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Smith, E.

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Smith, E.

Smith, E.

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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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**Workplace Safety and Insurance Appeals Tribunal**

505 University Avenue, 7th Floor, Toronto, ON M5G 2P2

Telephone: 416-314-8800 | Fax: 416-326-5164 | Toll-free (within Ontario): 1-888-618-8846





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An application to the Tribunal to reconsider this decision was denied in *Decision No. 1171/98R* (July 6, 2007) [2007 ONWSIAT 1731].

#### **Decision No. 855/03** (2005), 76 W.S.I.A.T.R. (online)

An application to the Divisional Court for judicial review of this decision was granted (Lederman J. and Jennings J.; Swinton J. dissenting) (Court File No. 105/06, September 10, 2007). The decision was set aside and the matter was remitted to the Tribunal for rehearing. The Tribunal has filed an application for leave to appeal.

#### **Decision No. 1288/03** (2005), 72 W.S.I.A.T.R. 104

An application to the Tribunal to reconsider this decision was denied in *Decision No. 1288/03R* (August 22, 2007) [2007 ONWSIAT 2157].

#### **Decision No. 1402/03** (2004), 67 W.S.I.A.T.R. 163

#### **Decision No. 1402/03R** (2005), 80 W.S.I.A.T.R. (online)

An application to the Divisional Court for judicial review of these decisions was denied (Court File No. 190/06, April 2, 2007). An application to the Court of Appeal for leave to appeal was denied (Court File No. M34977, October 17, 2007).

#### **Decision No. 1647/04** (2005), 75 W.S.I.A.T.R. (online)

An application to the Tribunal to reconsider this decision was denied in *Decision No. 1647/04R* (March 21, 2007) [2007 ONWSIAT 740].

#### **Decision No. 750/06** (2006), 80 W.S.I.A.T.R. (online)

An application to the Tribunal to reconsider this decision was granted in *Decision No. 750/06R* (July 17, 2007) [2007 ONWSIAT 1853] on the issue of retroactive adjustment of the employer's NEER account to reflect SIEF relief.



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### Practice Directions

#### All current Practice Directions can be found in the Reporter as follows:

[\*Access to Workers' Information When the Issue in Dispute is at the Board\*](#) (2007), 81 W.S.I.A.T.R. (online)  
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[\*Confirmation of Appeal and Hearing Ready Letter\*](#) (2007), 81 W.S.I.A.T.R. (online)  
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[Tribunal Hearing Recordings and Transcripts](#) (2007), 81 W.S.I.A.T.R. (online)

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## Abbreviations

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

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



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### Keyword Index

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**Board policies**  
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**Board policy**  
**error of fact**  
**error of law**  
**new evidence**  
**procedural error**  
**standard of proof**  
**subsequent Tribunal decision**

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**Retroactivity**  
**policy change**

[\*\*Decision No. 878/06R\*\*](#)

**Right to sue**

[\*\*Decision No. 1670/06\*\*](#)  
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[\*\*Decision No. 1782/04\*\*](#)  
[\*\*Decision No. 2165/04R\*\*](#)  
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**statutory accident benefits**

**Standing**  
**insurer**

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**Suitable employment**

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**Supplier of motor vehicle, machinery or equipment**  
**purchase or rental basis**

[\*\*Decision No. 1684/06\*\*](#)

**Wages for day of accident**

[\*\*Decision No. 1521/06\*\*](#)

**Waiver**  
**right to compensation**  
**settlement**

[\*\*Decision No. 2455/06\*\*](#)

**Worker**  
**contract of service**  
**learner**

[\*\*Decision No. 382/06\*\*](#)  
[\*\*Decision No. 2197/00\*\*](#)



## Decision No. 1926/06

Panel: E. Smith (Vice-Chair), Stewart, Broadbent

Decision — January 30, 2007

Neutral Citation: 2007 ONWSIAT 234

**Apportionment (occupational disease) – Experience rating (NEER) – Beryllium-related disease – Merits and justice.**

**Board policy provides for exclusion of seven specific long latency diseases from NEER experience rating – Policy was based on Board Minute that excluded long latency diseases from experience rating – Worker's condition was of type addressed in the Minute but was not specifically in the list of seven diseases in the Board policy – In circumstances, and considering merits and justice of case, claim should be excluded from employer's NEER rating.**

The worker was diagnosed with beryllium sensitivity and chronic beryllium disease (CBD) in 2001. The employer appealed a decision of the Board denying exclusion of the costs of the claim from the employer's NEER rating. The appeal was allowed.

Board policy provides for exclusion of seven specific long latency occupational diseases from NEER experience rating. The Board found that CBD was not truly a long latency occupational disease. Rather, the Board found that it had a sensitization feature that made it comparable to dermatitis, which is not considered to be a long latency occupational disease.

The worker's condition was first diagnosed in 2001. This was the accident date. Accordingly, the case had to be adjudicated under the *Workplace Safety and Insurance Act, 1997*. The Tribunal does not have jurisdiction directly to revise or change the Board's NEER program as it relates to long latency occupational diseases. However, it has jurisdiction to hear and decide appeals with respect to premiums and penalties and whether the NEER program, as designed, has been properly applied. This includes consideration of the merits and justice as applicable to an individual appeal.

The Board policy was based on a WCB board of directors Minute that excluded long latency diseases from experience rating. The Panel found that sensitization to beryllium and CBD are long latency diseases of the type addressed in the Minute. Beryllium sensitization and CBD are not listed specifically in the list of seven diseases in the Board policy, but this may have occurred either because the Board's experts did not fully address their minds to the characteristics of this

disease, or because they did not address their minds to the medical distinction between this disease and pneumoconiosis, which is on the list.

The Panel found that CBD is quite different from asthma or dermatitis. They are considered to be short latency diseases and are not excluded from NEER calculations. However, with beryllium-related diseases, not only the symptoms but also the sensitization can sometimes develop long after the exposure. There are other differences as well. Improvement in asthma or dermatitis is expected after removal from exposure but that is not the case with CBD.

Based on the general nature of the disease, the Panel found that there were exceptional circumstances that warranted exclusion of the costs of the worker's claim from the employer's NEER account. There were also some possible misunderstandings in the Board's analysis of the specific facts of this case that supported relief for the employer.

**Répartition (maladie professionnelle) – Tarification par incidence (NMETI) – Affection liée au béryllium – Bien-fondé et équité.**

**La politique de la Commission prévoit l'exclusion de sept maladies particulières à longue période de latence de la NMETI – La politique était fondée sur un procès-verbal de la Commission excluant des maladies à longue période de latence de la tarification par incidence – La maladie du travailleur était du type traité dans le procès-verbal mais ne figurait pas au nombre des sept maladies exclues dans la politique de la Commission – Dans les circonstances, et compte tenu de la justice et du bien-fondé du cas, la demande d'indemnisation devait être exclue de la tarification de l'employeur dans le cadre de la NMETI.**

Le travailleur a reçu un diagnostic de sensibilité au béryllium et de béryllose en 2001. L'employeur a interjeté appel de la décision par laquelle la Commission refusait d'exclure les coûts d'indemnisation de ce travailleur de sa tarification dans le cadre de la Nouvelle méthode expérimentale de tarification par incidence (NMETI). L'appel a été accueilli.

La politique de la Commission prévoit l'exclusion de sept maladies professionnelles particulières à longue période de latence de la NMETI. La Commission a conclu que la béryllose n'était pas vraiment une maladie professionnelle à longue période de latence. Elle a estimé que cette maladie présentait un aspect de sensibilisation qui l'a rendait comparable à une dermatite, affection qui n'est pas considérée comme une maladie professionnelle à longue période de latence.

La date de l'accident était 2001 parce que le travailleur avait reçu son premier diagnostic au cours de cette année. Le cas devait donc être réglé aux termes de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997). Le Tribunal n'est pas directement compétent pour réviser ou changer la NMETI de la Commission pour ce qui concerne les maladies professionnelles à longue période de latence. Le Tribunal est cependant compétent pour entendre et régler les appels relatifs aux primes et aux pénalités ainsi que la question de savoir si le programme de la NMETI, tel qu'il avait été conçu, a été appliqué correctement. Cela inclut l'examen de l'équité et du bien-fondé de chaque appel.

La politique était fondée sur un procès-verbal du conseil d'administration de la Commission excluant de la tarification par incidence les maladies à longue période de latence. Le comité a conclu que la sensibilisation au béryllium et la béryllose



sont des maladies à longue période de latence du type de celles traitées dans le procès-verbal. La sensibilisation au béryllium et la béryllose ne figurent pas au nombre des sept maladies à longue période de latence énumérées dans la politique de la Commission mais cela pouvait être dû au fait que les experts de la Commission ne s'étaient vraiment arrêtés aux caractéristiques de ces maladies ou à la distinction médicale entre ces maladies et la pneumoconiose, qui était sur la liste.

Le comité a conclu que la béryllose diffère passablement de l'asthme ou de la dermatite. Ces affections sont considérées comme des maladies à courte période de latence et elles ne sont pas exclues lors des calculs de la NMETI. Cependant, dans le cas des maladies liées au béryllium, non seulement les symptômes mais aussi la sensibilisation peuvent parfois se manifester longtemps après l'exposition. Il y a d'autres différences également. On s'attend à une amélioration des symptômes d'asthme et de dermatite après arrêt de l'exposition, ce qui n'est pas le cas de la béryllose.

Compte tenu de la nature générale de la maladie, le comité a conclu qu'il y avait des circonstances exceptionnelles justifiant d'exclure les coûts d'indemnisation du travailleur du compte de l'employeur dans le cadre de la NMETI. Il y avait aussi une possibilité de malentendus dans l'analyse que la Commission avait faite des faits à l'appui de l'exonération de l'employeur dans ce cas particulier.

#### **Tribunal Decisions Considered:**

- *Decision No. 1431/99* (April 13, 2000) [2000 ONWSIAT 984] refd to
- *Decision No. 1835/99* (2001), 59 W.S.I.A.T.R. 38 refd to
- *Decision No. 2033/99* (2002), 62 W.S.I.A.T.R. 117 refd to
- *Decision No. 2162/99* (January 31, 2000) [2000 ONWSIAT 298] refd to
- *Decision No. 2437/03* (March 29, 2004) [2004 ONWSIAT 598] consd
- *Decision No. 1633/04* (November 17, 2004) [2004 ONWSIAT 2358] refd to
- *Decision No. 2028/05* (November 21, 2005) refd to
- *Decision No. 2471/06* (December 20, 2006) [2006 ONWSIAT 3010] refd to

#### **Workplace Insurance Legislation Considered:**

- *Workers' Compensation Act*, R.S.O. 1990, c. W.11
  - s. 134(8)
- *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A
- s. 83(1)
  - s. 83(2)
  - s. 123(1)
  - s. 123(2)
  - s. 126

#### **Board Directives and Guidelines Considered:**

- *Operational Policy Manual*
- Document No. 08-05-01 (June 20, 1996) (since superseded)
  - Document No. 11-01-03 (April 6, 2001) (since revised)
- Document No. 19-04-11 (June 15, 1999) (since superseded)

#### **Cross-References:**

- *Decision No. 1926/06I* (October 26, 2006) [2006 ONWSIAT 2401]

APPEAL by the employer from a decision of the Board denying the exclusion of the costs of a claim from the employer's NEER rating.

January 30, 2007. THE TRIBUNAL: —

**BEFORE:** E.J. Smith, Vice-Chair  
G.V. Stewart, Member Representative of Employers  
D. Broadbent, Member Representatives of Workers

**HEARING:** October 5, 2006 and November 2, 2006, at Toronto  
Oral hearing

**DECISION(S) UNDER APPEAL:** WSIB decision dated June 22, 2004

**APPEARANCES:**

For the employer: Mr. W. LeMay, lawyer  
For the worker: Mr. D. Wilken, lawyer  
(participating for the purposes of *Decision No. 1926/06I*)

For the Tribunal Counsel Office: Ms. Laura Lunansky, articling student

**REASONS**

**(i) The Issue**

This employer appeal was originally with respect to two issues:

1. the removal of claim costs from the employer's experience rating; and
2. the ARO determination of the worker's medical restrictions to include no return to work at the employer's [KC] site.

As indicated in *Decision No. 1926/06I* (October 26, 2006), a pre-hearing conference was held on October 5, 2006. The employer withdrew its appeal on the second issue at that time. Mr. Wilken indicated that he would not participate on the first issue.

Therefore the hearing reconvened on November 2, 2006 to consider whether the claim costs for the worker's beryllium sensitivity and chronic beryllium disease (CBD) should be excluded from the employer's NEER rating.

The hearing proceeded by way of submissions about the written material on record. Mr. LeMay did not call witnesses.

**(ii) Background**

The worker was diagnosed with beryllium sensitivity in September 2001 as the result of his participation in voluntary testing while working at the employer's plant. He had been employed as a millwright with the employer since 1975. Since the late 1980s the employer brought secondary feed materials from outside suppliers on site for processing. This was identified as a possible source of exposure for beryllium.

The claim has been accepted for beryllium sensitization. The worker was granted a 5% non-economic loss (NEL) award for this condition and a 33% award for psychotraumatic disability. In October 2002 his condition was diagnosed as having progressed to chronic beryllium disease.

The employer submits that this is a long latency disease that should be excluded from experience rating.

### **(iii) The Legislation; The Board Policy; The 1986 Board Discussion Paper**

The Board's Discussion Paper dated December 22, 1986 addresses whether long latency diseases should be excluded from costs for experience rating purposes. It states:

Ideally, given its principal objective of directly influencing workplace health and safety performance through adoption of preventative measures, an experience rating plan should focus on identifying and targeting for possible rebate or surcharge all risks which are reasonably avoidable by employer preventative actions, while spreading all remaining risks through collective liability principles.

In practice, of course, it is not always easy to segregate risks in this fashion. However, on this basis, it seems clear that certain types of industrial disease claims, characterized by long latency periods (e.g. cancer, hearing loss) are not really amenable to direct influence by way of experience rating.

The reasons for this conclusion include the usually unappreciated connection between a disease and a work process at the time of exposure, the very long time lag between preventative actions and the impact on worker health, and the difficulty of apportioning causation (and subsequent charges) between what may have been a number of employers over a long period of time.

The conclusion that the long latency industrial disease should properly be excluded from the ambit of experience rating does not, of course, imply that they are somehow less worthy of attention; it simply means that experience rating is not an appropriate or suitable method for seeking to influence their incidence. The same considerations do not apply, however to short latency industrial diseases such as dermatitis: there remains no reason why these should not be covered under the terms of an experience rating plan.

The Board of Directors' Minute implementing the recommendation included in this Discussion Paper is Minute #4, January 2, 1987, page 5147. It states under item "v": "Long latency industrial diseases should be excluded from experience rating coverage."

The Board has notified the Tribunal for the purposes of this appeal of *Operational Policy Manual* Document No. 08-05-01 "Experience Rating" dated June 20, 1996. This policy specifies that the exclusion for long latency industrial diseases applies to seven specific diseases. It provides that the costs for these diseases are excluded from both the VER and NEER experience rating programs, as follows:

Both experience rating plans automatically exclude costs resulting from the following long-latency conditions and diseases:

- acquired Immune Deficiency Syndrome (AIDS)
- carcinoma
- chest diseases due to aluminum and cadmium exposure
- chronic noise exposure
- chronic obstructive lung disease

- pneumoconiosis due to asbestos, silica, talc, hard metal (cobalt), and other mineral dust
- scleroderma

Costs resulting from these conditions and diseases are excluded for experience rating purposes because the symptoms often show themselves long after exposure occurs, and the resulting claims cannot be fairly dealt with under experience rating programs.

This policy was introduced by Administrative Minute #4, dated May 1, 1996, Page 205. The legislative authority is the *Workers' Compensation Act*, R.S.O. 1990, c. W.11. Therefore we read this policy as applicable to accidents that occurred prior to January 1, 1998 and which are subject to the pre-1997 Act. A later version of the policy is similar, but excludes the last paragraph. It provides no reasons for the exclusion of the identified long latency diseases.

The Act and Board policy also contain provisions providing for variations from the strict terms of a policy on the merits and justice of the case. We have also been notified by the Board of OPM Document No. 11-01-03 "Merits and Justice", which provides:

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.

Board policy and Tribunal decisions have interpreted the merits and justice provisions to apply when there are exceptional circumstances which would result in manifest unfairness if the policy is applied.

We note also section 83(1) and (2) of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA), which provides the Board with a broad discretion to establish incentive programs. That section reads:

**83(1)** The Board may establish experience and merit rating programs to encourage employers to reduce injuries and occupational diseases and to encourage workers' return to work.

**(2)** The Board may establish the method of determining the frequency of work injuries and accident costs of an employer.

The WSIA applies to accidents that occurred after January 1, 1998. Similar provisions are found in the pre-1997 Act, subject to distinctions which do not affect our analysis in this case. We note in particular that we accept the analysis of *Decisions No. 1431/99* (April 13, 2000), *1835/99* (2001), 50 W.S.I.A.T.R. 38, and *2033/99* (2002), 62 W.S.I.A.T.R. 117, that, despite section 134(8) of the pre-1997 Act, the Board had authority to establish incentive programs with respect to industrial diseases under that legislation.

We note also that, under the WSIA, subsection 123(2), para. 4, provides that determinations of the Board under section 83(1) and (2) of that Act are specifically excluded from the jurisdiction of the Tribunal. Therefore, with respect to appeals heard after January 1, 1998, the Tribunal has no jurisdiction with respect to determinations about the design of the NEER program as subject to these sections, as such.

Further, under section 126 of the Act, the Tribunal is required to apply Board policy. This is the case with respect to appeals that are subject to both the pre-1997 Act and the WSIA.

The Board has notified the Tribunal of the pre-1998 policy documents. However *Operational Policy Manual* (OPM) Document No. 19-04-11 defines the date of a worker's injury as the date the worker "experiences a disabling physical or functional abnormality". We have therefore considered, below, what Act applies.

#### **(iv) The Board Adjudication**

##### *(a) The Opinions of the Board's Experts*

A memo from Ms. Claire Marie Fortin, Director, Medical and Occupational Disease Policy Branch, states that Dr. Moira Gribbin, senior scientist, has stated that chronic beryllium disease is not a pneumoconiosis. That is consistent with the opinion of Dr. Rossman, below.

Ms. Fortin provides the ARO with a commentary from the February 7, 2004 issue of the *Lancet*, which lists a large number of potential occupational exposures for beryllium, including exposures in metal machine shops and alloy applications. The article states:

The latency period for beryllium sensitization and chronic beryllium disease can also be much shorter than previously recognized. Although chronic beryllium disease can take more than 30 years to develop, beryllium sensitization can occur within 2 months and chronic beryllium disease within 3 months of initial exposure.

##### *(b) The Analysis of the ARO*

The analysis of the ARO is also relevant. The ARO notes that short latency industrial diseases, such as dermatitis, and asthma, are not excluded from NEER. He determines that this worker's disease cannot be "truly" considered a long latency disease. Therefore he finds that it is not excluded. His reasoning is as follows:

I do note that dermatitis can have a sensitization feature which could be said to make it comparable to chronic Beryllium disease. In addition, other industrial diseases involving sensitization such as occupational asthma are not included in the policy for exclusion of experience rating. In effect with Beryllium exposure claims, the injury can be said to be the sensitization which from the evidence before me cannot be considered a long latency process although it may be undetected for some considerable time. I would conclude that the experience rating exclusion request for chronic Beryllium disease cannot be based on a diagnosis of pneumoconiosis with the distinguishing feature being sensitization. In addition, it would seem that an employer can take precautionary measures to control and limit Beryllium so as not to place workers at increased risk and can help reduce the risk of injury.

We note that the implication of this analysis is that the worker became sensitized to beryllium at or shortly after the time of his exposure.

#### **(v) Other Medical Evidence**

##### *(a) The Opinion of the Employer's Expert*

The employer obtained a report from Dr. M. Rossman, who is the director of the Pulmonary Immunology Laboratory, and of the Interstitial Lung Disease Program at the University of Pennsylvania Medical Centre. His report addresses the latency of beryllium sensitization and CBD as follows:

The average latency from first exposure to onset of chronic beryllium disease is believed to be about 10 years. *However, once someone has been exposed to beryllium, there is a lifetime risk for the development of chronic beryllium disease.* I have seen two beryllium machinists who developed sudden onset of chronic beryllium disease 20 years after their exposure ceased... There are cases of CBD in the literature that were not diagnosed until 30-40 years after initial exposure. With regard to the stages of chronic beryllium disease, it is believed that first an individual will develop a delayed type of hypersensitivity reaction to beryllium. This can be measured by a skin test or a blood test. Generally a blood test... is used today since older studies in the literature suggested that skin testing could sensitize some individuals. Sensitization may occur as early as 6 weeks after exposure. Because ... workers have not been followed systematically after they were beryllium exposed, it is not known how long the average time from exposure to sensitization is. *It is assumed that sensitization can occur a long time after exposure to beryllium has ceased. Some individuals will develop CBD shortly after they become sensitized, while others may never develop CBD or do so a long time after they become sensitized.* CBD may be an asymptomatic condition or progress to scarring and destruction of lung tissue leading to respiratory failure and death.

...

I do not believe that CBD should be considered a pneumoconiosis. The term pneumoconiosis implies that there is a dose response relationship. While this is true for acute beryllium disease, this is not true for chronic beryllium disease. Chronic beryllium disease is a hypersensitivity reaction to beryllium. Thus the amount of beryllium in the lung does not correlate with the amount of the disease. [Emphasis added]

We note that Dr. Rossman identifies the latency issues related to beryllium as applying to two distinct aspects of the disease. The ARO addresses the fact that there may be a delay between the time of exposure to beryllium and the development of CBD. However he appears to assume that sensitization takes place at or near in time to the exposure. However, Dr. Rossman indicates that in some cases there may also be a delay of years between the date of the exposure and the development of sensitization to beryllium.

From this worker's work history, Dr. Rossman estimates that it is most likely that his exposure occurred in 1999, when he was working in the employer's analytical laboratory. However, beryllium had been on the site prior to 1999. Dr. Rossman also expressed the opinion that there is a background level of beryllium at very low levels in the earth's atmosphere, and so it is impossible for an employer to provide a workplace with no exposure whatever to beryllium. He addresses steps that an employer might take to reduce risk of exposure.

### *(b) Other Medical Evidence on File*

Mr. LeMay provided the Panel with excerpts of a textbook on beryllium entitled *Beryllium: Biological and Environmental Aspects* edited by Dr. Rossman, Otto P. Preuss, and Martin B. Powers. Dr. Rossman and Dr. W. Jones-Williams discuss in Chapter 10 the immunopathogenesis of CBD. The authors describe granulomatous inflammation as the pathological hallmark of CBD. A granuloma can be defined as a localized chronic response to an indigestible or persistent irritant. In CBD, as in sarcoidosis, and Wegener's granulomatosis, a hypersensitivity-type of granuloma is suspected because of the marked immunological abnormalities associated with these disorders. With foreign body granulomas, repeated exposures to the irritant will result in similar inflammatory reactions. However, with hypersensitivity granulomas, a second or repeated exposure is associated with an enhanced or accelerated inflammatory reaction which is the hallmark of an immune response.

The authors state (at p. 128):

There seems to be little doubt that certain individuals can develop a cell-mediated immune response to beryllium and that this response has been associated with the development of a pulmonary granulomatous reaction. The pathogenesis of CBD might be best explained as follows...Beryllium is first deposited in the lungs. Acting as a hapten, beryllium binds to some unknown proteins in the lung...

Once the particle of beryllium is deposited in the lung, the authors then describe a biological process leading to a persistent immune response and the development of granuloma. Eventually, further processes may lead to scarring and retraction and a destroyed lung and respiratory failure.

The authors describe two theories to explain the low incidence of CBD. The first is that only a small portion of the population has a genetic disposition. The second is that the process of sensitization in the lung may be very difficult. The authors state that this second theory could explain several observations about the disease:

*First, the long latency period could be due to the difficulty of becoming sensitized to beryllium. Second, the occasional sudden onset of symptoms of CBD after a long latency period could reflect the onset of sensitization.* Third, the difficulty of pulmonary sensitization could explain why a relatively high proportion of normals can develop skin sensitivity but less than 5% of exposed beryllium workers develop CBD. Finally this second theory could explain the different incidences of CBD noted in several studies. Last, it is important to realize that these latter two theories are not necessarily mutually exclusive. [Emphasis added]

Therefore this excerpt offers a theory of why there may be a long latency period not only with respect to the development of CBD, but also with respect to the development of sensitization itself. The authors' discussion reflects the fact that, as already stated by Dr. Rossman in his opinion for the purposes of this appeal, in some cases there may be delay of years between the time that beryllium is deposited in the lung and the time that a worker becomes sensitized to it.

In Chapter 11, at p. 139, Dr. Rossman and Dr. Preuss address the apparent shortening of the latency period for this disease, in recent times. They refer to research that has suggested that the average latency for exposures after 1960 is now reduced to 6.6 years. The explanations suggested for the reduced latency period are: 1) greater awareness of the disease, 2) greater availability of medical care and 3) possible over-diagnosis. The authors note that a reliable test for CBD has only be available since about 1983. However, the authors also suggest that the shortening of the latency period may be fictitious:

Reduction of the latency period to less than 10 years may only be because, for workers more recently exposed to beryllium, insufficient time has elapsed for some of them to develop CBD. *Thus, for workers exposed to excessive levels of beryllium, long term follow up/surveillance will be needed.* [Emphasis added]

This comment suggests that, while there has been some shortening of the average latency period in recent years, there remains a long term risk for exposed workers.

In Chapter 12 of this textbook, by E. Nicholas Sargent, the author addresses the radiological aspects of the disease. CBD is described as a "pneumopathy", rather than a "pneumoconiosis". This is because the term pneumoconiosis actually implies inhalation and accumulation of dust in the lung, e.g., the radiographic changes from coal and silica are quantifiable relative to the amount of dust inhaled. For beryllium, however, this is not the case, since the changes caused by this element are not proportional to the amount of dust or fumes inhaled.

Dr. Sargent goes on to state at p. 142:

Even though CBD cannot be defined as a true pneumoconiosis, the radiographic changes can still be classified similar to pneumoconiosis patterns from mineral dusts; e.g. coal, silica, or asbestos. The latest classification system adopted in 1980 by the International Labor Office (ILO) can be applied quite adequately to the changes caused by beryllium...

He continues at p. 147:

Radiographically, the [opacities seen in CBD] are indistinguishable from opacities of progressive massive fibrosis caused by other dusts.

At p. 149 he states:

Dusts causing “hard metal pneumoconioses” which include cobalt as a binder will cause changes quite similar to those seen with beryllium hypersensitivity.

These quotations serve to emphasize the similar effects of this disease compared to those of a “true” pneumoconiosis.

The record also contains an article of Dr. Rossman’s, entitled: “Chronic Beryllium Disease: A Hypersensitivity Disorder”, Applied Occupational and Environmental Hygiene, Volume 16(5) 615-618, 2001. In that article Dr. Rossman states:

The initial description of this disease was of a delayed chemical pneumonitis, suggesting some sort of toxicity...Radiologically it was indistinguishable from a disease of unknown etiology known as sarcoidosis. [Based on early criteria used for diagnosis] the latency of CBD was shown to average 10 years and some cases were not diagnosed until 40 years after their initial exposure. *It is important to emphasize that continuing exposure to beryllium is not required. Some of the exposures could be very short.* I personally saw one individual who worked as a high school student for only two weeks in 1946 at a plant in Reading Pennsylvania. He was diagnosed with beryllium disease 13 years later when he was 29 with no subsequent exposure in the industry.

Dr. Rossman states that in the 1980s chronic beryllium disease was finally established as a hypersensitivity disorder, when fiberoptic bronchoscopy enabled the collection of live cells. He describes the finding that CBD was due to hypersensitivity as having important implications. It meant that there must be genetic predispositions. Only a limited portion of the population will develop the disease. He states:

Thus, until it is known what the lowest level of exposure to beryllium is that will cause the disease, efforts should be made to limit the number of workers who are potentially exposed to beryllium.

Other articles referred to in Dr. Rossman’s report and included on file describe the fact that incidents of disease have been found in persons living in the environs of beryllium producing plants, or in secretaries working in plants or laboratories where beryllium was used. These incidents of the disease indicated that genetically vulnerable persons may possibly be sensitized at low levels. Although regulation of the disease is addressed through the setting of threshold limits, there is not a clear dose-response relationship for this disease. Some experts in the United States have called for a reduction in the presently approved threshold levels.

As referred to above, these articles suggest that the average latency periods for CBD are falling, to closer to 6.6 years for persons first exposed since 1960, apparently in large part due to more accurate and earlier diagnosis of the disease. They describe CBD as histologically and clinically similar to sarcoidosis, and that formerly it was frequently diagnosed as such.



Both diseases are described as characterized pathologically by the presence of granuloma in the lung, suggesting that sarcoidosis may also represent a chronic cell-mediated immune reaction in the lung.

An article by Leslie Lang, a freelance writer in North Carolina, “Beryllium: A Chronic Problem” *Environ Health Perspect.* 1994 Jun-Jul; 102 (6-7): 526-531, states:

“Most clinicians are taught that beryllium disease is a dinosaur” [because the acute form of the disease has been all but eliminated] states Lee S. Newman of the Occupational and Environmental Medicine Division, National Jewish Center for Immunology and Respiratory Medicine, in Denver. “But the chronic form of the disease is far from extinct. In fact, with increasing usage of beryllium in industry, the absolute number of cases can be expected to increase as well.”

The article continues:

“Some people who haven’t been exposed in over 30 years now have beryllium disease, with symptoms manifested very recently. So it seems latency has a range from a few months up to 30 or more years” said Newman. “*We don’t truly know the latency for either beryllium sensitization or beryllium disease.* We don’t actually know how long it takes from the time you’re exposed to the time you first become sensitized, nor do we know the length of time it takes from sensitization to development of granulomas or other lung function reactions to beryllium. Despite what is in the literature, we truly don’t know.”

...

“There’s a wide spectrum of severity and rate of disease progression,” Newman continues, “It’s becoming clear that CBD is a disease that results from at least two hits: there may be an element of individual genetic risk and the element of exposure. [Emphasis added].

The quotations referred to in this article are consistent with the opinion of Dr. Rossman, set out above, that the latency periods for this disease relate not only to the gap in time between sensitization and the development of chronic beryllium disease, but also relate to gaps in time between the exposure, when beryllium particles enter the lung, and the development of the sensitization reaction.

## **(vi) The Employer’s Submissions**

Mr. LeMay submits that CBD should either be found to be a form of pneumoconiosis, within the terms of the policy, or to be a disease that it is so close to pneumoconiosis that the costs should be excluded from NEER on the merits and justice of the case. He submits that there is no question that it is a long latency industrial disease. He submits that the ARO denied the appeal based on an analysis that seems to suggest it is not a long latency disease. The ARO treats the date of sensitization as the accident date. However, this is incorrect. It is not possible to know when the exposure occurred or when the sensitization occurred. Like other long latency industrial diseases, it is not possible to identify a discrete accident. It is not possible to know even that this worker’s exposure occurred in the employer’s workplace. Although the possibility is small, there is at least some possibility that the worker worked with metals involving beryllium exposure even before working at the employer’s workplace. He had worked as a machinist elsewhere.

Mr. LeMay submitted that there are good workers’ compensation reasons for excluding this disease from NEER. An inclusion of these costs in NEER provides a negative incentive for employers to encourage testing of employees. If employees are not tested, their condition may not become known for many years, during which time they might have other

possible sources of exposure. He noted that this worker participated in voluntary testing offered by the employer. His sensitization was discovered in 2001 as a result of this testing. He was not symptomatic at that time. In 2002, his sensitization was found to have progressed to CBD. However this fact was discovered because he was being followed medically for the development of lung changes. In the absence of the initial testing, it is not clear when his symptoms would have been sufficient for his condition to have been diagnosed.

Mr. LeMay submits that there is no principled analytical basis to exclude this disease from the class of long latency diseases that are excluded from NEER. The policy considerations referred to in the Board's Discussion Paper apply to the case. There is a long lag time before it would be possible to fully measure the success of preventive measures. There are a wide range of occupational exposures that might possibly involve exposure, and a worker might have been exposed in more than one workplace. It is difficult to know what specific exposure caused a worker's disease.

Mr. LeMay submitted that, while some long latency diseases are the result of the cumulative results of exposures that may occur in more than one workplace, this is not the case for all the long latency diseases recognized in the list of those excluded from NEER. For instance, AIDS is included on that list. However, it is not the result of cumulative exposures. It is also possible to test for HIV and to know whether there has been exposure before symptoms arise. Therefore the fact that it is possible to test for sensitization before symptoms of CBD develop does not provide a principled basis to exclude this disease.

### **(vii) TCO Submissions**

Ms. Lunansky noted that the Board has provided the 1996 version of the NEER policy, in Documents No. 13-02-02 and 08-05-01. These documents refer to the pre-1997 Act. She noted that the worker's beryllium sensitivity was not identified until 2001, and his CBD was not diagnosed until 2002.

Ms. Lunansky reviewed the Tribunal's decisions with respect to long latency and short latency industrial diseases, and their inclusion in or exclusion from the NEER program. Many of these decisions address the interpretation of section 134(8) (formerly 122(8)) of the pre-1997 Act.) There is no similar provision in the WSIA. In any event, even under the wording of the pre-1997 Act, the more recent line of Tribunal decisions has supported the Board's authority to determine what diseases are included in an experience rating program. A number of Tribunal decisions have declined to exclude short latency industrial diseases such as dermatitis from NEER. This Panel has agreed, above, with the analysis of *Decisions No. 1431/99, 1835/99 and 2033/99*.

Ms. Lunansky also referred us to *Decision No. 2437/03* (March 29, 2004). In that decision, the Vice-Chair declined to exclude a case of lung cancer from NEER, with respect to a pre-1987 accident. The time period in issue was prior to the Board Minute of January 1, 1987, and the NEER program at that time did not exclude long latency industrial diseases. The Vice-Chair denied the employer's request to exclude costs based on findings that 1) the exposure at the employer's workplace had likely been a significant factor in the development of the disease and 2) that the employer had failed to act with due diligence. The employer requested NEER relief only many years after the worker was diagnosed.

### **(viii) Conclusions**

#### **(a) The Accident Date**

To address the issues of this case, it is first necessary to determine what Act applies.

Dr. Rossman expresses the opinion that, although prior exposures are possible, the most likely exposure to beryllium for this worker was when he was working in the employer's analytical laboratory in 1999. That places the exposure after the introduction of the WSIA. However, the medical evidence also suggests that sensitization does not necessarily occur at the time of exposure. The medical reporting is consistent in suggesting that there may be a gap in time between the time that a particle of beryllium enters the lung, and the time that the worker becomes sensitized to it.

OPM Document No. 19-04-11 defines the date of a worker's injury as the date the worker "experiences a disabling physical or functional abnormality". All that is known with certainty in this case is that the sensitization had occurred by the time that the worker was diagnosed with beryllium sensitization, in 2001. In our view, this is the accident date. It is the first date that it can be established that the worker had a demonstrable impairment, in the form of sensitization, and certainly the first date of any psychotraumatic impact from that diagnosis.

Therefore the appeal falls to be adjudicated under the WSIA. As a result, we must next address the question of our jurisdiction.

### *(b) The Tribunal's Jurisdiction*

Because of our finding about the accident date for this appeal, we recognize that we do not have jurisdiction to directly revise or change the Board's NEER program, as it relates to short and long latency industrial diseases.

However, we note that the NEER policy, like other policies of the Board, is subject to the merits and justice provisions of the Act and Board policy. The Tribunal has jurisdiction under section 123(1)(b) to hear and decide appeals with respect to the amount of the premiums and penalties payable by an employer, and therefore whether the NEER program, as designed, has been properly applied. This includes a consideration of the merits and justice of the case as applicable to the individual appeal. Therefore we retain jurisdiction to consider whether there are exceptional circumstances in this case that would result in manifest unfairness, if an exception to the strict terms of the policy were not granted. The recognition that there may be such circumstances is an integral part of the design of the NEER program and of the policy implementing that program, as it is in the case of other Board policies.

In determining the types of circumstances that may be found to be exceptional, or in considering what matters constitute manifest unfairness, we note also that Tribunal decisions have not limited themselves to situations which are likely to occur only in single or extremely rare instances. Tribunal decisions have determined that in some circumstances, certain types of fact situations may be found to reflect exceptional circumstances. For instance, in NEER retroactivity cases, a number of Tribunal decisions have found that a retroactive NEER adjustment may be ordered outside the strict terms of Board policy in cases in which it would be necessary for an employer to conduct an "audit" in order to determine that there has been Board error (see for examples *Decisions No. 2028/05* (November 21, 2005), *1633/04* (November 17, 2004), and *2162/99* (January 31, 2000), and also *Decision No. 2471/06* (December 20, 2006), which places limits on the extent to which that reasoning applies.) In our view, the Board's NEER retroactively policies are part of the design of the NEER program, and therefore subject to the limits on Tribunal jurisdiction discussed above. However, despite this fact, the Tribunal has interpreted the merits and justice provisions of the WSIA, as incorporated into the design of the NEER program, to apply to this "category" of facts. These decisions find that the alternative analysis would result in manifest unfairness.

Therefore the fact that the considerations in this appeal, in some respects, are common to all cases of beryllium sensitization

or of CBD does not mean, in our view, that the merits and justice of the case cannot be considered. However, given that our findings about CBD are based on the significant evidence about that condition which was adduced in this case, this decision may have some application to other cases involving this disease. We thus find it of particular importance to consider both 1) whether it is likely that the Board intended to exclude this disease, when it restricted the list of long latency diseases to seven named diseases and 2) the particular facts of this appeal, as distinct from other cases that might involve this disease, which support a merits and justice analysis.

### *(c) The Merits and Justice of the Case*

We find that the facts of this case support an exclusion of these costs from NEER, based on the following analysis.

#### **1) General Considerations about the Nature of This Disease**

In our view, sensitization to beryllium and CBD are long latency industrial diseases of the type addressed in the Board of Director's 1987 Minute that excluded long latency diseases from experience rating. Although they are medically distinct from pneumoconiosis, because they involve an immune reaction, the symptoms are radiographically very similar to those diseases. Therefore we consider that there is a reasonable likelihood that the reason that beryllium sensitization and CBD are not specifically referred to in the list of long latency diseases set out in the NEER policy is either because the Board's experts did not fully address their minds to the characteristics of this disease, or because they did not address their minds to the medical distinction between this disease and pneumoconiosis, when the list of long latency diseases was prepared.

We note that, in denying the employer's appeal, the ARO made a finding that this disease was not "truly" a long latency disease. He considered the fact that other diseases involving sensitization, such as asthma, or dermatitis, are considered short latency diseases, and are not excluded. However, while the beryllium-related diseases involve an immune response, it appears to us from the medical evidence that they are quite different in aetiology from asthma, dermatitis, or other short latency diseases. From our understanding of these diseases, it would not be expected that an occupational exposure would result in the first onset of asthma, or dermatitis, years after the end of the exposure. While these diseases may involve sensitization, it would not be expected that there would be a long delay between the last date of relevant exposure and the development of the sensitization. However, from the excerpts set out above, we understand that not only the symptoms of CBD, itself, but also the beryllium-related sensitization, can sometimes develop long after the beryllium particles become embedded in the lung. The disease is different also in other ways. An occupational asthma, or dermatitis, would be expected to improve or resolve once the worker is out of exposure. That aetiology assists as an evidentiary matter in linking the disease to the workplace exposure. However the risk of or symptoms from CBD are not resolved by ending exposure. They may both commence and possibly deteriorate at distant future times. From the literature, there is a life-long risk. Beryllium sensitization and CBD are therefore very different from the other immune-type diseases referred to by the ARO. Because of their long latency characteristics, we are satisfied that, under the policy criteria of the Board's Discussion Paper, they are more similar to the long latency diseases listed as excluded from NEER, than to short latency immune-type diseases. It is possible that, if the Board addressed its mind to CBD when the list was established, it may have assumed that pneumoconiosis would include CBD.

In considering whether the facts are exceptional, we are of the view that the Board's current NEER policy, which was introduced by an Administrative Minute, should be read in the context of the prior Minute of the Board of Directors and of the Board's more general Discussion Paper. In our view, the policy concerns referred to in the Board's 1986 Discussion Paper

apply in the case of this disease. Especially in past time periods, there would have been an often unappreciated connection between the disease and the work process at the time of exposure. The relationship was especially unclear in the past because of the earlier difficulties with diagnosis. Because there is a lifelong risk of development of the disease, it appears that there would also be a long lag time between the introduction of preventative actions and the time when it was possible to measure, clearly, the impact of those actions on worker health. Because of the range of occupational uses of beryllium, there would in many cases be a difficulty in identifying or apportioning causation.

There are also good compensation reasons to exclude this disease from NEER. Inclusion in NEER might act as a negative incentive for an employer to offer the kind of voluntary testing that resulted in the worker's early diagnosis in this case.

We also agree with the employer that, even if the sensitization reaction always occurred at or near the time of the exposure, there is no apparent principled basis to distinguish between this disease and AIDS. The ARO distinguishes beryllium sensitization from other long latency diseases because it is possible to test for sensitization. However, it is also possible to test for the HIV virus. Yet, AIDS is included as a long latency industrial disease. Therefore this is not a rational basis for distinction. In any case, we have found that the ARO was in error in assuming that there was generally little or no latency period between the time of exposure and the time of sensitization. The evidence suggests that while sensitization may sometimes take place soon after an exposure, in other cases there may be a delay in time before sensitization occurs.

Therefore, after considering the general evidence, we cannot identify any logical basis for why the Board would not list this disease with the other diseases identified as long latency industrial diseases. We find it most likely that when this list of diseases was identified, the Board policy makers either did not address their minds to the characteristics of this disease at all, because of the comparative rareness of the chronic form of the disease, or that the Board policy makers did not address their minds to the fact that this disease is not technically a pneumoconiosis. It appears likely to us that the Board policy makers did not clearly address their minds to the fact that the strict wording of the policy denied employers relief for the costs of this disease, when the policy statements of the Board of Directors suggest that this disease should have been excluded.

Under this analysis, the facts are exceptional, both because the disease has been considered relatively rare in the past, and because its similarities to pneumoconiosis may have affected whether it was separately addressed by the Board.

We have also considered the reasoning of *Decision No. 2437/03* and whether that reasoning applies to this case. In that case the Vice-Chair denied a NEER adjustment in the absence of a specific policy exclusion. The Vice-Chair took into account the fact that the employer's workplace had likely been a significant contributor to the exposures leading to the disease. In this case, it is not disputed that the employer's workplace is the most likely source of this worker's disease. However, we note that *Decision No. 2437/03* addressed a request for the exclusion of costs from NEER in the time period before the effective date of the Board's 1987 Minute. There was no policy statement from the WSIB Board of Directors, applicable in that time period, that long latency industrial diseases were appropriately excluded from NEER. Further, in *Decision No. 2437/03*, the Vice-Chair found that the employer did not meet the test of due diligence that Tribunal Panels and Vice-Chairs have required when an employer requests relief under the merits and justice provisions of the Act. We read that to have been a critical finding, on the facts of that case. In this case, there is no issue of a failure of due diligence.

## 2) The Specific Facts

There are also additional facts specific to this appeal, that make the circumstances exceptional in this case, and which support

relief for this employer.

It is notable that, in our view, the ARO's analysis is based on a misunderstanding of the medical facts. The ARO appears to consider that there is no long latency period between the date of exposure and the date of sensitization. We accept that there are cases of sensitization that can develop relatively quickly. However, the ARO states:

Sensitization can occur within two months, whereas, development of chronic Beryllium disease can be quite variable and after long period of time...I do note that dermatitis can have a sensitization feature that could be said to make it comparable to chronic beryllium disease.

The ARO's analysis that CBD is not a "true" long latency disease is based on the assumption that, in general, the periods of latency before the development of sensitization to beryllium would be similar overall to those involved for dermatitis. Our findings, from the medical evidence on record, are that it is more likely that there are two different "delays" that may occur with this disease: first, between the time of exposure and the time of sensitization, and secondly between the time of sensitization and the time of the development of CBD. From the evidence, there is much unknown about the possible extent of these delays. As already discussed, we do not find the latency considerations for this disease comparable to dermatitis. In our view, it is more properly considered a long latency disease. It cannot be known whether the ARO would have come to the same conclusion as the Panel if his determination had been based on our understanding of the medical facts.

We also note that the Board has notified us of the pre-1998 policy. In our view, the Board's misperception of the accident date in this respect is a further factor indicating that the Board has not fully addressed the considerations that properly apply to the analysis of this worker's condition.

We have also considered the particular circumstances of this employer. The employer was acting in a manner that was consistent with good workers' compensation principles in providing voluntary testing to workers to identify this type of medical condition. There has also been no failure of due diligence in the appeal process.

Given our understanding of the issues of this case, and the lack of a full Board analysis of those issues, we consider that it would be manifestly unfair for the employer to be assessed under NEER for the costs of this worker's sensitization or chronic beryllium disease.

## **DISPOSITION**

The appeal is allowed.

*Appeal allowed.*



## Decision No. 573/05

Vice-Chair: E. Smith

Decision — November 21, 2006

Neutral Citation: 2006 ONWSIAT 2729

**Experience rating (NEER) (three year window) – Assessment of employers (retroactivity) – Board Directives and Guidelines (employer assessment) (retroactivity) – Class of employer.**

**In implementing decision to reclassify portion of employer's payroll, Board correctly recalculated not only the premiums for the transferred employees, but also the employer's NEER experience rating charges based on the new classifications.**

In *Decision No. 1504/01*, the Tribunal found that the employer was entitled to reclassification of a portion of its payroll retroactive to 1995. In implementing the decision, the Board recalculated not only the premiums payable for the transferred employees, but also the employer's NEER experience rating charges based on the new classifications. The result was that the employer received a credit of about \$100,000 instead of about \$500,000 which it would have received if the NEER account had not been adjusted. The employer appealed a decision of the Appeals Resolution Officer confirming the amount of the credit. The appeal was dismissed.

The employer noted that the total payroll costs to the employer for accidents in issue between 1995 and 2001 was about \$41,000, and NEER costs based on the Board's statements for the new rate group was about \$101,000, yet the reduction in the refund to the employer was about \$400,000.

An Experience Rating Manager for the Board appeared and testified regarding how NEER charges are derived. The calculation of a NEER refund or surcharge is the result of a comparison between expected claim costs of the class and the actual claim costs of an employer. Certain components of the gross premium rate, which related to matters such as unfunded liability, long latency occupational disease and transfers to SIEF, are subtracted from the expected claim costs of the class. The actual claim costs of an employer include amounts for future costs. This explains why the actual costs calculated by the Board were \$100,000 rather than the \$41,000 of the employer's actual payroll costs.

After some of the employer's employees were transferred to the new rate group, the old rate group had fewer employers and a smaller number of accidents. This resulted in calculation of a smaller NEER refund for the employer in the old rate group.

In the new rate group, there were now more employees and more claims. The expected claim costs for the rate group and the employer's actual NEER costs increased. Thus, there was a smaller refund owing.

There is also an impact based on the size of the employer as it is taken into account in the formula used to calculate the expected cost factor. With small firms, there is potentially more fluctuation in claims and hence higher insurance is required. As the size of the firm increases, there is more stability and the need for insurance decreases.

The Vice-Chair noted that it is to be expected that a reclassification to a rate group with higher premium costs will result in a greater NEER refund and a reclassification to rate group with lower premium costs will result in a lower NEER refund.

The Vice-Chair agreed with *Decision No. 1186/05I* that NEER adjustments and premium adjustments are intertwined.

The employer submitted that the NEER calculation should not be adjusted due to reasons of fairness. There was delay by the Board in implementing *Decision No. 1504/01*. However, the Vice-Chair found that there is no remedy for negative impact of systemic delay other than through payment of interest. In this case, the employer was paid interest only from 1997, in accordance with Board policy. The magnitude of the NEER adjustment also did not support relief in this case. The employer was not treated unfairly. It simply did not receive the benefit from the reclassification that it expected.

The employer submitted that the Board was applying *Operational Policy Manual*, Documents No. 08-06-06 and 13-02-02, retroactively in order to authorize the retroactive NEER adjustment. However, the Vice-Chair found that the policy did not make any substantive change in how the Board implements a classification change. The Act authorized adjustments to both premiums and NEER charges in this situation. The Board had authority to make the adjustments prior to the introduction of the policy.

**Tarification par incidence (NMETI) (délai de trois ans) – Cotisation des employeurs (effet rétroactif) – Directives et lignes directrices de la Commission (cotisation de l'employeur) (rétroactivité) – Classification de l'employeur.**

**Lors de la mise en œuvre d'une décision prévoyant un changement de groupe de taux pour une portion de la masse salariale de l'employeur, la Commission a calculé correctement non seulement les primes pour les employés visés mais aussi les frais de l'employeur au titre de la NMETI à partir de la nouvelle classification.**

Dans la *décision no 1504/01*, le Tribunal a conclu que l'employeur avait droit à un changement de groupe de taux pour une portion de sa masse salariale à partir de 1995. Lors de la mise en œuvre de cette décision, la Commission a calculé de nouveau non seulement les primes payables pour les employés visés par le changement de groupe de taux mais aussi les frais de l'employeur au titre de la Nouvelle méthode expérimentale de tarification par incidence (NMETI) à partir de la nouvelle classification. Par suite de ces calculs, l'employeur a obtenu un crédit d'environ 100 000 \$ au lieu du crédit d'environ 500 000 \$ qu'il aurait obtenu si son compte NMETI n'avait pas été rajusté. L'employeur a interjeté appel de la décision par laquelle le commissaire aux appels a confirmé le montant du crédit. L'appel a été rejeté.

L'employeur a noté que les coûts d'accidents pour l'ensemble de sa masse salariale entre 1995 et 2001 étaient d'environ



41 000 \$ et que, selon les relevés de la Commission, les coûts de la NMETI pour le nouveau groupe de taux étaient d'environ 101 000 \$, alors que la réduction de son remboursement était d'environ 400 000 \$.

Un gestionnaire de la tarification par incidence de la Commission a comparu et a expliqué de quoi dérivent les frais de la NMETI. Les rabais et surcharges de la NMETI résultent d'une comparaison entre les coûts d'indemnisation prévus de la catégorie et les coûts d'indemnisation réels d'un employeur. Certaines composantes du taux de prime brut, en rapport avec la dette non provisionnée, les maladies professionnelles à longue période de latence et les virements au Fonds de garantie pour travailleurs réintégrés (FGTR), sont soustraites des coûts d'indemnisation prévus de la catégorie. Les coûts d'indemnisation réels d'un employeur incluent des montants pour les coûts futurs. Cela explique pourquoi les coûts réels calculés par la Commission étaient de 100 000 \$ plutôt que les coûts d'indemnisation réels de la masse salariale de l'employeur, qui étaient de 41 000 \$.

Le changement de groupe de taux de certains employés avait entraîné une réduction du nombre d'employés et de demandes d'indemnisation dans l'ancien groupe de taux. Cela avait entraîné une réduction du rabais de la NMETI auquel l'employeur avait droit pour l'ancien groupe de taux.

Il y avait eu dès lors une augmentation du nombre d'employés et de demandes d'indemnisation dans le nouveau groupe de taux. Cela avait entraîné une réduction du rabais de la NMETI auquel l'employeur avait droit pour le nouveau groupe de taux.

La taille de l'employeur a aussi une incidence car elle est prise en compte dans la formule utilisée pour calculer le facteur des coûts prévus. Dans le cas des petites entreprises, il y a un plus grand risque de fluctuations dans les demandes d'indemnisation, ce qui entraîne de plus grands besoins en matière d'assurance. La stabilité augmente et le besoin d'assurance diminue plus l'entreprise est grande.

La vice-présidente a noté qu'il faut s'attendre que le passage à un groupe de taux dont les primes sont plus élevées entraîne un rabais de la NMETI plus important et que le passage à un groupe de taux dont les primes sont moins élevées entraîne un rabais de la NMETI moins important.

La vice-présidente a indiqué qu'elle était d'accord avec la *décision no 1186/05I* pour dire que les rajustements et les primes de la NMETI sont inextricablement liés.

L'employeur a soutenu que le calcul de la NMETI ne devrait pas être rajusté pour des raisons d'équité. La Commission avait tardé à mettre en œuvre la *décision no 1504/01*. La vice-présidente a toutefois conclu qu'il n'y avait aucun autre recours que le paiement d'intérêts pour les retards systémiques. L'employeur avait reçu des intérêts seulement à partir de 1997, conformément à la politique de la Commission. L'ampleur du rajustement de la NMETI ne militait pas en faveur d'une exonération en l'espèce. L'employeur n'avait pas été traité injustement. Il avait simplement profité moins que prévu du changement de groupe de taux.

L'employeur a fait observer que la Commission avait appliqué les documents nos 08-06-06 et 13-02-02 de son *Manuel des politiques opérationnelles* pour autoriser le rajustement rétroactif de la NMETI. Cependant, la vice-présidente a conclu

que la politique n'avait pas entraîné de changement important dans la façon dont la Commission procédait aux changements dans la classification. La Loi autorisait un rajustement des primes et des surcharges de la NMETI dans cette situation. La Commission était compétente pour procéder à des rajustements avant l'introduction de la politique.

#### **Tribunal Decisions Considered:**

- *Decision No. 652/93R* (2000), 56 W.S.I.A.T.R. 1 reld to
- *Decision No. 499/00I* (2001), 58 W.S.I.A.T.R. 54 reld to
- *Decision No. 1062/02* (2005), 72 W.S.I.A.T.R. 66 reld to
- *Decision No. 1186/05I* (2005), 74 W.S.I.A.T.R. 306 apld

#### **Workplace Insurance Legislation Considered:**

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

#### **Board Directives and Guidelines Considered:**

- *Operational Policy Manual*
  - Document No. 08-06-03 (December 12, 1990) (since superseded)
  - Document No. 08-06-06 (July 25, 1997) (since superseded)
- Document No. 13-02-02 (December 14, 2001) (since superseded)

#### **Cross-References:**

- *Decision No. 1504/01* (February 28, 2002) [2002 ONWSIAT 532]
- *Decision No. 1504/01R* (October 16, 2002) [2002 ONWSIAT 2164]

APPEAL by the employer from a decision of the Appeal Resolution Officer regarding the amount of a NEER credit.

November 21, 2006. THE TRIBUNAL: —

BEFORE: E.J. Smith, Vice-Chair

HEARING: March 6, 2006 and September 20, 2006, at Toronto, Oral hearing

DECISION(S) UNDER APPEAL: WSIB ARO Decision dated May 13, 2004

#### **APPEARANCES:**

For the worker: Mr. R. Cronish, Q.C.

For the TCO: Mr. M. Delorme

For the Board as *Amicus Curiae*: Mr. S. Recchi

## **REASONS**

### **(i) Background**

The employer appeals the decision of the Board ARO dated May 13, 2004. This decision flows from a prior WSIAT decision, *Decision No. 1504/01* (February 28, 2002), in which the Panel found that the employer was entitled to a classification change for a portion of its payroll, retroactively from January 1, 1995.

In implementing this decision, the Board recalculated not only the premium amounts payable for the transferred employees, but also recalculated the employer's NEER charges based on the new classifications. Under the initial, higher classification,

the employer had been awarded significant NEER refunds. These were greatly reduced when NEER was recalculated. The result was that the net amount owing to the employer, after the recalculation of both the premiums and the NEER amounts, was approximately \$100,000. If the NEER account had not been adjusted the employer would have been entitled to a credit totalling about \$500,000.

The Board relied on *Operational Policy Manual* (OPM) Document No. 08-06-06, “Adjustments to NEER Refunds and Surcharges” dated July 25, 1997, and OPM Document No. 13-02-02, “NEER Experimental Experience Rating Plan” dated December 14, 2001, to authorize the retroactive NEER adjustment.

Mr. Cronish made submissions.

Mr. Cronish submits that applying these policies constitutes retroactive application, because they were not introduced until 1997. He submits that, at the most, they can be read to apply to adjustments from January 1, 1998. He relies on *Decisions No. 1062/02* (2005), 72 W.S.I.A.T.R. 66, and 499/00I (2001), 58 W.S.I.A.T.R. 54, in which the Panels declined to give Board policies retroactive effect. In *Decision No. 499/00I* the Panel distinguished between a policy that makes a substantive change in the law, and a clarification. He relies on *Decision No. 652/93R* (2000), 56 W.S.I.A.T.R. 1, to support the proposition that the Tribunal cannot fetter its discretion.

Mr. Cronish also addressed what estimates should be used for the costs of future claims, in the NEER calculation. In his opening statement, Mr. Cronish submitted that the Board should use actual rather than actuarial costs as the basis of the NEER recalculation, because actual costs were known by the time of the recalculation. In his closing arguments, after hearing the explanation of how the mathematical recalculations were carried out, he made a slightly different submission. He submitted that, even if the policy applies, the words of the policy can be read to support the use of the “final” calculations for future costs that had been calculated prior to the reclassification. He submitted that there was no reason for the Board to change its projection of future costs merely because of the change in classification.

Therefore he did not object to the calculation being based on an actuarial estimate of claim costs *per se*. However he submitted that there was no reason to change these estimates. He submitted that this portion of the NEER calculation should remain unchanged.

In any event, even under the policy, he submitted that the merits and justice of the case require that there be no NEER adjustment, because of the exceptional circumstances described below.

He submitted that, with respect to the time period prior to the introduction of these policies, the Tribunal has discretion to determine whether a NEER adjustment should take place. There was no policy in place affecting this issue prior to the introduction of these policies. He submitted that, given the fairness considerations outlined below, no NEER adjustment should be ordered for that time period.

Prior to the oral hearing, Mr. Cronish also identified as an issue whether the Board had correctly calculated the NEER adjustment.

Because of this issue, I asked that the Board participate in the appeal as *amicus curiae*. At the Tribunal’s request, Mr. Serge Recchi, Board counsel, appeared, and the Board provided a witness, Mr. Alex Kasperowitsch, Manager, Experience Rating,

who explained the recalculation that was carried out when the reclassification of a portion of the employer's payroll was ordered by WSIAT. A further clarification was provided in materials submitted by Mr. Recchi after the first day of hearing.

After consideration of this information, Mr. Cronish submitted that he would not pursue the question of whether there was a mathematical error in how the recalculation had been carried out. However I have included a summary of the witness's testimony, below, because it assists in an understanding of the other issues.

Subject to my findings about the application of Board policy, Mr. Cronish also raises an issue under the *Canadian Charter of Rights and Freedoms*, R.S.C. 1985, App. II, No. 44. He challenges section 126 of the *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A, on the basis that that section fetters the Tribunal's discretion and is inconsistent with the Charter. The consideration of that issue was deferred until after the determination of the appeal on the merits. Mr. Cronish agreed in his final submissions that this issue only requires determination if my decision turns on the application of section 126.

