel’s view, is whether the worker was exposed to substances in her workplace that resulted in injury to her. It is a well-accepted principle at common law and in workers’ compensation law that the causal relationship between the work and the injury (in a compensation situation) is that of significant or material contribution. The issue to be addressed is whether the work contributed in a significant or material way to the worker’s disabling condition, which became apparent on April 14, 1998 when she visited the nurse and left work.

A material contribution need not be the sole contribution, but must be more than a minimal contribution. Causation need not be determined with scientific precision. Medical experts ordinarily determine causation in terms of certainties, but the law requires a lesser standard. It is the function of the trier of fact, not the medical witnesses to make a legal determination of the question of causation, using a “robust and pragmatic approach”, where there is medical uncertainty with respect to causation. Reasonable inferences may be made from the primary facts of the case. Causation is determined on a balance of probabilities, or applying the benefit of the doubt where the evidence is equally weighted. However, a finding of causation may not be made based on mere speculation or evidence of a possibility, rather than a probability.¹

In this case, the Panel is satisfied on a balance of probabilities that the worker was exposed to fibreglass and other dusts in the workplace. Taking a robust and pragmatic approach to the primary facts of the case, we are satisfied that the exposure to these dusts led to her disabling symptoms in April 1998.

The Panel accepts the testimony of the witness and the worker, which is consistent and substantiated by reports both medical and non-medical that were made at the time of the events beginning in April 1998. We find based upon this evidence that on April 14, 1998, the worker was exposed to fibreglass and other dusts that descended upon her from holes in the ceiling above her desk, causing her to suffer an immediate reaction that necessitated her leaving work.

The report of the Health Canada investigators makes clear that there was exposure to fibreglass and other dusts from above the ceiling level, and that workers should be removed from the area. Her reaction to the exposure in April 1998 was immediate and disabling. There is a strong temporal connection between her symptoms at that time and the exposure to fibreglass and other dusts in her workplace.

Further, the Health Canada investigation found that the air balance and flow in the building was out of control, leading to “blowouts” of unfiltered air. The documentary evidence provided by the occupational health committee’s minutes indicate that the process of cleaning, filling the ceiling holes and rebalancing air system took many months.

Given her consistent reports of feeling ill after being moved to this location on the eighth floor starting in August 1997, and the evidence from the witness and the worker and written reports concerning renovations that were being made to this area, it is likely that she was exposed to these dusts starting in August 1997. It is likely that these exposures continued until the area above the ceiling tiles were properly cleaned and the holes that permitted dust from above the ceiling tiles to sift down on the worker’s desk were closed.

There is ample evidence in the file and testimony of workers in the same area as the worker whose health was affected by this exposure. We find that this exposure constituted an accident arising out of and in the course of the worker’s employment. She is entitled to benefits under WSIA as a result.

The Panel finds that it is not necessary to conclude whether the worker suffered from environmental sensitivity or sick building syndrome. We understand from the reports of Dr. Given that “environmental sensitivities” is considered to be a controversial diagnosis. Yet, Dr. Given was still satisfied that the worker had suffered a reaction to her exposure to workplace substances, leading to recommendations that her workplace be changed. We are satisfied by the reports of all physicians and nurse who saw her at or near the time of exposure from April to October 1998, that the worker suffered disabling symptoms that were a direct reaction to the exposures in the workplace. In particular, there were symptoms of redness and congestion of the eyes and ears, sore throat, and skin rashes. These symptoms appear to have been consistent reactions that appeared at work on numerous occasions during this period and resolved when away from work. They are not explainable as simple allergies, since she has not tested positively to any allergens. There is a strong temporal connection between these symptoms and her reported exposure to dusts at work.

We find on a balance of probabilities that there is insufficient evidence to show that the worker suffered from any illness or injury that related to a workplace exposure before April 1998.

The Panel does not accept the employer’s submission that the worker’s entitlement to benefits under WSIA is barred by a settlement with the employer mediated by the Canadian Human Rights Commission. There is no evidence that the worker agreed to waive her benefits under WSIA. Moreover, the only waiver of benefits permitted under WSIA is under section 63, where a worker of a Schedule 2 employer may agree to accept a specified amount in lieu of or in satisfaction of payments to which she is entitled under the insurance plan, but only if the Board approves that agreement. There is no evidence before us of a Board approval within the meaning of section 63 of the agreement mediated by the Canadian Human Rights Commission in this case. Nor is there any evidence before us of the contents of that agreement.

The Panel determines initial entitlement only in this appeal. The Panel declines to award the specific remedies sought by the worker, and leaves this matter to the Board to determine at the first instance. We do not

address the nature and level of benefits to be paid to the worker, leaving this to the Board to determine in the first instance. The Board's determination is subject to the provisions for appeal provided by WSIA.

The Panel has determined that the report of Dr. Molot was useful in this appeal. Therefore, we order that the Tribunal shall pay a fee to Dr. Molot for the report prepared for this appeal. The amount paid shall be at the usual rate at which the Tribunal pays for medical reports.

DISPOSITION

The worker's appeal is allowed. The worker is entitled to benefits under WSIA for exposure to fibreglass and other dusts causing disability in April 1998. The nature, duration and level of benefits shall be determined by the Board, subject to the rights of appeal provided by WSIA. The Panel orders that Dr. Molot be paid his fee at the usual rate the Tribunal pays, for a medical report which was prepared for this appeal.

Appeal allowed.

1. See *Decision No. 915 (1987)*, 7 W.C.A.T.R. 1; *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Laferrière v. Lawson* [1991] 1 S.C.R. 541 per Gonthier J.



Decision No. 2122/04

Panel: Robeson (Vice-Chair), Wheeler, Lebert

Decision — May 30, 2006

Neutral Citation: 2006 ONWSIAT 1192

Labour market re-entry (co-operation) – Loss of earnings (level of benefits) – Expenses (child care) – Human rights (discrimination) (family status).

Board policy provides for payment of necessary expenses related to attending school, but not for payment of personal expenses, such as child care – Worker made only superficial submissions that failure to pay expenses was violation of Human Rights Code provision for equal treatment with respect to services without discrimination based on family status – Worker was not entitled to payment of child care expenses.

The worker suffered a wrist injury in 1999. The worker appealed a decision of the Appeals Resolution Officer denying full LOE benefits from September 2002 to July 2003, and denying payment of child care expenses while the worker was attending school as part of an LMR program. The appeal was dismissed.

The worker was unable to return to her pre-accident employment, and the employer did not offer suitable work. However, the worker was not totally disabled. She was capable of working at minimum wage, but did not make reasonable efforts to secure employment. The worker was not entitled to full LOE benefits during the period in question. She was only entitled to partial LOE benefits based on ability to work at minimum wage.

The worker was not entitled to child care expenses. Board policy on LMR expenses provides for payment of necessary expenses related to attending school, such as school fees, text books, course materials and room and board away from home. It does not provide for payment of personal expenses, such as child care.

The worker made superficial submissions that failure to pay for child care expenses was a violation of the Ontario *Human Rights Code* provision for equal treatment with respect to services without discrimination based on family status. However, the worker made no specific submissions regarding jurisdiction or exclusion of periodic payments from the definition of services in the *Human Rights Code*.

Réintégration sur le marché du travail (collaboration) – Perte de gains (niveau des prestations) – Dépenses (garde d'enfants) – Droits de la personne (discrimination) (situation matrimoniale).

La politique de la Commission prévoyait le paiement des dépenses nécessaires pour fréquenter l'école mais non le paiement des dépenses personnelles telles que celles associées à la garde d'enfants – La travailleuse a fait observer seulement de façon superficielle que le défaut de payer de telles dépenses constituait une infraction aux dispositions du Code des droits de la personne prévoyant un traitement égal en matière de services sans discrimination fondée sur la situation matrimoniale – La travailleuse n'avait pas droit au paiement de frais de garde d'enfants.

La travailleuse, qui avait subi une lésion au poignet en 1999, a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de lui reconnaître le droit à des prestations pour perte de gains (PG) totale de septembre 2002 à juillet 2003 ainsi qu'au paiement de frais de garde d'enfants pendant qu'elle fréquentait l'école dans le cadre d'un programme de réintégration sur le marché du travail (RMT). Le Tribunal a rejeté l'appel.

La travailleuse était incapable de retourner à son emploi d'avant l'accident et l'employeur ne lui avait pas offert de travail approprié. Cependant, la travailleuse n'était pas totalement invalide. Elle pouvait travailler au salaire minimum mais elle n'avait pas fait d'efforts acceptables pour obtenir un emploi. La travailleuse n'avait pas droit à des prestations pour PG totale pendant la période en question. Elle avait seulement droit à des prestations pour PG partielle calculées en fonction de ses possibilités de gains au salaire minimum.

La travailleuse n'avait pas droit au paiement de frais de garde d'enfants. La politique de la Commission prévoyait le paiement des dépenses nécessaires pour fréquenter l'école telles que celles associées à l'admission, aux livres, aux fournitures scolaires et à la pension. La politique ne prévoyait pas le paiement des dépenses personnelles telles que celles associées à la garde d'enfants.

La travailleuse a fait observer seulement de façon superficielle que le défaut de payer de telles dépenses constituait une infraction aux dispositions du *Code des droits de la personne* de l'Ontario prévoyant un traitement égal en matière de services sans discrimination fondée sur la situation matrimoniale. Cependant, elle n'a fait aucune observation au sujet de la compétence ou de l'exclusion des paiements périodiques dans la définition de services aux termes du *Code des droits de la personne*.

Tribunal Decisions Considered:

- *Decision No. 291/98* (1998), 48 W.S.I.A.T.R. 115 consd
- *Decision No. 468/94* (1995), 35 W.C.A.T.R. 101 consd
- *Decision No. 291/98R* (February 18, 2000) [2000 ONWSIAT 415] consd
- *Decision No. 2724/00* (July 30, 2001) [2001 ONWSIAT 2300] refd to
- *Decision No. 1759/01* (July 30, 2001) [2001 ONWSIAT 2302] refd to
- *Decision No. 377/03* (December 5, 2003) [2003 ONWSIAT 2647] refd to
- *Decision No. 1163/05* (August 25, 2005) [2005 ONWSIAT 1906] refd to
- *Decision No. 1453/05* (December 9, 2005) [2005 ONWSIAT 2727] refd to

Other Decisions Considered:

- *B v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403 (S.C.C.) refd to
- *Brown v. Canada (Department of National Revenue, Customs and Excise)*, [1993] C.H.R.D. No. 7 refd to
- *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society* (2004), 240 D.L.R. (4th) 479 (B.C. C.A.) refd to
- *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 (S.C.C.) refd to
- *Symes v. Canada*, [1993] 4 S.C.R. 695 (S.C.C.) consd
- *Tranchemontagne v. Ontario (Direction, Disability Support Program)*, 2006 SCC 14, 266 D.L.R. (4th) 287 (S.C.C.) consd
- *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150 (S. C. C.) refd to

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A*
 - s. 42
 - s. 43(1)
 - s. 43(2)
 - s. 43(3)
 - s. 43(4)
 - s. 43(7)

Other Statutes and Regulations Considered:

- *Human Rights Code, R.S.O. 1990, c. H.19*
 - s. 1

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
 - Document No. 18-03-02 (December 24, 2003) (since superseded)
 - Document No. 19-03-01 (October 12, 2004)
 - Document No. 19-03-04 (October 12, 2004)
 - Document No. 19-03-06 (November 30, 2001) (since revised)
- *Adjudicative Advice – Practice Guidelines for Ordering LOE Benefit Arrears Under WSIA*
- Director Appeals Branch, March 1, 2002

APPEAL by the worker from a decision of the Appeals Resolution Officer denying full benefits for a period of time and denying payment of child care expenses while the worker was attending an LMR program.

May 30, 2006. THE TRIBUNAL: —

BEFORE:

V.R. Robeson, Vice-Chair
B. Wheeler, Member Representative of Employers
R.J. Lebert, Member Representatives of Workers

HEARING:

December 16, 2004 at Toronto, Oral
Post-hearing activity was completed March 24, 2005

DECISION UNDER APPEAL:

WSIB Appeals Resolution Officer decision dated August 12, 2003 and amended on October 16, 2003

APPEARANCES:

For the worker: R. Collie, United Steelworkers of America, Local 9042
For the employer: Not participating

REASONS**(i) Issues**

The worker seeks entitlement to payments for full loss of earnings benefits rather than partial loss of earnings benefits, from September 2, 2002 to July 24, 2003, and to child care expenses while attending school full-time in her LMR program.

(ii) Background

The worker was born in 1980. She began working for the accident employer as a general labourer on December 18, 1998 at an

hourly wage of \$12.71.

The worker reported to the Board that she had problems with her right wrist on August 12, 1999 and with her left wrist on December 6, 1999 resulting from the nature of her work for the accident employer.

The worker lost no time from work at the time of the right wrist injury, but continued to work on modified duties until December 6, 1999 when she laid off complaining of problems with both wrists.

The Board accepted the worker's claims. The Board granted the worker a 10% non-economic loss (NEL) benefit for "bilateral tendiopathy from RSI" (repetitive strain injury).

The employer was unable to provide modified work and did not have an obligation to re-employ the worker, because she did not work continuously for the employer for one year prior to the date of the work-related accident.

The Board initially granted the employer 75% Second Injury and Enhancement Fund (SIEF) relief, but later increased the level of SIEF relief to 90% on the basis of a major pre-existing condition and a minor accident.

The Board provided a labour market re-entry (LMR) program to the worker since it was unlikely that she would be able to return to her pre-accident employment. The program took place from October 2000 to September 2002. The worker and the LMR service provider signed an LMR plan in December 2000 and the plan was submitted to the Claims Adjudicator for Board approval. There was little, if any, contact between the LMR service provider or the Board and the worker regarding the LMR plan from December 2000 to May 2002. Most of this time was taken up by the LMR service provider developing SEBs (suitable employment or business) considered suitable by the Claims Adjudicator for the worker's bilateral upper extremity condition. The worker's involvement was limited to attending a keyboarding assessment at the Board's hand clinic on October 16, 2001. Contact between the worker and the LMR service provider resumed in May 2002.

The worker gave birth to a baby on August 24, 2001. The worker testified that she did not advise the Board that she gave birth to a baby in August 2001, and that she could not recall whether she met with anyone from the Board or the LMR service provider in 2001.

The worker received full LOE benefits from October 2000 to September 2002.

The Claims Adjudicator cancelled the LMR program and reduced the worker's LOE benefit by decision dated September 5, 2002 on the basis of a lack of co-operation by the worker.

The Appeals Resolution Officer issued two decisions, the original decision dated August 12, 2003 and an amended decision dated October 16, 2003.

With respect to the worker's claim for full LOE benefits from September 2002, the Appeals Resolution Officer found in his decision of August 2003 that there was "insufficient information" on which to conclude that the worker failed to co-operate in her LMR program in August 2002, accepted that the worker's "self-directed efforts in LMR since September 2002 [were] sufficient to attract benefit entitlement", and directed "payment of loss of earnings benefits during this time interval".

The Appeals Resolution Officer clarified in his amended decision of October 2003 that the worker was entitled to partial LOE benefits from September 5, 2002 to July 24, 2003, the date of the Appeals Resolution Officer hearing, based on the worker's ability to earn the minimum wage, and full LOE benefits from July 24 to August 12, 2003, the date that the Board reopened the worker's LMR program.

The Appeals Resolution Officer stated as follows in his amended decision with respect to the worker's claim for full LOE benefits from September 2002 to July 2003:

At [the hearing on July 24, 2003], the worker testified that she checked local newspapers for career information during this interval, visited FOCUS for job and career leads, revised her resume and researched the suitability of George Brown College programs and facilities ultimately deciding on two preferred SEB options. I was impressed that the worker was focussed appropriately during this interval and that she arrived at the hearing with definite ideas about how to mitigate her future wage loss.

At the same time, I am not convinced that the extent of the worker's job search and self-directed LMR during this interval is sufficient to attract payment of full LOE. Her actions were consistent with those taken when one fully expects to be successful in an appeal. While that is not an unrealistic or unworthy expectation, I do not believe the worker was incapable of securing some form of minimum wage, accommodated job during this interval.

In my view, it is appropriate to base LOE on the acceptance that [the worker] was capable of earning minimum wage to the date of the hearing. While a minimum wage job would not have fully eliminated the wage loss resulting from her impairment, I consider that the worker was capable of finding and persevering at suitable minimum wage employment without training, given her aptitude to learn and her stated willingness to work.

With respect to LMR services, the worker and her representative asked the Appeals Resolution Officer at the beginning of the Board hearing in July 2003 to consider approving the worker's admission to one of two programs identified by the worker at Georgian College to begin in September 2003. The two programs were Aviation Management (NOC 2272) and Mechanical Engineering Technology (NOC 2232). The Appeals Resolution Officer approved a change in the worker's SEB and directed the WSIB operating area to "accept the Aviation Management SEB, NOC 2272, and contact Georgian College as soon as possible to confirm [Board] sponsorship in this new LMR program" effective September 2003.

In approving the new SEB, the Appeals Resolution Officer noted in his decision of August 2003, that it was a 45-minute drive from the worker's home to Georgian College and that the college had a "YMCA-affiliated day care centre where [the worker] would be able to take her [two-year-old] child" and the worker had "made arrangements for emergency childcare backup if needed".

The worker and her representative met with the LMR service provider in late August 2003 shortly after the release of the Appeals Resolution Officer's to arrange the worker's return to school in September 2003. Concern was raised about the suitability of NOC 2272. Based on confirmation from the worker's representative that the worker actually preferred the Mechanical Engineering Technology program over the Aviation Management program and information from Georgian College, the Appeals Resolution Officer agreed in his amended decision of October 2003 to change the worker's SEB to Mechanical Engineering Management and approve her entry into the program in September 2003.

The worker signed the LMR plan on October 22, 2003. The reopened LMR program continues to date. The target completion date for the formal training component of the LMR program is August 2006.

With respect to child care expenses, the worker's representative asked the Appeals Resolution Officer at the Appeals Resolution Officer hearing in July 2003 that child care be made a part of the worker's LMR program. The Appeals Resolution Officer stated, in part, as follows in his decision of August 2003:

I also agree [with the worker's representative] that the travelling and childcare arrangements are conducive to overall success in the worker's chosen program and that benefits from September 2002 are warranted.

...

I am not aware of any specific provision in the legislation or in policy where child care services may be provided or subsidized by the WSIB. However, it is in my view apparent that factors such as the provision of adequate child care are taken into account during the development of an appropriate LMR program in order to secure the greatest likelihood of success. The worker has taken this into consideration in choosing Georgian College as an appropriate location to receive the specialized training that she requires at this time. However, given that I have no legislative discretion to authorize child care expenses, I deny special child care provisions in this claim.

The worker appealed the Appeals Resolution Officer's decisions to the Tribunal.

The worker testified at the Tribunal hearing that she and her husband separated in September 2004. The worker submitted two receipts at the Tribunal hearing which she stated were for private child care expenses in 2003 (\$2,000) and 2004 (\$6,000).

(iii) Law and Policy

The accident date in this appeal is 2000. Accordingly, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) applies.

The Board identified the following policy packages (revision #5) as applicable to the subject matter of this appeal:

Package #149: Labour Market Re-Entry,

Package #202: Partial LOE/Adjustment to Level of LOE, and

Package #300: Decision Making/Benefit of Doubt/Merits and Justice.

(iv) LOE Benefits From September 2, 2002 to July 24, 2003

The worker seeks entitlement to full LOE benefits, rather than partial LOE benefits, from September 2, 2002 to July 24, 2003.

(a) Law and Policy on LOE Benefits

Section 43 of the WSIA provides for LOE benefits:

43(1) A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins. The payments continue until the earliest of,

(a) the day on which the worker's loss of earnings ceases;

- (b) the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury;
- (c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury;
- (d) the day on which the worker is no longer impaired as a result of the injury.

(2) Subject to subsections (3) and (4), the amount of the payments is 85 per cent of the difference between,

- (a) the worker's net average earnings before the injury; and
- (b) the net average earnings that he or she earns or is able to earn in suitable employment or business after the injury.

However, the minimum amount of the payments for full loss of earnings is the lesser of \$15,312.51 or the worker's net average earnings before the injury.

(3) The amount of the payment is 85 per cent of his or her pre-injury net average earnings less any earnings the worker earns after the injury if the worker is co-operating in health care measures and,

- (a) his or her early and safe return to work; or
- (b) all aspects of a labour market re-entry assessment or plan.

(4) The Board shall deem the worker's earnings after the injury to be the earnings that the worker is able to earn from the employment or business that is suitable for the worker under section 42 and,

- (a) if the worker is provided with a labour market re-entry plan, the earnings shall be deemed as of the date the worker completes the plan; or
- (b) if the Board determines that the worker does not require a labour market re-entry plan, the earnings shall be deemed as of the date this determination is made.

...

(7) The Board may reduce or suspend payments to the worker during any period when the worker is not co-operating,

- (a) in health care measures;
- (b) in his or her early and safe return to work; or
- (c) in all aspects of a labour market re-entry assessment or plan provided to the worker.

Board *Operational Policy Manual*, Document No. 18-03-02, "Payment of LOE Benefits", states that a worker who has a loss of earnings as a result of a work-related injury or disease is entitled to loss of earnings (LOE) benefits. A full LOE benefit is 85% of the worker's pre-injury net average earnings, and partial LOE is some portion of the worker's pre-injury net-average earnings.

The Board developed practice guidelines for adjudicators ordering LOE benefits arrears: "Adjudicative Advice: Practice

Guidelines For Ordering LOE Benefit Arrears Under WSIA” (March 1, 2002, Director, Appeals Branch). The guidelines are discussed below.

(b) Submissions

The worker’s representative submitted that the worker is entitled to full LOE benefits during the appeal period for several reasons: the Appeals Resolution Officer granted the worker full LOE in his decision of August 12, 2003, but changed his mind and granted partial LOE benefits in his decision of October 16, 2003 after the claims manager contacted the Appeals Resolution Officer’s manager; the Board incorrectly terminated the worker’s LOE benefits in September 2002; had the Board made the correct decision at the time the worker would not have lost that money; the worker is entitled to be made whole; LOE benefits continue until the loss of earnings ceases; there was nothing for the worker to co-operate with because the Board removed the worker’s ability to co-operate when it closed LMR services; the worker’s LOE benefit should have been based on an appropriate SEB but there was no SEB at that time; and there is no legislative or policy requirement that the worker has to be involved in a self-directed LMR program to get full LOE benefits.

(c) Conclusions

We conclude that the worker is not entitled to full LOE benefits from September 2, 2002 to July 24, 2003.

We do not agree with the worker’s representative that the worker is entitled to full LOE from September 2002 to July 2003 simply because the Board did not provide an LMR program. Tribunal decisions have consistently found that a worker has an obligation in this situation to make reasonable efforts on his or her own initiative to return to the work force, for example, by looking for work or engaging in vocational rehabilitation or medical rehabilitation.

Section 43(1) of the WSIA provides that a worker who has a loss of earnings as a result of a work injury is entitled to payments beginning when the loss of earnings begins until, in this case, the earlier of the day when the worker’s loss of earnings ceases.

Section 43(3) provides that a worker who has a loss of earnings resulting from a work-related injury will receive a full LOE benefit if the worker is co-operating in health care measures and in early and safe return to work or all aspects of an LMR assessment or plan. Thus, LOE benefits are paid throughout the ESRTW and LMR stages. Section 43(7) provides, however, that the Board may reduce or suspend LOE benefits when a worker is not co-operating in health care measures and an early and safe return to work or all aspects of an LMR assessment or plan

Section 43(2) states that LOE is 85% of the difference between the worker’s pre-injury net average earnings and the “net average earnings that he or she earns *or is able to earn* in suitable employment or business after the injury” (emphasis added). The phrase “is able to earn” imports a concept of deemed ability to earn. Thus, section 43(2) appears to reduce the amount of LOE benefits by the amount a worker is able to earn in suitable employment after the injury, and the Board may deem post-accident earnings for a worker to be what the worker could earn in suitable employment. The earnings under the LMR assessment are governed by section 43(3) and the worker is entitled to full LOE benefits while co-operating in an LMR assessment or plan.

In the event of a gap period between LMR and further LMR, for example, when LMR is closed and later reopened, the Board

determines whether the worker conducted a self-directed LMR program, such as a job search or further schooling or training.

The Tribunal has dealt in a number of decisions with the issue of the level of LOE benefits during the LMR phase of a worker's return to work, including in situations where the Board closed and later reopened LMR and the issue is the level of LOE benefits during the period when the Board did not provide LMR.

See, for example, *Decisions No. 1759/01* (July 30, 2001), *2724/00* (July 30, 2001), *377/03* (December 5, 2003), *1163/05* (August 25, 2005) and *1453/05* (December 9, 2005).

In this situation, the Tribunal considers whether the worker has undertaken a self-directed LMR program or plan. If so, then Tribunal decisions generally have found that full LOE benefits are payable, provided there is sufficient evidence of the program. A self-directed program or plan refers to a job search as well as activity in which the worker engages to develop or improve skills, knowledge or abilities to re-enter the labour market, such as an assessment or training program or academic upgrading. A self-directed LMR plan need not be as sophisticated as a Board plan, however, but will be judged according to what is reasonable to expect from the worker.

In determining the level of LOE benefits in the absence of evidence of a satisfactory self-directed LMR program or plan, Tribunal decisions have generally granted benefits in keeping with the Board's practice guidelines on ordering LOE benefit arrears ("Adjudicative Advice: Practice Guidelines For Ordering LOE Benefit Arrears Under WSIA", March 1, 2002).

These guidelines provide for different levels of LOE benefits in six circumstances. The first, second and third circumstances deal with a situation in which a work-related impairment prevents a return to pre-injury employment and no suitable employment has been offered. The fourth, fifth and sixth circumstances deal with a situation in which a work-related impairment prevents a return to pre-injury employment and the worker has refused to accept suitable employment.

The first and second circumstances described in these practice guidelines are relevant to this appeal:

1. **100% LOE** is payable where an impairment exists that prevents the worker from returning to pre-injury employment and no suitable employment has been offered, but the worker is making reasonable efforts to secure employment or engaged in other activities (e.g. active health care treatment) reasonably aimed at improving employability and minimizing LOE.
2. **Partial LOE** (equivalent to 85% of the difference between the pre-accident earnings and the amount the worker is able to earn in the SEB) is payable where an impairment exists that prevents the worker from returning to pre-injury employment, no suitable employment has been offered to the worker, but the worker has not made reasonable efforts either to secure suitable employment or improve his/her employability. The post-accident earnings are to be based on the SEB identified through an LMR assessment as achievable without training. In the event an offer of employment is made after the arrears order but before the completion of the LMR assessment, the 'SEB-equivalent earnings' for the arrears period should be determined as if no such offer had occurred.

Our review of the evidence in this case indicates that the second circumstance applies for the period from September 2002 to July 2003: the worker's bilateral upper extremity condition prevented her from returning to her pre-injury employment, no suitable employment was offered to the worker, and she did not make reasonable efforts either to secure suitable employment or improve her employability.

The worker told the Appeals Resolution Officer that she checked local newspapers for career information, visited FOCUS for

job and career leads and ideas, revised her resume and researched the suitability of programs at a community college. The worker testified at the Tribunal that she went twice per week to FOCUS where she was able to use the internet, a photocopiers and a FAX machine. The worker testified that she took her two-year-old to three-year-old daughter with her to FOCUS. The worker testified that she applied for some jobs at grocery stores, retail stores and fast food restaurants, but had no records, and had about eight interviews, but provided no further information. The worker testified that she contacted the community college a few times by telephone during the 10-month appeal period, but did not go to the college. With respect to medical attention during the appeal period, the worker testified that she saw her family doctor every couple of months and a specialist twice and received no treatment.

This evidence indicates to us that the worker's efforts were minimal during the 10-month appeal period, and as such, that she did not make reasonable efforts to secure suitable employment or improve her employability.

We now turn to the matter of the level of LOE benefits. The practice guideline for partial LOE set out above provides for post-accident earnings to be based on the "SEB identified through an LMR assessment as achievable without training". Thus, the worker would receive 85% of the difference between her pre-injury earnings and the net average earnings in this SEB.

The Appeals Resolution Officer concluded that the worker's LOE benefits for the period from September 2002 to July 2003 should be based on 85% of the difference between her pre-injury earnings and what she could earn at a minimum wage job, rather than on a specific SEB identified through an LMR assessment. We consider this approach to be appropriate in the circumstances of this case.

The worker completed Grade 12 in Ontario in 1998. Her assessed academic achievement at the time of the vocational assessment in 2000 was as follows: vocabulary and reading comprehension Grade 11, spelling Grade 10, numeracy Grade 13, and problem solving and visual memory average. While attending secondary school, the worker worked as a cashier in a grocery store, a babysitter, as a general office clerk in an accounting office on a co-op term, and as a teachers' assistant at a day care on a co-op term.

The restrictions for the worker's work-related bilateral upper extremity condition include avoiding heavy or repetitive lifting, pushing, pulling, reaching, handling, fingering and gripping. The report from the keyboard assessment in October 2001 stated that the worker would be able to do some keyboarding as part of her training and her future employment, but that it would "not be feasible for keyboarding to be the major component of her job" and a "maximum of 2½ hours a day with short breaks or other duties interspersed" appeared to be reasonable.

The LMR plan agreed to by the worker and the LMR service provider in December 2000 identified Cashier (NOC 6611) at entry-level wages of \$6.90 per hour as a suitable job that the worker would be qualified for without training. The ergonomic specialist concluded in November 2001 that this job was not suitable for the worker because it required "repetitive key/punching and/or repetitive gripping to bag items". The second LMR plan proposed by the LMR service provider in July 2002, but not signed by the worker, identified Security Guard (NOC 6651) at entry-level wages of \$7.82 per hour as a suitable job that the worker would be qualified for without training. The LMR provider stated that there were limited positions as a security guard which would be physically suitable for the worker. The Appeals Resolution Officer did not address the suitability of this job, but initially accepted one of the SEBs proposed by the worker at the Board hearing in July 2003 and later confirmed a change in the SEB with the worker's "agreement and consent". The worker began a community college program in this SEB shortly thereafter and, as a result, a third LMR plan was not developed based on a new LMR assessment.

The worker earned \$12.71 per hour at the time of the work-related accident. The minimum hourly wage between September 2002 and July 2003 was \$6.85.

We agree with the ergonomic specialist and the Claims Adjudicator that a job as a store cashier would not be suitable for the worker, and accept the LMR provider's conclusion that there would be limited suitable positions as a security guard. However, in view of the worker's English language, numeracy, problem solving and visual memory skills, her transferable skills from earlier employment and her physical restrictions due to her upper extremity disability, it seems reasonable to us that the worker could have found employment at minimum wage.

In these circumstances, we confirm the Appeals Resolution Officer's decision that the worker's LOE benefits for the period from September 2, 2002 to July 24, 2003 should be based on the minimum wage in effect at the time.

(v) Child Care Expenses

The worker seeks child care expenses from September 2003 while attending school as part of her LMR program.

(a) Law and Policy on LMR

Section 42 of the WSIA provides for LMR services:

42(1) The Board shall provide a worker with a labour market re-entry assessment if any of the following circumstances exist:

1. If it is unlikely that the worker will be re-employed by his or her employer because of the nature of the injury.
2. If the worker's employer has been unable to arrange work for the worker that is consistent with the worker's functional abilities and that restores the worker's pre-injury earnings.
3. If the worker's employer is not co-operating in the early and safe return to work of the worker.

(2) Based on the results of the assessment, the Board shall decide if a worker requires a labour market re-entry plan in order to enable the worker to re-enter the labour market and reduce or eliminate the loss of earnings that may result from the injury.

(3) In deciding whether a plan is required for a worker, the Board shall determine the employment or business that is suitable for the worker.

(4) The Board shall arrange for a plan to be prepared for a worker if the Board determines that the worker requires a labour market re-entry plan.

(5) The labour market re-entry plan shall be prepared in consultation with,

(a) the worker and, unless the Board considers it inappropriate to do so, the worker's employer; and

(b) the worker's health practitioners if the Board considers it necessary to do so.

(6) The plan shall contain the steps necessary to enable the worker to re-enter the labour market in the employment or business that is suitable for the worker.

(7) The worker shall co-operate in all aspects of the labour market re-entry assessment or plan provided to the worker.

(8) The Board shall pay such expenses related to the plan as the Board considers appropriate to enable the worker to re-enter the labour market.

Board *Operational Policy Manual* (OPM), Document No. 19-03-01, “Labour Market ReEntry”, states, in part, as follows:

The WSIB provides the worker with a labour market re-entry (LMR) assessment and, if necessary, an LMR plan if the early and safe return to work (ESRTW) activities do not result in a return to work that

- is suitable
- is available, and
- restores the worker’s pre-injury earnings.

In determining entitlement to LMR services, and when providing LMR assessments and/or plans, the WSIB must have regard for workers’ rights to equal treatment with respect to services, goods, and facilities, without discrimination, under the Ontario *Human Rights Code*.

Board OPM, Document No. 19-03-04, “Entitlement to LMR Plans”, states, in part, as follows:

The WSIB must have regard for a worker’s rights under the *Ontario Human Rights Code*. Workers are entitled to equal treatment, without discrimination, with respect to services, goods, and facilities. Therefore, when determining entitlement to LMR, the WSIB considers any non-work-related disability, handicap, or condition a worker may have.

Board OPM, Document No. 19-03-06, “LMR Expenses”, states, in part, as follows:

POLICY

The WSIB pays the necessary expenses related to a labour market re-entry (LMR) assessment and plan.

GUIDELINES

LMR assessment

The expenses paid by the WSIB during the LMR assessment may include the service fees for evaluations, interpreter assistance, and travel expenses (see 17-01-09, Travel and Related Expenses).

LMR plan

The WSIB pays expenses relating to an LMR plan that it considers necessary and appropriate.

All anticipated expenses or costs to be paid by the WSIB must be set out in the LMR plan before the plan starts. Payment of expenses is discontinued when the plan is completed, or if the plan is terminated before completion.

Typical expenses

The typical expenses paid during an LMR plan include

- registration fees
- tuition
- examination fees
- text books
- course materials (items or supplies specifically required for a course or project)
- tutor assistance, and/or
- transcript fees.

The WSIB does not pay for miscellaneous school- related or personal supplies (e.g., pens, pencils, writing paper, backpack).

Travel and parking

The WSIB reimburses workers for travel and parking expenses incurred during the activities of the LMR assessment or plan. The rates of reimbursement are outlined in 17-01-09, Travel and Related Expenses

Exceptional expenses

The WSIB pays the following exceptional expenses if the circumstances require.

Workplace modifications and assistive devices

...

Tools, equipment, or protective clothing

...

Relocation

...

Room and board

...

The Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, provides, in part, as follows:

1 Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

(b) Submissions

The worker's representative submitted that the worker is entitled to have the Board pay her child care expenses while she attends school as part of her LMR program in accordance with the WSIA and Board policy Documents No. 19-03-01, 19-03-04 and 19-03-06, and that, by not paying for the worker's child care expenses, the Board placed itself above the law and violated the worker's rights under the Ontario *Human Rights Code* which provides that every person has a right to equal treatment without discrimination because of family status.

The worker's representative submitted that Board Document No. 19-03-06 states that the Board pays the expenses relating to an LMR plan that it considers "necessary and appropriate", and that, since it is necessary for the worker to have her child cared for while she attends school weekdays, it is appropriate for the Board to pay the child care expenses. The worker's representative submitted that, although the list of "typical expenses" paid for by the Board does not include child care, this does not preclude the Board from paying for childcare.

The worker's representative submitted that parents and non-parents attending school on LMR programs should be on a "level playing field", and that the only way to place the worker on a level playing field with non-parents is for the Board to pay the worker's child care expenses.

The worker's representative referred to the Ontario Student Assistance Program (OSAP) and the Canada Student Loans program in support of the worker's claim for child care expenses, submitting that "these programs provide a child care component as part of the funding". The worker's representative submitted in writing as follows:

From the information provided from OSAP and CSLP it is clear that someone receiving educational funding through these programs receives amounts specifically to cover child care costs. The amount is based on the number of dependent children and if the number is three or more then the student receives a separate bursary. If the student has one or two children then an amount is included in the loan funding from the provincial and federal agency.

My submission at the hearing regarding OSAP and CSLP was given as an example of government educational programs that recognize the need for additional funding for students with dependent children. This in no way relieves the WSIB of their responsibility to cover expenses necessary as a result of an injured worker's participation in a WSIB sponsored LMR program.

The worker's representative further submitted in writing as follows:

The bottom line is that, if the worker were working, she would be able to find shift work on a shift opposite her spouse thereby eliminating the need for child care. Her participation in LMR and her required attendance at school during the daytime directly conflicts with the work schedule of her spouse therefore she must provide alternate sources of child care for which she must pay a provider. This cost comes directly out of her LOE benefit and reduces that benefit. An injured worker without dependents enrolled in the exact same LMR program, receiving the exact same LOE benefit as [the worker] would not have the cost of child care deducted from their LOE. To expect her to pay for child care that is necessary as a result of her participation in LMR and given that her participation is the result of her compensable injury, is discriminatory based on her status as a parent.

The worker's representative stated that the Ontario *Human Rights Code* does not come up much in Tribunal appeals and the Tribunal is reluctant to apply the *Human Rights Code*, and submitted that the Tribunal must have regard to the *Human Rights Code*, noting that the worker clearly meets the classification of "family status" in section 1.

The worker's representative stated that there was only one Tribunal decision on child care expenses, and referred to *Decision No. 291/98* (1998), 48 W.S.I.A.T.R. 115, submitting briefly that this decision was distinguishable on the basis of the

applicable legislation and no argument was made under the *Human Rights Code*.

The worker in *Decision No. 291/98* worked part-time as meat wrapper. She injured her left non-dominant wrist in a work-related accident in August 1995. Accordingly, the pre-1997 *Workers' Compensation Act* [R.S.O. 1990, c. W.11] applies. The hearing Panel considered the appeal under section 52 of the pre-1997 Act which provides that the Board may make expenditures to aid in getting injured workers back to work or to assist in lessening or removing a handicap resulting from their injuries. There was no Board policy regarding payment for day care. The hearing Panel found that the Board exercised its discretion in a fair and proper manner. The hearing Panel concluded that there was no evidence that child care expenses were a barrier to rehabilitation. Further, the hearing Panel stated, the handicap in section 52 referred to handicap resulting from the injury. It would allow for provision of physical aids such as glasses and braces but should not be defined so broadly as to extend to child care expenses. Also, the Panel noted that the worker did not receive child care expenses while employed. The hearing Panel denied the worker's appeal.

The worker requested that the Tribunal reconsider *Decision No. 291/98*. The reconsideration Vice-Chair stated in *Decision No. 291/88I2* (February 18, 2000) that the worker's representative submitted in her request for reconsideration that there was constructive discrimination in accordance with the Ontario *Human Rights Code*. The reconsideration Vice-Chair summarized the representative's submissions as follows [at para. 15]:

The worker's representative also submitted that, given that "child care is still considered a predominantly female obligation", the denial of child care expenses to women constituted "constructive discrimination" under the Ontario *Human Rights Code*. She submitted that "child care issues, especially when put in the context of the injured part-time worker, were a very real barrier to a successful labour market re-entry". The worker's representative referred, in particular, to sections 5, 10 and 11 of the Ontario *Human Rights Code*. Section 5 provides that every person has a right to equal treatment with respect to employment without discrimination because of, amongst other things, "handicap". "Because of handicap" is a defined term in section 10 of the Ontario *Human Rights Code*. Section 11 of the Code deals with "constructive discrimination" where "a requirement, qualification or factor exists that is not discrimination on a prohibited ground ... results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member". An exception is where "the requirement, qualification or factor is reasonable and *bona fide* in the circumstances".

The reconsideration Vice-Chair denied the request for reconsideration on the basis that the "arguments put forth by the worker's representative in the application for reconsideration [were] no more than re-statements (perhaps with further refinements) of the same arguments which were put to the Panel in *Decision No. 291/98* and rejected by that Panel". The reconsideration Vice-Chair stated that the issues of gender and family were clearly considered by the hearing Panel, although the Ontario *Human Rights Code* was not specifically considered by the hearing Panel.

The worker's representative in this appeal referred briefly to the following five court decisions, noting specific passages:

1. *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150
2. *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145
3. *Brown v. Canada (Department of National Revenue, Customs and Excise)*, [1993] C.H.R.D. No. 7
4. *B v. Ontario (Human Rights Commission)*, [2002] S.C.R. 403
5. *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society*, (2004), 240 D.L.R. (4th) 479.

Based on these cases, the worker's representative submitted, human rights legislation has authority over all other legislation, the Tribunal should have regard to the Ontario *Human Rights Code* and its decisions should not be inconsistent with the code, there is a duty for parents to find a balance between family needs and employment requirements and a duty for employers to accommodate that balance within certain criteria, human rights legislation must be interpreted purposefully, and there is a duty to accommodate child care obligations.

(c) Conclusions

We are unable to conclude that the worker is entitled to child care expenses from September 2003 while attending school as part of her LMR program based on grounds presented to us by the worker's representative.

The intent of Board policy on LMR expenses set out in Document No. 19-03-06, in our view, is to pay necessary expenses directly related to attending school, not personal expenses. Typical expenses identified in the policy include school fees, textbooks, course materials, tutor assistance, relocation expenses and room and board away from home. We note the worker's argument that OSAP and Canada Student Loans primarily provide loans to cover child care and, in limited circumstances, a bursary. These are different programs than those available under the WSIA, with different purposes and different financial assistance from the benefits available under the WSIA. The current Board policy does not address this expense. Whether the policy should do so would seem to be a policy issue for the Board to consider, noting that it is the Board, not the Tribunal, which creates policy.