## **(ii) The Calculation Issue**

### ***(a) The Employer's Witness***

The file material indicates that the Board made a debit adjustment of \$398,701.14 to the employer's NEER refund as a result of the classification change. This adjustment reduced the net credit owing to the employer as a result of the premium reductions from the reclassification. The final net amount refunded to the employer was only \$107,364.12, instead of approximately \$506,065.26.

The employer's Payroll Manager, Ms. DL, testified about this reduction in the refund. She testified that the actual payroll cost to the employer for the accidents in issue between 1995 and 2001, inclusive, was \$41,420.97. The NEER cost based on the Board's statements for the new Rate Group 636, was a total of \$101,844.87. The total reduction in the employer's refund was about \$400,000.

The witness, and Mr. Cronish, questioned how the Board was justified in negatively affecting the employer to the extent of a reduction of approximately \$400,000 with respect to payroll costs of approximately \$40,000 and NEER estimated costs of approximately \$100,000.

The Board offered testimony to assist with this question.

### ***(b) Testimony of the Manager of the Experience Rating Section***

Mr. Alex Kasperowitsch appeared for the Board. The witness testified that he is the Manager of the Experience Rating Section. He referred the Vice-Chair and parties to information setting out how the NEER charges are derived.

The calculation of a NEER refund or surcharge is the result of a comparison between the expected claim costs of the class and the actual claim costs of an employer. The Board calculates expected claim costs by identifying the components of the gross premium rate of the classification and subtracting out the components of that premium that relate to the unfunded liability, to long latency occupational disease, to amounts transferred to SIEF, or other amounts not included for the purposes of the NEER calculation. The result of this calculation is the NEER "expected claim cost". This figure is based on the actuarially

derived expected costs of new claims, as well as an amount for overhead. The witness clarified that the overhead amount includes not only the Board's overhead, but also the costs of the health and safety programs assigned to the Board by the Ministry of Labour, the Safe Workplace Associations, and other costs assigned to the Board by legislation, such as the budgets of the Office of the Worker Adviser, the Officer of the Employer Adviser and the Tribunal.

Based on these components, the Board calculates expected claim costs for the class. The estimate is based on five-year historical figures for the class. That calculation is then compared to the actual costs calculated for the specific employer. Again, the estimate of actual costs includes amounts for future costs (reserves), which are calculated based on actuarial estimates, derived from the five-year history of the class. Again, some costs, of the sort referred to above, are not included. Costs above claim "limits" are also not included. However, the estimate of actual claim costs does include an amount for overhead.

The witness testified that these extra components in the employer's actual claim costs are the explanation of why the payroll costs of \$41,000, which the employer paid directly to the workers whose claims were transferred, is not the same as the Board's estimates of actual claim costs, which are stipulated in the quarterly statements sent to the employer. Once reserves (for future benefit payments) and overhead costs are included, the actual claim costs as calculated by the Board were \$101,000.

The witness then explained an example of the recalculation that was required. He reviewed the calculations required for the claims transferred in 1997.

Under its prior classification in Rate Group 333, in 1997, the employer had received a significant NEER refund. After the transfer of a number of the employer's employees to the new classification, there were fewer employers in that rate group, and also a smaller number of accidents. The net result was that the refund owed to the employer under this rate group decreased, mainly because of the reduction in the size of the group in that class. Therefore, the employer was required to pay back to the Board a portion of the refund previously paid to it with respect to this rate group. The amount owed back to the Board with respect to Rate Group 333 in 1997 was calculated at \$95,821.47.

Under the second classification, Rate Group 636, as a result of the transfer, there were now more employees and more claims. Both the expected claim costs and the employer's actual NEER costs increased. There had been a small refund owing under this rate group under the prior calculation. The extent of the refund owing increased as a result of the transfer of employees. The amount owed to the employer was calculated at \$23,804.27.

However, after the recalculation was completed for the two rate groups, there was a net reduction in the size of the refund. This was because, after the employees were transferred to the lower premium rate group, the employer's actual claim costs were closer to the expected claim costs than they had been before.

For the accident year 1997, the total net amount owed by the firm to the Board because of the net reduction in the amount of its NEER refund was calculated at \$72,017.20.

However, the witness testified that the amount owed back to the Board because of the NEER recalculation was offset by the credit owed to the employer because of the reduced premiums owed for the employees transferred to the new, lower premium, classification. The reduction in premium amounts was greater than the amount lost in NEER refunds. Based on the entire

time period in question the witness testified that the employer gained from the reclassification by a net amount of \$107,364.12.

However, the credit that would have been calculated if only premiums had been adjusted was substantially reduced because of the decrease in the amount of the refunds paid to the employer under the NEER program.

In my view this is an expected result. I note that this is intuitively a correct result in that in most cases, when a classification is changed retroactively, the impact on the NEER calculation will be the inverse of the effect on the premium calculation. An employer who moves to a more expensive and higher risk rate group would expect an increase in premium costs. However, if its accident history was then closer to what was expected for the class, it could expect to receive a greater NEER refund, or a reduction in NEER penalties, than might otherwise apply. On the other hand, it is reasonable to expect that when an employer is moved to a lower cost rate group, its premiums will be reduced, but any NEER refund may also be reduced, offsetting that benefit.

However, there was one aspect of the Board's calculation that was unclear at the first day of hearing. It is understood that certain elements of the NEER calculation are dependent on the size of the employer. Larger employers will have higher claim cost "ceilings" and different rating factors. However, Mr. Cronish raised the issue of why the estimates of future costs for workers in a class would change because of a classification change. The estimate of how workers' injuries might progress in the future would not be expected to change for this reason.

The Board provided clarification of this issue after the first day of hearing. In material dated September 15, 2006, the Board indicated that the size of an employer is taken into account in the formula used to calculate the "expected cost factor". Different sized employers are subject to different "expected insurance factors" which are a component of this calculation. The calculation incorporates a methodology that reflects the size of an employer. The Board states in its submission:

The formula captures the fact that for small firms (low premiums) there is potentially more fluctuation [in claims] and hence higher insurance is required. As the size of a firm increases, there is more stability and the need for the insurance decreases.

The factor relates to a recognition that small firms required more insurance.

Therefore the size of the employer also factors into the NEER calculation in the formula used to calculate the expected future costs of claims. The future costs estimated for NEER purposes vary in accordance with the size of the employer, because insurance factors are included in the calculation.

Therefore the reclassification affected this employer's NEER charges in two different ways. When the employees moved into the lower premium rate group, this meant that that group's record of accidents no longer compared as favourably to the class.

This affected its entitlement to refunds. Further, in this case, the reclassification affected the size of the groups that were subject to the NEER assessments. This employer has two rate groups. The changes confirmed in *Decision No. 1504/01* were for the transfer of some employees from the higher premium rate group to the lower premium rate group. However, even after the transfer, the employer continued to have employees in both rate groups. The change therefore affected the size of these two groups, which were each treated as a separate "employer" for classification purposes. Therefore this change affected the formulas used to estimate the costs of the claims in the future.

### **(iii) Conclusions**

*(a) Tribunal Discretion*

I have considered first whether a NEER adjustment is proper, assuming that no Board policy applies. Even if the policies relied on by the Board do not apply, I find that the Board has properly calculated the refund payable to the employer.

Mr. Cronish submits that, in the absence of applicable policy, I have discretion not to order the NEER adjustment. However, he does not dispute that I also have the authority to order that adjustment.

I agree with the Panel in *Decision No. 1186/05I* (2005), 74 W.S.I.A.T.R. 306, that NEER adjustments and premium adjustments are intertwined. I consider that it would be inappropriate and unreasonable for the Board to recalculate the premium amount without also recalculating the NEER charges. Mr. Cronish's proposal would result in a windfall to the employer. The employer would not be placed back into the position that it would have been if the classification had been correctly determined from the start. It would not be treated similarly to other employers in that classification. It would be in a considerably better position. I do not consider that there is any issue of fairness or of exceptional circumstances in this case, that affects that conclusion.

Both under the policy, and irrespective of the policy, Mr. Cronish's most critical submissions relate to issues of fairness, and therefore I have considered these submissions first.

*(b) The Fairness Issues*

Mr. Cronish argued that there are three circumstances that go to fairness on the facts of this case, and that support his position that the NEER calculation should not be adjusted. The first is that the Board failed to implement *Decision No. 1504/01* until the appellant brought an application for judicial review. The Board then proceeded to request reconsideration, which led to *Decision No. 1504/01R* (October 16, 2002). Therefore the employer has been prejudiced by the Board's unreasonable actions in delaying payment.

I have sympathy for the employer because of this delay. However I do not consider this a proper reason to vary or waive the NEER adjustment. It is not uncommon for appellants to request relief because of delays and, rightly or wrongly, to blame the Board for those delays. However the Tribunal does not have the jurisdiction to order costs. It does not have a supervisory role over the Board. Therefore, as a general matter, in my view, it is not open to the Tribunal to order increased benefits to a worker, or to decrease the amounts otherwise payable by an employer, because it considers that the Board acted badly in delaying an appeal. Generally, the Tribunal has jurisdiction only to order the payments authorized by the Act.

Notwithstanding the above, I recognize that there are some situations in which Board policy, and Tribunal decisions, provide for limitations on the extent to which errors in providing benefits or in charging assessments will be corrected retroactively.

In these situations, it may sometimes be relevant to consider both the behaviour of the parties and the behaviour of the Board. Common situations in which these factors are relevant include time extension applications, the collection of overpayments, and retroactive SIEF, NEER or classification adjustments. However, the relevant Board policies provide rules applicable to the retroactive correction of Board errors or purported Board errors. The retroactivity of the classification change that was ordered for this employer was addressed in *Decision No. 1504/01*, and is not before me.

Once it has been determined that a classification change will be made retroactively, the Board policies do not provide for any

additional adjustments in how that classification change applies, to remedy the negative impact of systemic delays or even of Board “misbehaviour”. In my view, with the exception of the application of specific policies, such as those referred to above, the WSIA and Board policy address the negative impacts of systemic delay only through the Board’s interest policies. The legislation does not provide any other remedy for systemic delay.

This brings me to the second aspect of the fairness argument put forward by Mr. Cronish. He submitted that the employer has not been paid interest on its refund for the years 1995 and 1996. The employer was paid interest only from 1997. It is Board practice to pay employer interest only from 1997. He submits that this is also a reason for the NEER adjustment not to be ordered.

However, in my view, if Mr. Cronish considers that interest should have been paid prior to 1997, his remedy is to raise that issue with the Board, and ultimately, if necessary, with the Tribunal on appeal. The fact that a party feels it has been under-compensated with respect to one matter is generally not a basis for the award of a different benefit or relief. I do not have jurisdiction on the interest issue. In *Decision No. 1504/01*, the Panel referred consideration of the payment of interest to the Board. There is no final decision of the Board on the question of whether the merits and justice of this case require the payment of interest on the refunded amounts for the time period prior to 1997.

The third “fairness” argument made by Mr. Cronish was that the magnitude of the NEER adjustment supports relief, especially given the fact that full interest was not paid.

However this is not a case in which the size of the adjustment means that the employer was unfairly treated. There is no issue of detrimental reliance in this case. The employer simply did not receive the benefit from the classification change that it expected. It received a smaller, although still significant, benefit. The benefit was smaller than expected because the employer had a wrong expectation of how the mathematical calculations would apply. However, given that Mr. Cronish has withdrawn his objection to those calculations, there is no basis for me to find that the effect on the employer’s net refund was unfair. The employer’s view that the NEER offset was unfair was the result of a misunderstanding on its part.

Therefore in my view the “fairness” issue is not a basis for the NEER adjustment to be waived.

### *(c) Estimated Claim Costs*

Mr. Cronish also argued that, whether acting under the policy or not, I should order that the estimates of future claim costs, as previously calculated, should not be changed for the purposes of the NEER recalculation. He submitted that the original estimate of claim costs was calculated as final at the time that the NEER window closed, and there is no reason for it to be adjusted.

I did at first consider it unclear why a change in the employer’s classification would affect the Board’s estimate of the future costs of the transferred claims. However, the Board has provided an answer to that question. Under the NEER formula, the estimate of future claim costs varies both with the accident history of the class, and the size of the employer. There is greater insurance protection for smaller employers.

The Board did not provide a detailed calculation of how much of the NEER recalculation in this case resulted from the change in the classification *per se*, and how much it related to the change in the comparative sizes of the employer’s two rate groups.



However, I accept that the changes ordered in *Decision No. 1504/01* affected the NEER calculation in the ways described by the Board. Mr. Cronish has withdrawn his submission that the calculation was not carried out properly.

There is a rational basis for why the estimates for future claim costs varied when employees were transferred to a different classification. There is no basis in the evidence, in my view, to vary the Board's recalculation in any respect.

*(d) How Decision No. 1504/01 Should Be Read*

I also consider my findings consistent with how I read *Decision No. 1504/01*.

In *Decision No. 1504/01* (as clarified in *Decision No. 1504/01R*) the Panel ordered that certain employees were to be transferred to Rate Group 636. It did not make any specific order about what flowed financially from that reclassification. It did not specifically order the Board to recalculate the payroll premiums. It also did not specifically order a recalculation of the NEER charges. It simply ordered a classification change.

In my view, when a Panel orders a classification change, that order should be understood to mean that the Board is to undertake all the recalculations that naturally flow from that change. For an employer in the NEER program, the NEER charges are an integral part of the employer assessment system. In this respect, they are no different from the premium charges.

In my view, absent wording to the contrary, a Tribunal decision that orders a classification change should be read to require that both premiums and NEER charges be adjusted accordingly.

In addition, *Decision No. 1504/01* made a finding that OPM Document No. 08-06-03 applied to the issue of retroactivity. That policy states that: "the Board may reassess employers for up to six previous years or to the last year audited, whichever is more recent". *Decision No. 1504/01* applied the policy to find that the change in classification was to have effect from 1995.

I read the reference to reassessment in this policy to extend to whatever reassessment flows from the change in classification. For an employer in NEER, in my view, the wording is reasonably read to extend to both the recalculation of premiums and the recalculation of NEER charges.

*(e) Retroactivity: OPM Documents No. 08-06-06 and 13-02-02*

Therefore I do not consider there to be any issue of retroactivity in this case.

The Board relies on OPM Documents No. 08-06-06 and 13-02-02. Given that OPM Document No. 08-06-06 was introduced first, on July 25, 1997, and addresses the relevant issue, I have considered its application the most relevant. It states:

**Retroactive Adjustments**

The WCB adjusts the final NEER refund or surcharge for a given accident year in accordance with retroactive adjustments affecting classification and assessable earnings.

This policy provides express authority for the NEER recalculation carried out by the Board, at least from January 1, 1998. I accept that there are no partial year calculations for NEER. Therefore 1998 is the first year to which this specific provision can apply. The question raised by Mr. Cronish is whether the policy can be applied retroactively.

However given my interpretation, above, I do not read this policy to be making any substantive change in how the Board implements a classification change. I agree with the position of Mr. Recchi, in his written submissions dated September 29, 2005, that the Act authorizes adjustments to both premiums and NEER charges in this situation. Therefore the Board had authority to make these adjustments prior to the introduction of this policy. Mr. Cronish did not dispute that the Act provided that authority. The policy documents introduced in 1997 provided for new limitations to the rules about retroactivity, in fact situations that are not applicable to this appeal. They also included the wording set out above, which clarified that the new limitations on retroactive application were not intended to apply to retroactive NEER adjustments when a classification changed. I consider the wording introduced in OPM Document No. 08-06-06 to be a clarification that the Board's past practice, in making these NEER adjustments, would continue, when there had been a classification change.

In my view, this policy did not cause any substantive change to the Board practice in this respect. It did change the status of that practice, because it is more specific than the earlier policy and therefore more clear in giving the Board's past practice the status of Board policy. As a result, whatever the case prior to the introduction of this policy, it is clear that from its date of introduction that this practice is expressly subject to section 126 of the WSIA.

However, I consider it both reasonable and appropriate for both premiums and NEER amounts to be recalculated when a classification is changed retroactively. Therefore I consider it appropriate to apply that practice, even to the time period prior to the introduction of the policy. Nothing turns on the fact that this practice was incorporated into Board policy, on the facts of this appeal.

#### *(f) The Charter Issue*

Given that my decision does not rest on the application of section 126 of the Act, there is no need to determine the Charter issue.

## **DISPOSITION**

The appeal is denied.

*Appeal dismissed.*



## Decision No. 2455/06

Vice-Chair: Moore

Decision — February 12, 2007

Neutral Citation: 2007 ONWSIAT 344

### **Benefits (deductions) – Waiver (right to compensation) (settlement).**

**Worker received \$44,000 from employer as result of settlement of grievance regarding long-term disability benefits – Board correctly deducted amount of settlement from retroactive benefits payable to worker, in accordance with s. 45(1) of the pre-1997 Workers' Compensation Act – Settlement arose out of same facts giving rise to claim, and was a payment in respect of a work-related accident – Settlement did not constitute waiver of benefits – Worker did not waive workers' compensation benefits.**

The worker suffered a compensable injury in 1995, for which he was granted a 20% NEL award. In 1999, he claimed entitlement for a recurrence and for psychotraumatic disability. The Board denied the claim. In *Decision No. 1515/04*, the Tribunal allowed the worker's appeal, finding that the worker had entitlement for psychotraumatic disability, a NEL assessment for psychotraumatic disability and supplementary benefits under s. 43(9) of the pre-1997 *Workers' Compensation Act*.

In implementing *Decision No. 1515/04*, the Board granted supplementary benefits retroactively from 1998 to 2003. In doing so, the Board reduced the amount of the benefits by \$44,000, which was an amount the worker had received from the employer as a result of settlement of a grievance regarding long-term disability benefits. The worker had sought long-term disability benefits when the Board denied entitlement for the recurrence.

The worker appealed a decision of the Appeals Resolution Officer confirming deduction of the \$44,000 from the lump sum payment of the retroactive supplementary benefits. The appeal was dismissed.

Section 45(1) of the pre-1997 Act provides for having regard to payments to a worker from the employer in respect of the accident, when finding the amount of compensation to be paid. Board *Operational Policy Manual*, Document No. 18-01-11, also provides for taking into consideration any payments to workers by their employers in respect of a work-related accident. The grievance settlement of \$44,000 was referred to in the settlement as damages. However, the Vice-Chair was satisfied that it related to the worker's claim for long-term disability benefits, which arose out of the same facts giving rise to the claim for compensation benefits. Thus, it was a payment in respect of a work-related accident.

Section 18 provides that a worker cannot waive benefits. However, the Legislature did not intend s. 18 to negate rights conferred elsewhere in the Act. Section 45 clearly anticipates the situation where an employer pays benefits to a worker in advance of confirmation of entitlement by the Board. Under the settlement agreement, the worker did not waive workers' compensation benefits. Rather, the worker received the full amount of benefits to which he was entitled, but became subject to the provisions of s. 45(1).

The Board correctly deducted the \$44,000 from the payment of retroactive supplementary benefits.

### **Indemnités (déductions) – Renonciation (droit à une indemnité) (règlement).**

**Le travailleur avait reçu 44 000 \$ de l'employeur à la suite du règlement d'un grief relatif à ses prestations d'invalidité à long terme – La Commission a correctement déduit 44 000 \$ des prestations payables au travailleur, conformément au par. 45 (1) de la Loi d'avant 1997 – Le règlement résultait du même ensemble de faits que celui qui avait donné lieu à la demande d'indemnité et était un paiement relatif à un accident professionnel – Le règlement ne constituait pas une renonciation à des prestations – Le travailleur n'a pas renoncé à toucher des prestations d'assurance contre les accidents du travail.**

Le travailleur a subi une lésion indemnisable en 1995 pour laquelle il a obtenu une indemnité pour perte non financière (PNF) de 20 %. En 1999, il a demandé le droit à une indemnité pour une récidive et pour une invalidité psychotraumatique. La Commission a rejeté sa demande. Dans la *décision no 1515/04*, le Tribunal a accueilli l'appel du travailleur en concluant qu'il avait droit à une indemnité pour invalidité psychotraumatique, à une évaluation de la perte non financière découlant de cette invalidité psychotraumatique et à un supplément aux termes du paragraphe 43 (9) de la *Loi sur les accidents du travail* d'avant 1997 (Loi d'avant 1997).

Quand elle a mis en œuvre la *décision no 1515/04*, la Commission a reconnu au travailleur le droit à un supplément pour la période de 1998 à 2003. En ce faisant, elle a réduit le montant des prestations de la somme de 44 000 \$ que le travailleur avait reçue de l'employeur par suite du règlement d'un grief concernant ses prestations d'invalidité à long terme. Le travailleur avait demandé des prestations d'invalidité à long terme quand la Commission avait refusé de lui reconnaître le droit à une indemnité pour une récidive.

Le travailleur a interjeté appel de la décision dans laquelle le commissaire aux appels a confirmé la déduction de 44 000 \$ du paiement forfaitaire de son supplément. L'appel a été rejeté.

Le paragraphe 45 (1) de la Loi d'avant 1997 prévoit de tenir compte des paiements que l'employeur verse au travailleur en rapport avec l'accident au moment de déterminer l'indemnité à verser. Le document no 18-01-11 du *Manuel des politiques opérationnelles* de la Commission prévoit aussi de tenir compte de tous les paiements que l'employeur verse au travailleur en rapport avec un accident professionnel. Le montant de 44 000 \$ était traité comme des dommages-intérêts dans le règlement du grief. Cependant, le vice-président était convaincu qu'il était lié à la demande de prestations d'invalidité à long terme du travailleur, laquelle résultait du même ensemble de faits que celui qui avait donné lieu à la demande de prestations d'assurance contre les accidents du travail. Il s'agissait donc d'un paiement en rapport avec l'accident professionnel.

L'article 18 prévoit qu'un travailleur ne peut pas renoncer à des prestations. Cependant, le législateur ne voulait pas que l'article 18 nie des droits conférés ailleurs dans la Loi. Il était clair que l'article 45 prévoit la situation où un employeur verse des prestations à un travailleur avant que la Commission confirme le droit à une indemnité. Aux termes du règlement, le travailleur n'avait pas renoncé à toucher des prestations d'assurance contre les accidents du travail. Il avait plutôt touché le plein montant des prestations auxquelles il avait droit mais il était devenu assujéti aux dispositions du paragraphe 45 (1).

La Commission avait correctement déduit 44 000 \$ du paiement rétroactif du supplément.

#### **Tribunal Decisions Considered:**

- *Decision No. 731/93* (1995), 36 W.C.A.T.R. 53 consd

#### **Workplace Insurance Legislation Considered:**

- *Workers' Compensation Act*, R.S.O. 1990, c. W.11
  - s. 18
  - s. 43(9)
  - s. 45(1)
- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
  - s. 56
  - s. 102

#### **Board Directives and Guidelines Considered:**

- *Operational Policy Manual*
  - Document No. 18-01-11 (October 12, 2004)

#### **Cross-References:**

- *Decision No. 1515/04* (July 6, 2005) [2005 ONWSIAT 1511]

APPEAL by the worker from a decision of the Appeals Resolution Officer confirming deduction of the amount of a grievance settlement from retroactive benefits payable to the worker.

February 12, 2007. THE TRIBUNAL: —

BEFORE: J.P. Moore, Vice-Chair

HEARING: December 1, 2006 at Toronto, Written

DECISION(S) UNDER APPEAL: WSIB ARO decision dated February 21, 2006

#### **APPEARANCES:**

For the worker: F. Evangelista, Consultant

For the employer: D. Mahony, Lawyer

## **REASONS**

### **(i) Introduction**

On July 4, 1995, the worker was injured in the course of his employment. At the time of the injury, the worker was employed as a mechanic. The worker was granted initial entitlement to benefits for his injury, including a 20% non-economic loss

(NEL) award for an organic impairment.

The worker stopped work on June 1, 1999 claiming that he had suffered a recurrence injury. The worker also sought entitlement to benefits for a psychotraumatic disability. The Board denied the worker's claim for benefits subsequent to June 1, 1999. The worker appealed that decision. His appeal was allowed by a Vice-Chair of the Tribunal in *Decision No. 1515/04* (July 6, 2005). That decision allowed the worker retroactive benefits to July 1, 1999, including a NEL assessment for a psychotraumatic disability and supplementary benefits under section 43(9) of the pre-1997 *Workers' Compensation Act*, R.S. O. 1990, c. W.11. The decision further directed that the Board redetermine the worker's future economic loss (FEL) entitlement as of September 1, 2003.

The Board implemented the Tribunal's directions in a decision dated August 23, 2005. In a letter of that date, the Board informed the worker that a NEL assessment would be arranged and that the worker's "R2" FEL entitlement had been redetermined. Of particular significance for this appeal, the Board also implemented the directions in *Decision No. 1515/04* and paid the worker retroactive supplementary benefits from September 1, 1998 to September 1, 2003. The Board then made the following determination:

The \$44,000 you received from your employer as a result of the grievance settlement over the denial of your Long Term Disability (LTD) benefits for the same period of absence for which WSIAT has granted you entitlement has been deducted from your benefit payment.

Hence, the retroactive supplementary benefits the worker received from the Board were reduced by an amount equivalent to the amount the worker received under a grievance settlement. That settlement was set out in Minutes of Settlement dated March 1, 2002.

The settlement arose out of a grievance filed by the worker when his employment was terminated on October 31, 2001 because of his failure to attend work, effective June 1, 1999.

According to evidence on file, after the worker's claim for compensation benefits was denied, the worker sought LTD benefits. According to the evidence, the accident employer has a self-insured LTD plan that is administered by an insurance company. The insurance company denied the worker's claim for LTD benefits on the basis that the worker was not totally disabled because he was likely able to continue employment with the accident employer. I note that this was essentially the same rationale used by the Board for denying the worker entitlement to benefits subsequent to June 1, 1999.

According to the evidence, the worker continued to seek both LTD benefits and compensation benefits. When his employment was terminated on October 31, 2001, the worker filed a grievance. As I noted above, the grievance was settled. As a result of that settlement, the termination of the worker's employment in October 2001 was changed to a resignation. The worker also received the sum of \$44,000. The paragraph from the Minutes of Settlement granting that award reads as follows:

3. That the [accident employer] shall pay to the grievor [the worker] \$44,000 as damages. The grievor shall accept this payment as good and valuable consideration for any claims for Long Term Disability benefits for the period of time alleged in the grievance ... and for any other period of time including from the dates these minutes are signed by the parties.

Hence, immediately prior to the issuance of the Tribunal's *Decision No. 1515/04*, the worker had not been in receipt of LTD benefits but had received a settlement in lieu of such benefits. When the Board implemented *Decision No. 1515/04*, it

deducted the sum of \$44,000 from the lump sum retroactive payment granted to the worker for supplementary benefits. The worker objected to that deduction. His objection was denied by the ARO in the decision of February 21, 2006. The worker now appeals that issue to the Tribunal.

## **(ii) The Issue**

The issue in this appeal is whether the Board correctly deducted the sum of \$44,000 from a lump sum payment made to the worker in recognition of retroactive entitlement to FEL supplementary benefits from September 1, 1998 to September 1, 2003.

## **(iii) The Decision**

Having reviewed the evidence and submissions presented to me, I am persuaded that the Board's decision was correct.

## **(iv) Analysis**

In the decision under appeal, the Board and the ARO cited section 56 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, as authority for making the deduction in issue. As Mr. Evangelista noted in his written submissions, the worker's accident occurred in 1995. Hence, in accordance with section 102 of the WSIA, the pre-1997 Act continued to apply to determinations made regarding the worker's claim (subject to certain amendments). In the present case the applicable provision from the pre-1997 legislation is found in section 45. Section 45(1) of the pre-1997 legislation reads as follows:

**45(1)** In fixing the amount of compensation to be paid to a worker or his or her dependants regard shall be had to any payment, allowance or benefit paid to them by the worker's employer in respect of the worker's accident, including any gratuity or other allowance provided wholly at the expense of the employer.

The applicable Board policy is found in Document No. 18-01-11 of the Board's *Operational Policy Manual*. I note the following excerpts from that document:

The WSIB takes into consideration any payment, allowance or benefit paid to workers by their employer in respect of a work-related accident, including any gratuity, in fixing the amount of compensation paid to the worker. Such compensation may include a deduction of money payable to the worker equivalent to the amount of any contributions made by the employer.

...

Compensation payments in the form of pension awards for permanent disability under the pre-1989 legislation and benefits for non-economic loss (NEL) and future economic loss (FEL) are not subject to any deductions for employer advances or benefits, and employers are not eligible for any reimbursement for these payments.

The exemption from deductions does not apply to pension or FEL supplements for any supplements awarded or continued on or after July 1, 1993. The WSIB takes into account payments made by an employer in relation to a worker's injury, when calculating the pension or FEL supplement payable to the worker.

Since the deduction made by the Board was from a lump sum payable retroactively for FEL supplementary benefits, it would appear that making such a deduction was permissible under the Board's policy provided that the deduction was for a payment that met the threshold requirement in the legislation and the policy: i.e., that it be a payment, allowance or benefit paid "in

respect of a work-related accident”.

In his submissions on behalf of the worker, Mr. Evangelista argued that the payment made to the worker pursuant to the settlement of his grievance did not constitute a payment in respect of a work-related accident but was, rather, damages. He noted the specific wording of the paragraph granting the award which stipulated: “That the [accident employer] shall pay to the grievor \$44,000 as *damages*” (emphasis added).

Mr. Evangelista argued that this precise stipulation was intended to distinguish the payment from the type of payment contemplated in section 45(1) by making it a payment that was not “in respect of the worker’s accident”. He argued that further evidence of this was found in the fact that the award did not stipulate a specific period of time to which the reimbursement was applicable. Mr. Evangelista further argued that the payment in issue could not be considered an “offsettable award” because to do so would violate section 18 of the pre-1997 Act. That section reads as follows:

**18** It is not competent for a worker to agree with his or her employer to waive or to forego any of the benefits to which the worker or his or her dependants are or may become entitled under this Part and every agreement to that end is void.

In his submissions on behalf of the employer, Mr. Mahony made a number of arguments which I will not review here given that I am effectively applying those arguments in the reasoning set out below.

My understanding of the award granted to the worker under the Minutes of Settlement is that, although described as “damages”, it was paid as “good and valuable consideration for any claims for Long Term Disability benefits”. My understanding of the facts is that the worker applied for LTD benefits after unsuccessfully seeking compensation benefits. It is also my understanding that the worker’s claim for LTD benefits arose out of the same facts giving rise to the claim for compensation benefits, and, therefore, from the same work-related accident. I infer that the worker sought LTD benefits to replace income he lost as a result of the injury that he believed to be compensable but for which the Board initially denied entitlement. While the settlement award did not specify a period of time for which reimbursement was granted, the award was intended to compensate the worker, in part, for lost LTD benefits. In my opinion, there is no doubt about that purpose.

It appears from the submissions made by Mr. Evangelista and Mr. Mahony that use of the word damages was intended to provide the worker with a tax advantage. In my opinion, that concession does not alter the primary intent of the award which was to reimburse the worker in part for income lost as a result of a dispute arising out of his compensable workplace injury. To put it in somewhat different terms, had the worker obtained the WSIB coverage he sought, at the outset, he would not have been entitled to either LTD benefits or to the sum he eventually received by way of a settlement. The only basis for the worker’s claim for the award he ultimately received was his workplace injury and the dispute between the worker and the employer over issues arising out of that accident.

With respect to Mr. Evangelista’s argument that section 18 prevented the Board from offsetting the worker’s award, I note a previous Tribunal decision, *Decision No. 731/93* (1995), 36 W.C.A.T.R. 53, in which a panel of the Tribunal addressed the significance of section 18 in similar circumstances. At page 61 of that decision, the Panel stated:

The significance of section 18 was discussed briefly in the Tribunal’s *Decision No. 145/95* (1995), 35 W.C.A.T.R. 195 at page 206:

In our opinion, this submission can be dealt with briefly. In our view, the Legislature did not intend section 18 to take away a right explicitly conferred on Mr. Lozo by section 10(1) of the Act. In our view, section 18 is to



be read as being inapplicable to the exercise of a right conferred by the Act. Section 10(1) permits a worker to pursue legal action in lieu of claiming benefits. In our opinion, if the worker enters into an agreement with the Board or his employer as part of the exercise of that right, section 18 should not be a bar to that process.

In the opinion of the present Panel, that reasoning applies to the case at hand. In our view, the Legislature did not intend section 18 to negate rights conferred elsewhere in the Act. Section 45 of the Act clearly anticipates the situation where an employer pays benefits to a worker in advance of confirmation of entitlement by the Board. The section also permits the Board to repay such advances once such entitlement has been established.

In the Panel's opinion, the agreement entered into by the worker and the employer does not reflect an intention on the worker's part to waive or forego benefits or to contract out of the Act in any way. Rather, it appears to us to reflect an intention to enter into an agreement that brings the parties under the aegis of section 45.

The same reasoning applies to the present case, in my view. As I interpret the settlement agreement entered into by the worker and the employer, its intention was not to preclude the worker from seeking or receiving benefits under the pre-1997 Act. In fact, the worker went on to pursue his appeal from the Board's prior entitlement decisions and was successful in his appeal, receiving what amounted to full compensation from June 1, 1999 onward. Hence, the worker did not, under the settlement agreement, agree to waive or forego any compensation benefits. Instead, the worker agreed to receive a sum that constituted partial reimbursement of entitlement for LTD benefits. The worker went on to receive full compensation from the Board, but that became subject to the provisions of section 45(1). The sum paid by the employer was clearly "in respect of the worker's accident". Whether the employer paid the worker LTD benefits or a settlement amount in lieu of such benefits, the effect is the same. Any such payment would have been paid by the employer to the worker to replace income lost by the worker as a result of his compensable injury. Once the Board subsequently accepted responsibility for those payments, the payment made by the employer became an income replacement benefit in lieu of compensation benefits, for which a deduction should be made to preclude double recovery.

I am persuaded, therefore, that the Board's actions were appropriate and correct under the applicable legislation and policy and I confirm the deduction of the sum of \$44,000 from the retroactive payment granted to the worker for supplementary benefits.

## **DISPOSITION**

The worker's appeal is denied.

*Appeal dismissed.*



## Decision No. 215/07

Vice-Chair: Parmar

Decision — February 1, 2007

Neutral Citation: 2007 ONWSIAT 269

**Earnings basis (long-term) – Board Directives and Guidelines (earnings basis) (non-permanent or irregular employment) – Construction.**

**Construction worker was injured on fourth day of employment – It was intended that worker would work regular hours and would be employed all year – In circumstances, worker was in permanent employment, and there was no basis to change long-term earnings basis from short-term basis.**

The worker was injured in May 2002, on his fourth day of employment as a bricklayer's assistant. He had not previously worked in construction. The Board based long-term benefits on the worker's earnings during the 24 months prior to the accident, resulting in a substantial reduction from short-term benefits. The worker appealed a decision of the Appeals Resolution Officer confirming the calculation of long-term benefits. The appeal was allowed.

According to Board policy, long-term benefits of workers in permanent employment are only recalculated if it would be unfair to continue to base benefits on short-term average earnings. Long-term benefits of workers in non-permanent or irregular employment are based on earnings during the 24 months prior to the accident.

The worker worked regular hours until the accident. The employer's Form 7 did not indicate that the worker's hours were irregular. Evidence indicated that the employer continued operating during the winter months and that the employer anticipated being able to operate in adverse weather conditions. Any unavailability of worker due to weather conditions would likely only be in exceptional circumstances.

The Vice-Chair concluded that the worker was not hired for a specific period of time and that it was intended that the worker would work regular hours and would be employed 52 weeks of the year. The worker was in permanent employment. There was no basis to find that continuation of LOE benefits based on short-term earnings would be unfair. The worker was entitled to continuation of benefits based on his short-term earnings.

**Base salariale (long terme) – Directives et lignes directrices de la Commission (base salariale) (emploi non permanent ou irrégulier) – Construction.**

**Un travailleur de la construction a subi une lésion le quatrième jour de son emploi – Il devait avoir des heures de travail normales et être employé à l'année – En l'espèce, l'emploi du travailleur était permanent, et rien ne justifiait d'utiliser la base salariale à court terme au lieu de la base salariale à long terme.**

Le travailleur a été blessé en mai 2002 pendant sa quatrième journée de travail comme aide briqueteur. Il n'avait jamais travaillé dans le secteur de la construction auparavant. La Commission a calculé ses prestations à long terme en fonction de ses gains pendant les 24 mois antérieurs à l'accident, ce qui a entraîné une forte réduction de ses prestations comparativement à ses prestations à court terme. Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels a confirmé ses prestations à long terme. L'appel a été accueilli.

Selon la politique de la Commission, les prestations à long terme des travailleurs occupant un emploi permanent sont calculées de nouveau seulement s'il serait injuste de continuer à les calculer en fonction de ses gains moyens à court terme. Les prestations à long terme des travailleurs occupant un emploi non permanent ou irrégulier sont calculées en fonction de leurs gains au cours des 24 mois précédant l'accident.

Le travailleur avait des heures de travail normales jusqu'au moment de l'accident. Sur le formulaire 7, l'employeur n'a pas indiqué que les heures de travail du travailleur étaient irrégulières. La preuve indiquait que l'exploitation de l'employeur continuait pendant les mois d'hiver et que l'employeur s'attendait à pouvoir fonctionner par mauvais temps. Les absences du travailleur pour cause de mauvais temps ne devaient être que dans des circonstances exceptionnelles.

Le vice-président a conclu que le travailleur n'avait pas été embauché pour une période particulière, qu'il devait avoir des heures normales de travail et qu'il devait être employé 52 semaines par année. Le travailleur occupait un emploi permanent, et rien ne justifiait de conclure qu'il serait injuste de continuer à calculer ses prestations pour perte de gains à partir de ses gains à court terme. Le travailleur avait le droit de continuer à toucher des prestations fondées sur ses gains à court terme.

#### **Board Directives and Guidelines Considered:**

- *Operational Policy Manual*
- Document No. 18-02-03 (July 7, 2000) (since revised)
- Document No. 18-02-04 (September 14, 1999) (since revised)

APPEAL by the worker from a decision of the Appeals Resolution Officer regarding the earnings basis for calculation of long-term benefits.

February 1, 2007. THE TRIBUNAL: —

BEFORE: J. Parmar, Vice-Chair

HEARING: January 29, 2007, at Toronto, Oral

DECISION(S) UNDER APPEAL: WSIB ARO decision dated February 18, 2005

**APPEARANCES:**

|                   |                            |
|-------------------|----------------------------|
| For the worker:   | Ms. D. Rangin, Consultant  |
|                   | Ms. R. Niroomand, Observer |
| For the employer: | Did not participate        |

**(i) Introduction**

This is an appeal by the worker to the Workplace Safety and Insurance Appeals Tribunal in respect of a decision by an Appeals Resolution Officer (ARO) of the Workplace Safety and Insurance Board, dated February 18, 2005, which held that the calculation of the worker's long-term loss of earnings (LOE) benefit was correct.

**(ii) Background**

The worker suffered an injury to his right shoulder when he fell on May 10, 2002. The worker had recently commenced employment with the accident employer that very week, and was injured on his fourth day at the job. He was employed as a labourer, assisting the bricklayers.

The worker was unable to return his pre-accident employment, and the employer was unable to provide him with suitable work. The worker was then referred for labour market re-entry services.

In May 2003, the worker was awarded a 7% non-economic loss (NEL) award in respect of his right shoulder. In September 2006, his NEL award was increased to 44% to reflect entitlement for a psychological impairment.

When the worker was initially injured, he was granted LOE benefits on the basis of his short-term average earnings with the pre-accident employer. Subsequently, the adjudicator determined the worker's pattern of employment was irregular or non-permanent. For this reason, the worker's entitlement to LOE benefits was later adjusted to reflect his long-term average earnings. This resulted in a reduction of the worker's LOE benefit from \$756.94 per week to \$296.24 per week.

The worker appealed the downward adjustment at the Board level. The worker submitted that he was a permanent worker. Alternatively, he submitted that if he was an irregular or non-permanent worker, then his long-term LOE benefit should be calculated on the basis of his earnings in the year prior to his accident rather than the 24 months prior to his accident. The ARO concluded, on the basis of evidence from the employer, that the worker's employment with the accident employer was irregular. She also concluded that the calculation of the worker's long-term LOE benefit was calculated in a manner consistent with Board policy.

The worker appeals these determinations to the Tribunal.

**(iii) Issue**

The issue in this appeal is whether the worker's LOE benefit was properly recalculated to reflect employment as an irregular or non-permanent worker.

#### (iv) Analysis

Having reviewed the evidence and submissions of the worker, I find that the appeal should be allowed.

The Board has two relevant policies: *Operational Policy Manual* Documents No. 18-02-03 and 18-02-04. Together these policies articulate the difference between a worker with permanent employment and a worker with non-permanent or irregular employment. The distinction is made to address the factual circumstance where the earnings immediately before an accident may not be a fair representation of the worker's average earnings.

*Operational Policy Manual* Document No. 18-02-03 provides the following definition for permanent employment:

**Permanent employment** is employment in which a worker has no set termination date, apart from retirement. Permanent employment may be full-time or less than full-time.

**Exception** – A worker in permanent employment, whose earnings vary from day to day, or week to week due to irregular hours or method of payment, is considered to be in **irregular employment**.

**Regular employment** is employment in which a worker is employed (by the employer) 52 weeks a year, with no seasonal or cyclical layoffs. Regular employment may, however, involve occasional short-term layoffs or non-earning periods due to shortage of work, plant shutdowns during holidays, retoolings, strikes, lockouts etc. Such temporary layoffs or non-earning periods do not sever the employment relationship because workers do not typically obtain work with other employers during these periods.

For a permanent employee, the worker's LOE benefit is only recalculated on the basis of long-term average earnings if it would be unfair in the circumstances to continue to make payments on the basis of short-term average earnings.

*Operational Policy Manual* Document No. 18-02-04 provides the following definition for non-permanent or irregular employment:

**Non-permanent employment** is employment in which a worker has been hired only for a specific period of time, or who has received a termination notice, e.g., contract workers, and workers hired for a temporary period through a union hall.

**Irregular employment** is employment in which

- a worker is hired by an employer, but generally not for 52 weeks of the year, or
- a worker's earnings vary from day to day, or week to week due to irregular hours or the method of payment.

Workers in irregular employment include seasonal or cyclical workers, temporary agency workers, workers whose salary is based solely on commissions, or drivers paid per mileage driven.

*NOTE: Workers who are permanently employed and who lose time due to occasional short-term layoffs caused by work shortages, plant shutdowns during holidays, retoolings, strikes or lockouts are not considered irregular workers.*

LOE benefits for workers with non-permanent employment are based on the worker's long-term average earnings from the beginning of the thirteenth week of LOE benefits.

The worker testified that he came to Canada in 2000. He commenced employment the next day with a wiring company. He

worked there for approximately five months, and then left as he had secured employment as an aluminium welder. He worked as a welder until approximately May 2001. At that time, he indicated he injured his foot and the employer suggested he take parental leave as his wife was having a baby at the time. While on leave, he was issued a lay-off notice for shortage of work.

The worker indicated he began looking for work after his parental leave and was referred by a friend to the accident employer. He spoke to the owner over the telephone on the weekend, and was advised that he could start that week. The worker indicated he was looking for permanent employment, as he needed a secure position to support his young family. The worker testified that he was advised that the work would be permanent and that there was lots of work available. He indicated he asked about the security of the work a number of times because of his concerns over continuous income. He was repeatedly assured of continued employment. The worker stated that he was also told the work would be year-round.

The worker started working on May 6, 2002, and was injured on May 10, 2002. The worker stated that he worked everyday that week, until his injury, from about 6:30 a.m. to 4:30 p.m. The worker indicated he understood his hours would be 42.5 hours per week, but that overtime would also be available. The worker indicated he did work overtime in his first week, but could not recall how much.

The employer filed a Report of Injury – Form 7 after the accident. The form, dated May 16, 2002, is signed by JA, bookkeeper. The worker's rate of pay is indicated as \$26.19 per hour with total weekly pay hours as 42.5. There is a column entitled "if weekly pay hours are irregular, please state average weekly hours". This column was left blank. In response to the question of whether the worker's work schedule changes from week to week, the employer responded no. The worker's usual hours were indicated to be Monday through Friday. In a telephone conversation with the claims adjudicator on May 28, 2002, JA again advised that the worker worked 42.5 hours per week. This information is consistent with the worker's evidence that he was to have regular hours of work.

The only indication that the worker's hours were not regular is in the course of a telephone conversation between the claims adjudicator and a Ms. T. In a memo documenting the conversation, dated August 29, 2002, the adjudicator reports she telephoned the bookkeeper and spoke to Ms. T. Ms. T advised that the worker's hours would vary week to week and that availability of work depended on weather conditions, as the worker would be unable to work in rain or poor weather conditions. Ms. T confirmed, however, that the employer continued operating during the winter months.

In my opinion, the information from Ms. T contradicts the earlier information provided by the employer that the worker worked regular hours and his hours did not vary week to week. Given this inconsistency, I have some concerns about relying on the information of Ms. T in this respect. It is unclear in this memo whether Ms. T was referring only to regular hours or including overtime hours, which could well have varied. I also note that since the employer continued operating during the winter months, the employer clearly anticipated being able to work in adverse weather conditions. As such, unavailability of work due to poor weather conditions would likely be only in exceptional circumstances. Any period where there was a lack of work due to weather conditions would then have been only a short-term lay-off or non-earning period. In my opinion, such a brief period would not have severed the employment relationship, as the worker would likely not have been expected to obtain work elsewhere during such a brief period.

Given the worker's evidence and the information provided by the employer to the Board, I am prepared to conclude the worker had regular hours of work and was intended to be employed 52 weeks of the year. I also conclude the worker was not

hired for a specific period of time.

Having considered the evidence, I find that the worker had permanent employment. I see no basis to conclude that continuing his LOE benefits on the basis of his short-term earnings would be unfair. As such, I find that his LOE benefits should not have been recalculated on the basis of his long-term average earnings, but should have continued on the basis of his short-term earnings.

## **DISPOSITION**

The appeal is allowed. The worker was permanently employed. The worker is entitled to LOE benefits on the basis of his short-term average earnings, as originally calculated by the Board.

*Appeal allowed.*



## Decision No. 878/06R

Vice-Chair: E. Smith

Decision — January 25, 2007

Neutral Citation: 2007 ONWSIAT 195

**Reconsideration (Board policy) – Board policies (applicability of Board policy) – Board policies (interpretation) – Retroactivity (policy change) – Earnings basis (seasonal employment) – Earnings basis (period of unemployment) – Board Directives and Guidelines (earnings basis) (unemployment insurance benefits).**

**Worker was injured in October 1996 – Version of Board policy as it existed at time of accident was applicable – That policy did not bar inclusion of employment insurance benefits in calculation of earnings basis under s. 40(1)(b) of the pre-1997 Workers' Compensation Act – Tribunal is required to apply Board policy but has jurisdiction to interpret meaning of working found in policy – Not all provisions in policy package sent by Board to Tribunal are relevant to any particular appeal – Decision not to apply provisions in a policy simply means that provisions were not relevant, based on findings in particular case.**

The worker was a full-time seasonal worker who suffered a left hand injury in October 1996. She returned to modified work at no wage loss in May 1997. She was permanently laid off in March 2001, due to a plant relocation. The Board originally based benefits on the worker's earnings at the time of the accident in accordance with s. 40(1)(a) of the pre-1997 *Workers' Compensation Act*. On application by the employer, the Board calculated benefits under s. 40(1)(b), resulting in a reduction of the worker's earnings basis from \$330 per week to \$208 per week.

On appeal to the Tribunal, the vice-chair found in *Decision No. 878/06* that it was appropriate for the Board to base benefits on the worker's earnings during the year prior to the accident under s. 40(1)(b), but that employment insurance benefits received by the worker during that year should be included in the calculation.

The Board applied for reconsideration of *Decision No. 878/06*. The Board submitted that employment insurance benefits are not earnings for the purpose of determining a worker's earnings basis. The application to reconsider was denied.

*Board Operational Policy Manual*, Document No. 05-02-02, in effect at the time of the accident indicated that employment insurance benefits could be included in the calculation of average earnings under s. 40(1)(a), only when paid in conjunction with federal work sharing and job creation programs. Tribunal decisions have found that this policy did not address inclusion of employment insurance benefits in calculations under s. 40(1)(b), and that the policy did not bar



inclusion of employment insurance benefits.

In 1998, Document No. 05-02-02 was amended to remove the reference to s. 40(1)(a), so that the intent of the policy would be to limit inclusion of employment insurance benefits to federal work sharing and job creation programs in all circumstances. The 1998 version of the policy did not contain a provision regarding application date.

In 2001, the policy was amended to include specific provisions prohibiting inclusion of employment insurance benefits, except as specified. The amended policy states that it applies to all decisions made on or after April 1, 2001, regardless of accident date.

The Vice-Chair found that the version of Document No. 05-02-02 as it existed at the time of the accident in October 1996, or perhaps at the time of the recalculation in February 1997, was applicable to this appeal. There was no change in the relevant provisions of the policy between those two dates. The original vice-chair who heard the appeal applied the provisions of that policy correctly.

The Board had notified the Tribunal that the 2001 policy was applicable to the appeal, based on the application date in that version of the policy. Under s. 126 of the *Workplace Safety and Insurance Act, 1997*, the Tribunal is required to apply Board policy. However, the Vice-Chair stated that the Tribunal has jurisdiction to interpret the meaning of the wording found in Board policy. It is appropriate to interpret the Board's policy document in a manner consistent with the legal principles governing retroactivity. There is a strong presumption against retroactivity. The Vice-Chair found that s. 126 of the WSIA requires the Tribunal to apply the Board policy that was in effect at the date of the relevant determinations. The Vice-Chair read the reference to "decision" in the application section of the 2001 policy to refer to the operating level decision. A different interpretation would produce an unfair result.

This interpretation of the word "decision" is not a finding that any version of the earnings basis policy is inconsistent or unauthorized by the Act.

The Vice-Chair considered the policy notification process in s. 126. The Board sends the Tribunal policy packages. Clearly not all the provisions in any policy package are relevant to any particular appeal. When the Tribunal makes a decision that does not apply provisions in a policy, it does not mean that the Tribunal has decided that the provision does not apply within the meaning of s. 126(4). Rather, it simply means that the provision was not relevant to its determinations, based on its findings of fact and law. Further, the fact that the Board may fail to provide a relevant policy is contemplated by s. 126(3), which allows the Tribunal to ask the Board to notify it of an applicable policy. This request is discretionary. The implication is that the Tribunal may proceed to apply the correct Board policy under s. 126(1) without requesting clarification.

In this case, the Board notified the Tribunal that the 2001 policy was applicable. The Vice-Chair found that the earlier version of the policy was applicable. The vice-chair hearing the appeal applied the correct version of the policy.

There was no error in the content of the original decision that, if corrected, would likely have changed the result.

**Réexamen (politique de la Commission) – Politiques de la Commission (applicabilité de la politique de la Commission) – Politiques de la Commission (interprétation) – Effet rétroactif (modification de la politique) – Base salariale (emploi saisonnier) – Base salariale (période de chômage) – Directives et lignes directrices de la Commission (base salariale) (prestations d'assurance-emploi).**

**La travailleuse a subi une lésion en octobre 1996 – C'était la version de la politique existant au moment de l'accident qui était applicable – Cette politique n'empêchait pas l'inclusion des prestations d'assurance-emploi dans le calcul de la base salariale aux termes de l'alinéa 40 (1) b) de la Loi d'avant 1997 – Le Tribunal est tenu d'appliquer les politiques de la Commission mais il est compétent pour en interpréter les rouages – Les dispositions de l'ensemble de politiques que la Commission envoie au Tribunal ne sont pas toutes pertinentes à un appel particulier – La décision de ne pas appliquer des dispositions d'une politique signifie simplement que les dispositions en question ne sont pas pertinentes compte tenu des constatations faites dans un cas particulier.**

La travailleuse, une travailleuse saisonnière à plein temps, a subi une lésion à la main gauche en octobre 1996. Elle est retournée à un emploi modifié sans perte de salaire en mai 1997. Elle a été licenciée de façon permanente en mars 2001 en raison du déménagement de l'usine. La Commission a initialement calculé les prestations de la travailleuse en fonction de ses gains au moment de l'accident aux termes de l'alinéa 40 (1) a) de la *Loi sur les accidents du travail* d'avant 1997 (Loi d'avant 1997). À la demande de l'employeur, la Commission a calculé les prestations de la travailleuse de nouveau aux termes de l'alinéa 40 (1) b), ce qui a entraîné une réduction de sa base salariale de 330 \$ par semaine à 208 \$ par semaine.

Dans la *décision no 878/06*, la vice-présidente a conclu qu'il était approprié de la part de la Commission de calculer les prestations de la travailleuse à partir de ses gains pendant l'année précédant l'accident aux termes de l'alinéa 40 (1) b) mais que les prestations d'assurance-emploi touchées pendant cette année-là devaient être incluses dans le calcul.

La Commission a demandé un réexamen de la *décision no 878/06*. La Commission soutenait que les prestations d'assurance-emploi ne sont pas des gains aux fins de la détermination de la base salariale d'un travailleur. La demande de réexamen a été rejetée.

Aux termes du document no 05-02-02 du *Manuel des politiques opérationnelles*, qui était en vigueur au moment de l'accident, les prestations d'assurance-emploi pouvaient être incluses dans le calcul des gains moyens aux termes de l'alinéa 40 (1) a) seulement quand le travailleur participait à un programme fédéral de travail partagé ou de création d'emploi. Selon la jurisprudence du Tribunal, cette politique ne règle pas la question de l'inclusion des prestations d'assurance-emploi dans les calculs effectués aux termes de l'alinéa 40 (1) b) et elle n'empêche pas l'inclusion des prestations d'assurance-emploi.

En 1998, la Commission a modifié le document no 05-02-02 pour supprimer la référence à l'alinéa 40 (1) a) de sorte que la politique vise à limiter l'inclusion des prestations d'assurance-emploi aux programmes fédéraux de travail partagé et de création d'emploi dans toutes les circonstances. La version de 1998 de la politique ne contenait pas de disposition au sujet de la date d'application.

En 2001, la Commission a modifié sa politique pour inclure des dispositions particulières empêchant l'inclusion des prestations d'assurance-emploi, sauf comme il était spécifié. La politique modifiée stipule qu'elle s'applique à toutes les décisions rendues le 1<sup>er</sup> avril 2001 ou après cette date, peu importe la date de l'accident.

La vice-présidente a conclu que c'était la version du document no 05-02-02 existant au moment de l'accident d'octobre 1996, ou peut-être au moment du nouveau calcul en février 1997, qui était applicable à cet appel. Aucun changement n'avait été apporté aux dispositions pertinentes de la politique entre ces deux dates. Le vice-président qui a entendu l'appel initialement a appliqué correctement les dispositions de cette politique.

La Commission avait notifié le Tribunal que la politique de 2001 était applicable à l'appel en se fondant sur la date d'application de cette version de la politique. Aux termes de l'article 126 de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997), le Tribunal est tenu d'appliquer les politiques de la Commission. Cependant, la vice-présidente a déclaré que le Tribunal est compétent pour interpréter le sens du libellé de la politique de la Commission. Il est approprié d'interpréter les politiques de la Commission d'une manière compatible avec les principes juridiques régissant la rétroactivité. Il existe une forte présomption à l'encontre de la rétroactivité. La vice-présidente a conclu que l'article 126 de la Loi de 1997 exige du Tribunal qu'il applique les politiques de la Commission en vigueur à la date des décisions pertinentes. La vice-présidente a interprété la référence à la « décision » dans la section d'application de la politique de 2001 comme une référence à une décision du secteur opérationnel. Une interprétation différente entraînerait un résultat injuste.

Cette interprétation de « décision » ne revient pas à constater qu'une version ou une autre de la politique sur la base salariale est incompatible ou non autorisée par la Loi.

La vice-présidente a examiné le processus de notification prévu à l'article 126. La Commission envoie des ensembles de politiques au Tribunal. Il est clair que les dispositions des ensembles de politiques ne sont pas toutes pertinentes à un cas particulier. Quand il rend une décision dans laquelle il n'applique pas des provisions de la politique, cela ne veut pas dire que le Tribunal a décidé que la disposition ne s'applique pas aux termes du paragraphe 126 (4) mais plutôt simplement que les dispositions ne sont pas pertinentes à ses décisions, compte tenu de ses constatations et de la Loi. Qui plus est, le fait que la Commission puisse négliger de fournir une politique pertinente est envisagé au paragraphe 126 (3), lequel permet au Tribunal de demander à la Commission de l'aviser au sujet de l'applicabilité d'une politique. Cette demande est discrétionnaire. Elle sous-tend que le Tribunal peut appliquer la politique correcte de la Commission aux termes du paragraphe 126 (1) sans demander d'éclaircissement.

En l'espèce, la Commission a notifié le Tribunal que la politique de 2001 était applicable. La vice-présidente a conclu que c'était la version antérieure de la politique qui était applicable. Le vice-président qui a entendu l'appel a appliqué la bonne version de la politique.

La décision initiale ne comportait aucune erreur de fond dont la rectification aurait probablement pour effet de changer l'issue de l'instance.

**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 consd to
- *Decision No. 850/87R* (1990), 14 W.C.A.T.R. 1 consd to
- *Decision No. 229/98* (1999), 52 W.S.I.A.T.R. 45 consd
- *Decision No. 284/98* (May 7, 1998) refd to
- *Decision No. 382/98* (1998), 46 W.S.I.A.T.R. 231 refd to
- *Decision No. 809/98* (2000), 53 W.S.I.A.T.R. 61 consd
- *Decision No. 1342/98* (1998), 48 W.S.I.A.T.R. 212 consd
- *Decision No. 1943/98A* (2000), 55 W.S.I.A.T.R. 45 consd
- *Decision No. 221/99* (1999), 50 W.S.I.A.T.R. 193 consd
- *Decision No. 417/99* (1999), 52 W.S.I.A.T.R. 172 consd
- *Decision No. 1783/99* (November 10, 1999) consd
- *Decision No. 1099/00* (August 18, 2000) [2000 ONWSIAT 2325] consd
- *Decision No. 2474/00* (2004), 69 W.S.I.A.T.R. 57 consd
- *Decision No. 1429/01* (June 26, 2001) [2001 ONWSIAT 2002] consd
- *Decision No. 2105/01* (2005), 76 W.S.I.A.T.R. (online) consd
- *Decision No. 2828/01* (2003), 67 W.S.I.A.T.R. 81 consd
- *Decision No. 998/02* (2004), 67 W.S.I.A.T.R. 133 consd
- *Decision No. 560/03* (2003), 64 W.S.I.A.T.R. 308 consd
- *Decision No. 932/03* (July 29, 2004) [2004 ONWSIAT 1595] consd
- *Decision No. 1258/03R* (2006), 79 W.S.I.A.T.R. (online) consd
- *Decision No. 1647/04* (2005), 75 W.S.I.A.T.R. (online) consd
- *Decision No. 573/05* (2006), 81 W.S.I.A.T.R. (online) refd to
- *Decision No. 1357/05* (2006), 79 W.S.I.A.T.R. (online) refd to

**Other Decisions Considered:**

- *Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)* (2001), 34 Admin. L.R. (3d) 289 (Alta. Q.B.) refd to

**Workplace Insurance Legislation Considered:**

- *Workers' Compensation Act*, R.S.O. 1990, c. W.11
  - s. 40
  - s. 70
  - s. 92
- *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A
- s. 126
- s. 129

**Board Directives and Guidelines Considered:**

- *Operational Policy Manual*
  - Document No. 05-02-02 (July 22, 1993) (since superseded)
  - Document No. 05-02-02 (February 23, 1994) (since superseded)
  - Document No. 05-02-02 (October 22, 2001) (since superseded)

**Cross-References:**

- *Decision No. 878/06* (May 4, 2006) [2006 ONWSIAT 985]

APPLICATION by the Board for reconsideration of *Decision No. 878/06*.