We also note that a previous Supreme Court decision has held that child care expenses are considered to be personal expenses, not employment-related expenses. See *Symes v. Canada*, [1993] 4 S.C.R. 695, where the Supreme Court of Canada held that there was not a Charter violation when the *Income Tax Act* did not permit the deduction of child care expenses as a business expense. The worker's representative did not address this case before us.

We note that child care expenses are a normal personal expense of working and not expenses that employers generally cover. If the worker returned to work, she would have to pay them herself. Workers' compensation aims to put workers in the same position they would have been if they had not been injured, but not in a better position.

The worker's representative stated that "the bottom line" was that the worker would not have had any child care expenses while working, because her husband worked two weeks on days and two weeks on afternoons and she could have alternated shifts to cover child care. This bottom line is speculative, however, since the worker worked for the accident employer from December 1998 to December 1999 when she did not have children. She stopped working in 1999 due to a work-related injury to her arms, and her baby was born afterwards, in August 2001. The worker's working conditions at the time of her injury did not include any financial support or accommodation by the employer for child care. There was also no evidence before us that the employer could have accommodated the worker in this way. It is therefore speculative whether she and her husband would be able to co-ordinate shifts to avoid child care expenses.

The worker's representative made superficial submissions on the *Human Rights Code*, referring to specific passages in five court decisions. We note that none of these decisions was factually the same as this appeal in that none considers workers' compensation or a vocational rehabilitation/labour market re-entry program. Only three of the cases consider the family status ground and two of these are from different jurisdictions where the human rights legislation may or may not be the same.

Other than as noted above, the worker's representative made no specific submissions on whether we have the jurisdiction to apply the *Human Rights Code* or whether our jurisdiction is just to use it as an interpretive aid. Since the hearing, the Supreme Court of Canada has issued its decision in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, 266 D.L.R. (4th) 287, which held that the Social Benefits Tribunal has jurisdiction to hear a human rights matter. The worker also did not address existing Workplace Safety and Insurance Tribunal cases concerning its jurisdiction. For example, *Decision No. 468/94* (1995), 35 W.C.A.T.R. 101, noted that periodic payments are excluded from definition of services in the Ontario *Human Rights Code*. In that case, the section 147(2) supplement, considered in its entirety along with an associated rehabilitation program, was a periodic payment to which the Code did not apply. The worker did not address whether *Decision No. 468/94* had any application to this case.

The Board extended LMR services to the worker as it does for other workers. The Board arranged for a service provider to work with the worker to develop an LMR program. In the end, the worker was sponsored by the Board to attend the community college program she chose. The LMR plan signed by the worker on October 22, 2003 did not include child care expenses. The Board had regard to the worker's concern about child care, however, in developing and approving the LMR plan. The Appeals Resolution Officer noted the shorter travelling time between the worker's home and the community college she chose compared to the travelling time in the 2002 plan the worker did not sign, and specifically stated in his decision of August 2003 that the community college the worker wanted to attend had a YMCA-affiliated day care centre where she could take her child and that the worker had "made arrangements for emergency child care backup if needed". The lack of child care in the LMR plan was not a barrier to the worker's participation in the plan. The worker began the college program in September 2003 and was still attending school at the time of the Tribunal hearing in December 2004.

In these circumstances, we are unable to conclude that the worker is entitled to child care expenses from September 2003 while attending school as part of her LMR plan.

DISPOSITION

The worker's appeal is denied.

Appeal dismissed.



Decision No. 1334/05

Vice-Chair: Kenny

Decision — May 8, 2006

Neutral Citation: 2006 ONWSIAT 1009

Future economic loss (calculation) (Canada Pension Plan) – Legal precedent (consistency) – Supplements, transitional provisions (permanent) (wage loss) – Supplements, transitional provisions (calculation) (subsequent FEL award).

Worker was not entitled to supplementary benefits under s. 147(4) of pre-1997 Workers' Compensation Act where wage loss was related to subsequent accident in 1990 – Board offset worker's FEL award for 1990 accident was by 50 % of CPP disability benefits for period between 1996 and 2004 – That approach was consistent with Board practice and not inconsistent with the Act – Many Tribunal decisions have accepted that approach and should be followed in interests of consistency and predictable adjudication.

The worker suffered back injuries in 1977 and 1985, for which he was granted a 10% pension. He suffered another back injury in 1990. The worker did not return to work after the 1990 accident. Subsequently, he received CPP disability benefits. From 1996 to 2004, the Board offset the worker's FEL award by 50% of the CPP disability benefits. The worker appealed a decision of the Appeals Resolution Officer denying a supplement under s. 147(4) of the pre-1997 *Workers' Compensation Act* and confirming the offset of FEL benefits by 50% of the CPP disability benefits. The appeal was dismissed.

The worker had been able to restore his pre-injury earnings after the 1977 and 1985 accidents. He was working in 1989 at work that approximated his pre-injury earnings. His wage loss after 1990 was related to the 1990 accident, not the 1977 and 1985 accidents. The Vice-Chair noted that the worker's NEL award for the 1990 injury was reduced to account for the prior back injuries. However, the FEL award was not reduced to reflect the pre-1990 injuries. Rather, the FEL award was based on what employment was suitable for the worker based on his back condition as a whole after the 1990 injury.

The wage loss after 1990 was not related to the pre-1990 accidents. The worker was not entitled to supplementary benefits.

The Board based the worker's FEL award on deemed earnings of \$630 per month. From 1996 to 2004, the Board reduced the FEL award by 50% of the CPP disability benefits, resulting in FEL benefits of \$290 per month. Beginning in 2004, the

Board changed its policy so that it only offset a FEL award by the portion of CPP benefits that exceeded the amount a worker was considered capable of earning after the injury. In this case, the CPP disability benefits did not exceed the worker's deemed earnings. Accordingly, the Board no longer reduced the FEL award after January 2004.

For the period between 1996 and 2004, the Vice-Chair agreed with *Decision No. 1875/03* that, although other approaches were valid, the Board approach was also valid, that many Tribunal decisions had accepted that approach and that, in the interests of consistency and predictable adjudication, that approach should be followed. Accordingly, the Vice-Chair found that the Board decision to offset the CPP benefits was consistent with its practice during that period and not inconsistent with the Act.

Perte économique future (calcul) (Régime de pensions du Canada) – Jurisprudence (cohérence) – Suppléments, dispositions transitoires (permanents) (perte de salaire) – Suppléments, dispositions transitoires (calcul) (indemnité pour PÉF subséquente).

Le travailleur n'avait pas droit à un supplément aux termes du par. 147 (4) de la Loi d'avant 1997 étant donné que sa perte de gains était liée à un accident subséquent survenu en 1990 – La Commission avait réduit l'indemnité pour PÉF à laquelle le travailleur avait droit pour l'accident de 1990 de 50 % du montant de ses prestations d'invalidité du RPC pour la période de 1996 à 2004 – Cette façon de procéder était compatible avec la pratique de la Commission et elle n'était pas incompatible avec la Loi – Le Tribunal a accepté cette approche dans plusieurs de ses décisions, et il convenait de la suivre dans l'intérêt de l'uniformité de la jurisprudence du Tribunal et de la prédictibilité des décisions.

Le travailleur avait subi des lésions au dos en 1977 et en 1985. Il avait obtenu une pension de 10 %. Il avait subi une autre lésion au dos en 1990. Il n'avait pas recommencé à travailler après l'accident de 1990. Par la suite, il avait touché des prestations d'invalidité du Régime de pensions du Canada (RPC). De 1996 à 2004, la Commission avait réduit l'indemnité pour PÉF à laquelle il avait droit pour l'accident de 1990 de 50 % du montant de ses prestations d'invalidité du RPC. Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels a d'une part refusé de lui reconnaître le droit à un supplément aux termes du paragraphe 147 (4) de la *Loi sur les accidents du travail* d'avant 1997 (Loi d'avant 1997) et, d'autre part, confirmé la réduction de son indemnité pour PÉF de 50 % du montant de ses prestations d'invalidité du RPC. Le Tribunal a rejeté l'appel.

Le travailleur avait pu rétablir ses gains d'avant la lésion après les accidents de 1977 et de 1985. Ses gains de 1989 correspondaient approximativement à ses gains d'avant la lésion. Sa perte de gains d'après 1990 était liée à la lésion de 1990, et non à celles de 1977 et de 1985. La vice-présidente a noté que la Commission avait réduit l'indemnité pour perte non financière (PNF) du travailleur pour tenir compte de ses anciennes lésions au dos mais qu'elle ne l'avait pas fait pour l'indemnité pour PÉF. L'indemnité pour PÉF était plutôt fondée sur le genre d'emploi approprié pour le travailleur compte tenu de tous ses problèmes de dos après la lésion de 1990.

La perte de gains d'après 1990 n'était pas liée aux accidents d'avant 1990. Le travailleur n'avait pas droit à un supplément.

La Commission avait calculé l'indemnité pour PÉF du travailleur en fonction de gains estimatifs de 630 \$ par mois. De 1996 à 2004, la Commission avait réduit l'indemnité pour PÉF de 50 % du montant des prestations d'invalidité du RPC, ce qui avait donné des prestations de 290 \$ par mois. À partir de 2004, la Commission avait modifié sa politique de manière à réduire l'indemnité pour PÉF seulement de la portion des prestations d'invalidité du RPC excédant le montant qu'un travailleur était réputé pouvoir gagner après la lésion. En l'espèce, les prestations d'invalidité du RPC n'excédaient pas les gains estimatifs du travailleur. Par conséquent, la Commission avait cessé de réduire l'indemnité pour PÉF à partir de janvier 2004.

En ce qui concerne la période entre 1996 et 2004, la vice-présidente a indiqué qu'elle était d'accord avec la *décision no 1875/03* que l'approche de la Commission était valide même si d'autres approches l'étaient aussi, que le Tribunal l'avait acceptée dans plusieurs décisions et qu'il convenait de la suivre dans l'intérêt de l'uniformité de la jurisprudence et de la prédictibilité des décisions. La vice-présidente a donc convenu que la décision de la Commission de déduire les prestations d'invalidité du RPC était compatible avec sa pratique au cours de cette période et que cette approche n'était pas incompatible avec la Loi.

Tribunal Decisions Considered:

- *Decision No. 199/00* (2001), 57 W.S.I.A.T.R. 47 consd
- *Decision No. 1875/03* (2004), 72 W.S.I.A.T.R. 118 apl

Workplace Insurance Legislation Considered:

- *Workers' Compensation Act*, R.S.O. 1990, c. W.11
 - s. 43(3)
 - s. 43(7)
 - s. 147(2)
 - s. 147(4)

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
 - Document No. 05-01-14 (November 18, 1991) (since superseded)
 - Document No. 05-03-06 (April 12, 1995) (since superseded)
 - Document No. 05-05-05 (November 22, 1993) (since superseded)
 - Document No. 18-01-03 (June 15, 1999) (since superseded)

APPEAL by the worker from a decision of the Appeals Resolution Officer confirming offset of future economic loss benefits by 50% of Canada Pension Plan disability benefits, and denying supplementary benefits.

May 8, 2006. THE TRIBUNAL: —

BEFORE: M. Kenny, Vice-Chair

HEARING: July 22, 2005 at Sudbury, Oral
Post-hearing activity completed on August 29, 2005

DECISION(S) UNDER APPEAL: WSIB ARO decision dated April 10, 2003 and
WSIB ARO decision dated January 16, 2003

APPEARANCES:

For the worker:	M. Jurgeit, Consultant
For the employer:	Did not participate

R

(i) Introduction

The worker had low back injuries at work in 1977 and 1985. He received benefits for disability from these injuries in accordance with legislation in effect before 1990. These benefits included a 10% permanent disability pension (that was fully commuted). Although the worker had a permanent disability award under the pre-1985 *Workers' Compensation Act* [R.S.O. 1980, c. 539], the Board decided that he was not entitled to a section 147(4) supplement (under the pre-1997 *Workers' Compensation Act*, R.S.O. 1990, c. W.11) because the Board concluded that the worker had been able to restore his pre-injury earning capacity.

The worker sustained another low back injury in 1990. He received benefits for disability from this accident in accordance with the pre-1997 Act (that applied to injuries occurring after January 1, 1990). He did not return to work after the 1990 accident. He subsequently received Canada Pension Plan (CPP) disability benefits.

In 1996, when the Board conducted its final review of the amount of FEL compensation payable to the worker, it granted the worker a partial FEL benefit. It calculated the amount of FEL compensation payable to the worker by comparing his pre-injury earnings with post-injury earnings that consisted of “deemed” earnings plus 50% of his CPP disability benefits.

This CPP offset continued from March 1, 1996, until 2005 when the Board revised its policy and recalculated the amount of the worker’s FEL compensation with a retroactive adjustment to January 1, 2004.

(ii) The Issues

The issues to be decided in this appeal are:

1. whether the worker is entitled to a section 147(4) supplement under the pre-1997 Act;
2. from March 1, 1996 to January 1, 2004, whether the worker was entitled to FEL compensation that was not reduced by the CPP disability benefit he received.

(iii) ISSUE 1: Is the Worker Entitled to a Section 147(4) Supplement?

In 1989, legislation changed the nature of pension supplements that could be paid to workers who were permanently disabled as a result of a pre-1985 or pre-1989 injury.

Section 147(2) and 147(4) of the pre-1997 Act states:

147(2) Subject to subsections (9) and (10), the Board shall give a supplement to a worker who, in the opinion of the Board, is likely to benefit from a vocational rehabilitation program which could help to increase the worker’s earning capacity to such an extent that the sum of the worker’s earning capacity after vocational rehabilitation and the amount awarded for permanent partial disability approximates the worker’s average or net average earnings, as the case may be, before the worker’s injury.

...

(4) Subject to subsection (8), (9) and (10), the Board shall give a supplement to a worker,

(a) who, in the opinion of the Board, is not likely to benefit from a vocational rehabilitation program in the manner described in subsection (2); or

(b) whose earning capacity after a vocational rehabilitation program is not increased to the extent described in subsection (2) in the opinion of the Board.

Thus, section 147(4) supplements are payable to workers whose earning capacity (plus the amount awarded for a permanent disability pension) does not approximate their pre-injury earnings.

Section 147 supplements became payable as of the later of July 26, 1989 or the day the worker was determined to have a permanent disability, or the day the worker ceased to participate in a vocational rehabilitation program.

Board *Operational Policy Manual* Documents No. 05-03-06 and 18-01-03 describe the circumstances in which section 147(2) and 147(4) supplement will be paid. Document No. 18-01-03 states:

s. 147(4) supplements

The WSIB pays s. 147(4) supplements to workers:

- who have a wage loss but are not eligible for a s. 147(2) supplement, or
- whose earning capacity, after participating in an LMR plan and receiving a supplement under s. 147(2), did not increase to the extent that the worker's total potential earning capacity approximated the escalated pre-injury earnings.

(a) The Board's Decision

In 1989 when the legislation created section 147(4) supplements, the worker was working as a sawyer. He ensured that logs flowed along the feeder conveyor to a trough. He had returned to work after his 1985 back injury.

The Board used the following figures in deciding whether the worker had entitlement to a section 147(4) supplement as of July 1989:

Escalated pre-accident earnings in 1989: \$468.65

Amount of 10% PD pension: 35.15

Thus, the Board concluded that the worker would need to earn \$433.50 per week to restore his pre-injury earning capacity.

When the worker sustained another injury at the beginning of January 1990, he was earning \$462 per week (\$10.50 per hour for a 44-hour week).

The Board therefore concluded that he was not sustaining a wage loss because of his pre-1990 injuries, and he was therefore not entitled to a section 147(4) supplement.

(b) The Worker's Representative's Submission

The worker's representative did not dispute the figures used by the Board in calculating the worker's earnings before 1990. However, he argued that the worker had been unable to work after his 1990 work injury and that this post-1990 wage loss could be used to entitle the worker to a section 147(4) supplement.

(c) The Findings

I agree with the Board's decision that the worker is not entitled to a section 147(4) supplement.

In July 1989, when such a supplement would have become payable, the worker's post-injury earnings approximated his pre-injury earnings. He was therefore not entitled to be paid a section 147(4) supplement.

Although he later did sustain a loss of earnings, that loss of earnings occurred after he sustained a new injury in January 1990. The Board paid him benefits for that 1990 injury in accordance with the pre-1997 Act which applied to injuries that occurred after January 1, 1990. The 10% rating given for the worker's pre-1989 permanent low back disability was deducted from the 24% NEL rating he received after his 1990 back injury, and the amount of his NEL compensation was reduced accordingly.

However, the amount of compensation he received for loss of earnings arising from his 1990 back injury was not reduced to reflect his pre-1989 injuries. The Board asked what employment was suitable and available to the worker having regard to his back condition as a whole after his 1990 work injury and it paid FEL compensation on that basis (without reducing the amount of FEL compensation to reflect any loss of earnings that arose from the pre-1990 back injuries).

In my view, the Board correctly decided that the worker was not entitled to a section 147(4) supplement because he had restored his pre-injury earnings in July 1989 when such a supplement would otherwise have become payable. The worker's post-January 1990 wage loss arose from his 1990 work injury. Thus, the Board's decision to pay the worker FEL compensation rather than a section 147(4) supplement for his post-January 1990 wage loss was correct.

(iv) ISSUE 2: Was the Worker Entitled to Receive FEL Compensation Without an Offset for CPP Disability Benefits?*(a) The Offset of CPP Disability Benefits from March 1, 1996 to January 1, 2004*

The worker did not return to work after his January 1990 back injury. By 1993, when the Board first reviewed the amount of the worker's FEL compensation, the Board had concluded that the worker was likely able to earn \$7 an hour in suitable and available employment. It therefore decided that he was entitled to \$630.75 a month in FEL compensation. Although the worker was receiving CPP disability benefits at that time, the Board did not offset the CPP benefits from the FEL compensation the worker received.

However, in March 1996, when the Board conducted the second FEL review, the Board decided that it would offset 50% of the worker's CPP disability benefits from the FEL compensation he received. It offset 50% rather than 100% of the CPP because it concluded that only 50% of those CPP benefits related to his 1990 claim. This meant that the worker's FEL compensation was reduced from \$630.75 a month to \$291.77 per month as of March 1, 1996.

In June 2005, the Board advised the worker that it had revised its policy concerning the calculation of CPP/QPP Disability Benefits Offset. It wrote:

Effective January 1, 2004, we will offset only that portion of CPP/QPP Disability benefits that exceed the amount a worker is considered capable of earning after the injury.

At the second FEL review, the Board considered the worker to be capable of earning \$326 per week (indexed to \$342 per week by 2004), and the amount of 50% of the CPP disability benefit the worker received was about \$83 per week. Because the worker's CPP disability benefit did not exceed the worker's deemed earnings, in 2005 the Board decided that, under its revised policy, the worker's FEL compensation should no longer be reduced by any CPP disability benefit offset. The Board made a benefits adjustment so that the worker's FEL compensation had no CPP disability benefits offset after January 1, 2004.

(b) The Worker's Representative's Argument

The worker's representative argued that there should have been no CPP disability benefit offset from the worker's FEL compensation in the period from March 1, 1996 to January 1, 2004.

He argued that the worker's situation is similar to that which arose in Tribunal *Decision No. 199/00* (2001), 57 W.S.I.A.T.R. 47, and that it should be dealt with in the same way. He noted that *Decision No. 199/00* had found that a worker's partial FEL award should not be reduced in a situation where the combined value of the FEL and the CPP disability benefits did not exceed the worker's pre-accident earnings. The worker's representative noted that the worker in this appeal was in a similar position and he should therefore have received FEL compensation without a CPP offset. He also argued that to do otherwise was unfair, and the Tribunal should consider this case on the merits and justice of its own peculiar facts.

(c) The Law and Policy

The accident for which the Board paid the worker FEL compensation occurred in 1990. Thus, the pre-1997 Act applies in deciding this appeal.

Section 43 of the pre-1997 Act describes when a worker will be paid FEL compensation, and how the amount of that FEL compensation will be calculated. Section 43(3) states that the amount of FEL compensation payable to a worker will be 90% of the difference between the worker's pre-injury earnings and the earnings "that the worker is likely to be able to earn after the injury in suitable and available employment."

Section 43(7) of the pre-1997 Act describes a number of factors that the Board is required to "have regard to" in determining the amount that the worker is "likely to be able to earn in suitable and available employment" for the purposes of calculating the amount of FEL compensation under section 43(3). It states:

43(7) For the purpose of subsection (3), in determining the amount that a worker is likely to be able to earn in suitable and available employment, the Board shall have regard to,

...

(b) any disability payments the worker may receive for the injury under the Canada Pension Plan or the Quebec Pension Plan.

Board *Operational Policy Manual*, Document No. 05-01-14 (referred to in this decision as the Board policy on CPP Disability Payments) dated November 18, 1991, states:

LAW

In having regard to any disability payments the worker receives for the injury under the CPP or QPP pursuant to s. 40(3) and 135 (11) [later re-numbered 43(3) and 147(11) respectively] of the *Act*, the Board shall deduct such payments from the worker's gross pre-injury earnings.

...

GUIDELINES

Determining Payments

To determine whether payments received under the CPP...are in relation to the work-related injury, the Board examines any relevant information that may indicate the basis for such payments, in particular, any available medical reports that guide the Board as to the nature of the work-related injury and its possible association with the CPP or QPP payments.

Merits and Justice

Every decision made pursuant to this policy must be made in accordance with the real merits and justice of the case.

Application Date

These guidelines apply to all decisions made on or after January 2, 1990.

Board *Operational Policy Manual* Document No. 05-05-05 (referred to in this decision as “the Board policy on calculating post-injury net average earnings”) dated November 22, 1993¹ states:

Work injury-related CPP/QPP benefits

The FEL decision-maker determines the CPP or QPP benefits stemming from the work-related injury/disease and adds the CPP or QPP benefits to the worker's post-injury NAE [net average earnings]. The resulting amount is considered to equal the worker's post-injury NAE for determining FEL benefits.

...

Application date

These guidelines apply to all initial FEL decisions and FEL review decisions governing periods of FEL entitlement starting on or after December 1, 1993.

(d) Tribunal Decisions

As indicated by the worker's representative, Tribunal *Decision No. 199/00* did conclude that a worker's partial FEL award

should not be reduced in a case where the combined value of the FEL and the CPP benefit did not exceed the worker's pre-injury earnings. The decision noted that there had been Tribunal decisions that had upheld Board decisions to offset CPP benefits from both full and partial FEL awards. *Decision No. 199/00* concluded that the intent of the section 43(7) directive that the Board "have regard" to CPP payments was to avoid "overcompensation" that would otherwise result if a worker received both a full FEL award and a disability pension from the CPP. The decision noted that Board and CPP decision-makers can reach conflicting conclusions about a worker's employability, particularly because the judgements about employability are made under different statutory schemes and neither institution is bound by the other's decision. *Decision No. 199/00* found that, on the facts of that case, there was no danger of "overcompensation" if the Board disregarded the amount the worker received in CPP disability benefits because the total value of that worker's CPP pension (\$635 per month) plus the post-injury earnings the Board felt the worker was able to earn (\$1,140 per month) was less than her pre-injury earnings (of \$1,900 per month). Thus, if the worker received the full amount of the partial FEL award plus the full amount of her CPP disability pension, she would still have a total income that was less than her pre-injury earnings. *Decision No. 199/00* therefore found that the worker's partial FEL award should not be reduced by the amount she received as CPP disability benefits.

Tribunal *Decision No. 1875/03* (2004), 72 W.S.I.A.T.R. 118, later described the history of the Board's practice with respect to the CPP offset as follows [at paras. 34-36]:

From 1990, when the FEL system came into effect, until approximately February 1996, the Board only offset the worker's FEL award by the CPP disability payments in this way if the worker was in receipt of a full FEL award. If the worker was deemed by the Board to be capable of earning something after the injury, the worker received a FEL award based on those deemed earnings. If the worker was also in receipt of CPP disability payments, the worker received those payments in addition to the FEL award, with no offset.

...

Effective February 1996, the Board administrators determined that CPP disability payments should be offset from partial FEL awards in the same way that they were offset from full FEL awards. The policy itself did not change. Rather after February 1996, it was applied to both partial and full FEL award cases whereas before it had been applied only to full FEL cases.

Decision No. 1875/03 noted that the Board was reviewing its practice regarding the CPP offset and it was considering a recommendation to change its practice. *Decision No. 1875/03* said the following with respect to the recommendation the Board was then considering [at paras. 42-43]:

If the proposal recommended in the discussion paper² were implemented, the worker's CPP disability payments would be treated as earnings. There would only be an offset from the FEL award if the combined value of the CPP disability payments and the FEL award exceeded the equivalent of full benefits.

This would solve the underlying problem in the application of the CPP offset provision to partial FEL benefits which is that the worker's FEL award is based on a proposition that is almost always impossible. Except in very rare circumstances, it is not possible to both earn something from employment (as a worker is deemed to be able to do in a partial FEL case) and receive CPP disability payments since those payments are only payable if the worker is incapable regularly of pursuing any substantially gainful occupation. This was the approach followed in *Decision No. 199/00*.

Although Tribunal *Decision No. 1875/03* indicated that the approach recommended in the Board's CPP discussion paper would be entirely consistent with the legislation, it concluded that other approaches were also consistent with the legislation.

Decision No. 1875/03 concluded that the Board's practice of applying the CPP offset to both full and partial FEL cases was also consistent with the legislation. In this regard, *Decision No. 1875/03* stated [at paras. 71-72]:

It is now clear that the Board has put its mind to the question of whether it intended the current policy to apply to both partial and full FEL cases and that, at least for the time being, the Board's intention is that the policy as stated is to apply to both partial and full FEL cases.

This interpretation of the Board's policy has been found to be a valid exercise of the Board's discretion under section 43(7). While in my view the interpretation of the policy set out in *Decision No. 199/00* is also consistent with section 43(7), most Tribunal decisions have interpreted the Board's policy more narrowly. There is a need for consistency and predictable adjudication (see, for example, *Decision No. 764/91* (1991), 21 W.C.A.T.R. 348). There does not now appear to be any ambiguity that the Board intends this to apply to partial FEL cases as well as full FEL cases, pending a further policy review. Accordingly, I am following the majority of Tribunal decisions in holding that the current Board policy authorizes the offset of CPP disability benefits from partial as well as full FEL benefits.

Decision No. 1875/03 therefore concluded that the Board could add the portion of the worker's CPP disability payment that related to her work injury to the worker's deemed post-injury earnings in calculating the amount of her FEL compensation.

(e) The Findings

I find that the 50% of the CPP disability benefits that the Board concluded related to the worker's 1990 claim can be included with the amount the Board deemed the worker was able to earn in the calculation of post-injury earnings used to determine the amount of the FEL compensation payable to the worker from March 1, 1996 to January 1, 2004.

Decision No. 1875/03 considered the reasoning of *Decision No. 199/00* (the decision upon which the worker's representative's arguments were based) and it fully explained why it reached a different conclusion than did *Decision No. 199/00*. I agree with the conclusion and the reasoning set out in *Decision No. 1875/03*.

I find that the Board's decision to offset the CPP benefits in the manner it did in this worker's situation was consistent with its practice during this period, and it was not inconsistent with either the pre-1997 Act or the Board policy. There is no basis, on the merits and justice of the facts before me, to apply the Board's policy or practice differently.

DISPOSITION

The worker's appeal is denied:

1. the worker is not entitled to a section 147(4) supplement;
2. the worker is not entitled to have the FEL compensation he received from March 1, 1996 to January 1, 2004 adjusted to eliminate the 50% CPP disability benefit offset.

Appeal dismissed.

1. Document No. 05-05-05 was deleted in December 1999 and replaced by *Operational Policy Manual*, Document No. 18-04-06.

2. The April 2002 WSIB Consultation Paper on CPP prepared by the Board's Benefits Policy Branch.



Decision No. 1051/05

Vice-Chair: Keil

Decision — May 19, 2006

Neutral Citation: 2006 ONWSIAT 1122

Future economic loss (review) (material change in circumstances) – Future economic loss (deemed earnings) – Fraud.

Board can review FEL award more than 60 months after initial determination if worker failed to notify of material change in circumstances before expiry of 60-month period – Anonymous caller reporting to Board within 60-month period that worker was exaggerating symptoms, was not sufficient to establish that material change of circumstances had occurred at that time – Further investigation established material change at later date, still within 60-month period – Worker's FEL award reduced as of that later date, based on wages he would have been capable of earning.

A welder suffered a back injury in June 1994. He was granted a 34% NEL award for a herniated disc. The worker was granted a FEL sustainability award at D1 in March 1996, with supplementary benefits. This was continued at R1. In December 2000, an anonymous caller reported that the worker was exaggerating his symptoms. The Board conducted surveillance from October 2001 to December 2001 and again for a period in December 2002. The R2 FEL determination was delayed during this process. The Board arranged for examination by an orthopaedic surgeon, who concluded that the worker was malingering and deliberately misrepresenting his condition. In March 2004, a Regulatory Claims Officer concluded that the worker failed to report a material change in circumstances as of the date of the anonymous call in December 2000. The Board confirmed the FEL sustainability award at R2 but concluded that the worker was not entitled to the supplementary benefits he had been receiving. This created an overpayment of about \$27,000.

The worker appealed the decision of the Regulatory Claims Officer. The appeal was allowed in part.

A FEL award can be reviewed more than 60 months after the date of initial determination only if the worker failed to notify the Board of a material change in circumstances before the 60-month period expired or if the worker was provided with an LMR plan that was not completed within the 60-month period.

The Board received the anonymous call before expiry of the 60-month period. However, an anonymous call is not sufficient to establish that a change in circumstances has occurred. In fact, the Board took no immediate action. Accordingly, that date of December 2000 cannot stand as the date of the material change in circumstances.

The approach that the Board seemed to take originally was based on the LMR plan not being complete. The Board logically delayed the R2 FEL determination until completion of assessment. The Board had all the information it needed for the final FEL determination by the date of the orthopaedic surgeon's final report in March 2003.

The Vice-Chair concluded that the material change in circumstances occurred when the worker was examined by the orthopaedic surgeon in December 2002. It is certainly possible that the worker had been misrepresenting his level of disability for some time but the actual misrepresentation was only established at the time of the medical examination. Accordingly, the overpayment is limited to the period that the worker received supplementary benefits from December 2002.

Although the worker misrepresented the level of his disability, he did have a compensable permanent impairment. He was not capable of returning to his pre-accident job as a welder but he was capable of working in more sedentary work as a bench welder. The worker was entitled to an R2 FEL award based on projected earnings at that type of work.

Perte économique future (révision) (changement important dans la situation) - Perte économique future (gains réputés) – Fraude.

La Commission peut réexaminer l'indemnité pour PÉF plus de 60 mois après sa détermination quand un travailleur néglige de l'informer d'un changement important dans les circonstances entourant son cas avant l'expiration de ladite période de 60 mois – Un appel anonyme informant la Commission que le travailleur exagérait ses symptômes n'était pas suffisant pour établir qu'un changement important s'était produit à ce moment-là – Une enquête plus poussée avait permis d'établir qu'un changement important s'était produit à une date ultérieure, mais également avant l'expiration de la période de 60 mois – Le Tribunal a déterminé que l'indemnité pour PÉF devait être réduite à compter de cette date ultérieure en fonction des gains que le travailleur aurait pu faire.

Un soudeur avait subi une lésion au dos en juin 1994. Il avait obtenu une indemnité pour perte non financière (PNF) de 34 % pour une hernie discale. Il avait obtenu une indemnité de maintien pour perte économique future (PÉF) au moment de la détermination initiale de cette indemnité (D1) en mars 1996, avec un supplément. La Commission avait maintenu cette indemnité lors de la première révision (R1). En décembre 2000, la Commission avait reçu un appel anonyme l'informant que le travailleur exagérait ses symptômes. La Commission avait surveillé la situation d'octobre à décembre 2001 et de nouveau pendant un certain temps en décembre 2002, et elle avait reporté la deuxième révision (R2) durant ce processus. La Commission avait fait examiner le travailleur par un chirurgien orthopédiste, et ce dernier avait conclu que le travailleur simulait et qu'il présentait délibérément ses problèmes de façon inexacte. En mars 2004, un agent de réglementation avait conclu que le travailleur avait négligé de déclarer un changement important dans les circonstances entourant son cas à compter de la date de l'appel anonyme à la Commission de décembre 2000. La Commission avait confirmé l'indemnité de maintien pour PÉF au moment de la R2 mais elle avait conclu que le travailleur n'avait pas droit au supplément qu'il avait touché, ce qui avait créé un paiement excédentaire de 27 000 \$.

Le travailleur a interjeté appel de la décision de l'agent de réglementation. Le Tribunal a accueilli l'appel en partie.

La Commission peut réexaminer l'indemnité pour PÉF plus de 60 mois après la date de sa détermination initiale quand un travailleur néglige de l'informer d'un changement important dans les circonstances entourant son cas avant l'expiration de ladite période de 60 mois ou quand un travailleur a reçu un programme de réintégration sur le marché du travail (RMT) qui n'est pas achevé à l'expiration de ladite période de 60 mois.

La Commission avait reçu un appel anonyme avant l'expiration de la période de 60 mois; cependant, un appel anonyme indiquant que le travailleur exagérait ses symptômes n'était pas suffisant pour établir qu'un changement important s'était produit à ce moment-là. En fait, comme la Commission n'avait pris aucune mesure immédiate, la date de décembre 2000 ne pouvait pas servir comme date du changement important dans les circonstances entourant le cas.

La Commission avait initialement agi comme si le travailleur n'avait pas achevé un plan de RMT. Elle avait agi logiquement en prorogeant la R2 de l'indemnité pour PÉF jusqu'à ce que l'évaluation soit terminée. Elle avait tous les renseignements nécessaires pour procéder à la dernière détermination de l'indemnité pour PÉF à la date du rapport définitif du chirurgien orthopédiste en mars 2003.

La vice-présidente a conclu que la date du changement important dans les circonstances était la date de l'examen par le chirurgien orthopédiste en décembre 2002. Il était bien possible que le travailleur ait faussé son degré d'invalidité pendant un certain temps mais un tel état de fait n'avait été établi qu'au moment de l'examen médical. Le paiement excédentaire devait donc se limiter à la période de versement du supplément à partir de décembre 2002.

Le travailleur avait présenté son degré d'invalidité de façon inexacte mais il n'en demeurait pas moins qu'il souffrait d'une déficience permanente. Il ne pouvait pas retourner à son emploi de soudeur d'avant la lésion mais il était apte à travailler à un emploi plus sédentaire de soudeur à l'établi. L'indemnité pour PÉF à la R2 devait donc être fondée sur les gains estimatifs du travailleur dans ce genre d'emploi.

Workplace Insurance Legislation Considered:

- *Workers' Compensation Act*, R.S.O. 1990, c. W.11
 - s. 43(13)
- *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A
 - s. 44
 - s. 107

Board Directives and Guidelines `Considered:

- *Operational Policy Manual*
 - Document No. 11-01-06 (June 15, 1990) (since superseded)

APPEAL by the worker from a decision of the Regulatory Claims Officer finding that the worker failed to report a material change in circumstances.

May 19, 2006. THE TRIBUNAL: —

BEFORE:	Vice-Chair: M.F. Keil
HEARING:	June 8, 2005 at Windsor, Oral

DECISION(S) UNDER APPEAL: WSIB Regulatory Claims Officer decision dated March 22, 2004. This decision denied the entitlement for left shoulder and stomach problems; confirmed the NEL award of 34%; found the worker had failed to file a material change in circumstances on December 4, 2000; confirmed there was a recoverable debt of \$27,340.24 owing the Board; and, found the worker fit for pre-accident earnings.

APPEARANCES:

For the worker: P. Guidice, Guidice Solutions, Inc.
 For the employer: Not participating

(i) Introduction

The now 57-year-old worker was employed as a welder when, on June 20, 1994, he injured his back. The worker was subsequently diagnosed as having a disc herniation and received a 34% non-economic loss (NEL) award in 1997. The worker claimed to be unable to return to his regular work and was offered clerical work in March of 1995. The worker felt unable to work full days and full benefits were reinstated until his future economic loss (FEL) determination in March 1, 1996. The Board allowed only a sustainability award on the basis that he could perform bench welding. This FEL decision was overturned by an Appeals Resolution Officer (ARO) decision dated March 21, 2001, which concluded the bench welding was not within the worker's restrictions. By June of 2001, the Board had concluded the worker was capable of "low sedentary type job with precautions."

During this period, the worker was receiving supplementary benefits. By request dated August 20, 2001, from a Windsor claims adjudicator, the worker was also being investigated by the Investigative Services Branch. An anonymous call placed in December 2000 reported that the worker was exaggerating his symptoms and had been observed doing manual labour. The Board conducted surveillance from October 2, 2001 to December 11, 2001, and for a period in December of 2002. While this was ongoing, the R2 FEL determination was delayed and the worker continued to receive supplementary benefits.

At the request of the Board, the worker saw orthopaedic surgeon Dr. S. Bartol on December 10, 2002 (one of the days during which he was under surveillance). In his report from that date, and based on a physical examination of the worker, Dr. Bartol concluded the worker had significant restrictions and was unlikely to be able to work for more than an hour or two a day.

The Board subsequently provided Dr. Bartol with its surveillance material of the worker, including three videotapes (one of which was from December 10 and showed the worker before and after he entered the hospital for his appointment with the specialist). Based on these materials, Dr. Bartol concluded that the worker was capable of "far more than he demonstrated at the time of [his] examination" on December 10, 2002. According to the orthopaedic surgeon, "there was a dramatic discrepancy between the physical findings that the worker displayed...in [the physician's] office and those which were displayed on the surveillance material". The physician concluded that the only possible explanation for the discrepancy was deliberate misrepresentation on the worker's part and that he was malingering. Dr. Bartol agreed the worker had a disc herniation but it did not necessarily produce back pain, leg pain or nerve tension findings. He stated that if the worker's "disc herniation [was] causing any symptoms at this stage, it [was] clear from a review of the surveillance materials that any residual symptoms [were] much less than the worker indicated...at the time of my examination."

In his decision of March 22, 2004, the Regulatory Claims Officer (RCO) concluded that the worker had failed to report a material change in circumstances on December 4, 2000 (the date of the anonymous telephone call). Flowing from this the

worker's FEL award was confirmed as a 1% sustainability award, and with a sustainability R2 FEL award with the effective dated of March 1, 2001. All supplementary benefits paid to the worker from December 4, 2000 were inactivated leading to a recoverable debt of \$27,340.24. The RCO also denied the worker entitlement for left shoulder and stomach problems, confirmed the 34% NEL award and found the worker to be fit for the essential duties of his regular work, also effective December 4, 2000.

Subsequently, the worker was convicted by a Justice of the Peace on two counts of making a false statement to the WSIB and one count of failing to report a material change in circumstances. He was fined a total of \$6,500.

(ii) The Hearing

At the hearing, Mr. Guidice asked for permission to withdraw the issues of entitlement for stomach and left shoulder. I agreed to this and pointed out that statutory time limits would apply to any future attempt to reopen these matters.

Mr. Guidice also stated he did not wish to have the worker give testimony. The worker and Mr. Guidice agreed that the worker had exaggerated his symptoms as demonstrated in the videotapes and as set out by Dr. Bartol. There was also agreement that the worker was not a reliable historian. Finally, the worker and Mr. Guidice stated they were in accord with the court decision. Given the agreed upon facts, I determined that testimony was not necessary.

(iii) Relevant Law and Policy

The relevant section of the pre-1997 *Workers' Compensation Act*, R.S.O. 1990, c. W.11, states:

43(13) Where possible, the Board shall review its determination of the amount of compensation payable to a worker under this section,

(a) in the twenty-fourth month after the date of its initial determination;

(b) in the sixtieth month after the date of its initial determination; and

(c) within twenty-four months after a reconsideration of the percentage of permanent impairment of a worker, under subsection 42 (21), results in a determination of increased permanent impairment of the worker,

but the Board shall not vary the amount of compensation payable as a result of a review unless the amount of the variation would be equal to at least 10 per cent of the amount of compensation being paid at the time of the review.

While the worker's injury occurred before 1998 and the above pre-1997 Act applied at the time, one must also have reference for the following transitional section of the current *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A, which states:

107(1) Subsection 43(6) of the pre-1997 Act shall be deemed to be repealed.

(2) Subsection 43(13) of the pre-1997 Act shall be deemed to be repealed. Instead, subsections 44(1) to (2.6) of this Act apply, with necessary modifications, with respect to a review by the Board of the amount of compensation for future loss of earnings payable under section 43 of the pre-1997 Act. However, a reference to "more than 72 months after the date of the worker's injury" in subsection 44(2) of this Act shall be read as "more than 60 months after the date the compensation for future loss of earnings is

determined by the Board under section 43 of the pre-1997 Act” and any reference to “72-month period” in subsection 44(2.1) of this Act shall be read as “60-month period”.

(3) Subsection 43(15) of the pre-1997 Act shall be deemed to be repealed. Instead, subsections 62(2) and (3) of this Act apply, with necessary modifications, with respect to the payment of compensation for future loss of earnings under section 43 of the pre-1997 Act. However, a reference to “72-month period” in the first line of clause 62(2)(b) shall be read as “60-month period”.

The section referred to above states as follows:

44(1) Every year or if a material change in circumstances occurs, the Board may review payments to a worker for loss of earnings and may confirm, vary or discontinue the payments.

(2) Subject to subsection (2.1), the Board shall not review the payments more than 72 months after the date of the worker’s injury.

(2.1) The Board may review the payments more than 72 months after the date of the worker’s injury if,

(a) before the 72-month period expires, the worker fails to notify the Board of a material change in circumstances or engages in fraud or misrepresentation in connection with his or her claim for benefits under the insurance plan;

(b) the worker was provided with a labour market re-entry plan and the plan is not completed when the 72-month period expires; or

...

(2.2) If clause (2.1) (a) applies, the Board may review the payments at any time.

(2.3) If clause (2.1)(b) applies, the Board may review the payments,

(a) within the 30 days after the date on which the plan is completed; and

(b) at any time, if the worker, at any time on or before the day that is 30 days after the date on which the plan is completed, fails to notify the Board of a material change in circumstances, or engages in fraud or misrepresentation in connection with his or her claim for benefits under the insurance plan.

Board *Operational Policy Manual*, Document No. 11-01-06, entitled “Material Change In Circumstances – Worker,” defines a material changes in circumstances as any change that affects a worker’s entitlement to benefits and services under the Act. It also states that:

When there is a material change, whether reported on time or not, the WSIB adjusts the worker’s benefits retroactively to the date of the change. This could result in a benefit-related debt (see 05-01-09**).

...

If a worker fails to inform the WSIB of a material change in circumstances the WSIB presumes that this is intentional and thus “wilful” unless the worker can demonstrate having no knowledge of the change. Decision-makers determine whether the worker reasonably should have been aware of the change by reviewing the facts of the case. Board policy sets out changes that must be reported as including changes of medical status (including an improvement or deterioration of the work-related condition); changes of income; and, changes in work status. A worker is responsible for notifying the Board of a material change within ten calendar days of the change occurring. Adjustments to benefits and services resulting from the material change are effective from the date

the change occurred.

Board policy sets out changes that must be reported as including changes of medical status (including an improvement or deterioration of the work-related condition); changes of income; and, changes in work status. A worker is responsible for notifying the Board of a material change within ten calendar days of the change occurring. Adjustments to benefits and services resulting from the material change are effective from the date the change occurred.

(iv) Submissions

Mr. Guidice submitted that the Board improperly delayed the limits of the R2 FEL decision. By virtue of the March ARO decision, the worker's original SEB was found to be not suitable and a new LMR assessment was ordered. Subsequently there was an LMR referral in May 2001 and vocational assessment in June 2001. However, the Board did not make an R2 FEL determination at this point. Mr. Guidice submitted that the reason for this could be found in a referral memorandum from the claims adjudicator dated August 20, 2001, wherein he asked for an investigation of the worker to ascertain whether the allegations made in the anonymous telephone call were accurate. The Board simply continued to pay the worker supplementary benefits until the investigation was completed and then disentitled him by way of the CRO's decision. In Mr. Guidice's view, the extension of supplementary benefits until January 2003 was not made in good faith, but was solely for the purpose of allowing the Board to finish its investigation.

Mr. Guidice argued that there had been no failure to report a material change within the 60-month period as set out in statute and the Board had no right to reassess the worker's entitlement to FEL benefits. Further, the overpayment existed solely because the Board deliberately paid supplementary benefits to the worker for an extended period of time in order to give the Investigations Branch time to finish its work.

Lastly Mr. Guidice argued that, while the worker was very wrong to misrepresent the extent of his disability, the misrepresentation itself did not signify that he had no disability. The CRO confirmed the 34% NEL award and the worker did have a documented herniated disc. Mr. Guidice submitted that in such circumstances, even if the worker were capable of some kind of work, standard back restrictions would apply and his pre-accident earnings would not be suitable. He did acknowledge that sending the worker for another LMR assessment would not be reasonable; he suggested that if I found the worker was capable of some kind of work, I should establish a SEB based on the file documentation.

(v) The Vice-Chair's Findings

This is a difficult case, made more so by the entanglement of statutory time frames and a Board investigation into misrepresentation by the worker. In his decision, the CRO determined that, as of December 4, 2000, the worker failed to report a material change in circumstance. This was the date of the anonymous telephone call and, from the Board's perspective, a date that fell within "60 months after the date the compensation for future loss of earnings is determined by the Board under section 43 of the pre-1997 Act," a time frame within which the Board could review the matter.

Notwithstanding this, an anonymous telephone call is not sufficient to establish a material change in circumstance has occurred. If that were all that was required, an investigation to determine whether an anonymous call was accurate would not be necessary. Besides, if the Board were of the opinion that the material change occurred on that date and that the call were sufficient, there is no reasons why the Board would not have reduced the benefits as of that date. That the Board took no immediate action suggests that it knew an anonymous call did not demonstrate that a material change had occurred.

Accordingly, that date cannot stand.

If that date does not stand, then the material change did not occur within the time lines specified by the legislation and the Board cannot rely on section 44(2.1)(a) to remove the worker's supplementary benefits, establish an overpayment and delay the final FEL review.

However, the legislation does permit a delay under section 44(2.1)(b), where a worker is provided with a labour market re-entry plan and the plan is not completed when the 72-month period expires. This, it seems to me, is the premise from which the Board originally worked. The ARO ordered an LMR assessment in March 2001. The worker's final review would logically have been deferred while the LMR assessment was carried out. In this case, I have no quarrel with Mr. Giudice's assertion that the Board deliberately attenuated that process in order to allow the Investigations Branch to finish its surveillance of the worker and to obtain a final report from Dr. Bartol. I find this in light of the fact that nothing else was going on in the worker's file during this period. However, if the worker had been candid about his level of disability, this surveillance would not have been required.

Further, I do not agree with Mr. Giudice's assertion that by prolonging the worker's supplementary benefits, the Board acted in bad faith. One should not forget that a proper LMR assessment and plan are contingent on possessing accurate information as to the extent of a worker's disability. In this case, the worker was professing total disability and the Board did not believe this to be the case. The Board further believed that there were grounds for thinking that the worker might be exaggerating the nature of his condition. Consequently, it waited until the investigation was complete and Dr. Bartol provided his final report. Presumably, if the investigation had not proved the worker was exaggerating his disability, Dr. Bartol's original report would have stood and the LMR results and the final FEL decision would have been much different.

As it stands, the Board had all the information necessary to arrive at its final FEL determination once it had received Dr. Bartol's final report. The final FEL date therefore can reasonably be set as of March 7, 2003.

The corollary issue for me to decide is the date, in accordance with section 44(2.3)(b), that the material change can reasonably be said to occur. In most cases, external documentation is available to substantiate when a material change actually occurred. That is, there are records when a worker changes jobs, gets a promotion, has his hours reduced, etc. The situation is more complicated when the material change involves a medical deterioration/improvement. When a worker reports a significant deterioration the Board does not go by what the worker says, but by the specialist's reports in conjunction with clinical findings. Finally, when a worker experiences an improvement to his condition and does not tell anyone, it is much more difficult to establish the date of the material change. As stated earlier, an anonymous call cannot stand as the date of a material change. One cannot reasonably rely on second-hand, anonymous information in reducing a worker's benefits. Even if one suspects a worker of operating in bad faith, the Board cannot act independently of the tenets of natural justice.

In this case, while it is certainly possible that the worker had been misrepresenting his level of disability for some time, the actual misrepresentation was established when he saw Dr. Bartol on December 10, 2002. Dr. Bartol, a respected orthopaedic surgeon, confirmed that there was a discrepancy between the worker's symptoms and his actual disability on that date. Consequently, as of that date, a material change can, with some certainty, be said to have occurred.

I understand the Board's frustration in this case. When a worker knowingly misrepresents his level of disability, establishing the material change absent any help from the worker is difficult. Having said this, it is not clear to me why there was a one-

year gap between surveillance tapes (from December 2001 to December 2002). Presumably, if the Board had determined the 2001 tapes were sufficient to prove the case, it would not have then surveilled the worker again in December 2002. Further, the Board had the authority to declare that a material change had occurred anytime during that period and chose not to do so. A reasonable inference would be that the Board did not consider it had sufficient grounds to proceed until December 2002. If that is the case, then that is the time when I can conclude that a material change occurred.

Accordingly, the Board can establish an overpayment only from December 10, 2002 and not earlier. I acknowledge that Dr. Bartol did not confirm the deception until his March 2003 report but he was commenting on actions from December 10, 2002; this makes the former date applicable.

I turn now to the issue of the final FEL determination. Mr. Guidice has argued that it is unfair to assume that the worker can do his regular work and that the Board acted unreasonably in finding him fit for his pre-accident work. One cannot escape the conclusion that the worker has brought much of this on himself. It is difficult to expect the Board to establish a realistic SEB and/or FEL determination when a worker frustrates all actions. The worker has lied about the extent of his disability; the worker professes total disability when that is clearly not the case; the worker is an unreliable historian; and, as a result, one cannot extract the wheat from the chaff as far as his symptoms are concerned.

Because of the above, the Board arrived at the conclusion that the worker can perform his pre-accident employment. Certainly, the surveillance tapes establish a level of mobility one would not expect in a worker with a 34% NEL award. Given the worker's deception when examined, Dr. Bartol has been unwilling to commit to any specific restrictions.

However, the fact that the worker has been dishonest and has attempted to obtain more from the system than was his due does not signify he has no impairment, or that he has no physical limitations. It simply makes the impairment/restrictions difficult to establish with any precision. I acknowledge that Dr. Bartol had commented that not all people with herniated discs are disabled. None the less, I cannot consider it prudent to send someone with herniated discs, whether currently symptomatic or not, back to a job that includes repetitive bending. It seems to me that in such a case some back restrictions would not be untoward. However, I find nothing to indicate that the worker requires a sedentary occupation, as originally concluded in June 2001.

While it is impossible to be certain in this case as to the worker's actual functional abilities, on the preponderance of the evidence, I accept that the bench welding job, a less physically demanding job than regular welding, should be suitable. It is unlikely that the worker would progress to the highest end of this job category, but there is no reliable documentation on file to suggest that he could not work full time as a bench welder, earning closer to entry/mid level wages (somewhere between \$12 and \$14 an hour).

Accordingly, as of the worker's final FEL determination in March 2003, I find that he could not return to his pre-accident earnings; however, I do find that he could find employment as a bench welder and has all the necessary skills to do so. His projected earnings in this job, because of his compensable herniated disc, should not be set at the maximum level but, rather, at the low to average range.

DISPOSITION

The appeal is allowed in part. The Board has only a recoverable overpayment from December 10, 2002, the date the material

change in circumstance was established. For reasons set out above, the worker's final FEL date is set at March 7, 2003. He is not fit to return to his pre-accident work but bench welding constitutes a suitable SEB. Projected earnings are to be set at the low to medium range for this occupation.

Appeal allowed in part.



Decision No. 490/06

Vice-Chair: Josefo

Decision — April 13, 2006

Neutral Citation: 2006 ONWSIAT 828

Future economic loss (deemed earnings) (employability) (age).

Worker was competitively unemployable, considering age and limited training and experience in are in which he was expected to begin new career.

In *Decision No. 155/00*, the Tribunal found that the worker was entitled to labour market re-entry services and directed the Board to reassess the worker's entitlement to a FEL award. The Board granted a FEL award based on deemed earnings of \$10 per hour. The worker appealed, claiming that he was unemployable and, thus, entitled to a full FEL award. The appeal was allowed.

If the Board had acted in 1995 to train the worker, rather than after the release of *Decision No. 155/00* in 2000, the worker may have been able to find employment. However, now the worker was 57 years old with only limited training and no experience in the area in which he was expected to begin a new career. In the circumstances, the worker was competitively unemployable and entitled to a full FEL award.

Perte économique future (gains réputés) (employabilité) (âge).

Le travailleur était non employable sur le marché de l'emploi concurrentiel, compte tenu de son âge ainsi que de son peu de formation et d'expérience dans le secteur professionnel dans lequel on s'attendait à ce qu'il débute une nouvelle carrière.

Dans la *décision no 155/00*, le Tribunal avait conclu que le travailleur avait droit à des services en vue de sa réintégration sur le marché du travail et il avait enjoint à la Commission de procéder à une évaluation aux fins d'une indemnité pour perte économique future (PÉF). La Commission avait établi une indemnité pour PÉF à partir de gains réputés de 10 \$ de l'heure. Le travailleur a interjeté appel de cette décision en soutenant qu'il était non employable et qu'il avait donc droit à une indemnité pour PÉF intégrale. Le Tribunal a accueilli l'appel.

Si la Commission avait fait le nécessaire en vue du recyclage en 1995, plutôt qu'après la *décision no 155/00* en 2000, le travailleur aurait peut-être pu trouver un emploi. Cependant, le travailleur était maintenant âgé de 57 ans et il avait peu

de formation et d'expérience dans le secteur professionnel dans lequel on s'attendait à ce qu'il débute une nouvelle carrière. Dans les circonstances, le travailleur n'était pas employable sur le marché de l'emploi concurrentiel et il avait droit à une indemnité pour PÉF intégrale.

Tribunal Decisions Considered:

- *Decision 1999/05* (December 13, 2005) [2005 ONWSIAT 2785] consd

Cross-References:

- *Decision No. 155/00* (January 25, 2000) [2000 ONWSIAT 139]

APPEAL by the worker from a decision of the Appeals Resolution Officer denying a full future economic loss award.

April 13 , 2006. THE TRIBUNAL: —

BEFORE:	J. Josefo, Vice-Chair
HEARING:	March 9, 2006 at Toronto, Oral
DECISIONS UNDER APPEAL:	WSIB ARO decision of A. Forbes, dated August 12, 2003

APPEARANCES:

For the worker:	Mr. A. Consiglio, Consultant
For the employer:	Employer did not participate

REASONS

(i) The Appeal: Issues and Background

The worker appeals the August 12, 2003 decision of Board Appeals Resolution Officer (ARO) A. Forbes. That decision concluded that the worker's final future economic loss (FEL) award should be based upon \$10.18 an hour. The ARO also concluded that the worker was employable.

The worker asserts that he was not, in reality, competitively employable. The worker asserts that because of his age and lack of experience other than as a factory worker, he had no hope of gaining employment, notwithstanding his and the Board's efforts with respect to retraining. The worker thus appeals the decision of the ARO and seeks a 100% FEL award at the final FEL review.

Tribunal *Decision No. 155/00* (January 25, 2000) sets out further background in this matter. The issue involving this worker in that earlier decision was whether the worker was entitled to labour market re-entry services from June 1995, when the accident employer closed the plant where the worker was employed. This earlier decision discusses the worker's series of work-related injuries to his back, which the worker sustained in the early 1990s. It is not disputed that one of the more important accidents was that of September 9, 1992.

Decision No. 155/00 discusses the worker's background and employment history, in part as follows [at paras. 7-39]:

For purposes of this appeal, suffice it to say that the worker, currently 55 years old, had been employed since 1974, with the same employer performing essentially the same shipping duties, with the exception of a two year period ending approximately in the spring of 1995.

Throughout his period of employment with the accident employer, a producer of automotive parts, mainly brakes, the worker sustained four documented work-related accidents between July 19, 1990, and August 10, 1993, which caused injuries to his low back.

According to the evidence, the first and the last accident respectively sustained, as stated, in July 1990 and in August 1993, precipitated a period of disability lasting approximately one month in each instance.

In contrast, while the accident sustained on May 26, 1992, did not precipitate any period of disability, the accident sustained on September 9, 1992, precipitated a period of disability lasting several months, specifically until April 5, 1993.

The September 1992 accident, in addition to precipitat[ing] the longest period of temporary low back disability experienced by the worker as a result of the stated four accidents, also attracted a 14% NEL award, on an organic basis, allowed with arrears in the fall of 1996.

...

On the evidence it is undisputed that the worker sustained a fourth compensable accident causing further injury to his low back on August 10, 1993. As a result of this accident the worker received temporary benefits for approximately a month.

...

One of the problem[s] with the comments attributed to the nurse is that they were conveyed to the Board after the worker, two or three months before the plant closure, was returned to the job performed before the occurrence of the September 1992 accident.

When the worker was asked to comment on this aspect of the case, he testified that the change was made necessary by the fact that his counter job was phased out in anticipation of the plant closure.

In these circumstances, being determined to remain employed as long as it was feasibly possible, the worker testified that he reluctantly accepted to resume his prior shipping job which was more physically demanding.

...

Furthermore, the worker conceded that the counter job, which required extensive clerical tasks to service attending clients, was physically lighter than the work previously done in the same department when he had to assemble on a continuous basis large orders for shipment.

...

In addition, irrespective of the fact that such a change was not implemented with the benefit of the Board's input, I am nonetheless satisfied that the counter job, physically lighter, was offered in response to the compensable low back problems reported by the worker as of 1990.

...

On the basis of the testimony received from the worker, I am also satisfied that the worker experienced a gradual deterioration of his low back symptoms from the moment he went back to the pre-accident shipping job.

This evidence leads me to the conclusion that the shipping job done by the worker at the time of the plant closure in June 1995, was unsuitable, on a long term basis, bearing also in mind the recognized NEL award eventually allowed.

Accordingly, the worker should have been offered LMR services in order to more accurately assess whether, as a result of the accident in question, he is entitled to any FEL benefits currently denied as of June 1, 1996, as indicated in a letter dated March 13, 1998.

In closing it should be noted, for the benefit of the Board, that the worker saw fit, on his own initiative, to take a furniture finishing course from the fall of 1995, to May 1996. However, this course did not ultimately help him to find suitable employment.

When the worker was questioned about the nature of the course, he testified that to this day he continues to be interested in this field. When questioned whether he had any prior work experience in this field, he answered in the negative and simply stated he just likes this work.

At the same time, the worker confirmed that, without some help, he is at a loss regarding his future employment prospects given that the bulk of his working history was spent doing physically demanding work.

On this aspect of the case, the worker also testified that he cannot derive any help from the unskilled work done with three different employers between 1966, the year he arrived in Toronto from his native country, and 1974, the year he found work with the accident employer.

...

The appeal is allowed. The worker is entitled to LMR services. The nature of the benefits payable to the worker as of June 1995, following the plant closure, is remitted back to the Board for adjudication in the normal course, based on the findings of fact made.

At the same time, based on the same findings and the outcome of the LMR services to be made available, the Board is directed to reconsider the denial of any FEL benefits processed in this case as of June 1, 1996.

ARO Forbes also well summarized events subsequent to the earlier Tribunal decision. The worker underwent a vocational evaluation and the suitable employment or business (SEB) chosen, ultimately, was "Recording and Scheduling and Distributing Occupations". The worker undertook an upgrading program, followed by a 16-week course in computerized inventory control, as well as distribution.

At the time of the final FEL review in May 2001, the worker was not finished the job search phase of the LMR program. The worker was then age 56.

In denying the worker entitlement to a 100% FEL award at the final review point, ARO Forbes concluded in part as follows:

The worker is not competitively unemployable in my view. He was able to successfully complete his LMR program and conduct a thorough, but unsuccessful, job search. His level of permanent impairment at 14% does not render him unable to work, but his capabilities must be within standard back restrictions. [The worker] is, in my opinion, physically capable of performing jobs in this NOC Code. The lowest wages according to the current wage information on the HRDC website is \$8.24 per hour. The medium wage is \$12.12. I am not convinced a fully-experienced worker with the same skills and physical attributes of this worker would earn in excess of the average between the low and medium wages. The averages between these two wage groups is \$10.18. I believe this is a fair wage on which to base the worker's Future Economic Loss award.

(ii) Analysis and Conclusions

There is no question that the worker participated fully in his Functional Abilities Evaluation which took place in February 2000, and in his LMR training. The VR Closure Report, dated December 11, 2001 from the Service Provider notes that the worker conducted a “thorough and organized” job search. The worker sought work within the NOC title of Computerized Inventory Control and broadened his search as discussed by the Rehabilitation Counsellor.

Indeed, in the Closure Report, the Rehabilitation Counsellor notes that the worker was an excellent candidate for LMR services, who worked very hard throughout the program. Earlier reports from the Rehabilitation Counsellor discussed the worker’s 10 weeks of upgrading and 16 weeks of computerized training. The Rehabilitation Counsellor also tried to assist the worker with his job search efforts. To the end, the Rehabilitation Counsellor was optimistic that the worker would succeed in locating new employment in this new field.

The worker testified that he tried very hard to find employment. He stated that on a few occasions, the potential employment was clearly beyond his medical restrictions. On other occasions, he simply was never called back when he attended at an interview or made contact with prospective employers over the telephone. The worker believes that the fact that he had a gap in his résumé of a number of years following the plant closure in 1995, and that he was age 57 when he completed the job search training, caused his difficulty in finding work within his restrictions.

In my view, there can be no question with respect to the good faith effort put forth by this worker. There is no question from the Rehabilitation Counsellor or from anyone that the worker did not try hard and do all that was asked of him to retrain. The worker also struck me as an articulate individual who, despite having come to Canada from Malta 40 years ago, speaks well and fluently. He presents well. He also does not look age 61, his current age.

The worker believes that his age and lack of specific experience, given that for most of his career he performed either factory work or was an order/picker, was what caused employers to be hesitant when considering his employability. While he continues to make some limited attempts to find employment at this time, the worker stated, realistically, at age 61, with no experience and many years of absence from the workforce, the likelihood of him becoming employed is small.

It is indeed depressing that the worker was unable to find new employment, given that he likely had much to offer a prospective employer. But, I find that it is certainly not any fault of the worker that he did not find new employment. Indeed, as the previous Tribunal decision recognizes, the worker looked at various opportunities, including woodworking, to pursue following the plant closure in 1995. It is also clear that the worker was a hard worker for most of his career and, indeed, was with the accident employer for 21 years, the last few years accommodated because of his compensable condition until the plant closed.

The worker’s résumé is in the materials before me. While indeed it is a good résumé, it is clear that the worker has a significant gap of some five or six years from his last employment through to his job search efforts. There is also a five-year gap from the last employment until the worker’s computerized inventory control and distribution training, for which he earned a certificate, was provided. These gaps may well have caused some employers concern, which, when added to the worker’s age of 57 when he began the job search, made his task not only difficult but, practically speaking, impossible.

In this case, if the Board had acted in 1995 to train the worker, instead of only after *Decision No. 155/00* which was rendered in January 2000, it may have been that the worker would have been employed. After all, matters would have taken place five years earlier, with the worker having been five years younger. But, for reasons that need not be considered at this time,

matters were not advanced until 2000 when the worker was already well into his fifth decade. This is, after all, the time when some people consider early retirement.

Decision No. 1999/05 (December 13, 2005) involved the issue of LOE benefits for a worker who was not found to be competitively employable, in the main because of his age. *Decision No. 1999/05* states, in part, as follows [at paras. 14-26]:

The record demonstrates that the worker made very solid efforts with respect to LMR Services. He certainly tried his best to return to the active workforce. Unfortunately, because the LMR goal was likely not suitable from the outset, LMR Services failed, and failed spectacularly, for this worker.

Where I disagree, respectfully, with the conclusions of the Appeals Resolution Officer is with the finding that the worker was competitively employable. In my view, taking into account the overall context of this matter, I find that the worker was not competitively employable.

The worker was age 57 when he completed the LMR program. That is a hard time for anyone to find employment, and particularly so when someone begins in a new field that is other than self-employment. In this case, the worker would have been dependent upon an employer to hire him for full-time employment, knowing that the worker had no experience in the new area, and that the worker would be retiring in no more than 8 years. After all, when these events unfolded, mandatory retirement at age 65 still existed.

Given the worker's obvious back disability, which led to a very high 26% NEL award following back surgery, and heavy restrictions of no lifting or handling weight over 10 lbs, it is my view that his returning to an industrial setting was unlikely. Certainly, the worker could not do direct labourer's work.

...

While years ago the worker was employed as a Production Supervisor or Foreman, working his way up to those positions in some cases, it is hard to imagine a prospective employer hiring:

- a 57-year old worker,
- with very severe work restrictions,
- with no recent experience or particular industry experience,
- with a limited education and limited education potential as identified by the psycho-vocational assessment.

While the report indicates that the worker was motivated, and that it is very much to his credit, the psycho-vocational assessor also was nuanced in his opinion as to the worker's re-employability, given the repetitive indication that the worker, "in principle", might be able to be employed in one or other areas.

...

Accordingly, given the worker's age, education and compensable disabilities, I find the worker to be competitively unemployable. The worker is entitled to full, not partial, LOE benefits from April 1, 2002 onwards.

While this earlier decision is slightly different, in that in the matter before me, there was no reservation that the worker could have performed the new work, the other facts are all very similar with that earlier decision. After all, in this matter before me, once again, I am faced with a worker, aged 57, who was expected to begin a new career in an area for which he had no previous experience, and only some limited training.

To repeat, if the positive efforts with respect to LMR services had been made in this case at an earlier stage, these efforts may well have succeeded. That the efforts did not succeed in this case means that the worker was, for all the aforesaid reasons, competitively unemployable at the time of the final FEL review.

The worker is thus entitled to a 100% FEL award at the final FEL review.

DISPOSITION

The worker's appeal is allowed.

The worker is entitled to a 100% FEL award at the final FEL review and ongoing.

Appeal allowed.



Decision No. 1113/03

Panel: Robeson (Vice-Chair), Wheeler, Timms

Decision — April 19, 2006

Neutral Citation: 2006 ONWSIAT 853

Stress, mental – Harassment (sex) – Harassment (person in position of authority) – Sexual assault – Credibility.

Evidence did not support worker's claim of sexual assault and harassment by her group leader – Group leader, who was responsible for property but did not have authority to hire, discipline or fire, was not a person in position of authority.

The worker was a school cleaner. The worker appealed a decision of the Board denying entitlement for mental stress, which the worker claimed resulted from sexual assault and harassment by the group leader in the period from June 1992 to September 1993. The appeal was dismissed.

The worker filed a complaint of sexual harassment with the police in October 1993. The police investigated but closed the file as being unfounded. The worker also advised the employer in October 1993 that she had been sexually harassed and assaulted by the group leader. The employer immediately conducted a thorough investigation, interviewing the worker and 30 staff members and students. The investigation found very little corroborative evidence to support the worker's allegations. Rather, it found that the group leader and the worker engaged in consensual sexual activity. None the less, the employer found that the conduct of the group leader, in engaging in sexual conduct in the workplace, was unacceptable. The group leader was suspended for two months, demoted and reassigned to a new work location.

The Panel found that the evidence did not support the worker's view of events. There were witnesses to many of the events described by the worker but the evidence of the witnesses did not support the worker. The Panel concluded that the worker and the group leader engaged in consensual sexual activity, including sexual intercourse.

The Panel noted that the employer's investigation described the group leader as being in a position of authority. However, the Panel found that the group leader did not occupy a position of authority over the worker. The group leader was the responsible custodian for the school property but had no authority to hire, discipline or fire, and did not have input into performance evaluation.

Further, this case was not a situation in which the worker's complaints were ignored such that she was in a stressful

condition for long periods before any action was taken. On the contrary, the employer investigated thoroughly and professionally in a very timely manner.

The Panel concluded that the worker's stress was not related to her employment.

Tension mentale – Harcèlement (sexuel) – Harcèlement (personne en position d'autorité) – Agression sexuelle – Crédibilité.

La preuve n'appuyait pas les allégations d'agression et de harcèlement sexuels de la travailleuse à l'endroit de son chef de groupe – Le chef de groupe était responsable de la garde de la propriété mais il n'avait aucun pouvoir d'embauche, de discipline ou de licenciement, et il n'était donc pas une personne en position d'autorité.

La travailleuse, une préposée au nettoyage dans une école, a interjeté appel de la décision par laquelle la Commission a refusé de lui reconnaître le droit à une indemnité pour du stress qu'elle attribuait à de l'agression et à du harcèlement sexuels auxquels elle disait avoir été victime de la part de son chef de groupe pendant la période de juin 1992 à septembre 1993. Le Tribunal a rejeté l'appel.

La travailleuse avait déposé une plainte de harcèlement sexuel en octobre 1993. Après avoir enquêté, la police avait conclu que la plainte était sans fondement et elle avait fermé le dossier. La travailleuse avait aussi informé l'employeur en octobre 1993 qu'elle avait été victime de harcèlement et d'agression sexuels de la part du chef de groupe. L'employeur avait immédiatement mené une enquête approfondie dans le cadre de laquelle il avait interrogé la travailleuse ainsi que 30 personnes parmi les membres du personnel et les étudiants. Au lieu de produire des éléments de preuve à l'appui des allégations de la travailleuse, l'enquête avait révélé que le chef de groupe et la travailleuse s'étaient livrés à des activités sexuelles consensuelles. L'employeur avait néanmoins conclu que le fait de se livrer à des activités sexuelles sur les lieux du travail constituait une conduite inacceptable de la part du chef de groupe. L'employeur a suspendu le chef de groupe pour deux mois, pour ensuite le rétrograder et l'affecter à d'autres lieux de travail.

Le comité a conclu que la preuve n'appuyait pas la version des événements de la travailleuse. Des personnes avaient été témoins de plusieurs événements décrits par la travailleuse mais leur version n'appuyait pas celle de cette dernière. Le comité a conclu que la travailleuse et le chef de groupe s'étaient livrés à des activités sexuelles consensuelles, y compris à des rapports sexuels.

Le comité a noté que le chef de groupe avait été décrit comme une personne en position d'autorité dans l'enquête de l'employeur. Cependant, le comité a conclu que le chef de groupe n'était pas en position d'autorité vis-à-vis de la travailleuse. Le chef de groupe était responsable de la garde de la propriété de l'école mais il n'avait aucun pouvoir d'embauche, de discipline ou de licenciement, et il n'avait aucun apport dans l'évaluation du rendement du personnel.

En outre, il ne s'agissait pas d'une situation où une travailleuse aurait été soumise à de longues périodes de stress en attendant que ses plaintes soient prises au sérieux et que des mesures soient prises. Au contraire, l'employeur avait mené une enquête approfondie, et ce, avec professionnalisme et grande diligence.

Le comité a conclu que le stress de la travailleuse n'était pas lié à son emploi.

Tribunal Decisions Considered:

- *Decision No. 631/91* (1992), 21 W.C.A.T.R. 251 consd
- *Decision No. 500/94* (April 30, 1997) refd to
- *Decision No. 826/94* (1995), 36 W.C.A.T.R. 102 consd
- *Decision No. 1490/01* (February 7, 2003) [2003 ONWSIAT 249] refd to
- *Decision No. 535/02* (May 13, 2002) [2002 ONWSIAT 1143] refd to
- *Decision No. 2056/03* (March 12, 2004) [2004 ONWSIAT 489] consd

Other Decisions Considered:

- *Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C. C.A.) refd to
- *Phillips v. Ford Motor Co. of Canada* (1971), 18 D.L.R. (3d) 641, [1971] 2 O.R. 637 (Ont. C.A.) refd to

Workplace Insurance Legislation Considered:

- *Workers' Compensation Act*, R.S.O. 1990, c. W.11
 - s. 1(1) "accident"
 - s. 4(1)

Cross-References:

- *Decision No. 1113/03I* (September 5, 2003) [2003 ONWSIAT 1987]

APPEAL by the worker from a decision of the Board denying entitlement for mental stress.

April 19, 2006. THE TRIBUNAL: —

BEFORE:	V.R. Robeson, Vice-Chair B. Wheeler, Member Representative of Employers D.C. Timms, Member Representatives of Workers
HEARING:	May 9, 10 and 11, and October 14, 2005 at Toronto, Oral
DECISION UNDER APPEAL:	WSIB Decision Review Specialist dated November 25, 1994 confirmed by J.T. Slinger, Director of Appeals Branch, on August 22, 2001 as the final decision of the Board

APPEARANCES:

For the worker:	H.A. Balmer, Consultant Worker's husband attended as an observer
For the employer:	A. Emmink, Consultant Employer's disability management co-ordinator attended as an advisor to the employer's representative

REASONS

(i) Issue

The worker seeks entitlement to benefits for mental stress resulting from sexual harassment and assault during her employment for the employer between June 1992 and September 1993.

(ii) Background

The worker was born in 1949. She began working for the accident employer in January 1988 as a school custodian, or cleaner. The worker worked part-time in the afternoon, four hours per shift, five shifts per week. The worker's hours of work were initially from 1:00 p.m. to 5:00 p.m. and later from 2:00 p.m. to 6:00 p.m.

The group leader began working for the accident employer in about 1987. He began working at the school where the worker worked in June 1992. He initially worked from 7:00 a.m. to 4:00 p.m. and later from 6:30 a.m. to 3:30 p.m.

The custodians and the group leader are in the same bargaining unit represented by a trade union.

The secondary school where the worker and the group leader worked had about 130 students, about 10 teachers, a principal and a school secretary. The custodial supervisor supervised the custodians and the group leader.

The worker injured her lower abdomen at work on March 15, 1988. The worker injured her right eye at work on October 4, 1988. The worker injured her nose at work on August 30, 1988. The worker cut her left hand at work on November 5, 1992.

The worker completed her shift on Friday, October 1, 1993.

On October 4, 1993, the worker made a complaint to the police of "being sexually, verbally and physically harassed and several times sexually assaulted over a period of fifteen months from June 1992 to September 1993 by group leader".

The complaint of sexual harassment filed with the police in October 1993 was initially filed on November 16, 1993 as "Active", and later closed on April 8, 1994 as "Inactive: Cleared Unfounded". The investigating officer stated in his report that it was his opinion that an "offence of sexual assault would not be supported as there was no evidence to indicate that the complainant did not consent to the sexual activity with the suspect". The worker was interviewed by another police officer in February 1994 at her request. The investigating officer stated in his report that he reviewed the additional information and statement from the worker and concluded in April 1994 that his opinion remained the same that there was "no evidence to support the Criminal Code offence of Sexual Assault".

The worker also advised the accident employer on October 4, 1993 that she was sexually harassed and assaulted by the group leader between June 1992 and September 1993.

The accident employer immediately investigated the complaint, interviewing the worker and some 30 staff (teachers, custodial staff and office staff) and students between October 6 and November 3, 1993, and reported the results of its internal investigation to the director of education on November 24, 1993.

The investigating committee consisted of the superintendent of education/human resources and the employment equity consultant.

The group leader was accompanied by a trade union representative when interviewed. The worker chose not to be accompanied by a trade union representative when interviewed, but was accompanied by her husband.

The case materials include notes from interviews and telephone calls with the worker from the employer's investigation, and

documents and letters written by the worker to the employer and the Human Rights Commission. The case materials also include interview notes for the staff and students from the employer's investigation.

The memorandum from the employer committee conducting the investigation dated November 24, 1993 concerning the results of the employer's investigation stated that most of those interviewed were people identified by the worker as witnesses. The committee reported the following findings:

Findings:

- After an exhaustive investigation involving interviews with 30 people , not including [the worker and the group leader], the Committee has found very little corroborative evidence in support of [the worker's] allegations and, accordingly, has been unable to substantiate them.
- There is ample evidence that [the group leader] has a difficult time distinguishing between what is appropriate and inappropriate behaviour and language in the workplace.
- [The group leader] has admitted to having had an affair with [the worker] and to having engaged in sexual activity with her on more than one occasion on [the employer's premises]. According to him, this was consensual in nature. From the [employer's] point of view, such behaviour is totally unacceptable regardless of consent.
- [The worker] does not admit to having had an affair, but rather that she was under duress to accede to [the group leader's] advances. Given this, and the absence of any factual evidence to suggest otherwise, we could not sustain a recommendation for disciplinary action against her.

The members of the employer investigating committee wrote individual letters to the worker and the group leader on November 30, 1993 about the results of the investigation.

The accident employer took the following action as a result of its investigation: the group leader was suspended without pay for two months; the group leader was demoted to custodian and reassigned to a new work location at the end of his suspension; the worker was reassigned to a new work location when she returned to work on December 6, 1993; and letters were placed in the worker's personnel file and the group leader's personnel file. The employer permitted the group leader to apply for a group leader position about two years after his demotion.

The worker submitted a claim to the accident employer dated November 15, 1993 for sickness and accident benefits. The medical certificate signed by the worker and her family doctor indicated that the worker had been absent from work since October 4, 1993 due to "personal injury", as opposed to a "work-related injury" or "personal injury", diagnosed as post-traumatic stress disorder.

The worker was off work from October 4 to December 6, 1993 when she returned to her regular work at a different work location. The group leader returned to his regular work on February 1, 1994 at a different location at the end of his suspension.

The worker laid off work on February 1, 1994. The worker did not return to work for the accident employer.

Dr. G. Jones submitted a Physician's First Report to the Workplace Safety and Insurance Board dated February 2, 1994 reporting an accident date of October 4, 1993. Dr. Jones reported the following history of injury:

I saw this [worker] in October. Today on February 2, 1994 she tells me that she qualifies for a WCB claim. She has allegedly been sexually victimized at her place of employment by a fellow employee and had finally brought her situation out into the open with her husband, myself, police and sexual assault counsellor. She had returned to work but is now distraught at discovering that the individual involved is again working in a school. She is seeing a different sexual assault counsellor. She feels currently unable to work until stress controlled.

The accident employer submitted an accident report to the WSIB on February 14, 1994 with a letter attached, stating that the worker asked the accident employer to submit a lost time claim to the WSIB for sexual harassment and assault dating back to September 1992, and that the worker told the accident employer that she reported the assaults to her supervisor, the school principal and the police.

The worker submitted an accident report to the WSIB on February 21, 1994, stating that she was sexually harassed and assaulted by the group leader who also threatened her if she told anyone. The worker also stated that she told her employer and reported the assaults to the police.

The Board conducted an investigation in April 1994 when the Claims Investigator interviewed the worker in the company of her husband. The Claims Investigator reported that the worker explained that she stopped working on October 4, 1993 because she "felt completely hysterical and unable to cope", adding that she had been unable to sleep for quite some time and had colitis, irregular menstruation, migraine headaches, an increased frequency of yeast infections, elevated blood sugar, achy joints and erratic mood swings. The worker returned to work from December 6, 1993 to February 1, 1994. The Claims Investigator reported that the worker explained why she stopped working on February 1: the worker learned at a school staff meeting that day that the (former) group leader's suspension was up and he would be returning to work at a different school under the supervision of the same supervisor she had. The worker explained that the school offered to provide her with a walkie-talkie so that she could be in contact with people whenever necessary, and that, even though he would not be in the same school, she became hysterical at the thought that the (former) group leader would be in contact with women and children again and, as a result, stopped working.

The worker appealed the decision of the employer's investigating committee to the director of education. The director met individually with the worker, accompanied by her husband, and the group leader and denied the appeal by letter to the worker dated April 26, 1994. The stated role of the director was to "make sure that the investigation was fairly carried out, was sufficiently thorough, and that the consequences were consistent with the findings". In her letter to the worker, the director stated that she believed that the investigating committee "carried out this investigation fairly and thoroughly, and that their decision regarding consequences was consistent with the records and with [her] own interviews". The director stated that the "committee received conflicting testimony from [the worker] and [the group leader], and its investigation did not provide evidence that would enable it to support [the worker's] position rather than his" position.

The director of education also addressed in her letter concerns raised by the worker about the discipline meted out to the group leader, her reassignment to another school, and the group leader's placement following his suspension. The director stated that she considered the two-month suspension without pay, resulting in a financial loss to the group leader of about \$5,000, and the demotion as "substantial punishment in the short term, and also with respect to his long-term career" with the employer. The director stated that the worker's placement at a different school following the investigation was "in no way

punishment”, and that the “chance of rumour and misinformation at [the original school] made it preferable for [the worker] to be placed in another setting”. With respect to the group leader’s “placement in a position in the same geographical area”, the director stated that she did not consider this a threat to the worker’s physical welfare, and that, although the group leader was placed in another school in the same municipality, there was no expectation for contact between the worker and the group leader in the course of their work duties.

The worker applied for Canada Pension Plan (CPP) disability benefits in July 1994. The Disability Adjudicator, Disability Operations Division, Canada Pension Plan, denied the application by decision dated August 29, 1994.

The worker’s claim for worker’s compensation benefits was denied by the Junior Entitlement Adjudicator on May 30, 1994, the Manager of Client Services on July 22, 1994 and by the Decision Review Specialist on November 25, 1994.

The Decision Review Specialist concluded as follows:

Assessment of Evidence and Conclusions:

This Decision Review Specialist has carefully reviewed all of the evidence concerning [the worker’s] claim for sexual harassment. As it was indicated in the letter from the Claims manager, dated July 22, 1994, it is usually the Board’s practice to provide compensation benefits in claims for a non-organic condition related to an acute stressor, that is, exposure to stress that can be characterized as a chance event. The Board has taken the position that the necessary condition to the workplace is established when the timely onset of a non-organic condition follows a sudden, shocking and/or life-threatening event. It also must be established that the chance event is work-related, separate from the injury and is the cause of the injury.

Having reviewed all of the evidence in this case, I find that the series of incidents and contacts with [the worker’s] group leader occurred on a gradual basis, over a period of several months. It is the opinion of this Decision Review Specialist that there is insufficient evidence to substantiate that these incidents were sudden, shocking or life-threatening. Consequently, I find there is insufficient evidence to allow initial entitlement under this claim. The decision of the Claims manager, dated July 22, 1994 has been confirmed.