January 25, 2007. THE TRIBUNAL: —

BEFORE: E.J. Smith, Vice-Chair

HEARING: October 16, 2006, Written Hearing

DECISION(S) UNDER APPEAL: WSIB request for reconsideration of *Decision No. 878/06* dated May 4, 2006

**APPEARANCES:**

|                   |                                                     |
|-------------------|-----------------------------------------------------|
| For the WSIB:     | Gurjit Brar, Board counsel                          |
| For the worker:   | Daryl Seupersad, Office of the Worker Adviser (OWA) |
| For the employer: | Not participating                                   |

**(i) Background**

[1] The Board requests reconsideration of *Decision No. 878/06* because of the Vice-Chair's alleged failure to apply Board policy as required by section 126 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA). In *Decision No. 878/06* the Vice-Chair followed other Tribunal decisions and included employment insurance (EI) benefits (formerly unemployment or UI benefits) in the worker's earnings basis as calculated under section 40(1)(b) of the pre-1997 *Workers' Compensation Act*, R.S.O. 1990, c. W.11.

[2] The facts are not in dispute. The worker was employed as a full-time seasonal packer/labourer working approximately eight months from April to September. She was injured on October 5, 1996. She was granted a 19% NEL award for impairment of her left fourth finger, left wrist and post-traumatic stress disorder. Her earnings basis was initially set using pre-accident earnings of \$11.91 an hour based on a 40-hour work week. In a letter dated November 26, 1996, the employer's representative requested an adjustment to reflect seasonal employment. The earnings basis was adjusted accordingly, and the adjustment was communicated to the worker in a letter dated February 10, 1997.

[3] The worker returned to work at no loss of earnings, and so was not paid future loss of earnings (FEL) benefits at the initial FEL review date in 1998. However, she was permanently laid off due to a plant relocation on March 16, 2001. She was provided LMR services. The Board redetermined her FEL entitlement. However the Board determined that she was entitled to only a FEL sustainability award, because the suitable employment or business (SEB) determined for her after the completion of LMR services did not result in a loss of earnings, based on her pre-accident earnings basis.

[4] At the Tribunal, the worker objected to the calculation of her pre-accident earnings basis based on two submissions.

[5] First, the worker submitted that the FEL calculation should have been based on her earnings at the time of her lay-off, which were higher than her earnings at the time of her compensable 1996 accident.

[6] The Tribunal Vice-Chair denied this aspect of the worker's appeal, on the basis that there was no authority in the Act to compensate a worker for increases in earnings that occurred after the date of accident.

[7] Secondly, the worker submitted that the re-calculation of earnings basis that took place in February 1997 should have included EI (formerly UI) payments.

[8] The Vice-Chair allowed this aspect of the appeal. For this purpose, he relied on the analyses set out in a line of Tribunal decisions, discussed below.

[9] I note that the ARO addressed the correctness of the February 1997 calculation of earnings basis. The Board did not make

a ruling that the worker's appeal of this issue was beyond the time limit for appeal. The time limit for appeal of the February 1997 determination of earnings basis was June 30, 1998. However, the ARO addressed that issue on the merits. Therefore, under the WSIA, the worker was entitled to appeal that issue to the Tribunal on the merits, and the Tribunal Vice-Chair addressed that issue accordingly.

## **(ii) The Reconsideration Test**

[10] The *Workers' Compensation Act* and the *Workplace Safety and Insurance Act* 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.

[11] 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) Submissions**

### ***(a) Submissions of the WSIB***

[12] Mr. Brar submits that pursuant to section 126(2) of the WSIA, the WSIB provided the Tribunal with *Operational Policy Manual* Document No. 05-02-02 "Calculating Temporary Total Disability Rate" (dated October 22, 2001), along with other Board policies which applied to the appeal, on January 7, 2005. He submits that according to Document No. 05-02-02 "EI benefits are not earnings for the purposes of determining a worker's average earnings..."

[13] He submits that the Vice-Chair's inclusion of EI benefits on the basis that this "results in a more equitable calculation of the worker's earnings basis" is inconsistent with the clear and express language of the applicable Board policy, which excludes EI benefits for the calculation of average earnings.

### ***(b) Submissions of the OWA***

[14] The OWA submits that the Tribunal should not re-open this matter both on the basis that the original Vice-Chair committed no error in reaching his conclusions, and that if an error was made that error fails to meet the standard of review for reconsideration. The representative notes the tests described in a number of Tribunal decisions, including *Decision No. 95R* at pages 10 and 11, as follows:

In deciding whether it is advisable to reconsider, a panel is not only dealing with an individual complaint, it is dealing with an Act which has made the Tribunal a final level of appeal and has stated that Tribunal decisions are "final and conclusive". The parties have already had the appeal considered by many levels of decision-makers at the Board. There has been at least one oral hearing of the appeal at the Board level. The parties have a reasonable expectation that the Tribunal decision is final. The Tribunal and the parties have an interest in ensuring that applications for reconsideration do not simply add another layer of appeal to an already multi-tiered appeal system.

...

Generally, the panel reviewing the application must find 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.

[15] In *Decision No. 850/87R* at page 6 the Panel stated:

*Decision No. 72R2* indicates that a reconsideration panel which believes an aspect of the original panel's decision to be wrong in some material respect could not conclude that it was advisable to reopen and reconsider that decision unless it were also of the view that the error and its effects were exceptional enough, when balanced against the importance of decisions being final or the nature of any prejudice to one side or another of the decision being reopened, to warrant such a step.

[16] The representative submits that the Vice-Chair applied the merits and justice provisions of the Act and Board policy in an appropriate manner, relying on the application of these provisions in prior Tribunal decisions, and that the public interest in the finality of decisions and the integrity of the appeal process along with the prejudice to the worker outweighs the interests of the Board in this case.

[17] The representative also relies on the principle of the benefit of the doubt.

#### **(iv) The Law and Board Policy**

##### ***(a) The Law: Earnings Basis – The Pre-1997 Act***

[18] The following provisions apply to the calculation of earning basis under the pre-1997 Act:

**40(1)** In determining the average earnings of a worker, the Board shall,

(a) calculate the daily or hourly rate of the worker's earnings with the employer for whom the worker worked at the time of accident as is best calculated to give the rate per week at which the worker was remunerated at the time of the accident;

(b) if the calculation under clause (a) does not fairly represent the average earnings of the worker, upon application, the Board shall determine the worker's average earnings with the employer for whom the worker worked at the time of the accident during the twelve months or such lesser period immediately preceding the accident when the worker was employed with the employer.

**(2)** Where owing to the shortness of the time during which the worker was in the employment of the employer or the casual nature of the employment or where it is impractical to calculate the average earnings at the time of the accident, regard may be had to the average earnings that during the twelve months prior to the accident was being earned by a person in the same grade employed at the same work by the same employer or, if there is no person so employed, then by a person in the same grade employed in the same class of employment in the same locality.

[19] I note that the calculation of earnings basis under section 40 of the pre-1997 Act is based on the worker's earnings calculated either at the time of the accident or during the 12 months prior to the date of accident. It is the date of accident that "triggers" these calculations. The accident in this case occurred on October 5, 1996.

[20] However, under the pre-1997 Act, the calculation of earnings basis under section 40(1)(a) may be redetermined under section 40(1)(b) "upon application". The decision letter of February 10, 1997 informs the worker that that redetermination

was carried out in this case. The redetermination was not applied retroactively: from the file, no overpayment was created. However, it is important to the issues of retroactivity raised by this case to recognize that the calculation in both cases, both initially, and upon redetermination, were with respect to the appropriate determination of the worker's earnings as calculated with respect to the date of her injury.

*(b) The Pre-1998 Board Policy*

[21] The Board policy in effect on October 5, 1996 had last been amended on April 26, 1995, and contained the following provisions applicable to unemployment insurance (UI):

**Interim policy**

*Federal work-sharing & job creation programs*

When a worker is participating in a Federal work-sharing or job creation program, the WCB takes into consideration unemployment insurance benefits and the period over which they are paid in calculating the worker's average earnings before the injury under s. 40(1)(a). [Emphasis added]

[23] <sup>1</sup> Later in the policy, a further provision states:

*Federal work-sharing & job creation programs*

Only unemployment insurance (UI) benefits paid in conjunction with Federal work-sharing and job creation programs are acceptable.

[24] Given the earlier specific reference to section 40(1)(a), I find it reasonable to read the later provision, also, as intended to apply to calculations under section 40(1)(a).

[25] A revised form of OPM Document No. 05-02-02 was introduced on March 4, 1997. However, there are no changes to the above provisions. Therefore they are the relevant policy provisions that were in place both at the date of the worker's accident, and at the date of the Board's redetermination of her earnings basis in February 1997.

*(c) Tribunal Decisions Under the Pre-1998 Policy*

[26] I note that all the decisions relied on by the Vice-Chair in *Decision No. 878/06* were also with respect to accidents that occurred while the above policy was in place. The earliest decision referred to in *Decision No. 878/06* is *Decision No. 221/99* (1999), 50 W.S.I.A.T.R. 193, issued May 17, 1999. That decision referred to *Decision No. 1342/98* (1998), 48 W.S.I.A.T.R. 212. *Decision No. 1342/98* applied the merits and justice provisions of the Act and Board policy to interpret the wording of a Board policy on a different issue. The Vice-Chair in *Decision No. 221/99* relied on the merits and justice provisions of the Act to include UI amounts in earnings basis.

[27] However, I prefer the analysis of the merits and justice provisions of the Act found in *Decision No. 1099/00* (August 18, 2000), which, after considering *Decision No. 221/99*, stated [at para. 32]:

The circumstances in which it is appropriate to apply the merits and justice provision, to deviate from the result that would



otherwise flow from the application of Board policy, are narrow ones. This provision is perhaps most appropriately applied to situations that are anomalous and unusual. The provision should not be used to avoid the intended result of a policy simply because the Panel thinks that the policy is not the policy it would prefer or even the most fair in the circumstances. Section 126 sets out an express procedure to be used in the event that a Panel finds that a policy is not applicable or is inconsistent or unauthorized by the Act. Subject to that provision, the Act may be best interpreted as giving the policy-making role to the Board.

[28] In my view it is not consistent with section 126 or with the merits and justice provisions of the Act for a Vice-Chair or Panel to decline to apply the general provisions of a Board policy, based on the merits and justice of the case, based only on a finding that a different policy would, in essence, reflect a better analysis of the law, or be more “fair.” In my view, that interpretation has the effect of rendering section 126 of little force or effect. To give effect to all the provisions of the Act, it is necessary to read the provisions together. In my view, that end can be best achieved if the merits and justice provisions are applied to exceptional facts that were likely not contemplated when the Board policy was adopted. Tribunal decisions have found that when there are exceptional facts the merits and justice provisions may apply to avoid manifest unfairness. However, if the facts are not exceptional, and are clearly contemplated by the wording of the applicable Board policy then, in my view, section 126 provides that the Board policy should apply, unless it is found that the policy is inconsistent with or not authorized by the Act. Section 126(4) sets out a special process for dealing with such issues.

[29] However, I note that the decisions that followed *Decision No. 221/99* did not rely solely on the merits and justice provisions of the Act. *Decision No. 417/99* (1999), 52 W.S.I.A.T.R. 172, addresses the implications of section 126 and the wording of the pre-1998 Board policy more directly. The wording of the Board policy considered in that decision was the same as the policy set out above. The Vice-Chair asked [at para. 42]:

Is there anything in the Act or Board policy which precludes the inclusion of employment insurance income in the calculation of average earnings under section 40(1)(b)?

[30] She then conducted an analysis of whether the UI amounts can be considered “earnings” under the Act. She noted that the Board has accepted that these amounts may fall within the definition of “earnings” in some circumstances. She continues [at para. 43]:

This suggests that the Board has concluded that such earnings fall within the definition of earnings under the Act. However, the Board policy is silent with respect to whether employment insurance benefits are to be included in a section 40(1)(b) calculation of average earnings of workers who experience periods of lapse in employment as part of “the worker’s usual employment cycle”.

[31] The Vice-Chair concluded that the pre-1998 policy did not prohibit the inclusion of UI in earnings under section 40(1)(b). She went on to state that whether UI amounts should be included, or not, fell to be decided on the facts of the particular case.

[32] It is important to note that the policy provision referred to above restricts what amounts may be included with respect to UI in calculations under section 40(1)(a). Only amounts received under Federal work-sharing and job creation programs may be included under that section. The provision is reasonable, because it is difficult to ascertain any other situations in which UI would be correctly included in a calculation under section 40(1)(a). That calculation is based on the worker’s earnings at the date of injury. It is only under this type of program that a worker would likely be in receipt of UI at the date of an injury suffered at work.

[33] However, I agree with the Vice-Chair in *Decision No. 417/99* that the pre-1998 wording of the policy does not address

whether UI is or is not to be included in a calculation under section 40(1)(b). The matters that may be appropriately considered under section 40(1)(b) or section 40(2) are quite different and considerably broader than those considered under section 40(1)(a).

[34] The fact that the pre-1998 policy does not expressly address UI inclusions under section 40(1)(b) is addressed again in *Decision No. 1783/99* (November 10, 1999). That decision states [at para. 46]: “[OPM Document No. 05-05-02] does not specifically prohibit the inclusion of UI benefits in the calculation of a worker’s earnings basis.”

[35] It was also addressed in *Decision No. 1429/01* (June 26, 2001). In that decision the Vice-Chair stated [at para. 69]:

I agree with the interpretation of the Vice-Chair in *Decision No. 417/99* that the wording of *Operational Policy Manual* Document No. 05-02-02 dated March 4, 1997 does not bar the inclusion of E.I. amounts.

[36] The additional decisions relied on in *Decision No. 878/06* adopt the reasoning of prior Panels, and do not offer any additional analysis on these points. However I note that the accident dates in all these decisions were in the time period that would have been subject to the wording of the policies set out above.

*(d) OPM Document No. 05-02-02: The 1998 and 1999 Policies*

[37] The wording of OPM Document No. 05-02-02 underwent subsequent changes relevant to the inclusion of EI in earnings basis. In a policy dated November 1998 the words “under s. 40(1)(a)” are removed from the provision entitled “Interim Policy” so that that provision no longer applies only to that section. This changed wording is also found in a 1999 version of the policy.

[38] This change in wording appears intended to limit the inclusion of EI amounts to Federal work-sharing and job creation programs in all circumstances. There would appear to be little reason for this change in wording except to remove the prior restriction of this provision to calculations under section 40(1)(a).

[39] I note that this policy refers to the provisions of the pre-1997 Act and appears intended to apply to pre-1997 accidents. However, earnings basis is determined based on pre-injury earnings as calculated based on the date of accident. The accident dates for injuries subject to the pre-1998 Act would have occurred while the earlier version of OPM Document No. 05-02-02 was in place. In most cases, the Board’s initial operating level decisions about earnings basis would also have been made prior to 1998. The revised 1998 version of the policy does not include provisions about the application date of the policy. It is therefore unclear how the Board intends this policy to apply.

[40] I note that several of the decisions referred to by the Vice-Chair in *Decision No. 878/06* refer to versions of the policy that contain this revised wording. It appears that in those cases Panels or Vice-Chairs were notified of the later version of the policy in the notification process carried out under section 126. However, the decisions adopt the analysis of the earlier decisions without reference to the fact that the wording of the policy has changed. That is also the case with respect to the analysis of *Decision No. 2828/01* (2003), 67 W.S.I.A.T.R. 81, discussed further below.

[41] It appears that if these decisions had addressed the implications of the changed wording, it might have been necessary to consider issues of retroactivity, such as those addressed below, with respect to that policy also.

[42] However, it is not necessary for me to address this version of the policy for the purposes of this application. The provisions of the policy were changed again in 2001.

*(e) OPM Document No. 05-02-02 Dated October 22, 2001*

[43] In the case of *Decision No. 878/06*, the Board notified the Tribunal of the version of the policy dated October 22, 2001. This was the policy in place at the time of the ARO decision. The wording found in this document had been introduced into this policy from about August 2001, and is stated to have effect from April 2001. This version of the policy states:

*Federal work-sharing or job creation programs*

When a worker is participating in a federal work-sharing or job creation program, the WCB considers both:

- EI benefits, and
- the period over which the EI benefits are paid in calculating the worker's average earnings before the injury.

This is because the EI benefits paid in these programs generally function as **earnings**, even if the worker is paid some wages for work performed.

[44] This policy now also includes a new specific provision prohibiting the inclusion of EI benefits other than as specified:

*EI benefits not earnings*

EI benefits are not earnings for the purposes of determining a worker's average earnings, except for federal work-sharing or job creation programs. This is because the Act requires that only the worker's earnings with the accident employer be used to calculate (or recalculate) the worker's average earnings.

[45] The application date for the policy is set out as follows:

This policy applies to all decisions made on or after April 1, 2001, regardless of accident date, [except with respect to matters that are not relevant here].

*(f) Section 126 of the WSIA*

[46] The issues in this case turn on the application of section 126 of the WSIA. That section reads:

**126(1)** If there is an applicable Board policy with respect to the subject-matter of an appeal, the Appeals Tribunal shall apply it when making its decision.

**(2)** The Board shall state in writing which policy, if any, applies to the subject-matter of an appeal after receiving notice of the appeal under section 125(3).

**(3)** If the Board does not state that a particular policy applies in respect of the subject-matter of an appeal, the tribunal may ask the Board to notify it if there is an applicable policy and the Board shall do so as soon as practicable.

**(4)** If the tribunal, in a particular case, concludes that a Board policy of which it is notified is inconsistent with, or not authorized by, the Act or does not apply to the case, the tribunal shall not make a decision until it refers the policy to the Board for its review

and the Board issues a direction under section (8).

[47] A procedure is then set out for a referral under section 126(4), leading to the Board's providing the Tribunal with a written direction under section 126(8).

*(g) Tribunal Decisions about the Retroactive Application of Section 126*

[48] Several Tribunal decisions have considered how section 126 applies if a Board policy is purported to have retroactive effect. In *Decision No. 2828/01*, the Vice-Chair considered the effect of the different versions of OPM Document No. 05-02-02. In that case, the accident occurred in 1994. The Board redetermined the worker's earnings basis under section 40(1)(b) in 1997. The ARO decision was issued on October 15, 1999, and the Board originally notified the Tribunal of the 1999 version of the policy. The Board then forwarded to the Tribunal the 2001 version of the policy, which had come into effect after the date of the ARO decision but before the date of the Tribunal decision.

[49] The fact that the Board forwarded its new policy to the Tribunal under the notification process suggests that the Board was interpreting the word "decision" in the application provisions of the 2001 policy to apply to Tribunal decisions.

[50] The Vice-Chair in *Decision No. 2828/01* relied on the statutory presumption against retroactivity to decline to apply the 2001 policy. The principles applicable to retroactivity are discussed fully in that decision. I note in particular the following part of that analysis [at paras. 51-54]:

Ms. Shaw addressed the question of whether the presumption against retroactivity was weaker with respect to policy than it is with respect to legislation. Ms. Shaw directed the Panel's attention to *Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)*. The Alberta Court of Queen's Bench made comments about the retroactivity of policy that were *obiter* but are, nonetheless, instructive. The comments addressed a similar statutory scheme. Slatter, J. stated at paragraph 16 that section 81(7) of the *Alberta Workers' Compensation Act*, which was introduced in 1988, required the Appeals Commission to apply Board policy. Slatter, J. went on to say:

It is clear that the Appeals Commission, at least at the rehearing, relied expressly on the 1997 policy which was not published until after [the worker's] accident. The Applicant argues that the retroactive application of the policy is not authorized by the statute.

The position of the Respondents was that the Workers' Compensation policies are fluid in nature. While the claims department applies the policies in force on the date of loss, the Appeals Commission will apply any policy that is in force at the time of the decision. In this particular case the Assessment Review Committee actually made its decision in 1998, and it would have applied whatever policies were in force then, even if those policies had not been in force on the date of the accident. Likewise, when the Appeals Commission made its decision in 1999, it would have applied whatever policies were in place then. The result would appear to be that a decision might be reversed during the multiple- stage appeal process not because it was wrong, but because of a change of policy.

It accordingly appears that the Workers' Compensation Board and the Appeals Commission take the view that policies do have retroactive effect. The Board obviously believes that it can enact policies retroactively, as can be seen by the notation on policy 02-03... that the pooling of labour policy was in force as of January 1, 1982.

Because statutorily-authorized policies can have the force of law, there is a general presumption that such policies cannot be made to apply retroactively. Citizens are entitled to know what the law is as of the date they

are making decisions about their conduct. Even the legislature rarely enacts regulations with retroactive effect, because of this constitutional principle. Accordingly, the power to make retroactive policies will not be inferred unless the statute requires it: *Western Decalta Petroleum Ltd. v. Alberta (Public Utilities Board)* (1978), 6 Alta. L.R. (2d) 1, 86 D.L.R. (3d) 600 (Alta. C.A.); *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, (1975), [1977] 1 S.C.R. 271; and *N.W.T.T.A. v. Northwest Territories (Commissioner)* (1997), 153 D.L.R. (4th) 80 (N.W.T.S.C.). The statute need not expressly permit retroactivity if the context implies it: *R. v. Patton*, [1968] S.C.R. 341 (S.C.C.) at 358.

...

If the policies of the Board are regulations, they are covered by the common law presumption against retroactivity and the presumption in s. 9 of the [Alberta] *Regulations Act*. Even if they are not regulations, it is difficult to see why the policies would have a greater ability to operate retroactively than regulations themselves.

...

Accordingly, absent a specific power to create retroactive policies, the common law presumption would be that no such power was intended.

...

Based on the general presumption against the retroactivity of subordinate legislation, and based on the distinction that the statute appears to draw between various types of decision-making mechanisms, I am not satisfied that s. 149.2 authorizes the Board to pass policies retroactively. Parties such as the Applicant are entitled to know the law in force at the time that they make decisions about their business. Generally, they should be entitled to assume that the effect of decisions made by them will not be reversed retroactively by legislation, unless that is expressly authorized by the statute... It is unlikely that the Lieutenant Governor in Council has a general power to make retroactive regulations under s. 147, and it is unlikely that it was intended that for [sic] Board to have a wider power. I am accordingly not satisfied that the Board has any general authority to make retroactive policies.

The authorities set out above note that, in order to rebut the presumption against the retroactive application of policy, it must be shown that the governing legislation, in this case the WSIA expressly authorizes retroactivity or that retroactivity is authorised by necessary implication. The only comments about Board policy in the WSIA are found in section 126, which has been set out above. Section 126 does not contain any provisions which explicitly authorizes the retroactive application of Board policy, nor is there any reason why, by necessary implication, Board policy may be given retroactive effect by the Tribunal.

The Panel members note that section 183(6) of the WSIA states:

**183(6)** A regulation is, if it so provides, effective with reference to a period before it is filed. However, no regulation may be made effective as of a day before January 1, 1998.

It can be seen that the Legislature provided for limited retroactivity of regulations under the WSIA but is silent on the subject of policies. The Panel concludes that there is nothing in the Act to authorize the retroactive application of Board policy, nor is retroactive application authorized by necessary implication.

[51] Based on this reasoning, the Panel applied the 1999 policy, which was the policy in effect at the date of the ARO decision. The Panel followed the reasoning of the earlier Tribunal decisions in determining that this policy did not prohibit

the inclusion of EI in the earnings basis. It did not address the fact that the wording of the 1999 policy was not the same as the wording of the pre-1998 policies, which was the wording addressed in the earlier decisions that had set out the initial formulation of this reasoning. In my view, if it had, the same concerns about retroactivity would have applied to that policy, and it would have been necessary to address whether the pre-1998 policies were the applicable policies. The accident date in that case was in 1994, and the section 40(1)(b) determination took place in 1997. Both those events were subject to the pre-1998 wording.

[52] In *Decision No. 932/03* (July 29, 2004) the Vice-Chair also found that section 126 did not authorize the application of the later earnings basis policies retroactively. She found that the policy applicable to earnings basis under section 126 was the policy in place at the time of the accident.

[53] The issue of the purported retroactivity of the Board's stress policy was also recently addressed in *Decision No. 1647/04* (2005), 75 W.S.I.A.T.R. (online). That decision adopts the reasoning of *Decision No. 2828/01*.

[54] Tribunal decisions have also addressed how to interpret the word "decision" in the application section of a Board policy, given the law governing retroactivity. In *Decision No. 560/03* (2003), 64 W.S.I.A.T.R. 308, the Vice-Chair found that the relevant "decision" for determining the applicability of the Board's revisions to OPM Document No. 05-02-02 was the initial operating area decision. The Vice-Chair found that this interpretation ensured that the applicable policy remained consistent throughout the adjudicative and appeal process of a particular case.

[55] In *Decision No. 998/02* (2004), 67 W.S.I.A.T.R. 133, the Vice-Chair took a different view. She determined that the relevant policy for the purposes of section 126 in the context of an appeal to the Tribunal is the Board's final decision, as applied in the ARO decision. She found that when the Board makes a final decision, the Board's jurisdiction to make further decisions on the issue ends, subject to the decision to reconsider, and the worker's right to appeal to the Tribunal vests. She interpreted the reference to the word "decision" in the August 2001 version of OPM Document No. 05-02-02 as intended to apply to all decisions of the Board made on or after April 1, 2001, including ARO decisions. However she did not read the word "decision" to mean decisions of the Tribunal.

[56] I also note the reasoning of the Vice-Chair in *Decision No. 2105/01* (2005), 76 W.S.I.A.T.R. (online), about whether the Board has the authority under section 126 to limit the Tribunal's jurisdiction by policy. The summary of that decision states:

Section 126(1) of the *Workplace Safety and Insurance Act*, requires the Tribunal to apply Board policy that applies to the subject-matter of an appeal. The subject-matter of an appeal must be understood to refer to the substantive issues in an appeal. The subject-matter in this case was the overpayment and whether recovery should be pursued. Different versions of Board policy have different provisions as to how to deal with overpayments, for example provisions regarding a three-year rule for notification and financial hardship. These provisions speak to the subject-matter of the appeal. The statement in Board policy that there is no right of appeal to the Tribunal is not a statement regarding the subject-matter of the appeal. Rather, it is a statement reflecting the Board's view of the Tribunal's jurisdiction. However, the Tribunal defines its jurisdiction through the interpretation and application of s. 123 of the WSIA, not from Board policy.

## (v) Conclusions

[57] The Board requests reconsideration because the Vice-Chair in *Decision No. 878/06* did not apply OPM Document No. 05-02-02 dated October 2001. The Board had notified the Tribunal of this document. By adopting the analysis of prior Tribunal decisions, including *Decision No. 417/99*, the prior Vice-Chair implicitly, in my view, applied the earlier, pre-1998 wording

of this policy and not the October 2001 version.

[58] I have therefore addressed the Board's application for reconsideration under two headings:

a) what policy applies, under section 126(1);

b) how does section 126(4) apply if the Board has notified the Tribunal of the wrong policy.

[61]<sup>2</sup> I note that I have not considered the benefit of the doubt provisions of the Act, although the worker representative refers me to those provisions. The benefit of the doubt is an evidentiary rule. It applies if the evidence for and against an issue is approximately equal in weight. It does not apply to issues concerning the correctness of a Vice-Chair's interpretation of the law or Board policy.

*(a) What Was the Applicable Version of OPM Document No. 05-02-02?*

[62] Turning to the first issue, of what policy applies, I find that OPM Document No. 05-02-02 as it existed in 1996 or, perhaps arguably, in February 1997, is the version of the document applicable to this appeal. Given that there was no change in the relevant provisions of this document prior to 1998, it is not necessary to determine whether it is the date of accident, or the date of the Board's decision redetermining the earnings basis, that is the relevant date with respect to the application of the Board policy. On either interpretation I find that the prior Vice-Chair applied the principles of these policies correctly in this case.

[63] It appears that the Board notified the Tribunal of the 2001 version of this policy because of the reference to the "application date" in that policy. The ARO decision is dated September 12, 2002. The application date specified in the 2001 policy is stated as: "This policy applies to all decisions made on or after April 1, 2001, regardless of accident date". The Board notified the Tribunal of the policy in effect at the date of the ARO decision. I understand that the Board generally interprets the reference to the date of a decision in the "application" provisions of a policy as applicable not only to the Board's operating level decision, but also to the ARO decision, as well as, from the facts of *Decision No. 2828/01*, to the Tribunal's decision, should the policy change after the date of the ARO decision.

[64] However, the Tribunal has the jurisdiction to interpret the meaning of the wording found in a Board policy. I agree with the analysis of *Decision No. 2828/01* that the issue of what policy applies for the purposes of section 126 must be considered in light of the legal presumption against retroactivity. The effect of section 126 is to require the Tribunal to apply Board policy. This gives Board policy legal force and effect beyond that of a mere policy "guideline", which may, or may not, be followed. In other situations, policy guidelines have been found to be subject to the doctrine of legitimate or reasonable expectations. However, under the WSIA, the Tribunal is required to apply Board policy, and the analysis of *Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)* (2001), 34 Admin. L.R. (3d) 289 (Alta. Q.B.) is relevant.

[65] In my view, it is appropriate to interpret the Board's policy document in a way that is consistent with the legal principles governing retroactivity. There is a strong presumption against retroactivity. There is nothing in section 126 that suggests that this presumption is rebutted. Therefore, in my view, section 126(1) does not bind the Tribunal to apply Board policy to the extent that that policy purports to have retroactive effect. In my view section 126(1) requires the Tribunal to apply the Board policy in effect at the date of the relevant determinations. It is within the Tribunal's jurisdiction to decide which of the

Board's determinations are relevant for this purpose, and to make the necessary findings about whether a policy has retroactive effect. I also note that if the Board has clearly rescinded and superseded an earlier policy, there might be cases in which no policy has continuing binding effect under section 126, under this analysis.

[66] In this case, I find that the issues of retroactivity are sufficiently addressed through an interpretation of the word "decision" in the application section of the 2001 policy, and that it is not necessary to consider the accident date. I read the reference to a "decision" in this portion of the policy to refer to the operating level decision. I prefer the analysis of *Decision No. 560/03* to that of *Decision No. 998/02*. In this case, the operating level decision was made in February 1997. Therefore the 2001 policy does not apply.

[67] In my view, a different interpretation would produce an unfair result. It would mean that the entitlement of a party whose benefits are subject to appeal might change, from day to day, while in the appeal process, based on changes in the wording of Board policy. However if the operating level decision were not appealed, no such change in the application of the law would apply. The result would be not only that section 126 might apply to give Board policy retroactive legal effect, contrary to the legal presumption, but also that a new policy would apply to some, but not all, workers who had entitlement under the Act. This would result in inconsistent adjudication. This would be the case especially if the word "decision" were interpreted to apply to Tribunal decisions. However, in my view, it is also the case if the word "decision" is read to apply to the ARO decision, if the appeal is one that involves substantive issues of retroactivity. The Board does not issue its operating level decisions as interim decisions, which are subject to review if Board policy changes. When the Board changes its policy it does not go back and reconsider operating level decisions made under the older version of the policy. Those decisions stand, unless the matter is appealed. However, if a new policy applies, retroactively, only to decisions that are appealed, this results in an inconsistent application of the law. In my view, it is not consistent with the statutory right of appeal. If, after the date of the operating level decision, a party's rights are affected by the application of a new and different policy document, it is not clear on what basis the party has been provided with a full right of appeal from the original decision, as required by the statute.

[68] In many cases it may be reasonable for the Tribunal to consider issues under the policy in place at the date of the ARO decision, if it has been notified of that policy and no substantive issues of retroactivity are raised. Further, even when the issue is raised, there may be cases in which the changes made to the policy involve clarifications only, or do not engage the principles of retroactivity. See for instance *Decisions No. 1357/05* (2006), 79 W.S.I.A.T.R. (online), and *573/05* (2006), 81 W.S.I.A.T.R. (online). However, in my view, if a substantial issue of retroactivity is raised, that issue must be addressed.

[69] I note that, in interpreting the word "decision" in this provision as I do, i.e., as a reference to the Board's initial decision about earnings basis, and not to appeal level "decisions", I am not making a finding that any of the versions of the Board's earnings basis policies are inconsistent with or unauthorized by the Act. The prior Vice-Chair also did not make that finding. I am simply interpreting the wording of this provision in a way that is consistent with the general law on retroactivity.

[70] I find that there was no error in how the Vice-Chair applied Board policy in *Decision No. 878/06*. The question remains, however, how section 126 applies, when the Board notifies the Tribunal of the wrong policy.

### *(b) How Section 126 Applies*

[71] The issues in this case turn on the application of section 126 of the WSIA, set out above. Section 126(1) provides that if



there is an applicable Board policy with respect to the subject-matter of the appeal, the Appeals Tribunal shall apply it when making its decision. Section 126(2) and (3) provides that the Board is to notify the Tribunal of the applicable policy, and that the Tribunal may request notification of the applicable policy if the Board has not stated it. Section 126(4) provides that if the Tribunal, in a particular case, concludes that “a Board policy of which it is notified is inconsistent with, or not authorized by, the Act or does not apply to the case”, the Tribunal shall not make a decision until it refers the policy to the Board.

[72] I note that, in this case, neither the analysis of the Vice-Chair in *Decision No. 878/06*, nor that of any of the other Tribunal decisions discussed, nor of this reconsideration decision, rest on a finding that any of the versions of the Board policy are inconsistent with or not authorized by the Act. Therefore the question in this case is what is meant by the phrase “does not apply to the case”, in section 126(4). The question is how broadly this provision should be read.

[73] In my view, if this phrase is interpreted at its broadest, and most literal, the notification process presently in place between the Board and the Tribunal would be unworkable. It is the Board’s practice to notify the Tribunal for each appeal of a “package” of policy documents which, broadly speaking, address the subject-matters raised in the appeal. However, it would be fair to say that there is no case in which all the provisions of the Board’s policy packages, or even all the policies included in the package, are relevant to any particular appeal. Which provisions will turn out to be relevant and, broadly speaking, “applicable” depends on the issues and the particular facts of each appeal. If Tribunal Panels and Vice-Chairs were to return to the Board under section 126(4) every provision of these packages that they did not intend to “apply” in a decision, there would be multitudinous section 126(4) references to the Board in virtually every appeal. Further, there are other complications in how the notification process applies. As is apparent from this appeal, the same OPM policy document may be subject to numerous revisions over time. If the Tribunal makes determinations of fact or law that differ in any respect from the Board’s determinations of fact or law, the result is that a different version of the policy document may be the relevant policy. New policies may have been adopted or others repealed. Different findings of fact or law may also mean that completely different Board policies are relevant. The relevant policy may not be the policy included in the Board’s notification package. In many cases, the changes affecting the relevant policy will not result in any actual difference in interpretation or outcome in the individual case. However, if section 126(4) is read broadly, to refer to policies that the Board has included in the notification package but which are found not to be relevant, a section 126(4) reference would be required in all these cases. The Tribunal would not be “applying” the provisions of the policies of which it was notified.

[74] I do not read this phrase as intended to be read so broadly. I do not consider the fact that a Vice-Chair or Panel fails to make a determination under a policy, or a provision thereof, of which the Tribunal has been notified, necessarily means that the Tribunal has determined that the policy does not “apply” within the meaning of section 126(4). It simply means that that policy provision is not relevant to its determinations, based on its findings of fact and law. In those cases, it has been the practice for Tribunal Vice-Chairs or Panels to apply the relevant version of Board policy or, when necessary, a different policy. They have done so even if that policy document, or version thereof, was not included in the policy package provided in the notification process. A request for notification of the relevant policy may be made to the Board under section 126(3). However Tribunal decision makers have not referred these matters back to the Board under section 126(4). In most cases, unless there is some uncertainty involved, and in light of the discretion provided in section 126(3), they have simply applied the correct policy, under section 126(1). See, for example, *Decisions No. 382/98* (1998), 46 W.S.I.A.T.R. 231, and *284/98* (May 7, 1998). I do not consider this practice inconsistent with section 126(4).

[75] In my view, the fact that the Board may fail to provide all the policies that turn out to be relevant and applicable, in the notification process, is contemplated in section 126(3). Section 126(2) requires that the Board shall state in writing which

policy, if any, applies to the subject-matter of the appeal. Section 126(3) addresses the situation in which the Board has not stated that a particular policy applies in respect of the subject-matter of an appeal. In that case, the Tribunal *may* ask the Board to notify it about whether there is an applicable policy. However, that request is discretionary. The implication of the section is that the Tribunal may, alternatively, proceed under section 126(1), without requesting clarification, and apply the correct policy. The Tribunal is an expert appeal body and would be expected to be aware of Board policy generally. This interpretation facilitates decision making as it enables the Tribunal to dispose of appeals without interrupting and lengthening proceedings. It is also consistent with the Board's practice of supplying policy packages without a detailed review of the contents of those packages and how they might apply to the specific facts of a case.

[76] In this case, in my view, the Board did not notify the Tribunal of the policy that was applicable to the subject-matter of this appeal. I note that the interpretation of the meaning of the words of section 126, in particular "apply" and the "subject-matter of an appeal", is within the jurisdiction of the Tribunal. The phrase "subject-matter of an appeal" was recently interpreted in *Decision No. 2105/01* as not extending to provisions in a Board policy that purported to limit the Tribunal's jurisdiction. See also *Decision No. 1258/03R* (2006), 79 W.S.I.A.T.R. (online), which has recently agreed with that decision. At paragraph 47 the Vice-Chair notes: "In my view, the referral to the Board provided for in section 126(4) is triggered when the Tribunal fails to apply a policy with respect to the subject-matter of the appeal, pursuant to section 126 (1)."

[77] In this case, in my view, the subject-matter of this appeal was the Board's determination of the worker's earnings basis in the time period prior to 1998, i.e., in 1996 and 1997. The Board notified the Tribunal of a policy that applied to the subject-matter of earnings basis determinations made four or five years later, in 2001. The Board did not notify the Tribunal of the Board policy applicable to the subject-matter of the appeal. As discussed above, the Tribunal has the jurisdiction in such circumstances to apply the correct policy under section 126(1).

[78] This interpretation is consistent with the findings of *Skyline Roofing* and of prior Tribunal decisions such as *Decision No. 2828/01* that section 126 cannot be interpreted as requiring the Tribunal to apply Board policy in a manner that gives that policy retroactive effect.

[79] I note that this reasoning is also consistent with how section 126 has been applied in the past. The Tribunal has not referred matters back to the Board under section 126(4) simply because the Board has notified the Tribunal of a wrong or irrelevant policy. The Tribunal has only referred matters to the Board under section 126(4) when it has found that a policy provided by the Board addresses the subject-matter of the appeal, i.e., *is the relevant policy*, but that, despite this fact, does not apply, under the Tribunal's analysis of the facts and the law. To date, there have been three matters referred to the Board under section 126(4). All have arisen in situations in which there was no issue that the policy provided in the notification process was the relevant policy, and applied, pursuant to its terms, to the subject-matter of the appeal. However the Tribunal Panel or Vice-Chair found that the subject-matter or substance of the policy was inconsistent with or not authorized by the Act. In the cases of *Decisions No. 809/98* (2000), 53 W.S.I.A.T.R. 61, and *1943/98A* (2000) 55 W.S.I.A.T.R. 45, in its direction under section 126(8), the Board acquiesced in the Tribunal's view of the law. In the third case, in *Decision No. 2474/00* (2004), 69 W.S.I.A.T.R. 57, the Tribunal Vice-Chair largely (although not entirely) accepted the Board's view of the law. In other cases, such as in *Decision No. 229/98* (1999), 52 W.S.I.A.T.R. 45, Board policy has been clarified or amended without going through the full section 126(4) process. Therefore, in my view, the section 126(4) process has been relatively successful to date in resolving differences between the Board and the Tribunal on genuine issues of dispute about how the substantive provisions of Board policy reflect the provisions of the Act.

[80] However, in my view, the matters addressed in *Decision No. 878/06* do not turn on a finding that either the pre-1998 policy or the 2001 version of the policy were inconsistent with or not authorized by the Act or did not apply to the case. They turned on a determination that, because of the presumption against retroactivity, the 2001 policy document was not the relevant policy document and did not address the subject-matter of the appeal. It would have been more helpful if the prior Vice-Chair had considered more fully the wording of the different versions of the policy, and explained why he did not apply the policy included in the Board's policy package. However, by adopting the analysis of *Decision No. 417/99*, in particular, the Vice-Chair made an implicit finding that the pre-1998 policy was the policy that addressed the subject-matter of the appeal. That policy did not prohibit the inclusion of EI in the earnings basis.

[81] Accordingly, I find that there was no error in the content of *Decision No. 878/06* that, if corrected, would be likely to change the result of the prior decision. The Tribunal's threshold test for granting a reconsideration request has not been met.

## DISPOSITION

[82] The request for reconsideration is denied.

*Application denied.*

<sup>1</sup> Editor's Note: There is no para. 22.

<sup>2</sup> Editor's Note: There are no paras. 59, 60.



## **Decision No. 2005/06**

Vice-Chair: E. Smith

Decision — November 24, 2006

Neutral Citation: 2006 ONWSIAT 2771

**Health care (dental aid) – Board Directives and Guidelines (health care) (dental aid) (denture replacement).**

**Board policy provides for discretion with respect to future replacement costs when worker paid portion of original costs – In circumstances, worker paid original cost for additional extractions of other previously compromised teeth and Board paid for denture – Worker was entitled to reimbursement for cost of later replacement of denture.**

The worker was struck in the mouth in 1991. Two teeth had to be removed and two teeth were weakened. The worker's other teeth were already compromised by periodontal disease and bone loss. The Board suggested removal of all of the worker's upper teeth at his own expense, and replacement by a full upper denture at the Board's expense. The worker's dentist suggested a partial denture with removal of eight teeth. The Board accepted this proposal with the cost of the extraction of the other teeth to be paid by the worker. In 1993, one of the other injured teeth had to be removed and the denture modified. This was paid for by the Board.

In 2004, the worker required replacement of the denture. The worker appealed a decision of the Appeals Resolution Officer denying reimbursement for the replacement. The appeal was allowed.

The Board policy on dental entitlement has a section regarding dentures. This section was not relevant as it referred to dentures that are broken in an accident. The applicable section of the policy was the section regarding restorations. There were a number of relevant provisions in that section of the policy. Generally, the Board pays for restoration of injured teeth and for keeping those restorations in repair. The general provisions apply when the restoration relates only to teeth injured in the accident. When other teeth also have to be restored due to pre-existing conditions, the worker may receive the dental service but without future repair. When the recommended treatment is extraction of all teeth in the same arch due to pre-existing conditions, the Board pays for the extraction of the injured teeth only. In such a situation where the Board did not pay all costs at the time of the original restoration, the Board may assume future repair costs. There were still other provisions regarding future extractions necessitated by the injury and future extractions due to other causes.

The Vice-Chair viewed the policy as providing for discretion with respect to future replacement costs when the worker paid a portion of the original costs. In this case, the worker paid the original cost for the additional extractions. Further,

the original cost of treatment was less than might have been expected because the worker could only be fitted with a denture rather than a more costly bridge, and because the worker's proposal required only a partial denture rather than a full denture. In addition, the Board's acceptance of responsibility for the additional extraction in 1993 may bring the situation within the provision for future extractions necessitated by the injury, in which case the policy provides that the entire restoration is kept in permanent repair.

In the circumstances, the Vice-Chair concluded that the worker was entitled to reimbursement for the cost of the replacement denture.

**Soins médicaux (soins dentaires) – Directives et lignes directrices de la Commission (soins médicaux) (soins dentaires) (remplacement de prothèse dentaire).**

**La politique de la Commission prévoit une discrétion relativement aux coûts futurs de remplacement quand un travailleur a payé une portion des coûts initiaux – Le travailleur a payé le coût initial d'extraction de dents touchées précédemment et la Commission a payé la prothèse dentaire – Le travailleur avait droit au remboursement du coût de remplacement futur de sa prothèse dentaire.**

Le travailleur a été frappé à la bouche en 1991. Il s'est fait enlever deux dents et deux autres de ses dents étaient affaiblies. Les autres dents du travailleur étaient déjà affaiblies par une parodontopathie et une perte osseuse. La Commission a suggéré au travailleur de se faire enlever toutes ses dents du haut à ses propres frais et de les remplacer par une prothèse dentaire complète aux frais de la Commission. Le dentiste du travailleur a proposé une prothèse dentaire partielle avec extraction de huit dents. La Commission a accepté cette proposition avec l'extraction des autres dents aux frais du travailleur. En 1993, le travailleur a dû se faire enlever une des autres dents touchées et sa prothèse dentaire a dû être modifiée. La Commission a payé les frais engagés.

En 2004, le travailleur a eu besoin d'une nouvelle prothèse dentaire de remplacement. Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels refusait de lui reconnaître le droit au remboursement de la prothèse de remplacement. L'appel a été accueilli.

La politique relative aux prestations dentaires comporte une section au sujet des prothèses dentaires. Cette section n'était pas pertinente étant donné qu'elle concerne les prothèses brisées lors d'un accident. La section applicable de la politique, qui concerne la restauration des prothèses, contenait plusieurs dispositions pertinentes. La Commission paie généralement pour la restauration des dents endommagées et pour l'entretien de la restauration. Les dispositions générales s'appliquent quand la restauration a seulement rapport aux dents blessées dans l'accident. Quand d'autres dents doivent être restaurées en raison d'une affection préexistante, le travailleur peut recevoir des services dentaires mais sans réparation future. Quand le traitement recommandé est l'extraction de toutes les dents d'un même cadran en raison d'une affection préexistante, la Commission paie seulement pour l'extraction des dents endommagées. La Commission peut prendre en charge les frais de réparation futurs quand elle n'a pas payé tous les coûts de la restauration initiale. Il y avait aussi d'autres dispositions concernant les extractions futures nécessitées par la lésion et celles nécessaires pour d'autres raisons.

La vice-présidente a estimé que la politique prévoyait une discrétion au sujet des coûts de remplacement futur quand le travailleur a payé une portion des coûts initiaux. En l'espèce, le travailleur a payé le coût initial des extractions supplémentaires. Qui plus est, le coût initial du traitement a été moindre qu'il aurait pu l'être parce que le travailleur pouvait seulement recevoir une prothèse partielle plutôt qu'un pont plus coûteux et parce que la proposition du travailleur a nécessité une prothèse partielle plutôt qu'une prothèse complète. De plus, comme la Commission avait accepté de se charger de l'extraction supplémentaire en 1993, la situation pouvait cadrer avec la disposition relative aux extractions futures nécessitées par la lésion, dans quel cas la politique prévoit l'entretien permanent de toute la restauration.

Dans les circonstances, la vice-présidente a conclu que le travailleur avait droit au remboursement du coût de sa prothèse de remplacement.

#### **Workplace Insurance Legislation Considered:**

- *Workers' Compensation Act*, R.S.O. 1980, c. 539
  - s. 52
- *Workers' Compensation Act*, R.S.O. 1980, c. 539 as am. S.O. 1984, c. 58
  - s. 52
- *Workers' Compensation Act*, R.S.O. 1990, c. W.11
  - s. 50
- *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A
  - s. 33

#### **Board Directives and Guidelines Considered:**

- *Operational Policy Manual*
  - Document No. 17-03-03 (October 12, 2004)

APPEAL by the worker from a decision of the Appeals Resolution Officer denying reimbursement for replacement of a denture.

November 24, 2006. THE TRIBUNAL: —

BEFORE: E. Smith, Vice-Chair

HEARING: October 19, 2006, at Toronto, Written hearing

DECISION(S) UNDER APPEAL: WSIB ARO decision dated March 24, 2005

#### **APPEARANCES:**

For the worker: Mr. M. Rozon, USWA Local 7135

For the employer: Not participating

## **REASONS**

### **(i) Background**

The worker appeals the decision of the Board Appeals Resolution Officer (ARO) dated March 24, 2005. That decision concluded that the worker was not entitled to health care benefits for replacement of his partial denture.

The worker was struck in the mouth on October 25, 1991 while using a pneumatic tool. The Board paid \$730.42 for the cost of a partial denture at that time. The issue is whether the worker is now entitled to reimbursement for the cost of replacing the partial denture, in the amount of \$1,205.89.

In his correspondence dated September 22, 1993, the worker described that he injured four teeth in the accident. Two had to be removed at that time. Two were weakened.

However, the file indicates that the worker's other teeth were already compromised by periodontal disease and bone loss. Given the extent of the periodontal involvement, the Board indicated at the time of the accident that it would pay for a full upper denture. This would require the removal of all the worker's upper teeth. Under this proposal, the worker was to be responsible for the cost of the extraction of the teeth that had not been injured in the work related accident, but the Board would bear the full cost of the upper denture.

However, the worker did not accept this offer. His dentist proposed a partial denture, with only eight teeth removed. The Board accepted this proposal also on the basis that the worker would pay the cost for extraction of the teeth that had not been injured in the accident, but the Board would pay for the denture.

I find it understandable that the worker and his dentist did not want to remove teeth unless this was absolutely necessary, at that time. Without the workplace accident it is possible that the worker might have continued on for some time without a denture, although it is not clear for how long.

From the dental records on file, it appears that the cost to the worker for the extraction of the "non-compensable" teeth was about \$137.89. As stated above, the Board paid \$730.42 for the denture.

In 1992 or 1993 a further tooth was extracted, and the denture was modified accordingly. The Board paid for this dental work. I understand that the additional tooth removed was one of the two teeth that had been weakened in the accident but not removed at that time. In any event the Board accepted that the removal of this tooth was secondary to the workplace accident. The additional cost was \$130.42.

In April 2004 the worker sought payment for a replacement of his partial denture. The information provided was that the denture was 12 years old, and worn out. The Board declined payment for the replacement on the basis of the provisions of Board policy, discussed below. It noted that the worker had been sent correspondence at the time of the earlier procedures, informing him that the Board's payment for dental services was complete.

The worker's dentist has also provided information about the cost that would have been incurred if a bridge had been provided to replace the lost teeth at the time of the injury. The cost would have been about \$2,015.30, or over twice the cost ultimately paid by the Board for the partial denture. However, the original records on file indicate that there were not good abutements for a fixed bridge replacement. I understand that that was because of the periodontal disease. I understand that a bridge was not provided because it was not an option at that time.

## **(ii) Law and Policy**

Under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) and the pre-1985 [R.S.O. 1980, c.

539], pre-1989 [R.S.O. 1980, c. 539, as am. S.O. 1984, c. 58] and pre-1997 [R.S.O. 1990, c. W.11] *Workers' Compensation Acts*, every worker who sustains a compensable injury is entitled to such health care as may be necessary as a result of the accident and is entitled to make the initial choice of health care professional. The Board, and on appeal the Tribunal, shall determine questions concerning the necessity, appropriateness or sufficiency of health care and payment for health care. See WSIA, section 33; the pre-1997 Act, section 50; the pre-1989 Act, 52; and the pre-1985 Act, section 52.

The Board has adopted various policies on health care. *Operational Policy Manual* Document No. 17-03-03, "Dental Entitlement" outlines the policy provisions relevant to this case. For convenience in the discussion, I have numbered the various provisions to which I refer. All the provisions are of course subject to the merits and justice provisions of the Act and Board policy, on specific facts.

#### *(a) The First Relevant Provision: Dentures*

I note that the policy has several subheadings. One subheading refers specifically to dentures. However, despite its broad title, I read this section to apply only to dentures that are broken or damaged in a work-related accident. The body of this provision does not address any other situation. Therefore it is not applicable to this case. That is despite the fact that the ARO refers to this provision in support of his analysis.

#### *(b) The Second Relevant Provision: Restorations – The General Rule*

Given this interpretation, I have considered the issue under the provisions of the policy that apply to dental "restorations" that are necessary as a result of a work related accident. Under this section of the policy, the general principle is that the necessary restorations will be kept in repair. The policy states:

If all or some of the worker's teeth are injured, the WSIB pays to have the teeth restored and kept in repair for the worker's lifetime, providing there is no evidence of carelessness or misconduct on the worker's part.

Although the wording does not refer specifically to dentures, it is broad enough to apply to dentures. Therefore I understand that, as a general rule, the policy provides that the Board will pay for maintenance of dental work, including dentures, necessitated by the workplace injury. This is consistent with the wording of the Act.

However, I read this provision as intended to apply generally to situations in which the restoration relates solely to the teeth injured in the workplace accident. That is because there are other, more specific provisions, which address several other situations when this is not the case. They provide for exceptions to the general rule.

#### *(c) The Third Relevant Provision: Restoration of Additional Teeth – Payment of All Immediate Costs*

This provision contains an exception to the general rule, as follows:

If some of the worker's teeth are damaged but the number of teeth to be restored increases because of the pre-existing condition of the mouth, the worker may receive the dental service but this completes the entitlement.

In my view, this provision contemplates a "rough and ready" apportionment of responsibility when dental work is necessary as the result of a compensable accident and additional work is necessitated by a pre-existing condition. The policy recognizes



that it may be reasonable for the worker to have the additional work done at the same time as the repair of the compensable injury, because the dental plan may need to be designed to address the entire condition of the mouth. Therefore the Board pays for all the work.

However, the trade-off contemplated by the policy is that, when this occurs, the Board does not undertake its usual responsibility for future maintenance. The Board policy states that in this situation “this completes the entitlement.”

The Board has relied on this provision to deny the worker’s request for reimbursement in this case.

*(d) The Fourth Relevant Provision: When Additional Teeth Are Extracted*

There is another relevant provision in the policy. The Board did not pay the full cost of the original work, in this case. The worker paid for the extraction of the teeth that had not been injured in the workplace.

The Board policy addresses this situation as follows:

When some teeth are damaged and the remainder in the same arch show evidence of pre-accident dental disease, and the recommended treatment is extraction of all teeth, the WSIB pays for the extraction of the injured teeth only. *This may complete entitlement.* [Emphasis added]

It is necessary to read the third and fourth provisions together. Taken alone, the third provision indicates that entitlement is “complete” when the restoration done addresses additional non-work-related matters. However, that provision also contemplates that the Board will pay the costs of the full restoration. The fourth provision refers to the situation in which the worker is required to pay some costs related to the restoration, i.e., the cost of the additional extractions. In that case there is discretion as to whether future repair and maintenance costs will be paid. The entitlement “may” be complete. I understand this to be because, when the worker has paid some of the costs of the restoration, the division of costs contemplated under the preceding provision is not as clear cut.

However there are two further provisions that are relevant.

*(e) The Fifth Relevant Provision: Future Extractions Necessitated By the Injury*

This provision provides:

If the restorations supplied cause deterioration of abutting teeth to the extent that they must be restored or extracted at a later date, any necessary dental work is provided. The entire restoration will be kept in permanent repair.

The Board accepted responsibility for the later extraction of this worker’s third injured tooth, which I understand would have been under this provision. I understand that this is the provision that applies to future restorations that are causally related to the workplace accident.

However, the provision appears to provide that when this further compensable work takes place, the Board then takes on responsibility for maintenance of the entire restoration from that date. There is no reference to any situations in which this work will be considered “complete”. There is also no reference to any sharing of costs, such as that found in the provision

discussed next, below.

*(f) The Sixth Relevant Provision: Future Extractions Due to Other Causes*

I also note the following provision:

If the WSIB supplies the worker with necessary restoration and, later, teeth in the same arch have to be removed, the WSIB pays 50 per cent of the cost of the new restoration, provided it includes teeth originally restored by the WSIB. This service completes the worker's entitlement. The WSIB is not responsible for maintaining the new work.

I read this provision to mean that, when the future renovation is because of the deterioration of other teeth, not injured in the accident, but also involves the teeth originally restored, there is a sharing of costs and the Board has no further responsibility for future maintenance.

It is not entirely clear how all these provisions are intended to be read together. However I do not understand the references to "completion" of entitlement in the third and fourth provisions as intended to exclude the application of the fifth or sixth provisions, when new work needs to be done. Rather, I read the third and fourth provisions to limit, only, the worker's entitlement for repair or maintenance of the work previously provided. Under the general provisions of the policy, this maintenance would otherwise be the responsibility of the Board. However I understand the provisions to mean that this limitation ceases to apply if further work is required. The facts then fall subject to the fifth or sixth provisions, as applicable.

This reading is consistent with the fact that the Board took responsibility for the extraction of the third "compensable" tooth in this case, despite its prior statements to the worker, in its correspondence, that the original denture had "completed" his entitlement.

**(iii) Submissions**

The worker representative submits that the denture was required because of the workplace accident and now needs replacement. He submits that this is a Board responsibility.

The employer did not participate.

**(iv) Conclusions**

In my view, the policy provides for discretion with respect to the costs of the replacement denture in this situation, when the worker has paid a portion of the original costs. I find that the costs of the replacement denture are to be paid. There are several factors that I consider support payment.

First, the time of the original work, the charges to the Board were less than might otherwise have been expected. The worker had lost only two teeth in the compensable accident. In this situation, the usual choice of treatment would have been a bridge. However, because of the condition of his other teeth, the worker could not be fitted with a bridge. He needed a partial denture. The cost of the denture was considerably less than the cost of a bridge.

The policy contemplates cost sharing between the Board and the worker when work is done to address dental problems

beyond those caused by the compensable accident. In the usual case, the Board will be required to undergo increased cost because of the additional work. Therefore the Board is not responsible for later maintenance costs.

However, in this case, there was no excess cost attributable to extra work. The Board's costs were reduced, because the options for treatment were limited to the less costly denture. This consideration suggests that there is little unfairness to the Board if it takes responsibility for the maintenance costs of keeping the denture in repair. The general rule is that the Board will be responsible for repair and maintenance. The policy exceptions to that rule contemplate that the Board has paid additional costs beyond what might have been usual. That is not the case here.

Secondly, the Board was willing to provide a denture based on extraction of all the worker's upper teeth. The worker's decision to obtain a partial denture only, instead of accepting the Board's proposal for a fuller restoration, was also a cost saving for the Board.