The worker filed a complaint with the Ontario Human Rights Commission. The Commission closed the worker’s file on December 15, 1994 at the inquiry stage of its process. The worker testified that she was traumatized by the whole process with the Human Rights Commission and stopped the proceedings. She testified that the Commission did not do its own investigation, but said that the employer did a thorough investigation.

The worker made an application to the Ontario Criminal Injuries Compensation Board for compensation for injury arising from the commission of a crime of violence. The Board convened a hearing on January 22, 1998 before two Members who issued a decision on March 12, 1998 denying the worker’s application. Noting that the “absence of criminal charges or a conviction against the Alleged Offender is not fatal to the application”, the Criminal Injuries Compensation Board reached the following decision:

Although it is clear that there was sexual activity involving the Applicant and the Alleged Offender which was inappropriate in a school and in a supervisory relationship, there was no corroboration of the crimes of violence alleged and there was conflicting evidence before the Board. There was insufficient evidence to establish, on a balance of probabilities, that the sexual incidents were not consented to and were therefore crimes of violence.

The WSIB made the Decision Review Specialist decision final on August 22, 2001. The worker appealed to the Tribunal on

October 30, 2001.

The worker received short-term sickness and accident benefits from the employer's insurance company and long-term benefits from August 1994.

The worker brought an action in the Ontario Superior Court of Justice against the employer's insurance company concerning her claim for ongoing disability benefits. The worker signed a "Full and Final Release and Resignation from Employment" with the employer on August 22, 2004. The worker resigned her employment with the employer and received \$40,000.

(iii) June 1992 to September 1993

The worker described several incidents between June 1992 and September 1993 in notes and letters dated October 1993 and February and March 1994. The worker also described several incidents between June 1992 and September 1993 in in-person interviews and telephone conversations with the employer's investigating committee in the fall of 1993 and in testimony at the Tribunal.

The worker identified witnesses to some of the incidents, including the co-worker, school principal, school secretary, supervisor of custodians, teachers and students. The co-worker, school secretary and supervisor, as well as several teachers and students identified as witnesses by the worker, were interviewed by the employer's investigating committee between October 6 and November 3, 1993. The co-worker, school secretary, custodial supervisor, the current director of education and the group leader testified at the Tribunal hearing.

The evidence about the period from June 1992 to September 1993 includes over 100 pages of interview notes and documents written by the worker and the testimony of the worker, co-worker, school secretary, group leader and the supervisor of custodians. It is not possible to reproduce all of this evidence in this decision. The following paragraphs review the evidence.

The incidents described by the worker included the group leader making comments to her and asking questions of a sexual nature, standing too close to her, pressing against her, blocking doorways, running his fingers through her hair, propositioning her for sex, rubbing her breasts, masturbating in front of her, forcing her to perform oral sex on him and raping her.

The worker also described inappropriate comments and behaviour by the group leader involving her co-worker, the school secretary and students. The worker described the "control" exerted by the group leader over her and the co-worker, school secretary, custodial supervisor and one particular student.

The worker identified her co-worker as a witness to several incidents or exchanges involving the worker and the group leader. The worker also described incidents involving the group leader and the co-worker, for example, running his fingers through the co-worker's hair, asking about the co-worker's sex life and standing too close to the co-worker. The investigating committee interviewed the co-worker for about 45 minutes. During this interview, the co-worker described conversations that she, the worker and the group leader had during lunch and breaks. She explained that some of the conversations were of a sexual nature, but not so that she felt uncomfortable. She stated that the worker participated in the conversations. The co-worker could not recall the group leader giving the worker an unwanted kiss in the custodial staff room, and stated that she never saw the group leader and the worker in a compromising position.

The co-worker recalled the events in September-October 1993 involving the student the worker was concerned about. The co-worker stated that the student spoke to her (the co-worker) first (September 29), telling the co-worker that the worker had told her (the student) that the group leader had sexually assaulted her (the worker) or touched her (the worker) and that she (the worker) should have slapped him. The co-worker recalled that the worker spoke to her the following day (September 30) about the group leader spending time with the student. The co-worker recalled that on October 1 the worker said she just could not let the matter go, and that she (the co-worker) replied that the worker should remember that people's lives were on the line.

The co-worker testified at the Tribunal that she never had a problem with the group leader, did not recall the worker complaining about him standing too close, did not recall discussing "all-nighters", did not recall him running his fingers through her (the co-worker's) hair or standing too close to her (the caseworker), did not recall seeing the group leader brushing by the worker, kissing the worker or touching the worker's breasts, did not recall the group leader standing too close to the student the worker was concerned about, and did not recall telling the group leader not to "hit on students". The co-worker testified that the group leader sometimes flicked her (the caseworker's) hair when he walked by. The co-worker testified that she was shocked when the worker made the complaint against the group leader, because she was not aware of anything going on and actually thought that they did not like one another.

The worker identified the school secretary as a witness to several incidents or exchanges involving the worker and the group leader, for example, the group leader standing too close to her and the worker blushing at one of his remarks. The worker also reported that she saw the group leader sexually harass the school secretary in the office, and that she often said to the secretary: "Doesn't this bother you?" The worker testified that, in the presence of the school secretary, the group leader said that the "school principal was a bitch and he'd screw her good and hard". The investigating committee interviewed the school secretary for about 60 minutes. She stated that she could not recall specific occasions when the worker and the group leader were in the school office, and that she would remember if the group leader made sexual comments. The school secretary described the atmosphere in the school as friendly, casual with lots of communication and people, including the group leader, joking about things. The school secretary testified that she noticed some "slight flirting" in conversations. With respect to the student the worker was concerned about, the school secretary testified that she told the principal that she thought the student, a 16 or 17 year old female, seemed to be hanging around some workmen at the school, and that she cautioned the group leader about the student. The school secretary described to the investigating committee the incident when she returned to the school before 5:00 p.m., announced herself as she entered the school, saw the group leader coming out of the staff room with his shirt untucked and heard the worker say: "What does she think we're doing?" The school secretary testified that she was not concerned about the incident and did not think about it afterwards. The school secretary testified that she did not feel uncomfortable in the presence of the worker and the group leader, and that the worker did not express any concern to her about the group leader's behaviour. She vaguely recalled the worker being a "bit flushed" at some point, but did not know what caused it.

The worker identified two teachers as witnesses to the group leader making sexual comments and standing too close to her. The teachers were interviewed by the employer's investigating committee. One of the teachers stated that he recalled comments of a sexual nature by the group leader, but did not think that they were that offensive and the worker might even have laughed. He stated that the group leader could be indiscrete but did not think that anybody took him seriously, and that he never heard the worker reprimand the group leader for his behaviour. He stated that he never saw the worker talking to female students. The other teacher stated that he recalled one incident when the worker did not like something the group leader said and told him so. The teacher was told about an allegation by the worker that she was sexually assaulted by the

group leader in the staff room and that the noise of the desk banging attracted the teacher's attention and he came upstairs to the staff room to investigate, thus interrupting the assault. The teacher recalled an incident when he came to the school to get something and, while proceeding up the stairs to the staff room, heard the staff room door shut. He stated that he did not realize anyone was there, but, as he entered the staff room, he saw the group leader bending down by the counter where the photocopier was and heard the washroom door shut. He stated that the worker came out of the washroom and left the staff room, and that he could not recall her saying anything. He stated that he did not notice anything in particular about the behaviour of the worker or the group leader.

The worker identified a teacher as witnessing the group leader make eye contact with the worker and rub his crotch while she was cleaning a classroom and he was standing outside the school beside a portable. The teacher was interviewed by the employer's investigating committee. The teacher stated that she could not recall such an incident. The teacher stated that she had no idea anything was going on between the worker and the group leader.

The worker identified a teacher as a witness to the group leader giving her an unwanted kiss on the cheek. The teacher was interviewed by the employer's investigating committee. The teacher did not recall the incident. The teacher stated that the group leader joked around with staff and sometimes his comments could be construed as having a sexual connotation. The teacher stated that there were jokes between the group leader and the school secretary. The teacher stated that the group leader did not pay particular attention to female students. The teacher stated that he thought that the worker and the group leader had only a professional relationship.

The worker identified a teacher who was a witness to the group leader teasing her inappropriately about a cut and sore spot on her nose. The teacher was interviewed by the employer's investigating committee. The teacher seemed to recall such an incident, but stated that she did not pay much attention to it, describing it as a "non-event". The teacher stated that the group leader liked to playfully say things, but she did not recall seeing him tease the worker. The teacher stated that she had no concerns about either the worker or the group leader and the whole situation took her completely by surprise. The teacher stated that it would not occur to her to be uncomfortable with the group leader.

The worker identified the custodial supervisor as a witness to the group leader sexually harassing her co-worker and her in the school office, and forcing her to have sexual intercourse in the principal's office. The worker explained in an interview that she was in the principal's office one day during March break and the group leader pushed her back on to the principal's desk, pulled down her pants and raped her, that the custodial supervisor came into the office to use the telephone and would have to have seen something, and that when she saw the custodial supervisor he had a laughing red face. In a later telephone discussion with the superintendent of education/human resources, the worker stated that the custodial supervisor walked in one day during the March break when she was on the principal's desk being raped by the group leader, and the custodial supervisor laughed. The worker also described the incident in writing, stating that the group leader forced her back onto the principal's desk and "made penetration", that "all of a sudden" she heard the group leader speaking and, as she lifted her head, saw the custodial supervisor leaving the office. The worker wrote that the custodial supervisor later "came walking down the stairs from upstairs red with embarrassment", and asked her whether she would be interested in a four-hour custodial position at another school, and that she told him she would discuss it with her husband and asked him whether there was a chance her daughter could be hired as a student summer helper. The supervisor was interviewed by the employer's investigating committee and testified at the Tribunal hearing. He testified that he did not see what the worker says he saw in the school office. He testified that he called out as he usually does when he entered the school, proceeded upstairs to the staff room, came downstairs and saw the group leader and then the worker appeared. The supervisor testified that he heard that the group

leader was a “kidder, practical joker”, and that his conversations with the group leader were conducted in a professional manner.

With respect to the worker getting a job for her daughter at the school, the worker explained in testimony that other students had been hired to work at the school, and that, after the group leader grabbed her by the jacket and told her that the custodial supervisor told him that she wanted to speak to the custodial supervisor, she had to say something so she talked to the supervisor about her daughter working at the school.

The custodial supervisor testified that group leaders are part of the bargaining unit and do not hire, fire or discipline custodians, and that the group leaders sometimes deal with issues at the school level and sometimes bring them to him. He explained that he completes the performance appraisals of group leaders and custodians.

The group leader testified at the Tribunal that his duties as group leader included opening the school, regulating the heat, shovelling snow, sweeping up glass, ordering supplies and directing contractors doing repairs. The group leader testified that he did not set the custodians’ hours, approve their vacations or transfers, or do their performance appraisals.

The worker described incidents involving the group leader and students and stated that she contacted students directly to get more information. The worker identified one particular student as being the object of the group leader’s attention. The worker testified that she went outside the school to warn the student about him and told her co-worker what was happening, and that the co-worker told the group leader that he should not “hit on students” because he could lose his job. The school principal interviewed the student who said that she and the group leader had sat down outside the school once or twice, that he never gave her cigarettes, and that he drove her home once.

The worker described students referring to the group leader as a “pervert” and to a sign over the group leader’s office

Several other students were interviewed during the course of the employer’s investigation of the worker’s complaint against the group leader. They generally described him as a “nice guy” who “joked around with the kids” and did not recall him paying more attention to the girls than the boys.

The worker described in testimony the “stupid look” on her face, the look of the “chronically sexually harassed”, and stated that the school secretary and one particular student had the same look.

The worker explained during the employer investigation why she did not report the harassment and sexual assault earlier. The worker explained that she was too afraid to go to her supervisor. The worker explained that, on one occasion when she tried to talk to her supervisor, the group leader was standing behind him waving his arms, as in: “No, don’t do it”. The worker explained that she did not come forward earlier, because she had an orgasm during one of the rapes and she was very embarrassed by it and thought there was something wrong with her, but that she now understood that this was a physical aspect and can happen during rape. The worker explained that she felt intimidated by the group leader from the time she came to the school, and that the group leader was sly and slick. The worker explained that the group leader manipulated her and had control over her. The worker explained that she made a bad judgement call because she befriended him and made friends. The worker explained that the group leader knew how far to go, what to say to make her cry and how to control her. The worker explained that she was off work in November/December 1992 and May 1993 because things with the group leader were really bothering her, but she could not say anything to her doctor and said she was off due to her arthritis. The worker testified that

the group leader repeatedly threatened her and told her he would get his brother (a biker) after her. The worker testified that victims of sexual harassment and assault do not come forward because of fear and shame, not because of guilt.

The worker testified that the first person she told about the harassment and assault was her husband and then her co-worker and the student, and that the “floodgates opened”.

The investigating committee interviewed the group leader on two occasions. The group leader limited his answers to questions about sexual harassment during the first interview, and said that he would not answer questions about sexual assault because of the police investigation. During the second interview the group leader described occasions when the worker took the initiative in discussions about sexual matters, in complaining about her husband and their relationship, in bringing in a City TV videotape showing a woman being interviewed about oral sex and a 300-pound woman wearing only a G-string, and in bringing him lunch at the school and in initiating intimacy (hugging, kissing and touching). The group leader stated that he and the worker had consensual sex in the school. He testified that he, the worker and the co-worker took their lunch break together and that the subject-matter of their conversations started out with less personal things, like weekend activities, and gradually became more personal, like marital sex. The group leader testified that he did not run his fingers through the worker’s hair or the co-worker’s hair, though he might have tousled their hair in thanks for doing him a favour. The group leader testified that his relationship with the worker became more personal; for example, she told him she planned to leave her husband and was going to transfer to another school, asked to borrow a carpet cleaner which he delivered to her home, brought a music tape and a video tape to work, brought him donuts and asked him to come for lunch one day during the summer of 1993. He testified that one thing led to another and they had consensual intercourse in a portable in June 1993. He testified that the worker never told him that she wanted to discontinue their relationship. He testified that the worker asked him in September 1993 whether he was avoiding her, told him that she was leaving her husband and asked him whether he would leave his wife. The group leader testified that he initially denied having sex with the worker, because he wanted to tell his wife first, and later told the employer that he did have sex with the worker in the school.

The current director of education testified at the Tribunal that he was a secondary school principal in 1992-1993, and that he was familiar with the subject matter of this appeal because he was the superintendent of employee relations and freedom of information co-ordinator from 1994. He testified that in these positions he handled the freedom of information inquiry and the decision to allow the group leader to bid on a posted group leader position. He testified that the group leader in a school is considered to be the “first among equals”. The director testified that he understood that the group leader was disciplined because of comments he made and his admitted sexual activity on school property, and that there was no finding by the employer’s investigating committee that the group leader sexually assaulted the worker. The director testified that, in deciding whether the group leader would be allowed to apply for a posted group leader position, he took advice from the members of the investigating committee, senior management and the president of trade union local representing all custodial staff.

(iv) Medical Evidence

The medical evidence in this appeal includes emergency reports and reports from Drs. G.J. Jones (family doctor), M.A. Fry (family doctor), J.I. Stewart (family doctor), R. Barnes (psychologist), J. Plowsky (clinical and rehabilitation psychologist), W. B. Taylor (psychiatrist), E. Borins (psychiatrist), J. Nundy (psychiatrist), T. Haines (occupational medicine), L. Solomon (psychiatrist), J. Pilowsky (psychologist), J.M. Lacroix (psychologist), and M.W. Voorneveld (psychologist). There is also a report in the case materials from a sexual assault centre reporting generally on the period from October 1993 to February 1994.

The worker was also seen in 1993 and/or 1994 by a rheumatologist, a gynaecologist and two eye doctors.

The case materials include a Tribunal discussion paper dated 2002 by Dr. D. Whitney, "Post Traumatic Stress Disorder".

Dr. Borins testified under oath at the Tribunal hearing.

(a) June 1992 to October 1993

The worker saw Dr. Jones, her family doctor, on about 25 occasions between October 1990 and May 1992. The worker saw Dr. Jones as follows between June 1992 and September 1993: October 9, November 5, 12, 25 and 30, December 7 and 29, 1992, and January 7 and 18, March 8 and 22, April 15 and 29, May 15, June 3, 7 and 14, and October 1, 1993.

The worker was off work November 23 to December 4, 1992, and May 12 to 21, 1993. Dr. Jones noted on November 5, 1992 that there was "some conflict re mismatched sexual drive between [the worker] and her husband" and that she was "discovering her sexuality in post child-rearing years". Dr. Jones noted "recent eye flare-up and joint flare-up" and "too bothersome to work" on Nov 25, 1992 and "overall doesn't feel well enough to work" on November 30, 1992. Dr. Jones noted "marital/sexual counselling" on March 8, 1993. Dr. Jones noted on May 15, 1993 that the worker had low back pain with no sciatica and was "unable to work", and on May 25, 1993 that the worker was "ready to work, overall a little better, will be laid off work this summer".

With respect to Dr. Jones' notation for November 5, 1992, the worker testified that she did not recall saying what he reported, that she cried when he did a PAP test and "he came to the conclusion that I had some problem" and "reported what he reported", and that "sometimes doctors are afraid to ask questions and patients are afraid to speak". With respect to Dr. Jones' notation for November 30, 1992, the worker testified that she did not recall.

(b) From October 1993

The worker saw Dr. Jones on October 8 and 21, November 2 and 15 and December 1, 1993, and on January 3, February 2, 14, 22 and 24 and March 21, 1994.

Dr. Jones reported that the worker was in "emotional turmoil" on October 8, and that since then she had "offered many symptoms during her various visits including anxiety, fear, insomnia, preoccupation, arthralgias and insecurity". Dr. Jones reported that the worker had shown some improvement by December 3, 1993 and he thought it might be therapeutic for her to return to work, but that the "situation deteriorated at work, in part because of comments by male co-workers" until February 1, 1994 when he authorized the worker off work.

The worker and Dr. Jones completed a medical certificate for the employer dated November 15, 1993 for the worker's absence from work from October 4, 1993. They reported a "personal illness" diagnosed as "post-traumatic stress disorder".

Dr. Jones completed a Physician's First Report on February 2, 1994, reporting the following history from the worker:

I saw this lady in October. Today, she tells me that she feels qualified for a WSB claim. She has allegedly been sexually victimized at her place of employment by a fellow employee and had finally brought her situation out into the open with her husband, myself

and sexual assault counsellor. She had returned to work but now is distraught at discovering that the individual involved is again working in a school.

Dr. Jones reported that the worker was seeing a different sexual assault counsellor and a psychiatric referral was pending, and that the worker was currently unable to work due to post-traumatic stress disorder.

The worker saw a therapist at a community sexual assault centre between October 28, 1993 and January 6, 1994, when she stopped therapy, and returned for further therapy on April 19, 1994. The therapist described the worker's issues and symptoms as consistent with "Rape Crisis Trauma", and stated that her "major issues included a high level of anxiety, loss of personal safety and extreme fear, loss of self-esteem, difficulty coping with daily situations and fear about returning to work where the assault took place".

The worker saw Dr. Stewart for counselling on February 18, March 1, April 15 and 28, May 9 and June 13 and 23, 1994. The worker saw Dr. Nundy for psychiatric treatment on April 12, 1994. The worker first saw Dr. Taylor for psychiatric counselling in February 1995. The worker first saw Dr. Fry on August 1, 1995. The worker saw Dr. Barnes for psychological assessment between November 18 and December 4, 1996. The worker first saw Dr. Borins for psychiatric assessment and treatment on September 19, 1997 and continues to see her to date.

Dr. Solomon conducted an independent psychiatric assessment on May 5, 1999 for the employer's insurance company. Dr. Pilowsky saw the worker on March 17, 2000 for psychological assessment arranged by the employer's insurance company.

The reports from Drs. Stewart, Nundy, Taylor, Fry, Barnes, Borins and Pilowsky set out the worker's account of what occurred during the period from June 1992 to September 1993 and the period after she reported that she was sexually harassed and assaulted, and the doctors' diagnosis and treatment.

Dr. Stewart diagnosed "post-traumatic stress disorder". Dr. Nundy diagnosed "rape crisis; strict, mature and guilt-prone personality". Dr. Taylor diagnosed "post-traumatic stress disorder" and stated that the worker "continued to feel that there is no justice and to feel revictimized in many situations". Dr. Fry diagnosed "post-traumatic stress disorder". Dr. Barnes provided a DSM-IV diagnosis of "post-traumatic stress disorder" and "sexual abuse of adult" on Axis I, and "occupational problems, victim of crime, concerns about legal and administrative response to her assault" on Axis II and a GAF of "70 (prior to the sexual assaults in 1992-93" and "40 (present)". Dr. Borins diagnosed "chronic post-traumatic stress disorder secondary to sexual harassment in the workplace" and stated that the worker's case was difficult and "certainly not assisted at the present time [1997] by the severe invalidation which she has experienced". Dr. Pilowsky diagnosed "post-traumatic stress disorder" and stated that it appeared that the worker's "symptoms have been magnified by the re-victimization she perceived at the hands of the justice system".

Dr. Borins testified about "post-traumatic stress disorder" generally and with respect to the worker. Dr. Borins testified about the characteristics of an assailant and the role of bystanders. Dr. Borins testified that it is not necessary that there be corroboration in order for a person's account of a traumatic event to be true. Dr. Borins stated that she has not seen the group leader and has not read the interviews from the employer's investigation. Dr. Borins testified that she is working with the worker on the assumption that the group leader is a psychopath with no capacity to empathize and a disregard for other people. Dr. Borins testified that it was unlikely that people would recognize these qualities in the group leader, and that it was unlikely that he would have sexually harassed only one person or on only one occasion. Dr. Borins testified that it was not

strange that there were no complaints about the group leader before or after the worker's complaint, and that that did not prove or disprove anything. Dr. Borins testified that the moral issue of the group leader paying attention to one particular female student precipitated the worker coming forward with her complaint.

(v) Law and Policy

The accident date in this appeal is June 1992. Accordingly, the pre-1997 *Workers' Compensation Act*, R.S.O. 1990, c. W.11, applies.

Section 4(1) of the pre-1997 Act states as follows:

4(1) Where in any employment, to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the worker and the worker's dependants are entitled to benefits in the manner and to the extent provided under this Act.

Thus, to establish entitlement, it is necessary to show that a "personal injury by accident arising out of and in the course of employment" was caused to the worker.

The pre-1997 Act defines "accident" as follows:

1(1) In this Act,

"accident" includes,

- (a) a wilful and intentional act, not being the act of the worker,
- (b) a chance event occasioned by a physical or natural cause, and
- (c) disablement arising out of and in the course of employment.

In this case, the worker claims entitlement to compensation for mental stress resulting from sexual harassment and sexual assault by the group leader. The worker described specific comments and incidents over the period June 1992 to September 1993 that she relates to her disability.

The Board identified the following policy packages (revision #5) as applicable to the subject matter of this appeal:

Package #1: Initial Entitlement,

Package #30: Decision Making/Benefit of Doubt/Merits and Justice, and

Package #64: Psychotraumatic/Chronic Pain Disability – DOA January 1, 1990 to December 31, 1997.

Unlike the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, which specifically excludes entitlement for mental stress except for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment, the pre-1997 Act has no provision treating cases of psychological injury from chronic mental stress differently than cases of physical injury or psychological injury from acute stress. Tribunal decisions have

therefore applied the general entitlement provisions of section 4(1) of the pre-1997 Act in deciding whether a worker is entitled to benefits for psychological injury from chronic mental stress.

In adjudicating these types of cases, usually referred to as “chronic stress” appeals, the Tribunal adopted a reasonable person test, formulated in *Decision No. 631/91* (1992), 21 W.C.A.T.R. 251, as follows [at p. 266]:

- 1) Were there stressors, whether usual or unusual, in the workplace? and
- 2) If so, would a reasonable person accept that these stressors were potentially disabling?

The reasonable person test was followed and refined in subsequent Tribunal decisions. In *Decision No. 826/94* (1995), 36 W.C.A.T.R. 102, the Panel reviewed past Tribunal decisions and summarized the two-part test for entitlement in chronic stress cases as follows: 1) whether workers of average mental stability would perceive the workplace circumstances as mentally stressful as the injured worker perceived them; 2) if so, whether such average worker would be at risk of suffering a disabling mental reaction to such perceptions. The Panel stated that the key question in chronic stress cases is not whether employment was a significant contributing factor in the injury, but whether the injuring process was part of the employment. If the injuring process is primarily a dysfunctional process of the worker’s mind, it cannot be said to be causally connected to the employment so as to create entitlement to compensation.

The assessment of the credibility of interested witnesses has been discussed as follows in the following decision of the British Columbia Court of Appeal, *Faryna v. Chorney* [1952], 2 D.L.R. 354, (which was quoted with approval by the Ontario Court of Appeal in *Phillips v. Ford Motor Co.*, [1971] 2 O.R. 637):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

(vi) Submissions

The worker’s representative made oral submissions and provided a written copy of her submissions. The worker’s representative submitted, in part, as follows:

[The record shows that the worker’s employment from January 1988 to June 1992 was quite uneventful.] However, this changed when her immediate supervisor began an unrelenting campaign of verbal harassment, derision, and intimidation. She became increasingly distressed and fearful. The situation escalated into physical violence and rape. Like other rape survivors, [the worker] did not tell anyone because her assailant had threatened her with death if she told anyone.

The injured worker endured this torture, pain and suffering for 15 months and it was only upon witnessing her assailant making advances to a high school student that she broke her silence.

The worker’s representative referred to a decision by a WSIB Hearings Officer dated June 29, 1990. The worker’s representative submitted that this decision is “very pertinent to the [worker’s] case before this Tribunal because it was probably the first time that the WSIB allowed a claim such as this”, and stated that the Hearings Officer “accepted that the

worker had been a victim of persistent sexual harassment at the workplace and that this harassment contributed significantly to the development of her anxiety reaction”, and determined that the circumstances that existed in that workplace constituted an accident as defined by the disablement provision of the Act.

The worker’s representative referred to *Decision No. 2056/03* (March 12, 2004), which concluded that the worker was the subject of ongoing harassment by her manager and granted entitlement, and submitted that the “*attacks by the injured worker’s supervisor [in this appeal] were several orders of magnitude above*” those in *Decision No. 2056/03*, because the worker in this appeal was “*subjected to unrelenting bullying between 1992 and 1993.*”

The worker’s representative continued, submitting, in part, as follows:

On the one hand, the [employer] clearly minimized all of the fears and concerns reported by [the worker] – dismissed and invalidated her. Yet they were clearly concerned enough to impose a penalty upon [the group leader].

Should there have been only a single episode of assault, then it would [be] much more difficult to assume that the perpetrator was engaging in a pattern of behaviour. However, [the group leader] continued his violent attacks over a 15-month period, ignoring the pleas from [the worker] to leave her alone and stop. This clearly was evidence of a pattern. Yet, the [employer] allowed him to return to a school at another location virtually unfettered. What is particularly frightening is that this was not simply a workplace, but a place where children are present. Could this be interpreted to mean that, despite the penalty imposed upon [the group leader], the [employer] continues to condone the culture within the custodial community?

In her oral testimony, Dr. Borins emphasized that, when individuals are severely traumatized, parts of the brain are seriously affected. The memory of such events is often very fragmented. Events such as those experienced by the injured worker were man-made in origin and are much worse than if such events had been caused by nature. Dr. Borins also pointed out that, when individuals are severely traumatized as in this case, the blood supply to this speech centre of the brain is affected and this causes the victim to be unable to verbalize and recount the horrendous events. Hence, the injured worker’s impaired ability to recount what happened to her.

And finally,

It is then important to be noted that three specialists, one psychiatrist and two psychologists, who have had recent contact with [the worker] as well as other specialists in the past do entirely concur diagnostically.

Both [the employer] and the WSIB continued to insist that corroborating evidence was necessary before [the worker] would be believed. The fact remains that the employer admitted that [the group leader] behaved inappropriately and imposed a significant penalty. The medical evidence in this file is not only substantial, but assessors unequivocally agree that [the worker’s] PTSD [post-traumatic stress disorder] was a direct result of the violence imposed by [the group leader]. It would appear that the employer and the WSIB are attempting to characterize this case simply as a dispute between two individuals.

We would respectfully submit that the documentary evidence record and the oral testimony given by witnesses reflect that, during the past 13 years, agencies such as [the employer] and/or WSIB have continued to attempt to negate the rapes and assaults by denial or deafening silence. As a result, the injured worker was mentally raped repeatedly – as documented by her treating physicians.

[The worker] has shown incredible courage throughout her ordeal over the past 13 years. Agencies that should have assisted her have instead continued to fail her. She is incredibly brave to appear before you today. We would respectfully remind all parties that in her testimony Dr. Borins emphasized that significant additional trauma was inflicted on the injured worker because she continued to [be set] aside by agencies, including [the employer], that ought to have been there to protect her. Dr. Borins clearly

indicated that this was more damaging than the repeated assaults and rape.

It is respectfully submitted that, based upon the documentary and oral evidence that has been given at this hearing, there can be no question that the worker's psychiatric injury – PTSD – arose out of and in the course of her employment.

...

Conclusion

In his letter of April 20, 2005, Mr. Emmink has stated that: “*as the alleged assailant*”, [the group leader's] evidence “*would be critical in the adjudication of the worker's appeal*”. It is respectfully submitted that, according to the case record, there is nothing “alleged” with regard to the position taken by the employer in November 1993. On November 30, 1993, the employer wrote to [the group leader] and stated the following:

There is ample evidence of an inability on your part to distinguish between appropriate and inappropriate behaviour and language in the workplace. Further, and by your own admission, you engaged in sexual activity on [the employer's property] on more than one occasion with [the worker]. As someone in the position of authority over [the worker], you ought to have known that your behaviour might well be seen as intimidating and taken as a threat by the individual concerned. As outlined during our meeting, your behaviour in this matter has been totally unacceptable.

The language in this letter has been very carefully crafted to disguise the harsh reality of repeated criminal activity. The injured worker had made repeated attempts to report that she had been assaulted and raped over a very long period of time. On the face of it, the “investigation” conducted by the employer would appear to be an attempt to discredit and blame the injured worker. The employer and other agencies, including the WSIB, have continued to ignore, obscure and cover up the facts. Whatever testimony has been offered by the witnesses does not in any way diminish, negate or invalidate the injury that was sustained by the injured worker.

What is absolutely clear is that for 15 months the injured worker was subjected to unrelenting bullying by her immediate supervisor and further that any and all of the agencies that should have been there to protect her absolutely failed.

The issue before this Tribunal is to determine whether or not, as a result of circumstances that arose out of and in the course of her employment, the worker suffered an injury. By the aforementioned letter, the employer has confirmed that [the group leader] did violate its policy on sexual harassment. The plethora of medical evidence absolutely confirms that, as a result of the bullying assaults inflicted by [the group leader, the worker] was seriously injured, has a permanent impairment and remains severely disabled.

The accident employer's representative discussed the legal framework for the worker's claim, reviewed the evidence of the witnesses, the medical evidence for the 1992-1993 period, discussed *Decisions No. 826/94, 500/94* (April 30, 1997), *1490/01* (February 7, 2003) and *535/02* (May 13, 2002), submitted that there were inconsistencies and peculiarities in the worker's evidence and the evidence from the other witnesses did not corroborate the worker's evidence, and submitted that the evidence does not support a conclusion that an “accident” occurred. The accident employer's representative submitted that the employer conducted a thorough investigation immediately after the worker made her complaint, that the interviews provide good, weighty contemporaneous evidence, and that the fact that the employer disciplined the group leader does not provide prima facie evidence of the worker's allegations.

(vii) Conclusions

The worker seeks entitlement to benefits for mental stress resulting from sexual harassment and sexual assault (rape) by the group leader between June 1992 and September 1993. There is no dispute that sexual harassment or assault which occurs in the course of employment and which results in mental stress is compensable. The primary issue in this case is whether the events occurred as alleged by the worker.

This is not a case where the worker's evidence is the only evidence, nor is it a case where there is evidence from only the two principals. Rather, it is a case where there is evidence from the two principals, the worker and the group leader, and evidence from several other individuals identified by the worker as witnesses to specific incidents or as aware of the group leader's sexual harassment and assault.

The worker's representative referred to a 1990 Hearings Officer decision granting a worker entitlement for psychological problems following persistent harassment by co-workers. The employer in that case did not participate in the Board hearing. The Hearings Officer accepted the "uncontroverted evidence" from the worker. Unlike this Board decision and some Tribunal decisions on harassment, we have had the benefit of hearing from a number of witnesses and considering information obtained closer in time to the events in question for the purpose of other proceedings, as well as the Board record and evidence and submissions adduced by the parties' representatives for the purpose of this hearing.

A careful review of the evidence in this case does not support the worker's view of events. Accordingly, we conclude that the worker is not entitled to benefits for mental stress resulting from her employment for the employer.

In reaching this conclusion, we particularly note evidence about incidents during the period in question from the worker, group leader, co-workers, school secretary, custodial supervisor, teachers and students, and medical evidence during and following the period in question.

In assessing conflicting descriptions about events, Tribunal decisions have taken the approach that the real test of the truth of the story of a witness is its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

The worker first reported that she was sexually harassed and assaulted in October 1993 when she contacted the police and the employer. The worker described several incidents of sexual harassment witnessed by teachers, the school secretary, co-worker and the custodial supervisor, and sexual assault (rape) witnessed by a teacher and the custodial supervisor. The group leader described the same incidents in interviews and testimony. The worker and the group leader sharply disagree about the incidents.

We have set out at some length above the evidence from the worker, the group leader and teachers, school staff and students, including people identified by the worker as witnesses to various incidents. In our view, the worker's description of the incidents is not in harmony with the statements from the witnesses named by the worker or the testimony at the Tribunal from the co-worker, school secretary and custodial supervisor. For example, the co-worker recalled conversations of a sexual nature, but did not recall them the way the worker did, and did not recall the group leader brushing by the worker, kissing her or touching her breasts. The school secretary recalled the incident when she returned to the school, but did not recall it the way the worker did and was not concerned at the time about what she saw. One teacher recalled the worker telling the group leader that she did not like a remark he had made, while another teacher did not recall the worker reprimanding the group leader for his behaviour but recalled that she might even have laughed at one of the group leader's remarks. The same teacher

recalled the incident when he returned to the school and went to the staff room, but did not notice anything in particular about the behaviour of the worker or the group leader. The teacher identified by the worker as having witnessed the group leader rub his crotch did not recall such an incident. The teacher identified by the worker as witnessing the group leader giving her an unwanted kiss did not recall such an incident. A teacher seemed to recall the group leader teasing the worker about a cut and sore spot on her nose, but described it as a “non-event”. The custodial supervisor recalled coming to the school during March break and encountering the group leader and the worker, but denied seeing the group leader harassing and raping the worker in the school office as described by the worker.

This raises the matter of the worker talking to the custodial supervisor about her daughter working at the school which the worker described as taking place at the time of this incident during March break. The worker explained that the group leader essentially forced her to speak to the custodial supervisor and she spoke to him about her daughter working at the school because she had to say something. We think it unlikely that the worker would have wanted her daughter to work in the environment described by the worker or raised the matter with the custodial supervisor having just been raped by the group leader. We also find her explanation for raising the matter with the custodial supervisor on that occasion to be implausible.

It does not seem reasonable to us that the worker could have been subjected over 15 months to the level of intimidation and violence she and her representative described without someone noticing something. It seems reasonable to expect that at least one witness the worker herself identified would have corroborated her view of events. It also seems reasonable to expect that the thorough investigation by the employer which occurred immediately following the events and which involved interviews with some 30 people would have uncovered evidence, if the events had occurred as the worker feels they did.

Considering the evidence as a whole, we find that the incidents did not occur as described by the worker. The preponderance of evidence indicates to us that there were consensual sexual incidents, including sexual intercourse, involving the worker and the group leader, and that they did not cause the worker mental stress while they were occurring. The evidence also indicates to us that the worker came to believe that these sexual incidents took place without her consent, and that it was the investigation by the employer and the outcome of the investigation that caused the worker mental stress.

We have considered Dr. Borins’ testimony about the psychology of bullying and the role of bystanders and her views about the character and motivation of the worker and the group leader. However, we note that Dr. Borins’ understanding of this case comes entirely from what the worker told her four to five years after the period at issue and the worker’s complaint to the employer. With respect, Dr. Borins’ testimony is theoretical since she has not dealt with the group leader directly nor has she read the employer’s investigation report or heard the witnesses at this hearing. Her analysis is based on her acceptance of the worker’s account. Our understanding of the case is based on information provided by several people at the time of the worker’s complaint and testimony from both the worker and the group leader and from the co-worker, school secretary and custodial supervisor identified by the worker as witnesses to the incidents.

The medical evidence for the period from June 1992 to September 1993 contains no diagnosis of mental stress and no evidence, in our view, to suggest that the worker was suffering from mental stress due to events at work. This is not a case where there is no medical evidence because the worker did not seek medical attention or where the medical record does not contain references to sexual concerns. On the contrary, the worker saw her family doctor, Dr. Jones, on several occasions between June 1992 and September 1993. The only suggestions of mental stress in Dr. Jones’ notes for the period from June 1992 to September 1993 appear in notes dated November 5 and 30, 1992 and these refer to marital issues. The only references to sexual difficulties occur in the context of marital situations. The worker’s explanation for how these comments appeared in

Dr. Jones' notes do not seem plausible to us. The medical record indicates that the worker felt sufficiently comfortable with Dr. Jones to discuss sexual matters. We consider it unlikely that, once having raised the topic of sexual matters, the worker would not have said something or given some indication that would have raised some concern in Dr. Jones' mind. The worker described herself at one point as having a "year long nervous breakdown" during the period at issue, but we find no suggestion of that in Dr. Jones' notes for the period despite her numerous visits to him.

In its letter to the group leader, the investigating committee described him as "being in a position of authority" over the worker. Our review of the evidence indicates that the group leader did not occupy a position of authority over the worker. The worker and the group leader were part of the same bargaining unit. The group leader was the responsible custodian for the school property, but had no authority to interview, hire, discipline or fire, and did not have input into performance evaluation. Again, this distinguishes the facts in this case from other Tribunal decisions where the worker was in a position of significant vulnerability.

The first indication that the worker was suffering from mental stress occurred only after she reported to the police and her employer that the group leader had sexually harassed and assaulted her during the period June 1992 to September 1993. The medical evidence includes several reports diagnosing post-traumatic stress disorder. All of the reports concern medical attention the worker received after, in some cases several years after, the period at issue from June 1992 to September 1993.

The worker did not work from October 4 to December 6, 1993, the period during which the employer conducted its investigation. The investigating committee submitted its report to the director of education on November 24, 1993, and the director of education wrote to the worker and the group leader on November 30, 1993. The worker returned to work at a different school on December 6, 1993. It was only in February 1994 when the group leader returned to work at a different school that the worker stopped working. The worker described her reaction to the group leader returning to work to the Claims Investigator, stating that she became hysterical at the thought that the group leader would be in contact with women and children again.

It seems clear from this description and from comments by the worker, for example, in letters to the director of education and the Ontario Human Rights Committee, reports from the worker's treating psychologists and psychiatrists, and testimony at the Tribunal, that the worker felt betrayed, initially by the employer's handling of her complaint, particularly, by what she regarded as the lenient punishment meted out to the group leader, and later by the criminal justice system, the Human Rights Commission, the WSIB and the Criminal Injuries Compensation Board.

We do not share this view. For the reasons set out above, we have reached the independent conclusion that the alleged sexual harassment and assault did not occur. We are also of the view that the employer handled a difficult investigation in a professional way. While an investigation which rejects a complaint will be stressful to the complainant, we are satisfied that a worker of average mental stability would not have suffered a disabling reaction.

Faced with an extremely difficult situation involving charges by one worker against another worker of repeated sexual harassment and assault over 15 months at one of its secondary schools, the employer immediately undertook what can only be regarded, in our view, as an extensive investigation involving interviews with some 30 people, including co-workers, teachers, school secretary, group leader, custodial supervisor and students. The worker was interviewed on at least two occasions by the investigating committee, spoke by telephone to the two members of the investigating committee, and submitted written statements to the investigating committee. The investigating committee interviewed several individuals identified by the

worker as being present during particular incidents. The school principal spoke to and took statements from several students. The involvement of students and the school community at large no doubt made the situation stressful for the employer and for the worker and other people involved.

The group leader continued working and the worker was off work on sick leave during the investigation. The worker objected to the group leader remaining at work during the investigation, thus giving him an opportunity in her view to influence potential witnesses. While the investigation might have been structured differently, it does not seem unreasonable to us that the employer would not prevent the group leader or the worker from working during the investigation. In any event, this is a matter which could have been pursued by the worker at the time if she had felt that it was an issue of significant concern. With respect to the group leader having the opportunity to influence potential witnesses, we note that the worker herself attempted to speak or spoke to students at the time she complained to the employer. Looking at the employer's handling of the situation overall, we are satisfied that the employer took the worker's allegations very seriously and conducted an immediate and thorough investigation.

The investigating committee submitted its report to the employer about seven weeks after the worker's complaint to the employer and the police. The director of education met separately with the worker and the group leader on November 30, 1993 to discuss the outcome of the investigation and gave them a copy of a letter. Again, we are satisfied that the employer communicated the results appropriately and was sensitive to the fact that the worker and the group leader should be kept apart.

The group leader was suspended without pay for two months, demoted to custodian and transferred to a different school. The demotion remained in effect for about two years when the employer permitted the group leader to apply for a posted group leader position. We do not regard a two-month suspension without pay and a demotion to be unreasonable, given that the discipline was being imposed for sexual conduct in the workplace. The worker was assigned to work at a different school. We do not regard this assignment as punishment, and accept as reasonable the explanation by the director of education that such a move was in the best interests of the school community.

To summarize, this is not a situation where the worker's complaints were ignored and she was forced to work in stressful conditions for long periods before any action was taken. As soon as the complaint was made, the employer undertook a thorough and professional investigation. While the investigation did not substantiate the worker's complaints, the group leader was nonetheless disciplined for inappropriate sexual conduct in the workplace which he admitted. The worker was not disciplined, nor was she placed in a situation where she would have to continue to deal with the group leader. We note that the worker returned to work following the investigation and did not lay off until she discovered the group leader was returning to work, at a lower position in a different school. The worker's reaction appears to have been due to her mistaken belief that the group leader had engaged in violent and non-consensual sexual acts. We are satisfied that this reaction was a product of the worker's own perceptions and beliefs. The medical opinions supporting a causal connection between the workplace events and the worker's condition are based on a version of events which the Panel has rejected.

Having considered all of the evidence, we conclude that the injuring process that produced the worker's mental stress did not arise out of and in the course of her employment for the employer from June 1992 to September 1993.

DISPOSITION

The appeal is denied.

Appeal dismissed.



Decision No. 610/05R

Panel: Crystal (Vice-Chair), Wheeler, Grande

Decision — June 8, 2006

Neutral Citation: 2006 ONWSIAT 1257

Reconsideration (natural justice) – Natural justice (procedural error) (full and fair hearing) – Hearing (conduct of hearing).

Worker was, at times, directed to limit answers so that they would be responsive to questions asked – These directions from the panel were appropriate – Further, hearing was reconvened for sole purpose of hearing submissions from worker's representative – It was appropriate to advise worker that his role on reconvened hearing would be limited to observing – There was no denial of natural justice.

The worker applied for reconsideration of *Decision No. 610/05*.

The original hearing panel considered the evidence and came to a reasonable conclusion. New evidence submitted by the worker would not have changed the result.

There was no denial of natural justice in the conduct of the hearing. The worker was, at times, directed to limit his answers so that they would be responsive to the questions asked by his representative and the hearing panel. These directions from the panel were appropriate. Further, the original hearing was reconvened for the sole purpose of hearing submissions from the worker's representative. It was appropriate to advise the worker that his role on the reconvened hearing would be limited to observing the proceedings.

The application to reconsider was denied.

Réexamen (justice naturelle) – Justice naturelle (erreur de procédure) (audition complète et équitable) – Audience (déroulement de l'audience).

Le comité avait demandé à quelques reprises au travailleur de limiter ses réponses aux questions posées – Ces directives du comité étaient appropriées – L'audience avait repris à une date ultérieure dans le seul but d'entendre les observations du représentant du travailleur – Il était approprié d'informer le travailleur qu'il devrait se contenter d'observer lors de la reprise de l'audience – Il n'y avait pas eu déni de justice naturelle.

Le travailleur a demandé le réexamen de la *décision no 610/05*.

Le comité d'audience avait examiné la preuve et était parvenu à une conclusion raisonnable. Un nouveau témoignage de la part du travailleur n'aurait pas changé le résultat de l'appel.

Il n'y avait pas eu déni de justice naturelle lors de l'audience. Le comité avait demandé à quelques reprises au travailleur de limiter ses réponses aux questions posées. Ces directives du comité étaient appropriées. L'audience avait repris à une date ultérieure dans le seul but d'entendre les observations du représentant du travailleur. Il était approprié d'informer le travailleur qu'il devrait se contenter d'observer lors de la reprise de l'audience.

Le Tribunal a rejeté la demande de réexamen.

Tribunal Decisions Considered:

- *Decision No. 72R* (1986), 18 W.C.A.T.R. 1 reld to
- *Decision No. 72R2* (1986), 18 W.C.A.T.R. 26 reld to
- *Decision No. 95R* (1989), 11 W.C.A.T.R. 1 reld to
- *Decision No. 850/87R* (1990), 14 W.C.A.T.R.1 reld to
- *Decision No. 393/91*(1993), 26 W.C.A.T.R. 72 consd

Workplace Insurance Legislation Considered:

- *Workers' Compensation Act*, R.S.O. 1990, c. W.11
 - s. 70
 - s. 92
- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
 - s. 129

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
 - Document No. 03-02-09 (August 9, 1991) (since superseded)

Cross-References:

- *Decision No. 610/05* (September 23, 2005) [2005 ONWSIAT 2103]

APPLICATION by the worker to reconsider *Decision No. 610/05*.

June 8, 2006. THE TRIBUNAL: —

BEFORE:	M. Crystal, Vice-Chair B. Wheeler, Member Representative of Employers A. Grande, Member Representative of Workers
HEARING:	December 22, 2005 at Toronto, Written hearing
DECISION(S) UNDER APPEAL:	Worker request for reconsideration of <i>Decision No. 610/05</i> dated September 23, 2005
APPEARANCES:	
For the worker:	Self-represented

REASONS

(i) Introduction

This request for reconsideration was considered on December 22, 2005, by M. Crystal, Vice-Chair, B. Wheeler, Member Representative of Employers, and A. Grande, Member Representative of Workers.

(ii) The Reconsideration Request

The worker is requesting that the Tribunal reconsider its *Decision No. 610/05*, dated September 23, 2005. Two reconsideration request forms were prepared by the worker, dated September 30, 2005 and October 27, 2005. In support of these requests for reconsideration, the worker also provided correspondence dated October 27, 2005, November 9, 2005 and December 14, 2005, each with attachments.

We had before us *Decision No. 610/05*, the reconsideration request forms, and the reconsideration record.

The worker is claiming that *Decision No. 610/05* should be reconsidered because:

- i. the Panel did not properly take into account the evidence that was before it on appeal;
- ii. new evidence, adduced with the worker's Request for Reconsideration, supports a finding that the worker is entitled to benefits;
- iii. the hearings conducted on March 31, 2005 and July 18, 2005 were not fair hearings and did not meet the requirements of natural justice.

(iii) The Reconsideration Test

The *Workers' Compensation Act*, R.S.O. 1990, c. W.11, and the *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A, provide that the Appeals Tribunal's decisions shall be final. However, sections 70 and 92 of the *Workers' Compensation Act* and section 129 of the *Workplace Safety and Insurance Act* provide that the Tribunal may reconsider its decisions "at any time if it considers it advisable to do so." Because of the need for finality in the appeal process, the Tribunal has developed a high standard of review, or threshold test, which it applies when it is asked to reconsider a decision.

Generally, the Tribunal must find that there is a significant defect in the administrative process or content of the decision which, if corrected, would probably change the result of the original decision. The error and its effects must be significant enough to outweigh the general importance of decisions being final and the prejudice to any party of the decision being reopened. The threshold test has been discussed in some detail in *Decisions No. 72R* (1986), 18 W.C.A.T.R. 1, 72R2 (1986), 18 W.C.A.T.R. 26, 95R (1989), 11 W.C.A.T.R. 1, and 850/87R (1990), 14 W.C.A.T.R. 1.

It should be noted that in the materials submitted by the worker in support of his Request for Reconsideration, he frequently referred to *Decision No. 610/05* as a decision of the Vice-Chair, without referring to the fact, as noted above, that *Decision No. 610/05* is a decision by all three members of the Panel. In the same manner, it should be noted that this decision is also a decision of all three members of the Panel.

(iv) The Basis for Decision No. 610/05

The issue to be determined in *Decision No. 610/05* was whether the worker is entitled to benefits for a heart condition. The decision denied entitlement on three grounds.

First, the decision concluded that the evidence before the Panel was insufficient for us to determine that the worker suffered a myocardial infarction (MI) (i.e., a heart attack) or heart failure in May 1996, or at any other time, apart from a pre-1994 “silent MI”.

The Panel reviewed the medical evidence included in the case materials. *Decision No. 610/05* provided a summary of the medical evidence that it considered to be pertinent to the decision. We found that the medical evidence indicated that the worker suffered from a chronic cardiac condition but that it did not support a finding that the worker suffered an MI or heart failure in or about May 1996.

Secondly, the decision concluded that, although the worker plainly suffered from a chronic cardiac condition, and that the worker received medical treatment in February 1994, April 1996, and at other times for such condition, the preponderance of evidence did not disclose that such treatment related to discrete incidents associated with acute emotional stress. The decision noted that the Board’s *Operational Policy Manual* Document No. 03-02-09 states that entitlement for a heart condition will be allowed in circumstances where there has been “acute emotional stress with no significant delay in the onset of symptoms.” *Decision No. 610/05* stated in part [at para. 79]:

In our view, [*Operational Policy Manual* Document No. 03-02-09] means that entitlement for a heart condition will only be allowed when cardiac symptoms are an immediate sequela of a discrete episode of emotional stress. The policy does not allow entitlement for a heart condition that results from long-term chronic stress.

Thirdly, the decision concluded that the worker was subject to an array of non-compensable risk factors for cardiac disease. These included chronic coronary artery disease, chronic peripheral vascular disease, type II diabetes mellitus, hypertension, hyperlipidemia, obesity, a family history of heart disease, a history of smoking, non-compliance with dietary advice and non-compliance with drug therapy. It was the Panel’s view that the existence of these non-compensable risk factors made it unlikely for occupational emotional stress to have been a factor which contributed significantly to the worker’s chronic cardiac condition.

(v) Whether the Panel Properly Took Into Account the Evidence Before It

Included with the worker’s Request for Reconsideration Form was about 500 pages of documentation, much of which was included in the original case materials. The Panel reviewed all of the evidence included in the case materials in reaching its decision. In our view the worker is seeking to re-argue the appeal given an unfavourable outcome.

A point which is raised by the worker’s materials in support of his request for reconsideration is the allegation that the Panel did not properly take into account evidence which indicated that the worker suffered from “congestive heart failure” on May 9, 1996.

The case materials included a series of documents which state at the top of each document “Decoded List of Services for: [the worker]”. At the appeal hearing the Panel inquired about these documents and asked the worker’s representative if she could explain how the documents came into existence. No clear explanation was provided to the Panel in relation to these

documents.

The documents appear to be a series of computer generated printout pages. Each printout page was comprised of a series of lines. Each line apparently represented a time when a medical service was provided to the worker. Each line included information on the “provider #,” “Date,” “Service Code” and “Diagnostic Code.” On further reflection, the Panel considers it likely that this information is a printout from the Ontario Health Insurance Plan (OHIP), which describes the services that were provided over time to the worker through OHIP.

One line in one document indicated that for May 9, 1996, the service code was “General assessment – internal medicine.” The same line provided a diagnostic code of “CONGESTIVE HEART FAILURE.” It appears to be the worker’s contention in the materials which support his Request for Reconsideration, that this is proof that on May 9, 1996, he experienced congestive heart failure.

In fact, the case materials included a written report prepared by Dr. Devaraj dated May 9, 1996. The report noted that the worker was seen by Dr. Devaraj, who is a specialist in internal medicine, on that date. The report noted that the worker was admitted to hospital on April 24 and 25, 1996 with a diagnosis of bronchitis and pleurisy. The report stated in part:

IMPRESSION

1. Recently treated pneumonia and pleurisy
2. Hypertension
3. Type 2 diabetes mellitus
4. Severe hypercholesterolemia – on combination treatment
5. PVD [peripheral vascular disease] – stable
6. CAD [coronary artery disease] – stable.

The report did not refer to the worker suffering from a recent episode of congestive heart failure. The case materials included a further report from Dr. Devaraj dated June 13, 1996. That report also did not refer to the worker suffering from a recent episode of congestive heart failure. It is the Panel’s view that if the worker suffered congestive heart failure on May 9, 1996, it is probable that information to that effect would have been included in the report from Dr. Devaraj of that date, or at least in the subsequent report provided by Dr. Devaraj. In our view, the “Diagnostic Code” of “CONGESTIVE HEART FAILURE” indicated on the OHIP printout for May 9, 1996, does not represent a medical diagnosis. It may represent an area of concern, or an area of investigation. Even if the entry were to be treated as a diagnosis, such diagnosis is inconsistent with the information contained in the medical report by Dr. Devaraj for that date. The Panel relies on that medical report. We note that the OHIP printout indicated that the service provided to the worker as indicated by the “service code” for May 9, 1996 was “General assessment – internal medicine”. The provision of such service is consistent with the service described in the report from Dr. Devaraj for that date.

The Panel did not “overlook” the evidence of the OHIP printout. It did not give weight to the printout, however, because in our view, the best evidence available in relation to the worker’s medical condition on May 9, 1996, was the medical report of

that date provided by Dr. Devaraj.

In support of his request for reconsideration, the worker also stated that the Panel did not take into account evidence provided by Dr. Hew or Dr. Devaraj which indicated that the worker's medical condition was attributable to emotional stress. In fact, the Panel did take this medical information into account. *Decision No. 610/05* stated in part [at paras. 81-82]:

In fact, there are few references in the case materials to job stress of any type. So far as we can ascertain, there are three references to job stress in the materials. The first is an entry, dated February 18, 1988, in Dr. Hew's clinical notes, in which he stated that the worker had five risk factors for heart disease, and he listed "job stress" as one of those factors. The second is an insurance form, dated July 17, 1996, prepared by Dr. Devaraj. That form stated that the worker suffered from "angina on exertion or emotional stress." The third reference to emotional or workplace stress in the materials is the more recent report provided by Dr. Hew, dated October 20, 2004.

All of these references relate to stress in a general way, and none of them refer to a discrete episode of acute emotional stress which was immediately followed by the onset of cardiac symptoms. The only evidence before us of such discrete episodes was the testimony of the worker, which, for reasons noted above, we find to be unreliable.

It should be understood that the Panel did not deny that the worker's employment with the accident employer may have been stressful. In *Decision No. 610/05*, the Panel found, however, that the worker's occupational stress was chronic. Board policy allows entitlement for a heart condition, however, when there has been "acute emotional stress with no significant delay in the onset of symptoms." For reasons which are fully set out in *Decision No. 610/05*, we found that the worker did not meet that criteria. The Panel did not overlook the medical evidence provided by Dr. Hew or Dr. Devaraj. Rather, it concluded that that evidence was evidence of chronic stress rather than evidence of a heart condition attributable to "acute emotional stress with no significant delay in the onset of symptoms." As such, the evidence did not give rise to entitlement under the Board's policy.

We note that where there is strong evidence which is specific to a worker and supports medical causation, some Tribunal decisions have relied on the medical evidence even where the situation is not covered by Board policy. This happens, for example, in occupational disease cases where the exposure levels required by Board policy, or some other element of Board policy, have not been met, but where the medical evidence nevertheless indicates causation.

In this case, however, in addition to the fact that the worker's condition does not satisfy the requirement in Board policy that allows entitlement for a cardiac condition associated with emotional stress only where there has been "acute emotional stress with no significant delay in the onset of symptoms," the medical evidence associated with causation, or significant contribution to the condition, was not sufficient to support entitlement, particularly in light of the non-compensable risk factors which are enumerated and described elsewhere in the decision.

We also note that in the worker's materials which are provided in support of his request of reconsideration, the worker stated:

In June 24, 1996, I was in the Show room and I collapsed to the floor and taken to the Mississauga General Hospital via Ambulance to Emergency Care. And then transferred to St. Michael's Hospital Emergency Critical Care Unit. They did not think that I was going to make it and they called my wife and even paid for her Taxi Ride to see me for the last Time [sic] as I was ¼ inch from death at that time and I was in a very special section at the hospital with a nurse 24 hours a day...

I was in the Hospital critical care unit from June 24 to July 5 1996 with severe angina...

The facts disclosed by the medical documentation on record is not consistent with this account of events. According to a report prepared by Dr. Devaraj, dated June 24, 1996, on that date the worker had undergone a “persantine thallium study.” That study apparently was planned in advance and does not appear to have been performed on an emergency basis, given that Dr. Devaraj stated in a report dated June 13, 1996, that the study would need to be performed “in the near future for further assessment of chest pain.” According to the report from Dr. Devaraj dated June 24, 1996, however, when the worker underwent the study on that date, he developed quite severe chest pain during the persantine infusion. He was admitted to the emergency department of Credit Valley Hospital subsequent to his severe reaction to the persantine thallium study on June 24, 1996 and on June 27, 1996, he was transferred to St. Michael’s Hospital on an emergency basis.

Accordingly, it appears from the evidence that the factor which precipitated the worker’s admission to hospital in late June and early July 1996 was not a collapse on the showroom floor of the accident employer’s premises on June 24, 1996, but rather, a severe adverse reaction to a planned test that was administered in the morning on that date.

As a general proposition, the worker has submitted in his materials in support of his request for reconsideration that the Panel did not properly take into account the severity of his condition. It should be understood that the Panel recognizes that the worker is severely disabled. In *Decision No. 610/05*, it found, however, that the worker’s disability was not compensable under the applicable legislation or Board policies.

It was the worker’s further submission that the Panel did not properly take into account evidence relating to the failure of the accident employer to accommodate the worker and that it did not take into account the manner in which he was allegedly mistreated by the accident employer. The worker also has submitted that the Panel did not permit him to lead evidence to the extent he considered necessary, in relation to these issues pertaining to his treatment by the accident employer.

In *Decision No. 610/05* the Panel took into account the fact that the worker had poor relations with the accident employer towards the end of his tenure with the employer. As noted above, the Panel does not dispute that the worker suffered from chronic occupational stress. The three grounds for determining that the worker was not entitled to benefits in this appeal are set out at length in *Decision No. 610/05*, and are summarized above. They need not be repeated at this point in these reasons. The Panel has taken into account the evidence included in the case materials and in the worker’s testimony concerning his working conditions and relationship with the accident employer. Given the basis for *Decision No. 610/05*, that evidence does not cause us to change the decision.

(vi) New evidence Provided with the Request for Reconsideration

The worker provided the Tribunal with some new evidence in support of his request for reconsideration of *Decision No. 610/05*. One such piece of evidence is an unsigned copy of a letter, dated November 8, 2006, apparently prepared by the worker’s twin sister. The correspondence stated that she herself did not suffer from any health problems associated with a heart condition, that their mother died at age 58 due to some issues associated with rheumatic fever which she had at age 19, and that their father died in his early 80s, while suffering from Alzheimer’s disease. Her letter implied that there did not appear to be hereditary factors associated with heart disease affecting the worker, and that “any issues he has are entirely related to his level of stress within his past working environment.”

In the worker’s material in support of his request for reconsideration he stated:

For Some reason Mr. Crystal does not want to believe the status of official death certificates that were related to my parents dying at the age of thirty-five and my father at the age of sixty of heart disease where in fact my mother died at the age of 61 from uterus cancer and yeas [sic] my father died of a heart attack and stroke at the age of 84 which at this point the gentleman (Mr. M. Crystal) because of the wrongful information I will seek a court order to have the bodies exhumed and tested for heart disease and their death reasoning to prove not only their evidence by mine also. Mr. Crystal was shown their death certificates and their ages but for some reason he does not want to believe the official status of the certificates and the reporting system of the government of Ontario...

We note that the evidence provided by the worker's sister is inconsistent with histories provided by the worker to his physicians, as recorded in the various reports that they provided. In particular, we note that the report provided by Dr. Devaraj, dated June 24, 1996, stated that the worker's "father died at age 60 after two myocardial infarctions" and that his "mother died at age 35 of unknown reason." Dr. Ball stated in his report dated July 5, 1996, that the worker "has a positive family history for cardiac disease." Dr. Freeman stated in his report dated September 10, 1996, that the worker had a "family history of premature coronary artery disease in that his mother died in her mid 30s of presumed CAD and his father died at age 60 having sustained two previous myocardial infarctions."

We also note that the information provided in the worker's sister's letter is not consistent with the account provided by the worker in his submissions in support of his request for reconsideration (i.e., the letter from the sister stated that their mother died at age 58 as a result of factors associated with an earlier occurrence of rheumatic fever, while the worker's submissions stated that their mother died of cancer of the uterus at age 61; the letter from the sister stated that their father died while suffering from Alzheimer's disease and does not mention heart disease as a cause of his death, while the worker's submissions stated that their father died of a heart attack and stroke).

Given the repeated histories that the worker provided to his physicians stating that he had a family history of heart disease, we are not persuaded by the letter from the worker's sister that there was no history of heart disease in the worker's family. It should be understood, however, that the question of whether there was such a family history, although a factor in *Decision No. 610/05*, was not the determinative factor in that decision. As noted above, the Panel gave three grounds for its decision. One of those grounds was that the worker was subject to an array of non-compensable risk factors which caused the Panel to conclude that emotional stress was probably not a significant factor contributing to the worker's condition. Eleven risk factors, apart from emotional stress, were noted in the decision. A family history of heart disease was only one of the identified non-compensable risk factors.

Even if it were established that there was no history of heart disease in the worker's family, given the other non-compensable risk factors noted in *Decision No. 610/05*, and the other grounds for the decision, the disposition of the appeal would not be affected.

In support of the worker's request for reconsideration, the worker also provided documentation prepared by a Claims Specialist employed by the accident employer's disability insurance provider. The documentation indicated that the worker's coverage was initially terminated in August 1996, but that in December 2001 the worker entered into a settlement with the insurer whereby he was paid an all-inclusive amount of \$25,000. Life insurance coverage was also continued.

We have considered this evidence associated with entitlement decisions made by the employer's disability insurance provider. In our view, the worker's entitlement to benefits available through a private insurer is a separate issue which does not involve the application of the Act. We have also taken into account the fact that it is unlikely that the insurer had the benefit of all of

the evidence upon which this Panel based its decision.

In support of the worker's request for reconsideration, the worker also provided copies of pages that appear to be from his desk calendar in 1994 and 1996. The pages included a small area for each date in which notations could be made. We have reviewed this material, paying special attention to notations made for the period from April to July 1996. Nothing included in this material would cause us to change the disposition of *Decision No. 610/05*.

(vii) Whether the Worker Had a Fair Hearing which Met the Requirements of Natural Justice

The worker provided testimony at the hearing that was conducted on March 31, 2005. In submissions that the worker provided in support of his request for reconsideration, he stated:

During the Trial March 31 2005 I tried to bring in and introduce evidence and was told by Mr. M. Crystal to be quiet and only answer questions that he only asks and do not say any thing else as per the trial tapes...

Issues that were not addressed under the Charter of Rights and Human Rights act [sic] that Mr. Crystal would not allow to be addressed when He [sic] told me to be quiet and not speak and only answer questions that he asks.

We agree that, at times during the hearing on March 31, 2005, the worker was directed to limit his answers so that they would be responsive to the questions asked of him by his representative and the Panel. We agree that the Panel gave directions to the worker to limit the scope of testimony so that it would be responsive to the issues within our jurisdiction. We find that the Panel's directions to limit the scope of the worker's testimony and the scope of the issues to be considered in the appeal, to have been appropriate.

The Tribunal's jurisdiction is limited by the Act to issues on which the Board has made a final decision which has been appealed to the Tribunal. Statutory tribunals have limited jurisdiction and it is not unusual for them to limit the issues and testimony to those matters that they can decide.

It was also the worker's submission that:

At the secondary trial that was held on July 18, 2005 right up front Mr. M. Crystal said directly as per the tapes that I was not allowed to say anything address anything or give anymore evidence and to be quiet. Criminals get a better deal than I did...

At the conclusion of the hearing on March 31, 2005, the worker's representative completed her case in-chief and advised the Panel that she wished an opportunity to obtain a few more medical reports. The Panel agreed to allow the worker time to obtain this additional documentation. The hearing was reconvened on July 18, 2005, for the sole purpose of hearing submissions from the worker's representative on the merits of the appeal. The worker's representative, who was responsible for the conduct of the appeal, did not advise the Panel at any time between the conclusion of evidence on March 31, 2005, and the reconvened hearing on July 18, 2005, that the worker wished to provide further testimony.

It was understood by the representative that the purpose of the reconvened hearing was to allow her to provide submissions. At the reconvened hearing, the Panel advised the worker that it wished to hear submissions from his representative and that it did not wish for the worker to intervene in the delivery of submissions.

In our view, where a party is represented at a hearing and the only remaining task to be completed is the delivery of submissions, it is the representative's role to present the submissions. The worker was represented by an experienced representative who made reasoned submissions. The worker was free to dismiss his representative if he did not believe that she was representing him appropriately. The worker was also free to ask for a break in the proceedings so that he might provide instructions to his representative, if he was not satisfied with the manner in which she was presenting the submissions. That did not occur. Given that the worker's testimony had been completed and the only element of the case which remained to be completed on July 18, 2005, was the presentation of submissions by the representative, it was appropriate for the Panel to advise the worker that his role on that date was to observe the proceedings.

The materials submitted by the worker in support of his request for reconsideration included a copy of the letter sent to him by the Tribunal's Scheduling Department which indicated that the hearing on March 31, 2005 was scheduled for "all day." The worker made a marginal notation on the copy which stated "I was entitled to all day not from 10:20 a.m. to 12:20 a.m."

We find that the Panel conducted the hearing on both March 31, 2005, and on July 18, 2005, until the worker's representative advised the Panel that the hearing session was completed. It was appropriate to adjourn the hearing on March 31, 2005, when the evidence and submissions were completed for that date, and again on July 18, 2005, when the representative completed her submissions on that date.

We also note that the materials submitted by the worker in support of his request for reconsideration indicated that the swearing of an oath should be performed on a Bible. In the circumstances of this appeal, the worker did not swear an oath to tell the truth on a Bible, but affirmed that he would tell the truth.

The Panel in *Decision No. 393/91* (1993), 26 W.C.A.T.R. 72, determined that a secular oath was appropriate and that the substantive requirements of the traditional oath are fulfilled by a solemn promise to tell the truth together with a warning about consequences of intentionally failing to do so. At the appeal hearing, the worker promised to tell the truth and stated that he understood that if he broke that promise he would be breaking the law. We agree with the Panel in *Decision No. 393/91* and find that the affirmation made by the worker was appropriate and met the pertinent legal requirements.

We find that the hearing conducted on March 31, 2005 and reconvened on July 18, 2005, was in accordance with the Tribunal's general practices, appropriate to the circumstances, and met the requirements of natural justice.

(viii) Conclusion

We find that there was no significant defect in the administrative process or content of the decision which, if corrected, would probably change the result of the original decision. Accordingly, we find that the Tribunal's threshold test for granting a reconsideration request has not been met.

DISPOSITION

The request for reconsideration is denied.

Application denied.



Decision No. 940/05

Vice-Chair: Moore

Decision — May 29, 2006

Neutral Citation: 2006 ONWSIAT 1178

Right to sue – Worker (test) – Worker (deemed) – Independent operator (owner/operator) – Personal coverage.

Truck driver was independent operator, not worker of trucking company, considering factors such as intent of parties and capital investment, even though contract contained exclusivity clause – Trucking company reported payroll for drivers, but driver was not aware of, and did not consent to, compensation coverage – Driver was also not deemed worker by direction of Board.

The plaintiff in a civil case was the operator of a truck that he had leased privately. He drove under licences that were in the name of a trucking company. The plaintiff was injured in a motor vehicle accident in August 2003. The plaintiff brought the action against the owner and the operator of the other truck. An insurer applied to determine whether the plaintiff's right of action was taken away. The issue was whether the plaintiff was a worker or an independent operator at the time of the accident.

Board policy with respect to independent operators in the trucking industry generally relies on five features. The Vice-Chair's reading of Tribunal decisions suggested that considerable weight will be given to the extent of an individual's capital investment and to the stated intention of the parties. These criteria are also reflected in Board policy.

The intention of the parties was demonstrated in the owner-operator agreement entered into between the plaintiff and the trucking company. That agreement clearly established that the intent of the parties was to create a relationship between two independent contractors.

Regarding capital investment, the Vice-Chair was satisfied that the worker's capital investment was significant and that it provided him with an opportunity for profit or loss. The plaintiff bore a wide variety of financial responsibilities under the contract, including provision and maintenance of a vehicle, provision of substitute drivers, fuel and insurance costs.

A third criterion in Board policy involves market mobility. The contract in this case contained an exclusivity clause. However, Tribunal decisions have found that two parties can have an exclusive relationship and not have an employment relationship. The Vice-Chair found that the exclusive relationship in this case reflected a mutually beneficial

interdependent relationship in which the plaintiff retained a status separate from the trucking company.

The Vice-Chair concluded that the plaintiff was an independent operator.

The trucking company had been in negotiations with the Board regarding the status of its contractors. From 1997 onward, the trucking company began payroll reporting. The applicant submitted that, when the plaintiff entered into the contract with the trucking company, he was effectively applying for personal coverage.

Section 12(1) of the *Workplace Safety and Insurance Act, 1997*, states that, where an independent operator makes an application for personal coverage, the Board may declare that person to be a deemed worker. This implies that the independent operator must make an application for coverage. The Vice-Chair also noted s. 12(2) which provides that a company may apply for coverage for an executive officer. Such an application can be made by the company itself, but the Board will not make a declaration unless the executive officer consents to the application. The Vice-Chair was of the view that s. 12(1) did not require consent to the application by the independent operator because the independent operator must make the application personally. In this case, the plaintiff was not aware of and had not consented to compensation coverage.

The definition of worker includes a person deemed to be a worker or an employer by a direction or order of the Board. The Board stated that it does not deem people to be workers under that provision.

The Vice-Chair concluded that the plaintiff was an independent operator, that he did not have personal coverage and that he was not a deemed worker. Accordingly, the plaintiff's right of action was not taken away.

Droit d'intenter une action – Travailleur (critère) – Travailleur (réputé) – Exploitant indépendant (propriétaire exploitant) – Protection individuelle.

Le conducteur de camion était un exploitant indépendant, et non un travailleur de l'entreprise de camionnage, compte tenu de facteurs tels que l'intention des parties et les investissements en capitaux, même en dépit d'une clause d'exclusivité – L'entreprise de camionnage déclarait la masse salariale de ses conducteurs mais le conducteur en l'espèce n'était pas au courant de la protection et n'y avait pas consenti – La direction de la Commission ne considérait pas le conducteur de camion comme un travailleur.

Le demandeur dans une action civile était le conducteur d'un camion qu'il louait en privé. Les permis qu'il utilisait étaient au nom d'une entreprise de camionnage. Il a subi une lésion dans un accident de véhicule automobile en août 2003. Il a intenté une action contre le propriétaire et conducteur de l'autre camion. Un assureur a demandé au Tribunal de déterminer si la Loi supprimait le droit d'action du demandeur. Le Tribunal devait régler la question de savoir si le demandeur était un travailleur ou un exploitant indépendant au moment de l'accident.

La politique de la Commission au sujet des exploitants indépendants de l'industrie du camionnage repose généralement sur cinq critères. Le vice-président a estimé que la jurisprudence du Tribunal semblait accorder une importance considérable à l'investissement fait par le particulier et à l'intention déclarée des parties. La politique de la Commission

tenait également compte de ces critères.

Le contrat de propriétaire exploitant liant le demandeur et l'entreprise de camionnage démontrait l'intention des parties. Le contrat établissait clairement que les parties avaient l'intention d'établir une relation entre deux exploitants indépendants.

Le vice-président était aussi convaincu que le travailleur avait fait un investissement considérable en capital et que cet investissement créait une occasion de profits et un risque de pertes. Le demandeur assumait un large éventail de responsabilités financières en vertu de son contrat, y compris celles en rapport avec la fourniture et l'entretien d'un véhicule, les conducteurs suppléants, le carburant et les assurances.

La politique de la Commission comportait un troisième critère, soit celui de l'ouverture sur le marché. Le contrat de service en l'espèce comportait une clause d'exclusivité. La jurisprudence du Tribunal indiquait toutefois que deux parties pouvaient avoir une relation d'exclusivité tout en n'ayant pas de relation d'emploi. Le vice-président a conclu que la relation d'exclusivité existant en l'espèce en était une d'interdépendance mutuellement profitable dans le cadre de laquelle le demandeur retenait un statut professionnel distinct de l'entreprise de camionnage.

Le vice-président a conclu que le demandeur était un exploitant indépendant.

L'entreprise de camionnage avait eu des négociations avec la Commission au sujet du statut professionnel de ses entrepreneurs. À partir de 1997, l'entreprise de camionnage avait commencé à déclarer la masse salariale de ses conducteurs. L'assureur requérant a soutenu que le demandeur avait en fait demandé une protection individuelle quand il avait signé un contrat avec l'entreprise de camionnage.

Le paragraphe 12 (1) de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* stipule que, quand un exploitant indépendant demande une protection individuelle, la Commission peut déclarer que cette personne est réputée être un travailleur. Cette disposition suppose qu'un exploitant indépendant doit faire une demande pour bénéficier d'une protection individuelle. Le vice-président a aussi noté le paragraphe 12 (2) aux termes duquel une entreprise peut faire une demande de protection individuelle pour un dirigeant. Une telle demande peut être faite par l'entreprise mais la Commission n'émet aucune déclaration à moins que le dirigeant y consente. Le vice-président a estimé que le paragraphe 12 (1) n'exigeait pas le consentement de l'exploitant indépendant puisque ce dernier doit faire la demande lui-même. En l'espèce, le demandeur n'était pas au courant de la demande de protection et n'y avait pas consenti.

La définition de travailleur inclut « la personne qui est réputée être un travailleur d'un employeur par une directive ou une ordonnance de la Commission ». La Commission a déclaré qu'elle ne se fonde pas sur cette disposition pour déterminer la situation professionnelle d'un travailleur.

Le vice-président a conclu que le demandeur était un exploitant indépendant, qu'il n'avait pas de protection individuelle et qu'il n'était pas réputé être un travailleur. Par conséquent, la Loi ne supprimait pas le droit d'action du demandeur.

Tribunal Decisions Considered:

- *Decision No. 860/88* (June 20, 1989) refd to
- *Decision No. 940/88* (January 11, 1991) refd to
- *Decision No. 226/89* (1989), 11 W.C.A.T.R. 307 consd
- *Decision No. 773/89* (March 2, 1992) refd to
- *Decision No. 921/89* (1990), 14 W.C.A.T.R. 207 consd
- *Decision No. 288/90* (July 20, 1992) consd
- *Decision No. 381/91* (June 27, 1991) refd to
- *Decision No. 522/91* (October 1, 1993) refd to
- *Decision No. 659/91* (June 22, 1992) refd to
- *Decision No. 585/92* (October 19, 1993) consd
- *Decision No. 422/93* (November 21, 1994) refd to
- *Decision No. 543/93* (1993), 28 W.C.A.T.R. 180 refd to
- *Decision No. 395/94* (November 17, 1995) refd to
- *Decision No. 472/94* (November 16, 1994) refd to
- *Decision No. 602/94* (1994), 33 W.C.A.T.R. 174 refd to
- *Decision No. 891/95* (April 2, 1997) refd to
- *Decision No. 546/96* (November 28, 1997) refd to
- *Decision No. 1443/97* (July 23, 1998) refd to
- *Decision No. 108/01* (July 30, 2002) [2002 ONWSIAT 1656] consd
- *Decision No. 1079/01* (May 14, 2001) [2001 ONWSIAT 1550] refd to

Other Decisions Considered:

- *Market Investigations Ltd. v. Minister of Social Security*, [1968] 3 All. E.R. 732 consd

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
 - s. 2(1) “worker”
 - s. 12(1)
 - s. 12(2)
- s. 28

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
 - Document No. 12-01-03 (January 31, 2001) (since superseded)

APPLICATION to determine whether the right of action of the plaintiff in a civil action was taken away.

May 29, 2006. THE TRIBUNAL: —

BEFORE:	J.P. Moore, Vice-Chair
HEARING:	At Toronto on May 19, November 15, and November 16, 2005, Oral
APPLICATION:	For an order removing the right to sue in Court File No. 69419-03, Ontario Superior Court Of Justice, Newmarket

APPEARANCES:

For the applicant(s):	V. Bulger, Lawyer
For the respondent(s):	A. Conte, Lawyer
For the additional party:	J.S. Hong, Lawyer

REASONS

(i) Introduction

On August 20, 2003, the respondent, V. Tolusic, was injured in a two-vehicle motor vehicle accident (MVA) that occurred in

the State of Ohio in the United States of America. At the time of the accident, the worker was in the course of his employment, driving a motor vehicle on behalf of a company that was registered with the Board as a Schedule 1 employer. Throughout this decision, that company shall be referred to as D Corp.

The vehicle Mr. Tolusic was driving at the time was leased by him, privately. However, he drove the vehicle under licences that were in the name of D Corp. He also drove under an umbrella insurance policy taken out by D Corp. The cost of that policy was paid by Mr. Tolusic and other drivers who operated on behalf of D Corp.

As a result of injuries sustained in the accident, Mr. Tolusic was disabled and began receiving Statutory Accident Benefits (SABs) from an insurance company that is the Applicant in these proceedings.

On December 1, 2003, the worker commenced a lawsuit against the operator and the owner of the other vehicle involved in the MVA of August 20, 2003. Both the operator and the owner of that vehicle were residents of Ontario at the time. The owner of the vehicle is a Schedule 1 employer registered with the Ontario Workplace Safety and Insurance Board. There is an issue as to the status of the operator of the other vehicle but, given the decision outlined below, that issue need not be addressed.

The insurance company from whom the worker is receiving SABs has brought this application and is supported in the application by the insurance company representing the owner of the other vehicle involved in the MVA in issue. The applicants seek a declaration that the respondent, Mr. Tolusic, was in the course of his employment for a Schedule 1 employer, D Corp., at the time of the accident of August 20, 2003, and is, on the basis of that fact, precluded by section 28 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule (WSIA) from pursuing the lawsuit commenced on December 1, 2003. If such a declaration were made, it would also have an effect on the worker's entitlement to SABs.

At the outset of the hearing of this matter, the parties agreed that the initial issue to be addressed by the Tribunal was the status of Mr. Tolusic. The parties further agreed that there were secondary issues, the consideration of which would turn on the Tribunal's finding with respect to the status of Mr. Tolusic. Consideration of those matters was, therefore, deferred pending the Tribunal's ruling concerning the status of Mr. Tolusic.

(ii) The Issue

The issue addressed in this decision is whether the respondent, Mr. Tolusic, was, at the time of his accident of August 20, 2003, a worker of a Schedule 1 employer or an independent operator.

(iii) The Decision

Having reviewed the evidence and submissions presented to me, I am persuaded on a balance of probabilities that the worker was an independent operator under the WSIA and is not, therefore, precluded from pursuing the legal action commenced on December 1, 2003.

(iv) Analysis

(a) The Respondent's Arrangement with D Corp.

Mr. Tolusic's arrangement with D Corp. was governed by a contract that is described by the following title: "Owner-operator Agreement." On May 26, 2003, Mr. Tolusic signed that agreement. The nature and content of that agreement is discussed in greater detail below. According to the evidence, all drivers who work in association with D Corp. are required to sign such an agreement.

On that same date, the worker completed a single-page form. The form, entitled "Owner-operator New Start/Update Record" (New Start form), indicated that the worker was operating a business known as "Tola Delivery Service." The form also provided information regarding Mr. Tolusic's vehicle.

The form, which was prepared by D Corp., contained a section that read: "WSIB Coverage Provided by: ...". The form then asked the applicant to select one of two boxes, one of which was entitled "Owner-operator", the other of which was D Corp.'s business name. On the form signed by Mr. Tolusic, there is an "x" in the box next to D Corp.'s business name. The significance of this form is discussed in greater detail below.

Witnesses testified at the hearing on behalf of D Corp. These witnesses stated that D Corp.'s current arrangement with its owner-operators includes payment of WSIB premiums on behalf of the owner-operators. To that end, the company submits an annual payroll statement to the Board that separately indicates the total earnings of the company's employees and the total earnings of the company's "Contractors." However, the totality of the earnings are processed by the Board as the earnings of workers in a Rate Group covering "Courier Service Operations."

D Corp. appears to have created a new account with the Board in 1989. At that time, the company was registered with the Board as a numbered company with a different business name. Its business operations were as a "Messenger Service." The company name was changed in 1990, but the statement of payroll for 1990 indicated that the company was still a Messenger Service, whose workers were "Owner-operators."

During the early 1990s, D Corp. and the Board engaged in a considerable amount of communication regarding the status of the company's drivers. At that time, most of the company's business involved deliveries "intra-city." It appears from the Board file that, during the early 1990s, a number of owner-operators requested a declaration by the Board as to their status as workers. It also appears that the Board concluded that these individuals were workers, although there are occasional indications in the file that some of the owner-operators were considered to be independent operators by the Board.

In 1993, D Corp. informed the Board that it was expanding its operation to include a "newly formed trucking division, which would focus on international deliveries." D Corp. apparently then entered into arrangements with owner-operators who provided their own vehicles. The drivers were, however, covered by a collective agreement and, hence, determined by the Board to be workers under the governing legislation.

D Corp. subsequently provided information to the Board indicating that only some of the owner-operators were covered by a collective agreement, and submitted a formal request that certain owner-operators be considered to be independent operators. The owner-operators in question were asked to complete questionnaires. On December 16, 1993, D Corp. submitted those questionnaires, along with the following letter:

Further to your letter of December 1, 1993, please find enclosed our responses to the WCB questionnaire, co-signed by myself. In addition, I have also enclosed a list of our equipment...

All of the tractors move pin to pin between Toronto and Detroit, Cleveland, Chicago, New York, Hartford, Boston and Montreal. All other equipment moves inter-city, primarily within Ontario and between Ontario and the Great Lake States. A copy of our miles travelled by jurisdiction should be proof that we are not a local intra-city operation.