Thirdly, it is arguable that the wording of the fifth provision described above means that the Board's acceptance of responsibility for the loss of the additional tooth, in 1993, results in the Board again becoming responsible for the maintenance of the denture, quite aside from other considerations. That provision states that the Board will be responsible for maintenance of the "full restoration", if additional work is done that is causally related to the accident. While some cost sharing might have been expected in that situation, on the facts of this case, no cost sharing is specified in this provision. It is not clear how the Board could maintain the restoration of the newly replaced tooth without maintaining the full denture.

On the whole, I consider it appropriate for the costs of the replacement denture to be paid.

## **DISPOSITION**

The appeal is allowed.

The worker is entitled to reimbursement for the cost of his replacement denture.

*Appeal allowed.*



## Decision No. 2197/00

Panel: B. Cook (Vice-Chair), Wheeler, Crocker

Decision — December 15, 2006

Neutral Citation: 2006 ONWSIAT 2949

**In the course of employment (reasonably incidental activity test) – Worker (learner) – Board Directives and Guidelines (training) (unpaid placement).**

**Worker participated in a training program that included a placement – Worker was injured while on the placement – Worker had entitlement for accident – Worker was a learner within the definition of worker in the pre-1997 Workers' Compensation Act – Employer was employer with whom she was placed.**

The worker was a homemaker at a nursing home. She participated in a training program that would qualify her as a health care aide. The program was offered by a private adult education school and included a placement at a health care facility. The cost of the program was covered by the Ontario government. The worker was injured while on the placement in April 1992. The worker appealed a decision of the Appeals Resolution Officer denying entitlement. The appeal was allowed.

A worker is generally in the course of employment while engaged in activity that is reasonably incidental to employment. In this case, the worker was taking a training course that related to her employment in general. However, the course was entirely voluntary. The nursing home had no involvement in the actual program. The Panel concluded that the worker was not in the course of employment with the nursing home at the time of the accident.

The definition of worker includes a learner. A learner is defined as a person who becomes subject to the hazards of an industry for the purposes of undergoing training stipulated by the employer as a preliminary to employment.

At the time of the accident, the Board did not have a formal policy regarding learners. However, it did adopt a policy in September 1992. The worker would have been considered a learner within the policy and would have had entitlement for the accident. The employer would have been the employer with whom the learner was placed.

The Panel found that the case turned on the aspect of the definition of learner that requires that the training be stipulated by the employer as a preliminary to employment. The reference to stipulation by “the employer” seems to suggest that the training must be stipulated by one particular employer. On the other hand, since training is a prerequisite for many jobs, it could also be understood to have a broader meaning. The Panel noted that it is not possible to work for any

employer as a nurses' aide without first having the necessary training. The Panel found that definition of learner ambiguous as to whether a particular employer must stipulate a training program as a preliminary to employment.

The Board policy clearly adopted the broader interpretation. It contemplates that individuals are learners if they are placed by training agencies with employers to obtain skills and experience. The Panel was of the view that the purpose of the Board policy was primarily to clarify the rules regarding learners. Prior to adoption of the policy, the Board appeared to have a practice of compensating workers for injuries in certain training programs if the injury occurred during a placement.

The Panel concluded that the worker was a learner while participating in the training program. She suffered an injury while participating in the placement and was subject to the hazards of the industry. The employer was the employer with whom she was placed. The worker had entitlement for the accident.

**Au cours de l'emploi (critère de l'activité raisonnablement connexe) – Travailleur (stagiaire) – Directives et lignes directrices de la Commission (formation) (placement non rémunéré).**

**La travailleuse a participé à un programme de formation comportant un placement – La travailleuse a été blessée pendant le placement – La travailleuse avait droit à une indemnité pour l'accident – La travailleuse était une stagiaire selon la définition de « travailleur » dans la Loi d'avant 1997 – L'employeur était l'employeur chez qui elle était placée.**

La travailleuse était préposée aux services ménagers dans un établissement de soins infirmiers. Elle a participé à un programme de formation en vue de se qualifier comme aide-soignante. Le programme était offert par une école privée de formation des adultes et comprenait un placement dans un établissement de soins de santé. Le gouvernement de l'Ontario payait les frais du programme. La travailleuse a été blessée lors de son placement en avril 1992. La travailleuse a interjeté appel de la décision par laquelle le commissaire aux appels refusait de lui reconnaître le droit à une indemnité. L'appel a été accueilli.

Un travailleur est généralement en cours d'emploi pendant qu'il s'adonne à une activité raisonnablement connexe à l'emploi. La travailleuse en l'espèce prenait un cours de formation relié à son emploi en général; cependant, ce cours était entièrement volontaire. L'établissement de soins infirmiers n'avait rien à voir avec le programme en question. Le comité a conclu que la travailleuse n'était pas en cours d'emploi à l'établissement de soins infirmiers au moment de l'accident.

La définition de « travailleur » inclut les stagiaires. Un stagiaire est défini comme une personne exposée aux risques d'une industrie dans le cadre d'un travail de formation stipulé par l'employeur comme préalable à l'emploi.

Au moment de l'accident, la Commission n'avait pas de politique officielle au sujet des stagiaires mais elle en a adopté une en septembre 1992. La travailleuse aurait été considérée comme une stagiaire au sens de cette politique et elle aurait eu droit à une indemnité pour l'accident. L'employeur aurait été l'employeur chez qui elle avait été placée.

Le comité a conclu que l'issue du cas dépendait de l'aspect de la définition de stagiaire exigeant que la formation soit

stipulée par l'employeur comme préalable à l'emploi. La référence à la stipulation par « l'employeur » semble indiquer que la formation doit être stipulée par un employeur particulier; cependant, cela pouvait se prêter à une interprétation plus large puisque la formation est préalable à plusieurs emplois. Le comité a noté qu'il n'est pas possible de travailler pour un employeur comme aide-soignante sans avoir d'abord acquis la formation nécessaire. Le comité a conclu que la définition de stagiaire était ambiguë sur la question de savoir quel employeur doit stipuler qu'un programme de formation est préalable à l'emploi.

La Commission a manifestement adopté une interprétation plus large. Cette politique envisage que les particuliers sont des « stagiaires » s'ils sont placés chez des employeurs par des organismes de formation dans le but d'acquérir des compétences et une expérience. Le comité a estimé que la politique de la Commission visait essentiellement à clarifier les règles relatives aux stagiaires. Avant l'adoption de la politique, la Commission semblait avoir pour pratique d'indemniser les travailleurs pour les lésions subies dans certains programmes de formation si la lésion était survenue pendant un placement.

Le comité a conclu que la travailleuse était une stagiaire pendant qu'elle participait au programme de formation. Elle a subi une lésion pendant qu'elle participait au placement et elle était exposée aux risques de l'industrie. L'employeur était l'employeur chez qui elle avait été placée. La travailleuse avait droit à une indemnité pour l'accident.

#### **Tribunal Decisions Considered:**

- *Decision No. 915A* (1988), 7 W.C.A.T.R. 269 refd to
- *Decision No. 1059/94* (1995), 34 W.C.A.T.R. 257 consd
- *Decision No. 59/96* (June 21, 1996) consd

#### **Workplace Insurance Legislation Considered:**

- *Workers' Compensation Act*, R.S.O. 1990, c. W.11
  - s. 1(1) "employer"
  - s. 1(1) "learner"
  - s. 1(1) "worker"

#### **Board Directives and Guidelines Considered:**

- *Operational Policy Manual*
  - Document No. 01-02-13 (May 31, 1995) (since superseded)

APPEAL by the worker from a decision of the Appeals Resolution Officer denying entitlement for an accident that occurred while on a placement which was part of a training program.

December 15, 2006. THE TRIBUNAL: —

BEFORE:

B.L. Cook, Vice-Chair

B. Wheeler, Member Representative of Employers

J.A. Crocker, Member Representatives of Workers

HEARING:

August 31, 2000 at Windsor

Post-hearing activity completed on November 16, 2006

DECISION(S) UNDER APPEAL:

WCB Hearings Officer M. Prpic, dated November 3, 1993

**APPEARANCES:**

|                                                                                   |                                                                                            |
|-----------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|
| For the worker:                                                                   | Paul Laporte, Officer of the Worker Adviser<br>Donna Chaplow, Office of the Worker Adviser |
| For the employer that employed the worker at the time of the accident:            | Not participating                                                                          |
| For the employer that operates the training facility where the accident occurred: | Mark Gordon                                                                                |

**(i) History of the Appeal**

This is an appeal by the worker from a decision of a Workers' Compensation Board Hearings Officer, dated November 2, 1993. It concerns an injury that the worker sustained on April 16, 1992 while on a training course. The Hearings Officer concluded that at the time of the accident, the worker was not acting in the course of her employment with the nursing home with which she was employed. He also concluded that the worker was not a "learner" at the time of the accident.

The worker's appeal was filed at the Tribunal in December 1998. It was assigned to a differently constituted Panel which heard the appeal on August 31, 2000. The Hearing Panel determined that it required additional information regarding the applicability of certain policies of the Board. The Hearing Panel also directed the Tribunal Counsel Office to notify the health care facility where the worker was injured of the worker's appeal. That employer indicated that it wished to participate in the appeal. It was represented by Mark Gordon, a consultant.

In a post-hearing memo dated August 31, 2000, the Hearing Panel directed the Tribunal Counsel Office to obtain various policies of the Board and to make submissions on the issue of whether the worker could be considered to be a "worker," a "learner" or a "student" at the time of the accident. The parties were also invited to make submissions.

For reasons that are not clear, there was a substantial delay in processing the Panel's post-hearing directions. In the interim the worker's representative changed and she was represented by Ms. Donna Chaplow, of the Office of the Worker Adviser. A package of submissions from the Tribunal Counsel Office, Ms. Chaplow and Mr. Gordon was received by the Hearing Panel in February 2004. Final reply submissions from Ms. Chaplow were dated March 31, 2004 and the final package of post-hearing materials was provided to the Panel in April 2004.

Subsequently, and before the Hearing Panel could come to a decision on the appeal, Mr. Zimmerman, the Hearing Panel Vice-Chair and Ms. Fay, the Hearing Panel Member Representative of Employers, left the Tribunal. With the consent of the parties the appeal was continued with replacement Panel members. Brian Cook and Brian Wheeler were appointed and continued the appeal, together with Mr. Crocker.

The new Panel members were provided with a copy of the tape of the original hearing which they reviewed. The Panel has now reached a conclusion regarding the appeal.

**(ii) Background**

The worker was employed as a homemaker at a nursing home. She started that employment in 1989. In 1992, she learned

that she could take part in a training program at no cost to herself. At the completion of the program she would be qualified to work as a Health Care Aide. She wanted to take the training program to advance her career. The training program was offered by a private adult education school and involved a placement at a health care facility. The worker suffered the injury while on the placement.

The worker testified that she was advised of the program by the employer. While she believed that the employer would pay the tuition, the employer subsequently clarified that in fact the tuition was covered by an agency of the Ontario government. In any event, the worker did not have to pay any tuition. The employer assisted with the registration process. However, the employer was not otherwise involved in the training program.

The employer subsequently advised the Board that attending the program was not a condition of the worker's continued employment although the employer did encourage employees to upgrade their skills.

The worker wore her uniform while attending the training program. However, this was a requirement of the college and not a requirement of the employer.

On April 16, 1992, the worker was participating in the placement part of the training program. The placement was at a health care facility not associated with the worker's employer. While at the placement, she was struck on the back by a patient at the health care facility and suffered a back injury.

The issues in this appeal are whether at the time of the accident, the worker was in the course of her employment with her employer, or a "leaner" or a "student".

### **(iii) Was the Worker In the Course of Her Employment with the Employer at the Time of the Accident?**

The worker was clearly not directly in the course of her employment with the nursing home that regularly employed her at the time of the accident. The accident did not occur on the employer's premises. The worker was not being paid by the employer for taking the course. The accident did not occur during the worker's regular working hours and did not occur on the employer's premises. She was not under the employer's control or supervision. The only factors that suggest that there was an employment relationship in regards to the accident are that the worker was wearing the employer's uniform and that the employer encouraged its workers to take advantage of training programs that were available to upgrade their skills.

It is apparent that the requirement that the worker wear a uniform was imposed by the training college and not by the worker's employer. The reason for this was so that the students on the placement would be identifiable as health care workers when they were doing the placement.

It is also apparent that the employer encouraged its workers to take part in skill development programs. The worker found out about the program through an information bulletin from the employer. It indicated that higher wages would be paid to staff with more training and credentials. It encouraged employees to contact the employer's personnel manager for information and assistance in pursuing training opportunities.

In general, a worker who is injured while engaged in an activity that is reasonably incidental to employment may be considered to be in the course of her employment. The fact is the worker was taking the training course that was related to her



employment in general. She would not likely have taken the course if it were not for her employment with the employer. Indeed, it appears that a prerequisite for taking the course was employment in a related field.

However, it is also clear that participation in the course was entirely voluntary. Other than facilitating the course registration process, the employer had no involvement in the actual program. Many employers encourage staff to take upgrading programs to increase their skills. Employees who do so benefit themselves and there also may be benefit for the employer. However, the mere fact that an employee is taking a course that may benefit the employer is not sufficient to establish an employment relationship. In this case, the training would have increased the worker's skills and her increased skills would allow her to secure better paying employment. However, she could have done so with the employer or with a different employer. She was not required to take the course in order to have continued employment with the employer as she could have continued to work in her regular job.

After considering the available evidence regarding the nature of the training program, the Panel finds that the worker was not in the course of her employment with her regular employer at the time of the accident.

#### **(iv) Was the Worker a Learner?**

Learner is defined in the pre-1997 *Workers' Compensation Act*, R.S.O. 1990, c. W.11, as follows:

**1(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 within the scope of Part I for the purpose of undergoing training or probationary work specified or stipulated by the employer as a preliminary to employment.

The definition of “worker” makes clear that a learner is to be considered a worker for the purposes of the Act:

**1(1)** In this Act,

...

“worker” includes a person who has entered into or is employed under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes,

(a) a learner...

The definition of “employer” includes “a person who authorizes or permits a learner to be in or about an industry for the purpose mentioned in the definition of learner.”

It appears that the Board did not have a formal policy regarding learners in place in April 1992, when the worker was injured. However, shortly thereafter, the Board did develop a policy. The first policy was an interim policy, and applied to accidents on or after September 1, 1992. *Operational Policy Manual* Document No. 01-02-13, “Individuals on Unpaid Training Placements – Coverage,” is a comprehensive policy dealing with a variety of situations. It states that it applies to all accidents

occurring on or after July 1, 1993.

As noted by the submissions from the Tribunal Counsel Office in this case, the introduction of this policy was not the result of a change in the definition of “student” or “learner” in the Act.

The policy states:

Individuals who are placed by training agencies with employers to obtain work skills and experience, but who are not paid by the employer, are “learners”. The “employer” of these individuals is the employer with whom they are placed.

The policy further provides:

Individuals on unpaid training placements with employers are “learners” if **both** of the following are met:

- the placement is authorized by a training agency, **and**
- the individual participates, however minimally, in the activities of the placement employer’s industry.

Participating in the activities of the workplace includes job shadowing/twinning.

Workers’ compensation coverage extends only to the job placement portion of the training program. There is no coverage for in-class portions of training programs.

#### **Training participants who are learners**

Learners under this policy include:

- college or university students on a training placement with an employer as a formal part of their course or program. Examples are:
  - nursing students on placement with a hospital
  - law and security students on placement with a police force
  - social work students on placement with a social service agency
- individuals placed with an employer by a private vocational school as part of their course or program....

The worker in this case was placed with an employer by a private vocational school as part of the nurses’ aide course. She was participating in the activities of the employer’s workplace when she was injured. The injury did not occur during the in-class portion of the course.

On these facts, and as noted by the Tribunal counsel’s submissions, there can be little doubt that the worker’s accident would be covered by this policy and that under the policy the worker would be entitled to benefits for her injury. However, as discussed, the policy was not in effect at the time of the worker’s accident. The interim policy, which had similar provisions, took effect only as of September 1, 1992, about five months after the worker’s accident. As also noted, it appears that the Board did not have a formal policy regarding learners at the time of the worker’s accident.

In his submissions, Tribunal counsel indicated:

Consideration of policy that was not strictly applicable was an option for the Vice-Chair in *Decision No. 985/03*. In that appeal, the Vice-Chair found that it was appropriate to rely on policy for the *Workers' Compensation Act* where the Board did not develop any applicable policy under the *Workplace Safety and Insurance Act*. "In my view such an approach is only appropriate to the extent that in the absence of any applicable policy under the *WSIA*, consideration can be given to policy developed under the pre-1997 Act for guidance on how the legislative provisions should be interpreted and obviously only where the legislation reflected similar provisions or concepts." It is submitted that the Panel could make a decision based on the potential relief under the policy if it is found to be helpful. Such a decision would be made first on the merits and justice policy given the similarity to the worker's situation and then a review of the facts under the aegis of the Policy 01-02-13.

Tribunal counsel went on to note, however, that it may also be important for the Panel to keep in mind the general presumption against retroactivity. Since the policy explicitly states that it applies only to accidents that occurred after the accident in this case, it may not be appropriate to give the policy retroactive effect. Tribunal counsel's submissions note that this point may turn on the question of whether the policy that the Board developed was based on a new interpretation of the legislation. If the Board previously interpreted the legislation to mean that workers injured while on training programs were not entitled to benefits, the new policy would represent an "overruling". As discussed in *Decision No. 915A* (1988), 7 W.C.A.T.R. 269, that would require a determination of the effective date of the overruling. In this case, that date would likely be September 1, 1992, the effective date of the interim policy.

On the other hand, if the intent of the policy was simply to clarify the rules for entitlement that already existed and did not involve a change in interpretation of the law, the policy would not represent an overruling. The policy could then be taken as clarification of the existing interpretation of the law.

In his submissions on behalf of the employer, Mr. Gordon submits that, in the absence of policy that was in effect at the time, the worker can only be found to be entitled to benefits if it is clear that the accident is covered by the definition of learner in the Act:

**1(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 within the scope of Part I for the purpose of undergoing training or probationary work specified or stipulated by the employer as a preliminary to employment.

In Mr. Gordon's submission, this definition means that a person must be undergoing training that was specified or stipulated by an employer as a preliminary to employment. In his view, the training that the worker was undergoing was not specified or stipulated by either the worker's regular employer or the placement nursing home and that she was not, accordingly, a learner under the Act.

It appears that there are only two Tribunal cases concerning the definition of "learner" under the pre-1997 *Workers' Compensation Act* where the accident occurred prior to September 1, 1992, when the policy came into effect.

The first is *Decision No. 1059/94* (1995), 34 W.C.A.T.R. 257. In that case, the appellant was injured while operating a piece of heavy equipment at a community college while in a training program at the college. The worker was sponsored by the

Employment Insurance Commission while taking the program. The worker was injured while operating the heavy equipment at the community college, rather than in at a construction site. The Panel found that he was not a learner [at p. 264]:

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.

The accident in that case occurred in February 1993. This was subsequent to the development of the interim policy and prior to the adoption of *Operational Policy Manual* Document No. 01-02-13. The Panel asked for some clarification from the Board about the Board's practice prior to the interim policy [at p. 262]:

In her November 21, 1994, correspondence to the Tribunal, the Board's legal counsel, E. Brown, advised that the Board began a policy review of the issue of training participants on unpaid placements with employers in March 1992. One of the issues addressed by the Board was the arrangement concerning coverage of EIC [Employment Insurance Canada] program participants. The Board adopted interim guidelines on training participants effective September 1, 1992, which continued in force until June 30, 1993 (Administrative Minute #1, August 31, 1992, page 152, and Administrative Minute #4, November 20, 1992, page 154).

Ms. Brown advised that during the 1980s, the Board adopted a practice of covering individuals enrolled in certain training programs, which extended to the classroom portion of the training as well as unpaid work placements with an employer. However, Ms. Brown was unable to locate any documentation relating to this arrangement and, more specifically, she could locate no documents with respect to the alleged employer in this case during the relevant years.

Given this information, the present Panel has concluded that we would not likely be assisted by asking for further clarification from the Board about its practice in April 1992, when the accident in the instant case occurred.

In *Decision No. 59/96* (June 21, 1996), the accident occurred on July 2, 1992. The appellant was a counsellor-in-training at a children's camp and suffered a serious injury while participating in a training program that was a prelude to work as a counsellor-in-training. The Panel majority found that he was a learner. The Panel majority considered the definition of "learner" in the Act and concluded [at p. 8]:

The majority of the Panel notes that the definition of a "learner" seems to contain three elements. The first is that the individual must be "subject to the hazards of an industry"; the second is that they must be undergoing "training or probationary work"; thirdly, that training must be "specified or stipulated by the employer as a preliminary to employment".

In her submissions on behalf of the worker, Ms. Chaplow takes issue with the view taken by the Panel majority in *Decision No. 59/96*. In her view, it is important to appreciate the significance of the word "or" in the definition:

**1(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 within the scope of Part I for the purpose of undergoing training *or* probationary work specified *or* stipulated by the employer as a preliminary to employment. [Emphasis added]

Ms. Chaplow submits:

Therefore, “probationary work” is an alternative in situations where “training” is not satisfied in the first instance. Similarly the element of being “stipulated by the employer” is offered as an alternative in the event that either of the first two elements does not apply. “Stipulated by the employer” is the final alternative in the sequence of elements determined by the wording of the *Act* and is not to be interpreted as a requirement of the definition of “learner”...

It is our contention that two elements must exist in meeting the definition of “learner” under the *Act*. The first is the person is “subject to the hazards of the industry” and the final element must be one in the list of alternatives of “training or probationary work or stipulated by the employer”.

In our view, this view of the definition is somewhat problematic. While it is possible to understand training as something distinct from probationary work, it is difficult to see what “stipulated by the employer” might mean on its own. The thing that is stipulated by the employer must be either the training or the probationary work. We therefore agree with the majority in *Decision No. 59/96* that the definition contains three elements. The first is that the individual must be “subject to the hazards of an industry”; the second is that the individual must be undergoing “training or probationary work”; thirdly, that training must be “specified or stipulated by the employer as a preliminary to employment”.

In our view, this case turns on what is meant by “stipulated by the employer as a preliminary to employment”. Does this mean that a particular employer must stipulate a training program or probationary work as a preliminary to employment with that particular employer or does it have a more general meaning? To take this case as the example, would the worker be a learner only if the nurse’s aide training that she was taking was going to lead to employment with a particular nursing home or, would she be a learner if the training program would qualify her for employment as a nursing aide with nursing homes generally?

In our view, the definition is ambiguous on this point. The reference to “specified or stipulated by *the* employer” (emphasis added) seems to suggest that the training or probationary work must be stipulated by one particular employer. On the other hand, since training is a prerequisite for many jobs, it could also be understood to have a broader meaning. It is, for example, not possible to work for any employer as a nurses’ aide without first having the necessary training and certification.

We note that the Board policy clearly adopts the broader interpretation. The policy contemplates that individuals are learners if they are placed by training agencies with employers to obtain work skills and experience. It does not require that the employers with whom the learners are placed will offer employment to the learner at the end of the training program or that there be any specific offer of employment for which the training program is specified or stipulated as a condition of that employment. Rather, it contemplates that the training programs will qualify the learner for employment generally in the area for which they are being trained.

If the narrower interpretation of the definition of learner were correct, then the Board’s policy would be contrary to the *Act*.

In our view, the policy is not contrary to the *Act*. We agree with the Board that the definition can, and should, be read broadly. The focus is on the fact that individuals are subject to the hazards of an industry by virtue of the fact that they are undergoing training for future employment in that industry. If the learner is injured while doing work in a placement situation, they are entitled to benefits. It is not necessary that the training be specified or stipulated by one particular employer as a condition of employment with that particular employer. It is instead sufficient if the training is a requirement of employment in that type of work generally.

In our view, the primary purpose of *Operational Policy Manual* Document No. 01-02-13 was to clarify the rules regarding learners generally. The policy is multi-faceted and deals with a number of situations and clarifies a number of issues including definitions of payment and situations where individuals will not be considered to be learners. It also deals with special arrangements with Human Resources Development Canada and programs under the *Education Act*, school apprenticeship programs, etc., and also with situations where the employer is not registered with the Board. None of these are relevant to this case.

On the basis of the information provided to the *Decision No. 1059/94* Panel, it appears that prior to the policy review that the Board undertook in 1992, it had a practice of compensating injuries to workers who were participating in certain training programs if the injury occurred during a placement that subjected the worker to the hazards of the industry.

In our view, the policy did not adopt a new view of learner as it applies to training programs like the one that the worker in this case was participating in. The policy does not accordingly represent an overruling with regard to the interpretation of the definition of “learner” in the context of this case.

We conclude that the worker was a learner while participating in the training program. She suffered an injury in the course of participating in the placement part of the training program and was subject to the hazards of the industry. For workers’ compensation purposes, her employer at the time of the injury was the employer with whom she was placed.

The worker is entitled to benefits for the injury that she suffered on April 16, 1992.

## **DISPOSITION**

The appeal is allowed.

The worker was a learner at the time of her injury.

The worker is entitled to benefits for the injury that she suffered on April 16, 1992.

*Appeal allowed.*



W.S.I.A.T.

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## Décision no 2352/06I

Indexed as: Decision No. 2352/06I

Jury : Martel (vice-présidente), Séguin, Besner

Décision — le 12 février 2007

Référence neutre : 2007 ONWSIAT 338

### **Décès (maintien de la demande par la succession).**

**La conjointe de fait n'était pas une conjointe au sens de la Loi portant réforme du droit des successions – En l'espèce, la conjointe de fait n'était pas autorisée à interjeter appel au nom de la succession du travailleur à moins qu'elle obtienne un certificat de nomination à titre de fiduciaire.**

Le travailleur a subi des lésions indemnissables en 1981 et en 1990. Il est décédé dans un accident de tracteur à son domicile en 1997. La conjointe de fait du travailleur a interjeté appel de la décision du commissaire aux appels concernant ses prestations de survivant et les prestations auxquelles le travailleur avait droit de son vivant.

Dans cette décision, le comité a examiné la question de savoir si la conjointe de fait était autorisée à interjeter appel au nom de la succession.

Le travailleur avait été marié précédemment et était divorcé. Il avait eu trois enfants avec sa première conjointe. Le représentant de la conjointe de fait avait été incapable de retracer la première conjointe du travailleur et ses enfants. Le représentant se fondait sur l'opinion d'un avocat selon lequel la conjointe de fait était la seule bénéficiaire de la succession.

La conjointe de fait était une conjointe au sens de la définition de « conjoint » dans la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997). Il était clair que la conjointe de fait pouvait interjeter appel au sujet des prestations de survivant. Il fallait régler la question de savoir si la conjointe de fait était autorisée à interjeter appel au nom de la succession au sujet de présumées prestations dues au travailleur de son vivant.

Quand il y a un testament, le Tribunal accepte généralement le fiduciaire (anciennement connu sous le nom d'exécuteur) comme agent autorisé à agir au nom de la succession au Tribunal. Quand il n'y a pas de testament, le Tribunal n'exige normalement pas que le requérant obtienne un certificat de nomination (auparavant « lettres d'administration »), à condition que tous les bénéficiaires immédiats aient consenti à ce qu'il interjette appel.

Pour déterminer les bénéficiaires, le Tribunal se guide sur la *Loi portant réforme du droit des successions* (LRDS). En général, en l'absence d'un testament, le conjoint et les enfants du défunt ont le droit de se partager la succession. Cependant, dans la LRDS, la définition de « conjoint » est plus étroite que dans la Loi de 1997, et elle n'inclut pas le conjoint de fait.

Le comité a distingué ce cas d'autres cas traités dans les décisions du Tribunal invoquées par le représentant de la conjointe de fait parce qu'elles concernaient des personnes qui étaient des bénéficiaires en vertu de la LRDS. De nos jours, nombre de législations reconnaissent les conjoints de fait au même titre que les conjoints mariés mais ce n'était pas le cas de la LRDS. Le représentant a invoqué une opinion juridique selon laquelle la définition de « conjoint » de la LRDS ne résisterait pas à une contestation en application de la *Charte canadienne des droits et libertés*. Cependant, le Tribunal n'est pas l'avenue indiquée pour une telle contestation. Le Tribunal peut examiner une contestation visant sa législation habilitante mais non une contestation visant une autre législation.

En l'espèce, la conjointe de fait n'était pas autorisée à interjeter appel au nom de la succession sans un certificat de nomination à titre de fiduciaire de la succession.

#### **Death (maintenance of claim by estate).**

**Common law spouse was not a spouse within meaning of Succession Law Reform Act – In circumstances, common law spouse did not have authority to bring appeal on behalf of worker's estate unless she obtained certificate of appointment as the estate trustee.**

The worker suffered compensable injuries in 1981 and 1990. He died in a tractor accident at home in 1997. The worker's common law wife appealed a decision of the Appeals Resolution Officer regarding survivor benefits and regarding benefits to which the worker was entitled during his lifetime.

In this decision, the Panel considered the authority of the common law spouse to act on behalf of the estate. The worker had been previously married and divorced and had three children with his first wife. The representative of the common law spouse had been unable to locate the first wife and children. For authority to act, the representative relied on an opinion from a lawyer that the common law spouse was the sole beneficiary of the estate.

The common law spouse was a spouse within the definition of spouse in the *Workplace Safety and Insurance Act, 1997*. The common law spouse clearly could pursue the appeal regarding survivor benefits. The question was whether the common law spouse was authorized to bring the appeal on behalf of the estate regarding alleged benefits owed to the worker during his lifetime.

Where there is a will, the Tribunal generally accepts that the estate trustee (formerly known as the executor or executrix) has authority to act for the estate at the Tribunal. When there is no will, the Tribunal normally does not require the applicant to obtain a certificate of appointment (formerly known as letters of administration), provided that all immediate beneficiaries consent to the applicant bringing the appeal.



In determining who are the beneficiaries, the Tribunal is guided by the *Succession Law Reform Act*. Generally, the spouse and children of a deceased are entitled to share in an estate, in the absence of a will. However, spouse is not defined as broadly in the *Succession Law Reform Act* as in the WSIA. A common law spouse is not included in the definition under the *Succession Law Reform Act*.

The Panel distinguished other cases of the Tribunal referred to by the representative of the common law spouse, as they involved persons who were beneficiaries under the *Succession Law Reform Act*. In this day and age, much legislation recognizes a common law spouse in the same way as a married spouse. However, that was not the situation with the *Succession Law Reform Act*. The representative referred to a legal opinion that the definition of spouse in the *Succession Law Reform Act* could not stand in the face of the *Canadian Charter of Rights and Freedoms*. However, the Tribunal is not the proper venue for such a challenge. The Tribunal may consider a challenge in respect of its enabling legislation, but is not the proper venue for a challenge to another piece of legislation.

In the circumstances, the common law spouse does not have the authority to bring the appeal on behalf of the estate without a certificate of appointment as the estate trustee.

#### **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. 1383/98I* (September 28, 1998) refd to
- *Decision No. 137/02I* (April 24, 2002) [2002 ONWSIAT 1034] distd
- *Decision No. 524/04* (November 18, 2004) [2004 ONWSIAT 2376] refd to
- *Decision No. 596/06I* (2006), 78 W.S.I.A.T.R. (online) distd

#### **Workplace Insurance Legislation Considered:**

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
  - s. 2(1) “spouse”
  - s. 2(1) “survivor”

#### **Other Statutes and Regulations Considered:**

- *Succession Law Reform Act*, R.S.O. 1990, c. S.26

Détermination de la capacité de la conjointe de fait du travailleur défunt d'agir pour le compte de la succession.

Le 12 février 2007. LE TRIBUNAL : —

DEVANT :

S. Martel, Vice-présidente  
J. Séguin, Membre représentant les employeurs  
D. Besner, Membre représentant les travailleurs

MODE D'AUDITION :

Conférence téléphonique préparatoire à l'audience le 22 novembre 2006

DÉCISION EN APPEL :

Décision du 22 juin 2001 de la commissaire aux appels de la CSPAAT

COMPARUTIONS :

|                       |                                                       |
|-----------------------|-------------------------------------------------------|
| Pour le travailleur : | M. R. Séguin, Bureau des conseillers des travailleurs |
| Pour l'employeur 1 :  | Compte non actif à la CSPAAT                          |
| Pour l'employeur 2 :  | Ne participe pas                                      |
| Pour le TCO :         | Me Marc Delorme                                       |

## (i) Introduction

Nous devons régler la question préliminaire de savoir si la conjointe de fait du travailleur (la demanderesse) a le pouvoir de faire appel.

## (ii) Contexte des dossiers d'indemnisation et des appels du travailleur

L'appel a rapport à deux accidents différents.

Le 18 juin 1981, alors qu'il avait 33 ans, le travailleur poussait un arbre, sa main a glissé et il a ressenti une douleur soudaine au dos. Le Dr Oldaker, chiropraticien, a posé un diagnostic d'entorse thoracique avec subluxation vertébrale en T5. Le Dr Oldaker a autorisé le travailleur à retourner à son emploi régulier de bûcheron à compter du 4 août 1981 mais il en a été incapable en raison de circonstances liées à la disponibilité du travail. La Commission lui a reconnu le droit à des prestations d'invalidité totale temporaire du 20 juin 1981 au 4 août 1981. Le travailleur a fait une demande d'indemnité pour une récurrence en février 1982, et la Commission a rejeté sa demande. Le travailleur a communiqué avec la Commission de nouveau en septembre 1993 pour demander une évaluation de son invalidité permanente, des services de réadaptation et des prestations de soins médicaux, ce que la Commission lui a refusé. Le travailleur ne travaillait pas depuis le 3 mai 1990 en raison d'une autre lésion.

Le 3 mai 1990, le travailleur a été frappé par un arbre à la région du cou et de l'épaule gauche. Une déficience permanente était évidente dans ce dossier. La Commission a déterminé qu'il avait atteint son degré de réadaptation médicale maximum le 31 juillet 1991, avec réduction de mouvement du cou et de l'épaule. Étant donné que le travailleur soutenait être totalement invalide et qu'il n'avait pas cherché de travail, il a touché des prestations d'invalidité partielle temporaire de 50 % du 31 juillet 1991 au 27 octobre 1993, quand il a indiqué être disposé à participer à un programme de réadaptation professionnelle. Il a participé à diverses activités de réadaptation professionnelle aux frais de la Commission jusqu'en juillet 1994, quand il a recommencé à soutenir être totalement invalide. La Commission n'a pas accepté qu'il était totalement invalide, et elle a calculé son indemnité pour perte économique future (PÉF) à partir du 1<sup>er</sup> octobre 1994 en fonction des possibilités de gains de 8,23 \$ de l'heure au poste de préposé de poste de pesage visé comme objectif professionnel, ce qui a donné une indemnité pour PÉF de 1 178,38 \$ par mois. Au moment de la première révision (R1) de l'indemnité pour PÉF, comme elle avait noté que le travailleur touchait une pension d'invalidité du Régime de pensions du Canada (RPC), la Commission a procédé à une nouvelle détermination de l'indemnité pour PÉF à partir du même objectif professionnel et elle a déduit 50 % de la pension du RPC en considération de problèmes non indemnifiables pour lesquels elle était versée. L'indemnité pour PÉF est alors passée à 754,85 \$ par mois à compter du 1<sup>er</sup> octobre 1996.

En mars 1995, le travailleur touchait une indemnité pour perte non financière (PNF) de 11 % pour l'épaule gauche et une indemnité pour PNF de 27 % pour le cou, pour une indemnité pour PNF totale de 35 %.

Le 27 septembre 1997, le travailleur a malheureusement été victime d'un accident mortel de tracteur à son domicile. En octobre 1997, sa conjointe de fait a communiqué avec la Commission pour demander des prestations de survivant en alléguant que la lésion indemnisable au cou avait contribué de façon considérable à l'accident de tracteur. La Commission a rejeté sa demande de prestations de survivant.

La conjointe et son représentant ont contesté auprès de la commissaire aux appels en ce qui concerne l'accident de tracteur, la réduction des prestations d'invalidité totale temporaire à 50% du 30 juillet 1991 au 27 octobre 1993 et du 28 juillet 1994 au 1<sup>er</sup> octobre 1994 ainsi que l'indemnité pour PÉF au moment de la R1 (1<sup>er</sup> octobre 1996). Dans une décision dans laquelle elle a accueilli l'appel en partie, la commissaire aux appels a reconnu le droit à des prestations intégrales d'invalidité totale temporaire du 31 juillet 1991 au 27 octobre 1993 mais elle a refusé de reconnaître le droit à de telles prestations pour la période du 28 juillet 1994 au 1<sup>er</sup> octobre 1994 et elle a maintenu l'indemnité pour PÉF établie au moment de la R1. Elle a aussi conclu que les lésions indemnissables n'avaient ni causé ni contribué à l'accident dont le travailleur a été victime à son domicile le 27 septembre 1997, et elle a donc refusé de reconnaître le droit à des prestations de survivant.

En septembre 2001, la conjointe de fait du travailleur a interjeté appel de la décision de la commissaire aux appels au Tribunal. Elle demande :

1. des prestations intégrales du 28 juillet 1994 au 1<sup>er</sup> octobre 1994;
2. une indemnité pour PÉF de 100 %;
3. aucune déduction de la pension du RPC;
4. des prestations de survivant;
5. le droit à une indemnité pour des troubles à la région lombaire dans le dossier de l'accident du 18 juin 1981;
6. le droit à une indemnité pour des troubles au genou droit dans le dossier de l'accident du 18 juin 1981;
7. le droit à une indemnité continue, y compris à une pension d'invalidité permanente pour des troubles à la colonne dorsale.

En mai 2003, le Tribunal a communiqué avec le représentant pour lui demander une copie du testament du travailleur pour identifier l'exécuteur testamentaire de sa succession ou, s'il était décédé sans testament, une autorisation signée par tous ses conjoints et enfants survivants identifiant la personne autorisée à agir au nom de la succession. Le représentant a répondu qu'il faudrait du temps pour rassembler toutes les autorisations requises et l'appel a donc été inscrit sur la liste des dossiers inactifs. Le représentant a ensuite demandé de réinscrire l'appel sur la liste des dossiers actifs parce que la conjointe de fait était incapable de trouver la première conjointe du travailleur et les trois enfants issus de son premier mariage. M. Séguin s'appuyait sur une lettre en rapport avec le transfert d'un véhicule motorisé dans laquelle un avocat indiquait que, selon lui, la conjointe de fait était la seule bénéficiaire de la succession du travailleur défunt.

Comme la conjointe de fait du travailleur était incapable de trouver les enfants issus du premier mariage du travailleur, le Bureau des conseillers juridiques du Tribunal a demandé la tenue d'une conférence téléphonique préparatoire à l'audience pour déterminer si elle avait le pouvoir de faire appel au nom de la succession du travailleur.

### **(iii) Situation de la demanderesse pour faire appel en l'espèce**

Le travailleur était né en 1947.

Il avait précédemment été marié à « J ». Trois enfants étaient issus de ce mariage : un fils en 1972, une fille en 1974 et une

autre fille en 1979. Selon la conjointe de fait, la troisième de ces enfants avait été adoptée par une autre famille à l'âge de cinq ans.

Le travailleur et « J » avaient divorcés légalement et obtenu l'annulation de leur mariage par l'Église catholique. L'union du travailleur et de sa conjointe de fait remontait à 1981. Ils ont eu une fille en mars 1982. La conjointe de fait avait un fils d'une relation antérieure. Ce fils est né en 1976 et vivait avec sa mère et le travailleur. Il était à la charge du travailleur mais ce dernier ne l'avait jamais adopté. Seule la fille issue de l'union de fait vivait au domicile familial et était à la charge du travailleur au moment de son décès.

Lors de la conférence téléphonique, la conjointe de fait a dit ce qu'elle savait au sujet de la première conjointe du travailleur et des enfants issus de cette union. Elle a déclaré que, même s'ils étaient en contact, le travailleur et ses enfants n'étaient pas proches les uns des autres et qu'il y avait des frictions entre eux. Les deux plus vieux étaient venus aux funérailles du travailleur. Ils étaient aussi venus chez le travailleur pour demander quelques effets personnels en souvenir de leur père. La fille aînée du travailleur vivait dans une localité voisine. La conjointe de fait l'avait vue pour la dernière fois environ deux ans après le décès du travailleur quand elles s'étaient croisées en ville. Elles s'étaient saluées. La conjointe de fait a essayé d'entrer en contact avec elle depuis en se rendant chez elle mais la maison a été vendue et le nouveau propriétaire ne sait pas où elle se trouve. Selon la conjointe de fait, il est possible que la première conjointe et les enfants du travailleur se trouvent au Québec mais elle ne sait pas où. Elle ne sait pas non plus si la fille du travailleur porte encore le nom de famille du travailleur. Le nom de famille du travailleur est assez commun au Québec.

La fille issue de l'union du travailleur et de la conjointe de fait vit au Québec. Elle a déposé une lettre indiquant ce qui suit :

La présente confirme que je [nom de la fille] ne m'oppose pas à ce que ma mère [nom de la mère] fasse appel au nom de mon père [nom du père]. La présente confirme aussi que je [nom de la fille] ne désire pas participer à l'appel. Pour plus de renseignements de ma part, communiquez avec M. Raymond Séguin. [traduction]

Le travailleur et la demanderesse vivaient dans une maison dont ils étaient copropriétaires au moment de son décès en 1997. Le travailleur et la demanderesse étaient les propriétaires et occupants inscrits de cette propriété.

La propriété de huit véhicules motorisés a été transférée à la demanderesse au moment du décès du travailleur.

La demanderesse a demandé et touché la portion du survivant de la pension du RPC du travailleur.

#### **(iv) Observations**

M. Séguin a fait des observations oralement et s'est appuyé principalement sur les motifs de la *décision no 596/06I* (2006), 78 W.S.I.A.T.R. (en ligne). Me Delorme a présenté des observations écrites et orales principalement centrées sur la définition de « conjoint » dans la *Loi portant réforme du droit des successions* (LRDS).

#### **(v) Conclusion**

##### *(a) Prestations de survivant*

Il n'y a aucun doute en l'espèce que la conjointe de fait peut interjeter appel en son propre nom en vue d'obtenir des

prestations de survivant aux termes de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997). Aux termes de la Loi de 1997, « survivant » s'entend d'un conjoint, d'un enfant ou d'une personne à charge d'un travailleur décédé. La Loi de 1997 donne aussi la définition suivante du terme « conjoint ».

S'entend d'une personne avec laquelle la personne :

a) soit est mariée;

b) soit vit dans une union conjugale hors du mariage, si les deux personnes, selon le cas :

(i) ont cohabité pendant au moins un an,

(ii) sont les parents du même enfant,

(iii) ont conclu un accord de cohabitation en vertu de l'article 53 de la *Loi sur le droit de la famille*.

En l'espèce, le travailleur et la demanderesse cohabitaient depuis 16 ans au moment du décès du travailleur et ils étaient parents d'un enfant.

La conjointe de fait du travailleur peut donc faire appel en son propre nom relativement à la question des prestations de survivant. Cela signifie qu'elle peut faire appel relativement au droit à des prestations de survivant par suite de l'accident de tracteur survenu au domicile du travailleur et relativement à la question de savoir si les troubles indemnifiables ont contribué de façon considérable à son décès.

### *(b) Succession du travailleur*

La question en litige dans cet appel est la question de savoir si la demanderesse a le pouvoir d'interjeter appel au nom de la succession du travailleur. Cette question englobe toutes les questions restantes relatives aux prestations qui étaient prétendument dues au travailleur de son vivant.

La jurisprudence du Tribunal indique uniformément que la succession d'un travailleur défunt est en droit de demander les prestations d'assurance contre les accidents du travail qui auraient dû être versées du vivant du travailleur. Voir, par exemple, les *décisions nos 148/87* (le 6 septembre 1988), *410/87* (le 20 juillet 1989), *104/89* (le 25 octobre 1989) et *461/90* (le 15 août 1990). C'est le Tribunal qui détermine qui a qualité pour agir au nom de la succession aux fins des instances du Tribunal. Quand un travailleur a un testament, le Tribunal accepte généralement le fiduciaire (anciennement connu sous le nom d'exécuteur) comme agent autorisé à agir au nom de la succession au Tribunal. Quand un travailleur décède sans testament, le Tribunal n'exige *normalement* pas que le demandeur obtienne un *Certificat de nomination à titre de fiduciaire de la succession non testamentaire* (auparavant « lettres d'administration »), à condition que les bénéficiaires immédiats aient consenti à ce que le demandeur interjette appel au nom de la succession. Voir, par exemple, les *décisions nos 1383/98I* (le 28 septembre 1998) et *524/04* (le 18 novembre 2004).

Pour déterminer les bénéficiaires d'une succession en Ontario, le Tribunal se guide sur la LRDS, *Partie II – Succession Ab Intestat*, laquelle est la législation indiquant qui a droit à la succession en l'absence d'un testament. En général, ces personnes sont le conjoint et tous les enfants du travailleur défunt comme défini par la LRDS. Cependant, « conjoint » est défini de

façon plus étroite dans la LRDS que dans la Loi de 1997. Suit la définition de « conjoint » dans la LRDS.

« conjoint » L'une ou l'autre de deux personnes qui, selon le cas :

a) sont mariées ensemble;

b) ont contracté, de bonne foi selon la personne qui fait valoir un droit en vertu de la présente loi, un mariage nul de nullité relative ou absolue.

Dans les circonstances entourant le cas en l'espèce, les dispositions de la *Partie II – Succession Ab Intestat* de la LRDS prévoient que les bénéficiaires de la succession du travailleur sont ses descendants, c'est-à-dire ses enfants. Étant donné que le travailleur et la demanderesse n'étaient pas mariés, la demanderesse n'est pas une « conjointe » aux termes de la LRDS et elle n'est donc pas une bénéficiaire de la succession.

M. Séguin s'est fondé sur la *décision no 596/06I* et sur d'autres décisions dans lesquelles le Tribunal a adopté une approche pragmatique et a examiné la preuve indiquant au nom de quelle personne les biens étaient et quelle personne d'autres entités gouvernementales avaient reconnue comme agissant au nom de la succession du travailleur. Les circonstances entourant le cas en l'espèce sont toutefois nouvelles. Dans toutes les décisions sur lesquelles M. Séguin s'est appuyé, la personne qui demandait d'agir au nom de la succession était bénéficiaire de la succession aux termes de la LRDS. En particulier, dans la *décision no 596/06I*, qui est probablement la plus récente rendue sur la question, le Tribunal examine la question de savoir si la veuve pouvait interjeter appel au nom de la succession du travailleur malgré l'opposition d'une fille issue d'une union précédente. Le comité a conclu que la veuve était la représentante de la succession du travailleur en se fondant sur un certain nombre de documents relatifs aux droits de propriété et sur le fait que d'autres entités provinciales et fédérales avaient reconnu la veuve comme représentante de la succession du travailleur.

De façon similaire, dans la *décision no 137/02I* (24 avril 2002), le comité a examiné si la veuve avait le pouvoir d'agir au nom de la succession d'un travailleur dont les enfants issus d'un mariage précédent étaient introuvables. La demanderesse avait fourni plusieurs documents dont un avis d'admissibilité de la veuve à la prestation de décès du RPC pour la succession, une lettre d'une société de fiducie faisant des paiements pour le compte de la Commission à la succession aux soins de la veuve, un certificat de divorce attestant du divorce du travailleur de sa première conjointe, des certificats provenant des avocats de la première conjointe et du travailleur ainsi qu'un certificat de transfert de propriété de la voiture du travailleur à la veuve. Compte tenu de ces documents, le comité était convaincu que la demanderesse était la représentante de la succession du travailleur.

La différence cruciale dans ces cas par rapport au cas en l'espèce est que les veuves étaient des conjointes aux termes de la LRDS. Chacune d'entre elles était mariée au travailleur au moment du décès de ce dernier.

En l'espèce, la demanderesse n'est pas une conjointe et elle ne peut donc pas être une bénéficiaire en vertu des dispositions de la LRDS.

Nous sommes d'accord que, de nos jours, nombre d'entités gouvernementales et de législations reconnaissent les conjoints de fait au même titre que les conjoints mariés. Pour des raisons dépassant nos compétences, dans la LRDS, le législateur a défini « conjoint » de façon beaucoup plus étroite que dans d'autres législations.

Nous notons aussi que M. Séguin s’est appuyé sur une opinion juridique indiquant ce qui suit :

Vous avez demandé cette lettre en vue du transfert d’un camion au nom de [le travailleur], étant donné le décès de votre conjoint. Votre conjoint est décédé sans testament et vous n’étiez pas mariés bien que vous cohabitiez depuis plus de 16 ans, que vous étiez propriétaires conjoints de biens et que vous vous considériez comme des conjoints à toute fin pratique au sens de la loi.

À mon avis, un tribunal conclurait que vous êtes la seule bénéficiaire de la succession du défunt [le travailleur]. Bien que dans les cas de succession ab intestat la *Loi portant réforme du droit des successions* prévoie que la propriété va au conjoint, la définition de « conjoint » indique qu’une personne doit être légalement mariée. Je soutiens que cela n’est plus tolérable en regard des dispositions sur l’égalité de la Charte des droits ni du droit ontarien en matière de soutien ni des récents arrêts de la Cour suprême du Canada reconnaissant un droit de propriété à des conjoints de fait en contrepartie de leur contribution à l’union. [traduction]

Même s’il est possible que la demanderesse puisse invoquer un tel argument, le Tribunal d’appel n’est pas l’avenue indiquée pour ce faire. Le Tribunal peut examiner une contestation fondée sur la Charte visant sa loi habilitante<sup>1</sup>, la Loi de 1997, mais il n’est pas l’avenue appropriée pour une contestation fondée sur la Charte visant une autre loi.

M. Séguin a aussi invoqué la Partie V de la LRDS – *Personnes à charge, aliments*, qui définit, *uniquement aux fins de cette partie*, « conjoint » moins étroitement en y incluant aussi deux personnes qui cohabitaient. Aux termes de ces dispositions, en cas de succession tant testamentaire qu’ab intestat, *le tribunal peut, sur requête*, ordonner que des aliments, qu’il juge suffisants, soient prélevés sur la succession du défunt afin de fournir des aliments convenables à des personnes à charge, ou à certaines d’entre elles, si le défunt n’y a pas pourvu suffisamment. Même s’il est possible que la demanderesse puisse déposer une requête en vue d’obtenir une telle ordonnance, le Tribunal n’est pas l’avenue appropriée pour ce faire.

Nous croyons qu’il s’agit ici d’un de ces cas dans lesquels le Tribunal doit exiger de la demanderesse qu’elle se procure un *Certificat de nomination à titre de fiduciaire* pour démontrer qu’elle a le pouvoir d’agir au nom de la succession du travailleur défunt.

## DÉCISION

La conjointe de fait du travailleur peut faire appel en son propre nom relativement à la question des prestations de survivant. Cela signifie qu’elle peut faire appel relativement au droit à des prestations de survivant par suite de l’accident de tracteur survenu au domicile du travailleur et relativement à la question de savoir si les troubles indemnifiables ont contribué de façon considérable à son décès.

La conjointe de fait du travailleur n’a pas le pouvoir d’interjeter cet appel au nom de la succession du travailleur sans un *Certificat de nomination à titre de fiduciaire*.

*Ordonnance en conséquence.*

<sup>1</sup> *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, [2003] 2 R.C.S. 504.



W.S.I.A.T.

**REPORTER**

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## Decision No. 2404/05

Vice-Chair: Gehrke

Decision — December 28, 2006

Neutral Citation: 2006 ONWSIAT 3066

**Disablement (nature of work) – Dupuytren's contracture – Medical opinion (Dupuytren's contracture) – Construction (carpenter).**

**Medical literature indicated that there was insufficient evidence to establish a relationship between manual labour and Dupuytren's contracture.**

A carpenter appealed a decision of the Appeals Resolution Officer denying entitlement for Dupuytren's contracture. Medical literature indicated that there was insufficient evidence to establish a relationship between manual labour and Dupuytren's contracture. The worker had a history of smoking and of consumption of alcohol at levels that were at least moderate. New research information links smoking and alcohol consumption with Dupuytren's contracture.

The Vice-Chair concluded that the worker's manual labour as a carpenter was not a significant contributing factor to development of Dupuytren's contracture.

Further, for any acute injury to precipitate the onset of Dupuytren's contracture, the onset would be expected to occur relatively soon after the injury. In this case, the worker's condition was not diagnosed until three years after he stopped working.

The appeal was dismissed.

**Incapacité (nature du travail) – Maladie de Dupuytren – Opinion médicale (maladie de Dupuytren) – Construction (menuisier).**

**Les publications médicales indiquaient que la preuve était insuffisante pour établir l'existence d'un lien entre le travail manuel et la maladie de Dupuytren.**

Un menuisier a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de lui reconnaître le droit à une indemnité pour la maladie de Dupuytren.



Les publications médicales indiquaient que la preuve était insuffisante pour établir l'existence d'un lien entre le travail manuel et la maladie de Dupuytren. Le travailleur avait des antécédents de tabagisme et de consommation d'alcool de niveau au moins modéré. La recherche récente relie le tabagisme et la consommation d'alcool à la maladie de Dupuytren.

La vice-présidente a conclu que le travail manuel de menuisier n'a pas contribué de façon importante à l'apparition de la maladie de Dupuytren.

Qui plus est, pour conclure qu'une lésion aiguë a accéléré l'apparition de la maladie de Dupuytren, il faudrait que cette affection se soit manifestée peu de temps après la lésion. En l'espèce, l'état pathologique du travailleur s'est manifesté trois ans après qu'il a cessé de travailler.

L'appel a été rejeté.

#### **Cross-References:**

- *Decision No. 2404/05I* (March 27, 2006) [2006 ONWSIAT 688]

APPEAL by the worker from a decision of the Appeals Resolution Officer denying entitlement for Dupuytren's contracture.

December 28, 2006. THE TRIBUNAL: —

BEFORE: L. Gehrke, Vice-Chair

HEARING: December 6, 2005 at Thunder Bay, Oral  
Post-hearing activity

DECISION(S) UNDER APPEAL: WSIB Hearings Officer decision dated September 11, 1992

#### **APPEARANCES:**

For the worker: P. Trush, Office of the Worker Adviser

For the employer: C. Nichols, Office of the Employer Adviser

Interpreter: Italian

## **REASONS**

### **(i) Introduction**

The issue I must decide in this appeal is whether the worker's Dupuytren's contracture, a bilateral condition of the hands, resulted from his work as a carpenter or from previous compensable injuries to his hands.

In *Decision No. 2404/05I* (March 27, 2006), I set out the background facts and requested an opinion from a Tribunal-appointed medical assessor. The report of the medical assessor has now been received, and further submissions were invited but declined by the parties.

This is my final decision in this appeal.

## (ii) Analysis

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 or prior workplace injuries contributed in a significant or material way to the development of the medical condition in question, in this case Dupuytren's contracture. 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.<sup>1</sup>

The key facts in my view are these:

- The worker was employed as a carpenter, in concrete wall construction, which involved a lot of hammering, including sledgehammering and hammering of steel pins into pipes and pipes into steel forms. He did not wear gloves at work. He described his hands as always calloused, and with cuts. He described a gash to the left hand, and hammering a nail through his finger. He had several injuries at work, including injuries to his right elbow, neck and left shoulder, and left wrist carpal tunnel syndrome.
- Marked idiopathic clubbing of the fingernails of both hands was noted by several specialists from 1981. Investigations for the causes of this condition by Dr. C. John, Respiriologist, in 1985 were essentially negative. However Dr. John noted that x-rays perhaps showed early interstitial lung disease, and that interstitial lung diseases are associated with clubbing.
- The worker had a 20 pack-year history of smoking and regularly drank wine with meals. He quit smoking in 1991.
- The worker had a history of suffering from recurrent pansinusitis. He moved to Australia to try to improve this condition. He had repeated procedures in 1978 and 1981 for this condition.
- In November 1977, the worker fell six feet from a scaffold, injuring his right elbow. He developed olecranon bursitis of the right elbow as a result, and underwent surgical removal of this in 1988.
- In November 1980, the worker injured his neck and left shoulder, superimposed on a history of degenerative disc disease at C4-5 and C5-6 and subsequently C6-7. In 1986, he was awarded a permanent disability award for the cervical spine and left shoulder.  
He was diagnosed with mild carpal tunnel syndrome in the left hand and underwent surgery for this in 1984.
- In 1985, the worker suffered a compensable back injury. With the exception of a few days worked from July 28 to August 7, 1986, he has not worked since.
- Examinations by Board physicians in 1986 showed extreme clubbing of the fingernails, bilaterally, no sensory changes in the fingers, and some weakness of the grip on the left side.
- In 1988, Dr. Remus, Orthopaedic Surgeon, diagnosed mild to moderate Dupuytren's contracture involving the palmar aspect of both hands.

- In 1990, Dr. Remus opined that the Dupuytren's contracture, which was then moderately severe, had developed because of repetitive injury and heavy use of his hands at work.
- In 1992, the worker underwent surgical excision of Dupuytren's contracture of the right hand. Dr. Remus commented that the worker "relates this to 20 years of hard employment in the construction field".
- In 2000, Dr. J.E. Anderson, Occupational Health Physician, assessed the worker and opined that the worker was repeatedly exposed to vibration and manual work, and commented that these two factors can lead to the development of Dupuytren's contracture. Dr. Anderson commented that work relatedness of this disorder is usually considered on a case-by-case basis. An ergonomic report attached to Dr. Anderson's opinion states: "Due to poor study designs, and largely unknown amount of information on the pathogenesis of this disorder it is often difficult to establish the work-relatedness of this disease."