All of our owner-operators work exclusively for [D Corp.]. They spend an extreme amount of money for a fleet policy, which would be null and void if they ran for anyone else, including themselves.

On the basis of that information, the Board appears to have concluded that the drivers for D Corp. were workers and not independent operators.

There were, however, continuing indications in the file that occasionally owner-operators were considered to be independent operators by the Board.

In 1997, the Board conducted an audit of D Corp. As a result of that audit, the Board divided D Corp's owner-operators into two categories: those driving vehicles with loads of less than five tons, and those driving vehicles greater than five tons. For the former group, it was determined that the assessable earnings of the drivers would be 75% of their gross earnings; for the latter group, it was determined that their assessable earnings would be deemed at one-third of their gross earnings.

Mr. Tolusic was, at the time of his accident, in the latter group because he was an individual who was driving a vehicle of greater weight than five tons. In accordance with the Board's practice, such a person's assessable earnings were considered to be one-third of his gross earnings. The effect of that was that an owner-operator who was injured in the course of his work, and who claimed compensation benefits, was not compensated on the basis of his total loss but, rather, on the basis of one-third of his gross earnings. The Board's rationale for this was that two-thirds of the driver's gross earnings consisted of capital and maintenance expenses for the driver's equipment; only one-third was considered to be lost wages. How an injured driver would recover the cost of ongoing capital expenses in the absence of any earnings because of injury was apparently considered by the Board to be a matter outside the scope of compensation coverage.

From 1997 onward, D Corp. began the payroll reporting I described above: earnings for employees declared separately from earnings for contractors. That was the status of the owner-operators for D Corp. at the time of the Mr. Tolusic's injury.

(b) The Status of Mr. Tolusic

Mr. Tolusic testified that, at the time he entered into his arrangement with D Corp., and at the time of his accident, he considered himself to be an independent operator. He testified that he had driven for a number of other companies prior to 2003 and had done so as an independent operator. He stated that, in each of these arrangements, he brought his truck and his labour to the arrangement, while the companies provided licences and arranged deliveries for the drivers.

After he was injured, Mr. Tolusic did not file a claim for compensation benefits with the Board, although D Corp. did file a Form 7 with the Board. Instead, Mr. Tolusic requested benefits under the insurance plan covering his vehicle. In his application for those benefits, Mr. Tolusic confirmed that he did not file a claim for compensation benefits and that he was "self-employed."

Mr. Tolusic further stated that, although the New Start form he completed on May 26, 2003 referred to WSIB coverage provided by D Corp., he did not consider himself to be covered by the WSIB. He stated that when he was informed by his

insurance company that he had a right to claim compensation benefits, he chose not to do so because, in his view, he had not paid for such coverage.

Section 2 of the WSIA defines a worker in the following terms:

2 In this Act,

...

“worker” means a person who has entered into or is employed under a contract of service or apprenticeship and includes the following:

...

9. A person deemed to be a worker of an employer by a direction or order of the Board.

10. A person deemed to be a worker under section 12.

Section 12 stipulates that an independent operator or a sole proprietor carrying on a Schedule 1 business may apply for optional coverage under the insurance plan.

Section 12(1) stipulates:

12(1) Upon application, the Board may declare that any of the following persons is deemed to be a worker to whom the insurance plan applies...

Independent operators and sole proprietors are then listed as eligible applicants for optional coverage.

Noting that definition, and the submissions of the parties in the present case, to make a declaration that Mr. Tolusic was a worker under the Act requires making one of the following three alternative findings:

1. Mr. Tolusic entered into a “contract of service”;
2. Mr. Tolusic opted into the insurance plan, pursuant to section 12;
3. Mr. Tolusic was deemed to be a worker of a Schedule I employer by a direction or order of the Board.

(c) Did Mr. Tolusic Enter Into a Contract of Service with D Corp.?

I am not persuaded that Mr. Tolusic had a contract of service with D Corp. when he was injured on August 20, 2003.

As I noted above, section 2 of the WSIA defines a worker as “a person who has entered into or is employed under a contract of service.” A contract of service is generally considered a contract under which a person agrees to perform tasks as directed by an employer.

Conversely, an independent operator is a person who does not operate under a “contract of service.” An independent operator is, in general, a person who enters into a “contract for services” – a contract to provide services as specified by the terms of

the contract.

The test for deciding whether a person is party to a contract of service or to a contract for services has been addressed in a number of Tribunal decisions that have considered the question of a person's status as a worker or an independent operator.

Having reviewed those decisions, I make the following observations regarding them.

My first observation is that many of those decisions have relied, either directly, or indirectly through cited cases, on a statement of law found in a 1968 English case, *Market Investigations Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 at 738-739:

The observations of Lord Wright, of Denning L.J. and of the judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this:

Is the person who has engaged himself to perform these services performing them as a person in business on his own account?

If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no", then the contract is a contract of service...The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk be taken, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task...

(For examples of reliance on this statement of principle, see the Tribunal's *Decisions No. 860/88* (June 20, 1989), *940/88* (January 11, 1991), *522/91* (October 1, 1993), *422/93* (November 21, 1994), *395/94* (November 17, 1995), and *564/96* (November 28, 1997).

My second observation regarding prior Tribunal decisions is that the factors cited in the *Market Investigations* case are to be considered in the light of the stated intention of the parties to a contract in question. Hence, according to these Tribunal decisions, the intention of the parties will be given significant weight, subject to the qualification that the stated intention of the parties must be consistent with and supported by objective factors. (For examples, see *Decisions No. 522/91*, *659/91* (June 22, 1992), *422/93*, *543/93* (1993), 28 W.C.A.T.R. 180, *395/94*, and *472/94* (November 16, 1994).

My third observation is that a number of Tribunal decisions have emphasized that two parties can have an exclusive relationship with each other and still not have an employment relationship. Those cases have emphasized the distinction between the integration of one party into the operations of the other, in contrast to an "interdependent" relationship that mutually benefits both parties. (See, for example, *Decisions No. 773/89* (March 2, 1992), *921/89* (1990), 14 W.C.A.T.R. 207, *381/91* (June 27, 1991), *522/91*, and *585/92* (October 19, 1993).

Out of these principles has evolved a test referred to as the "business reality" or "hybrid" test. The leading case in the development of this test was *Decision No. 921/89*. At page 225, the Panel, in that decision, offered the following reasoning for the development of this particular test:

The actual name applied to the test, whether "integration" test, "organization" test, "hybrid" test or "business reality" test, is not

important. What is important is that parties have an idea of the factors to be considered by the Appeals Tribunal in determining status as a “worker” or “independent operator.” By referring to these factors, parties may themselves develop a sense of the character or reality of the business relationship and thus make a realistic assessment of the situation. It is the opinion of this panel that the factors enumerated in this decision assist in this goal to a greater extent than merely asking whether the work is “integral” to the overall business operation. The question to be asked is, “what is the true nature of the service relationship between the parties, having regard to all relevant factors impacting on that relationship?” The resulting analysis, based on business reality, should lead to a decision in accordance with the real merits and justice of the case.

The Panel, in that decision, proposed 11 factors that might be considered in determining the nature of the relationship between two parties to a service contract [at pp. 223-225]. They are:

1. ownership of equipment used in the work or business;
2. the form of compensation paid to the worker or independent operator (i.e., whether a fixed rate is agreed to or a variable remuneration with an attendant prospect of profit or risk of loss);
3. business indicia;
4. evidence of owner-operator's control as to “where” and “when” the work is performed;
5. the intention of the parties often evidenced by an agency agreement, employment agreement, contract for service, contract of service or limited term contract;
6. business or government records which reflect upon the status of the parties;
7. the economic or business market;
8. the existence of the same or very similar services supplied to an “employer” by a person or persons who are classified as “workers” under the Act;
9. substitute service (i.e. the right to hire others);
10. size of the consideration or payments;
11. degree of integration.

Board policy regarding workers and independent operators is set out in Document No. 12-01-03 of the Board's *Operational Policy Manual*. The criteria for determining whether a person is a worker or an independent operator, set out in that policy document, generally reflect the criteria noted above from the Tribunal case law.

The Board's policy criteria, as they apply to the trucking industry, have been reduced to five “features” that are set out in a questionnaire that an owner-operator of a truck can complete if he or she wishes to have the Board make a determination regarding his or her status under the Act. Recent Tribunal decisions have relied on those criteria in determining whether an individual in a particular case is a worker or an independent operator. It is these criteria to which I give particular attention in the reasoning below.

There are a number of Tribunal decisions that address the question of whether the owner-operator of a truck is an independent operator. Because such individuals frequently operate their trucks exclusively for one transportation company, characterization of the owner-operator's status can be difficult. Generally, Tribunal decisions have focused on the business reality of the relationship in light of all the circumstances. No single criterion is determinative.

Having said that, however, my reading of the Tribunal decisions in this area suggests to me that considerable weight will be given to the extent of an individual's capital investment. If an owner-operator has made a substantial capital investment, that fact is strongly suggestive of an entrepreneurial character not found in an employment contract.

Similarly, Tribunal decisions place considerable emphasis on the stated intention of the parties in an arrangement between an independent operator and a trucking company. I note, for example, discussion in the Tribunal's *Decision No. 585/92*, at pages 10-11, regarding the importance of respecting the intention of the parties insofar as that stated intention is not determined to be a sham by the other circumstances of the case.

My reading of the Tribunal cases in this area suggests to me that the panels in those cases have attempted to ascertain the "prevailing character" of the business relationship between the parties whose status is in issue. In those cases where the evidence has established a substantial capital investment and a clear intention to have an independent arrangement, Tribunal panels have found that an employment contract had not been created.

On the other hand, in those cases where panels have found an employment contract existed, they have done so because they were not persuaded that there was a true capital investment on the part of the owner-operator (see, e.g., *Decision No. 1079/01* (May 14, 2001) or that the stated intention of the parties was not supported by the prevailing character of the arrangement (see, e.g., *Decisions No. 891/95* (April 2, 1997) and *1443/97* (July 23, 1998)).

Capital investment and the stated intention of the parties are two of the five criteria set out in the Board's questionnaire for determining an owner-operator's status.

With respect to capital investment, the questionnaire requires that the owner-operator pay for "the truck and a majority of the equipment or other related property." That particular criterion also requires that the equipment in question be obtained or financed through "non-company sources."

The criterion in the Board's questionnaire that reflects the intention of the parties requires that the owner-operator and "the Principal" explicitly state that the relationship between them is one of a contract for service and not that of an employer and employee.

On the evidence presented to me, I am persuaded, on a balance of probabilities, that these two criteria have been met in the present case.

In my view, the intention of the parties is fully demonstrated by the owner-operator agreement entered into by Mr. Tolusic when he began his arrangement with D Corp. The agreement stipulates that the operator-owner must provide motor vehicle equipment of a certain quality, but that the expense of meeting D Corp.'s requirements was to be borne by the owner-operators. The owner-operators were also responsible for providing fully competent drivers, at the owner-operators' expense. There was a restriction in the contract about turning down shipments, but it appears only to have applied to owner-operators servicing a special expedited service. Under the contract, the owner-operators were responsible for all expenses associated with operating the vehicle, including the payment of wages to drivers hired by the owner-operators. The owner-operators were responsible for any damage or liability for which the company might be liable as a result of the actions of the owner-operators. They were also required to obtain appropriate insurance, either through the company fleet policy or their own policy. If they obtained coverage through the company policy, they were expected to pay for it themselves.

The owner-operators were subject to a reduction in their payments if they failed to complete paperwork properly, and were responsible for any Customs fines or other forms of financial loss suffered by the company. The contract was terminable with

15 days notice, or without notice in certain circumstances.

The contract contained an exclusivity clause, limiting an owner-operator's ability to enter into an agreement with any customer of D Corp., either during the course of the owner-operator's contract with D Corp., or for six months thereafter.

If an owner-operator was incapacitated, or the owner-operator vehicle was inoperable, it was the owner-operator's responsibility to provide either a replacement driver or a replacement vehicle at the owner-operator's own expense.

The agreement also contained a number of conduct rules.

Finally, I note the following clauses from the contract:

The sole relationship between the Parties hereto is that of Principal and Owner-operator, and nothing else herein shall be deemed to create another relationship including, without limiting the generality of the foregoing, relationship of employer and employee, agency, partnership, association or joint venture. (Paragraph 3.07).

It is the intent of the Parties hereto that the Owner-operator is an Independent Contractor only, and neither the Owner-operator nor his/her employees and/or agents are employees of the Company. (Paragraph 14.01).

In my opinion, what that agreement establishes clearly is that the intent of the parties was to create a relationship between two independent contractors. The language is quite explicit in that regard. The stipulations in the contract also establish quite explicitly that the owner-operators are financially separate from D Corp. and have full responsibility for all capital and maintenance expenses associated with their engagement with D Corp. D Corp. provides no benefits, with the exception of an optional fleet insurance policy coverage, for which the drivers are, none the less, expected to reimburse D Corp.

Consequently, I am persuaded that, in the present case, the agreement entered into by Mr. Tolusic and D Corp. in May 2003 fully supports the stated intention of the parties that their arrangement be one between independent operators and not one between an employer and a worker.

With respect to the second of the Board's criteria, capital investment, I am persuaded that the worker's capital investment was a significant one and one that squarely provided him with an opportunity for profit or a risk of loss. There is no indication in the owner-operator agreement he entered into with D Corp. that D Corp. would in any way assist Mr. Tolusic with the capital costs associated with his operation, or with any of the maintenance costs associated with the business. The contract is clear in stipulating that Mr. Tolusic bore a wide variety of financial responsibilities under the contract, including the cost of providing and maintaining a vehicle, providing and maintaining substitute drivers or substitute vehicle, as well as all fuel and insurance costs. Other than the costs of vehicle identification, I am unable to find any indication that D Corp. had any risk of loss arising out of the operation of Mr. Tolusic's vehicle.

And, of course, Mr. Tolusic's ability to drive and maintain his vehicle in an efficient manner, and to manage the expenses associated with the cost of operating his business, provided him with an opportunity to profit from his arrangement with D Corp. The payments he received from D Corp. went far beyond compensation in the form of wages but included what was intended to be compensation for the entire costs of operating Mr. Tolusic's business, including the costs of purchasing and maintaining his vehicle.

I am persuaded, therefore, that Mr. Tolusic made a significant capital investment in his business and had a significant opportunity for profit and risk of loss in the operation of that business.

The third criterion in the Board's questionnaire involves market mobility. Mr. Bulger placed considerable emphasis on the "exclusivity" clause in the contract between Mr. Tolusic and D Corp. However, in my view, the presence of such an exclusivity clause in the contract is a reflection of the reality of the industry in which, for practical reasons, owners of a truck enter into exclusive relationships with delivery companies. This phenomenon was discussed generally above (para. 37) where I noted Tribunal decisions that have found that two parties can have an exclusive relationship with each other and not have an employment relationship:

Those cases have emphasized the distinction between the integration of one party into the operations of the other, in contrast to an "interdependent" relationship that mutually benefits both parties.

In my view, Mr. Tolusic's exclusive relationship with D Corp. reflected a mutually beneficial interdependent relationship in which Mr. Tolusic still retained a status separate from the operations of D Corp.

That reasoning also applies to the aspects of the contract that appeared to assert significant control over the owner-operator's "conduct." As was noted by Mr. Bulger, the contract contains extensive rules and regulations regarding how a driver was to conduct himself or herself, and how the driver's vehicle was to be marked.

However, in my opinion, the control stipulated by the contract in the present case had little or nothing to do with the manner in which Mr. Tolusic carried on his business but focused primarily on the manner in which Mr. Tolusic represented the interests of D Corp. The controls were, in essence, public relations controls that did not go to the heart of the manner in which Mr. Tolusic conducted his business.

Finally, I note for the sake of completeness, that Mr. Tolusic's arrangement with D Corp. was not governed by a Union contract.

Mr. Bulger cited and relied on a prior Tribunal decision, *Decision No. 108/01* (July 30, 2002), a decision that in his view was essentially identical to the present case.

I note, first of all, that, while the facts in that case may have borne a significant resemblance to the facts in the present case, a Tribunal Panel or Vice-Chair must base a decision on the interpretation of the evidence before them.

Mr. Bulger relied, in particular, on the Panel's findings of fact in that decision, at paragraph 76. The Panel reviewed the circumstances of a driver and concluded that the indicia of the arrangement suggested that the driver was, in reality, a worker and not an independent operator. However, an important distinction between that case and the present case is that the individual whose status was discussed in that paragraph was, himself, of the view that he was a worker and not an independent operator.

At paragraph 55, the Panel noted the following submission from Counsel representing that individual:

Mr. Collier also questioned the evidentiary value, which could be placed on the terms of the Owner/Operator Agreement, noting it had been made clear to Mr. Holt that if he did not sign it, he could not continue to work for Can-Am. In his view, this was not a

freely negotiated agreement but rather a “take it or leave it” proposition.

In the present case, Mr. Tolusic testified that he was and expected to be treated as an independent operator by D Corp., in accordance with the terms of the contract and in accordance with his experience within the trucking industry.

Weighing all of the circumstances of this case, I am persuaded that the prevailing arrangement between Mr. Tolusic and D Corp. was that of an independent operator and a principal, rather than that of a worker and an employer. Consequently, I find that Mr. Tolusic was an independent operator when he was injured on August 20, 2003.

Having so determined, I must now consider whether Mr. Tolusic was a worker under the Act, by virtue of the deeming provisions in section 12 or by a direction of the Board.

(d) Is Mr. Tolusic a Deemed Worker Pursuant to Section 12 of the Act?

The applicant called witnesses who testified regarding the WSIB coverage provided by D Corp. to its “contractors.” The witnesses acknowledged that the contractors were seen as independent operators and not workers. None the less, these latter individuals were provided with WSIB coverage as a “benefit.” The witnesses were unaware of the early history regarding D Corp.’s attempts to have the status of the owner-operators clarified by the Board.

With respect to the “New Start form”, signed by Mr. Tolusic on May 26, 2003, one of the witnesses stated that she could not recall actually discussing WSIB coverage with Mr. Tolusic. However, she also stated that it was her practice to provide each new owner-operator with information regarding the terms of the contract. She stated that this discussion included WSIB coverage.

I note, in this regard, that the contract entered into by Mr. Tolusic on May 26, 2003, described as the “Owner-operator Agreement”, contains no reference to WSIB coverage. As I noted above, the only apparent reference to such coverage is in the New Start form, which Mr. Tolusic signed on May 26, 2003, and in which there was a notation in the corner of the form indicating that WSIB coverage was provided by D Corp.

Mr. Bulger submitted that, when Mr. Tolusic entered into his contract with D Corp., he knew, or ought to have known, that he was effectively applying for optional coverage under the insurance plan, a fact that he argued was confirmed by the New Start form signed by Mr. Tolusic on May 26, 2003. Mr. Bulger submitted that, by signing this form, Mr. Tolusic effectively applied for optional coverage pursuant to subsection 12(1) of the Act, coverage that was subsequently paid for by D Corp. as a benefit.

Section 12(1) stipulates that, where an independent operator makes an application for optional coverage, the Board may declare such a person to be a deemed worker. The subsection implies that there must, in fact, be an application for coverage. The inference I draw from the subsection is that the application must be made by the independent operator and it must result in an explicit declaration by the Board that the individual will be considered to be a worker. In my view, that implies that the independent operator must be aware of and consent to any such application.

That interpretation is supported, in my opinion, by section 12(2), which stipulates that a company may apply to the Board for a declaration that an executive officer is deemed to be a worker. The application can be made by the company itself, but the Board will not make a declaration unless the executive officer “consents to the application.”

The consent element is not referred to in section 12(1), likely because the application under section 12(2) is made by someone other than the executive officer. Hence, the executive officer's consent would be necessary. Under section 12(1), it appears that the application must be made by the independent operator himself or herself. However, in my view, reading section 12(1) and (2) together, awareness of and consent to an application would be a *sine qua non* for a declaration by the Board that an individual has optional coverage as a deemed worker. I note, in this regard, Tribunal *Decision No. 226/89* (1989), 11 W.C.A.T.R. 307, in which a truck driver, who was found to be an independent operator, was none the less also found to be a deemed worker, because the company he worked with was remitting payment to the Board and the trucker was aware of this fact. That awareness constituted an election on the worker's part under section 12. In another such case, *Decision No. 602/94* (1994), 33 W.C.A.T.R. 174, a Tribunal Panel found that a worker had optional coverage by virtue of having consented to the deduction of money for compensation benefits.

In the present case, I am not persuaded that the worker was aware of and consented to compensation coverage.

The worker testified that he had never previously had compensation coverage and did not believe that such coverage was available when he entered into his contract with D Corp. I note again, in this regard, that there is no reference to compensation coverage in the lengthy "Owner-operator Agreement" signed by the worker. In my opinion, the terse reference to WSIB coverage in the New Start form signed by the worker when he began his arrangement with D Corp. does not constitute a consent by the worker to be deemed a worker under the Insurance Plan. In my view, the fact that the worker signed that form does not constitute persuasive evidence of awareness and consent.

As I stated earlier, the Insurance Plan coverage provided to D Corp.'s "contractors", if they drove a vehicle of greater than five tons, was limited to one-third of their gross earnings. Hence, an owner-operator who was injured in the course of his work received compensation that reflected only one-third of his actual loss. That was the portion of the loss that the Board felt was attributable to lost wages. The remainder was, in the Board's view, attributable to lost capital and maintenance costs. However, those losses are nonetheless real losses for the owner-operator, particularly if he must continue to pay for ongoing costs related to ownership and maintenance of his vehicle. In light of that significant consequence, the merits and justice of the case would require that the evidence on the worker's consent be of substantial weight.

In my opinion, the documentation and information that was provided to Mr. Tolusic provided no information about the nature and effect of the compensation coverage Mr. Tolusic was purportedly accepting. At most, it can be said that there was a non-specific indication that WSIB coverage may have been available through D Corp. In my view, there was no clear indication given to Mr. Tolusic that, by virtue of entering into his owner-operator agreement, he became a worker of D Corp. for the purposes of Insurance Plan coverage. In my view, there was no "application" by Mr. Tolusic for a declaration of optional coverage by the Board. Mr. Tolusic is not, therefore, a deemed worker pursuant to subsection 12(1) of the Act.

(e) Is Mr. Tolusic a Deemed Worker by Direction of the Board?

Mr. Bulger submitted, on this issue, that, even if the agreement Mr. Tolusic entered into with D Corp. described him as an independent operator, all owner-operators who worked with D Corp. had previously been declared by the Board to be workers and not independent operators. Hence, any individual who entered into an agreement with D Corp. became a worker by virtue of the Board's previous determinations regarding the status of D Corp.'s drivers. Such a person would be a worker as defined in paragraph 9 of the definition of worker: a "person deemed to be a worker of an employer by a direction or order of the Board."

Subsequent to the hearing of this application, I asked the Tribunal Counsel Office to obtain information from the Board regarding that definition of worker. In a letter dated January 9, 2006, S. Hewitt, a Legal Policy Analyst for the Board, wrote:

Under the definition of “worker” in section 2(1) of the WSIB Act, it states in part:

9. A person deemed to be a worker of an employer by a direction or order of the Board

The Board does not “deem” people to be workers and this provision is not currently in use. Therefore, there are no Board policies or practices to provide to the Tribunal.

However, in response to this information, Mr. Bulger submitted that, although the Board may have no current practice of deeming independent operators to be workers, they have done so in the past. He cited *Decision No. 288/90* (July 20, 1992), in which a Tribunal Panel found that a Board policy, deeming so-called owner-operators in the logging industry to be workers, was a reasonable exercise of the Board’s discretion. The Panel concluded, at page 20, that the Board’s policy reflected the process contemplated by the definition now found in clause 9 of the definition of worker in the current Act. The Panel stated:

In our opinion, that specific deeming provision appears to contemplate situations where the protection of workers in the province ... will require that the Board deem a person to be a worker who would not otherwise fall within the definition.

On its face, the expanded definition could include a person who might normally be characterized as an “independent operator” under the common law or the application of a business reality test. It appears to this Panel that the deeming contemplated by the paragraph would create substantive rights in favour of any person deemed to be a worker of an employer.

In the present case, however, it appears very clear that the Board did not exercise the statutory power to “deem” Mr. Tolusic to be a worker and confirmed that fact in its letter of January 9, 2006 from Ms. Hewitt. Accordingly, the ambit of the Board’s power under this provision need not be considered. Rather, it appears that the Board made a factual determination that the drivers who worked with D Corp. were not independent operators but workers of D Corp. The Board did not, therefore, *deem* people who were otherwise properly characterized as independent operators to be workers, but *found* that people who claimed to be independent operators were, in fact, workers. In my view, that is a significant distinction. The latter determination is subject to the test of correctness. Hence, in the context of a particular worker’s proceeding, any such determination must be correct. And, in my opinion, to the extent that the Board’s determinations in the mid-1990s about the structure of D Corp. remained valid in 2003, that determination would be considered incorrect with respect to Mr. Tolusic. As I have indicated above, I am persuaded that Mr. Tolusic was, at the time he entered into his contract with D Corp., an independent operator and not a worker of D Corp. In the particular circumstances of this case, Mr. Tolusic entered into a relationship with D Corp. as an independent owner-operator and his status was not changed by the action of either D Corp. or the Board.

For all these reasons, therefore, I find that Mr. Tolusic was an independent operator at the time of his injury on August 20, 2003, and was not a worker in fact or in law. Consequently, his rights to pursue litigation regarding that accident are not barred by the *Workplace Safety and Insurance Act*.

DISPOSITION

The application is denied. The respondent, Mr. Tolusic, was an independent operator and not a worker at the time of his accident on August 20, 2003. As such, Mr. Tolusic is not a person who is entitled to benefits under the insurance plan.

The right of Mr. Tolusic to pursue litigation for that accident is not barred by the *Workplace Safety and Insurance Act*.

Having made that determination, all other secondary issues that may have arisen in this application, particularly regarding the status of the defendants, need not be addressed.

Application denied.



Decision No. 369/06 (Hedru v. Plante)

Indexed as Decision No. 369/06

Vice-Chair: Gehrke

Decision — March 30, 2006

Neutral Citation: 2006 ONWSIAT 737

Right to sue – In the course of employment (travelling) – Out of province (accident in Ontario) (worker not resident of Ontario) – Out of province (substantial connection).

Worker from New Brunswick worked for national corporation with head office in Ontario – Worker injured while attending meetings in Ontario – Worker had substantial connection to Ontario.

The plaintiff and defendant in a civil case were involved in a motor vehicle collision. The defendant applied to determine whether the plaintiff's right of action was taken away.

It was agreed that the plaintiff was a worker of a Schedule 1 employer and that he was in the course of employment at the time of the accident. The issue was the status of the defendant. The plaintiff submitted that the defendant was not a worker in the course of his employment for a Schedule 1 employer because the defendant was a resident of New Brunswick who worked in New Brunswick and did not have a substantial connection to Ontario.

The defendant worked for a national corporation with a head office in Ontario. The national corporation was a Schedule 1 employer. All company locations were part of the national corporation. The national corporation paid the defendant's salary from its Ontario office. The defendant was in Ontario at the direction of the company to attend directors' meetings. Such meetings were regularly scheduled twice per year. The accident occurred while the defendant was driving a rental car from the airport, with two other company employees as passengers.

The Vice-Chair concluded that the defendant had a substantial connection to Ontario. The defendant was a worker of a Schedule 1 employer and was in the course of employment at the time of the accident. The plaintiff's right of action against the defendant was taken away.

Droit d'intenter une action – Au cours de l'emploi (déplacements) – Hors de la province (accident en Ontario) (travailleur non-résident en Ontario) – Hors de la province (lien considérable).

Le travailleur vivait au Nouveau-Brunswick et travaillait pour une société nationale dont le siège social se trouvait en Ontario – Le travailleur a été blessé pendant un voyage pour assister à des réunions en Ontario – Le travailleur avait un lien substantiel avec l'Ontario.

Le demandeur et le défendeur dans une action civile avaient été impliqués dans une collision d'automobiles. Le défendeur a demandé au Tribunal de déterminer si la Loi supprimait le droit d'action du demandeur.

Il était convenu que le demandeur était un travailleur d'un employeur de l'annexe 1 et qu'il était en cours d'emploi au moment de l'accident. La vice-présidente devait régler la question de la situation professionnelle du défendeur. Le demandeur soutenait que le défendeur n'était pas un travailleur d'un employeur de l'annexe 1 en cours d'emploi parce qu'il résidait et travaillait au Nouveau-Brunswick et qu'il n'avait pas de lien substantiel avec l'Ontario.

Le défendeur travaillait pour une société nationale dont le siège social se trouvait en Ontario. La société nationale était un employeur de l'annexe 1. Tous les bureaux de la société faisaient partie de la société nationale. Le salaire du défendeur provenait du bureau ontarien de la société. Le défendeur se trouvait en Ontario à la demande de la société pour assister à des réunions de directeurs. Ce genre de réunion avait lieu régulièrement deux fois par année. L'accident s'était produit alors que le défendeur conduisait un véhicule de location de l'aéroport en compagnie d'autres employés de la société comme passagers.

La vice-présidente a conclu que le défendeur avait un lien substantiel avec l'Ontario. Le défendeur était un travailleur d'un employeur de l'annexe 1 et il était en cours d'emploi au moment de l'accident. La Loi supprimait le droit d'action du demandeur contre le défendeur.

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
 - s. 27
 - s. 28
 - s. 29
 - s. 31

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
 - Document No. 12-04-12 (October 12, 2004)

APPLICATION by the defendant in a civil case to determine whether the plaintiff's right of action was taken away.

March 30, 2006. THE TRIBUNAL: —

BEFORE:	L. Gehrke, Vice-Chair
HEARING:	February 21, 2006 at Toronto, Oral
APPLICATION:	For order removing the right to sue

APPEARANCES:	
For the applicant(s):	V.T. Bulger, Lawyer

For the respondent(s):	D.L. Smith, Lawyer
For the additional party:	S. Monteiro, Lawyer

(i) Introduction

This is an application under section 31 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, by the defendants in an action filed in the Ontario Court as Tsegai Hedru et al. and Joseph Plante et al.

On May 5, 1999, the applicant Joseph Plante, the respondent Tsegai Hedru and the applicant Warren Askew were involved in a motor vehicle collision on Highway 409 in Ontario. It is not in dispute that Mr. Hedru was driving a van in the course of his employment with National Car and Truck Rental, a Schedule 1 employer, at the time of the accident. Mr. Plante was driving a rental car with two other directors from Pearson Airport to a directors' meeting organized by his employer, Toys R Us Canada Ltd., a Schedule 1 employer, in Markham, Ontario. It is not in dispute that Mr. Askew was not in the course of his employment.

Mr. Hedru initially claimed and received WSIB benefits for the injuries he suffered in the accident. Later, the Board terminated his benefits. He then sought to re-elect, which the Board permitted him to do on repayment of all benefits he had received. Mr. Hedru, his spouse and dependent child then sued Mr. Plante, Avis Rent-A-Car and Mr. Askew for his injuries.

The applicants submit that Mr. Hedru and Mr. Plante were both workers of Schedule 1 employers in the course of their employment at the time the accident happened. Since Mr. Hedru's employment status is not in dispute, the issue to be determined is Mr. Plante's employment status. The respondent submits that while Mr. Hedru was in the course of his employment for a Schedule 1 employer, Mr. Plante was not, because he was a resident of New Brunswick, worked in New Brunswick and did not have a substantial connection to Ontario.

(ii) Remedies Sought by the Applicants

The applicants seek the following remedies under section 31(1) of WSIA:

1. Joseph Plante seeks a determination under section 31(1)(a) that the right of Tsegai Hedru, Gareghu Ogbagiogis and Lidia Estifanos (the plaintiffs) to commence an action against him is taken away by WSIA;
2. Avis Rent-A-Car seeks a determination under section 31(1)(b) that the amount that it may be liable to pay the plaintiffs is limited by section 29 of WSIA;
3. Warren Askew seeks a determination under section 31(1)(b) that the amount he may be liable to pay the plaintiffs if their action proceeds is limited by section 29 WSIA.

(iii) Law and Policy

Sections 27, 28, 29 and 31 of WSIA provide in part:

27(1) Sections 28 to 31 apply with respect to a worker who sustains an injury or a disease that entitles him or her to benefits under the insurance plan and to the survivors of a deceased worker who are entitled to benefits under the plan.

(2) If a worker's right of action is taken away under section 28 or 29, the worker's spouse, child, dependant or survivors are, also, not entitled to commence an action under section 61 of the *Family Law Act*.

28(1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. Any Schedule 1 employer.
2. A director, executive officer or worker employed by any Schedule 1 employer.

...

(3) If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

(4) Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

29(1) This section applies in the following circumstances:

1. In an action by or on behalf of a worker employed by a Schedule 1 employer or a survivor of such a worker, any Schedule 1 employer or a director, executive officer or another worker employed by a Schedule 1 employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.
2. In an action by or on behalf of a worker employed by a Schedule 2 employer or a survivor of such a worker, the worker's Schedule 2 employer or a director, executive officer or another worker employed by the employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

(2) The employer, director, executive officer or other worker is not liable to pay damages to the worker or his or her survivors or to contribute to or indemnify another person who is liable to pay such damages.

(3) The court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the action.

(4) No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action.

...

31(1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,

- (a) whether, because of this Act, the right to commence an action is taken away;
- (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
- (c) whether the plaintiff is entitled to claim benefits under the insurance plan.

- (2) The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).
- (3) A decision of the Appeals Tribunal under this section is final and is not open to question or review in a court.
- (4) Despite subsections 22(1) and (2), a worker or survivor may file a claim for benefits within six months after the tribunal's determination under subsection (1).
- (5) The Board may permit a claim to be filed after the six-month period expires if, in the opinion of the Board, it is just to do so.

Board *Operational Policy Manual*, Document No. 12-04-12, though not binding in section 31 applications, is relevant to the issues being determined in this application. It provides criteria for determining whether there is a "substantial connection" between a worker and Ontario. That policy provides that a non-resident worker must have a substantial connection with Ontario in order to come within the scope of the Act.

(iv) Findings and Conclusions

For the reasons that follow, I have concluded that Mr. Hedru's right of action against Mr. Plante is taken away by section 28 (1) of WSIA. At the time of the accident, both Mr. Hedru and Mr. Plante were workers employed by Schedule 1 employers and they were in the course of their employment. Mr. Hedru and Mr. Plante were both entitled to claim benefits under the insurance plan because they were workers who were employed by Schedule 1 employers.

While Mr. Plante was not a resident of Ontario, he was injured in Ontario. He was at the time of the accident employed by a Schedule 1 employer situated in Ontario, Toys R Us Canada Ltd., (Toys R Us) and he was in the course of that employment in Ontario.

Toys R Us, a national corporation whose head office is in Concord, Ontario, hired Mr. Plante. He reported to and received directions from the head office of Toys R Us. He worked as a store director for Toys R Us at the time of his injury.

The evidence before me was that there was no separate Toys R Us corporation in New Brunswick. All Toys R Us locations were part of the national corporation located in Concord, Ontario. Toys R Us paid his salary from its Concord, Ontario office. Toys R Us in Concord, Ontario paid premiums to the New Brunswick Workplace Health Safety and Compensation Commission on his behalf. Toys R Us is a registered Schedule 1 employer in Ontario.

At the time of the accident, Mr. Plante was in Ontario at the behest of Toys R Us to attend several days of directors' meetings. Mr. Plante was driving a car rented by his employer to a work-related meeting. In the car were colleagues attending the same meeting. He had arrived at the airport and, as arranged by the employer, he picked up the rental car and two colleagues and was driving with them to the hotel that was arranged by the employer when the accident happened. I find that he was in the course of his employment while driving from the airport to the hotel, as this was for a work-related purpose, that is, attendance at mandatory meetings of the employer. He was travelling on the employer's business and at the employer's behest.

The sole purpose of the trip was to attend mandatory meetings of store directors on May 6, 7 and 8 in Ontario. The purpose of the meetings was to set new directions for the Toys R Us stores across Canada. Clearly, this was a work-related purpose. After the accident, Mr. Plante proceeded to the hotel in a replacement rental car and attended these meetings. He flew home

to New Brunswick on May 9, on a flight arranged by the employer.

Based on these facts, I conclude that Joseph Plante was a worker of a Schedule 1 employer in the course of his employment at the time of the accident.

I find that Mr. Plante would be considered under Board policy to be a worker with a substantial connection with Ontario at the time of his injury. He travelled to Ontario for an employment-related purpose. He was working in Ontario at the time of the injury. He spent a number of days each year in Ontario for work-related purposes on a regular basis during the year. In the year prior to the accident, the worker had attended meetings at the behest of his employer in September 1998 and February 1999. The May meetings were scheduled to last for three days. While the May meetings were a special set of meetings to produce a transformational plan, the September and February meetings were regularly scheduled spring and fall meetings that occurred each year. The September and February meetings were four days in length. Thus, his regularly scheduled meetings required him to be in Ontario approximately eight days per year. I find that including the special May meetings, the worker was in Ontario a total of 11 days within one year for work-related purposes. This in my view establishes a substantial work-related connection between Mr. Plante and Ontario.

I find that the evidence establishes on a balance of probabilities that Mr. Plante was a worker in the course of his employment with a Schedule 1 employer at the time of the accident.

It is not in dispute that Mr. Hedru was also a worker in the course of his employment with a Schedule 1 employer at the time of the accident. Therefore, under section 28, Mr. Hedru's right of action against Mr. Plante is taken away. The right of action of Mr. Hedru's spouse and child against Mr. Plante is taken away under section 27(2) of WSIA. Under section 31(5), Mr. Hedru may file a claim with the Board for compensation for the accident within six months of this decision.

It is undisputed that section 28(4) applies to Avis Rent-A-Car, since it supplied a motor vehicle to Mr. Plante without supplying workers to operate it. Therefore, Mr. Hedru's right of action against Avis is not taken away by the provisions of WSIA. Avis is entitled to a declaration under section 29(4) of WSIA that no damages, contribution or indemnity determined under section 29(3) be caused by any person described in that subsection is recoverable in an action.

Mr. Askew is also entitled to a declaration under section 29(4). He was an unprotected party who was driving a car that was struck from the rear by Mr. Plante's car.

DISPOSITION

The application is allowed:

1. Tsegai Hedru's right of action against Joseph Plante is taken away under section 28 of WSIA. Tsegai Hedru may file a claim with the Board for compensation for the accident within six months of this decision, as provided by section 31(5) of WSIA.
2. The right of action of Tsegai Hedru's spouse and child, Hareghu Ogbagiorgis and Lidia Estifanos, against Joseph Plante is taken away under section 27(2) of WSIA.

3. Tsegai Hedru's right of action against Avis Rent-A-Car is not taken away by the provisions of WSIA.
4. Avis Rent-A-Car and Warren J. Askew are each entitled to a declaration under section 29(4) of WSIA that no damages, contribution or indemnity determined under section 29(3) to be caused by any person described in that subsection is recoverable in the action.

Application granted.



Decision No. 1785/04I (Dhuga v. Tiwana)

Indexed as: Decision No. 1785/04I

Vice-Chair: Gehrke

Decision — April 27, 2006

Neutral Citation: 2006 ONWSIAT 921

Right to sue – Parties (representation) (conflict of interest).

Defendants in a civil case applied for determination regarding plaintiff's right to sue – All defendants were originally represented by some counsel, but one defendant obtained new counsel – All defendant's took same position regarding plaintiff's right of action – There was no conflict of interest on part of counsel.

The plaintiff in a civil case was a passenger in a vehicle driven by one of the defendants. The other defendants were the owner and lessee of the vehicle. The defendants applied to determine whether the plaintiff's right of action was taken away.

Originally, the defendants were all represented by the same counsel. However, one of the defendants was now represented by different counsel. The new counsel raised an issue regarding conflict of interest on the part of the other counsel.

The defendant who obtained new counsel did so because of a breakdown in the solicitor-client relationship, not because of any conflict of interest. The interest of all the defendants in this application was identical. They all took the position that the plaintiff's right of action was taken away because the plaintiff and the defendant driver were in the course of their employment with a Schedule 1 employer at the time of the accident.

At this time, there was no conflict of interest on the part of the other counsel.

The hearing will reconvene to consider the merits of the application under s. 31 of the *Workplace Safety and Insurance Act, 1997*.

Droit d'intenter une action – Parties (représentation) (conflit d'intérêts).

Des défendeurs dans une action civile ont demandé au Tribunal de déterminer si la Loi supprimait le droit d'action du demandeur – Les défendeurs avaient le même avocat initialement mais un d'entre eux en avait retenu un nouveau par la suite – Tous les défendeurs prenaient la même position à l'égard du droit d'action du demandeur – Il n'y avait aucun conflit d'intérêt de la part du premier avocat.

Le demandeur dans une action civile était un passager dans un véhicule conduit par un des défendeurs. Les autres défendeurs étaient le propriétaire et le preneur à bail du véhicule. Les défendeurs ont demandé au Tribunal de déterminer si la Loi supprimait le droit d'action du demandeur.

Les défendeurs avaient le même avocat initialement; cependant, un d'entre eux en avait retenu un nouveau par la suite. Le nouvel avocat a soulevé la possibilité d'un conflit d'intérêt de la part du premier avocat.

Le défendeur qui avait retenu les services d'un nouvel avocat l'avait fait en raison d'une rupture de la relation procureur-client avec le premier avocat, et non en raison d'un conflit d'intérêt. Cette demande présentait le même intérêt pour tous les défendeurs. Ils soutenaient tous que la Loi supprimait le droit d'action du demandeur parce que ce dernier et le chauffeur défendeur étaient au service d'un employeur de l'annexe 1 au moment de l'accident.