In my interim decision, I requested certain medical reports that were missing from the file as well as an opinion from a Tribunal-appointed Medical Assessor in answer to several questions. As a result, the following reports were received:

- Dr. M. R. Thibert, Plastic and Reconstructive Surgery, dated October 7, 1993, states in part that the worker had a "severe amount of contracture of the right small finger" and commented that Dupuytren's contracture is "a multifocal, bilateral and recurrent disease that cannot be cured in any way whatsoever, but requires recurrent operative interventions to remove the disease fascia when contractures occur."
- Dr. Thibert's operative report dated September 9, 1995, for Dupuytren's contracture left hand.
- Dr. Henderson, x-ray report, June 20, 1996, indicates deformity of the fifth finger, right hand, "suspicious of old fracture".  
Dr. D. Welbourne, Pathologist, September 27, 1995, diagnosing tissue specimen of left palmar fascia consistent with Dupuytren's contracture.
- Dr. P.E. Bentz, General Practitioner, April 2, 1992, providing information regarding the worker's medical history. Dr. Bentz thought that the worker's Dupuytren's contractures were of "a more recent origin", and opined that "the Dupuytren's contractures are not started by work. Certainly, they may be aggravated by the heavy work he did as a carpenter."
- Dr. D. de Demeter, Orthopaedic Specialist, in a memo to the Board's Hearings Officer, August 7, 1992, opined with respect to the clubbing of the worker's fingers that this is a separate condition from Dupuytren's contracture that "may be hereditary or idiopathic, or acquired and associated with a variety of disorders, including cyanotic heart disease, infective endocarditis, and a variety of pulmonary conditions...as well as some gastrointestinal diseases...(Harrison's Principles of Internal Medicine, 12th Edition, Volume 1, p. 228, 1991.) It is thought that clubbing is secondary to the presence of a substance (presumably humoral), which causes dilation of the vessels at the fingertip. Clubbing neither enhances nor aggravates Dupuytren's Contracture. It does not have the same pathophysiology." With respect to Dupuytren's Contracture, Dr. de Demeter noted that the condition generally develops in the fifth to seventh decades, more frequently in males; evidence points to heredity as a factor; it is more frequent and severe in persons with epilepsy or alcoholism; there is a higher incidence in persons with diabetes; it is often bilateral but rarely symmetrical; vascular insufficiency and cigarette smoking have been linked to Dupuytren's disease as possible causative factors. Dr. de Demeter noted that the worker was 42 years old in 1988, two and one-half years after he had last worked, when onset of Dupuytren's contracture was first noted, that he was a known smoker and drinks wine with his meals. "Therefore, he has some of the factors that are associated with Dupuytren's disease." Dr. de Demeter noted that there is controversy in

the medical literature with regard to trauma being either an etiological factor or an aggravating factor. Dr. de Demeter referred to the research of Dr. R. M. McFarlane, indicating that there is “not sufficient evidence from epidemiological studies to state that manual work either hastens the onset of D.D. or the progression of existing disease” and concluded:

From review of the foregoing as well as the fact that the patient’s Dupuytren’s contractures were first noted in January 1988 (2 and a half years after he last worked) I do not think that his bilateral Dupuytren’s contractures are causally related to the work performed.

Also in view of Dr. R. M. McFarlane’s research, there is no scientific evidence that microtrauma is a cause of Dupuytren’s contracture. Nor is there any scientific evidence to substantiate a claim that manual work hastens the progression of the existing disease (aggravation). Once again I would also like to point out that this patient’s bilateral Dupuytren’s contractures were not diagnosed until 2 and a half years after he had ceased work. There is absolutely no relationship between this patient’s bilateral Dupuytren’s contractures and his compensable neck, left shoulder and left wrist disabilities...

Dr. McFarlane states “Although the vast majority of injuries to the hand do not result in D.D. or even thickening of the palmar aponeurosis, we have shown that occasionally a single injury can precipitate an onset of D.D. Presumably, this occurs in genetically susceptible individuals and our study suggests that a causal relation can only be established in young people.”. He then gives guidelines to help establish a relationship between a single injury and the onset of D.D.:

1. Age. The appearance of D.D. before the age of 40 suggests a causal relationship unless the individual expresses a strong diathesis to D.D.
2. If the D.D. is bilateral, the disease in the uninjured hand should have appeared after age 40 in men, and in age 50 in women.
3. The injury was within the hand.
4. Objective evidence of injury.
5. D.D. is in the area of injury of the hand.
6. D.D. appeared within 2 years of injury.
7. Histological proof of fibromatosis is needed to make a definite diagnosis of D.D.

Dr. N. H. McKee, a Plastic and Reconstructive Surgeon at Mount Sinai Hospital who specializes in hands, and commonly performs Dupuytren’s fasciectomy surgeries, provided a report to the Tribunal dated September 10, 2006. Dr. McKee confirmed the diagnosis of Dupuytren’s contracture, based on the report of Dr. Thibert and the pathology report. Other conditions potentially affecting the hands from which the worker suffers include the right elbow injury, the clubbing, the left shoulder and neck injury, osteoarthritis of some DIP joints and the left carpal tunnel syndrome. Dr. McKee commented that the worker “has evidence of OA at many sites and may well be genetically predisposed to have it...Genetic predispositions are known for many hand problems including Dupuytren’s and carpal tunnel and for conditions such as Diabetes mellitus that are associated with hand problems – including Dupuytren’s.”

Dr. McKee also commented that the literature “does not reveal correlations of the conditions mentioned above with Dupuytren’s. *However*, lung problems can lead to clubbing. Dupuytren’s appears to correlate strongly with *smoking history*... The paper trail for [the worker] gives the smoking history in the 80’s to early 90’s (no more) but does not provide details of smoking habits in the earlier years. There is a note from April 1987 that he was admitted to hospital with...and...and “coughing of blood due to cigarette smoking.”

Dr. McKee also commented that in her experience, patients with Dupuytren’s could often have other hand problems. She

states: “I am not aware of any causal relationship other than coincidence. Such problems as trigger fingers, carpal tunnel and osteoarthritis are common and some individuals have all of them over time. Fewer individuals but still a few have Dupuytren’s as well! Some of these people have never done manual work.”

With respect to the clubbing, Dr. McKee commented that she was led to assume that the condition was not idiopathic (idiopathic hypertrophic osteoarthropathy aka pachydermoperiostosis and Touraine-Solente-Gole Syndrome), however, it was not clear that any radiologist had specifically ruled out bone findings of this diagnosis as manifested elsewhere in the body. Dr. McKee noted that “[a]cquired clubbing is associated with a list of clinical entities... In this chart, the first three clusters all concern the lung and thorax (neoplastic, suppurative and diffuse disease). As mentioned above, the smoking history does not include that likely early years of [the worker’s] smoking. *This may have been at a level to contribute to his subsequent lung findings, to his clubbing and to his Dupuytren’s*” (emphasis added).

With respect to the calluses, Dr. McKee was of the opinion that “Manual workers often do have calluses. Dupuytren’s can involve the deep layers of the skin and convince individuals that they have calluses. True calluses generally disappear when the provoking activities are no more. Dupuytren’s does not disappear spontaneously.”

With respect to new research information since the date of the Tribunal discussion paper on Dupuytren’s contracture, Dr. McKee noted that there are new papers:

One of the new papers has already been mentioned: *A prospective study linked both **alcohol and tobacco** to Dupuytren’s disease.* (Appendix 1) This paper looked very carefully at many possible covariates. It provides further evidence to support others who have found a linkage with alcohol consumption. It also provides convincing evidence of a link with smoking and the quantity of smoking. The odds ratios are impressive. The findings of this paper add to the similar findings of older papers.

*This same paper sought a relationship between physical activity at work (none, light, heavy) and Dupuytren’s and did not find one.*

...

An example of a new paper looking at old information is in Appendix 5: Hart and Hooper. ...This reintroduces the concept of acute injury and Dupuytren’s contracture...in my limited observations, an acute injury can precipitate a more rapid evolution of Dupuytren’s in a rare individual who has some predisposition.

The ideal, long term, prospective study may not have been done yet to put this issue of chronic trauma and Dupuytren’s contracture definitively to rest for all time. Godtfredsen’s is the most recent study that appears to have been well designed and it did not find an association between type of work and Dupuytren’s...From personal experience, I have certainly seen many, many individuals with significant Dupuytren’s contractures who had not done manual work or used their hands in athletic activities.

In summary, I did not find literature support that Dupuytren’s contracture is related to manual labour. I did find another paper that appears credible in terms of methods and statistics that did *not* find a correlation between Dupuytren’s contracture and manual work.

With respect to the factors in the worker’s history that could contribute to or influence his Dupuytren’s contracture, Dr. McKee commented:

As previously mentioned [the worker] has a smoking history and drinks some alcohol...By history neither has been excessive but the amounts used earlier in his life are unknown and may have contributed to his Dupuytren’s.

...With the available information, the role of [the worker's] genes in his hand problems is mainly unknown except for an early onset of multiple sites of osteoarthritis.

The etiology of the x-ray findings in 1996 (the spur on the fifth metacarpal of the right hand and possible previous trauma to the base of the distal phalanx of the little finger) are not documented. I did not find previous x-ray reports of the hands. I did not read of an injury to this finger. The timing of a possible injury to this finger is unknown. It may have preceded the late 1970's. Certainly there is no paper trail of an acute injury to this finger with a rapidly evolving Dupuytren's contracture suggesting an acute injury related to Dupuytren's. I did not find any history of Raynaud's or cold sensitivity that indicated that there was an ongoing problem with vascular sensitivity.

[The worker] did participate in heavy manual labour. He did have the injuries outlined earlier plus one to an eye and another to the lower back.

Summary: There is no evidence in the file for direct causality of Dupuytren's acutely following a hand injury. The need for surgery was remote from the date he last worked. My assessment of the literature, at this time, does not support heavy manual work over a period of time being causally related to Dupuytren's contracture. The most recent paper I found that addressed this topic found no correlation to Dupuytren's to level of use of hands at work. This paper was prospective, involved thousands and had good statistical techniques applied to the data.

[The worker] has two life style habits that do increase his chances of having Dupuytren's contractures: smoking and drinking alcohol.

I accept the opinion of Dr. McKee. It is thoroughly researched and well reasoned. Dr. McKee's opinion is consistent with the opinion of the Board's medical consultant with respect to the relationship between Dupuytren's contracture and acute injury or manual labour, and is also consistent with the Tribunal discussion paper on Dupuytren's contracture (July 2002 ) prepared by Dr. L.N. Hurst. All of these reports conclude based on the research literature that there is not sufficient evidence to establish a relationship between manual labour and Dupuytren's contracture. I prefer their opinion on this point to that of Dr. Remus. Dr. Remus, while relating the worker's Dupuytren's contracture to heavy manual work in this worker's case, did not state his reasons for drawing this relationship and did not address the research literature, which indicates that such a relationship does not exist.

The worker has a history of smoking up to 1991 and consumption of alcohol, at levels that were at least moderate. New research information provided by Dr. McKee links smoking and alcohol consumption with Dupuytren's contracture. This, combined with the research literature indicating that a relationship between manual labour and Dupuytren's contracture has not been shown to exist, persuades me on a balance of probabilities that the worker's manual duties as a carpenter were not a significant contributing factor to the development of his Dupuytren's contracture.

With respect to acute injury, I accept the opinion of Dr. McFarlane, quoted by Dr. de Demeter, and Dr. McKee, that if an acute injury precipitated the onset of Dupuytren's contracture, this would be expected to occur relatively soon after the injury. In this case, the worker stopped working in 1985 and was diagnosed with Dupuytren's contracture in 1988. As noted by Dr. McKee, there is no documented acute injury that could be linked to the onset of Dupuytren's contracture in this case. There is an x-ray that documents a possible fracture of the right little finger in the remote past, but there is no documentation or testimony establishing that the worker suffered such an injury in the course of his employment, and such an event would be too remote in the past to be a significant factor. There is no evidence to link his prior compensable injuries to the development of Dupuytren's contracture.

## DISPOSITION

The appeal is denied. The worker does not have entitlement for Dupuytren's contracture as a result of his work duties as a carpenter or as a result of prior injuries suffered at work.

*Appeal dismissed.*

<sup>1</sup> See the judgments of the Supreme Court of Canada in *Snell v. Farrell*, [1990] 2 S.C.R. 311, and *Laferrière v. Lawson* [1991] 1 S.C.R. 541 per Gonthier J.



## Decision No. 1521/06

Vice-Chair: Kenny

Decision — December 22, 2006

Neutral Citation: 2006 ONWSIAT 3039

**Earnings basis (overtime) – Earnings basis (short-term) – Wages for day of accident – Benefits (payments by employer).**

**Overtime worked by worker on day of accident should be included in determination of whether worker worked overtime in each of four weeks prior to accident.**

The worker suffered an accident on Saturday, August 24, 2002. The employer wanted to ensure that the worker did not sustain a wage loss after he returned to work. It sought advice from the Board about whether overtime worked by the worker before the accident would be included in the Board's calculation of pre-injury average earnings. The Board advised that the overtime would be included. The employer then paid the worker full-time wages plus the equivalent of 13 hours of overtime per week. The Board agreed to reimburse the employer for these advances paid by the employer to the worker.

When reviewing the worker's time sheets for the four weeks prior to the accident, the Board determined that pre-injury earnings would not have included overtime and that, accordingly, the employer was not entitled to reimbursement of advances for overtime. The employer appealed the decision of the Appeals Resolution Officer denying reimbursement of the advances for overtime. The appeal was allowed.

During the month of August 2002, the worker was working voluntary overtime for the employer on Saturdays. He worked overtime on Saturdays August 3, 10, and 17. Before he was injured on Saturday August 24, he worked 12 hours of 13 scheduled hours of overtime. In its original advice to the employer, the Board found that the worker worked overtime in each of the four weeks prior to the accident. However, later the Board determined that the four weeks prior to the accident do not include the day of the accident because the employer is responsible for paying the worker's wages (including overtime) for the day of the accident.

Under s. 53 of the *Workplace Safety and Insurance Act, 1997*, average earnings takes into account the rate per week at which the worker was remunerated at the time of the injury. Under s. 24, the employer is required to pay the worker's wages on the date of the injury as if the accident had not occurred. The Vice-Chair found that a fair reflection of the worker's remuneration would include the number of overtime hours the worker was scheduled to work on the day of the injury. The worker worked overtime on every Saturday in August 2002. The worker's short-term pattern of employment included regular voluntary overtime.

The Vice-Chair concluded that overtime should be included in the worker's short-term earnings basis.

**Base salariale (temps supplémentaire) – Base salariale (court terme) – Salaire pour le jour de l'accident – Indemnités (paiements par l'employeur).**

**Le temps supplémentaire fait le jour de l'accident devait être inclus pour régler la question de savoir si le travailleur avait fait du temps supplémentaire pendant chacune des quatre semaines antérieures à l'accident.**

Le travailleur a subi une lésion le samedi 24 août 2002. L'employeur voulait s'assurer que le travailleur ne subirait pas de perte de salaire après son retour au travail. Il a demandé à la Commission si le temps supplémentaire fait par le travailleur avant l'accident serait inclus dans le calcul



de ses gains moyens d'avant l'accident, et elle lui a répondu que oui. L'employeur a alors payé au travailleur son salaire à plein temps plus l'équivalent de 13 heures de temps supplémentaire par semaine. La Commission a accepté de rembourser l'employeur pour ces avances versées au travailleur.

Quand elle a examiné les feuilles de temps du travailleur pour les quatre semaines antérieures à l'accident, la Commission a déterminé que le temps supplémentaire ne serait pas inclus dans les gains d'avant l'accident et que l'employeur n'avait donc pas droit au remboursement des avances faites sur le temps supplémentaire. L'employeur a interjeté appel de la décision par laquelle le commissaire aux appels refusait de lui rembourser les avances qu'il avait faites sur le temps supplémentaire. L'appel a été accueilli.

Pendant le mois d'août 2002, le travailleur avait fait du temps supplémentaire volontairement pour l'employeur les samedis. Il avait fait du temps supplémentaire les samedis 3, 10 et 17 août. Avant de subir une lésion le samedi 24 août, il avait travaillé 12 des 13 heures de temps supplémentaire prévues pour ce jour-là. Dans sa réponse initiale à l'employeur, la Commission avait conclu que le travailleur avait fait du temps supplémentaire pendant chacune des quatre semaines avant l'accident. Cependant, la Commission avait ensuite déterminé que les quatre semaines antérieures à l'accident n'incluaient pas le jour de l'accident parce que l'employeur devait payer le salaire du travailleur (y compris le temps supplémentaire) pour le jour de l'accident.

Aux termes de l'article 53 de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997), le montant des gains moyens tient compte du taux hebdomadaire auquel le travailleur était rémunéré au moment de la lésion. Aux termes de l'article 24, l'employeur doit verser au travailleur son salaire à la date de la lésion comme si l'accident n'était pas survenu. La vice-présidente a conclu qu'une représentation juste de la rémunération du travailleur inclurait le salaire pour le nombre d'heures supplémentaires qu'il devait faire le jour de la lésion. Le travailleur avait fait du temps supplémentaire tous les samedis d'août 2002. Le profil d'emploi à court terme du travailleur incluait du temps supplémentaire volontaire régulier.

La vice-présidente a conclu que le temps supplémentaire devait être inclus dans la base salariale à court terme du travailleur.

#### **Workplace Insurance Legislation Considered:**

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
  - s. 24(1)
  - s. 43
  - s. 53(1)
  - s. 53(3)

#### **Board Directives and Guidelines Considered:**

- *Operational Policy Manual*
  - Document No. 15-01-08 (June 15, 1999) (since revised)
  - Document No. 18-02-02 (September 14, 1999) (since revised)
- Document No. 18-02-03 (July 7, 2000) (since revised)

APPEAL by the employer from a decision of the Appeals Resolution Officer denying reimbursement for advances of some benefits paid to the worker.

December 22, 2006. THE TRIBUNAL: —

|                           |                                            |
|---------------------------|--------------------------------------------|
| BEFORE:                   | M. Kenny, Vice-Chair                       |
| HEARING:                  | July 20, 2006 at Ottawa, Oral              |
| DECISION(S) UNDER APPEAL: | WSIB ARO decision dated March 30, 2004     |
| APPEARANCES:              |                                            |
| For the worker:           | T. McConnell, Office of the Worker Adviser |
| For the employer:         | A. Cramm, Office of the Employer Adviser   |

## **REASONS**

### **(i) Introduction**

The worker returned to full-time modified work with the accident employer for about nine months after an August 2002 accident.

The employer wanted to ensure that the worker did not sustain a wage loss after he returned to work. It therefore sought the Board's advice about whether the overtime that the worker had worked before his accident would be included in the Board's calculation of the worker's pre-injury "average earnings." The Board advised the employer that the overtime would be included in "average earnings."

The employer therefore paid the worker not only his regular full-time wages, but also an amount that was equivalent to about 13 hours of overtime a week (even though the employer did not have enough modified work for the worker to actually work this overtime).

The employer continued to pay the worker in this manner until the spring of 2003 when it had discussions with the Board about whether the worker's earnings should be recalculated in accordance with the Board's policy for determining long-term average earnings. The Board agreed to reimburse the employer for "advances" paid by the employer (for the "overtime" amounts the employer paid but the worker did not work).

However, after the Board received the worker's time sheets for the four weeks up to, and including, the date of the accident, it changed its position. The Board advised the employer that the Board's calculation of the worker's pre-injury average earnings would *not* have included overtime because the overtime the worker was working on the day of the accident would not be overtime "worked...before the injury." The Board concluded that the employer had "overpaid" the worker, and that the employer was not entitled to reimbursement for advances of "overtime" amounts that the employer paid the worker after the accident.

The employer's representative argued that either the Board was correct when it initially advised the employer the calculation of the worker's pre-injury "average earnings" would include overtime (in which case the Board should reimburse the employer for advances it made), or, if the Board was not correct, the Board should none the less reimburse the employer for more than \$10,000 it paid to the worker as a result of the Board's incorrect advice that overtime would be included in the calculation of the worker's pre-injury average earnings.

## **(ii) The Issue**

The issues to be decided in this appeal are:

1. whether the Board's decision that overtime should be excluded from the worker's short-term loss of earnings (LOE) rate is correct;
2. even if the Board correctly decided that overtime should be excluded in that calculation, whether the employer is entitled to be reimbursed for amounts that it "overpaid" the worker because it detrimentally relied on incorrect Board advice in doing so.

The worker's representative took no position because the worker's benefits were not at issue.

## **(iii) The Decision**

I am satisfied that overtime should have been included in the calculation of the worker's "average earnings" at the time of his 2002 work injury.

## **(iv) The Law and Board Policy**

The worker's accident occurred in August 2002. Thus, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) applies in deciding this appeal.

Section 24 of the WSIA states:

**24(1)** The employer shall pay a worker who is entitled to benefits under the insurance plan his or her wages and employment benefits for the day of the injury as if the accident had not occurred.

Thus, the employer is required to pay a worker for the day of the injury, and the amount of wages the employer is required to pay is calculated "as if the accident had not occurred." Board *Operational Policy Manual* Document No. 15-01-08 states that the wages for the day of the injury include overtime scheduled for the day of the injury.

A worker who has a loss of earnings as a result of a work injury is entitled to loss of earnings benefits under section 43 of the WSIA. In a case such as this where the worker is co-operating in his early and safe return to work, the worker is entitled to LOE benefits in an amount equal to 85% of the difference between his net average earnings before the injury and any net average earnings the worker earns after the injury. Thus, to calculate the amount of LOE payments the Board is required to pay the worker, it is necessary to determine the amount of the worker’s “net average earnings before the injury.”<sup>1</sup>

Section 53 of the WSIA describes how the Board is to determine the amount of a worker’s average earnings. It states:

**53(1)** The Board shall determine the amount of a worker’s average earnings for the purposes of the insurance plan and in doing so shall take into account,

- (a) the rate per week at which the worker was remunerated by each of the employers for whom he or she worked at the time of the injury;
- (b) any pattern of employment that results in a variation in the worker’s earnings; and
- (c) such other information as it considers appropriate.

Section 53(3) provides that the Board shall recalculate the amount of a worker’s average earnings if the Board determines that it would not be fair to continue to make payments on the basis of the determination of average earnings made under section 53(1).

Board *Operational Policy Manual* Documents No. 18-02-02 and 18-02-03 (respectively referred to in this decision as the Board policy on Determining Short-Term Average Earnings and the Board’s policy on Determining Long-Term Average Earnings) set out guidelines for determining the amount of average earnings.

The Board policy on Determining Short-Term Average Earnings states that LOE benefits are paid for the first 12 consecutive weeks of benefits based on the worker’s short-term average earnings. The policy describes how short-term average earnings are to be calculated. With respect to overtime, the policy differentiates between “mandatory overtime” and “voluntary overtime.” The worker in this appeal was working voluntary overtime.

With respect to whether voluntary overtime is included in the calculation of short-term average earnings, the policy states:

Voluntary overtime is included in the short-term average earnings if it is worked in **each of the 4 weeks** before the injury. The amount of overtime included is the average amount of overtime worked in those 4 weeks.

If voluntary overtime is not worked in each of the 4 weeks before the injury, it is considered irregular overtime and is not included in the calculation of short-term average earnings. However, irregular overtime is included in the recalculation of long-term average earnings.

The Board policy on Determining Long-Term Average Earnings provides for the recalculation if a worker’s short-term average earnings do not reflect a worker’s long-term earnings profile. Long-term average earnings are calculated using the worker’s total earnings (including overtime) during a period that is usually 12 months before the accident.

#### **(v) The Worker’s Earnings at the Time of the Injury**

The file contains time sheets showing hours the worker worked before his August 24, 2002 work accident. The time sheets run from Sunday to a Saturday “week ending” date. The time sheets show that the worker’s Saturday hours were considered to be “overtime” hours. The worker’s accident occurred on Saturday August 24 – a day when he was scheduled to work 13 overtime hours. The time sheets show that the worker worked overtime on the following Saturdays:

- |                        |                                                                                          |
|------------------------|------------------------------------------------------------------------------------------|
| 1. Saturday August 24: | Scheduled to work 13 overtime hours. Worked about 12 overtime hours before his accident. |
| 2. Saturday August 17: | Worked 13 overtime hours                                                                 |
| 3. Saturday August 10: | Worked 13 overtime hours                                                                 |

4. Saturday August 3: Worked 9 overtime hours.

5. Week ending Saturday July 27: No overtime hours.

Because the worker also worked some additional overtime hours during the weeks listed above, he averaged 13 hours of overtime per week for the four weeks ending August 3, 10, 17, and 24.

The other time sheets on file indicate that the worker seldom worked that much overtime earlier in 2002.

#### **(vi) The Board ARO's Decision**

The Board ARO decided that, under the Board policy on Determining Short-term Average Earnings, the worker's overtime could not be included in the calculation of "average earnings" unless the worker worked overtime in each of the four weeks before the injury – and that those four weeks do not include the date of the accident because the employer is responsible for paying the worker's wages (including overtime) for the day of the accident.

Although the ARO noted evidence that the employer had only paid the additional 13 hours of overtime per week because of incorrect information/ advice it received from the Board, the ARO decided that this did not constitute exceptional circumstances that gave him the authority to depart from the applicable Board policy in order to remedy this "administrative error." He suggested that the employer's remedy was to ask the worker to repay the benefits that he was not entitled to receive.

#### **(vii) The Findings**

I find that the Board was correct when it initially advised the employer that the calculation of the worker's (short-term) average earnings would include 13 hours a week overtime.

In my view, the Board policy on Determining Short-Term Average Earnings must be interpreted in light of the provisions of both the provisions of the WSIA and other provisions of the policy itself.

The wording of section 53 of the WSIA indicates that the worker's "average earnings" are to take into account the rate per week at which the worker was remunerated by the employer(s) at the time of the injury, and section 24 of the WSIA requires the employer to pay the worker's wages on the date of the injury "as if the accident had not occurred."

Had this worker's accident not occurred, he would have worked 13 hours overtime on the date of the accident. He had, in fact, worked about 12 hours overtime on the date of the accident before he was injured. In my view, a fair reflection of the worker's remuneration per week would include the number of overtime hours he was scheduled to work on the day of his injury. He had been scheduled to work this overtime before the injury occurred and wages for 13 overtime hours on August 24 accurately reflects what his weekly remuneration included when his wages for the day of the injury are calculated "as if the accident had not occurred" (as required by section 24).

In my view, a calculation of short-term "average earnings" that includes 13 overtime hours a week is also a fair reflection of the worker's "pattern of employment" at the time of the injury. He had worked overtime every Saturday in August. The employer's office manager testified that the worker had been doing a lot of overtime work, particularly for one customer. Although that work would have come to an end some time in the future, it had not yet done so. At the time of his injury, his pattern of employment was such that it included regular voluntary overtime, at least in the short-term.

The provisions of the Board policy on Determining Short-term Average Earnings emphasize the importance of determining the regularity of overtime worked by a worker in deciding whether voluntary overtime will be included in short-term average earnings. The policy states that "[v]oluntary overtime is included in the short-term average earnings if it is worked in each of the 4 weeks before the injury."

However, if the ARO's interpretation of the policy is correct, a worker who works voluntary overtime on the same day every week will not have that overtime included in the calculation of "average earnings" if the worker is injured on the day he/she is working overtime – regardless of the obvious regularity of the overtime. In my view, an exclusion of regular overtime from the calculation of such a worker's average earnings would be inconsistent with the objective of the policy itself, that is, the objective of including voluntary overtime if it is worked regularly in the four weeks

before the injury. It would also not fairly reflect such a worker's actual remuneration or pattern of employment at the time of injury.

In this case, I am satisfied that the worker's remuneration at the time of his injury included the overtime he had worked on each of the four Saturdays he worked in August 2002, including Saturday August 24 (the day of his injury).

The worker was therefore entitled to have the average number of overtime hours he worked (13 hours per week) included in the calculation of his short-term "average earnings."

I leave the question of what amounts constitute "advances" paid by the employer for amounts owed to the worker by the Board (i.e., for overtime hours that the worker did not work after his work accident) to the Board to determine.

## **DISPOSITION**

The employer's appeal is allowed.

*Appeal allowed.*

**1 Section 43(3).**



## Decision No. 1782/04

Panel: McCutcheon (Vice-Chair), Robb, Hodgkiss

Decision — January 30, 2007

Neutral Citation: 2007 ONWSIAT 229

### Right to sue – Election (deemed).

**Worker who suffers accident under circumstances in which worker may be entitled to bring action against a third party, is required to elect whether to claim benefits or bring action – There may be circumstances in which it is appropriate to deem a worker to have made an election but mere fact of receipt of workers' compensation benefits is not determinative of whether worker should be deemed to have elected to claim benefits.**

The worker was 20 years old when he suffered burns to 35% of his body in 1992 when a fitting on a machine failed. His mother signed the Form 6. At the time, the worker was not provided with an election form regarding benefits or maintaining an action because the employer did not state that a third party was responsible for the accident. The worker received benefits from 1992 to 1994. In 1995, the worker commenced an action against the Canadian manufacturer of the fitting and a related American company. In 2002, the Board's Senior Legal Counsel wrote to the worker advising that he had received benefits, that his right of civil action was subrogated to the Board, that the Board would not assume the action and that the Board did not consent to the worker continuing the action on his own. The worker appealed the decision of the Board contained in the letter. The appeal was allowed.

If a worker suffers an accident under circumstances in which the worker may be entitled to bring an action against some third party, the worker is required to elect whether to claim benefits or bring an action. Section 9 of the pre-1997 *Workers' Compensation Act*, provides that if an election is not made, the worker is presumed to have elected not to claim benefits. Section 10(7) provides that a parent may make the election for a worker who is under 18 years of age. Section 10(8) provides for an election by a dependent spouse or the Public Trustee if the worker is unconscious.

In this case, the worker did not formally make an election. The worker's mother signed the Form 6, but was not authorized to make the election because the worker was over age 18.

The issue in this case was whether the worker should be deemed to have made an election by virtue of his receipt of benefits.

The Panel stated that the mere fact of receipt of benefits is not determinative of whether a worker should be deemed to have elected to claim benefits. However, there may be cases in which it is appropriate to deem a worker to have made an election. The circumstances of the case must be considered, including the following relevant factors: the worker's age and experience; the nature of the accident; the length of time the worker received benefits; severity of the injury; information received by the worker from the Board; legal advice; complexity of the legal situation; exceptional circumstances.

In this case, the worker was young and inexperienced. The description of the accident in the Form 7 filed by the employer should have triggered the Claims Adjudicator to send an election form to the worker or seek advice from the Board's legal department. The worker received benefits for a fairly lengthy period of time but was unrepresented during that period. When the worker did obtain representation and the representative approached the Board, the Board provided inaccurate information that was relied upon by the worker to his detriment.

In the circumstances, the Panel concluded that the worker should not be deemed to have elected to claim benefits.

### **Droit d'intenter une action – Choix (réputé).**

**Un travailleur victime d'un accident dans des circonstances dans lesquelles il peut avoir le droit d'intenter une action contre un tiers est tenu de choisir de demander des prestations ou d'intenter une action – Il peut être approprié dans certaines circonstances de considérer qu'un travailleur a fait un choix mais le seul fait d'avoir touché des prestations d'assurance contre les accidents du travail n'est pas déterminant relativement à la question de savoir s'il devrait être réputé comme ayant choisi de demander des prestations.**

Le travailleur avait 20 ans quand il a subi des brûlures à 35 % du corps en 1992 quand un raccord de tuyauterie a fait défaut. Sa mère a signé le formulaire 6. À ce moment-là, le travailleur n'a pas reçu de formulaire d'option pour signifier qu'il choisissait de demander des prestations ou d'intenter une action parce que l'employeur n'a pas indiqué qu'un tiers était responsable de l'accident. Le travailleur a touché des prestations de 1992 à 1994. En 1995, le travailleur a intenté une action contre le fabricant canadien du raccord de tuyauterie et une société américaine affiliée. En 2002, le conseiller juridique principal de la Commission a envoyé une lettre au travailleur indiquant qu'il avait touché des prestations, que la Commission était subrogée dans son droit d'action civile, que la Commission ne prendrait pas l'action en charge et que la Commission ne consentait pas à ce qu'il poursuive l'action lui-même. Le travailleur a interjeté appel de la décision de la Commission contenue dans cette lettre. L'appel a été accueilli.

Un travailleur victime d'un accident dans des circonstances dans lesquelles il peut avoir le droit d'intenter une action contre un tiers est tenu de choisir de demander des prestations ou d'intenter une action. L'article 9 de la *Loi sur les accidents du travail* d'avant 1997 (Loi d'avant 1997) prévoit que le travailleur est présumé avoir choisi de ne pas demander des prestations s'il ne fait aucun choix. Le paragraphe 10 (7) prévoit qu'un parent peut faire le choix pour un travailleur de moins de 18 ans et le paragraphe 10 (8) prévoit qu'un conjoint à charge ou un curateur public peut faire le choix pour le travailleur s'il est inconscient.

En l'espèce, le travailleur n'a pas officiellement fait un choix. La mère du travailleur a signé le formulaire 6 mais elle n'était pas autorisée à faire le choix puisque le travailleur avait plus de 18 ans.

La question en litige en l'espèce était la question de savoir s'il fallait considérer que le travailleur avait fait un choix du fait qu'il avait touché des prestations.

Le comité a déclaré que le seul fait de toucher des prestations n'est pas un facteur déterminant relativement à la question de savoir si un travailleur devrait être réputé avoir choisi de demander des prestations. Il peut être approprié dans certaines circonstances de considérer qu'un travailleur a fait un choix. Il faut tenir compte des circonstances entourant le cas, y compris des facteurs pertinents suivants : l'âge et l'expérience du travailleur; la nature de l'accident; la durée du versement de prestations; la gravité de la lésion; les renseignements reçus par le travailleur de la Commission; les conseils juridiques; la complexité de la situation juridique; les circonstances exceptionnelles.

En l'espèce, le travailleur était jeune et inexpérimenté. La description que l'employeur avait donnée de l'accident sur le formulaire 7 aurait dû inciter l'agent d'indemnisation à envoyer un formulaire d'option au travailleur ou à demander conseil à la Direction des services juridiques de la Commission. Le travailleur a touché des prestations pendant assez longtemps mais il n'avait pas de représentant pendant cette période. Quand il a retenu les services d'un représentant et quand le représentant a communiqué avec la Commission, cette dernière lui a fourni des renseignements inexacts sur lesquels le travailleur s'est fié à son détriment.

Vu les circonstances, le comité a conclu que le travailleur ne devait pas être réputé comme ayant choisi de demander des prestations.

#### **Tribunal Decisions Considered:**

- *Decision No. 764/91* (1991), 21 W.C.A.T.R. 348 consd
- *Decision No. 813/91* (July 21, 1992) consd
- *Decision No. 602/94* (1994), 33 W.C.A.T.R. 174 refd to
- *Decision No. 1185/96* (1997), 41 W.C.A.T.R. 257 refd to

#### **Other Decisions Considered:**

- *Choi v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 763 (Fed. C.A.) consd
- *West v. Workplace Safety and Insurance Board* (2005), 78 O.R. (3d) 270 (Ont. Div. Ct.) consd

#### **Workplace Insurance Legislation Considered:**

- *Workers' Compensation Act*, R.S.O. 1990, c. W.11
  - s. 9
  - s. 10(1)
  - s. 10(4)
  - s. 10(6)
  - s. 10(7)
  - s. 10(8)

#### **Board Directives and Guidelines Considered:**

- *Operational Policy Manual*
  - Document No. 02-03-04 (October 1989) (since superseded)

#### **Cross-References:**

- *Decision No. 1782/04I* (March 20, 2006) [2006 ONWSIAT 633]

APPEAL by the worker from a decision of the Board refusing consent to the worker to proceed with a civil action.



January 30, 2007. THE TRIBUNAL: —

BEFORE: R. McCutcheon, Vice-Chair  
C.J. Robb, Member Representative of Employers  
P.B. Hodgkiss, Member Representatives of Workers

HEARING: January 4, 2007, at London, Oral

DECISION(S) UNDER APPEAL: WSIB Senior Legal Counsel A.M. Belanger dated November 27, 2002

APPEARANCES:

For the worker: M. Lamers, Lawyer

For the employer: Not participating

Tribunal counsel: S. Adams

For the WSIB (as *amicus curiae*): Jean-Denis Belec

## REASONS

### (i) Introduction

The appellant seeks to appeal the decision of WSIB Senior Legal Counsel dated November 27, 2002. That decision stated that the WSIB would not consent to the worker proceeding with his civil action commenced in respect of a workplace injury on November 18, 1992. In a previous decision dated June 20, 2000, the WSIB Legal Counsel had concluded that the worker's receipt of benefits from the WSIB was a deemed election pursuant to the Act and the worker's right of action was subrogated to the Board.

Section 10(1) of the pre-1997 *Workers' Compensation Act*, R.S.O. 1990, c. W.11, provides that, where a workplace accident entitles a worker to claim benefits or bring an action against a third party, the worker may either claim benefits or bring such action. Under section 10(4), if the worker elects to claim benefits, then the worker subrogates all rights to the Board in respect of the injury and the Board may maintain an action in the name of the worker.

In this appeal, the worker seeks the right to pursue his civil action against the manufacturer of a part that he alleges was defective and caused his injury on November 18, 1992. This appeal gives rise to two questions:

1. whether the worker did make an election, expressly or implicitly, to claim benefits instead of a court action;
2. if so, whether the worker should be entitled to change his election and permitted to pursue a court action.

As the Panel noted in its interim decision, *Decision No. 1782/04I* (March 20, 2006), the Tribunal retains jurisdiction to hear such appeals from Board decisions for accidents occurring prior to January 1, 1998. For WSIB decisions regarding accidents on or after January 1, 1998, parties must seek judicial review.

### (ii) Background

In April 1992, at the age of 20, the worker was hired by the accident employer as a labourer in a factory setting. He had

completed high school and took on full-time employment to earn money to go to college.

On November 18, 1992, the worker had a workplace accident in which he suffered burns to 35% of his body surface area. On November 21, 1992, the employer filed an Employer's Report of Accidental Injury (Form 7) to the WSIB. The Form 7 described the accident as follows:

A fitting on a hydraulic line fractured allowing hydraulic fluid to reach a hot (1700° F) metal part being formed in the machine. The fluid ignited and the employee was engulfed by a ball of fire, setting his clothing on fire.

The worker was brought to the hospital, where he underwent surgery. He remained in the hospital until December 23, 1992. The worker's mother signed the Worker's Report of Injury (Form 6) on December 21, 1992, while the worker was hospitalized. The form itself was filled out by the employer.

The WSIB accepted the claim and paid benefits. According to the WSIB, the worker was not provided with an election form at the time the claim was filed, because the employer did not state on the Form 7 that a third party was responsible for the accident.

The Panel accepts the sworn statements of the worker and his mother that they were not advised of the statutory requirement for the worker to elect to claim benefits or pursue a civil action, nor did anyone from the Board suggest that the worker seek legal counsel regarding his rights and obligations under the *Workers' Compensation Act*.

The worker received temporary disability benefits from the Board from November 1992 until March 1, 1994. The WSIB terminated the worker's temporary benefits based upon the conclusion that the worker was capable of returning to modified work that was available with the employer. However, the worker chose to pursue a college education, rather than return to work with the accident employer. The worker received approximately \$25,766.62 in temporary benefits. The worker underwent a non-economic loss assessment in August 1995. On December 1, 1995, he was granted a 39% NEL award in the amount of \$28,311.49.

In May 1994, the worker consulted Mr. Lamers' firm with respect to the accident. It took several months for the lawyers to obtain sufficient information to form an opinion as to whether an action against a third party had a reasonable prospect of success. The information gathering process included obtaining files from the Ministry of Labour, which had conducted an investigation into the accident.

In 1995, the worker's counsel commenced an action against a Canadian company (PCA) as the manufacturer of the fitting which had fractured<sup>1</sup>. Subsequently, another action was commenced against PCO, an American company related to PCA<sup>2</sup>.

In its Statement of Defence dated February 9, 1996, PCA pleaded, among other defences, that the worker's action was barred as he had elected to receive WSIB benefits. This issue was raised again during the discoveries that took place in the course of the litigation.

In this regard, the worker's solicitor made inquiries to the Board. On January 7, 1997, Anna-Maria Castrodale, then a lawyer at Mr. Lamers' firm, wrote to the WSIB's head office:

We act as solicitors for [the worker] in connection with an action arising out of the incident which took place on November 18,

1992.

Would you please advise whether, as far as you are aware, [the worker] made an election pursuant to section 9(1) of the *Workers' Compensation Act* to claim compensation pursuant to that Act for the above accident.

A Claims Adjudicator contacted the plaintiff's solicitor by telephone on January 15, 1997. The Claims Adjudicator's memorandum documents the conversation:

- I talked to Anna-Marie Castrodale today
- We discussed her letter of January 7/97
- I advised her that an election was not required in this claim as the accident occurred in Ontario
- I advised her that I have interpreted Section 9(1) of the Act to cover accidents outside of Ontario
- She was satisfied with this information
- I noted that if she requires any further information, we will require a letter from the worker first, indicating she is authorized to act on his behalf.

The worker's claim file demonstrates that his solicitors contacted the WSIB on several subsequent occasions between 1997 and 1999 to request documents from the WSIB. At no time during this period did the WSIB inquire about the status of the legal action to which Ms. Castrodale had referred in her letter.

In 2000, the defendants apparently contacted the WSIB directly regarding the worker's legal action. In a letter dated June 20, 2000, WSIB Senior Legal Counsel wrote to the worker's solicitors, stating in part:

It is quite clear under the statute that a worker must choose to either receive benefits or pursue civil recovery. The receipt of benefits is a deemed election. Given the length of time [the worker] was in receipt of WSIB benefits and the amounts he was paid, his status is clear.

Thus, [the worker] had no authority to retain counsel to pursue an independent law suit in the circumstances. The Board, alone, has the right to maintain a subrogated action. The worker cannot do so without the Board's specific consent.

Please advise whether your firm obtained the Board's consent to initiating this law suit. If so, please forward copies of the relevant correspondence to my attention.

The WSIB's legal department subsequently took the position that the Board alone could authorize the worker's civil action. The WSIB requested documentation regarding the litigation to determine whether it would assume carriage of the action or consent to the worker continuing the action.

On January 28, 2002, the Board's legal counsel set out its decision that it would not assume carriage of the action and did not consent to the worker continuing the action on his own. The Board cited the potential exposure to cost risk as the reason for the decision.

The plaintiff objected to this decision and the Board reconsidered the matter. The Board obtained an independent legal opinion on the merits of the action<sup>3</sup>. In a decision dated November 27, 2002, Senior Legal Counsel confirmed the WSIB's refusal to consent to allow the worker to proceed with this action. That decision stated that it was a final decision of the WSIB regarding the worker's right of action. The worker appeals this decision to the Tribunal.

The Panel addressed preliminary issues in *Decision No. 1782/04I*. The Panel concluded that the Tribunal has jurisdiction over this appeal and that the defendants to the action did not have standing to participate in this appeal. The WSIB, in the role of *amicus curiae*, was given the opportunity to file written submissions. The WSIB filed written submissions dated November 24, 2004.

### **(iii) Law and Policy**

Since the worker was injured in 1992, the pre-1997 *Workers' Compensation Act* is applicable to this appeal. All statutory references in this decision are to the pre-1997 Act, as amended, unless otherwise stated. The hearing of the appeal commenced after January 1, 1998; therefore, certain provisions of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) also apply to the appeal.

Section 10(1) and 10(4) is relevant in this appeal:

**10(1)** Where an accident arising out of and in the course of a worker's employment happens to the worker under such circumstances as entitle the worker or his or her dependants to an action against some person other than the employer, or an executive officer or director thereof, the worker or his or her dependants, if entitled to benefits under this Part, may claim such benefits or may bring such action.

...

**(4)** If the worker or his or her dependants elect to claim benefits under this Act, the employer, if the employer is individually liable to pay it, and the Board, if the compensation is payable out of the accident fund, are subrogated to all rights of the worker or his or her dependants in respect of the injury to the worker and may maintain an action in the name of the worker, or of the Board if the employer is in Schedule 1, or of the employer if the employer is in Schedule 2, against the person against whom the action lies and any amount recovered over and above all amounts expended by the Board or the employer in respect of such claim and action shall be paid to the worker or his or her dependants and any such surplus paid to the worker or his or her dependants shall be deducted from the amount of any future compensation or other benefits to which the worker or his or her dependants may become entitled in respect of the accident that gave rise to the injury.

Section 10(7) and (8) addresses situations where a worker is a minor or mentally incapable of making an election:

**10(7)** If a worker or a dependant is under the age of eighteen years, the election under section (1) may be made on his or her behalf by a parent or guardian or by the Children's Lawyer.

**(8)** If a worker is mentally incapable of making the election under section (1) or is unconscious as a result of his or her injury and no committee has been appointed, the worker's dependent spouse may make such election, but if no election is made within sixty days after the day of the injury, the Public Trustee shall elect on behalf of the injured worker.

Section 10(6) provides:

**10(6)** The election shall be made and notice of it shall be given within the time and in the manner provided by section 9.

Since section 10(6) incorporates section 9 by reference, it is relevant to reproduce section 9, which states:

**9(1)** Where by the law of the country or place in which the accident happens the worker or his or her dependants are entitled to compensation in respect of it, they shall be bound to elect whether they will claim compensation under the law of such country or

place or under this Part and to give notice of such election, and, if such election is not made and notice given, it shall be presumed that they have elected not to claim compensation under this Part.

(2) Notice of the election, where the compensation under this Part is payable by the employer individually, shall be given to the employer and, where the compensation is payable out of the accident fund, to the Board, and shall be given in both cases within three months after the happening of the accident or, in case it results in death, within three months after the death or within such longer period as either before or after the expiration of such three months the Board may allow.

Pursuant to section 126 of the WSIA, the Board stated that the following documents from the *Operational Policy Manual* (OPM) would apply to the subject matter of this appeal:

- #03-01-02 – Definition of an Accident;
- #03-01-02 – Accident in the Course of Employment;
- #08-01-11 – Removal of Costs;
- #11-01-15 – Third Party Rights of Action;
- #11-01-16 – Third Party Motor Vehicle Claim Costs.

In written submissions, counsel for the WSIB referred to OPM Document No. 02-03-04, “Third Party.” That policy states in part:

The Workers’ Compensation Act provides no fault coverage for injuries arising out of and in the course of employment. In most cases, the right of “third party lawsuit” is taken away by Part 1 of the Act. However, a worker may claim compensation under specific circumstances, or pursue a third party claim through the courts.

...

If there is a right of action/recovery against a third party, the worker must elect to claim compensation benefits by signing a Schedule I Election to Claim Under Part 1 of Act, Form 2415A ... This transfers the worker’s right of action against the third party to the Workers’ Compensation Board.

The policy includes an illustration of a completed Election to Claim Under Part 1 of the Act. That election form states in part:

**And** whereas I am called upon to choose whether I will claim compensation under Part 1 of the Workers’ Compensation Act or bring action against Third Party;

**And** Whereas I have commenced no action against, made no claim upon or received any settlement from the said Third Party;

**And** Having Considered the matter, and understanding that (as provided by the said Act) my election to claim compensation under Part 1 of the said Act subrogates transfers, to the **Workers’ Compensation Board** any right or claim I may have against the said Third Party in respect of the said accident;

**I Hereby** Elect to claim compensation for the said accident under Part 1 of the Workers’ Compensation Act.

**And** I Hereby Give Notice of such election.

The form indicates that it will not be accepted unless the claimant’s signature is witnessed.

#### (iv) Discussion and Conclusions

The appeal is allowed. The Panel finds that the worker did not elect to claim benefits in lieu of bringing an action.

There is no dispute that the worker did not formally make an election to claim benefits instead of pursuing a civil action. The execution of the Form 6 by the worker's mother cannot be construed as an election. The Panel agrees with Mr. Lamers' submission that the worker's mother was not authorized to make an election on the worker's behalf, as he was not a minor. If the worker were considered incapable of making an election at the time, then section 10(8) should have been followed. The worker was not given the opportunity to make an election as required by the Act and OPM Document No. 02-03-04.

The main issue is whether the worker should be "deemed" to have made an election by virtue of his receipt of benefits. The Board takes the position that the worker is deemed to have made an election because he received benefits for a lengthy period of time, from November 19, 1992 to March 1, 1994. The Board does not dispute that it did not send an election form to the worker prior to the termination of his benefits, nor was the worker advised to seek counsel. The Panel accepts that the worker was not aware that he had a right of action against a third party; furthermore, he was not aware that he would compromise his right to bring such an action by accepting benefits from the Board.

In *Decision No. 813/91* (July 2, 1992), the Tribunal considered a case where a student worker suffered an accident at work in July 1988, then received benefits from the Board in the summer and autumn of that year. After benefits ceased, the worker brought an action against third parties. In *Decision No. 813/91*, the Tribunal considered whether the worker's right of action was subrogated to his Schedule 2 employer because there was a deemed election to claim benefits. In *Decision No. 813/91*, the Panel characterized the Tribunal's general approach to this issue as follows [at p. 8]:

Prior WCAT decisions have dealt with the election provisions of section 8 [of the pre-1989 *Workers' Compensation Act*] and, generally, panels decide each case on their facts. The fact that a claim has been made or benefits received, is not always evidence sufficient to support a "deemed" election. The circumstances are addressed carefully in each case.

We agree with and adopt this approach. The mere fact of receipt of benefits is not determinative of whether a worker should be deemed to have elected to claim benefits. At the same time, the Panel accepts that there are cases in which it may be appropriate to deem a worker to have made an election to claim benefits, although an election is not formally executed. Rather than relying on a single factor, such as the receipt of benefits, the circumstances of the case should be subject to a multifactorial analysis, in which all the relevant circumstances are considered. In determining whether the worker is deemed to have made an election, the Panel finds it relevant to consider:

- the worker's age and work experience;
- the nature of the accident (this goes to whether the potential liability of a third party would be apparent from the nature of the accident);
- the length of time the worker received benefits from the Board;
- the severity of the injury caused by the accident and how it may affect the worker's ability to consider the legal implications of the receipt of benefits;
- whether the worker received information from the Board which would enable him to make an informed choice to receive benefits;
- whether the worker had the benefit of legal advice following the accident;

- the complexity of the legal situation, for example, the technical nature of assessing the liability of a third party;
- any exceptional circumstances relevant in making a decision on the merits and justice of the case – in this appeal, the Panel finds that the Claims Adjudicator’s advice to the worker’s solicitors in January 1997 is a factor that must be taken into account.

In the Panel’s view, this set of facts is contradictory with finding that the worker made an “election” to claim benefits in lieu of pursuing a civil action. The very notion of an election connotes an element of choice – in the language of section 10(1), a worker who is entitled to an action against a third party “may claim such benefits or may bring such action.” If the worker has no knowledge of the statutory provisions creating that choice, and the consequences of that choice, then he has not made an “election” in any ordinary sense of the word. Mr. Lamers also relied upon the statutory presumption in section 9(1) that a worker who has not filed an election shall be presumed to have elected not to claim compensation.

The Panel finds the conclusions reached in *Decision No. 813/91* [at p. 9] to be applicable here:

The worker was a minor, a teen-ager with, at that time, a limited work history. Without apparently conferring with him or his mother, or advising, or putting the worker or his mother to an election, the Schedule 2 employer filed a report. This was done on the date of the accident, no doubt with the best of intentions. The benefits were paid even as the worker was hospitalized. Given the short time period between the accident and the cessation of benefits, the worker’s age and knowledge, the Panel is not prepared to assume the worker’s failure to stop the cheques was an implicit election to claim benefits.

As stated in WCAT *Decision No. 1123/87*, the purpose of the election under the Act is to be “an effective means of communication between the worker and the Board”, (in this case, the worker and the Schedule 2 employer). For administrative purposes, this communication should be done as soon as possible, and, by section 7(2), within three months of injury, unless expressly extended by the WCB. This worker was not put to his election by the Board, or his Schedule 2 employer, until May 12, 1989. In summary, the Panel cannot conclude that an election, express or implied, was made, as between the worker or his mother and the Ministry, in accordance with the Act. Therefore, the worker’s right to bring an action against the Applicants has not been subrogated to the Ministry.

The Panel notes that Board policy, reproduced above, is silent on the issue of “deemed elections.” The policy states:

If there is a right of action/recovery against a third party, **the worker must elect to claim compensation benefits by signing a Schedule I Election to Claim Under Part 1 of Act, Form 2415A** .... This transfers the worker’s right of action against the third party to the Workers’ Compensation Board. [Emphasis added]

Thus, the policy states that a worker *must* elect to claim benefits by executing the prescribed form. The language of the policy is consistent with the provisions of the Act, particularly the presumption in section 9(1). In the Panel’s view, there is nothing in this policy document that supports a conclusion that the worker’s passive receipt of benefits ought to be construed as a deemed election.

The Panel notes that the causation of the accident was a complex issue and was the subject of an investigation by the Ministry of Labour. The worker was not a party to the Ministry of Labour’s investigation and was apparently not directly notified of the results of the proceedings. The worker heard about the Ministry of Labour’s investigation from others and then sought legal advice in May 1994. It took the worker’s solicitors several months to obtain the Ministry of Labour’s files. It then took his solicitors several months to determine whether the worker had a viable action against a third party. In the Panel’s view, the complexity of the situation weighs in favour of a finding that the worker did not make an election to claim benefits,

because he did not have a sufficient understanding of the legal situation to make an informed decision.

The Panel finds the decision of the Divisional Court in *West v. Workplace Safety and Insurance Board*, (2005) 78 O.R. (3d) 270, to be instructive. In that decision, the Divisional Court considered the plaintiff's application for judicial review of a WSIB decision that he had elected to claim benefits under the Act, and the Board would not permit him to pursue a civil action. The decision describes the factual background as follows [at paras. 1-15]:

The applicant Marvin West ("Mr. West") is and on May 23, 2002 was an employee of Hydro One.

On that day, Mr. West was seriously injured during the course of his employment when he plummeted approximately 30 feet to the ground after the platform/bucket in which he was standing separated from a boom arm.

The next day, on May 24, 2002, Hydro One submitted an Employers' Report of Injury (Form 7) to the Workplace Safety and Insurance Board ("WSIB") containing the following:

Worker injured his low back when the upper boom on the timberjack broke causing the bucket and worker to fall . . .

...

Inexplicably, despite reading the information provided on the face of Form 7 prepared by Hydro One, the WSIB primary adjudicator did not recognize that Mr. West's injuries might have been caused, at least in part, by someone or something other than Hydro One or one of its employees. Specifically, he did not consider the manufacturer of the boom. He did not forward the Form 7, as he should have done, to WSIB legal services for consideration of a potential third party claim.

We note that as of October 10, 2001, Form 7 had been amended to require the employer (in this case, Hydro One) to disclose the name and address of any manufacturer/supplier of any object, material or equipment that may have caused or contributed to a worker's injury. The Form 7 completed by Hydro One and forwarded to the WSIB was outdated. Hydro One did not provide the required information to the WSIB.

Nevertheless, information that should have alerted the adjudicator to the possibility of a third party action had been included on Form 7. The WSIB adjudicator should have recognized that the manufacturer of the timberjack/boom arm may have caused or contributed to Mr. West's injury.

As the result of the WSIB adjudicator's failure to recognize the existence of a possible third party claim and of Hydro One's failure to use and properly complete the required Form 7, the WSIB required procedure where a possibility of third party involvement exists was not followed. Where they have recognized the potential of a third party claim, WSIB claims adjudicators are required to refer the file to WSIB legal services to consider sending an election form to the injured worker.

...

Instead of referring the matter to Legal Services, the WSIB forwarded a Form 6 to Mr. West on May 29, 2002 when he was still in hospital. That form contained nothing to alert him to the possibility of a third party claim. When he signed it, he had not been alerted to its possible significance or to his need for legal advice.

Well after he signed Form 6, on or about September 10, 2002, Mr. West spoke to lawyers about the accident for the first time. They investigated the merits of a possible third party claim and advised him of the relative advantages of a third party suit versus receiving funds pursuant to the Act. He learned for the first time that suing the boom manufacturer could potentially be much more



beneficial than collecting WSIB benefits. The materials before the court disclose a possible differential of \$50,000 per year over Mr. West's working life expectancy of more than 20 years.

After receiving legal advice, Mr. West decided he wanted his lawyers to commence an action against the manufacturer of the boom arm on his behalf.

Mr. West's solicitors then advised the Board that they intended to bring an action. Senior Legal Counsel subsequently advised that the worker had been deemed to have elected to claim benefits and was precluded from bringing any legal action. In finding that Mr. West did not elect to claim benefits, Sanderson J. reasoned, for the court [at paras. 20-24]:

In argument, counsel for Mr. West submitted that he has never elected to receive WSIB benefits, as he never received an election form or was advised (a) that he could be giving up significant rights (*e.g.*, the right to sue a third party and his right to make the decisions regarding that lawsuit); (b) that he should obtain legal advice, *inter alia*, regarding the relative advantage of receiving benefits under the Act versus tort damages in a lawsuit allowed under the Act against a third party.

We agree. In all the circumstances here, we are of the view that the Board made a patent and reversible error in deciding that Mr. West's receipt of benefits constituted a "deemed election". In all the circumstances here, the WSIB should have forwarded the election form to Mr. West and alerted him of the need for legal advice, given the potential importance of the election. At the time he signed Form 6, Mr. West had no idea that by receiving benefits pursuant to the Act he might be deemed to have forfeited a right that could result in much greater compensation.

The injured worker in *Decision No. 813/91*, like Mr. West, had not been advised of his right to choose between suing a third party or claiming WSIB benefits. He received benefits and later learned of a right to sue. In that case, the worker commenced an action in tort, the defendant tortfeasor challenged his right to sue, submitting that receipt of WSIB benefits had extinguished it. The Workers' Compensation Appeals Tribunal held that as the worker's receipt of benefits had been uninformed, his receipt of benefits should not be deemed to constitute an election of WSIB benefits and/or a rejection of his right to sue a third party.

While in some circumstances, a worker who has received legal advice and who has fully understood the effect of accepting benefits might be properly held to have forfeited his right to sue a third party (*i.e.*, where he has deliberately made an informed choice to accept one of two options), the facts here cannot and do not support a conclusion of "deemed election".

We are therefore of the view that the Board committed reversible error in holding that Mr. West's receipt of benefits in all the circumstances here could constitute a "deemed election".

The Panel finds that the foregoing reasoning is fully applicable to the facts of this appeal. The Form 7 in this case indicated that "a fitting on a hydraulic line fractured," leading to the worker's burn injuries. As in the *West* case, this description of the accident should have triggered the Claims Adjudicator to send an election form to the worker or seek advice from the legal department. When the worker received benefits, he had not been informed of his right to choose between suing a third party or claiming benefits from the Board.

Counsel from the Board argued that *Decision No. 813/91* was not relevant, as the worker in that case was a minor. However, the Panel finds that this factor is not determinative, as illustrated by the *West* case, in which there is no indication that Mr. West was a minor. The WSIB also submitted that the worker was not entirely unsophisticated at the time. The Panel has found as a fact that the worker was young and relatively inexperienced at the time of the accident. In the Panel's view, it was incumbent upon the Board to recognize that the fact situation could trigger an election. Regardless of the worker's level of sophistication, the Board was in a better position than the worker to recognize that there was a potential right of action against a third party.

The worker in this case did receive temporary benefits for a lengthier period of time than was the case in *Decision No. 813/91* and the *West* decision. It appears that the worker did not have any form of representation throughout the period of his receipt of temporary benefits. In addition, the Panel has considered this factor in light of the severity of the worker's injuries. In this case, the worker suffered severe burn injuries which required hospitalization for over a month. In view of the severity of the injury, the Panel finds it was not unreasonable for the worker to have accepted benefits until March 1994. Furthermore, the Panel is satisfied that the worker received these benefits in good faith without any knowledge of his possible right of action against a third party.

The Panel finds that the length of time the worker received benefits must also be considered in the context of his relative youth and work inexperience at the time of the accident. Furthermore, as discussed above, the Panel is persuaded that the worker did not understand the legal consequences of his acceptance of benefits.