Il n'existait pour le moment aucun conflit d'intérêt de la part du premier avocat.

L'audience se poursuivra à une date ultérieure pour examiner le fond de la demande aux termes de l'article 31 de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail*.

Tribunal Decisions Considered:

- *Decision No. 940/88I* (December 15, 1988) refd to
- *Decision No. 339/94I* (1994), 31 W.C.A.T.R. 241 apld

Other Decisions Considered:

- *Essa (Township) v. Guergis* (1993), 15 O.R. (3d) 573 (Ont. Div. Ct.) refd to
- *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.) apld
- *R. v. Speid* (1983), 3 D.L.R. (4th) 246 (Ont. C.A.) refd to
- *R. v. Wolfe Iron & Metal Ltd.* (1991), 5 C.O.H.S.C. 154 (Ont. Ct. (Prov. Div.)) refd to

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
 - s. 26
 - s. 27
 - s. 28
 - s. 29
 - s. 31

DETERMINATION as to whether there was a conflict of interest between different counsel for the applicants in an application under s. 31 of the *Workplace Safety and Insurance Act, 1997*.

April 27, 2006. THE TRIBUNAL: —

BEFORE: L. Gehrke, Vice-Chair

HEARING: January 23, 2006 at Toronto, Oral

APPLICATION: For order removing the right to sue

APPEARANCES:

For the applicant Shamsher Tiwana: Theresa Hartley, Lawyer
For all other applicants: Jennifer Griffiths, Lawyer
For the respondent: Andrew Suboch, Lawyer
Interpreter: Abdur Nasir, Punjabi

(i) Introduction

This is an application under section 31 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA). The respondents have sued the applicants Shamsher Tiwana, Mackie Moving Systems Corporation and Citicapital Commercial Leasing Corporation for injuries that Mr. Dhuga suffered in a motor vehicle accident on May 15, 2001, when a truck owned by Citicapital, leased to Mackie and insured by the applicant Zurich Insurance Company of Canada, in which Mr. Dhuga was a passenger and Mr. Tiwana was driving, crashed in Kentucky. The applicants allege that the right to sue of the respondents is removed by the provisions of WSIA because both Dhuga and Shamsher were workers in the course of their employment when the accident occurred. The relevant provisions of WSIA are:

26(1) No action lies to obtain benefits under the insurance plan, but all claims for benefits shall be heard and determined by the Board

(2) Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.

27(1) Sections 28 to 31 apply with respect to a worker who sustains an injury or a disease that entitles him or her to benefits under the insurance plan and to the survivors of a deceased worker who are entitled to benefits under the plan.

(2) If a worker's right of action is taken away under section 28 or 29, the worker's spouse, child, dependant or survivors are, also, not entitled to commence an action under section 61 of the *Family Law Act*.

28(1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. Any Schedule 1 employer.
2. A director, executive officer or worker employed by any Schedule 1 employer.

(2) A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. The worker's Schedule 2 employer.
2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

(3) If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury,

subsection (1) applies only if the workers were acting in the course of their employment.

(4) Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

29(1) This section applies in the following circumstances:

1. In an action by or on behalf of a worker employed by a Schedule 1 employer or a survivor of such a worker, any Schedule 1 employer or a director, executive officer or another worker employed by a Schedule 1 employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

2. In an action by or on behalf of a worker employed by a Schedule 2 employer or a survivor of such a worker, the worker's Schedule 2 employer or a director, executive officer or another worker employed by the employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

(2) The employer, director, executive officer or other worker is not liable to pay damages to the worker or his or her survivors or to contribute to or indemnify another person who is liable to pay such damages.

(3) The court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the action.

(4) No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action.

This interim decision addresses an issue that was raised by respondent's counsel at the hearing on January 23, 2006. Mr. Suboch submitted that Ms. Griffiths, who formerly represented all of the applicants, and now represents all applicants except Shamsheer Tiwana, was in a conflict of interest because she formerly acted as Mr. Tiwana's counsel in this application. Mr. Suboch submitted orally at the hearing that Ms. Griffiths should not be permitted to cross-examine the applicant Tiwana. It was not clear to me whether he was seeking to remove Ms. Griffiths from the record as solicitor for the remaining applicants.

On January 13, 2006, Ms. Griffiths notified the parties and the Tribunal that she was unable to continue to act for Mr. Tiwana, and that she understood that alternate counsel was in the process of being appointed for him. During the resumed hearing on January 23, 2006, Mr. Suboch made verbal submissions expressing concerns about Ms. Griffiths' continued representation of the applicants, and also submitted that it would be inappropriate for her to cross-question Mr. Tiwana.

Mr. Suboch had provided no prior notice of his intent to raise the issue of conflict of interest. I adjourned the hearing to permit the parties and Tribunal counsel to provide written submissions to me on this issue. Written submissions were filed by Ms. S. Adams, Tribunal counsel, Ms. Griffiths on behalf of the applicants Zurich Insurance, Mackie Moving and Mr. Dhuga, and Ms. Hartley on behalf of Mr. Tiwana. Mr. Suboch did not file any written submissions in support of his motion.

(ii) Analysis and Conclusions

I have concluded that Ms. Griffiths is not presently in a conflict of interest in this application. All of the applicants take the same position, that is, that the respondent Dhuga and the applicant Tiwana were in the course of their employment at the time of the injury and that both Mr. Dhuga and Mr. Tiwana are entitled to benefits under WSIA as a result of the accident. The fact that Mr. Tiwana now has separate counsel does not create a conflict of interest where none existed before.

The threshold issue to be determined is whether a conflict of interest arises in the facts of this case, either because of her initial representation of all or the applicants or because of the subsequent breakdown in the solicitor client relationship with the applicant Tiwana. If there is a conflict of interest inherent in representing the applicant Tiwana together with the remaining applicants, then I must consider whether there has been adequate consent by the applicants to waive the conflict.

Both Ms. Griffiths and Ms. Hartley, who together represent all of the applicants, submit that there is no conflict of interest in Ms. Griffiths continuing to represent the applicants other than Tiwana. They submit that Tiwana's interests and the interests of the other applicants are identical in this application. Ms. Griffiths states that she has not received any privileged information from the applicant Tiwana. In any event, Ms. Griffiths has undertaken not to cross-examine the applicant Tiwana. Ms. Griffiths submits in addition that the Tribunal has no jurisdiction to remove a solicitor from the record in a court action. As I noted above, respondent's counsel made no written submissions. The submissions of Tribunal counsel discuss the leading case on conflict of interest, Rule 2.04 of the Rules of Professional Conduct, and Tribunal decisions on this issue.

In my view, a conflict of interest does not arise in the circumstances of this particular application. The interests of the applicant Tiwana and the other applicants in this application are identical. All applicants, including Tiwana, take the position that the respondent Dhuga's right of action is taken away, because the applicant Tiwana and respondent Dhuga were workers in the course of their employment with a Schedule 1 employer at the time of the motor vehicle accident in which Dhuga was injured. The possibility of a future conflict of interest would be hypothetical and outside the scope of my consideration at this time. Given my conclusion that there is no conflict of interest present in Ms. Griffith's representation of the applicants, I do not need to consider the parties' consent, nor do I need to consider the extent of the Tribunal's jurisdiction, should such a conflict arise.

Rule 2.04 of the Rules of Professional Conduct of the Law Society of Upper Canada, "Avoidance of Conflicts of Interest", provides:

2.04 (1) In this rule

a "conflict of interest" or a "conflicting interest" means an interest

(a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or

(b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

(2) A lawyer shall not advise or represent more than one side of a dispute.

(3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

(4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter

(a) in the same matter,

(b) in any related matter, ...

unless the client and those involved in or associated with the client consent.

In this application, Ms. Griffiths has not represented and does not represent more than one side of a dispute. Nor is she acting against a former client. Nor is it alleged that Ms. Griffiths represented all of the applicants on one side of the dispute. All of the applicants are applying for a determination by this Tribunal that the respondent Dhuga's right to bring a court action against them is taken away under the provisions of the WSIA. All of them say that Mr. Dhuga and Mr. Tiwana were workers in the course of their employment with a Schedule 1 employer at the time of the action.

Separate counsel has been retained by the applicant Tiwana, not because of any conflict of interest, but because of a breakdown in the solicitor-client relationship. In essence, Ms. Griffiths says that she was unable to communicate with her client. She also says that she has not received any privileged information from the applicant Tiwana. She has also undertaken to Ms. Hartley that she will not cross-examine the applicant Tiwana.

In making this determination I have applied the reasoning of Sopinka J., writing for the majority of the Supreme Court of Canada in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235. The majority of the court held that in determining whether a disqualifying conflict of interest arises, the Court is concerned with three competing values: (1) the concern to maintain the high standards of the legal profession and the integrity of our system of justice; (2) the countervailing value that a litigant should not be deprived of choice of counsel without good cause; and (3) the desirability of permitting reasonable mobility in the legal profession. There is a public requirement that justice not only be done, but that it be seen to be done. Thus, the public, represented by a reasonably informed person, must be satisfied that no use of confidential information could occur. In this context, the Court said that two questions must be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client? A lawyer who has relevant confidential information is disqualified from acting against the former client.

In this case, even if Ms. Griffiths received privileged information relating to the applicant Tiwana, I am satisfied that it is highly unlikely that this would be used to his prejudice in this application, first because the interests of Mr. Tiwana and the other applicants are identical, and secondly because Ms. Griffiths has undertaken not to cross-examine the applicant Tiwana. Therefore, she will not be acting against her former client in this application. I would conclude in these circumstances that no use of confidential information obtained by Ms. Griffiths as a result of her solicitor-client relationship with Tiwana against his interests would occur. In these circumstances, I am satisfied that permitting Ms. Griffiths to continue to act for the remainder of the applicants, other than Tiwana, in this application, will not affect adversely the public's confidence in the judicial system.

In my view, that is a highly speculative consideration. As stated in *MacDonald Estate v. Martin*, one of the three paramount values to be considered is that a litigant should not be deprived of choice of counsel without good cause. Having found that there is no adverse effect to public confidence in the judicial system, there is no good cause in this case to deprive the applicants of their choice of counsel. Further, the purpose of this application is limited to determining if the court action may proceed. See also *Essa (Township) v. Guergis* (1993), 15 O.R. (3d) 573, *R. v. Speid* (1983), 3 D.L.R. (4th) 246 at 249, and *R. v. Wolfe Iron & Metal Ltd.* (1991), 5 O.H.S.C. 154, all discussed in *Decision No. 339/94I* (1994), 31 W.C.A.T.R. 241, of this Tribunal.

I do not comment on whether the applicant Tiwana and the other applicants may be on different sides of the dispute in the

future. This issue was discussed by a Panel of the Tribunal in *Decision No. 339/94I*, a very similar case to that before me, a right to sue application where the alleged conflict related to the fact that lawyers from the same law firm represented both the applicants and the insurer. All applicants were taking the same position in the (former s. 17) right to sue application before the Tribunal. They all submitted that the actions of the respondent were barred by the *Workers' Compensation Act*. The Panel held that there was no conflict of interest [at pp. 249-250]:

As both Mr. Monaghan and Mr. Wilson point out, however, they are both taking exactly the same position in the section 17 applications before the Tribunal. They both submit that Mr. Moore's actions against them are barred by the Act. In such circumstances, we see no threat to Mr. Wilson's and Mrs. Monaghan's abilities to give their separate clients their "undivided loyalties" in pursuing their claims that all those involved in the accident were workers of Schedule 1 employers in the course of employment at the time of the accident.

The law firm of Enfield, Hemmerick, Adair and Wood (with which both Mr. Monaghan and Mr. Wilson now practise) is not attempting to represent two clients who have conflicting interests in the issues which are before this Tribunal. The law firm with which both lawyers now practise is *not* sending two of its lawyers to this Tribunal to argue conflicting positions. Indeed, the two individual lawyers are both putting forth on behalf of their clients the very same position at this Tribunal.

(c) Possible Conflict in the Future?

Counsel for both interested parties referred us to the possibility that, if we were to find that Mr. Moore could not proceed with his action against the defendants, Progressive (Mr. Wilson's client) could then have a claim against Appollo (Mr. Monaghan's client) as owner of a heavy commercial vehicle subject to the "loss transfer mechanism" in the *Insurance Act*, R.S.O. 1990, c. I.8 (See the more detailed description of this below.) The law firm of Enfield, Hemmerick would then be, in their submission, clearly acting for two clients with conflicting interests.

...

The Divisional Court in *Essa (Township) v. Guergis* (1993), 15 O.R. (3d) 573, expressed concerns that courts should be reluctant to make what may be premature orders preventing solicitors from continuing to act. We also note the following comments of Dubin J.A. for the Ontario Court of Appeal in *R. v. Speid* (1983), 3 D.L.R. (4th) 246 at p. 249:

In assessing the merits of a disqualification order, the court must balance the individual's right to select counsel of his own choice, public policy and the public interest in the administration of justice and basic principles of fundamental fairness. *Such an order should not be made unless there are compelling reasons*. This is clearly such a case and to do otherwise would result in real mischief or real prejudice. [Emphasis added]

In *R. v. Wolfe Iron and Metal Ltd.* (1991), 5 C.O.H.S.C. 154, the court considered it inappropriate to proceed upon "speculative worse-case scenarios" to issue a disqualification order barring a lawyer from continuing to act for a client.

We consider it premature to make an order that Mr. Wilson or his law firm is precluded from continuing to act in these proceedings for Progressive. As we have noted above, there is no conflict as yet apparent from the information before us. There are, in our view, no "compelling reasons" for a disqualification order now. If a conflict between Mr. Wilson's client and Mr. Monaghan's clients exists after this Tribunal issues its decision in these section 17 applications, it could then be a matter for the forum in which the "loss transfer mechanism" is decided, but it is *not* an issue for this Tribunal now.

I agree with the reasoning of the Panel in *Decision No. 339/94I*, quoted above. I conclude that there is no conflict as yet apparent on the information before me. There are in my view no compelling reasons for a disqualification order now. In making this conclusion, I note that the interests of Ms. Griffiths former client and the remaining applicants are identical in this

application, that Ms. Griffiths has undertaken not to cross-examine her former client, that she has stated that she has not received any privileged information in relation to her former client and that her former client does not object to her continuing to act for the remaining applicants. Further, Tiwana states through his current counsel's submissions that he is satisfied that his future interests are protected.

Finally, even if there were a conflict of interest, as in *Decision No. 940/88I* (December 15, 1988) based upon a possible application of section 8(10) of the pre-1989 Act (section 28(4) of the WSIA) or a possible future transfer of loss as in *Decision No. 339/94I*, I conclude that this potential for conflict of interest has been cured by Mr. Tiwana's retention of separate counsel to represent him in this application.

DISPOSITION

The respondent's motion alleging a conflict of interest on the part of applicant's counsel is denied. The hearing of this application shall be reconvened. I remain seized.

Motion alleging conflict of interest denied.



Decision No. 2266/05

Panel: Crystal (Vice-Chair), Robb, Lebert

Decision — May 16, 2006

Neutral Citation: 2006 ONWSIAT 1077

Penalties (Workwell) – Employer (personnel agency) – Merits and justice.

Error of Board's Workwell evaluator led employer to spend much of time between Workwell audits in wrong area – Error was not so fundamental as to render audits a nullity, but should affect time period allowed for employer to rectify deficiencies.

The Board conducted Workwell audits of the employer in May 2002 and December 2002. In the first audit, the employer scored only 12.5%. In the second audit, the employer scored 49.1%, still well below the score needed to avoid a penalty. The employer appealed a decision of the Appeals Resolution Officer confirming a penalty against the employer. The appeal was allowed in part.

The employer was a provider of temporary personnel. It had a head office and nine satellite offices. The satellite offices were small, usually employing only one or two workers. People would only attend those offices to be recruited for temporary employment by the employer. Once recruited, personnel would be placed on a roster and would be contacted by telephone or mail to attend for temporary employment with client companies.

One of the important findings in the Workwell audits was that the employer did not have joint health and safety committees. The employer spent much time during the six months between the audits trying to establish joint health and safety committees, but it was not practical for the satellite offices because only one or two people were regularly employed there. In fact, since there were less than 20 people regularly employed at the satellite offices, a joint health and safety committee was not required at each location. Had the Workwell evaluator properly recognized that the committees were not required, the employer could have directed its efforts during the six months between audits to complying with other requirements of the audit.

The error by the evaluator regarding the joint health and safety committees was not so fundamental as to render the audits a nullity, but the Panel found that it should affect the time period for rectifying deficiencies. Board policy provides for six months to improve compliance. In the circumstances, the employer should be given six months from the time it received clear direction from the Board regarding the nature of the deficiencies. The decision of the Appeals Resolution Officer in June 2004 accepted that the joint health and safety committees were not required at the satellite offices. The

Board should determine the extent of the employer's compliance in December 2004, which is six months after the date of the ARO decision, and calculate the amount of surcharge, if any, as of that time.

Pénalités (Sécurité avant tout) – Employeur (bureau de placement) – Bien-fondé et équité.

Une erreur de l'évaluateur de Sécurité avant tout avait amené l'employeur à passer à tort beaucoup de temps sur un point particulier entre les vérifications dans le cadre de ce programme – L'erreur n'était pas assez fondamentale pour enlever toute valeur aux vérifications mais elle devait avoir une incidence sur la durée de la période donnée pour rectifier les lacunes notées.

La Commission avait procédé à des vérifications dans le cadre du programme Sécurité avant tout en mai 2002 et en décembre 2002. L'employeur avait obtenu 12,5 % lors de la première vérification et 49,1 % lors de la deuxième, ce qui était encore bien en-deçà du résultat nécessaire pour éviter une pénalité. L'employeur a interjeté appel de la décision par laquelle le commissaire aux appels confirmait la pénalité imposée. Le Tribunal a accueilli l'appel en partie.

L'employeur était une agence de placement de personnel temporaire. Il avait un bureau central et neuf bureaux auxiliaires. Les bureaux auxiliaires étaient petits et n'employaient habituellement qu'un ou deux travailleurs. Les gens se rendaient à ces bureaux seulement pour être recrutés par des employeurs qui avaient besoin d'eux temporairement. Une fois recrutés, les gens étaient inscrits sur une liste et les clients communiquaient avec eux par téléphone ou par la poste.

Une des importantes constatations faites lors des vérifications dans le cadre de Sécurité avant tout était que l'employeur n'avait pas de comités conjoints de santé et sécurité. L'employeur avait passé à tort beaucoup de temps au cours des six mois suivant la première vérification à essayer d'établir des comités conjoints de santé et sécurité mais il était impossible de le faire dans les bureaux auxiliaires car seulement une ou deux personnes y travaillaient régulièrement. En fait, comme moins de 20 personnes étaient régulièrement employées à ces bureaux, il n'était pas nécessaire d'y avoir un comité conjoint de santé et sécurité. Si l'évaluateur de Sécurité avant tout avait dûment noté que les comités conjoints n'étaient pas requis, l'employeur aurait pu essayer de rectifier d'autres lacunes notées lors de la première vérification au cours des six mois suivant.

L'erreur relative aux comités conjoints de santé et sécurité n'était pas assez fondamentale pour enlever toute valeur aux vérifications; cependant, le comité a conclu qu'elle devait avoir une incidence sur la durée de la période donnée pour rectifier les lacunes notées. La politique de la Commission prévoyait une période de six mois à cet effet. Dans les circonstances, l'employeur devait avoir six mois à partir du moment où il avait reçu des directives claires de la Commission au sujet de la nature des lacunes notées. Dans sa décision de juin 2004, le commissaire aux appels acceptait qu'il n'était pas nécessaire de créer des comités conjoints de santé et sécurité pour les bureaux auxiliaires. La Commission devait déterminer dans quelle mesure l'employeur s'était conformé en décembre 2004, soit six mois après la date de la décision du commissaire aux appels et calculer, le cas échéant, le montant de la pénalité à partir de ce moment-là.

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A

- s. 82
- s. 119(1)

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
 - Document No. 11-01-03 (October 12, 2004)
- Document No. 13-01-02 (December 14, 2001) (since revised)

APPEAL by the employer from a decision of the Appeals Resolution Officer confirming a penalty against the employer.

May 16, 2006. THE TRIBUNAL: —

BEFORE:	M. Crystal, Vice-Chair C.J. Robb, Member Representative of Employers R.J. Lebert, Member Representative of Workers
HEARING:	November 24, 2005 at Toronto, Oral Hearing
DECISION(S) UNDER APPEAL:	WSIB ARO Decision dated June 10, 2004

APPEARANCES:

For the worker:	Not applicable
For the employer:	Mr. R. Cronish, Legal counsel

REASONS

(i) Introduction

This appeal was heard in Toronto on November 24, 2005. The employer appeals the decision of Appeals Resolution Officer (ARO) W.D. Thomson, dated June 10, 2004. That decision determined that the Workwell Evaluation of the employer's operations produced a score of 575 points out of a possible 1,170 points, or 49.14% and that a recalculation of the employer's premium surcharge was required.

The employer appeared and was represented by Mr. Robert Cronish, legal counsel. Testimony was given by the employer's safety manager. Submissions were made by Mr. Cronish.

(ii) The Issues on Appeal

The issue to be determined in this appeal is whether the premium surcharge levied against the employer, arising from the Board's Workwell Evaluation, was correct.

(iii) The Board's Workwell Program

Section 82 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, provides:

82 The Board may increase or decrease the premiums otherwise payable by a particular employer in such circumstances as the Board considers appropriate including the following:

1. If, in the opinion of the Board, the employer has not taken sufficient precautions to prevent accidents to workers or the working conditions are not safe for workers.

In keeping with this provision, the Board developed *Operational Policy Manual* Document No. 13-01-02, which describes the Board's "Workwell Program." The policy document states in part:

POLICY

The Workwell program issues an additional premium charge to employers who have not taken sufficient precautions to prevent accidents in the workplace.

Workwell operates independently of the WSIB's experience rating programs and its additional premium charges are issued in addition to any premium or premium rate adjustments that may be realized through experience rating.

GUIDELINES

General

Workwell identifies employers with particularly poor accident records, compared to their rate group, or who have a history of non-compliance with the *Occupational Health and Safety Act* and encourages them to improve their prevention programs.

Workwell requires these employers to participate in a workplace health and safety evaluation. Employers that fail the evaluation are given a specified time frame to make improvements. If improvement does not occur within the given time the WSIB issues an additional premium charge.

...

Workwell evaluation

The Workwell evaluation verifies the existence, the consistent application, the implementation and the enforcement of an employer's health and safety program.

Evaluation consists of an initial phase and a follow-up phase. Each evaluation receives a score, weighted to take into account:

- the employer's size,
- the complexity of the employer's operations, and
- the risk associated with the industry in which it operates.

The WSIB looks at the following criteria when evaluating a workplace:

- a written health and safety policy,
- company rules and regulations regarding protective equipment and job procedures, the degree of distribution thereof, and the degree of compliance with these rules and regulations,
- any ongoing health and safety education/training programs for supervisors and workers,
- any preventative maintenance programs for equipment, machinery, and tools,
- any fire prevention programs,
- any safety training programs for operators of mobile equipment (where applicable),
- are there regular inspections of work areas by labour and management representatives,

- any workplace hazards analysis programs,
- any job task analysis programs from a health and safety perspective,
- any health promotion programs,
- the joint health and safety committee, where required under the *Occupational Health and Safety Act*, and its effectiveness in promoting workplace health and safety,
- the comprehensiveness of accident investigations,
- the type of analysis made of injury and disease reports,
- the type of follow-up action taken on injury and disease reports, and
- the severity of contravention of the WSIB's first aid regulations

Evaluation results

Initial evaluation

Employers are informed in writing of the results of the evaluation. Those that do not achieve a score of 75% or better compliance with the evaluation criteria fail initial evaluation and are eligible for a Workwell additional premium charge. Employers have 6 months to improve their compliance with the evaluation criteria.

Employers that fail the initial evaluation are required to work with a health and safety program provider (eg. a Health and Safety Association) to improve their compliance with the evaluation criteria. Failure to do so results in the immediate levying of the additional premium charge, based on the initial evaluation score. See the Additional Premium Charge Table below.

Second evaluation

WSIB staff re-visit the employer at the conclusion of the 6 months to re-evaluate the workplace and calculate the additional premium charge if indicated.

The ARO decision which is the subject of this appeal provided that the issue of how or why the employer was identified for a Workwell audit was an administrative decision beyond the scope of the appeal by the ARO.

(iv) The Evidence

(a) The Audit Process

The employer in this appeal underwent two Workwell audits. The first audit was conducted on May 27, 2000. The second audit was conducted on December 6, 2002. In each case, the audit was performed by a Board official who inspected the employer's premises and records in order to conduct the audit. The Auditor used an evaluation form, which was the basis of each audit. The evaluation form was essentially a "score card" which was used in the audit.

The evaluation form included a series of criteria to be used as the basis of the audit. The main topics addressed on the form were:

- Health and Safety Policies and Procedures
- Health and Safety Program Development
- Health and Safety Program Implementation

- Health and Safety Program Promotion/Communication.

The first of these topics, “Health and Safety Policies and Procedures,” was broken down on the evaluation form into further sub-topics. These included the requirements that the employer have a written health and safety policy, which contains certain specified elements, that certain documents associated with health and safety be conspicuously posted, and that the worksite Health and Safety Committee (HSC) be structured and functioning in relation to certain factors (e.g., composition, frequency of meetings, posting of minutes and reports, etc.).

The second of the topics “Health and Safety Program Development” was also broken down into further “sub-requirements.” These included designating individuals to co-ordinate the program, having written position descriptions, ensuring that health and safety training programs are carried out and documented, and that there is compliance with the first aid requirements set out by the *Workplace Safety and Insurance Act, 1997*.

The third of the topics “Health and Safety Program Implementation” was also broken down into further “sub-requirements.” These included requirements that management perform and document certain types of regular inspections (e.g., unplanned inspections, pre-start-up inspections, etc.), that certain general inspections be conducted by the Joint Health and Safety Committee, that certain observations, conditions, conclusions or actions be taken with regard to audits or assessments (e.g., air quality, noise, biological agents, etc.), that certain elements be included in management’s written accident/incident investigation procedure (e.g., interviewing workers or witnesses, participation by HSC, identifying hazardous conditions, etc.), that the procedure involve the investigation of certain events (e.g., critical injuries, fires and explosions, chemical spills, etc.).

The fourth of these topics, “Health and Safety Policies and Procedures,” is similarly broken down on the evaluation form into further sub-topics. These include the requirement that management promote its health and safety program through various measures such as holding regular meetings with workers, holding workers accountable for infractions, integrating health and safety into all aspects of the organization, encouraging on-the-job health and safety activities for workers, and other activities.

(b) The Two Workwell Audits of the Employer

The first Workwell audit of the employer was conducted on May 27, 2002. The evaluation form for that audit was included in the case materials. The form indicated that about 200 requirements were considered. Each of these requirements was given a point value (e.g., 5, 10, 15, 20 or 40 points, depending on the requirement). Partial compliance was considered to be non-compliance. If there was compliance with a requirement, full points were allotted. If full compliance with the requirement had not been achieved, zero points were allotted in relation to the requirement.

Following the audit, the Board’s Workwell Evaluator sent correspondence to the employer which stated in part:

On May 27, 2002, I visited [the employer] to conduct an evaluation of your occupational health and safety program according to section 82(1) of the Workplace Safety and Insurance Act. I appreciate the time and assistance given to me during the evaluation process. The report is based upon the approximately 6½ hours I spent in discussions with you and some of your staff as well as observations made during my tour of your workplace. This report is based upon the results of our discussions, as well as interviews with your staff and observations made during the tour of the workplace.

I hope that my comments and recommendations will assist you and your staff to develop and implement an occupational health and

safety program that meets your business' needs.

I appreciate the time and assistance you and your associates gave me.

Overall, [the employer] scored a total of 165 out of a possible 1325 marks, or 12.5%. This is below the accepted minimum score of 75% and indicates that several elements of a formalized health and safety program are not in place at your firm.

As per our discussion, no points are awarded for plans/programs which are not documented, incomplete or in the development stage. The scoring of the evaluation is based on a marking scheme which allows full points (100%) or no points at all. There are no provisions to consider a range (i.e. 50 to 75%) when scoring a particular question on the evaluation.

A good health and safety program provides a clear set of activities that, if followed, will assist in reducing accidents and cases of occupational illness. It is hoped that the recommendations that follow will assist you to develop illness/injury reduction guidelines to meet your firm's needs.

The program you are now developing should be documented, implemented and communicated through all levels of your organization. Consider centralizing the health and safety policy, standards and procedures in a manual/binder.

Regardless of the nature or size of your business, experience has shown that health and safety pays off. The time, energy and money devoted to the development and implementation of a health and safety program are much less than the costs associated with accident recovery...

In closing, I wish to stress that I came away from our discussions confident that the management team fully supports the need for ongoing revisions to your present health and safety program.

In further correspondence from the Board, dated May 27, 2002, the employer was advised that because it had scored only 12.5% on the audit, it was subject to an additional levy in the amount of \$500,000. The correspondence stated, however, that the Board "anticipated that [the employer] will improve its health and safety program prior to the re-evaluation thus eliminating or reducing the additional premium." The correspondence also stated that an appointment had been scheduled for a further audit on December 4 and 5, 2002, to re-evaluate the firm's health and safety programs.

One type of deficiency that was identified in the first audit resulted from the employer's failure to establish Joint Health and Safety Committees.

The second audit was conducted on December 5, 6 and 11, 2002, and the evaluation form for that audit was also included in the case materials. The Board's Workwell Evaluator reported on the second audit in correspondence, dated January 2, 2003, to the employer. That correspondence stated, in part:

Overall, [the employer] scored a total of 530 out of a possible 1315 marks or 40.3%. This score indicates that several elements of a formalized health and safety program are still not in place at [the employer]. Details of an additional surcharge will be forwarded to you in the near future.

You and your staff are to be complimented on the positive actions taken. I am confident that the momentum will be maintained and that changes which will enhance your workplace health and safety program will be implemented...

In closing, I wish to stress that I came away from our discussions confident that the management team fully supports the need for ongoing revisions to your present health and safety program...

In further correspondence from the Board, also dated January 2, 2003, the employer was advised that although the employer had improved its health and safety program, as evidenced by the improved score in the second audit, it would nevertheless be subject to an additional premium charge of \$451,256.

The second audit maintained that the employer's failure to establish Joint Health and Safety Committees continued to be a deficiency.

The evaluation form for the second audit was reviewed by the ARO, in its decision dated June 10, 2004, which is the subject of this appeal. The ARO decision concluded that the employer should be granted an additional 45 points, and that a further 145 points were not applicable. The ARO pointed out that the employer's new percentage score had improved to 49.1%, and noted that the employer's additional premium surcharge would need to be recalculated. As will be noted in greater detail below, the ARO found that the employer was not required by law to establish Joint Health and Safety Committees, given its small number of employees. It was implicit in the ARO decision that Workwell Evaluator's audits were in error in that they determined that the employer was required to establish these committees. The ARO decision sought to remedy the error by making the requirements concerning the establishment of the committees "not applicable" to the employer.

(c) Issues related to the employer's structure

The employer is a provider of temporary personnel to both the private and public sectors. Many of the personnel are employed in industrial settings. At the appeal hearing, the employer's safety manager testified about the company's composition. He testified that the employer has a head office and nine satellite offices throughout southern Ontario. He stated that the satellite offices are generally small, and that at any given time, the offices may employ between zero and 20 people. Because the employer's business is outsourcing personnel to outside locations, personnel are not located at the satellite offices. Personnel may attend the offices to be recruited for temporary employment with the employer, but once recruited, the personnel generally do not attend at the offices. Generally, if they are successfully recruited, personnel go onto a roster of employees, who may be contacted from time to time for temporary employment with other employers.

The safety manager testified that, in his contact with the Workwell Auditor, he was advised that the Auditor expected that a four-person HSC be established at each of the employer's locations. He noted that each satellite office would only employ one or two people and so it was necessary to recruit potential HSC participants from the temporary staff. The safety manager testified that he tried to recruit such employees to participate in HSCs, but found that frequently, when such employees were trained to participate in a HSC, they would leave the employer in favour of more permanent employment opportunities elsewhere.

The safety manager noted that many of the requirements of the Workwell audit depended on the existence of an HSC, and given the decentralized structure of the company, and the transient nature of its employees, it was difficult to achieve requirements related to ongoing permanent HSCs, within the timeframe set by the Board's Auditor.

The safety manager also testified that the employer had difficulties meeting the requirements of the Workwell audit within the timeframe required because there were few individuals working on health and safety issues at the time of the first audit, and there was insufficient time to hire and train new staff during the period between the two audits to perform all of the requirements to significantly improve the employer's score. The safety manager stated that, at the time of the first audit, he was the only person employed by the employer who spent significant time on health and safety issues.

He stated that there were two other employees who were working on health and safety issues during the relevant period, but that they were both off work due to maternity leave during portions of the relevant period. The safety manager also noted that he had responsibility for completing the Employer's Report of Injury/Disease (i.e., the Board's Form 7) when any employee had a workplace accident. He was also responsible for determining appropriate modified work for injured workers, and conducting investigations into accidents, when necessary. He also testified that he had responsibility for waste management services.

The safety manager testified that since the first Workwell audit, he performed a number of tasks associated with health and safety issues, including:

- posting bulletin boards in the employer's offices, which included the posting of documents and legislation, as required by the initial Workwell audit;
- publication of a monthly newsletter, entitled "The Informed Worker" which communicated various matters to the employer's employees, but was primarily related to safety issues;
- publication of a number of other documents intended to communicate safety issues to employees, addressing such issues as driving, controlled substance and alcohol testing, the transportation of dangerous goods, incident reporting, hazards associated with confined spaces, blood borne pathogens, and other issues;
- development of training manuals and carrying out the training of staff;
- development of an Emergency Action and Fire Prevention Plan;
- developing a special program for younger workers;
- attempting to establish Joint HSCs in all of the employer's offices;
- establishing a process for tracking claims made to the Board.

The safety manager testified that many of these tasks were performed between the two audits. He also stated that during that period of time, it was necessary for him to undertake training so that he could prepare the training and other materials, and carry out training of staff. The case materials included several substantial health and safety documents, including manuals and communication documents which were required by the audit.

(v) Analysis

At the appeal hearing, it was the employer's submission that it did not have enough time between the first and second audit to comply substantially with the requirements set by the first audit. We note that the first audit was conducted in late May 2002 and that the second audit was conducted in early December 2002 and that there was a period of about six months between the two audits. Although *Operational Policy Manual* Document No. 13-01-02 states that "Employers have 6 months to improve their compliance with the evaluation criteria," it is the Panel's view that, in the unique circumstances of this appeal, it was not possible for the employer to comply with the requirements set by the first audit within six months.

First, we note that the employer was a small company, employing about 30 staff members who were employed at the company's head office and at its nine satellite offices. At any given time, the satellite offices might employ only one or two individuals.

It was the employer's submission that it was not practical for it to establish a Joint Health and Safety Committee (JHSC) in its satellite offices. One of the requirements set by the first audit was the establishment of such committees. Item 1.5 in the audit required that "The worksite Health and Safety Committee is structured and functioning in accordance with legislated requirements regarding [a number of different factors]." The employer was awarded zero out of a possible forty-five points for these requirements in the December 2002 audit.

As noted above, the ARO decision agreed, at least to some extent, with the employer's submission in this regard. The ARO decision stated in part:

This element [i.e., the requirement to establish JHSCs] formed a significant portion of [the employer's] contention that the Workwell evaluator did not fully comprehend the nature of their business and the potential unique considerations that they felt were warranted. Primarily, that although their temporary staff are indeed their direct employees, those individuals are all assigned to fulfil the labour requirements of their clients on their clients' premises. Premises which [the employer] exercises virtually no control over, save for their initial site inspections conducted to ensure they were safe and healthy environments to provide temporary workers to.

[The employer's] offices, except for Head Office, only employ two to three full time permanent staff at most. The temporary staff recruited only visit the office once, in most cases, to sign up, provide documentation, undergo testing as required, receive their employee and safety indoctrination. They are then dispatched to [the employer's] clients by phone and receive their payment for services rendered and other communication usually by mail. So then, the [the employer's] offices cannot effectively be described as the temporary workers' workplace. They are simply their "dispatch and payroll accounting centres".

Therefore, it was [the employer's] position that JHSCs were not mandatory for each satellite location, under the statute, under these circumstances. They did acknowledge and establish a JHSC for their Head Office and, by extension, their satellite offices through the monthly attendance of a representative from each at the monthly meetings.

The statute prescribes the need for a two person JHSC where there are at least twenty, but fewer than fifty regularly employed workers at a workplace. And four where there are more than fifty. In [the employer's] satellite offices, there were far fewer than twenty regularly employed workers so it was clear that they did not require a JHSC at each location. Furthermore, their Head Office consisted of eleven staff members, fewer than twenty regularly employed staff minimum and was, therefore, also exempt. Despite that fact, not only has [the employer] established a JHSC at Head Office with representation from the satellite offices, they have undertaken to have that committee formally recognized by the Minister of Labour as a multi-workplace JHSC under section 9 (3.1) of the [Occupational Health and Safety] Act. And, as detailed at the hearing, have a JHSC of approximately thirteen for their less than fifty permanent employees.

I must therefore determine the points available under this element to be not applicable.

As noted above, the ARO decision is dated June 10, 2004. At the appeal hearing, the employer's safety manager testified that he expended a great deal of effort in seeking to establish JHSCs not only at head office, but also at the satellite offices. We find that the employer considered the establishment of these JHSCs to be central to a responsible Health and Safety Program. At the time that the employer received the results of the first audit, it would have been under the impression that the establishment of JHSCs was required by the audit, however, in addition, it considered that many of the other requirements set by the audit would be appropriate as subject matter for the consideration and deliberation of such committees. As such, we find that it was reasonable for the employer to conclude that the establishment of the committees would be a first priority.

It was not until about 18 months after the second audit, with the release of the ARO decision, however, that the employer

learned that establishment of the JHSCs was not a requirement. We agree with the ARO that the establishment of the JHSCs was not required.

The employer's efforts to establish the JHSCs, although laudable, were not ultimately recognized by the Workwell audit process. We find that the employer was misdirected by the first audit in this regard. It spent valuable time, during the six months between the two audits, in establishing a central JHSC and attempting to establish such committees in the satellite offices. Had the Workwell Evaluator properly recognized that the establishment of the committees was not required, the employer could have directed its efforts to complying with other requirements of the audit, and almost certainly would have scored higher on the second audit. It might well have scored high enough to have avoided the premium surcharge.

We also find that the employer acted in good faith in attempting to comply with the requirements of the audit process during the six-month period from May to December 2002. It was apparent from the materials that the employer's safety manager had prepared several substantial documents during the six-month period. He also testified that he underwent about thirty days of training during the six-month period, to be in a position to do this work.

The fact that the safety manager was one of the only employees of the employer devoting his efforts to health and safety issues, also made compliance with the requirements of the audit during the six-month period extremely difficult, if not impossible, to meet. Hiring new employees who were untrained and who were unfamiliar with the operations of the company, would not have rectified this problem, within the timeframe set by the Board's policy. We find that the safety manager made his best efforts to achieve compliance with the requirements of the audit process. We also note that the Board's correspondence dated January 2, 2003 expressed confidence that the employer was making its best efforts towards compliance.

The Workwell program is premised on a process in which the Board evaluates an employer's health and safety program, communicates deficiencies to the employer, and then gives the employer six months to rectify any deficiencies which are identified. If at the conclusion of the six months the deficiencies are not rectified, the employer is subject to financial consequences in the form of a premium surcharge. The accuracy and appropriateness of the initial audit, as well as the audit which occurs after six months, is critical to the integrity of the process, because they provide direction to the employer as to the deficiencies to be rectified, and the priority which must be given to the work associated with rectifying the deficiencies.

The Workwell audits which were performed by the Board in May and December 2002 incorporated a significant error, in that it directed the employer to establish Joint Health and Safety Committees at its head office as well as its satellite offices. In fact, the employer was not required by law to establish these committees. This error was clearly identified and articulated in the Board's ARO decision dated June 10, 2004. We agree with the ARO in that regard.

We find that this error was not so fundamental so as to render the audits a nullity, but we do find that the error affects the six-month time period for rectifying the deficiencies which were properly identified by the audits. Although *Operational Policy Manual* Document No. 13-01-02 states that "[e]mployers have 6 months to improve their compliance with the evaluation criteria," in our view, the six-month time period provided by the policy document should not begin to run until the employer has been given clear direction from the Board on the nature of the deficiencies.

The Workwell audits conducted by the Board in May 2002 and again in December 2002 did not provide such clear direction. For reasons noted above, the Board misdirected the employer, and caused the employer to perform a significant amount of

work, as a matter of priority, during the relevant period, establishing and working with Joint Health and Safety Committees. That misdirection caused the employer to perform work for which it did not obtain credit, and prevented it from performing other work for which it could have obtained credit during the six-month period.

Section 119 of the *Workplace Safety and Insurance Act, 1997* provides:

119(1) The Board shall make its decision based upon the merits and justice of a case and it is not bound by legal precedent.