The Panel notes that, in this case, the worker underwent a NEL assessment in August 1995 and received a NEL award in December; therefore, he accepted benefits from the WSIB after he had retained counsel in May 1994. It is arguable that the receipt of benefits after retaining counsel could give rise to a deemed election. Arguably, after retaining legal counsel, he could no longer assert that he was unaware of his rights and responsibilities under the Act. This was not raised specifically by the WSIB in its written submission. In any event, the Panel finds that the timing of the worker's receipt of the NEL benefit does not lead to a conclusion that the worker should be deemed to have elected to receive benefits in lieu of his right to sue, in view of the events that took place thereafter.

As noted above, the worker's solicitors wrote to the WSIB in January 1997 to inquire as to whether the worker had made an election pursuant to section 9 of the Act. That letter noted that the solicitors represented the worker in connection with an "action" arising out of the incident which took place on November 18, 1992. The Board was thereby put on notice that the worker was pursuing a civil action.

The adjudicator in the claim, instead of referring the matter to the WSIB's legal department, advised the worker's solicitors that an election was not required. Counsel for the WSIB argued that the Claims Adjudicator responded correctly to the solicitor's question, since she referred to section 9(1), which refers to out-of-province accidents. The WSIB argues that the solicitor asked the wrong question. The Panel is unable to accept this argument. Section 10(1) of the Act provides that a worker who has a right of action against a third party may elect to claim benefits or bring such action. However, the election process is set out in section 9. Section 10(6) specifically incorporates section 9 by reference: "The election shall be made and notice of it shall be given within the time and in the manner provided by section 9." Therefore, the solicitor's reference to an election under section 9(1) was not incorrect – a worker with a right of action against a third party is required to make the election pursuant to the terms of section 9 of the Act.

Even if the question were considered to be framed incorrectly, the worker's solicitors, through their January 1997 correspondence, had put the WSIB on notice that the worker was pursuing an action. The worker's solicitors specifically advised the WSIB that they represented the worker in an "action" arising out of the incident of November 18, 1992. Despite this information, the WSIB allowed the worker to carry on with the litigation, incurring the associated costs, for three years. The worker's solicitors also requested information from the Board on several occasions between 1997 and 2000.

Mr. Lamers argues that estoppel by conduct applies in these circumstances. Mr. Lamers relied in particular upon *Decision*

No. 602/94 (1994), 33 W.C.A.T.R. 174, and *Choi v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 763 (C.A.). In the *Choi* case, the Federal Court of Appeal considered a situation where the applicant inquired how to apply for permanent residence as an independent immigrant. The visa officer provided a pre-application questionnaire (PAQ) but failed to advise the applicant that a formal application for permanent residence could be made immediately. The applicant filed the PAQ, but in the meantime, the occupational demand for the applicant's skills was reduced and he consequently did not obtain sufficient units for the issuance of a visa. In allowing the appeal, the Federal Court of Appeal did not consider the matter in terms of estoppel, but stated [at paras. 13-14]:

...[A]t the very least, when the Canadian Government, through its agents, undertakes to supply information to immigration applicants as to how to become immigrants, it assumes a duty to provide this information accurately. This does not imply that Canadian authorities must provide a detailed exegesis of Canadian immigration law and procedures, or legal advice to prospective immigrants as to the legal significance of the available options, but it does mean that the Immigration Authorities have an obligation in fairness to provide basic information on the methods of application, and to make available the appropriate forms.

Fairness may, perhaps, require no more than the accurate presentation of information. But it surely demands that much. For governments, as for ordinary people, honesty is the best policy.

The Panel finds these fairness concerns to be equally applicable in the facts of this case. It is unnecessary to find that the constituent elements of estoppel by conduct have been met. The Panel does find, however, that the WSIB provided inaccurate information that the worker relied upon to his detriment and that the WSIB did not treat the worker fairly<sup>4</sup>.

The issue is not with the question posed by the worker's lawyer, but rather, the Board's response to it. The worker's lawyer asked if the worker had made an election. The Claims Adjudicator responded that an election was not required. Implicit in that answer is that he had not made such an election. At that time, the Board had all the information required to provide an accurate response to the question. Where the Board has advised the worker that no election had been made, it is unfair to then, three years later assert that the Board had "deemed" him to have made an election.

The issue in this appeal is whether the worker should be deemed to have made an election to receive benefits, when he did not in fact formally execute an election. Considering all of the circumstances, the Panel finds that the worker should not be deemed to have elected to claim benefits.

Counsel for the Board argued that "the statutory presumption at section 9 of the Act that a worker has not elected to claim benefits if the election is not returned in 3 months has no application in light of the fact that benefits were paid until March 1, 1994." The WSIB cites no authority for this proposition. The Panel agrees that the statutory presumption may be construed as rebuttable, but there is no authority for concluding that a section of the applicable statute may simply be ignored because the worker accepted benefits in a situation where the WSIB did not inform him of his right to make an election.

Counsel for the WSIB also cited several Tribunal decisions that are distinguishable from the facts of this case. In *Decision No. 764/91* (1991), 21 W.C.A.T.R. 348, the Tribunal addressed a case where a worker was struck by a vehicle in the employer's parking lot after she had finished her shift. She received temporary benefits for an extended period following the accident. Approximately 10 months after the accident, she executed an election form, in which she elected to receive compensation benefits in lieu of pursuing a civil action. Subsequently, the worker sought to re-elect to pursue a civil action. The Board denied the worker's request. In denying the worker's appeal from this decision, the Panel stated in *Decision No. 764/91* [at p. 362]:

In our view, the facts of this case indicate an implicit election by the worker to claim compensation benefits for the accident on February 24, 1988. This implicit election was formalized approximately 10 months after the accident by the execution of a written notice of election. Section 8(6) of the Act requires that a worker must make an election in order to receive compensation and must give notice of the election in accordance with s. 7. In our view, it follows that the worker's request for compensation benefits, whether accompanied by a written document or not, amounts to an election. Receipt of compensation payments and retention of benefits is further evidence of an election.

The foregoing comments must be read in the context of the facts of *Decision No. 764/91*. The worker in that case formally executed an election to claim benefits and there was no evidence that she was not aware of the implications of the choice she was making. She was seeking to change the formal election that she had made. The Panel finds that the Panel's comments regarding an implicit election must be read in light of the facts of that case.

The Board also relies upon *Decision No. 1185/96* (1997), 41 W.C.A.T.R. 257. In that case, the injured worker sought legal advice and gave notice of action within one week of the accident. She then filed a statement of claim and received compensation benefits for several months. The worker then attempted to elect to pursue her action rather than receive benefits. The Board refused to allow the worker to re-elect. In denying the worker's appeal, the Panel stated that it "must be persuaded that Ms. Thorogood's [the plaintiff/worker] judgment was so clouded as a result of her accident and injuries that she was in a substantially different position than other workers injured in the course of employment, who receive benefits which are deemed to be an election upon receipt." The facts of that case are clearly distinguishable, as the worker in that case promptly received legal advice and commenced an action within a week of the accident.

Several Tribunal decisions have acknowledged concerns about allowing workers to "flip flop" between electing to receive compensation benefits and electing to proceed with a civil action. The Panel recognizes that this is a legitimate concern, particularly in cases such as *Decisions No. 764/91* and *1185/96*, where workers seek to change their explicit elections or have received legal advice before accepting any benefits.

In this Panel's view, however, there is a corollary policy concern about a stringent rule to deem a worker to have relinquished his common law rights when he has not been apprised of his rights and responsibilities under the Act. It is evident from the facts of this appeal that there was a general lack of knowledge about the potential for a third party action and the consequences of the worker's acceptance of benefits. In the circumstances of this case, the Panel finds that the worker should not be prejudiced by the Board's lack of recognition of his potential right of action, nor should the worker be prejudiced by the incomplete and inaccurate information provided by the Board in 1997.

Accordingly, the Panel concludes that the worker did not elect to receive benefits. His right of action is not subrogated to the Board. As a consequence of this decision, the Board has no jurisdiction to control or curtail the worker's pursuit of his action.

Given this finding, it is unnecessary for the Panel to consider whether the Board erred in its decision not to permit the worker to continue with his action.

## DISPOSITION

The appeal is allowed. The worker did not elect to claim benefits under the Act. Therefore, section 10(4) of the Act does not apply.

*Appeal allowed.*

1 The plaintiff initially named the distributor of the part (TFS) as a defendant. The action as against TFS was later abandoned.

2 As noted in the Panel's interim decision, plaintiff's counsel has stated that they are only pursuing the action against PCO (the American company) as it was the manufacturer of the allegedly defective products. The plaintiffs do not intend to pursue the action against PCA.

3 Apparently this legal opinion was not disclosed to the worker's counsel until the WSIB made its written submissions in this proceeding.

4 The Panel notes that it has been held that estoppel cannot operate to interfere with the determination of parties' statutory rights under the Act. See, for example, *Decision No. 715/01* (January 29, 2003). However, those facts are distinguishable; in this case, estoppel is not being argued to interfere with the application of the statute. The statute is silent on the issue of "deemed elections."



## Decision No. 382/06

Panel: E. Smith (Vice-Chair), Christie, Hodgkiss

Decision — January 25, 2007

Neutral Citation: 2007 ONWSIAT 200

**Employer (construction) – Independent operator (construction) – Worker (contract of service).**

**Interdependence of integration of business activities is not conclusive of an employment relationship – In circumstances, installers used by subcontractor had to perform the installations personally, but were still found to be independent operators and not workers of the subcontractor.**

A manufacturer of kitchen cabinets sold cabinets to developers. The manufacturer used installation leaders to arrange for the installation of the cabinets to be done by individual installers. This hearing concerned the appeal by one of the installation leaders from a decision of the Appeals Resolution Officer finding that the individual installers were workers of the leader and not independent operators. The appeal was allowed.

Court decisions have found that interdependence or integration of business activities is not conclusive of an employment relationship. It must be determined whether the business activity of a subcontractor is sufficient to constitute a business in its own right notwithstanding its interdependence with the business activity of the principal.

The installers in this case owned their own vans and paid their own insurance and vehicle expenses. They also owned their own tools and bought their own supplies. They were paid on a piecework basis by the job. They set their own hours and worked when they pleased. They had the right to use helpers if they wanted. However, the contract with the installers was for personal service, that is, they were expected to do the job personally. They could not send someone else to do the job in their place without permission.

The Board provided a construction industry questionnaire to a number of the installers whose status was in issue. There was some variation in the answers and they were not always easy to understand. However, based on the questionnaires, the Panel found that the installers would be considered to be independent operators.

The questionnaires are a helpful tool but they are not Board policy. Therefore, the Panel considered also the jurisprudence and the Board policy to see if the analysis based on these other factors is consistent with the result of the questionnaires. The Panel found that it was consistent. An important factor in the jurisprudence is ownership of the vehicle and tools and investment in supplies. Board policy also identifies ownership of assets in addressing the concept of profit and loss. The

one important factor that weighs against independent operator status is the fact that the installers were expected to perform the work personally. There is court jurisprudence that gives considerable weight to this factor. However, while the requirement for personal service is strongly suggestive of an employment relationship, it is not conclusive. The Panel was of the view that there are instances in which persons may be in business for themselves and may, at the same time, offer a service in which personal performance is important or essential.

The Panel concluded that the installers of this leader were independent operators and not workers.

**Employeur (construction) – Exploitant indépendant (construction) – Travailleur (contrat de service).**

**L'interdépendance ou l'intégration des activités commerciales n'indique pas de façon concluante l'existence d'un lien d'emploi – En l'espèce, les installateurs utilisés par le sous-traitant devaient effectuer l'installation personnellement mais ils ont quand même été déclarés être des exploitants indépendants et non des travailleurs du sous-traitant.**

Un fabricant d'armoires de cuisine vendait des armoires à des promoteurs immobiliers. Le fabricant avait recours à des dirigeants d'installation qui faisaient installer les armoires par des installateurs autonomes. Un des dirigeants d'installation a interjeté appel d'une décision dans laquelle le commissaire aux appels a conclu que les installateurs autonomes étaient ses travailleurs et non des exploitants autonomes. L'appel a été accueilli.

La jurisprudence des tribunaux indique que l'interdépendance ou l'intégration des activités commerciales n'indique pas de façon concluante l'existence d'un lien d'emploi. Il faut déterminer si l'activité commerciale d'un sous-traitant est suffisante pour constituer un commerce à part entière malgré son interdépendance avec les activités commerciales de l'entrepreneur principal.

Les installateurs en l'espèce possédaient leurs propres camions pour lesquels ils payaient les assurances et les dépenses. Ils possédaient aussi leurs propres outils et achetaient leurs propres fournitures. Ils étaient payés à la tâche. Ils fixaient leurs propres heures de travail et travaillaient à leur rythme. Ils pouvaient avoir recours à des assistants s'ils le voulaient; cependant, leur contrat avec les dirigeants d'installation étaient des contrats de travail personnel, c'est-à-dire qu'ils étaient censés faire le travail personnellement. Ils ne pouvaient pas envoyer quelqu'un d'autre à leur place sans permission.

La Commission a fait remplir un questionnaire pour l'industrie de la construction par plusieurs installateurs dont la situation d'emploi était en question. Les réponses obtenues comportaient certaines variations et n'étaient pas toujours faciles à comprendre. Cependant, compte tenu des questionnaires, le comité a conclu que les installateurs étaient des exploitants indépendants.

Comme les questionnaires sont utiles mais ne constituent pas une politique de la Commission, le comité a aussi examiné la jurisprudence et la politique de la Commission pour voir si l'analyse fondée sur ces autres facteurs était compatible avec les résultats des questionnaires. Le comité a conclu que cette analyse était compatible. Un facteur important dans la jurisprudence est la propriété du véhicule et des outils ainsi que les investissements en fournitures. La politique de la

Commission considère aussi la propriété de l'actif lors de l'examen des profits et des pertes. Le facteur important pour lequel les installateurs n'avaient pas été déclarés des exploitants indépendants était qu'ils étaient censés faire le travail personnellement. La jurisprudence de tribunaux donne beaucoup de poids à ce facteur. Cependant, bien que l'exigence de service personnel semble fortement indiquer un lien d'emploi, il ne s'agit pas d'un facteur concluant. Le comité a estimé qu'une personne peut dans certaines situations être à son compte et offrir un service dans le cadre duquel l'exécution personnelle est importante ou essentielle.

Le comité a conclu que les installateurs de ce dirigeant d'installation étaient des exploitants indépendants et non des travailleurs.

#### **Tribunal Decisions Considered:**

- *Decision No. 773/89* (March 2, 1992) consd
- *Decision No. 652/93R* (2000), 56 W.S.I.A.T.R. 1 consd
- *Decision No. 355/95* (December 20, 1999) consd
- *Decision No. 934/98* (November 30, 2000) [2000 ONWSIAT 3346] consd
- *Decision No. 271/03* (May 1, 2003) [2003 ONWSIAT 1020] consd
- *Decision No. 805/03* (June 19, 2003) [2003 ONWSIAT 1402] consd
- *Decision No. 807/03* (November 3, 2004) [2004 ONWSIAT 2271] consd
- *Decision No. 938/03* (January 6, 2004) [2004 ONWSIAT 15] consd
- *Decision No. 1720/03* (April 2, 2004) [2004 ONWSIAT 633] consd
- *Decision No. 117/04* (September 27, 2004) [2004 ONWSIAT 1992] consd
- *Decision No. 56/05* (February 18, 2005) [2005 ONWSIAT 424] consd

#### **Other Decisions Considered:**

- *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (2001), 204 D.L.R. (4th) 542 (S.C.C.) consd
- *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 3 F.C. 553 (Fed. C.A.) consd
- *Joey's Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, [2001] N.B.J. No. 222 (N.B. C.A.) consd

#### **Workplace Insurance Legislation Considered:**

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
  - s. 141(2)

#### **Board Directives and Guidelines Considered:**

- *Operational Policy Manual*
  - Document No. 01-02-03 (June 19, 1992) (since superseded)
  - Document No. 12-01-03 (January 31, 2001) (since superseded)
  - Document No. 08-01-09 (June 4, 1997) (since superseded)

#### **Cross-References:**

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

APPEAL by a subcontractor from a decision of the Appeals Resolution Officer finding that installers used by the subcontractor were workers and not independent operators.

January 25, 2007. THE TRIBUNAL: —

BEFORE:

E.J. Smith, Vice-Chair

M. Christie, Member Representative of Employers

P.B. Hodgkiss, Member Representatives of Workers



|                                              |                                                                                                                 |
|----------------------------------------------|-----------------------------------------------------------------------------------------------------------------|
| HEARING:                                     | February 14, 15, 21, 22, 2006, at Toronto, Oral Hearing<br>Post-hearing activity completed on November 16, 2006 |
| DECISION(S) UNDER APPEAL:                    | WSIB ARO decision dated October 23, 2003 (re ABCK inc.)                                                         |
| APPEARANCES:                                 |                                                                                                                 |
| For the employer and the worker MK:          | R. Cronish, Q.C., lawyer.                                                                                       |
| For the Tribunal Counsel Office:             | Marc Delorme                                                                                                    |
| For the other workers/independent operators: | None participating                                                                                              |
| Interpreter:                                 | Andrew Kowakzyk, Polish                                                                                         |

## **(i) Background**

### *(a) The Batch Appeals*

[1] This decision addresses the first of 10 appeals that have been scheduled together as batch appeals. They relate to the business operations of the principal company, CK, which manufactures and sells kitchen cabinets, and of nine of its third party installers (TPIs). In this decision we also refer to the TPIs as D & I leaders (delivery and installation leaders) because that is how they are referred to in the trade. Their role is to arrange for the installation of the kitchen cabinets at the customers' sites. Most customers are developers. The D & I leaders arrange for the installation to be done by individual installers. It is the status of the installers that is in issue.

[2] For clarity, although the TPIs are referred to as delivery and installation leaders, we note that these TPIs do not arrange for the delivery of the cabinets. The principal company, CK, which manufactures and sells the cabinets, arranges for delivery. The truckers who deliver the cabinets to the sites work under contract directly with CK. The Board has granted them independent operator status in part in recognition of the fact that they own their own trucks.

[3] The Board has also recognized independent status for each of the D & I leaders. However, as the result of an audit that took place in the year 2000, the Board found that the installers, and a few of the staff persons of these nine TPIs, were workers, and not independent operators. Therefore the D & I leaders have been granted status as employers, not as independent operators. The auditor added the payments made to these persons to the employer payroll of the D & I leaders, for 1997, 1998 and 1999. It also charged the principal, CK, for the unpaid assessments of the TPI leaders under section 141 (2) of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A. This affected the premiums payable by CK, first, because it became directly responsible for those persons. Secondly, it affected how CK's common costs were allocated between different classifications.

[4] In *Decision No. 1193/04I* (2004), 70 W.S.I.A.T.R. 199, this Panel considered a number of issues related to the impact of the audit on CK. Certain other issues involving CK were deferred.

[5] In hearing days that took place on February 14, 15, 21, and 22, 2006, we considered evidence and submissions about the status of the persons added to the payroll for three of the nine D & I leaders who have appealed: ABCK Inc., UD Inc., and KC. We also considered evidence and submissions about the labour portion of the contracts of those persons, should they be determined to be workers, and as well as the appropriate period for retroactive application of the additions to payroll, for those

three appellants.

[6] The appeals of the other six D & I leaders were deferred until decisions have been issued in these three cases.

[7] This decision addresses the case of ABCK Inc. However, for convenience, we refer to the evidence in the three appeals that were heard together. The evidence of all three appeals assists us in understanding how this industry is structured.

*(b) Background: How the Audit Arose*

[8] We note the particulars of how the audit arose. The Notice of Audit is addressed to the principal company, CK, and dated January 1999. The first date proposed for an audit visit was changed, and the audit visit ultimately took place on March 1, 1999. The ARO who considered the audit results for CK (as discussed in *Decision No. 1193/04I*) used this date as the relevant date for the purposes of determining the retroactivity of the classification changes resulting from the audit. He therefore applied the changes retroactively from January 1, 1997. As discussed in *Decision No. 1193/04I*, under the rules of *Operational Policy Manual* (OPM) Document No. 08-01-09, he found that the changes applied to the current year, of 1999, and to the two prior years, 1998 and 1997.

[9] The Board has applied the same retroactive time period to the TPIs, as applicable to the addition of the persons designated as workers to their payrolls. However, there is no indication that any separate notice of audit visit was sent to the three TPIs whose appeals are considered here.

[10] The auditor's memo for ABCK Inc. is dated March 31, 2000. The audit letter to the company is dated May 8, 2000, and refers to an audit completed on March 7, 2000.

[11] The auditor's memo for UD Inc. is dated March 8, 2000. The audit letter to UD Inc. is dated April 12, 2000 and refers to an audit completed on March 7, 2000.

[12] The auditor's memo for KC is dated April 28, 2000. The audit letter to the company is dated May 8, 2000 and refers to an audit completed on April 28, 2000.

**(ii) The Appeal of ABCK**

*(a) The Testimony of ML*

[13] The witness ML testified. He is the owner of ABCK Inc. His business is installing kitchen cabinets. The cabinets are sold by the principal company, CK. CK prepares the drawings for the kitchens and sends them to the witness, who arranges for installers to go to the sites and install the kitchens. It is the status of those persons that is the primary issue in this appeal.

[14] The witness testified that he calls the installers and arranges for them to attend to do the work, or they call him, day by day. The installers call in to see if there is work for them. The installers know the price lists. The price lists are based on "box prices" which vary according to the type of kitchen. If there are any reasons to make an exception to the standard price, then that is negotiated.

[15] Installers are responsible for providing their own transportation. This has nothing to do with the witness. He does not

pay a gas allowance. The installers own their own tools. The witness indicated that the tools in his possession are worth about \$7,000 and would be similar to those owned by installers. However, ABCK does not lend tools to installers. They must have their own. If an installer needed a tool, the witness might tell him where to get what he needed and the installer would rent it or buy it.

[16] The agreements between CK and the owner and the owner and the installers are oral. There are no written contracts. There is no union agreement.

[17] The witness testified that he does attend at the site to ensure that the work is properly done. He checks it against CK's plan. The installer has a copy of the plan. It is the witness's duty to check that the kitchen is installed in the right house and in the way that CK requested.

[18] The witness testified that if an installer damaged materials, such as a countertop, he would be responsible for the damage. If the items delivered are damaged, then the installer would inform the witness and CK would be responsible. The witness would pay for whatever was necessary to supply a new item but he would issue an invoice to CK. If extra work were required to fix the situation, he would negotiate that price with the installer. This would occur if, for instance, the floor had not yet been put down in a kitchen and the installer had to raise the level of the cabinets to allow for future insertion of the floor. This would take more time and the witness would negotiate with the installer the price to do this. If there were an error in the drawings, he would expect the installer to discuss it with him before the installer could adjust the design to fix the problem.

[19] The witness testified that he does not have any influence on the schedule. That is up to the customer, who is often a developer. The customer needs the cabinets installed in a sequence that fits in with the other work. Usually, the witness has about 48 hours notice in order to find an installer. If he can't find anybody, he does the work himself. Generally speaking, there is co-operation between the leaders and he can find somebody.

[20] CK has never given the witness directions about what installer to use and has never told him not to use any particular installer. CK does not have the right to tell him not to use an installer.

[21] The kitchen cabinetry is sold with a one-year warranty. ABCK is responsible for servicing the warranty. If the customer damages the cabinetry, it is a different situation. Then repairs may be done by the CK Service Department or, if they are too busy, they might ask the witness to arrange for it. That would involve an additional invoice to CK.

[22] When the work is complete, the customer inspects it and provides a completion certificate. This allows the installer to be paid. The witness sends the completion certificate to CK with his invoice.

[23] The witness testified that he pays the installers weekly, so that they do not have to wait. If they need to take vacation, they talk about it. If an installer doesn't show up for a job, he sends another installer out. There is no discipline imposed. The reason why the installer doesn't show up is important and it may lead the witness to decide not to call the installer again. However, because there is a shortage of installers, he might use the installer again.

[24] The witness testified that all of his installers invoice him for GST. All have GST numbers. This is put on the invoice automatically. It is his practice to make sure that his installers have GST numbers. ABCK does not deduct source deductions

for the installers.

[25] The witness described how he might come to take on a new installer. An installer might approach him and he would talk to him to see how knowledgeable he was and whether he had the correct tools. He would then try him out.

[26] Although the witness was somewhat confused on the point, we understood him to testify that he expected the installers to do the installation personally and not to be in a position to substitute other persons to do the work. We understood from the testimony that any substitution would require approval by the witness. However, the witness did not object if the installer took somebody with him to assist with the work.

[27] The witness clarified that he does not own the trucks used for delivery of the cabinets. CK does. The reference in the audit to him contracting for the trucking deliveries is an error.

[28] The witness testified that all his installers carry disability insurance from a private insurance company. He discusses this with them. He doesn't arrange it for them, and it is their business whether they take it, but to his knowledge, they all have it. On further questioning, he was pretty sure that they all have it, based on conversations with them. If somebody told him that they were unwilling to get private insurance, he did not think he would give them work.

*(b) Testimony at the Board: ML*

[29] Because many of the witnesses who appeared at the Board were no longer available to testify at the Tribunal hearing, the Panel accepted copies of the Board transcript. ML also testified at the Board hearing.

[30] Additional testimony given at that hearing included evidence that his ad is constantly in the paper. He is always looking for new installers. The installers have the right to work for anybody they wish.

[31] The witness testified at the Board that he tried to have his installers register as independent operators with the Board, but failed. He also could not get clearance certificates or questionnaires. He was told that there was a pending process between CK and the Board and that no clearance certificates were being issued. He testified that the Board also refused to accept completed questionnaires. The Board returned any questionnaires that were submitted.

*(c) Testimony at the Board: VS for ABCK*

[32] Two installers testified at the Board for ABCK, although they were not available to testify before the Tribunal.

[33] The first installer to testify was VS. He testified that he did installation work for ABCK. He testified that he has an SUV for use in his business. He takes on work if the price is right. He also works for another contractor, a CK person, doing trade shows. He is paid for that work on an hourly basis. He can refuse work for ABCK and has done so. He does not need permission to take a holiday.

[34] He testified that ABCK pays him a "box rate", but he can negotiate extras. He is responsible for any damage that he does. He has registered his business and has a corporate business number and a GST number. He has a business card that he leaves with customers. He operates under a business name. He testified that he has about \$4,000 to \$6,000 invested in tools. We note that his 2001 tax return, on file, indicates a deduction of \$6,603.91 for supplies.

[35] He testified that ABCK would charge back to him the cost of any mistakes he made. If they did not, he would owe them a favour. He is responsible. He obtains the completion certificate from the customer.

[36] When asked about doing work for other companies, not associated with CK, he was able to refer to having done only one small job for a friend, whom he invoiced for materials only.

[37] He testified that he doesn't hire help. On occasion he has taken somebody with him to work and has paid that person cash.

[38] He has an office where he keeps his books, but he does not see customers there. He considers that he runs his own business. He was not trained by ABCK.

*(d) Testimony at the Board: WM for ABCK*

[39] The second installer to testify for ABCK at the Board was WM. This witness also testified that he was free to work for whomever he pleased. He sets his hours of work with his customers. He estimated that he had about \$4,000 worth of tools and spends about \$400 a month on consumable supplies. He owns his van and is responsible for insurance and maintenance. He is paid a fixed box price for standard installations, but negotiates extras. He did at one time do some work for another contractor, but ABCK has kept him busy generally.

[40] He testified that he understands that he is engaged in his own business. In his own mind, he is not an employee. He understands that he is responsible if he damages anything. He supplies his own materials. He has never been given any instruction or training by ABCK about his work. He works as many days a week as he pleases. He testified that he tells the leader when he wants to go on vacation. He arranges it with the leader on a friendly basis, by talking about it. He thinks he has the right to take an assistant with him to do the work. He testified that if he does service work he is paid an hourly rate.

[41] In order to get paid, he asks the customer to sign a completion certificate. He then invoices the leader. He bills the leader every week. He pays a bookkeeper to keep his records.

[42] He testified that he lists himself as self-employed for income tax purposes. He uses a business name and has a business registration. He has a GST number. He deducts expenses for tax purposes.

[43] This installer was not sure if he would be allowed to send another installer in his place to do the work.

*(e) Post-hearing Materials*

[44] After the hearing, by letter dated September 24, 2006, Mr. ML clarified that he required his installers to have GST numbers in the years in issue.

**(iii) The Appeal of UD Inc.**

*(a) Testimony at the Tribunal: The Owner, MS*

[45] The witness is the owner of UD Inc. His testimony about his business arrangements with his installers was largely similar to the above.

[46] However, he testified that he was not aware of installers hiring casual help to assist them. Unlike the owner of ABCK, he does not ask whether installers have private insurance. He would give an installer work even if he knew they had no private insurance. However, he is not in the habit of asking, especially if the installer is doing work for him only short-term.

[47] If an installer damages materials, he testified that this was a matter of judgement. He might require the installer to use his own time to repair the damage, but choose not to charge him for materials. He has never charged an installer for damaged materials but he knows other leaders who have. He does look personally at about 90% of the jobs done.

[48] The witness was referred to the fact that there is a pay stub on file for MH, which indicates that at one point in time this installer was documented as an employee. He could not explain that fact.

*(b) Testimony at the Board: MS*

[49] This witness testified at the Board about the difficulty finding installers. He has to look for installers himself. He testified that if he doesn't have enough then he has to train them. He has taken trainees out to train them. Half of the trainees don't amount to anything, and the time is just lost. The odd one sticks with it.

[50] He has had some discussions about making arrangements with a skills agency, but nothing has come of that.

[51] He testified that the installer is responsible if the work is done wrong and that his installers charge him GST. However, we note that from the testimony of his nephew, AS, at the Board, AS did not have a GST number. However, we accept that AS was the owner's nephew and may be a special case.

[52] He estimated his own investment in tools at \$4,000 to \$5,000 and that the investment of his installers would be similar.

[53] The witness testified that his installers applied for independent operator status to the Board but were rejected. He did not recall learning that they had been asked for further information, although those requests are on file. We note also that the questionnaires on file are dated 2003, and do not relate to the years in question in the audit.

*(c) The testimony of the witness MH*

[54] This witness testified that he works as an installer for UD Inc. Prior to doing installation work for that company, he had worked as an installer for another company, NC. This company was a franchisee of CK. When he did that work, he had been given an independent operator ID number by the Board. A copy of the correspondence approving this status is on record, dated 1996. He was doing the same work that he now does for UD Inc.

[55] The witness testified that he considers himself free to work for whomever he chooses. He testified that he considered that he was operating his own business. He is able to negotiate what he charges for extras. He does negotiate this before he does the work. He confirmed he has the right to refuse work. He doesn't refuse it if he can help it, because he wants the work. He testified that nobody supervises his work. He knows what he has to do. He follows the floor plan provided. He owns his own tools. If he damaged an item, such as a countertop, he would expect to be charged for it. If there were a

complication that required him to do extra work, he would negotiate for more money.

[56] This witness thought that he would be able to have somebody else do the work in his place, but that he would be responsible for that work. He thought that would be okay. However, he has never sent another installer in his place. A couple of times he has brought a nephew with him.

[57] He testified that he has registered a business. He has cards in the business name. He has registered a partnership with his wife. He thought he did this just after he got independent operator status from the Board, when he worked at NC. He charges GST and has a GST number.

[58] He does work for other contractors, other than UD Inc. However, he didn't think he had done that in 1997, 1998 or 1999. In those years, he was working virtually all his time for UD Inc.

[59] He confirmed that his tax returns show \$58,000 in gross income, but net taxable income of \$30,000. UD Inc. does not make deductions at source. He takes deductions for his work-related expenses, including his van, the office in his house, his tools and supplies. The cost of his tools is estimated on file at \$2,000.

[60] If he wants to go on vacation, he simply tells UD Inc. that he won't be available. He'll do this a couple of weeks in advance, or longer if he knows his plans.

[61] The witness testified that the Board had granted him independent operator status for his work with UD Inc. but this was later revoked.

[62] MH is a brother in law of MS, the owner of UD Inc.

*(d) Testimony of MH before the Board*

[63] MH's testimony before the Board was essentially similar to his testimony at the Tribunal.

*(e) Testimony of AS before the Board*

[64] The owner's nephew, AS, also testified at the Board hearing. He testified that he has worked as an installer for UD Inc. and also for a few other kitchen installation companies. He has done work for competitors of UD Inc. For the last three years, about 60% of his work has been for UD Inc. He has also done work for another company owned by his father.

[65] He testified that he was paid at a box rate but negotiated extras. He was not the one responsible for getting the completion certificate. He did not charge GST, and did not have a GST number, because he did not make \$30,000 in the year. We understand that this is the threshold earnings at which a GST number is required. He testified that he owns a vehicle that he uses for the work, and he has about \$2,000 to \$2,500 worth of tools. He has a business card. He has called around for work. He bills for service work at an hourly rate.

[66] We note that that details of the work arrangement with respect to this witness were slightly different from the testimony of the other witnesses. He was not responsible for the completion certificates and he did not have a GST number.

*(f) Post-hearing Materials*

[67] After the hearing, in a letter dated September 26, 2006, Mr. MS clarified that all his subcontractors had GST numbers in the relevant time period except for the witness AS. However, AS did not work for UD Inc. in the years in question in this appeal. His testimony was provided in order to describe the work arrangements that applied generally to installers.

**(iv) The Appeal of KC**

*(a) The Testimony of Mrs. MK*

[68] The witness, Mrs. MK, is the wife of the owner of that company. Although there was some reference on file to her being a partner in this company, she has not been formally registered as a partner or as an executive officer.

[69] She testified that she works as a bookkeeper for KC. She and her husband also inspect the work of the installers. They generally do this together because if an adjustment is needed to the work, he does the carpentry and she does the touch-ups. They do some work on just about every kitchen they inspect, to bring it up to par. They used to do installation themselves.

[70] The witness testified that in 1997, 1998 and 1999, the company's bookwork took her about four hours a day. The onsite work took about two to three hours per day. She also engaged in some private contract work for another company. She sold the odd kitchen. For those kitchens, she did the drafting, she did the pricing work, and she arranged for the cabinetry. She thought she might have done 10 kitchens a year. Because of her relationship with CK, she was able to get wholesale prices. She also manages some rental units.

[71] We understood that only her bookkeeping and on site work was done on behalf of the company, KC.

[72] The witness noted that many installers working for KC were originally recognized as independent operators by the Board, but that status was then withdrawn. She herself received a letter recognizing her status as an independent operator, but that status was subsequently withdrawn. She applied to the federal tax authorities for a GST number but that was also declined.

[73] This witness had testified before the ARO that if she had arranged for an installer to do work, she expected him to do it personally. She testified that she would have been concerned about liability to the Board if he did not have independent operator status or a clearance certificate, otherwise. However, at the Tribunal hearing, she testified that perhaps it would have been all right for installers to delegate work. However, she was still concerned about liability if someone was hurt and not wearing the proper equipment.

[74] She had no procedures in place to know whether installers took helpers along.

[75] She has never done source deductions for the installers. She completes the tax forms that are now required to report the company's relationship with independent contractors.

[76] She testified that she has had installers who walk out on jobs because they didn't like what they saw when they got to a site. That is a risk she takes with installers. Sometimes if an installer says he wants a certain amount of money to do some



work, she just has to pay it.

[77] She testified that all the installers working for KC have GST numbers. When she wants new installers to do work, she asks if they have a GST number or if they have a business registration. However she didn't know to do that in the early years. She was told that they would be recognized as having their own businesses if they had a helper, and in those days, they all did have a helper. That was because they picked up their own kitchen cabinetry.

*(b) Testimony of Mrs. MK before the Board*

[78] In her testimony before the Board, this witness testified about the turnover experienced with the installers. She testified that there was only one installer working in 2003 who had been with the company in 1999.

[79] Like the witnesses above, she testified that the installers have the right to refuse work. They set their own hours, and do what they like. They are paid per box, but each kitchen is different, and there are extras. They own their own tools. She does not pay mileage. They mostly have cell phones.

[80] At the Board, the witness testified that it was a mandatory rule for her installers to have GST numbers. She expects them to make more than \$30,000 in a year and so it's the law. They have to have one. They charge her GST. She tries to keep tabs on people who want to work. A lot of installers want to work part-time between two or three different companies, and she testified that she would say fine to this arrangement.

[81] The witness testified that she relied on the fact that a number of the installers who worked for her already had Board ID numbers based on their work for other companies. She relied on those ID numbers to mean that she was not required to report them as employees.

[82] She testified that if she discovered an error made by an installer right away, she would consider it his problem. If it was only discovered six months down the road, she would consider it the company's problem. They provide the warranty.

[83] The witness testified about training installers. She recalled that there had been a person trained a year or so prior. He worked with his brother, and so he was not one of the names added to the company's payroll by the Board. He was going to get his own coverage, but it never got to that point, because he went back to Argentina. The witness testified that the problem with training is that the person gets trained and goes somewhere else. She recalled another installer, also, who was originally trained by one of the installers. However we understood that he was trained by the installer, and not directly by the D & I leader.

[84] She testified that she does not deduct for vacations, health tax, income tax, or insurable earnings.

[85] She testified that she and her husband check every job, and fix the work if necessary. They generally do not send the installer back to do the labour, although they could.

*(c) The Testimony of WK before the Board*

[86] The installer WK testified before the Board. He is a brother of the owner of KC. He testified that he considers himself in business for himself. He applied for an ID number at the Board but was turned down. He owns his own tools and estimates

their value at \$3,000. He uses a van for work and also has a private car for his private use. He is paid by the piece. He does not ask permission to take vacation. He is responsible for mistakes. He thought that “sure” he could hire a replacement to do the work. He testified that he has a GST number.

[87] He testified that he was not working for any other companies at the time of his testimony. KC kept him busy. If he does not get work from KC he looks for painting work, or he would start advertising.

*(d) The Testimony of DB at the Board*

[88] A third witness who appeared before the ARO for KC was the installer DB. He testified to similar work arrangements. He estimated he had about \$4000 in tools. He invoiced weekly. He had a GST number. He incorporated his business in January 2002. He was the only installer of KC to testify specifically to having advertised.

*(e) Post-hearing Materials*

[89] After the hearing, in a fax dated September 26, 2006, Mrs. MK clarified that all her installers had GST numbers in the years in issue.

**(v) Law and Board Policy**

[90] We have considered the relevant Court cases and Tribunal jurisprudence first, because they provide background to the factors included in Board policy.

[91] We have then considered the applicable Board policy, as well as the Board’s questionnaire, the use of which is contemplated under that policy. The questionnaire used in this case is the one applicable to the construction industry.

*(a) The Court Cases*

[92] Mr. Cronish refers us to the case of *Wiebe Door Services Ltd. v. Minister of National Revenue*, (1986) 3 F.C. 553. That case addressed whether persons installing doors and repairing overhead doors were independent operators for tax purposes. It set out the fundamental test of “whose business is it”. The Court noted the limitations of earlier tests, some of which addressed the degree of “integration” between the functions of the principal and the contractor. This factor had been given weight in some earlier decisions that used an “organization test”.

[93] The Court stated [at para. 16]:

Of course, the organization test of Lord Denning and others produces entirely acceptable results when properly applied, that is, when the question of organization or integration is approached from the persona of the “employee” and not from that of the “employer”, because it is always too easy from the superior perspective of the larger enterprise to assume that every contributing cause is so arranged purely for the convenience of the larger entity. We must keep in mind that it was with respect to the business of the employee that Lord Wright addressed the question “Whose business is it?”

[94] In *671122 Ontario Limited v. Sagaz Industries Canada Inc.* (2001), 204 D.L.R. (4th) 542, the Court identified the fundamental question to be whether the person is in business on his own account. The headnote states:

In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[95] Therefore the Courts have elucidated that the fact of interdependence or integration of the business activities is not conclusive of the relationship. It must be determined whether the business activity of the subcontractor in question is sufficient to constitute a business in its own right, notwithstanding its interdependence with the business activity of the principal. This is an important consideration in these appeals, because the work of the TPIs and of the installers is integrated.

[96] The status question was further addressed in *Joey's Delivery Service v. New Brunswick (Workplace Health and Safety and Compensation Commission)* (2001), N.B.J. No. 222. In that decision the New Brunswick Court of Appeal found that drivers who made deliveries for a dispatch service were independent contractors. The Court found that the fact that the principal had custody of the customer list was irrelevant to the question of control. The fact that the drivers were required to work exclusively for the principal during their shifts was equally consistent with employment and with an independent operator relationship. The drivers provided their own vehicles, thereby establishing that they had a greater risk of loss and chance of profit than the typical employee. The Court found it significant that the drivers were under no obligation to work exclusively for the principal. The principal had no power to discipline the drivers. No source deductions were made.

[97] The Court referred to the fourfold test set out in previous jurisprudence, of: 1) control; 2) ownership of tools; 3) chance of profit; and 4) risk of loss. The Court described the factors that have been classically referred to in order to define "control" as including: 1) the power to direct the thing to be done; 2) the means by which it will be done; 3) the way it will be done; and 4) directing the time and place it will be done. The Court noted that the third aspect of this control test has been eliminated in modern law, however, and that the test now emphasizes control in the sense of directing the residual "when and where" of the work, as opposed to the manner of its completion. The elimination of the third criterion was necessitated by the fact that today professional employees and other highly skilled workers exercise a great deal of discretion in deciding how tasks are to be performed.

[98] The Court reviewed a number of decisions. Factors discussed as weighing in favour of an employment relationship included a requirement to wear a uniform, to insure that the vehicle was painted in the company's colours, a requirement to buy the vehicle from an associated company, a requirement to use the vehicle only for the business of the principal, or a prohibition from working for others, the fact that licenses or registrations and/or insurance were in the name of the principal, or that records were kept by the principal, whether the contractors were required to be available during specific hours, or whether they were required to keep an insured vehicle in good repair, and the fact that a contractor did not have a business office or telephone.

[99] The evidence indicates that none of these factors apply to the installers in this case.

[100] The Court also discussed a number of criteria supporting independence. It noted that a common feature of the disputed cases is that the work is performed away from the employer's business, resulting in the lack of direct control or supervision. It noted that the factors of "chance of profit" and "risk of loss" are really one. Ownership of tools is important because it signifies that the contractor has invested capital in the enterprise and has more to gain or lose. However the Court indicated that the purchase of tools or equipment alone, without more, is not sufficient to establish status.

[101] On our facts, the installers do work away from the business premises of the TPI, and do own their own vehicles and tools.

[102] The Court also referred to evidence about whether the contractor advertised, as a factor supporting independence. The Court also mentions as relevant the question of whether a substantial portion of income comes from the principal.

[103] The evidence on these points is more mixed, on our facts.

[104] The Court placed particular evidence on several factors. A factor noted as important is the level of capital investment. The Court stated [at para. 84]:

It is much easier to claim status as an independent contractor if capital expenses have been incurred. This is true even if the investment comes in the form of office space within the confines of one's home. In virtually all of the cases involving delivery of goods or passengers, the capital expenditure arises with the driver's purchase of the required vehicle.

[105] The Court addresses the situation in which a contractor works full time for one principal. It stated [at paras. 88-92]:

[T]he classical notion of an independent contractor is a person moving from one job site to another to complete an assigned task and who is available to anyone who will pay for his or her services. That is why it is conceptually difficult to accept that an independent contractor can work full-time for one principal...This is particularly so where the terms of engagement impose an obligation on the worker to be available at specified times.

...[I]f a driver retains absolute control as to when he or she will work and for how long then the proper inference is that the driver is an independent contractor. The inference is a reasonable one since the driver retains the discretion to offer his or her services to other clients as is true of the self-employed.

[106] The Court also addressed the question of substituted service. It stated [at para. 94]:

If the agreement between a driver is such that there is an express prohibition against sub-delegation of work, the proper inference is that it must be an employment relationship. Once again, the notion of "control" comes into play. However, if it is agreed that the worker has an unfettered right to use a replacement or substitute worker, the proper inference shifts to the understanding that he or she is an independent contractor...I would go so far as to say it would take compelling reasons to override that inference.

[107] In the *Joey* case, the evidence was that the drivers were free to sub-delegate work.

[108] On our facts, the installers do retain absolute control over when and where they work and for how long. However, the evidence is less clear on the issue of personal service. These matters are discussed further below.

[109] The Court also addresses the mischief rule: whether the policy objectives of the legislation suggest that it is necessary to find that the contractors are employees. The Court notes that there are advantages, including tax advantages, to independent status. It states:

Is there any reason that this Court should take a paternalistic attitude towards this group of workers? More importantly, can it be argued persuasively that the drivers are bargaining from a position of inequality or that the appellant is somehow exploiting the vulnerabilities of its drivers? I think not...

(b) *Tribunal Jurisprudence*

[110] Mr. Cronish refers us to *Decision No. 773/89* (March 2, 1992), in which the Tribunal found that couriers were independent operators. This decision considered the organization test in the time period during which it was first being developed at the Board, and before the Tribunal was required by the Act to apply Board policy. Therefore it considered the question of status directly, under the common law tests. The Panel considered the method of payment, the ownership and maintenance of equipment, the evidence of control, whether the courier was entitled to employ workers, the processes for recruitment and termination, and the degree of integration.

[111] The Panel found that the couriers participated in the process for establishing rates but the company ultimately set the rates. It found that the couriers negotiated variations in rates when there was a need for them to spend unexpected extra time on a delivery. They supplied their own tools in the form of vehicles and radios. There were not required to accept calls or to work specific hours. They were not required to notify the company about vacation or illnesses or other reasons for declining work. There was no limitation on their ability to work concurrently with other companies. They kept their own business records. These couriers also had the right to substitute others in their place.

[112] The couriers were paid for deliveries based on way-bills at rates that split receipts on a 70%-30% basis. The Panel found that this was a method of payment that was not consistent with employment. It resulted in the couriers sharing in the profit or loss of the company. They might also participate in expanding the business.

[113] The Panel found that, while it was undeniable that the work of the couriers was integrated with that of the courier company, that fact was not a sufficient answer to the question of status. The Panel described the relationship as symbiotic. It found that the courier service in its entirety was a business shared between the couriers and the courier company. The courier company was not an employer.

[114] Mr. Cronish relies on this decision to support his view, as discussed in *Wiebe*, that the “integration” test is not the proper test. We agree with this decision in this respect. However, we note that the facts of *Decision No. 773/89* differ from those of these appeals in two important respects. First, in that case, as in *Joey*, there was a clear finding that the brokers were permitted to substitute service. Secondly, there was, in essence, a profit sharing arrangement between the courier and the courier company, found in the 70%-30% split. Those facts do not apply in these appeals.

[115] In *Decisions No. 355/95* (December 20, 1999), *271/03* (May 1, 2003), and *805/03* (June 19, 2003) the Panel considered the status of truckers. We note that Tribunal decisions have frequently found that truckers who own their own trucks are independent operators, when the parties have structured the relationship on that basis and intend that relationship. This is the case even in the presence of some indicia of dependence. The purchase of a truck involves considerable investment.

[116] In *Decision No. 56/05* (February 18, 2005) the Panel found that information technology specialists were independent operators. This relationship was specified in the contract between the parties. The status was accepted by Revenue Canada. There were no source deductions. The employer did not provide training. The duties and hours of work were set by the customer, and the work was done at the premises of the customer. The specialists were not prohibited from working for other parties. They did not wear a uniform.

[117] In *Decision No. 807/03* (November 3, 2004) the Vice-Chair found that a carpet installer was an independent operator

and not a worker. This status was the clear intention of the parties. The installer was paid a flat rate for installation regardless of the time it took him, and was responsible for unsatisfactory work. Timing of the installation could vary depending on the customer. He owned and maintained his own truck, which he claimed as a business deduction.

[118] We note that the carpet installer was not required to do the work personally and did sometimes pay someone to assist him.

[119] We note that in these last decisions, the level of investment in the vehicle required for the work is analogous to that of the installers in these appeals.

[120] Mr. Cronish has also provided us with a decision of the ARO, Peter Hall, dated October 28, 2005, which provided independent operator status to installers of kitchen cabinets working under contract for competitors of CK. The business described is essentially similar to the business described by the witnesses, above. In that case, also, the installers were paid a small daily vehicle allowance, which was not the case for the installers of these appellants.

[121] We note also a number of cases that have found persons to be workers despite some indicia of independence. In *Decision No. 117/04* (September 27, 2004), a Vice-Chair found that a courier was a worker despite owning his own van. The courier did not own the license. The company had contracted to make WCB payments on his behalf. He was not allowed to expand his route and the company maintained considerable control over his route. In *Decision No. 938/03* (January 6, 2004) a courier was also found to be a worker despite owning his own vehicle. He was required to work exclusively for one employer and to wear a uniform. In *Decision No. 1720/03* (April 2, 2004) a trucker was found to be a worker. His employer paid the expenses on his truck. In *Decision No. 934/98* (November 30, 2000) a taxi driver was found to be a worker despite owning his own vehicle. There was a collective agreement and he was subject to discipline by his employer.

[122] Mr. Cronish also refers us to *Decision No. 652/93R* (2000), 56 W.S.I.A.T.R. 1, which finds that the Tribunal may vary from Board policy in the case of exceptional circumstances.

### *(c) The Board Policy*

[123] The Board has provided us with Board *Operational Policy Manual* Document No. 12-01-03, which took effect April 10, 2003, and is stated to apply to decisions made on or after December 1, 2001. The ARO decisions for these appeals were all issued after the introduction of this policy. The policy in place when the audit was done was Document No. 01-02-03. However it was agreed at hearing that there is no relevant difference between these policies.

[124] OPM Document No. 12-01-03 provides the following definitions of “contract of service” and “contract for service”, which is the basis for the common law distinction between a worker and an independent operator:

#### **General**

A “**contract of service**”, or employer-employee relationship, is one where a worker agrees to work for an employer (payer), on a full- or part-time basis, in return for wages or a salary. The employer has the right to control what work is performed, where, when, and how the work is to be performed.

Workers – those who work under contracts of service – are automatically insured and entitled to benefits if injured at work. In

addition, their employers must pay premiums to the WSIB.

A “contract for service”, or a business relationship, is one where a person agrees to perform specific work in return for payment. The employer does not necessarily control the manner in which the work is done, or the times and places the work is performed.

Independent operators – those who work under contracts for service – are not automatically insured or entitled to benefits unless they voluntarily elect to be considered “workers” and apply to the WSIB for their own account and optional insurance. (See: 12-03-02, *Optional Insurance*.) Independent operators may not be insured through the hiring company’s (payer’s) WSIB account.

[125] In order to determine status, Document No. 12-01-03 states:

The WSIB uses questionnaires (a general questionnaire and six industry-specific questionnaires) to gather information to help determine if a person is employed under a “contract of service”...

The following list compares worker/independent operator characteristics....The seven questionnaires do not necessarily include all the characteristics listed since they are designed to capture key elements of business relationships in specific industries.

Decision-makers consider the statements on the questionnaires, and any other information relevant to the terms and conditions of employment.

|                             | <b>Workers</b>                                                                                                                                                                                                                                          | <b>Independent Operators</b>                                                      |
|-----------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------|
| <b>Instructions</b>         | Comply with instructions on what, when, where and how work is to be done.                                                                                                                                                                               | Work on their own schedule. Does the job their own way.                           |
| <b>Training/supervision</b> | Trained and supervised by an experience employee of the payer.<br><br>Required to take correspondence or other courses.<br><br>Required to attend meetings and follow specific instructions which indicated how the payer wants the services performed. | Use their own methods and are not required to follow instructions from the payer. |
| <b>Personal service</b>     | Must render services personally. Must obtain payer’s consent to hire others to do the work.                                                                                                                                                             | Often hires others to do the work without the payer’s consent.                    |
| <b>Hours of work</b>        | The hours and days of work are set by the payer.                                                                                                                                                                                                        | Work whatever hours they choose.                                                  |
|                             |                                                                                                                                                                                                                                                         |                                                                                   |

|                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                              |
|----------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Full-time work</b>                        | <p>Must devote full-time to the business of the payer.</p> <p>Restricted from doing work for other payers.</p>                                                                                                                                                                                                                                                                                                                                                                                                                     | Free to work when and for whom they choose.                                                                                                                                                                                                                                                                                                                  |
| <b>Order or sequence of work</b>             | <p>Performs services in the order or sequence set by the payer.</p> <p>Performs work that is part of a highly co-ordinated series of tasks where the tasks must be performed in a well-ordered sequence.</p>                                                                                                                                                                                                                                                                                                                       | <p>Performs services at their own pace.</p> <p>Work on own schedule.</p>                                                                                                                                                                                                                                                                                     |
| <b>Method of payment</b>                     | <p>Paid by the payer in regular amounts at stated intervals.</p> <p>Payer alone decides the amount and manner of payment.</p>                                                                                                                                                                                                                                                                                                                                                                                                      | <p>Paid by the job on a straight commission.</p> <p>Negotiates amount and method of payment with the payer.</p>                                                                                                                                                                                                                                              |
| <b>Licenses</b>                              | Payer holds licenses required to do the work.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Person holds licenses required to do the work.                                                                                                                                                                                                                                                                                                               |
| <b>Serving the public</b>                    | <p>Does not make services available except on behalf, or as a representative, of the payer.</p> <p>Invoices customers on employer's behalf.</p>                                                                                                                                                                                                                                                                                                                                                                                    | <p>Has own office. Listed in business directories and maintains business telephone.</p> <p>Advertises in newspapers, etc.</p> <p>Invoices customers on own behalf.</p>                                                                                                                                                                                       |
| <b>Status with other government agencies</b> | <p>Terms of the relationship are governed by a collective agreement.</p> <p>Canada Customs and Revenue Agency either makes no ruling on the person's status, or rules that the person is a worker under the Canada Pension Plan (CPP) and the Employment Insurance Act (EIA). (A ruling is made after the relevant parties complete the form, "Request for a ruling as to the status of a worker under the CPP or EIA".) Collects and pays GST and other applicable taxes on payer's behalf. Payer deducts EI, CPP, insurance,</p> | <p>Terms of the relationship not governed by a collective agreement.</p> <p>Canada Customs and Revenue Agency has made an official ruling that the person is <b>not</b> a worker under the CPP and the EIA.</p> <p>Collects and pays CST and other applicable taxes on own behalf. Takes no deductions from pay for EI, CPP, insurance, income tax, etc.</p> |



|  |                            |  |
|--|----------------------------|--|
|  | income tax, etc. from pay. |  |
|--|----------------------------|--|

[126] Document No. 12-01-03 then discusses the concept of profit and loss opportunities for an individual and directs the decision-maker to consider:

- what assets (labour, materials, tools, and equipment) are used, operated, or put into action when doing the work, e.g., a lathe. These are to be distinguished from assets that are the subject of the work, or that are acted upon in doing the work, e.g., the table leg that is “turned” on the lathe.
- what costs are incurred in doing the work, including:
  - costs of the acquisition, maintenance, operation and repair of assets;
  - financing and loan arrangements with respect to the work; and
  - licensing and insurance fees
- who pays these costs – the employer or the person
- if the person pays the costs, does the person purchase items directly or indirectly from the employer or through an arrangement with the employer.
- what decisions influence the costs and to what extent
- who makes and has the right (legal or otherwise) to make these decisions – the person or the employer
- the market mobility of the person or the demand that exists for these services.

Workers have the right to make decisions that, in comparison to those that the employer makes (or has the right to make), have an insignificant or about equal influence on the workers’ opportunity to make a profit or suffer a loss in doing the work.

Independent operators have the right to make decisions that, in comparison to those that the hiring company makes (or has the right to make), have a significant influence on their opportunity to make a profit or suffer a loss.

[127] Document No. 12-01-03 then sets out other applicable criteria, which it is stated do not, on their own, determine status.

|                                            | <b>Workers</b>                                                                                                                                                                                                                                                                                          | <b>Independent Operators</b>                                                            |
|--------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------|
| <b>Continuing need for type of service</b> | Payer has a continuing need for the type of service that the person provides. A payer has a continuing need for service if all persons who perform such services collectively spend more than 40 hours a month on average doing the work, or if the work continues full-time for more than four months. | Payer does not have a continuing need for the type of service that the person provides. |
|                                            |                                                                                                                                                                                                                                                                                                         |                                                                                         |

|                                                 |                                                                                                                        |                                                                                                                                                                                                                                       |
|-------------------------------------------------|------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Hiring / supervising / paying assistants</b> | Hires, supervises, and pays workers, on direction of the payer (acts as a supervisor or representative of the payer).  | Hires, supervises and pays workers, on own accord and as the result of a contract under which the person agrees to provide materials and labour and is responsible for the results.                                                   |
| <b>Doing work on purchaser's premises</b>       | Payer owns or controls the worksite.                                                                                   | Works away from payer's premises uses own office space, desk, and telephone.                                                                                                                                                          |
| <b>Oral and written reports</b>                 | Required to submit regular oral or written reports to payer.                                                           | Submits no reports.                                                                                                                                                                                                                   |
| <b>Right to sever relationship</b>              | Either the person or the payer can end the work relationship at any time without legal penalty for breach of contract. | Agrees to complete a specific job and is responsible for its satisfactory completion or is legally obligated to pay for damages or loss of income that the payer sustains because of the failure to satisfactorily complete the work. |
| <b>Working for more than one firm at a time</b> | Usually works for one payer.                                                                                           | Works for more than one payer at the same time.                                                                                                                                                                                       |

[128] The earlier policy, OPM Document No. 01-02-03, also included a criteria entitled: "Continuing Relationship". If the individual worked for one party continuously, this was indicative of a worker. If there was no continuous relationship, this was indicative of an independent operator. This criteria is not found in the 2001 policy, but continues as a factor in the applicable questionnaire.

[129] The policy concludes:

The decision-maker reaches a decision about the status of the person when the criteria indicate the person has a separate business that is not integrated into the employer's business. If the decision-maker finds that the:

- person is subject to a high degree of control in doing the work; and
- decisions the person makes have an insignificant effect on the person's own opportunity to earn a profit or suffer a loss,

The person is a **worker** and does not have a separate business, even if a review of "Other applicable criteria" suggests that some independence is afforded the person in the relationship with the employer.

[130] We note that the policy refers to questionnaires, which are used to assist in the application of the policy. The questionnaires do not have status as Board policy, and are merely a tool used in the application of the policy.

[131] The construction industry questionnaire is the questionnaire that is applicable in this case. It is discussed further below.

## (vi) Submissions

[132] Mr. Cronish submitted that the ARO has placed undue weight on the fact that the work of the installers is integrated with the work of the TPIs. He refers us to the case law, above, on this point.

[133] On the question of personal service, he noted that, while the evidence is not entirely consistent, one installer felt sure he would be able to substitute another installer in his place.

[134] Mr. Cronish objected to the fact that the Board requires a determination of status contract by contract. He submitted that it is wrong to do this. The requirement to obtain a status ruling on every contractual arrangement is onerous. It creates a barrier for a person working in an independent business that is not consistent with the nature of that business activity. It implies an assumption that the person is a worker in each new contractual situation, and that it must be re-established each time that he or she is carrying on his own business. Revenue Canada makes a ruling about the business activity in general, and not about the status of each separate contract that a business enters into.

[135] He submitted that when a worker, such as MH, has obtained an ID number as a kitchen installer based on this work for NC, he should not be required to obtain a new ruling on his business status when he starts doing the same kitchen installation work for UD Inc.

[136] Mr. Cronish referred us to the deductions taken on the income tax returns of the installers who have provided those returns. They show business deductions in the range of 24% to 40% of gross income. He referred us to the invoices submitted by the installers to the leaders, indicating how they bill for the jobs done.

[137] He submitted that the completion slips used are analogous to the bills of lading used in trucking cases, which have been recognized as indicia of independence in those cases.

[138] He submitted that the Board questionnaire's use of the threshold of \$900 a week for the contract amount, found in Part 3 of the questionnaire, is inappropriate, especially given the turnover of staff in this industry. He submitted that the fact that the contractors invest in their vehicles and tools indicates independence. The size of the payment made to them is irrelevant.

[139] He submitted that having received the questionnaires from the TPIs' installers, it was improper for the Board to request additional information. The follow up requests by the Board had a chilling effect on the installers, who as a group were reluctant to supply personal tax information to the Board. The CK subcontractors were treated differently in this respect than the contractors of other companies. He submitted that the Board exceeded jurisdiction in asking for this additional information. It was also improper of the Board to refuse to provide questionnaires or to accept questionnaires.

[140] Mr. Cronish also made submissions on the issues of retroactivity and on the labour costs of the contracts which, given our decision, below, do not need to be addressed.

## **(vii) Conclusions**

### ***(a) The Installers of ABCK***

[141] This decision addresses the status of the ABCK installers.

[142] From the evidence, we accept that these installers owned their own vans. They paid their own insurance and vehicle expenses. They owned their own tools. They bought their own supplies. They obtained work assignments by calling the D & I leader a day or a few days in advance, or the leader called the installer. The installer was paid on a piecework basis, by the job. There was a standard price list available, which provided for payment per “box”, based on certain variables in the types of kitchen. The installer invoiced weekly or bi-weekly based on the standard price list. He was paid regularly, within a reasonable time after billing.

[143] The box price increased a few times in the years in issue, but the installers did not negotiate those increases themselves. They did negotiate what they were paid for “extras”, when they needed to do extra work to sort out problems. When that occurred, the installers telephoned their leader and they agreed what would be paid. This happened reasonably regularly. From the evidence, we did not understand it to be an unusual or rare occurrence. The installers were also paid on an hourly basis for service work.

[144] The installers understood that they were free to work when they pleased, and could work as many days a week as they pleased. They were free to take vacations when they wanted, but as a courtesy they let their leader know in advance when they were not available. However, they did not require approval to take vacation.

[145] The installers understood that they were free to accept work elsewhere at any time and were likely do so if they were offered work that paid more.

[146] The installers had the right to take somebody with them as a helper if they wanted to do this.

[147] However, we find that the contract with the installers was for personal service, i.e., that each was expected to do the job personally. We are not satisfied that the installers had the right to send anybody they wanted to do the job in their place, without permission. None of the installers had actually substituted service.

[148] We find it likely that all the installers understood that they were operating their own businesses. They filed their income tax returns as independent businesses. The D & I leader did not deduct income taxes or payroll expenses. From the evidence, the installers were likely to have had small, minimal offices in their homes, where they kept records of income and expenses. They would have taken business deductions on their tax returns, including the costs of the van, tools, supplies, and a deduction for a home office. From the evidence, these deductions likely reduced gross taxable income by 25% to 40%.

[149] Further, in the case of this TPI, the appellant provided evidence that all the installers whose status is in issue were required to have GST numbers.

[150] In addition, some of these installers may have been incorporated, or have registered their businesses, or advertised, or may have worked for more than one D & I leader in the relevant time period. They may also have earned more than \$900 a week. However we cannot assume these last facts, given the lack of specific evidence.

[151] In considering how the policy applies to these facts, we have considered:

1. How the Board’s questionnaire applies to these installers, in the absence of additional specific evidence on the latter points.

2. How Board policy applies, as distinct from the questionnaire. Board policy describes the questionnaire as a helpful tool. It is not described as binding on the status determination. The Board policy itself refers to the relevant criteria in a way that is slightly different from the questionnaire, and which provides for greater flexibility in terms of assigning weight. In considering this question, we have also considered the question of the weight to be given the relevant factors in light of the jurisprudence.

*(b) The Board's Questionnaire*

**1) The Tests Used under the Questionnaire**

[154] The Board provided the construction industry questionnaire to a number of the installers whose status was in issue. This is some variation in the evidence about how the questions were answered. They are not always easy to understand. In some cases the Board did not provide questionnaires, or returned them. The reasons for this are not fully explained on file, but Mr. Cronish attributes it to the nature of the dispute between the Board and TPI's principle, CK. The failure of the Board to obtain or retain the questionnaires offered in those cases makes our job more difficult. It deprives us of the type of factual evidence that the policy contemplates will be obtained by the Board. Not all the installers whose status is in issue can now be located.

[155] This difficulty with the evidence is a reason why we have addressed the evidence related to these three appellants together. As stated above, the broader evidentiary base assists us in understanding how the industry is structured.

[156] However we consider the Board's use of these questionnaires helpful. There are a great many factors involved in a status determination. Without a questionnaire of this type, it would be difficult to be confident that the Board's front line adjudicators were weighing factors in a consistent way. The questionnaire assists in ensuring a degree of consistency in how these factors are approached. Therefore we consider it useful to look first to the questionnaire in our analysis. We have determined what, in our view, would be the proper answers to the questionnaire, based on our assessment of the evidence.

[157] However, we do not find this questionnaire entirely clear or easy to interpret. We are not surprised that there may have been inconsistent and unclear answers given by installers.

[158] Part 5 of the questionnaire addresses who is a worker and who is an independent operator. To be an independent operator, it is necessary for the person to meet the criteria for two out of three parts of the questionnaire: Parts 2, 3, and 4. The questionnaire states that the answer must be "yes" to two of the three following questions:

- In Part 2, four or more questions fall in the "box";
- In Part 3, four answers fall in the "box";
- In Part 4, five or more answers fall in the "box";

[159] The reference to the "box" is a reference to the area of the questionnaire that is shaded in grey, in our files. For each question or group of questions, there is an answer that falls into the grey area.

## 2) Part 2 of the Questionnaire

[160] Turning to Part 2 of the questionnaire we find that, for these installers, 4 answers fall within the box. We find that “no” is the proper answer to the following four questions:

[161] *Hours of Work: Does the individual work the same hours as everyone else who does the same job on site?*

[162] On this point, the hours worked are based on the timing for the kitchen installation that is convenient to the customer. The work is done at the customer’s site. The other persons working on that site are doing different tasks. They are not necessarily working the same hours.

[163] *Order of Work: Is the work scheduled and co-ordinated with the work of others who are hired by the contractor?*

[164] On this point, we note that the work is not scheduled and co-ordinated with the work of persons hired by the D & I leader, but instead with the work activities of the customer.

[165] *Training/Supervision/Discipline: Is the individual trained or supervised by the contractor or by an experienced employee of the contractor?*

[166] On this point we are satisfied that the D & I leader has not engaged in more than minimal training of installers. In most cases, other installers do any training that gets done, because they are the persons on site. Generally, the evidence suggests that the job mobility in the sector is too great for this to be a worthwhile endeavour.

[167] The leader does inspect the installers’ work, and in some cases takes responsibility to bring the installation up to standard. In other cases the leader asks the installers to correct their work. However, in our view the leader does not “supervise” the installers. There is no evidence that the leader took steps as a manager to review, appraise, or improve performance. The leader did not discipline the installers.

[168] *Union Agreement: Are the work activities governed by a collective agreement setting rates of pay, vacation pay, etc.?*

[169] There is no collective agreement.

[170] The “no” answer in the case of each of these four questions places the answer for these installers in the “box” on Part 2 of the form. Therefore this criterion is met.

## 3) Part 3 of the Questionnaire

[171] In our view the evidence does not meet the requirements of Part 3. The criteria requires four answers in the “box”. There are only four questions in this Part. One of the questions is whether the contract is for less than \$900 a week. If the contract is not for at least \$900 a week, an installer cannot meet the criteria established for an independent operator, under this Part.

[172] This is despite the fact that these installers do satisfy the other three criteria of independence set out in this part: they own their own vehicles and tools; there was no evidence that these were financed through the D & I leader; and the leader did

not have the right to make decisions affecting financing payments.

[173] Therefore the questionnaire does not place any weight on the capital investment that these installers have in their vehicles and tools, because the evidence does not establish that the contracts were for \$900 a week. We have discussed this threshold further, below.

[174] Given that the installers cannot meet the criteria of Part 3, but have met the criteria of Part 2, their status under the questionnaire turns on whether or not they meet the criteria of Part 4.

#### **4) Part 4 of the Questionnaire**

[175] The questionnaire requires five answers in the “box” in Part 4. We find that the installers obtain five answers in the “box” in this Part.

[176] We consider the proper answer to be “no” to the following questions:

[177] *Full-Time Required: Does the individual work exclusively for one contractor?*

[178] We note that this question is somewhat contradictory. The initial words suggest that full time work for one contractor is *required*. The detail of the question looks only to what occurs *in practice*. In practice, the installers often work only for one D & I leader at a time, but that is not a requirement of the work. We note also the evidence that there is considerable mobility in this trade.

[179] Given the full context of the question, we have considered the correct answer to this question to be “no”. That answer falls within the box.

[180] *Does the individual work on a work site that is owned or controlled by the contractor?*

[181] There is no dispute that the answer to this question is no, which falls within the box.

[182] *Does the individual need the contractor’s approval to hire, fire or discipline employees? Does the contractor tell the individual to hire others to assist with the work?*

[183] We note that to obtain a “no” answer within the box, it is necessary to answer “no” to both these questions.

[184] The installers do not need approval if they wish to hire help. We have found that they were entitled to bring helpers along on jobs if they wished. We are satisfied that the D & I installer did not have processes in place to even be informed if the installers were bringing helpers to help with the work. There is also no evidence that the leader had authority to tell installers to hire assistants or that this ever occurred.

[185] Therefore the correct answer is “no”, in this respect also.

[186] We had some difficulty interpreting the last question in this Part, but have determined that the proper answer is also “no”. The last question in this section relates to termination. That question is: *Can the individual or the company end the*

*relationship at any time without legal penalty for breach of contract?*

[187] A “no” answer falls within the box. A “yes” answer does not.

[188] We find both the question and the result unclear. For instance, an employee may work under a contract of employment, and may be entitled to damages if the contract is ended early. Those damages would be for breach of the employment contract.

[189] The installers in our case are assigned work job by job. From one point of view, there is no penalty if the relationship is ended abruptly, because there is no ongoing contract, and no breach, beyond the specific job.

[190] Yet it is clear that the installers have truer indicia of independence in this circumstance, than the employee does, even if the answer to the question is yes for the installer and no for the employee. The installers have no right to expect a continuing relationship.

[191] In any event, technically, the answer to this question can be interpreted as “no” even for the installer. The question is whether a penalty would result if the contract with the installer is breached. The installer is hired job by job but, in our view, there is an implicit oral contract for each job for which he is hired. If he went to a job, and was told at the site that the job had been reassigned to someone else, in our view he would be entitled to some payment for that breach. He would likely be able to charge at least for his travel time spent in going to the site. This would be an entitlement arising from the breach of the contractual commitment. Further, if he performs the work negligently, he is responsible for that breach, and could not end the arrangement without “making good” on that work.

[192] Therefore we consider it appropriate for the installers to be provided with a credit within the “box” for this question. We consider that the termination arrangements with respect to their contracts are indicative of independence.

[193] The installers are also entitled to a fifth credit under a subsection of Part 4 of the questionnaire that requires three of five indicia of independence to be established for there to be an answer that falls within the box. However, we are satisfied that the installers have those three indicia:

[194] *From the evidence, they do not invoice the customers on behalf of the TPI. The TPI invoices the customers.*

[195] *Further, in our view, they do not act as a representative of the contractor when serving the general public.*

[196] This last indicia requires some consideration. We note that from the questionnaires on file, a number of the installers themselves were unclear about this question. Many have answered “yes”. However, we must consider what it means to act as a representative of the contractor. Given the nature of these industries, all independent operators act as a representative for the contractor, in one sense. They are subcontracted to do the work contracted by the contractor. However, for the question to have meaning, it must be intended to distinguish between different subcontracting situations. It cannot suggest a “yes” answer in every case, flowing simply from the fact of the subcontract.

[197] We note the situations described in the *Joey* case, in which persons may be presented to the public as acting on behalf of the contractor in the following respects [at para. 97]:



In some cases, the lack of indicia that a worker is carrying on business on his or her own account may be attributable to restrictions that the employer has placed on that worker. The ability of one party to promote his or her business may be diminished by the ability of the other party to exercise greater control over the terms and conditions of the working relationship. One example is workers that are required to present themselves to the public as employees. It should come as no surprise if such workers were classified employees. If someone is told to dress and act like an employee, the control factors points in the direction of an employment relationship. This is certainly true of those who are required, or voluntarily choose, to wear a company uniform. The same holds true for drivers required to market the business of their principal by placing advertisements on the formers' vehicles. The legal reality is that if you are carrying on business in the name of another it is difficult to promote your own.

[198] In our view, the answer to this question should be considered in light of these comments. In this case, we do not consider that the installers serve the general public at all. They work in the context of a complex set of specific contractual relationships that are most commonly part of a development project. We find it unlikely that customers in the construction industry would be unaware that workmen may be independent contractors. Subcontracting is common in the construction field. There is no basis for customers to assume that the installers would be workers of the principal, just because they are doing subcontracted work.

[199] The installers do not wear uniforms or have company markings on their vehicles. Several indicated that they had business cards and at least one testified that he left his card at the worksite so that he could be contacted. There was no evidence that the installers were required to keep confidential the fact of their independent businesses or to present themselves as employees of the TPIs.

[200] These facts are distinguishable from those discussed in the *Joey* case, in which persons were dealing with an “unsuspecting” public in that respect.

[201] *In this case, the installers also had GST numbers.*

[202] Therefore the installers meet three of these five criteria and as result are entitled to a fifth answer in the “box”.

[203] We note that, in addition, there are several other criteria which might be relevant under the questionnaire, if evidence was available. These are whether an installer had a business registration, or whether the installer worked continuously (“year after year”) for one TPI, or whether he earned more than \$900 a week. We do not have specific information for all these installers, with respect to these criteria. However, given our findings, that information would not affect the result under the questionnaire. Based on this evidence, the installers are independent operators under the questionnaire.

### *(c) The Law and Board Policy*

[204] However the questionnaire is not Board policy. Therefore we have also considered the factors set out in the jurisprudence and in the Board’s policy, generally, to see if our analysis of these factors is consistent with this result. We find that it is.

[205] An important factor taken into account in all the jurisprudence is the ownership of the vehicle used in the business, the ownership of tools, and the investment for supplies. The Board’s questionnaire places no weight on these factors if the contract amount is for less than \$900 a week. In those cases, the criteria for independence may be satisfied if the contractor meets the requirements of the questionnaire in other respects, but that factor is disregarded. However, the questionnaire is not

Board policy. The Board policy itself identifies the ownership of assets in addressing the concept of profit and loss. It does not contain the monetary restrictions found in the questionnaire. This matter is also addressed as an important factor in the case law.

[206] We find it reasonable that the Board looks at the extent of the installer's investment in the questionnaire. Further, we find that the contract amount (on a weekly basis) is a reasonable proxy by which to weigh the extent of that investment. If a contractor is required to make a significant investment in his vehicle and tools, in order to work, it is reasonable to expect this to be reflected in the contract payment. The Board's criterion is based on the weekly rate, not annual earnings. Therefore it does not require any significant amount of work to be done under any specific contract. However, it requires that the rate of pay be such as to reflect a certain level of investment.

[207] We do not find it unreasonable that the Board gives significant weight to this factor. However, we note that the Board gives no weight at all to the ownership of tools if the contract is not for this amount. We consider the fact that these installers own their vehicles, and have an investment in tools, worthy of at least some weight, even at a lower weekly charge. This factor should not be entirely disregarded in the questionnaire. We note that it is given weight in Document No. 12-01-03.

[208] We consider the installers' investment in their cars and tools a factor that provides additional support to our finding that the installers are independent contractors.

[209] We also note the evidence that there is significant mobility in this sector. Our finding that these installers are independent contractors is further supported by this factor. We do not have specific information about the job mobility of the individual installers in this case, because of the passage of time. However the evidence suggests that many installers did not work "year after year" for one TPI. This factor also supports our findings.

[210] There is one important factor, however, that weighs against independent operator status for these installers. We must consider what weight is to be given to the evidence that the installers were expected to do the work personally. We find, on the whole, that personal performance was expected. Some of the owners were frank about this. While some witnesses thought they had the right to substitute service, not one had actually done it.

[211] We note that *Joey* gave considerable weight to this factor. We read that decision to suggest that where there is no requirement for personal service, that fact alone strongly suggests that there is no employment relationship. However we do not read that decision to mandate the inverse position: that when personal service is expected, there must be a finding of an employment relationship. On those facts, we read *Joey* to indicate that the requirement of personal service is strongly suggestive of an employment relationship, but is not conclusive.

[212] In our view, there are instances in which persons may be in business for themselves and may, at the same time, offer a service in which personal performance is important or essential.

[213] On the Board's questionnaire, the requirement for personal service is listed in Part 5, as one indicia of worker status, but that inference may be outweighed if sufficient other criteria are met. We consider that weighting appropriate. In this case, we are satisfied the other criteria are met. We note that Document No. 12-01-03 also identifies this factor as one of many factors to be considered.

[214] Finally, we note that in his decision about the status of the ABCK installers, the ARO placed emphasis on the “integration” factor. While we consider this factor relevant, it must be considered in the context of the above jurisprudence. The fact of interdependence between the functions of the TPIs and the installers cannot be relied on to support worker status if other criteria establish that the installers are operating independent businesses. In this case, the other criteria satisfy us that that is the case.

## **DISPOSITION**

[215] The appeal of ABCK is allowed.

[216] The installers added to its payroll in 1997, 1998 and 1999 were independent operators, and not workers.

*Appeal allowed.*

[1](#) Editor's Note: There are no paras. 152 and 153.



## Decision No. 512/06I

Vice-Chair: Silipo

Decision — January 19, 2007

Neutral Citation: 2007 ONWSIAT 164

**Adjournment (illness of representative) – Consequences of injury – Loss of earnings (older worker) – Employment (retirement) (mandatory).**

**Under s. 43(1)(c) of Workplace Safety and Insurance Act, 1997, a 63 year-old worker is entitled to benefits for up to two years after injury – Worker is only entitled to benefits for two full years if none of other sections of s. 43(1) come into play and end benefits earlier – In circumstances, employer had policy of mandatory retirement at age 65 but worker likely would have found employment with a different employer and continued working past age 65 – Worker was entitled to benefits for two full years.**

A cleaner suffered a back and neck strain on February 5, 2001, at age 63. The Board paid LOE benefits until the worker reached age 65 on May 31, 2002. The worker appealed a decision of the Appeals Resolution Officer denying entitlement for a shoulder injury and denying LOE benefits after May 31, 2002.

In a preliminary matter, the Vice-Chair decided to proceed with the hearing of the appeal in the absence of the employer's representative. The hearing had been adjourned once because the employer had not been properly notified. On the day of the rescheduled hearing, the employer's representative called to say he could not attend because he had the flu. In the circumstances, the Vice-Chair proceeded with the hearing but agreed to give the representative a summary of the claim and testimony, and allow the representative to make written submissions.

Evidence did not establish that the worker suffered a shoulder injury in the compensable accident.

Section 43(1) of the *Workplace Safety and Insurance Act, 1997*, provides that a worker is entitled to LOE benefits until the earliest of: a) the day on which the loss of earnings ceases; b) the day on which the worker reaches age 65, if the worker was less than 63 on the date of the accident; c) two years after the injury, if the worker was age 63 or older on the date of the accident; d) the day on which the worker is no longer impaired as a result of the injury.

The employer had a mandatory retirement policy at age 65. The ARO found that the worker was not entitled to LOE benefits after age 65 under s. 43(1)(a) because his loss of earnings resulting from the injury ceased when he was forced to retire at age 65.

The Vice-Chair found that, when read in context, the most coherent interpretation of s. 43(1)(c) is not that it provides for LOE benefits automatically for a full two years after the accident but, rather, that it provides for the possibility of LOE benefits for up to two years after the injury. A 63-year-old worker is only entitled to benefits for two full years if the worker continues to suffer a loss of earnings as a result of the injury and none of the other sections of s. 43(1) come into play to end the benefits earlier.

In this case, the employer had a policy of mandatory retirement at age 65. There is no longer mandatory retirement in Ontario, as of December 12, 2006. However, even prior to that time, there was no law preventing employers from continuing to employ workers past age 65. The Vice-Chair considered the particular circumstances of the worker. He had been employed essentially all his working life as a cleaner. Many aspects of a cleaner's job were light in nature. The worker expressed an intention to work past age 65. The Vice-Chair was satisfied that the worker would have been able to find other employment as a cleaner and continue worker past age 65, although not necessarily at the same wage rate. The Vice-Chair concluded that the worker was entitled to LOE benefits from May 31, 2002 until February 5, 2003, but with the quantum of benefits to be determined by the Board.

The worker raised a constitutional challenge regarding the limitation of benefits to two years after the injury in s. 43(1)(c). If the worker wants to pursue this issue, the hearing will reconvene.

#### **Ajournement (maladie du représentant) – Conséquences d'une lésion – Perte de gains (travailleur âgé) – Emploi (retraite) (obligatoire).**

**Aux termes de l'alinéa 43 (1) c) de la Loi de 1997, un travailleur de 63 ans a droit à des prestations jusqu'à deux ans après la lésion – Le travailleur a droit à des prestations pendant seulement deux ans entières si aucun autre alinéa du par. 43 (1) n'entre en jeu pour mettre fin aux prestations plus tôt – En l'espèce, l'employeur avait une politique de retraite obligatoire à l'âge de 65 ans mais le travailleur aurait probablement pu trouver du travail auprès d'un autre employeur et continuer à travailler après l'âge de 65 ans – Le travailleur avait droit à des prestations pour deux années entières.**

Un nettoyeur a subi une entorse dorsale et cervicale le 5 février 2001, à l'âge de 63 ans. La Commission lui a versé des prestations pour perte de gains (PG) jusqu'à ce qu'il atteigne l'âge de 65 ans le 31 mai 2002. Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels refusait de lui reconnaître le droit à des prestations pour une lésion à l'épaule et à des prestations pour PG après le 31 mai 2002.

Le vice-président a examiné la question préliminaire de savoir s'il tiendrait l'audience en l'absence du représentant de l'employeur. L'audience avait été ajournée précédemment parce que l'employeur n'avait pas été adéquatement notifié. À la nouvelle date d'audience, le représentant de l'employeur a téléphoné pour dire qu'il ne pouvait pas se présenter parce qu'il avait la grippe. Dans les circonstances, le vice-président a tenu l'audience mais il a accepté de lui fournir un sommaire de la réclamation et de lui permettre de déposer des observations écrites.

La preuve n'indiquait pas que le travailleur avait subi une lésion à une épaule lors de l'accident indemnisable.

Le paragraphe 43 (1) de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997) prévoit qu'un travailleur a droit à des prestations pour PG jusqu'au premier en date des jours suivants : a) le jour où la perte de gains du travailleur prend fin; b) le jour où le travailleur atteint l'âge de 65 ans, s'il avait moins de 63 ans à la date où la lésion est survenue; c) le jour qui tombe deux ans après la date où la lésion est survenue, si le travailleur avait au moins 63 ans à cette date-là; d) le jour où le travailleur n'est plus déficient par suite de la lésion.

L'employeur avait une politique de retraite obligatoire à l'âge de 65 ans. Le commissaire aux appels a conclu que le travailleur n'avait pas droit à des prestations pour PG après l'âge de 65 ans aux termes de l'alinéa 43 (1) a) parce que la perte de gains résultant de sa lésion avait cessé quand il a été forcé de prendre sa retraite à l'âge de 65 ans.

Le vice-président a conclu que, dans le contexte, l'interprétation la plus cohérente de l'alinéa 43 (1) c) n'était pas qu'il prévoyait automatiquement des prestations pour PG pendant deux années entières après l'accident mais plutôt qu'il prévoyait la possibilité de prestations pour PG jusqu'à deux ans après la lésion. Un travailleur de 63 ans a seulement droit à des prestations pendant deux années entières s'il continue à subir une perte de gains par suite de sa lésion et si aucun des autres alinéas du paragraphe 43 (1) n'entre en jeu pour mettre fin aux prestations plus tôt.

En l'espèce, l'employeur avait une politique de retraite obligatoire à l'âge de 65 ans. La retraite n'est plus obligatoire en Ontario depuis le 12 décembre 2006. Cependant, même avant lors, il n'y avait aucune loi empêchant les employeurs de continuer à employer des travailleurs après l'âge de 65 ans. Le vice-président a examiné les circonstances particulières au travailleur. Il avait essentiellement travaillé toute sa vie comme nettoyeur. Plusieurs des aspects du travail de nettoyeur étaient de nature légère. Le travailleur a exprimé l'intention de travailler après l'âge de 65 ans. Le vice-président était convaincu que le travailleur aurait pu trouver un autre emploi de nettoyeur et continuer à travailler après l'âge de 65 ans bien que pas nécessairement au même salaire. Le vice-président a conclu que le travailleur avait droit à des prestations pour PG du 31 mai 2002 au 5 février 2003 mais que la Commission devrait déterminer le montant de ses prestations.

Le travailleur a contesté la constitutionnalité de la limitation des prestations à deux ans après la lésion à l'alinéa 43 (1) c). L'audience se poursuivra à une date ultérieure si le travailleur désire maintenir cette contestation.

#### **Workplace Insurance Legislation Considered:**

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
  - s. 43(1)
  - s. 112
  - s. 126

#### **Board Directives and Guidelines Considered:**

- *Operational Policy Manual*
  - Document No. 18-03-04 (October 12, 2004)

APPEAL by the worker from a decision of the Appeals Resolution Officer denying loss of earnings benefits after the worker reached age 65.

January 19, 2007. THE TRIBUNAL: —

BEFORE: A.V.G. Silipo, Vice-Chair

HEARING: May 19, 2006 at Toronto, Oral  
Post-hearing activity completed on October 2, 2006

DECISION(S) UNDER APPEAL: WSIB ARO decision dated September 16, 2004

APPEARANCES:

For the worker: Mr. Richard A. Fink, Barrister and Solicitor

For the employer: Ms. SC, In-house Solicitor

### **(i) Introduction**

The worker appeals the decision of Appeals Resolutions Officer S. Marangoni dated September 16, 2004. That decision concluded that the worker was not entitled to loss of earnings (LOE) benefits beyond May 31, 2002 for a back disablement and was not entitled to benefits for a right shoulder injury.

This appeal was initially scheduled before me on March 14, 2006 at 9:30 a.m. in Toronto. At that time I adjourned the hearing, since the Tribunal had failed to properly notify the accident employer of the hearing. The Tribunal rescheduled the appeal to May 19, 2006 at 9:30 a.m. on an expedited basis.

On the day of the hearing, the accident employer's representative at the time, Mr. David Jamieson, telephoned the Tribunal to advise that he could not attend the hearing because he had the flu. He asked that the Tribunal adjourn the hearing or, alternatively, that the hearing proceed by written submissions.

The worker and his solicitor were present at the hearing. I advised them that I was not prepared to grant Mr. Jamieson's request for an adjournment noting that this was the second time that the hearing had been scheduled. I decided to proceed with the hearing in the employer's absence, and to provide the accident employer's representative with a summary of the worker's claim and testimony by memorandum and give the accident employer an opportunity to make written submissions.

I followed that process. The accident employer provided written submissions through its in house solicitor, Ms. SC. The worker's solicitor provided written reply submissions.

### **(ii) Background**

The worker was employed as a cleaner with the accident employer, a municipality. He has a 10% permanent disability award for a low back injury that he sustained in 1982 or 1983 while working with another employer but had no evident restrictions from that injury.

On February 5, 2001, the worker fell and hit his head on a locker. He was 63 years old at the time. A Claims Adjudicator accepted that the worker sustained cervical and lumbar strains and granted him loss of earning benefits (LOE) benefits until May 31, 2002, when the worker reached age 65.

In February 2003 the worker claimed that he also injured his right shoulder in the February 5, 2001 accident. On March 3, 2003 a Claims Adjudicator denied him entitlement.

The worker objected to both decisions. The ARO denied the worker's objections. The worker appeals to the Tribunal.

### **(iii) Analysis and Conclusions**

On January 1, 1998, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) took effect and applies in this appeal. Pursuant to sections 112 and 126 of WSIA, the Appeals Tribunal is required to apply any applicable Board policy when making decisions. The Board has identified certain policies applicable to this appeal and I have considered them as necessary.

#### ***(a) The Claim for Benefits for a Right Shoulder Injury***

The worker testified that on February 5, 2001, he injured his right shoulder as well as his neck and back. He described the mechanics of the injury. He stated that he was using a wet mop. He stated that the handle on the mop broke and he fell head first onto a locker and struck his right shoulder.

The worker's representative submits that the medical reporting also supports the worker's assertion that he injured his right shoulder on February 5, 2001. He argues that the worker is entitled to benefits for a permanent impairment for that injury. He relies on the following medical reports:

- On April 25, 2001, neurologist Dr. Ross Roussev reported that the worker "has experienced aching and stiffness in the neck and shoulder region."
- On September 13, 2001, rheumatologist Dr. Shelly M. Dunne reported that the worker had pain in his right shoulder radiating into the neck area. She thought that although there was evidence of rotator cuff tear, the symptoms were more compatible with referred pain from the neck.

In my assessment, the evidence does not establish that the worker injured his right shoulder in the February 5, 2001 accident. There is no recorded onset of symptoms until two months later and even then it is limited to aching and stiffness. An MRI done on July 5, 2001 indicated rotator cuff tear. However, in September 2001 Dr. Dunne ascribed the worker's shoulder pain as referred pain from the neck injury. Therefore, both the delay in onset of the worker's complaints and the nature of the right shoulder pain suggest that the worker did not sustain an injury to his right shoulder in his accident of February 5, 2001, or arising from that injury. As a result, that part of the worker's appeal is denied.

#### ***(b) The Claim for LOE Benefits Beyond Age 65***

Section 43(1) of the WSIA, sets out a worker's entitlement to 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.

The applicable Board policy, entitled “Older Workers and LOE Benefits” is set out in *Operational Policy Manual*, Document No. 18-03-04, and essentially reiterates the provisions of the legislation:

## **LAW**

...

If the worker is 63 years of age or older on the date of injury, LOE benefits continue until the earliest of

- the day the loss of earnings ends, or
- the day on which the worker is no longer impaired as a result of the injury, or
- 2 years after the date of injury.

...

## **GUIDELINES**

### **Older Workers**

Workers who are 63 years of age or older on the day of injury are only entitled to LOE benefits for up to 2 years from the date of injury.

The worker’s solicitor submits that section 43(1)(c) of the WSIA entitles the worker to LOE benefits until February 5, 2003, being two years after the date of the injury.

The worker testified that he has worked as a cleaner since 1966 and worked with the accident employer since 1988. He described his duties and indicated that the 10% disability from his previous injury did not affect his ability to perform those duties. The worker tried to return to work in March 2001 but was unable to do so. He remained off work following his doctor’s advice. He testified that he would still be working if he had not injured himself despite being over 65 years old and had thought about continuing to work beyond age 65 before his injury. He stated that he still has pain in his right shoulder if he lifts his right hand.

The ARO interpreted that there is “room for interpretation” between the provision in section 43(1)(c) which allows a worker LOE benefits for two years after the date of injury and the provision in section 43(1)(a) which stipulates that a worker’s LOE benefits end when his or her loss of earnings ends. The ARO reasoned that the worker incurred no loss of earnings after age 65, since he would have had to retire at age 65 regardless of the injury because of the accident employer’s mandatory retirement policy. The ARO also considered the worker’s assertion that he would have found another job after age 65 and reasoned that “one cannot just assume he would have obtained alternate employment.” The ARO concluded that there was “no evidence to suggest he would have obtained a job or had anything lined up when he reached age 65.” The ARO also

reasoned that it was unlikely that the worker would have continued working beyond age 65 given his age, low level of education, lack of transferable skills and previous back injury. The accident employer's solicitor essentially supports the ARO's reasoning and conclusions.

Mr. Fink submits that there is no room for interpretation between the two clauses of section 43(1). He argues that the legislation gives older workers some additional benefits. He also argues that the worker's testimony that he intended to work past age 65 should be sufficient proof since people do work beyond age 65. He also notes that the worker managed to continue working for the accident employer for 14 years with no problems despite the 10% permanent disability from his earlier back injury.

Mr. Fink relies on a March 29, 2006 decision of ARO Mrs. N. Berman relating to another worker. In that decision, ARO Berman concluded that the worker, who was also 63 years old at the time of injury, was forced to take early retirement at age 64. She granted the worker LOE benefits until two years post-injury pursuant to the provisions of section 43(1)(c) of the WSIA.

The possibility of workers receiving LOE benefits past age 65 is a feature unique to the WSIA. I note that there is no provision similar to section 43(1)(c) of the WSIA in the pre-1997 *Workers' Compensation Act* [R.S.O. 1990, c. W.11]. Under the pre-1997 Act, future economic loss benefits, which are the equivalent of the LOE benefits, end when the worker reaches age 65. The WSIA does continue the earlier provision by ending LOE benefits at age 65 for workers who are younger than 63 when they sustain an injury. However, as noted the WSIA also provides that workers who were at least 63 years old at the time of injury may receive LOE benefits for some period beyond age 65.

In my assessment, there is room for interpretation in the provisions of section 43(1), but not for the reasons which the ARO noted. The interpretation which the ARO applied, that the worker no longer had a loss of earnings when he reached age 65 because he had to retire from his employment with the accident employer is too narrow an interpretation of the WSIA as it applies to the facts in this case.

When read in its entire context, the most coherent interpretation of section 43(1)(c) is not that it provides for LOE benefits automatically for a full two years after the injury, but rather that it provides for that possibility up to two years post-injury. A worker who sustains an injury at age 63 or later would only be entitled to LOE benefits for the full two years after the injury if the worker continued to suffer a loss of earnings as a result of the injury and none of the other provisions of section 43(1) had come into play to end entitlement to benefits prior to that date. Entitlement to LOE benefits would end before the two years post-injury even for a worker who was 63 years old at the time of the injury if the loss of earnings ended before that date, pursuant to section 43(1)(a), or if the worker was no longer impaired as a result of the injury, pursuant to section 43(1)(d). Therefore, the way in which the Board has restated the legislative provisions in its policy is correct.

In this case the problem arises in interpreting the relative weight of the individual clauses, and more particularly section 43(1)(a) against section 43(1)(c).

The parties' solicitors have offered two possible interpretations with respect to when the worker's loss of earnings ended. The accident employer agrees with the ARO's interpretation, that the worker no longer had a loss of earnings when he reached age 65, based on the accident employer's mandatory retirement policy. However, that interpretation has to also consider the state of the law in Ontario with respect to employment and mandatory retirement.

There is no mandatory retirement law in Ontario as of December 12, 2006. However, there was no mandatory retirement even previously. Rather, the status of the law in Ontario prior to December 12, 2006 was that it was not a breach of the *Human Rights Code*, R.S.O. 1990, c. H.19, for employers to require their employees to retire at age 65. That meant that employment contracts and collective agreements could, and generally did, specify a retirement age of 65. However, the law as it was then did not prevent employers from continuing to employ workers past age 65 and did not prevent workers from continuing to work past age 65.

In this case, the worker claims that he would have continued working past age 65 had it not been for the compensable injury. Tribunal decisions have generally interpreted that we should not assess the wage loss that an injured worker suffers because of a compensable injury solely in relation to the employment relationship with the accident employer. Rather, we must assess the worker's wage loss in a broader context. As Mr. Fink put it, the question is not just whether the worker could have continued working with the accident employer but whether the worker could have continued working either with the accident employer or with another employer after the age of 65, but for the injury.

In this case, it does not appear to be in dispute, and I find, that the worker had not recovered from the effects of his compensable injury by two years post-injury. Therefore, two years post-injury, on February 5, 2003, the worker was still suffering from the effects of his compensable injury. The remaining question is whether he continued to suffer a loss of earnings up to February 5, 2003. That is a question of fact to be determined in the circumstances of each case. The alleged loss of earnings cannot be theoretical. There must be sufficient evidence upon which to conclude that the worker would have continued working at least until that time, had he not sustained the compensable injury.

At first glance the evidence in support of that assertion appears to be mainly the worker's testimony to that effect. It is always preferable to have other, more objective evidence to support the subjective evidence which the worker's testimony represents. Otherwise, one arguably runs the risk that an older injured worker in similar circumstances could claim benefits until two years post-injury simply by stating that they intended to work past age 65.

I have no reason to question the worker's truthfulness about his stated intention to work past age 65. I also find that there is evidence which supports his assertion, when I consider the nature of the work that he expected to continue doing and his reasons for not looking for such work prior to the time of his injury. I accept his claim that given his many years of experience as a cleaner, not just with the accident employer but also essentially for all of his working life, he likely would have found some work as a cleaner past the age of 65, although that work might not have been as well paying as the work that he had with the accident employer. I also come to that conclusion noting that many of the aspects of a cleaner's job are light in nature and also considering that prior to the February 5, 2001 compensable injury, the worker was able to carry out his duties with the accident employer without modifications despite the 10% permanent disability award from his previous injury. I also find it reasonable that the worker would not have found such work prior to his injury of February 5, 2001, but that it would have been more logical for him to have begun to look for such work when he was closer to his retirement from the accident employer and therefore available for it. When he was injured the worker was a few months short of age 64. He was aware that the accident employer would have required him to retire at age 65. I find it reasonable that the worker would not have looked for other work as cleaner until he was much closer to age 65 and his impending retirement from his employment with the accident employer.

Therefore, there is sufficient evidence upon which to conclude that the worker would have continued working past age 65 if

not for the compensable injury. I make no findings as to how long he would have continued working past age 65 except that I am satisfied that he would have worked at least until February 5, 2003, when his LOE benefits would have ended pursuant to section 43(1)(c) of the WSIA. Therefore, he had a loss of earnings due to the compensable injury when he reached age 65, on May 31, 2002, and that loss of earnings continued until February 5, 2003, two years post-injury. He is entitled to LOE benefits from May 31, 2002 until February 5, 2003 pursuant to section 43(1)(c) of the WSIA.

*(c) The Quantum of the Worker's LOE Benefits from May 31, 2002 to February 5, 2003*

The Board will have to determine the level of the worker's LOE benefits for that period. It is not clear that the worker is entitled to LOE benefits at the same level as he received prior to age 65. The employer's solicitor has also raised the issue of whether the Board can attribute the costs of those benefits to the accident employer.

For the period from May 31, 2002 until February 5, 2003, the worker may or may not be entitled to the same level of LOE benefits that he received before he reached age 65. His benefits may be subject to review based on a material change in circumstances or the Board may decide that it should continue LOE benefits at the same rate as prior to age 65.

In addition, the accident employer may have an argument that the Board should not attribute the costs of the LOE benefits that the worker is entitled to after age 65 to its account since, as its solicitor states, the worker would not have had any further earnings with the accident employer after he reached age 65.

I make no findings about either of those issues and leave them to the Board to determine, subject to the parties' usual right of appeal.

*(d) The Constitutional Challenge*

The worker's solicitor has indicated that the worker intends to challenge the constitutionality of the provisions of the WSIA, which end the worker's LOE benefits either at age 65 or at some specific point after age 65. In this case, I understand that to be a challenge to the provisions in section 43(1)(c) of the WSIA, which end the worker's LOE benefits at two years post-injury.

The worker's solicitor has provided notice of his intent to pursue the constitutional matter to the Attorney General of Canada and to the Attorney General of Ontario, pursuant to section 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. I request the worker's solicitor to confirm that the worker intends to proceed with that challenge. If he does, I will provide procedural instructions to the parties by memorandum.

## **DISPOSITION**

The appeal is allowed in part.

The worker is not entitled to benefits for a right shoulder injury due to his accident of February 5, 2001, or arising from it.

The worker is entitled to LOE benefits from May 31, 2002 until February 5, 2003, pursuant to section 43(1)(c) of the WSIA. The Board shall determine the level of the worker's LOE benefits for that period and any related issues.

The worker is to confirm with the Tribunal his intent to pursue his challenge of the constitutional validity of section 43(1)(c) of the WSIA which limits his entitlement to LOE benefits beyond February 5, 2003. If he does, I will then provide further procedural instructions.

*Appeal allowed in part.*



## Decision No. 1903/01R2

Vice-Chair: E. Smith

Decision — December 29, 2006

Neutral Citation: 2006 ONWSIAT 3072

**Reconsideration (error of fact) – Hepatitis – Evidence (epidemiological) – Benefit of the doubt – Hospital employment (porter).**

### **Hospital porter had entitlement for hepatitis C.**

The worker started working as a porter in a hospital in 1987. He was diagnosed with hepatitis C in 1994. The employer appealed a decision of the Appeals Resolution Officer granting entitlement. In *Decision No. 1903/01*, the Tribunal allowed the employer's appeal and denied the worker entitlement for hepatitis C.

The worker applied for reconsideration of *Decision No. 1903/01*. In *Decision No. 1903/01R*, the Vice-Chair found that the original decision contained two errors: the hearing panel wrongly understood that the worker also had hepatitis B and also that the worker had cirrhosis of the liver. In order to consider what flowed from that finding, the Vice-Chair adjourned the hearing of the reconsideration application in order to obtain a report from a Tribunal medical assessor.

The report of the medical assessor described the evidence as being poorly defined with respect to the risks of health care workers, in the absence of needle stick injuries. However, the assessor identified three factors affecting this worker which could make his risk higher than the general population: 1) he did not always wear gloves in the decontamination room; 2) there was a report from the Ministry of Labour making recommendations for handling of laundry bags that were leaking, spilling and breaking, and which had to be repacked by hand; and 3) at times the worker had minor nicks or scratches, which he did not report.

Based on the errors in the original decision and the new evidence obtained to address the implications of those errors, the Vice-Chair concluded that there was a reasonable probability that the decision would change if the errors were corrected. The application to reconsider was granted.

The Vice-Chair went on to consider the merits of the appeal.

There were some factors weighing against entitlement, such as possible non-compensable risk factors, evidence of low risk workplace exposure and questions about the reliability of the worker's testimony.

There were also factors that supported entitlement, such as the indications of higher risk for this worker than the general population and evidence that health care workers in general have an incidence of hepatitis C that is double or triple the incidence found in the general population in Toronto. Assuming the higher risk relates to persons that are more likely to be exposed to needle stick injuries, the risk for persons such as the worker would still be double that of the general population.

The Vice-Chair considered the evidence for and against entitlement to be approximately equal in weight. Applying the benefit of doubt in favour of the worker, the Vice-Chair concluded that the worker had entitlement for hepatitis C. The employer's appeal from the decision of the Appeals Resolution Officer was dismissed.

### **Réexamen (erreur de fait) – Hépatite – Preuve (épidémiologique) – Bénéfice du doute – Emploi en milieu hospitalier (porteur).**

#### **Un porteur d'hôpital avait droit à une indemnité pour hépatite C.**

Le travailleur a commencé à travailler comme porteur d'hôpital en 1987. Il a reçu un diagnostic d'hépatite C en 1994. L'employeur a interjeté appel de la décision par laquelle le commissaire aux appels reconnaissait le droit à une indemnité au travailleur. Dans la *décision no 1903/01*, le Tribunal a accueilli l'appel de l'employeur en concluant que le travailleur n'avait pas droit à une indemnité pour hépatite C.

Le travailleur a demandé un réexamen de la *décision no 1903/01*. Dans la *décision no 1903/01R*, la vice-présidente a conclu que la décision initiale contenait deux erreurs : le comité d'audience avait faussement compris que le travailleur souffrait aussi d'hépatite B et qu'il avait une cirrhose du foie. La vice-présidente a ajourné l'audition de la demande de réexamen pour obtenir un rapport d'un assesseur du Tribunal afin de pouvoir examiner les conséquences de cette constatation.

Dans son rapport, l'assesseur a décrit la preuve comme mal définie en ce qui concerne les risques auxquels les travailleurs de la santé sont exposés en l'absence de lésions causées par piqûre de seringue. L'assesseur a toutefois identifié trois facteurs pouvant exposer ce travailleur à un risque plus élevé que le reste de la population : 1) il ne portait pas toujours des gants dans la salle de décontamination; 2) il y avait un rapport du ministère du Travail comportant des recommandations au sujet de la manutention des sacs à lessive devant être réemballés à la main à la suite de fuites, de débordements ou de déchirures; 3) le travailleur avait parfois eu de petites coupures ou égratignures qu'il n'avait pas déclarées.

Vu les erreurs constatées dans la décision initiale et les nouveaux éléments de preuve obtenus au sujet des conséquences de ces erreurs, la vice-présidente a conclu qu'il y avait une probabilité raisonnable que la rectification de ces erreurs entraînerait un changement dans la décision. La demande de réexamen a été accueillie.

La vice-présidente a ensuite examiné le fond de l'appel.

Il y avait certains facteurs allant à l'encontre du droit à une indemnité, tels que la possibilité de facteurs de risque non indemnisables, les éléments de preuve indiquant un risque d'exposition peu élevé sur les lieux du travail et des questions au sujet de la fiabilité du témoignage du travailleur.

Il y avait aussi des facteurs militant en faveur du droit à une indemnité, tels que les indications de risque plus élevé pour ce travailleur que pour la population en général et la preuve indiquant que le risque d'hépatite C est deux à trois fois plus élevé pour les travailleurs de la santé que pour la population de Toronto en général. En présumant que le risque plus élevé concernait les personnes plus susceptibles d'être exposées à des lésions par piqûre de seringue, le risque couru par les personnes telles que le travailleur demeurait le double de celui de la population en général.

La vice-présidente a estimé que la preuve à l'encontre et en faveur du droit à une indemnité était à peu près égale. Elle a accordé le bénéfice du doute au travailleur et elle a conclu qu'il avait droit à une indemnité pour hépatite C. L'appel de l'employeur contre la décision du commissaire aux appels a été rejeté.

#### **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
- *Decision No. 473/91* (1994), 32 W.C.A.T.R. 14 consd
- *Decision No. 933/02* (January 25, 2005) [2005 ONWSIAT 195] refd to
- *Decision No. 1386/03* (2004), 71 W.S.I.A.T.R. 95 refd to
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#### **Cross-References:**

- *Decision No. 1903/01* (November 23, 2001) [2001 ONWSIAT 3512]
- *Decision No. 1903/01R* (June 9, 2004) [2004 ONWSIAT 1146]

APPEAL by the employer from a decision of the Appeals Resolution Officer granting the worker entitlement for hepatitis C.

December 29, 2006. THE TRIBUNAL: —

BEFORE: E.J. Smith, Vice-Chair

HEARING: March 9, 2006, at Toronto, Oral hearing  
Post-hearing matters completed on September 12, 2006

DECISION(S) UNDER APPEAL: Worker request for reconsideration of *Decision No. 1903/01* dated November 23, 2001

#### **APPEARANCES:**

For the worker: Mr. W. Devoe, C.U.P.E.  
For the employer: Ms. Carole Hoglund, lawyer

## **REASONS**

### **(i) Background: The Prior Adjudication**



[1] This appeal was formerly the subject of *Decisions No. 1903/01* (November 23, 2001) and *1903/01R* (June 9, 2004). In *Decision No. 1903/01* a prior Panel, including the same Vice-Chair, found that the worker was not entitled to benefits for Hepatitis C. The full factual background of the case is set out in that decision.

[2] The worker requested reconsideration of that decision.

[3] In *Decision No. 1903/01R* I agreed with the worker's representative that there were two errors in the prior decision that arose due to unfortunate confusions in the evidence that was before the prior Panel.

[4] First, the Panel and all parties wrongly understood that the worker had Hepatitis B.

[5] As set out in *Decision No. 1903/01R*, this error arose because medical records included in the Board file were not the medical records of the worker. Therefore the Panel, and the parties, and, from the evidence, the worker himself, approached the issues on the basis of the understanding that the worker had Hepatitis B as well as Hepatitis C. This affected the issue of whether the worker had had relevant exposures prior to working at the employer, because he had been inoculated against Hepatitis B before starting work at the employer.

[6] After the hearing, the worker's Union brought this error to the attention of the Tribunal through the reconsideration request.

[7] The second error was that the prior Panel relied on medical reports on file that the worker had cirrhosis of the liver. This was not the case.

[8] I note that reference to the worker having cirrhosis is contained in three different medical records on file: the report of Dr. Maghami, dated May 4, 2000; the report of the psychiatrist Dr. T. Turner dated September 12, 1997; and the application for Canada Pension Plan (CPP) disability benefits dated April 17, 1998, filled out by the worker's family doctor, Dr. Aviz. Dr. Aviz lists Hepatitis C (active) with liver cirrhosis as the first diagnosis of the worker in the forms completed for CPP.

[9] Both the Board and the Tribunal had made extensive efforts prior to the original hearings to obtain the liver biopsy report from the worker's specialist, which would have provided the physical findings behind this diagnosis. However, those attempts were unsuccessful. The prior Panel relied on the medical reports that the worker had cirrhosis. It found that fact relevant in determining when the worker likely incurred the relevant exposure, because of evidence about usual latency periods for the disease.

[10] After the hearing, the worker's new representative obtained the liver biopsy report. It indicated that the worker did not have cirrhosis of the liver. He had only "mild fibrosis". This affected the determinations with respect to latency.

[11] As a result of these errors, in *Decision No. 1903/01R*, I requested the assistance of an assessor, as well as other post-hearing medical investigation to assist in my determination of whether the threshold test was met. Notice of the reconsideration process was provided to the employer. I determined that the threshold test and the merits of the case should be heard together. Therefore this decision addresses both those matters.

## **(ii) The Reconsideration Test**

[12] 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 (WSIA) 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.

[13] 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) The Evidence**

#### ***(a) The Panel's Findings of Fact in Decision No. 1903/01***

[14] In its prior decision, the Panel made the following findings about the factual evidence, which continue relevant to my analysis [at paras. 137-143]:

We do accept the evidence that the worker, from time to time, had exposure to blood, on materials he handled.

We also accept the evidence that he may have at times had minor nicks or scratches, some of which were reported to the health care centre when he asked for band-aids, but some of which he did not report to the health care centre.

This evidence does raise the possibility that he could have come into contact with contaminated blood that might have entered his blood stream through a fresh nick or cut.

However, we also note the evidence of Dr. Mazzulli [the expert called by the employer at the first hearing] about the likelihood of this type of exposure leading to a health care worker contracting HCV. Dr. Mazzulli testified that the known cases of HCV being contacted in the health care environment involved either laboratory workers or nurses, and that in his view their risk was from needle stick injuries. He testified that, for there to be a significant risk factor present, there must be contact at subcutaneous levels. We understood this to mean that the cut involved must be of some depth for there to be any significant risk.

Given the evidence of the number of times the worker did visit the health care centre for minor matters, we agree with the appellant [i.e. at the original hearing, the employer] that it is likely that if this worker had suffered a cut of any significant depth, he would have reported it.

We note also the article above, as testified to by Dr. Mazzulli, that there have been no reported cases resulting from exposure to intact or non intact skin, and that environmental exposures do not constitute any significant risk. We note Dr. Mazzulli's opinion that the type of exposures from contaminants encountered in the general environment, such as the exposures described by the worker, are the type of exposures termed "environmental" in the literature.

We accept this evidence as indicating that the risk of exposure encountered by the worker [at] his job duties was very low. However, we find that it does remain possible that he was exposed in this way.

#### ***(b) The Further Investigations: The Assessor's Reports of May 1, 2005 and April 19, 2006***

[15] In *Decision No. 1903/01R* I requested a report from a Tribunal medical assessor. I received a report dated May 1, 2005, prepared by Dr. G. Sweeney. Dr. Sweeney is a Professor Emeritus, Department of Medicine, McMaster University. I later received a further clarification to this report, dated April 19, 2006.

[16] In his report of May 1, 2005, Dr. Sweeney states that more is now known about the epidemiology of Hepatitis C than was known when the adjudication of this case commenced. He confirms that from the liver biopsy this worker does not have cirrhosis. He states that Hepatitis C was first known as non-A, non-B Hepatitis but the virus was isolated in 1988 and was then called Hepatitis C (HCV). A test for Hepatitis C became available soon after. At first HCV was thought only to be transferred through blood and not to be present in body fluids other than blood. He states that neither of these ideas was correct. While the infectivity of HCV is much lower than Hepatitis B, it has been found in saliva, semen and menstrual fluid. He states:

It is important to note that events causing infection with HCV will not necessarily be recognized but there must be opportunity for transfer of body fluids. Thus some occupations carry a higher risk than others.

[17] With respect to the evidence of Dr. Mazzulli, Dr. Sweeney states:

As Dr. Mazzulli emphasized in his testimony, infecting material must break the normal barrier provided by the skin and permit entry to the bloodstream...Dr. Mazzulli stated that the prevalence of HCV is no different between hospital workers and the general public. I agree with this but the “general public” does include high risk groups such as injection drug users. There is evidence that individuals who come into contact with body fluids of others have a higher prevalence of HCV infection than a group where no such risk can be identified...Thus there is room in both groups (general public and hospital workers) for gradations of risk.

[18] Dr. Sweeney identifies the “high” or “very high” risk factors for exposure as blood transfusions and shared needles. He identifies needle stick injuries as involving moderate risk. He identifies heterosexual and homosexual sex as involving very low risk or low risk. Other risks include a small risk identified for oral surgeons or dentists, a splash in the eye, and the risk to a family member. Risk factors are affected by the load of virus, the amount of virus in the body fluids, the severity of the donor’s infection and, in the case of sexual transmission, whether another sexually transmitted disease is present.

[19] Dr. Sweeney also addressed latency. He states that one study that followed HCV-positive blood donors found that after 4.9 years 28% had evidence of chronic hepatitis. Fifty-one per cent had fibrosis after 17 years. He states that in a high risk individual progression to liver fibrosis in three to six years is quite possible. He estimates that given the appearance of the liver biopsy it is most likely that this worker’s Hepatitis C was acquired between five and 20 years prior to the date of the biopsy, which was carried out in 1997.

[20] Dr. Sweeney addresses factors in the evidence of this case that make it difficult to evaluate. He refers to the worker’s testimony that when his virus was first identified he was told about non-A, non-B Hepatitis. He states that it was unusual that the worker would have been told of non-A, non-B Hepatitis in a test reported in 1994, four years after this entity was identified as Hepatitis C. He also states:

I agree with Dr. Mazzoulli that you don’t request an HCV test unless there has been evidence of exposure or you have evidence for liver disease...nothing in the record indicates why this test was done and certainly nothing to couple this test with a test for venereal disease.

[21] He also notes:

What was puzzling was that 12 lab reports are available for 1997 but nothing prior to that despite knowing that the worker was HCV [positive] in 1994...The gap in the record between 1994 and 1997 is puzzling and denies us the opportunity to observe progression in the abnormal liver enzymes. As already stated, chronic hepatitis could develop within 5 years but slower progression is more likely. The “liver enzymes”, AST & ALT, were normal in April 1993 [as stated by Dr. Elkashab to Dr. Aziz in a letter dated 1997] but abnormal in January 1997 providing evidence that hepatitis was not active in 1993.

[22] Dr. Sweeney notes that the worker had two of three predictors for a more rapid progression of his hepatitis: male gender, over 40 years. The other predictor was identified as consumption of more than 50 grams of alcohol, or about three to four shots of liquor daily. There is no evidence that this risk factor applies to this worker.

[23] With respect to the question of probability that the work was the source of the exposure, Dr. Sweeney states in this report:

It is unfortunately impossible to answer except to say it is “possible”. In general, if other sources of infection with hepatitis C can be excluded, there is a high probability that the disease was contracted while the worker was employed at [the employer]. This is also a period when the blood transfusion supply was not protected from hepatitis C. I don’t believe we have enough information to exclude other sources of infection.

[24] Dr. Sweeney questions whether the worker’s duties in the police force in Guyana might have exposed him to blood or body fluids from drug users.

[25] Dr. Sweeney also notes that the worker wore protective gear while doing his work at the hospital, but that the worker denied that these were always used and claimed the gloves were unreliable. He notes that the only injury documented was a lacerated finger on May 8, 1989. He refers to the worker’s testimony that he had minor unreported injuries requiring band-aids. He also refers to the evidence with respect to the leaking of contaminated waste in the laundry function.

[26] In this report Dr. Sweeney offers a final conclusion, as follows:

It is certainly possible that the hepatitis C infection took place after the worker started working as a porter on October 12, 1987. “Possible” would become “probable” if prior infection could be excluded. This is not possible on the information provided. Certainty ends in part because hepatitis C is a disease that can be contracted in a variety of ways with the initial event often unknown, and in part because of contradictory testimony and surprising gaps in the medical record.

[27] I note that in this report Dr. Sweeney made two errors in his assumptions of the facts. First, he refers to the worker as having had a needle stick injury. Secondly, he refers to him as having been responsible for washing needles. These facts were in error. In his decision, which had allowed the worker’s original appeal at the Board, the ARO describes the worker as having had needle stick injuries, and as having washed needles and sharp instruments, apparently based on the information provided at that hearing. At the Tribunal hearing it was clarified that the worker was not responsible for washing needles or instruments and that this function was assigned to other, specific, staff. The prior representative also informed the Tribunal Panel that the worker was not asserting that he had ever had a needle stick injury.

[28] Because of these errors, the Vice-Chair requested further clarification from Dr. Sweeney. He provided a second report dated April 29, 2006. In that report he describes the evidence with respect to the risks of health care workers, in the absence of needle stick injuries, as “poorly defined”. With respect to the worker’s risks he states:

All we know is that if blood or other bodily fluid contaminated with HCV mixes with the blood of another person there is a significant chance that hepatitis C will be contracted. However...that HCV is easily inactivated; we can discount exposure to contaminated materials during the washing process because soap or detergent would inactivate the virus.

[29] However Dr. Sweeney identified the three following specific factors, affecting this worker, which would make his risk higher than that of the general population:

- 1) there was testimony that gloves were not always worn in the decontamination room, or tore easily, exposing skin;
- 2) the Ontario Ministry of Labour report dated January 1992 made recommendations for the handling of laundry bags that were leaking, spilling, and breaking, and which had to be repacked by hand;
- 3) the worker testified that at times he had minor nicks or scratches, for which he sometimes obtained band-aids at the health care centre, but some of which he did not report.