Further, the Board's *Operational Policy Manual* Document No. 11-01-03 on the subject of "Merits and Justice" provides, in part:

Merits and justice

Every decision made by the WSIB must be based on the merits and justice of the case, which means decision-makers must take into account

- all facts and circumstances relating to the case
- the relevant WSIB policy or policies, and
- the relevant provision or provisions of the *Workplace Safety and Insurance Act* or the *Workers' Compensation Act* (the Act)

...

Exceptions to relevant policies

There may be rare cases where the application of a relevant policy would lead to an absurd or unfair result that the WSIB never intended. Therefore, a decision-maker may depart from a policy if it can be shown that the case has exceptional circumstances that justify doing so.

The decision-maker must clearly identify the exceptional circumstances and explain in the decision why the relevant policy is not applicable.

In our view, the merits and justice of this case require that the six-month period referred to in *Operational Policy Manual* Document No. 13-01-02 not begin to run until the time that the employer was advised by the Board that there was an error in the Workwell audits conducted by the Board in May 2002 and in December 2002. The error was not brought to the employer's attention until it received the ARO decision dated June 10, 2004. It was at that time that the employer received its first accurate and appropriate audit, which took into account the fact that the employer was not required to establish Joint Health and Safety Committees. Although we agree that the ARO was correct in determining that the employer was not required to establish Joint Health and Safety Committees, given the significant error of the Workwell Evaluator in this regard, which caused the employer to perform unnecessary work establishing the committees during the initial six months, the employer should have been given more time to correct the deficiencies.

Accordingly, the employer should have had a further six months from June 10, 2004, the date of the ARO decision, to rectify any deficiencies identified by the Workwell audit process. We find that the surcharge that was assessed in 2003 in relation to the 2002 audits, was not appropriate and that the surcharge for that year should be rescinded.

The audits performed by the Workwell Evaluator resulted in a surcharge of \$451,256. That amount was to have been altered as a result of the ARO's decision. The amount of the surcharge which resulted from the alteration by the ARO decision is not apparent from our materials, however, that surcharge is rescinded, in keeping with our direction, and any amounts paid by the employer in that regard should be refunded or credited to the employer.

In keeping with the spirit of the Board's policy, we find that compliance with the requirements of the Workwell audit articulated by the ARO decision in June 2004 was required within six months from the date of the decision, or by December 2004. The level of compliance in December 2004 should be determined by the Board, to the extent practicable, through a further Workwell audit, as it considers appropriate. The amount of the premium surcharge payable by the employer, if any, shall be determined by the Board, based on the level of the employer's compliance as of December 10, 2004. If the Board is of the view that it is not practicable to conduct a Workwell audit as of December 2004, it is open to the Board to conduct a Workwell audit as of a subsequent date and to base the amount of the premium surcharge, if any, on this later Workwell audit.

DISPOSITION

The appeal is allowed in part:

1. The surcharge that was assessed in 2003 in relation to the 2002 audits, was not appropriate.
2. The amount of the surcharge assessed in 2003 as altered by the ARO decision of June 10, 2004, is rescinded.
3. The Board shall conduct a further audit, if it considers it appropriate to do so, to determine the employer's level of compliance with the Workwell program, consistent with the requirements described by the ARO decision of June 10, 2004. Compliance shall be determined as of December 10, 2004. If the Board determines that it is not practicable to conduct a Workwell audit as of December 10, 2004, the Board may audit the employer's level of compliance as of a later date.
4. The amount of the premium surcharge payable by the employer, if any, shall be determined by the Board, based on the level of the employer's compliance as of December 10, 2004, or such later date as the audit is conducted.

Appeal allowed in part.



Decision No. 830/06

Vice-Chair: Sutherland

Decision — April 28, 2006

Neutral Citation: 2006 ONWSIAT 956

Re-employment (non-compliance) (payments) (mitigation).

Employer failed to fulfil re-employment obligations but worker refused to consider modified work or to make effort to find other employment – Worker was not entitled to payments equivalent to LOE benefits.

A road construction labourer suffered a back injury in July 1999. The worker was laid off in December 1999 as part of a seasonal lay-off, but he was not rehired in the spring of 2000. The Board found that the employer breached its re-employment obligations and assessed the maximum penalty against the employer. However, the Board refused to make payments to the worker equivalent to LOE benefits. The worker appealed a decision of the Appeals Resolution Officer denying the payments to the worker. The appeal was dismissed.

The worker applied for employment insurance sickness benefits. From the documentary evidence, it was clear that the worker had made up his mind not to return to work and that he had removed himself from the work force. He refused to consider his doctor's suggestion to return to modified work. There was no evidence that the worker made any effort to find other employment or that he intended to do so.

Board policy on re-employment provides that the Board may make payments to a worker who is available for a return-to-work placement program. The worker was not available for such a program in this case. He was not entitled to the payments.

Rengagement (inobservation) (paiements) (atténuation).

L'employeur avait négligé de remplir ses obligations en matière de rengagement mais le travailleur avait refusé de considérer la possibilité d'un travail modifié ou d'essayer de trouver un autre emploi – Le travailleur n'avait pas droit à des paiements équivalents aux prestations pour PG.

Un ouvrier de construction routière avait subi une lésion au dos en juillet 1999. Il avait été mis à pied en décembre 1999 dans le cadre de la mise à pied saisonnière mais l'employeur ne l'avait pas rengagé au printemps de 2000. La Commission avait conclu que l'employeur avait enfreint ses obligations en matière de rengagement et lui avait imposé la pénalité maximale. La Commission avait aussi refusé de verser au travailleur l'équivalent des prestations pour perte de

gains (PG). Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de lui reconnaître le droit aux paiements en question. Le Tribunal a rejeté l'appel.

Le travailleur avait fait une demande de prestations d'assurance-maladie. Selon la preuve documentaire, il était clair que le travailleur avait décidé de ne pas retourner au travail et qu'il s'était retiré du marché du travail. Il avait refusé de considérer la possibilité d'un travail modifié et rien n'indiquait qu'il avait essayé de trouver un autre emploi ou qu'il avait l'intention de le faire.

La politique de la Commission sur le rengagement prévoit que la Commission peut faire des paiements au travailleur aux fins d'un programme de retour au travail. Comme il n'était pas disponible pour un tel programme, le travailleur en l'espèce n'avait pas droit à de tels paiements.

Board Directives and Guidelines Considered:

- *Operational Policy Manual*
 - Document No. 05-06-06 (September 4, 1991) (since superseded)
 - Document No. 15-04-02 (March 15, 2005) (since superseded)

APPEAL by the worker from a decision of the Appeals Resolution Officer denying payments equivalent to loss of earnings benefits to the worker whose employer had failed to fulfil its re-employment obligations.

April 28, 2006. THE TRIBUNAL: —

BEFORE:	S. J. Sutherland, Vice-Chair
HEARING:	April 27, 2006 at London, Oral
DECISION(S) UNDER APPEAL:	Appeals Resolution Officer, T. McDonald, dated December 11, 2003

APPEARANCES:

For the worker:	K. Hahn, Middlesex-Elgin Legal Services Inc.
For the employer:	The employer did not participate
Interpreter:	H. DiBerardino, Portuguese

REASONS

(i) Issues

The worker seeks re-employment payments as per the Board's *Occupational Policy Manual*, Document No. 19-04-09.

(ii) Introduction

The employer is in the business of road building and excavation.

The worker was almost 63 years old when I heard his appeal. He was a labourer who got his work through the union hall, but he had been working for the employer consistently, on a seasonal basis, since 1987.

The injury from which this appeal arises happened on July 14, 1999. The worker was adjusting a pump and hoses near a 30-foot piling. The piling fell over and hit the worker on his left side, above the belt line.

The employer's representative, D. Dawson, advised the Claims Adjudicator on July 15, 1999, that the worker had been transported to a hospital after the accident. He was released after examination with a diagnosis of bruising to his left side. Mr. Dawson went on to say that the employer was providing the worker with modified job duties at no wage loss. However, according to the Appeals Resolution Officer's decision, the worker was absent from work for two weeks after this accident and the employer paid him his full wages. The worker returned to work as a flagman for a further two weeks, following which he returned to his regular job duties, although he had assistance with heavy lifting.

There was no further activity in the worker's claim file until March 28, 2000, when the legal clinic became the worker's representative.

On May 23, 2000, P. Duarte, a disability agent with the legal clinic, advised the Board that there had been a general lay-off on December 16, 1999, and more junior workers were recalled in the spring of 2000. The worker was unable to find other employment because of his restrictions against heavy lifting. Mr. Duarte asked for further benefits and a labour market re-entry program.

The Claims Adjudicator spoke with Mr. Duarte on May 24, 2000. The Claims Adjudicator recorded that she explained there were no medical reports that would indicate ongoing problems with the worker's back. The lay-off was an employment situation. The worker was not entitled to further benefits.

Ultimately the Appeals Resolution Officer heard the worker's appeal. That hearing took place over two days. The Appeals Resolution Officer heard from four witnesses. The Appeals Resolution Officer concluded that:

- the worker had pre-existing non-compensable back problems;
- the worker returned to his "pre-accident" condition by mid-August 1999;
- the lay-off in December 1999 was the usual seasonal lay-off;
- the employer was obligated to re-employ the worker;
- the re-employment obligation lasted until August 15, 1999; and
- the employer breached its re-employment obligation.

The Appeals Resolution Officer concluded that the worker's "physical condition and the related limitations did in fact play a role in [the foreman]'s decision not to recall this worker." She also found "that the failure to re-employ was in fact due in some part to the worker's July 1999 injury." The Appeals Resolution Officer assessed the employer, the maximum penalty for breaching the re-employment obligation. She found that the worker was not available for a return-to-work placement program because he applied for Employment Insurance Sick Benefits, which he received from March 5, until June 17, 2000, followed by sick benefits through his union from June 18, until April 10, 2001. The Appeals Resolution Officer said: "There is no evidence the worker attempted to mitigate the wage loss (incurred when the employer failed to rehire him) through any self-directed rehabilitation activities (i.e., job search; placing himself on the union hire list etc.)." She denied the worker re-employment benefits.

(iii) Mr. Hahn's Submissions

Mr. Hahn submitted that the worker elected to receive Employment Insurance benefits because he was not recalled by the

employer and he did not receive any assistance from the Workplace Safety and Insurance Board. The worker had been employed in construction all his life and had no other source of income.

Mr. Hahn referred me to a report dated July 27, 2000, prepared by Dr. J. Clifford, a specialist in physical medicine and rehabilitation. In that report, Dr. Clifford said:

The patient is 57 years of age and has apparently worked in construction since the age of 13. As such, it seems quite unrealistic to expect him to return to gainful employment unless he was offered appropriately modified duties by his current employer. He would seem not to be at all competitive on the open job market.

Mr. Hahn reviewed Board *Operational Policy Manual* Document No. 19-04-09 and submitted that the worker was entitled to re-employment payments because the employer did not offer him a job, and the worker was not given the opportunity to be unco-operative. Mr. Hahn argued in the alternative, that the worker was entitled to loss of earnings benefits because he was not offered either employment by the employer or a labour market re-entry plan by the Board.

(iv) Law and Policy

The policy portion of Document No. 19-04-09 says:

If the WSIB determines that the employer has not fulfilled the re-employment obligation, the WSIB may

- levy on the employer a penalty of up to the equivalent of the worker's net average earnings (NAE) for the year before the injury, and
- make payments to the worker, as if the worker were entitled to loss of earnings/temporary disability (LOE/temporary) benefits.

Under the heading "Re-employment payments," the policy says:

If the worker is fit for the essential duties of the pre-injury job without accommodation, but the employer fails to meet the re-employment obligation, the WSIB issues re-employment payments to the worker, including interest, effective from the start date of the re-employment obligation.

...

Re-employment payments are issued for up to

- one year, or
- the end of the obligation period, whichever comes first (see 19-04-03, Compliance with the Re-employment Obligation) as long as the worker is available for, and co-operates in, a return to work (RTW) placement program.

(v) Conclusions

Although the worker was present at the hearing, Mr. Hahn did not call on him to testify. Therefore, in coming to my conclusions, I have relied on Mr. Hahn's submissions, the written record, the Act, and Board policy.

The medical record shows that the worker underwent a number of investigations, including an x-ray (March 28, 2000), a CT scan (June 27, 2000) and a bone scan (August 24, 2000) and was treated for back problems throughout the period at issue.

A physiotherapy assessment report dated March 8, 2000 said: "this client is a seasonal construction worker and I suspect he should be able to return to work once his winter season lay off is finished." The discharge report dated April 7, 2000, said that the worker did not intend to return to work.

Mr. Dawson wrote the Board on June 1, 2000:

... one must understand that the crews are all hired out of the Union Hall, and are hired on a seasonal basis. That being said at the end of each season, workers are issued UI [unemployment insurance] papers, respecting lay-off, and thereby are released, and are free to register with their Union hall, for reassignment, to other possible employers. Employer/Employee relationship, respecting workers from the Union Hall, is thereby severed at the end of each season or at such time as the employer no longer requires said manpower.

The Claims Investigator met the worker and his representative on June 13, 2000. The investigator recorded:

... There was a general lay off in December 1999, but the injured worker was never recalled. The injured worker also confirms that he never called the accident employer about being recalled in the spring of 2000.

The worker's family physician, Dr. S. Jones, advised the Claims Investigator, on June 15, 2000, that he had been treating the worker for 5½ years for "a number of ailments including chronic back pain, allergic rhinitis and bilateral osteoarthritis of his knees." Dr. Jones reviewed the worker's treatment from May 13, 1999 on. He reported the following with respect to the worker's condition from the beginning of March 2000:

[The worker] cancelled his March 2, 2000 appointment. He next attended the clinic on March 7, 2000. At that time he indicated he was scheduled to return to work but was unable to work because of his persistent back pain. A modified work program (i.e. light duties) was suggested but declined by the patient. The physiotherapy was scheduled to start the following day. His medications were of little help, although I learned later he hadn't been taking them regularly. The patient was also started on medication to [treat an unrelated condition].

On March 16, 2000 the patient returned for re-evaluation of his right lower back pain and [the unrelated condition]. At that time his range of motion was in the normal range. There was minimal muscle spasm. He was given a prescription for Tylenol #3 and medication for his [unrelated condition].

The following week [the worker] was seen again (March 24) He had stopped physiotherapy because he felt this made his back worse. At the request of the patient x-rays were ordered. These subsequently revealed some mild degenerative changes. Once again his physical exam revealed a normal range of motion with minimal L5-S1 tenderness.

The patient returned on March 30, 2000 indicating that he thought physiotherapy was helping.

He was now taking his medication regularly. There was some tenderness over the SI joint bilaterally with the right being more tender than the left.

On April 10, 2000 I met with [the worker] and his son. I reviewed the back x-ray which did not indicate anything sinister. During this conversation [the worker] expressed his wish to pursue long term disability. No examination took place on this occasion. The patient and his son were to get the necessary forms for me to fill out. A referral to Dr. Southcott, an orthopedic surgeon was made

but Dr. Southcott's office indicated that he does not do back assessments. A subsequent referral to Dr. T. Miller at the Physical Medicine & Rehabilitation Centre was made but the patient could not be seen until November, 2000. I have subsequently referred the patient to Dr. John Clifford in Chatham – appt is July 27, 2000.

[The worker] returned 1 week later on April 17. At that time he had abandoned physiotherapy and seen a chiropractor. It was uncertain if he was taking any pain medication. [The worker] still had not got the UIC forms nor the short term disability or CPP disability forms, I had previously suggested. [The worker] has refused suggestions that this claim be filed as a WSIB re-injury of his July 1999 back injury. [The worker]'s predominant complaint on this visit focused on his blocked nose caused by allergies. His Prednisone was subsequently raised.

[The worker] was seen on May 4, 2000. He was complaining of pain originating in the lower back and radiating into his neck. Once again the patient was only taking his medication on a sporadic basis. The physical exam revealed right lower back pain especially with rotation to the right. A referral to Dr. Russell (chronic pain clinic) was subsequently made. A muscle relaxant was subsequently added as well as a medication to help sleep and chronic pain.

On May 30, 2000 I met with [the worker] to discuss concerns. [The worker] said he felt he was "unemployable" and that where he works there is no such thing as light duties. His back pain was bearable although he had stopped his medications. On physical examination he had flexion of 100 degrees, extension of 15 degrees, normal rotation and lateral flexion. Deep tendon reflexes 1+, power 5/5, Straight leg negative, no spasm but minimal left L5-S1 para-spinal tenderness. The patient was encouraged to take his medications regularly.

[The worker] has steadfastly refused to let me re-activate his case as a WSIB case. Instead he has engaged a paralegal in London to obtain some sort of settlement from his former employer. [The worker]'s case has been difficult and frustrating to manage: he has made it clear that he has no intention of returning to work. He has often been non compliant with his medications.

Dr. Jones produced essentially the same report on June 20, 2000.

It is quite clear from the documentary evidence set out above that the worker had made up his mind not to return to work by April 7, 2000 and he removed himself from the work force. The worker did not contact the employer to seek work. He told Dr. Jones that he was going to "pursue long-term disability"; he felt that he was unemployable; and "he has made it clear that he has no intention of returning to work." He refused to consider Dr. Jones' suggestion that he return to modified work.

It will be remembered that Mr. Duarte submitted to the Board that the worker was unable to find other employment because of his restriction against heavy lifting. There is absolutely no evidence that the worker ever tried to find other employment or that he intended to do so. In particular, the worker did not register with his union hall for reassignment.

The policy portion of Document No. 19-04-09 says that the Board "*may*" make re-employment payments to a worker who is "available for... a return to work placement program." This worker was not available for a return to work program.

Mr. Hahn submitted that the Board did not provide the worker a labour market re-entry plan. It can be seen from Dr. Jones' report that the worker refused to consider Dr. Jones' suggestions that a claim be filed. Given the worker's decision not to return to work, it is difficult to fault the Board for not providing a labour market re-entry plan.

I agree with the Appeals Resolution Officer's conclusion that the worker was not entitled to re-employment payments.

DISPOSITION

The worker's appeal is denied.

The worker is not entitled to re-employment payments.

Appeal dismissed.



Decision No. 1524/03ER2

Vice-Chair: Keil

Decision — April 21, 2006

Neutral Citation: 2006 ONWSIAT 875

Reconsideration (consideration of evidence) – Time limits (appeal) (diligence of applicant) – Time limits (appeal) (diligence of representative).

Previous representative may not have carried out duties and may have misled worker as to status of appeal – Some delay in contacting Tribunal might have been understandable but worker provided no compelling reasons for his lack of action in contacting Tribunal for almost five years – Reconsideration denied of decision denying extension of time to appeal.

In *Decision No. 1524/03E*, the worker's application to extend the time to appeal was denied. In *Decision No. 1524/03ER*, the worker's application to reconsider *Decision No. 1524/03E* was denied. The worker now made a second application to reconsider *Decision No. 1524/03E*.

There was little new in this second application for reconsideration, but the worker emphasized the well known nature of his previous representative in failing to carry out his obligations. The Vice-Chair acknowledged that the previous representative may not have carried out his duties and even that he may have misled the worker as to the status of the appeal to the Tribunal. Under such circumstances, some delay in contacting the Tribunal might have been understandable. However, in this case, the worker waited almost five years to contact the Tribunal. The worker provided no compelling reasons for his lack of action for such a long period of time.

The application to reconsider was denied.

Réexamen (examen de la preuve) – Délai (appel) (diligence du requérant) – Délai (appel) (diligence du représentant).

Il était possible que l'ancien représentant n'ait pas rempli ses fonctions et qu'il ait induit le travailleur en erreur au sujet de l'état d'avancement de son appel – Un certain retard pour communiquer avec le Tribunal aurait pu être compréhensible mais le travailleur n'a avancé aucun argument irréfutable pour expliquer pourquoi il avait tardé pendant presque cinq ans – Le Tribunal a rejeté la demande de réexamen de la décision par laquelle il avait rejeté la demande de prorogation du délai d'appel.

Dans la *décision no 1524/03E*, le Tribunal a rejeté la demande de prorogation du délai d'appel du travailleur. Dans la *décision no 1524/03ER*, le Tribunal a rejeté la demande de réexamen du travailleur visant cette décision. Le travailleur a fait une deuxième demande de réexamen visant la *décision no 1524/03E*.

Cette deuxième demande de réexamen ne différait pas beaucoup de la première si ce n'est que le travailleur a mis l'accent sur la propension bien connue de son ancien représentant à ne pas s'acquitter de ses obligations. La vice-présidente a admis que l'ancien représentant n'avait peut-être pas rempli ses fonctions et qu'il avait même pu induire le travailleur en erreur au sujet de l'état d'avancement de son appel au Tribunal. Un certain retard pour communiquer avec le Tribunal aurait pu être compréhensible dans de telles circonstances; cependant, en l'espèce, le travailleur avait attendu presque cinq ans pour le faire et il n'a avancé aucun argument irréfutable pour expliquer pourquoi il n'avait rien fait pendant aussi longtemps.

Le Tribunal a rejeté la demande de réexamen.

Tribunal Decisions Considered:

- *Decision No. 72R* (1986), 18 W.C.A.T.R. 1 refd to
- *Decision No. 72R2* (1986), 18 W.C.A.T.R. 26 refd to
- *Decision No. 95R* (1989), 11 W.C.A.T.R. 1 refd to
- *Decision No. 850/87R* (1990), 14 W.C.A.T.R.1 refd to

Workplace Insurance Legislation Considered:

- *Workers' Compensation Act*, R.S.O. 1990, c. W.11
 - s. 72
 - s. 90
- *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A
 - s. 129

Cross-References:

- *Decision No. 1524/03E* (August 20, 2003) [2003 ONWSIAT 1935]
- *Decision No. 1524/03ER* (July 13, 2005) [2005 ONWSIAT 1561]

APPLICATION by the worker for reconsideration of *Decision No. 1524/03E*.

April 21 , 2006. THE TRIBUNAL: —

BEFORE:	M.F. Keil, Vice-Chair
HEARING:	March 7, 2006 at Toronto, Written
DECISION(S) UNDER APPEAL:	Worker request for reconsideration of <i>Decision No. 1524/03E</i> dated August 29, 2003, and <i>Decision No. 1524/03ER</i> dated July 13, 2005

APPEARANCES:

For the worker:	O. Di Santo, Odisan Consultants Inc.
For the employer:	Not participating

REASONS

(i) Introduction

In a decision dated April 21, 1998, Appeals Resolution Officer D. Mosser denied the worker initial entitlement for low back disability (first claimed in 1996) said to have occurred over his 30 years of physical work. By virtue of the statutory, six-month time limit, the Tribunal would have had to receive notice of intent to appeal this by October 21, 1998. The Tribunal received the worker's Notice of Appeal (NOA) on February 24, 2003, 4½ years past the deadline. In *Decision No. 1524/03E*, the Vice-Chair denied the worker's request for an extension of time. The worker's representative had asked for an extension based on the fact that the previous representative had failed to pursue the appeal in a timely basis and had misled the worker as to the state of the appeal. Mr. Di Santo argued that the worker had limited English and would not have known how to pursue the appeal on his own. Lastly, Mr. Di Santo stated there was a handwritten note from the former representative to the Tribunal indicating the worker's intent to pursue the appeal. This note was written within the six-month limit. In denying the extension of time, the original Vice-Chair came to the following conclusions [at para. 11]:

- The delay in notifying the Tribunal in this case was significant – close to 5 years.
- While there is a hand-written note from a prior representative dated May 22, 1998, purportedly notifying the Tribunal of the worker's intention to appeal, there is no confirmation that this letter was ever actually sent to or received by, the Tribunal.
- The generic letter of intent received by the Board on June 17, 1998, makes no mention of this particular decision and in fact, indicates the worker wishes to “object to all outstanding decisions made on or before December 31, 1997”. The decision in question in this application is dated April 21, 1998.
- There is no indication that the worker or his representatives ever pursued the status of their application between 1998 and 2003.
- The employer has objected to the granting of a time extension.

The worker's representative asked for a reconsideration of the above decision. This was referred to a new Vice-Chair who denied the reconsideration and outlined the following reasons for doing so [at paras. 13-19]:

At the time of the time extension request, the worker's representative made written submissions dated May 15, 2003 as set out in *Decision No. 1524/03*. These submissions are essentially the same as the submissions for the reconsideration request: the worker instructed his representative at the time to appeal the Appeals Resolution Officer decision, the representative wrote to the Tribunal on May 28, 1998 and submitted a generic letter, and the worker has limited knowledge of English and the appeal procedures.

The hearing Vice-Chair addressed these submissions in his conclusions, noting that neither the worker nor his representative inquired about the status of the appeal for almost five years between 1998 and 2003, and there is no evidence that the hand-written letter of May 28, 1998 was actually sent to or received by the Tribunal.

The hearing Vice-Chair also commented on the generic letter dated June 15, 1998 and dated-stamped June 17, 1998 by the Board, not the Tribunal, referred to by Mr. Di Santo in his submissions for the reconsideration request. The hearing Vice-Chair noted that the date of the generic letter refers to objecting to “all outstanding decisions made on or before December 31, 1997”, a date that precedes the Appeals Resolution Officer decision the worker wants to appeal.

Thus, the hearing Vice-Chair considered the evidence and submissions in the original decision and, in my view, reached a reasonable conclusion.

The new evidence submitted with the reconsideration request consists of the three affidavits from one long-time acquaintance of the worker and two long-time co-workers. Except for the biographical information, the content of each affidavit is identical, indicating that the worker “complained continuously regarding the delay the [Tribunal] was taking to process his appeal”, that he became “increasingly frustrated with his previous representative who kept telling [him] that there was a backlog at the Tribunal and that was the reason for the delay”, that it seemed to the worker that nothing was being done to speed up the appeal process, and

that he met with Mr. Di Santo as suggested by someone, and, on Mr. Di Santo's advice, inquired at the Tribunal about his appeal.

This adds little to the worker's request for reconsideration, in my view, and would not have changed the result of the original decision had it been before the hearing Vice-Chair.

Accordingly, I find that the Tribunal's threshold test for granting a reconsideration request has not been met.

Mr. Di Santo has once again asked for a reconsideration, this time emphasizing the well known nature of the previous representative's failings to carry out his obligations.

(ii) The Reconsideration Test

The *Workers' Compensation Act*, R.S.O. 1990, c. W.11, and the *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A, provide that the Appeals Tribunal's decisions shall be final. However, sections 70 and 92 of the *Workers' Compensation Act* and section 129 of the *Workplace Safety and Insurance Act* provide that the Tribunal may reconsider its decisions "at any time if it considers it advisable to do so". Because of the need for finality in the appeal process, the Tribunal has developed a high standard of review, or threshold test, which it applies when it is asked to reconsider a decision.

Generally, the Tribunal must find that there is a significant defect in the administrative process or content of the decision which, if corrected, would probably change the result of the original decision. The error and its effects must be significant enough to outweigh the general importance of decisions being final and the prejudice to any party of the decision being reopened. The threshold test has been discussed in some detail in *Decisions No. 72R* (1986), 18 W.C.A.T.R. 1, *72R2* (1986), 18 W.C.A.T.R. 26, *95R* (1989), 11 W.C.A.T.R. 1, and *850/87R* (1990), 14 W.C.A.T.R. 1.

(iii) Findings

In this case, there is little new in the second request for reconsideration. It may well be that the previous representative did not carry out his duties; it is even possible that he may have misled his client as to the status of his (then) non-existent appeal at the Tribunal. Under these circumstances, some delay in contacting the Tribunal might have been understandable. However, in this case, and as emphasized in the previous decisions, the worker waited almost five years before contacting the Tribunal. Notwithstanding the lack of service that the worker may have received from his representative, he took no steps to forward his own appeal or to check the status for four years. While I acknowledge Mr. Di Santo's submissions that the worker has limited education, this does not signify that he could not have made inquiries. No compelling reasons have been forwarded to explain the 4½-year lack of action on the worker's part. Accordingly, I cannot find a significant defect in either of the two referenced decisions that would allow me to grant a reconsideration.

Accordingly, I find that the Tribunal's threshold test for granting a reconsideration request has not been met.

DISPOSITION

The request for reconsideration is denied.

Application denied.



Decision No. 189/06

Vice-Chair: McCutcheon

Decision — May 18, 2006

Neutral Citation: 2006 ONWSIAT 1103

Time limits (return to work or labour market re-entry) – Time limits (appeal) (length of delay).

Extension of time to appeal granted where delay was only 17 days and there was reasonable explanation – In circumstances, it was not necessary to address argument that six-month time limit rather than 30-day time limit should apply to decision regarding return to work that also involved medical issues as to cause of inability to return to work duties.

The worker appealed a decision of the Appeals Resolution Officer denying an extension of the time to appeal a decision of the Claims Adjudicator. The appeal was allowed.

The Board applied a 30-day time limit in this case, in accordance with s. 120(1)(a) of the *Workplace Safety and Insurance Act, 1997*, as it related to labour market re-entry or return to work.

The Vice-Chair noted that the worker missed the time limit by only 17 days. Further, the worker was unrepresented at the time of the Claims Adjudicator's decision. The worker acted diligently in retaining a representative after release of the decision. Considering the short time limit and the process of finding and retaining a representative, the Vice-Chair was satisfied that there was reasonable explanation for the failure to meet the time limit.

The worker's representative also argued that the Claims Adjudicator's decision dealt not only with the issue of return to work but also with medical issues related to the cause of the worker's inability to resume her work duties and that, accordingly, the case should have been subject to the six-month time limit rather than the 30-day time limit. The Vice-Chair noted that this was an interesting argument that was not without merit. However, in the circumstances, it was not necessary to address this argument.

Limites de temps (retour au travail ou réintégration sur le marché du travail) – Délai (appel) (durée du retard).

Le délai d'appel a été prorogé étant donné que l'avis d'appel avait tardé de seulement 17 jours et qu'il y avait une explication raisonnable – Dans les circonstances, il n'était pas nécessaire d'examiner l'argument

selon lequel il fallait appliquer le délai de six mois, plutôt que celui de 30 jours, parce que la décision concernait aussi des questions médicales en rapport avec la cause de l'inaptitude de la travailleuse à recommencer à s'acquitter des fonctions de son emploi.

La travailleuse a interjeté appel de la décision par laquelle le commissaire aux appels refusait de proroger le délai d'appel applicable à une décision de l'agent d'indemnisation. Le Tribunal a accueilli l'appel.

La Commission avait appliqué le délai de 30 jours en l'espèce, conformément à l'alinéa 120 (1) a) de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail*, étant donné que la décision concernait la réintégration sur le marché du travail ou le retour au travail.

La vice-présidente a noté que le retard était de seulement 17 jours après l'expiration du délai d'appel. La vice-présidente a aussi noté que la travailleuse n'avait pas de représentant au moment de la décision de l'agent d'indemnisation et qu'elle avait agi avec diligence pour en trouver un. Compte tenu de la courte durée du délai d'appel et du processus inhérent à la recherche et à l'obtention de services de représentation, la vice-présidente était convaincue qu'il y avait des raisons valables expliquant le non respect du délai d'appel.

Le représentant de la travailleuse a aussi soutenu que la décision de l'agent d'indemnisation traitait non seulement de la question du retour au travail mais aussi de questions médicales en rapport avec la cause de l'inaptitude de la travailleuse à recommencer à s'acquitter des fonctions de son emploi et qu'il aurait donc fallu appliquer le délai de six mois, plutôt que celui de 30 jours. La vice-présidente a noté qu'il s'agissait d'un argument intéressant qui n'était pas sans fondement; cependant, dans les circonstances, il n'était pas nécessaire de l'examiner.

Tribunal Decisions Considered:

- *Decision No. 1790/011* (2001), 58 W.S.I.A.T.R. 321 refd to

Workplace Insurance Legislation Considered:

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
 - s. 120
 - s. 126

Board Directives and Guidelines Considered:

- *Appeal System – Practice and Procedures, Appendix A, Guidelines for Dealing with Appeal Time Limit*

APPEAL by the worker from a decision of the Appeals Resolution Officer denying an extension of the time to appeal a decision of the Claims Adjudicator.

May 18, 2006. THE TRIBUNAL: —

BEFORE:	R. McCutcheon, Vice-Chair
HEARING:	January 9, 2006, at Toronto, Written
DECISION(S) UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) N. Ranta dated March 4, 2004

APPEARANCES:

For the worker:	J. Meleras, Lawyer

For the employer:

Not participating

R

(i) Background

The worker appeals a decision of the Appeals Resolution Officer (ARO), which concluded that she was not entitled to an extension of the time limit to appeal a decision of a claims adjudicator, dated March 27, 2001. That decision was rendered based upon the written record, without an oral hearing.

In November 2000, the worker experienced an onset of neck and shoulder problems in the course of her duties as a lead hand. The accident employer is a manufacturer of fibre optic components. The WSIB granted initial entitlement for a repetitive strain injury. The worker lost time from work following the injury and benefits were paid.

The worker returned to modified work on November 20, 2001, but eventually stopped working. The Claims Adjudicator reviewed the matter and determined that the employer offered modified work that was suitable for the worker's compensable neck injury. The Claims Adjudicator noted that the worker had a pre-existing non-compensable scoliosis of the spine. In the adjudicator's view, the worker's inability to work was due to scoliosis. In a decision dated March 27, 2001, the adjudicator informed the worker that the work offered by the employer was suitable, and that the worker's loss of earnings (LOE) benefits ended on March 13, 2001. That decision stated that the deadline for filing a notice of appeal was May 1, 2001.¹

On or about May 17, 2001, the worker retained a representative, Mr. Meleras. On May 18, 2001, Mr. Meleras wrote to the WSIB to appeal "every negative decision that may have been made" with respect to the worker's case. Mr. Meleras had not had an opportunity to review the file at that stage, but noted that he understood that the worker's benefits were discontinued and a decision would likely have been made to that effect. Mr. Meleras submitted that the worker's neck and arm problems were the sole factor in her inability to work. Mr. Meleras submitted that the worker had been capable of working in the past despite her scoliosis.

In a letter dated May 25, 2001, the Claims Adjudicator advised Mr. Meleras that the worker did not meet the time limit for appealing the termination of benefits, and "there is no right of appeal on this issue."

In February 2002, the worker was granted a 19% non-economic loss (NEL) award for the neck injury.

In April 2002, Mr. Meleras advised the WSIB that he was no longer acting for the worker. On August 30, 2002, the claims adjudicator denied entitlement for chronic pain disability (CPD). In May 2003, the worker again retained the services of Mr. Meleras. At that time, Mr. Meleras reiterated the objection to the closure of benefits and also to the denial of CPD.

In correspondence dated May 13, 2001, the adjudicator advised that the worker's objections were out of time with respect to both the closure of benefits and the denial of CPD. The worker objected with respect to the time limit decisions. The ARO allowed the worker's objection in part, with respect to the CPD decision. The ARO concluded that there was a lack of "true analysis" in the decision to deny CPD. Therefore, the ARO directed the Claims Adjudicator to review and analyze the CPD issue and render a new decision. The Claims Adjudicator revisited the CPD issue in a decision dated March 15, 2004. Entitlement to CPD was denied. The worker is pursuing an objection to the CPD denial.

With respect to the closure of benefits as of March 13, 2001, the ARO found that the appeal was out of time and there was no

basis for extending the time limit. The worker appeals this finding to the Tribunal. I considered this matter on the basis of written submissions.

(ii) Issue

The issue in this appeal is whether the Board ought to have allowed the worker an extension of time to file an appeal from the decision by a Claims Adjudicator dated March 27, 2001.

(iii) Law and Policy

On January 1, 1998, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) took effect. The legislation imposed time limits on appealing decisions made by the operating level of the Board. For decisions made prior to January 1, 1998, the deadline was July 1, 1998.

Section 120 of the WSIA stipulates that a notice of objection to a decision of the Board must, with respect to any matter other than a decision regarding a return to work or a labour market re-entry (LMR) plan, be filed “within six months after the decision is made”. There is a 30-day time limit for appealing decisions regarding a return to work or LMR Plan. The section gives the Board the discretion to extend the time limit.

Tribunal decisions have concluded, and the Board has accepted, that the Tribunal has jurisdiction to hear appeals from “final decisions” made by the Board on a time limit issue (see, for example, *Decision No. 1790/01I* (2001), 58 W.S.I.A.T.R. 321). In such cases, in reviewing the Board’s final decision, Tribunal panels have applied the same criteria as those applied in “time extension applications” regarding appeals to the Tribunal. Those criteria are as follows:

- the lapse of time between the expiration of the six months and the date the appeal was filed and any explanation for the delay;
- whether there is evidence to show an intention to appeal prior to the expiry of the six months;
- whether the applicant ought to have known of the time limit;
- whether the applicant acted diligently;
- whether there is prejudice to a respondent;
- whether the case is so stale that it cannot reasonably be adjudicated;
- whether the issue is so connected to another appeal that the Tribunal cannot reasonably adjudicate the other appeal without considering it;
- whether a refusal to hear the appeal could result in a substantial miscarriage of justice due to defects in prior process or clear and manifest errors;
- whether there are exceptional circumstances.

Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision #6, would apply to the subject matter of this appeal:

- #193 – Extension on Time Limit to Appeal;
- #300 – Decision Making/Benefit of Doubt/ Merits and Justice.

The WSIB stated that there is no policy document from the *Operational Policy Manual* (OPM) for the issue of time extensions, but policy package #193 contains Appendix A from the Appeal System Practice and Procedures Document, “Guidelines for Dealing with Appeal Time Limits.” The version of this document provided in this appeal states that circumstances giving rise to an extension of the time limits would include:

- Serious health problems (experienced by the party or the party’s immediate family) or the party leaving the province/country due to the ill health or death of a family member;
- Whether the worker had actual notices. This acknowledges that post ’98 decisions specifically refer to the time limits but pre’98 decisions do not;
- The length of the delay;
- Whether there are other issues in the appeal which were appealed within the time limits and which are closely related to the issues not appealed within the time limits;
- The significance of the issue in dispute;
- Whether the worker was able to understand the time limit requirements.

(iv) Discussion and Conclusions

The appeal is allowed. I find that the majority of relevant factors in this case support granting a time limit extension.

First, it is important to note that the worker missed the time limit set by the adjudicator by approximately 17 days. This is a relatively brief period of time, and there is no evidence of any prejudice to the employer caused by the delay.

Furthermore, the worker was unrepresented when the decision of March 27, 2001 was rendered. The decision was subject to a short time limit. Although the time limit was noted in the decision, it was not highlighted or emphasized in any way, and it is conceivable that the worker was not aware of it. Given these circumstances, I find the worker acted diligently in retaining a representative following the decision of March 27, 2001. In my view, the fact that the worker had to retain a representative to assist her with her objection to the March 27 decision provides an adequate reason for her failure to meet the shorter time limit. The process of searching for, selecting and meeting with a new representative can take time. In the context of the shorter time limit and relatively brief delay, I find this provides a reasonable explanation for the worker’s failure to meet the time limit.

According to the authorization on file, the worker retained the services of Mr. Meleras on or about May 17, 2001. On May 18, 2001, Mr. Meleras faxed a general objection letter to the WSIB. Mr. Meleras indicated in the letter that he had not yet had an opportunity to review the worker’s file, but sent the letter to protect the worker’s right to appeal. It is noted in the letter that he was unaware of any other decision that may have been made, other than an April 4, 2001 decision.² He was aware that the worker’s benefits had been terminated, but had not yet reviewed the decision in this regard. The ARO noted that Mr. Meleras did not explain the approximately three-week delay in meeting the time limit from the March 27, 2001 decision. However, Mr. Meleras explicitly states in the letter that he had not yet had an opportunity to review the file, and would not

have known that the decision to discontinue the worker's benefits was subject to a 30-day time limit.

The objection letter of May 18, 2001 also provided reasons for appeal, setting out the worker's position regarding the cause of her disability. Furthermore, the worker does have an ongoing appeal that is related to the decision for which a time limit extension is sought. The issue under appeal is suitability of work offered by the employer. The worker has an appeal pending from the WSIB's decision to deny entitlement for CPD disability. Entitlement for CPD, if granted, could have an effect on the determination of the suitability of work offered.

In addition, it was submitted that the worker was experiencing severe physical pain and depression during the period in question, and this could have contributed to the short delay. This is supported by the medical evidence on file.

Mr. Meleras also argued that the decision of March 27, 2001 should not have been subject to the shorter 30-day time limit, because it was not simply a return-to-work issue, but was also a case involving medical issues as they related to the cause for the worker's inability to resume her work duties. He submitted that he has seen many decisions similar to the decision rendered in this case, which were subject to a six-month time limit. In Mr. Meleras' submission, the issue of whether the worker's pain was due to her long standing scoliosis as opposed to her compensable neck strain is a medical one, and ought to have carried a six-month time limit. This is an interesting argument, which is not entirely without merit. However, I find it is unnecessary to address this argument in the circumstances of this appeal, as I have found that the worker is entitled to an extension of the time limit imposed by the WSIB.

DISPOSITION

The appeal is allowed. The worker is entitled to an extension of time to appeal the decision of the claims adjudicator dated March 27, 2001.

Appeal allowed.

1. As Mr. Meleras noted, the deadline of May 1, 2001 created a time limit of 35 days. Later correspondence from the WSIB indicated that the decision was subject to a 30-day time limit, as it pertained to a return to work. It does not appear that the claims adjudicator explained why this decision was subject to a time limit of 35 days, whereas the statute provides for a time limit of either 30 days (for return to work or labour market re-entry) or six months (for all other decisions). However, for the purposes of this appeal, I accept that the deadline for appeal was May 1, 2001, since the worker was notified of this date.

2. That decision denied the worker reimbursement for parking expenses to attend an eye appointment.