[33]<sup>1</sup> Dr. Sweeney states that the evidence of the worker that he handled contaminated material, did not always follow the dress code with regard to gloves, and could have open areas on his hands, do not apply to the “general population”.

[34] Dr. Sweeney did not feel able to make a specific estimate of risk with respect to this worker, because of the extent of the unknown factors. However, based on his review of the epidemiological evidence, he estimates that the parenteral exposure of health care workers double or trebles the risk of being HCV positive.

[35] I note that Webster’s Dictionary defines “parenteral” as meaning: “injected or for injection subcutaneously, intramuscularly or intravenously.” I therefore understand this statement to mean that health care workers have, through their occupation, an exposure to possible subcutaneous, intramuscular or intravenous exposures that result in a doubling or trebling of the risk of the group for becoming HCV positive. However, the risk that he identifies in this statement remains related to the risk of acquiring HCV through parenteral exposure, not through exposures in general.

### *(c) The Further Investigations: Additional Medical Records*

[36] In *Decision No. 1903/01R*, and again after the reconvened hearing on March 9, 2006, I also asked the Tribunal Counsel Office to make further efforts to obtain additional medical records, including the clinical notes of the worker’s family doctor, Dr. Aziz, and medical information from a specialist who possibly treated the worker in 1994. At the hearing on March 9, 2006, the worker gave further testimony about having seen a female specialist possibly in 1994.

[37] Because Dr. Sweeney’s reports had highlighted the differences between the testimony relied on by the ARO and that given at the Tribunal hearing, I also requested a copy of the Board transcript.

[38] However, Dr. Aziz was not able to locate his clinical notes for the time period prior to 1997, when the worker’s Hepatitis C symptoms became troublesome. This is despite the medical report on file that indicates that the worker was tested for Hepatitis C and syphilis in 1994, and that the test was positive for Hepatitis C and negative for syphilis. TCO was also not able to obtain any medical records with respect to a 1994 visit to a specialist. The worker had seen Dr. Laredo, a specialist, after 1996, but she had not seen him prior to that time. She wrote the Tribunal to state that she did not enter practice until 1996.

[39] The Board informed the Tribunal that it retained hearing tapes only for a period of seven years. Therefore I was not able

to obtain a copy of the ARO transcript.

#### **(iv) Submissions**

[40] The representatives made submissions at the reconvened hearing in March 2006 and after the receipt of the materials obtained after the March 2006 date of hearing.

[41] At the hearing on March 9, 2006, Mr. Devoe submitted that the errors in the prior decision are sufficient to lead to a new conclusion. He submitted that there are no other identified exposures. He submitted that, based on Dr. Sweeney's report, the latency period is consistent with what might be expected for liver fibrosis. The first hospital exposures were in 1987, 10 years prior to the identification of the fibrosis.

[42] In further submissions dated September 6, 2006, he submitted that Dr. Sweeney has identified risks that put the worker at higher risk than the general population. He states that the fact that the Ministry of Labour issued a report recommending changes in procedures indicates that the hospital had had a relaxed policy towards exposures. Dr. Sweeney's estimate of the extent of increased risk for health care workers is above the level of the 2, or 200 SIR, that has been found to support entitlement in industrial disease cases, based on epidemiological evidence.

[43] He submits that no weight should be given to the gaps in the medical evidence. The worker was forthright in providing all the information he could to support this investigation.

[44] He referred me to the tests set out in *Decision No. 1386/03* (2004), 71 W.S.I.A.T.R. 95, below.

[45] At the hearing on March 9, 2006, Ms. Hoglund submitted that the prior errors were not sufficient to change the outcome of the prior decision. She refers me to the statement of Dr. Sweeney that there is insufficient evidence to exclude other sources of infection. Based on Dr. Sweeney's description of the latency issues, the period of possible exposure includes a time period 10 years prior to the worker's work at the hospital. It includes the years from 1977 to 1982, when the worker was in Guyana. He worked as a police officer in Guyana.

[46] However, she agreed that the latency time period identified by Dr. Sweeney does not extend to the time period when the worker was 16, and in a detention camp. She agreed that that period of time was likely too far in the past to have been a relevant exposure.

[47] She noted that there is no evidence that the worker ever had needle stick injuries, which was a basis for the ARO decision allowing entitlement. The worker's evidence related only to cuts and nicks. Further, the worker visited the occupational health nurse 280 times while working at the hospital. Only two cuts were reported, for which the worker was given band-aids. She submitted it was unlikely that he would have used the first aid kit for a cut that was deep enough to have been a significant exposure.

[48] In her submissions dated September 8, 2006, she submits that Dr. Sweeney did not take into account the findings of the prior Panel that are included in *Decision No. 1903/01* [at para. 141]:

Given the evidence of the number of times the worker did visit the health care centre for minor matters, we agree with the appellant that it is likely that if this worker had suffered a cut of any significant depth, he would have reported it.

[49] She submits that there was no evidence of any significant incidents that would have exposed the worker to a risk of contacting Hepatitis C. Thus, the worker's risk of contracting Hepatitis C would not be higher than the general population.

[50] She submits that in his estimate of risk Dr. Sweeney has not made a distinction between health care workers, such as physicians and nurses, who have direct contact with patients, and workers, such porters, who do not have direct contact with patients and who work in a decontamination area with solvents which would protect them from contacting Hepatitis C.

[51] She submits that tests for Hepatitis C and syphilis are not ordered on a routine basis. These tests were ordered for this worker in 1994. Thus it is reasonable to infer that he was at risk of exposures for syphilis in activities unrelated to his employment.

[52] She submitted that the employer is not disputing that the worker is ill and entitled to benefits. However, she submitted that the benefits are more properly payable under the employer's general disability plan than under workers' compensation.

[53] With respect to the case law, she submitted that *Decision No. 1386/03* is distinguishable because there was clearer evidence of exposure in that case.

#### **(v) Law and Board Policy**

[54] On January 1, 1998, the WSIA was enacted. That legislation provided that the pre-1997 Act applies to accidents that occurred prior to January 1, 1998. Therefore it is the pre-1997 Act that applies to this appeal.

[55] Section 1(1) of that Act includes in the definition of accident a disablement arising out of and in the course of employment.

[56] *Decision No. 1386/03* addresses how the law applies to an alleged disablement from Hepatitis C. That case states [at paras. 32-33]:

In cases where it is impossible to know with certainty whether an exposure is actually the cause of a worker's illness, the Panel must weigh the different possible causes of the worker's condition and decide what is more probable than not. Some conditions may result from non-work related factors. Some conditions occur themselves. Some conditions are work-related. The issue of causation may be complicated, as it is in this case, by a lack of clear evidence as to what, exactly, the worker was exposed to, or when, or how often. Following the Supreme Court in *Lawson v. Laferriere*, [1991] 1 S.C.R. 541, *Snell v. Farrell* [1990] 2 S.C. R. 311, and *McGhee v. National Coal Board*, [1972] 2 ALL ER 1008 (HC) as adopted by tribunal jurisprudence (see *Decision No. 549/95I2*, for example) we note that an extremely high standard of virtual scientific certainty is not required before resolving these issues. It is not essential that the medical or scientific experts opine firmly in favour of the work-related cause(s). Rather, a Panel must be satisfied, on the balance of probabilities, that the work exposure is a significant contributing factor in the worker's condition. An inference may, in certain cases, support such a conclusion. That said, a causation theory must have some evidence to support it: it cannot be speculative. See *Decision Nos. 795/95; 1558/98; and 549/95I2*.

The Tribunal must decide the case on a balance of probabilities. The Panel is required to weigh the possible theories of entitlement to determine if it is more probable than not that the disease resulted from the workplace exposure. If the evidence for and against the issue is approximately equal in weight, section 4(4) of the pre-1997 Act provides that entitlement is to be allowed. This reflects the policy goals of the Act.

[57] Entitlement for Hepatitis C was considered also in *Decision No. 933/02* (January 25, 2005) [2005 ONWSIAT 195]. That decision addressed the distinction between possible work-relatedness, and a probable association.

[58] I note also *Decision No. 473/91* (1994), 32 W.C.A.T.R. 14, in which the Panel stated [at p. 30]:

As we noted above, adjudication of this kind of issue requires a decision one way or the other, based on a balancing of the evidence presented. The Panel has weighed the evidence in this case to determine probability, not certainty. The Panel does not have the luxury of deferring a conclusion pending greater scientific certainty. The Panel must base its conclusion on whatever evidence has been presented.

## **(vi) Conclusions**

[59] I have considered both the threshold test and the merits of the appeal in this decision.

[60] There were substantial errors in the prior decision. I have obtained new evidence in order to address the implications of those errors. I have considered first whether the new evidence supports a finding that the threshold test is met. I find that the threshold test is met. After reviewing Dr. Sweeney's reports, I find that the errors in the prior decision are sufficient for me to determine that, if the errors are corrected, there is a reasonable probability that the decision will be changed.

[61] I have therefore proceeded to consider the merits of the case. On considering the substantive issue, in light of the new evidence, I find that the worker is entitled to benefits. I have weighed the evidence for and against entitlement, and found it to be approximately equal in weight. Therefore I have applied the principle of the benefit of the doubt.

### ***(a) Evidence that weighs against entitlement***

[62] I find that the following factors weigh against entitlement.

#### **1) Non-compensable factors**

[63] There is some evidence of possible non-compensable risk factors. The worker had experience as a police officer in Guyana. Five years of that time period were within the 20-year latency period identified by Dr. Sweeney as the probable outside limit for relevant exposure. Dr. Sweeney identifies the fact that that work may have put the worker into contact with a high risk population.

[64] Dr. Mazzulli identified the fact that an increased risk for Hepatitis C has been identified in immigrant populations, in general, perhaps due to medical practices in other countries. However, no estimate was provided for the extent of that increased risk, and Dr. Mazzulli was not able to locate any specific evidence with respect to Guyana.

[65] There is little specific evidence with respect to these exposures for this worker.

#### **2) Evidence that the Workplace Exposures Were Low Risk**

[66] I note also that both Dr. Mazzulli and Dr. Sweeney are agreed that the most significant risk of exposure for health care workers is with respect to needle stick injuries, and that there is no evidence of a needle stick injury in this case.



[67] I also note the finding of the prior Panel [at para. 141]:

Given the evidence of the number of times the worker did visit the health care centre for minor matters, we agree with the appellant that it is likely that if the worker had suffered a cut of any significant depth, he would have reported it.

[68] In *Decision No. 1903/01* the Panel also referred to Dr. Mazzulli's evidence that environmental exposures had not been associated with infection. I note also the evidence of Dr. Mazzulli that the risk of health care workers, in general, is not higher than that of the general population.

[69] These factors also weigh against entitlement.

### **3) The Reliability of the Worker's Testimony**

[70] There are also questions about the reliability of the evidence. I find the worker's testimony, on the whole, less reliable than might be wished. The worker demonstrated considerable confusion about the facts relevant to his appeal. The ARO relied on wrong facts. The ARO understood that the worker was responsible for washing needles and "sharps", and that he had nicked his hands with needles. It has not been possible to ascertain exactly how that confusion arose, because the transcript of the ARO hearing was not available. However, at the least, it is apparent that the worker failed to make it clear to the ARO that he was not the person responsible for washing needles in the decontamination area and that there were other staff assigned to do this.

[71] At the Tribunal hearing, the worker acquiesced, during cross-questioning, to questions about his having Hepatitis B. He apparently accepted the wrong evidence contained in the file that he had Hepatitis B. He appears to have had little knowledge or understanding about his own medical diagnoses. It is also likely that he informed several doctors that he had cirrhosis of the liver, although this also was not the case. It is not clear how else Dr. Turner, and Dr. Maghami, for instance, came by the understanding that he had this disease.

[72] I do note that while some of the confusion in the evidence has been to the worker's advantage, some has been to his serious disadvantage, resulting in the necessity for this proceeding. However, it remains relevant that, on the whole, the worker's testimony has been unusually unreliable. Therefore, I have relied primarily on the testimony of other witnesses about the nature of his work duties.

[73] I have also addressed my mind to what inference is to be drawn from the fact that there is a gap in the medical reporting between 1994 and 1997, and that the worker was sent for a test for syphilis in 1994.

#### ***(b) Evidence that Supports Entitlement***

[74] On the other hand I note the following evidence, in support of the worker's case.

#### **1) Findings with Respect to the Reliability of the Evidence; Non-compensable Factors**

[75] With respect to the reliability issues, discussed above, I do not find it proper to draw any negative inference from the gap in medical evidence between 1994 and 1997. I am satisfied that the worker cooperated, at the reconvened hearing, by testifying to the best of his ability about what doctors he saw. He is not responsible if medical records are not now available

or cannot be located.

[76] Further, on consideration, I do not find it proper to draw any negative inference from the fact that a syphilis test was ordered in 1994. The test was negative. I do not consider the fact that it was ordered evidence that the worker had sexual contact of a type that might constitute a risk factor for Hepatitis C. Despite the submissions of the employer, I consider that it would be overly speculative to make a finding that it constituted such evidence, in the absence of any evidence from the doctor who ordered the test about why the test was ordered. It is possible that the doctor ordered the test because he had information about sexual contacts of the worker that led to a concern about syphilis. However it is also possible that the test was ordered simply to preclude this condition, without there having been any specific information about risky behaviour from the worker. It may be inferred that the worker had some symptoms at that date that led to his being tested for Hepatitis C. He also has a wide range of other medical conditions, some of which may have been symptomatic at that date. It may be that the treating physician made a connection in his or her mind between symptoms suggestive of Hepatitis C, or other symptoms, and risk factors for syphilis, and decided to test for this condition. From Dr. Sweeney's report, this would not necessarily have been usual medical practice, but that does not mean that it did not occur.

[77] I am not prepared to infer from the fact that this test was carried out that this doctor had specific information about sexual activity involving risk factors for Hepatitis C. It is not disputed that the worker is a Muslim, and had been in a long term-marriage.

[78] Further, if the physician who ordered these tests in 1994 had information about risk factors for Hepatitis C, there is some likelihood that that information would have been made known to the worker's family doctor, with the result that there would be some likelihood of continued reference to those risk factors in later clinical notes. A discussion of risk factors would likely have occurred again, in particular in 1997, when the worker first became ill with this disease. Persons will often be frank with their treating physicians about factors affecting their disease even if reluctant to be frank in other contexts. The Tribunal has on hand considerable medical information about the worker's medical treatment from 1997. There is no mention of behaviours involving non-occupational risk factors for Hepatitis C.

[79] I note also that sexual contact itself is a low risk factor for Hepatitis C. There is nothing to suggest that this worker has used intravenous drugs, or had blood transfusions, or tattoos, which are ranked higher as risk factors. I find it unlikely, although not impossible, that these risk factors would be present and not be known to or noted by his treating physicians.

[80] On the whole, I find it reasonable to conclude that the risk arising from the worker's non-occupational exposures likely puts him at no more risk than that of the average of the general population. As Dr. Sweeney notes, there are many gradations of risk within the general population, which affect the average risk for that group.

[81] The question is how to evaluate the workplace exposures, in relation to the non-occupational risk.

## **2) The Exposures at Work**

[82] Dr. Mazzulli states that the risk of health care workers in general has been found to be no greater than the risk of the general population. In his first report, Dr. Sweeney states that he does not dispute that finding. However, he notes that that comparison includes in the general population high risk groups such as intravenous drug users. He states that there are sub-categories of risk, both within the general population, and within health care users as a group.

[83] Both Dr. Mazzulli and Dr. Sweeney identify the highest risk group within the cohort of health care workers as being persons who are at risk for needle pricks. This group primarily includes doctors and nurses.

[84] In his final report, however, Dr. Sweeney reviews further epidemiological evidence and concludes: "It may be reasonable to say, on average, parenteral exposures of health care workers doubles or trebles the risk of being HCV positive."

[85] Dr. Sweeney makes this final statement after referring to several specific estimates of the rate of Hepatitis C in the general population. A large study found an overall infection rate of 1.9% in health care workers. Dr. Sweeney compares this incidence to an estimate of the prevalence of Hepatitis C in the general population, at about 1%, or, in a sampling referred to by Dr. Mazzulli, an incidence of 0.6% in the general population entering the employer hospital. A comparison of those figures led to his estimate of a doubling or trebling of risk for health care workers. I note that the low end of this comparison, i.e., of the ratio of 1.9% to 1%, is just below 2, and the high end, i.e., the ratio of 1.9% to 0.6%, suggest an incidence ratio of 3.1.

[86] It is unclear how this final estimate is consistent with the fact that Dr. Sweeney had previously agreed with Dr. Mazzulli that health care workers in general were not at increased risk when compared to the general population. However, it may be that Dr. Sweeney has looked more closely at the epidemiological studies before making this final statement, in his second report, than he had at the time of this first report, or that he has found more recent studies. It is also possible that the cohorts that found an incidence of 1% were screened to exclude some co-founding populations, such as drug users. Dr. Sweeney does not make it clear whether that was the case. In any event, his other point of comparison is to Dr. Mazzulli's evidence. Dr. Mazzulli referred to a study which reflected the incidence of disease for the population "coming in the door" at the hospital where Dr. Mazzulli worked. That is also the employer's hospital, where the worker worked. Therefore this is a very relevant comparison for the purposes of this worker. It reflects the incidence of this disease in the local, Toronto population. The incidence of Hepatitis C in health care workers found in the study referred to by Dr. Sweeney is triple that incidence.

[87] Given that Dr. Sweeney is an independent and well-qualified medical expert, who had the benefit of reviewing the more recent medical information, I prefer his opinion to Dr. Mazzulli's where there is a conflict. Based on Dr. Sweeney's opinion, I consider it reasonable to assume for the purposes of this decision that health care workers in general have an incidence of Hepatitis C that is double or triple the incidence found in the general population in Toronto, which is the relevant population for this worker. I assume that the higher end of the spectrum of risk relates to nurses and doctors, since these persons are more likely to be exposed to needle stick injuries. However, Mr. Devoe notes that even a doubling of risk is sufficient for entitlement. When risk is doubled, it is equally probable that a person's disease is related to that risk as to the risk of other exposures, all else being equal. This analysis has been relied on frequently in Tribunal decisions which address industrial diseases, when issues of compensability are weighed in terms of the SIR or SMR (standard incidence ratio or standard mortality ratio) calculations found in the epidemiological literature.

[88] Based on Dr. Sweeney's opinion, I will assume that a porter's risk, in general would be at the lower end of this spectrum. The work of some porters and of some hospital staff might well place them below the threshold of doubled risk. The question is whether the evidence in this case suggests that this worker's risk falls below that level. However, I note also the three specific risk factors referred to by Dr. Sweeney as applicable to this case.

[89] First, the worker had nicks and cuts on his hands, which required band-aids.

[90] On this point, the prior Panel made a finding that if the worker had had nicks or cuts of any significant depth he would likely have attended at the health care centre. However, he did attend at the health care centre for band-aids on a few occasions. Further, a co-worker corroborated the worker's testimony that there were band-aids available in the central supply area for smaller cuts. While those small nicks or cuts might not have been of significant depth, it is of note that Dr. Sweeney does not exclude such cuts as irrelevant, except while the worker was using detergent. The worker would have been using detergent for many tasks, but not necessarily for all tasks.

[91] Dr. Sweeney also notes that the linen bags were contaminated with blood or other contaminants until the hospital started to use plastic bags. That change in practice took place only after the specific involvement of the Ministry of Labour. It occurred sometime in about 1991 or 1992, and therefore several years after the worker started work. I note that the worker never worked full-time in handling the linen, but only as a back-up. However this evidence indicates that there was not only a risk to porters from handling the linen itself, but also that the hospital's processes were not fastidiously controlled to exclude risk factors in those years.

[92] Dr. Sweeney also notes the worker's evidence that he did not always use gloves. I note also the evidence of the employer that a failure to wear the "dress code" was a matter for discipline. The other witnesses who did this job did not testify to working without gloves. However, even disregarding this testimony of the worker, I note that both the worker and his co-worker testified that the gloves tore easily. Both testified to nicks and cuts from the sharp edges of the items handled. Therefore there was a possibility for exposure.

[93] In addition to the risk factors identified by Dr. Sweeney, I note also the fact that the worker worked in the decontamination area, which was recognized as a "dirty area". It was the area where items were brought to be washed which were known to be contaminated with blood and body waste. Trays brought from the operating and obstetrical areas in the early years were not pre-washed, except possibly to rinse off gross contaminants. The first wash was done by the porters, manually. It was only after the items were washed by hand that they were placed onto the conveyer for a more thorough machine wash. I also note the evidence that the porters were responsible for the entire washing of the items when the conveyor broke down. They also had to use their hands to loosen jam ups on the conveyor. While there was a dress code to protect the workers, and an awareness of risks of, for instance, AIDS, this worker started work before the introduction of universal precautions. That change in hospital procedures occurred between 1992 and 1994. While the porters had been required to wear a dress code prior to the introduction of the new procedures, their introduction would likely have affected to some degree the vigilance taken generally with respect to the mandated precautions.

[94] I note also the evidence that, when moving patients, the IV poles and tubing might be knocked lose, resulting in spills; that a porter might get paper cuts when working in the stores area, and that the porters working in the stores area were the workers called upon to transport bodies to the morgue. No dress code was required for this function. While the bodies were wrapped in plastic by the nurses, porters might assist in moving them onto the stretchers, and there is some small possibility for exposure in that task. That would be the case especially if a worker had a cut on his hands.

[95] I note also that the workers were not required to report cuts suffered out of the workplace.

[96] There is considerable evidence about the procedures used to reduce risk from these exposures. I accept that those procedures made the risk of exposure very low. However, once a disease is contracted, the issue for determination is not whether the risk from exposure was low, but whether it is more probable that the worker contracted the disease through a

workplace exposure or other exposure. Where the evidence is equally balanced, the Act provides that the benefit of the doubt goes to the worker.

[97] In this case, I find the evidence for and against a work place exposure to be approximately equal in weight.

*(c) The NEL Assessment*

[98] However, I do note one further matter. The worker's claim in this case was previously allowed by the ARO, and the worker was granted entitlement to a NEL assessment for his Hepatitis C. The Board also granted entitlement for aggravation of other medical conditions, as well as, it appears, for psychological impacts. Full information about these matters is not included in the Tribunal file.

[99] As a result of the prior Tribunal decision, entitlement for Hepatitis C, and therefore for these NEL awards, was overturned. This decision now entitles the worker, again, to a NEL assessment for his Hepatitis C, and for any secondary impacts.

[100] However, I note that in the prior NEL assessment, the NEL assessor who considered the psychological impacts, Dr. Maghami, in his report dated May 4, 2000, refers to the worker as having cirrhosis of the liver. This is an error that has been corrected in the course of this reconsideration proceeding. While the Board had previously requested the biopsy report, it was not obtained until the time of the reconsideration request. It appears that the Board also had initial difficulty in obtaining medical records. Information about the NEL award for the Hepatitis C award, itself, is not included in the Tribunal file.

[101] Therefore, in light of the confusion about the medical evidence in this file, although entitlement is allowed, I also find that it is open to the Board to review its prior NEL determinations, if it considers that appropriate in view of the new medical evidence and/or if it wishes to obtain any additional medical evidence. The Tribunal has obtained a number of new medical reports, and they are to be provided to the Board.

## **DISPOSITION**

[102] The worker's request for reconsideration is allowed.

[103] The employer's appeal to the Tribunal is reconsidered, and denied.

[104] The worker is entitled to benefits for Hepatitis C.

[105] Given the new medical information, the Board may wish to review its prior NEL assessments.

*Worker's application to reconsider granted;  
employer's appeal dismissed.*

1 Editor's Note: There are no paras. 30-32.



## Decision No. 1670/06

Vice-Chair: Martel

Decision — November 28, 2006

Neutral Citation: 2006 ONWSIAT 2796

**Initial entitlement (previous right to sue application) – Right to sue – Heart attack – Presumptions (entitlement) – Delay (treatment).**

**Right of action of worker's wife against employer regarding worker's fatal heart attack, was taken away in earlier decision – Decisions in right to sue cases based on assumption that facts as allege could be proven in subsequent trial – In circumstances, wife also not entitled to workplace insurance benefits.**

The worker arrived at work but left either before he started or just after he started working, because he was not feeling well. He died of a heart attack while driving home. The worker's wife brought an action against the employer, alleging that the worker's death was caused by the negligence of the employer in failing to ensure that a qualified first aid attendant was present at the plant.

In *Decision No. 1672/03*, the Tribunal found that the facts as pleaded, if proven at trial, would have resulted in a finding of negligence or breach of contract by the employer based on acts or omissions of the employer and its workers, which would have taken place in the course of employment. The plaintiff's right of action was taken away.

The wife then applied for workplace insurance benefits, but entitlement was denied by the Board. The wife appealed a decision of the Appeals Resolution Officer confirming the denial of entitlement. The appeal was dismissed.

The worker had underlying asymptomatic atherosclerotic heart disease, as well as other non-work-related risk factors, such as age, smoking, consumption of alcohol and being overweight. There was no more than a possibility suggested that the worker would not have died if emergency care would have been provided earlier. In any event, co-workers were not in a better situation than the worker himself to assess his situation. It was not the employment circumstances that led to the delay in obtaining treatment but the worker's own decision to leave the workplace and drive home.

In *Decision No. 1672/03*, the worker's right of action was taken away. That decision found that the worker would have been in the course of employment. However, decisions in right to sue cases are based on the assumption that the facts as alleged by the plaintiff could be proven in a subsequent trial.

The Vice-Chair concluded that there was no act or omission by co-workers that significantly contributed to the worker's fatal heart attack. The presumption that the heart attack arose out of employer was rebutted.

**Admissibilité initiale (demande antérieure relative au droit d'intenter une action) – Droit d'intenter une action – Crise cardiaque – Présomptions (admissibilité) – Retard (traitement).**

**Le Tribunal a conclu dans une décision antérieure que la Loi supprimait le droit d'action de la conjointe du travailleur contre l'employeur relativement à la crise cardiaque fatale du travailleur – Les décisions dans les cas de droit d'action sont fondées sur la supposition que les faits allégués pourraient être prouvés subséquemment lors d'un procès – Dans les circonstances, la conjointe n'avait pas droit non plus à des prestations d'assurance contre les accidents du travail.**

Le travailleur s'est présenté au travail mais est reparti avant de commencer à travailler, ou juste après avoir commencé, parce qu'il ne se sentait pas bien. Il est décédé d'une crise cardiaque en retournant chez lui en voiture. La veuve du travailleur a intenté une action pour négligence contre l'employeur en alléguant que le travailleur était décédé parce qu'il n'y avait pas de secouriste qualifié à l'usine.

Dans la *décision no 1672/03*, le Tribunal a conclu que, s'ils étaient prouvés dans un procès, les faits allégués mèneraient à une constatation de négligence ou de rupture de contrat pour cause d'actions ou d'abstentions de la part de l'employeur et de ses travailleurs au cours de l'emploi. La Loi supprimait le droit d'action de la demanderesse.

La veuve a alors fait une demande d'assurance contre les accidents du travail mais la Commission a refusé de lui reconnaître le droit à des prestations. La veuve a interjeté appel de la décision dans laquelle le commissaire aux appels a confirmé qu'elle n'avait pas droit à des prestations. L'appel a été rejeté.

Le travailleur souffrait d'une athérosclérose coronarienne asymptomatique sous-jacente. Il présentait aussi d'autres facteurs de risque non professionnels tels que l'âge, le tabagisme, la consommation d'alcool et une surcharge pondérale. Il n'y avait pas plus qu'une possibilité que le travailleur ne serait pas décédé s'il avait reçu des soins d'urgence plus tôt. De toute manière, les collègues du travailleur n'étaient pas en meilleure position que le travailleur lui-même pour évaluer la situation. Le travailleur avait tardé à recevoir des soins non pas à cause des circonstances entourant son emploi mais plutôt à cause de sa propre décision de quitter les lieux du travail pour retourner chez lui en voiture.

Dans la *décision no 1672/03*, le Tribunal a conclu que la Loi supprimait le droit d'action du travailleur et que ce dernier se trouvait en cours d'emploi. Cependant, les décisions dans les cas de droit d'action sont fondées sur la supposition que les faits allégués pourraient être prouvés subséquemment lors d'un procès.

La vice-présidente a conclu que les collègues du travailleur n'étaient pas coupables d'actions ou d'abstentions ayant contribué de façon importante à la crise cardiaque fatale du travailleur. La présomption que la crise cardiaque était survenue du fait de l'emploi était réfutée.

#### **Tribunal Decisions Considered:**

- *Decision No. 19/91* (1991), 20 W.C.A.T.R. 201 consd

- *Decisions No. 205/97* (March 18, 1997) consd
- *Decision No. 1683/01* (September 27, 2001) [2001 ONWSIAT 2903] consd

### **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. 13(2)
  - s. 31

### **Board Directives and Guidelines Considered:**

- *Operational Policy Manual*
  - Document No. 15-03-10 (October 12, 2004)

### **Cross-References:**

- *Decision No. 1672/03* (October 10, 2003) [2003 ONWSIAT 2231]

APPEAL by the worker’s wife from a decision of the Appeals Resolution Officer denying entitlement for a heart attack.

November 28, 2006. THE TRIBUNAL: —

BEFORE: S. Martel, Vice-Chair

HEARING: August 22, 2006 at Toronto, Written

DECISION(S) UNDER APPEAL: WSIB ARO decision dated March 17, 2005

### **APPEARANCES:**

For the worker: Mr. I.R.A. Macmillan, Lawyer

For the employer: Mr. W. LeMay, Lawyer

## **REASONS**

### **(i) Introduction**

The worker’s spouse seeks entitlement to benefits as a result of the worker’s fatal heart attack on the basis that the worker’s death arose out of and in the course of his employment.

### **(ii) Background**

The worker unfortunately suffered a fatal heart attack on September 1, 2000 at the age of 50. That morning, he left his house in Elora, Ontario, at around 5:00 a.m. in order to start work at 5:45 a.m. at his workplace located in Guelph. His spouse did not notice anything unusual about the worker’s appearance. He did not appear to be sick nor did he complain of being sick prior to leaving his house. He arrived at the workplace at around 5:30 a.m. While his regular shift began at 7:45 a.m., the worker was going to work early in order to perform a few hours of overtime prior to starting his regular shift. He was to start working at 5:45 a.m. Not long after arriving at the workplace, he complained to two co-workers about not feeling well. He decided to leave the workplace and drive himself home and asked that the two co-workers tell the supervisor that he was going home as he was not feeling well. He left the workplace at around 6:15 to 6:20 a.m. He was found slumped over the steering wheel of his car at an intersection between his workplace and his home. He apparently died at approximately 6:40 a.



m. An autopsy was performed on his body that same day. The cause of death was determined to be ischemic heart disease. No alcohol was detected.

In August 2002, his spouse commenced an action against the employer, claiming damages for negligence and breach of the employment contract. The employer brought an application to the Tribunal under section 31 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) for a determination that the worker's right of action had been removed by the WSIA. The application was allowed in *Decision No. 1672/03* (October 10, 2003). Subsequent to that decision, the worker's spouse requested entitlement through the Workplace Safety and Insurance Board. The Claims Adjudicator and the Appeals Resolution Officer (ARO) denied entitlement for the worker's heart attack on the basis that the worker's heart attack was not caused by an accident that arose out of his employment.

The worker's spouse now appeals this decision to the Tribunal.

### **(iii) The Parties' Positions**

#### ***(a) The Worker's Spouse***

On the spouse's behalf, Mr. Macmillan submits that the issue in this case is not whether the worker's heart attack was work-related but rather, whether the worker's *death* from the heart attack was work-related. Mr. Macmillan notes that the Panel of *Decision No. 1672/03* accepted that the worker was in the course of his employment at the time of the injury. The Panel found that the worker's symptoms commenced during the course of his employment and that he felt the onset of his myocardial infarction while at the workplace in the performance of his duties.

Mr. Macmillan submits that an accident can be an act or omission and that in this case, we are dealing with an omission. Mr. Macmillan submits that the two co-workers who were aware of the worker's complaints had a duty to report the worker's condition to their supervisor and that both elected not to do so with fatal consequences. Mr. Macmillan relies on the opinion of Dr. Strauss, a cardiologist, who suggests that it was obvious in retrospect that medical assistance should have been called for a 50-year-old male, who was overweight, a smoker, a dedicated worker who never missed work for any illness and who developed a sudden illness after arriving at work where he just did not feel well. Dr. Strauss opined that while the workplace was not the cause of the worker's probable heart attack, if proper protocol had been followed by his fellow employees by immediately informing the safety officer and the safety officer acting appropriately, the outcome for the worker may have been different.

Mr. Macmillan relies on several other Tribunal decisions where it was found that the nature of the worker's employment was a significant contributor to the resulting disability or death caused by a myocardial infarction or stroke in situations where there was delay in obtaining medical assistance (*Decisions No. 205/97* (March 18, 1997) and *19/91* (1991), 20 W.C.A.T.R. 201).

Mr. Macmillan submits that in the 40 minutes or so that the worker was at his workplace, there was every opportunity on the part of his co-workers to protect him from the fatal consequences of his heart attack, the symptoms of which were there to be seen. Mr. Macmillan submits that if co-workers choose to ignore their employer's safety and first aid policies and such policies are not stringently enforced, as occurred here, the workplace ceases to meet the safety requirements of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.

*(b) The Employer*

For the employer, Mr. LeMay relies on the will-say statement of the co-worker, Mr. DS, who indicated that September 1, 2000 was a Friday and that it was not unusual for the worker to feel a bit rough early on Friday morning after the worker's regular Thursday night golf outing. It is the employer's understanding that the worker complained about feeling unwell before the start of his overtime shift and that he did not actually perform any work prior to going home. Mr. LeMay submits that according to the employer's policy, the worker was supposed to have notified a supervisor that he was leaving because he was unwell and that the worker failed to follow this policy.

Mr. LeMay submits that the estate's appeal should be dismissed for two reasons: that the worker's myocardial infarction was not work-related and that the employer's first aid policy was properly implemented.

Mr. LeMay relies on *Operational Policy Manual* (OPM) Document No. 15-03-10, which states that the Board will only grant entitlement for heart attack where a worker has been engaged in unusual physical exertion or acute emotional stress. Mr. LeMay submits that even if the worker had started working, he was doing his usual work for only a few minutes at the most and that there was no evidence that he was doing anything unusual. Mr. LeMay relies instead on the number of underlying medical conditions and other personal factors that were more likely the cause of and contributed to the worker's heart attack. Furthermore, Mr. LeMay submits that there were no employment circumstances requiring the worker to be travelling as in *Decision No. 19/91*, relied on by the estate.

With respect to the argument that the worker's life could have been saved if the employer had somehow provided the worker with first aid, Mr. LeMay makes four arguments. First, the worker did not tell anyone in supervision that he was ill. Secondly, it was the worker who failed to follow protocol rather than the co-workers since the worker should have reported to his supervisor that he was leaving the workplace. Thirdly, the worker did not describe his symptoms in a way that would have given any of his co-workers any reason to suspect that he was suffering from a heart attack. Finally, it is speculative to conclude that the worker would have survived if he had received first aid. Mr. LeMay submits that any delay in medical treatment does not give the worker entitlement to benefits in this case.

**(iv) Law and Policy**

Section 13(1) and (2) of the WSIA provides:

**13(1)** 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.

**(2)** If the accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown.

Accident is defined in section 2(1) and 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.

The Board has a policy on heart conditions, OPM Document No. 15-03-10, which it provided for the purposes of this appeal. The policy states that the Board accepts claims as work related when:

- a causal relationship is shown between the cardiac condition and an accident at work, or
- the cardiac condition is established as a disablement “arising out of and in the course of employment.”

The policy guidelines provide that the Board accepts entitlement for cardiac conditions under any of the following circumstances:

- traumatic injury, either penetrating or non-penetrating injuries to the chest wall
- electric shock producing irregular cardiac rhythm
- inhalation of smoke and various noxious gases and fumes, e.g., fire fighters, and
- complication of treatment for a work-related injury, e.g., anaesthesia with an interval of hypotension, hypoxia, or cardiac arrest.

... or

- unusual physical exertion for the individual and/or acute emotional stress with no significant delay in the onset of symptoms.

For this last circumstance, the policy further states:

This instance is allowed on the basis of aggravation of a pre-existing non-work-related condition. When entitlement is established, the condition has stabilized, and a permanent disability/impairment evaluation has been conducted, further entitlement will not be granted for a **subsequent** cardiac condition unless there is a new work-related occurrence, which merits allowance under a new claim.

## (v) Conclusion

Most of the facts in this case are not in dispute and both parties are relying on the same evidence that was before the Panel of *Decision No. 1672/03*. Both parties also agreed that the Tribunal decide this appeal based on the written record and submissions. The only additional evidence put forward is the complete report of the post-mortem examination and a report by Dr. Strauss dated February 4, 2006, in which Dr. Strauss provides the following opinion:

I have reviewed in detail the deceased’s autopsy report and my file as well. First and foremost, the autopsy was thorough and appears to have been meticulously completed. There was no evidence of any major trauma, and no evidence of an intracranial hemorrhage that could have caused death. Rather, there is evidence of an acute myocardial infarction (within 24 hours) involving the left anterior descending artery, which is the most important coronary artery. The artery had evidence of an acute occlusion which confirms [the worker] died of an acute heart attack. Of note, if the patient had been taken to a hospital, there were treatment options available for this form of a heart attack which may have resulted in the survival of [the worker].

The estate’s position is essentially that if the worker had received first aid at the workplace and been taken to the hospital, his death may have been preventable.

The definition of accident includes the three listed scenarios including a “chance event occasioned by a physical or natural cause”. Mr. Macmillan further submits that since accident is defined as including the three listed scenarios, the definition does not necessarily exclude other types of accidents such as an omission.

Section 13(2) of the WSIA states that if the accident occurs in the course of the worker’s employment, it is presumed to have arisen out of the employment unless the contrary is shown. The Panel of *Decision No. 1672/03* concluded that the worker’s symptoms commenced during the course of his employment, while at the workplace and while in the performance of his duties. It was therefore found that the worker’s symptoms occurred in the course of his employment. Accordingly, the accident is presumed to have arisen out of the employment unless the contrary is shown. In my view, however, the presumption of section 13(2) is rebutted in this case and the worker’s heart attack and resulting death did not arise out of his employment.

On September 1, 2000, the worker was scheduled to start working at 5:45 a.m. He had either not started working or had just barely begun working when he started feeling unwell. It is highly unlikely that in this short amount of time he was engaged in anything physically strenuous. There is also no evidence that he was doing anything other than his regular work if indeed he had begun working. No work or task has been identified as potentially precipitating the worker’s heart attack and the worker’s estate is not making this allegation. Even Dr. Strauss has provided the opinion that the workplace was not the cause of the worker’s heart attack as found in his report of November 24, 2004.

The worker, unfortunately, had underlying asymptomatic atherosclerotic heart disease which precipitated his myocardial infarction. He also had many non work-related risk factors for heart disease, such as being a heavy smoker, a weekend alcohol consumer and overweight<sup>1</sup>. He was 50 years old at the time of his death. None of these factors were related to the worker’s employment.

A couple of Tribunal decisions have held that workplace circumstances that result in delayed medical treatment may be a significant contributor to the ultimate injury and disability suffered by a worker. In *Decision No. 19/91*, the worker worked as a long distance truck driver when he suffered a heart attack while sleeping alone in the cab of his truck. The Panel held that the nature of the worker’s employment was a significant contributor to the resulting injury. Had the worker been able to contact help immediately upon realising that he was suffering from a serious crisis, he could have obtained help in a more reasonable time period and avoided further damage to his heart muscle.

In *Decision No. 205/97*, the Panel held that a security guard working the night shift alone in areas locked and secured resulted in large part in his inability to obtain timely assistance after having suffered a stroke.

In the present case, the worker’s employment circumstances did not require that he work alone with no assistance available if needed. On the contrary, there were other workers and supervisors in the workplace. There was someone trained in first aid and CPR. The worker, however, decided to leave the workplace shortly after having arrived at work without himself informing a supervisor or seeking first aid. The worker apparently went outside where Mr. DS asked him if he was okay. The worker then indicated that he did not feel too good but Mr. DS assumed that it was a hangover from his previous night’s outing or was related to the worker’s usual complaints about the air-conditioning in the smoking room. Mr. DS then left to attend to a work task. Shortly afterwards, while Mr. DS was speaking with another co-worker, Mr. HK, the worker approached them and told them to tell the lead hand that he was going home because he was not feeling well. While the worker usually worked through his hangovers, there was nothing in his demeanour or complaints that suggested that the

worker was having a heart attack. He did not complain of anything having to do with chest pains. The worker was also a longstanding and trusted employee and no one would have second guessed his decision to unilaterally go home because he was not feeling well.<sup>2</sup>

Mr. Macmillan submits that the co-workers should not have allowed the worker to leave the workplace and should have instead called the supervisor and provided first aid and called an ambulance. He relies on the opinion of Dr. Strauss who states in part:

Although one cannot predict what would have happened if medical assistance was called before [the worker] left the factory and headed for home, it is very possible that [the worker] would have survived. Heart attacks can be treated with special “clot buster” medications in hospitals that prevent irreversible heart damage. If [the worker] was in hospital, even if his heart had stopped, an electric shock applied to the heart could have revived him. Without the electric shock begin administered in the first 6 minutes of the heart stopping, then the heart rhythm disturbance that [the worker] probably developed would have been irreversible and death would follow.

It is obvious in retrospect, that medical assistance should have been called for a 50 year old male, who was overweight, a smoker, and a dedicated worker who never missed work for an illness, and developed a sudden illness after arriving at work where he just did not feel well. The question arises why wasn’t medical assistance called for, a worker who was obviously at high risk for a heart attack, and who fellow workers should have suspected this as a possibility at that time. More importantly, who bears the responsibility for medical attention not being sought.

One of the problems with this opinion is that it is based on a *possibility* that if first aid had been called, the worker might not have died. This presupposes that emergency care and admission to the hospital would have been done in time prior to the development of any fatal condition. As submitted by Mr. LeMay, it is speculative to conclude that the worker would have survived if he had received first aid. Another problem with Mr. Macmillan’s submission is that it suggests that other employees were in a better situation than the worker himself to assess the severity of his condition. There is no evidence of any observable physical symptoms or complaints made by the worker that might have even suggested the need to call first aid and an ambulance. In my view, it is unreasonable to expect the co-workers to have realized the severity of the worker’s condition when the worker himself did not realize that his “illness” was of a more serious nature and would eventually lead to a heart attack. In this case, it is not the employment circumstances that lead to the delay in obtaining medical treatment but the worker’s own decision to leave the workplace and then subsequently suffer his heart attack in his vehicle part way between his workplace and his home.

Mr. Macmillan states that having been denied by the Tribunal under section 31 of the WSIA, the survivor returned to the Board only to have her claim denied there. In the right to sue application, however, as is frequently the case with such applications, the Panel accepted that “the facts as pleaded by the plaintiff, if proven at trial, would result in a finding of negligence and/or breach of contract by the Defendants and its employees, which would have taken place in the course of employment”. The Panel of *Decision No. 1672/03* relied on *Decision No. 1683/01* (September 27, 2001) as to why this approach is followed [at para. 34]:

I am of the view that it is necessary, in applications of this nature, to assume that the facts as alleged by the plaintiff can be proven in any subsequent trial. One of the objectives of the section 17 [currently section 31] process is to provide employers with immunity from liability for damages in those situations where the employer can properly claim the protection of the Act. A further objective of the provision is to insulate employers in such cases from the burden of participating in court proceedings, where their potential liability to the plaintiff arises *only* because of the actions of their employees, as contemplated by section 10(9) of the Act. This latter objective serves not just employers; it removes unnecessary litigation from an already overburdened judicial system,

and it protects plaintiffs from incurring unnecessary costs (both their own, and the costs to which they may be exposed as unsuccessful litigants). Consequently, at this stage, the Tribunal is concerned not with the Plaintiff's (or Defendant's) ability to prove their cases at trial, but with the extent to which the claims of negligence (or other causes of action), if proven, are based upon the acts or omissions of employees of the Defendants.

In the present appeal, I must consider the merits of the estate's claim for benefits and whether the acts or omissions of the employer and the co-workers significantly contributed to the worker's death. After having considered the evidence, I have concluded that there was nothing in the employment circumstances nor the actions or omissions of the co-workers that significantly contributed to the worker's fatal heart attack. The worker suffered from underlying atherosclerosis and had many personal risk factors that are more likely the cause of his myocardial infarction. In my view, the presumption that the worker's heart attack arose out of his employment is rebutted in this case and I therefore deny the appeal.

## DISPOSITION

The appeal is denied.

*Appeal dismissed.*

<sup>1</sup> Report dated September 3, 2003 by Dr. Haylock, the worker's family physician.

<sup>2</sup> Outline of expected testimony of Mr. DS, which statement was filed on consent without the necessity of the witness appearing to speak to its authenticity in the section 31 application as per then counsel of R. Andral's letter of August 26, 2003.



## Decision No. 14/06

Vice-Chair: Moore

Decision — February 12, 2007

Neutral Citation: 2007 ONWSIAT 339

**Right to sue (statutory accident benefits) – Jurisdiction, Tribunal (right to sue) (statutory accident benefits) – Standing (insurer).**

**Statutory accident benefits insurer had status to bring application for declaration under s. 31(1)(a) of the Workplace Safety and Insurance Act, 1997, that the right to commence an action was taken away.**

A dump truck operator was injured on October 12, 2004. He elected to not to claim benefits under the *Workplace Safety and Insurance Act, 1997*. He claimed and received statutory accident benefits. He did not pursue legal action. The insurer applied for a determination regarding the truck driver's status under the WSIA.

There is an issue regarding the status of an insurer to apply for a declaration under s. 31(1) of the WSIA in the absence of an action, which has been considered in three previous Tribunal decisions. Section 31(1)(c) refers to a plaintiff. Those prior decisions indicated that a plain reading would indicate that an insurer would not be able to apply for a determination in the absence of an action, even though it was able to do so under the pre-1997 *Workers' Compensation Act*. To retain the right to apply for a determination, it would be necessary to include a claimant within the word "plaintiff."

The insurer in this case submitted that its remedy was under s. 31(1)(a) rather than s. 31(1)(c). The Vice-Chair agreed with this submission.

Section 30(1) provides that it applies when a worker is entitled to benefits under the WSIA and is also entitled to commence an action. There is a distinction between a claim for benefits and the right to commence an action. A worker in s. 30 has to elect whether to claim benefits or commence an action. If an election is not made, the worker is deemed to have elected not to receive workplace insurance benefits. The Vice-Chair inferred from this that such a person will be treated as if he had elected to have commenced legal action.

The Vice-Chair also noted s. 59(1) and (2) of O. Reg. 403/96 under the *Insurance Act*, and interpreted it to mean that, once an insured person elects to bring an action, the insurer is required to pay statutory accident benefits regardless of whether the person is entitled to receive benefits under the WSIA.

Actual legal action is not required to trigger the provisions in issue. Section 31(1)(a) is intended to apply from the moment s. 30(1) defines a person's status. From the moment an accident occurs in circumstances that confer the right to claim benefits or commence an action under s. 30(1), the parties described in s. 31(1) are permitted to seek a declaration under s. 31(1)(a) to determine whether the right to commence an action is, in fact, taken away.

In this case, the truck driver believed that he had a right to commence an action and elected not to receive workplace insurance benefits under s. 30. The insurer was entitled apply for a declaration under s. 31(1)(a) that the driver did not have the right to commence the action.

The Vice-Chair found that the driver was a worker in the course of employment at the time of the accident. All workers of the Schedule 1 employer whose negligence allegedly contributed to the accident were also in the course of employment. The Vice-Chair concluded that the truck driver's right to commence an action was taken away.

It followed that the truck driver actually had no right to elect to commence an action. That election was of no force or effect. The truck driver was entitled to pursue a claim for workplace insurance benefits.

**Droit d'intenter une action (indemnités d'accident prévues par la loi) – Compétence du Tribunal (droit d'intenter une action) (indemnités d'accident prévues par la loi) – Qualité pour agir (assureur).**

**L'assureur de qui des indemnités d'accident légales étaient réclamées avait qualité pour déposer une requête pour que le Tribunal déclare aux termes de l'alinéa 31 (1) a) de la Loi de 1997 que le droit d'action était supprimé.**

Un chauffeur de camion benne a subi une lésion le 12 octobre 2004. Il a choisi de ne pas demander de prestations aux termes de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997). Il a demandé et touché des indemnités d'accident légales. Il n'a pas intenté d'action en justice. L'assureur a demandé au Tribunal de déterminer la situation juridique du chauffeur en vertu de la Loi de 1997.

Le Tribunal a examiné dans trois décisions précédentes la question de savoir si un assureur pouvait demander une détermination aux termes du paragraphe 31 (1) de la Loi de 1997 en l'absence d'une action. L'alinéa 31 (1) c) fait référence à un demandeur. Dans ces décisions précédentes, le Tribunal a indiqué qu'une interprétation franche indique qu'un assureur ne pourrait pas demander une détermination en l'absence d'une action, même s'il pouvait le faire en vertu de la *Loi sur les accidents du travail* d'avant 1997 (d'avant 1997). Pour maintenir le droit de demander une détermination, il faudrait inclure la personne qui demande des dommages-intérêts dans le terme « demandeur ».

L'assureur en l'espèce a soutenu qu'il se prévalait du recours prévu à l'alinéa 31 (1) a) plutôt qu'à l'alinéa 31 (1) c). Le vice-président a accepté son argument.

Le paragraphe 30 (1) prévoit qu'il s'applique dans les cas où un travailleur a le droit à la fois de demander des prestations aux termes de la Loi de 1997 et d'intenter une action. Il y a une distinction entre une demande de prestations et le droit d'intenter une action. À l'article 30, un travailleur doit choisir de demander des prestations ou d'intenter une action. S'il



ne fait pas ce choix, le travailleur est réputé avoir choisi de ne pas demander des prestations d'assurance contre les accidents du travail. Le vice-président en a déduit qu'une telle personne sera traitée comme si elle avait choisi d'intenter une action en justice.

Le vice-président a noté les paragraphes 59 (1) et (2) de la *Loi sur les assurances*, Règl. de l'Ont. 403/96, et il a indiqué que ces dispositions signifiaient selon lui que l'assureur doit verser des indemnités d'accident légales une fois qu'une personne choisit d'intenter une action, peu importe si cette personne a droit à des prestations d'assurance contre les accidents du travail aux termes de la Loi de 1997.

Une action en justice n'est pas nécessaire pour déclencher l'application des dispositions en question. L'alinéa 31 (1) a) est censé s'appliquer dès que le paragraphe 30 (1) définit la situation juridique d'une personne. Dès qu'un accident se produit dans des circonstances conférant le droit de demander des prestations ou d'intenter une action aux termes du paragraphe 31 (1), les parties décrites à ce paragraphe ont le droit de demander une détermination aux termes de l'alinéa 31 (1) a) en ce qui concerne la question de savoir si la Loi supprime le droit d'intenter une action.

En l'espèce, le chauffeur de camion croyait qu'il avait le droit d'intenter une action et il avait choisi de ne pas toucher de prestations d'assurance contre les accidents du travail aux termes de l'article 30. L'assureur avait le droit de déposer une requête pour que le Tribunal déclare aux termes de l'alinéa 31 (1) a) que le droit d'action était supprimé.

Le vice-président a conclu que le chauffeur de camion était en cours d'emploi au moment de l'accident. Tous les travailleurs de l'employeur de l'annexe 1 dont la négligence avait prétendument contribué à l'accident étaient aussi en cours d'emploi. Le vice-président a conclu que la Loi supprimait le droit d'action du travailleur.

Il s'ensuivait que le chauffeur de camion n'avait pas le droit de choisir d'intenter une action. Ce choix était inopérant. Le chauffeur de camion avait le droit de demander des prestations d'assurance contre les accidents du travail.

#### **Tribunal Decisions Considered:**

- *Decision No. 299/92* (1993), 26 W.C.A.T.R. 155 refd to
- *Decision No. 465/05* (2005), 76 W.S.I.A.T.R. (online) consd
- *Decision No. 2035/05* (2006), 76 W.S.I.A.T.R. (online) consd
- *Decision No. 1362/06I* (2006), 80 W.S.I.A.T.R. (online) consd

#### **Workplace Insurance Legislation Considered:**

- *Workers' Compensation Act*, R.S.O. 1990, c. W.11
  - s. 17(1)
- s. 17(2), as en. S.O. 1993, c. 10, s. 55(2)
- *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A
  - s. 12
  - s. 28
  - s. 30(1)
  - s. 30(2)
  - s. 30(6)
  - s. 31(1)

#### **Other Statutes and Regulations Considered:**

- *Insurance Act*, R.S.O. 1990, c. I.8
- *Statutory Accidents Benefits Schedule – Accidents On or After November 1, 1996*, O.Reg. 403/96
  - s. 59(1)

- s. 59(2)

APPLICATION by an insurer for a declaration under s. 31 of the *Workplace Safety and Insurance Act, 1997*.

February 12, 2007. THE TRIBUNAL: —

BEFORE: J.P. Moore, Vice-Chair

## REASONS

HEARING: November 21, 2006, at Toronto, Oral

SECTION 31 APPLICATION FOR  
A DECLARATION BY AN  
INSURANCE COMPANY

APPEARANCES:

For the applicant: D. McGoey, a Lawyer

For the respondent: Self-represented

### (i) Background

On October 12, 2004, the respondent was operating a dump truck. While unloading aggregate, the truck's hoist malfunctioned causing the truck to tip to the left. The respondent jumped from the cab of the truck and, in doing so, injured his left foot and ankle.

The respondent claimed insurance under the policy covering his motor vehicle. He received statutory accident benefits (SABs) until May 2005 when he returned to work. The SABs provider subsequently filed an application with the Tribunal seeking a declaration regarding the respondent's status under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA). That application is the subject of this decision.

### (ii) The Issue

The issue in this application is whether the insurance company providing SABs to the respondent is entitled to a declaration regarding the respondent's status under the WSIA.

### (iii) The Decision

Having reviewed the evidence and submissions presented to me, I am persuaded that the applicant is entitled to a declaration, under section 31(1)(a) of the WSIA, that the respondent's right to commence legal action is taken away and the respondent's election to do so is, accordingly, of no force and effect.

### (iv) Analysis

#### (a) The Facts

At the time of his accident, the respondent was operating a truck owned by a numbered company. That company paid premiums to the Board and was considered by the Board to be a Schedule 1 employer.

The respondent was the owner/operator of the numbered company. He and his spouse were the sole shareholders and officers of the company. Prior to his accident, the worker had obtained optional insurance under the WSIA, pursuant to section 12 of the legislation.

After the accident, the worker filed a claim with the Board but then informed the Board that he elected not to claim benefits under the WSIA. The respondent retained a lawyer who, in a letter dated November 11, 2004, informed the Board: “[The respondent] has instructed me to advise you that he has elected to commence an action against the party responsible for his injuries.”

On November 24, 2004, the respondent’s lawyer wrote a letter to a company who had serviced the respondent’s truck. The letter reads in part as follows:

Our purpose in writing to you is that [the respondent] has advised that his truck/trailer was serviced by your company on October 22, 2003, and that this accident occurred as a result of a “bad repair”.

We are writing to you at this time to put you on notice of our client’s intention to claim damages and pre-judgment interest as a result of the negligent repair of [the respondent’s] truck/trailer.

In the meantime, the worker applied for and began receiving SABs under the insurance policy covering his motor vehicle.

The respondent did not, in fact, pursue further legal action against the company that repaired his vehicle. A representative of that company testified at the hearing of this application and presented both a work order and an invoice indicating that his company had, in fact, serviced the respondent’s vehicle on October 22 and October 23, 2003, at the request of the respondent.

As I noted above, the respondent continued to receive SABs until he returned to work in May 2005. In his submissions on behalf of the applicant, Mr. McGoey stated that his client was seeking clarification of the respondent’s entitlement to past benefits, and to any future benefits. Mr. McGoey submitted that he was seeking a declaration pursuant to section 31(1)(a) regarding the respondent’s status under the WSIA. Mr. McGoey argued that, at the time of his accident, the respondent was a worker of a Schedule 1 employer, who had elected to pursue legal action against another Schedule 1 employer for the negligence of that employer’s workers. Mr. McGoey argued that the respondent could not elect to commence that action because section 28(1) of the WSIA barred such an action. That section stipulates:

**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.

In these circumstances, Mr. McGoey submitted that his client was entitled to a declaration pursuant to section 31(1)(a). Section 31(1) stipulates:

**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.

Mr. McGoey submitted that the respondent had no “right to commence an action” by virtue of section 28(1) and that his client, as an insurer from whom statutory accident benefits are claimed, was entitled to a declaration to that effect.

### *(b) The Problem*

Under the pre-1997 *Workers’ Compensation Act*, R.S.O. 1990, c. W.11, an insurer who was providing SABs could apply to the Tribunal for the type of declaration sought by Mr. McGoey pursuant to section 17(2) of that Act. That section exclusively addressed the right of an insurer to seek such a declaration. Section 17(1) of the pre-1997 Act contained a provision regarding the right of a party to an action to apply for a declaration concerning a right to sue.

When the legislation was amended with the enactment of the WSIA, the successor provision, section 31, contained different wording. There were no longer two separate provisions that addressed the application rights of a party to an action on the one hand and a SABs insurer on the other hand. Instead, section 31 states that either a party to an action or a SABs insurer may apply to the Appeals Tribunal. Section 31(1) stipulates the matters that the Tribunal may determine. The stipulated determinations do not precisely mirror those that were set out in the prior legislation. One of the stipulations, set out in section 31(1)(c), arguably narrows the Tribunal’s jurisdiction from that which existed prior to the WSIA amendments.

On the basis of the changes in the wording, two recent Tribunal decisions concluded that the Tribunal lacked the jurisdiction to provide a SABs insurer with a declaration under section 31 where the recipient of SABs had not yet commenced a legal action.

In the first of those decisions, *Decision No. 465/05* (2005), 76 W.S.I.A.T.R. (online), a Panel chaired by the present Vice-Chair, found that an insurance company could not seek a declaration that a SABs claimant was entitled to claim benefits under the WSIA because section 31(1)(c) stipulated that the Tribunal can only make such a declaration with respect to a “plaintiff”. The Panel concluded that, until such time as a SABs claimant initiated legal action and thereby became a plaintiff, the Tribunal lacked the jurisdiction to issue a declaration under section 31(1)(c) that the claimant was entitled to benefits under the WSIA. In so concluding, the Panel acknowledged that this reading narrowed the access of insurance companies to the Tribunal’s jurisdiction. However, the Panel concluded that the change in language in section 31(1)(c) must be given its plain meaning absent clear evidence that such a reading led to a nonsensical result. The Panel found that the change was, in fact, consistent with the overall scheme of the legislation. Consequently, it could not be said that the explicit narrowing of the predecessor legislation was nonsensical. The Panel chose therefore to apply the literal meaning of the language in the amended section.

A similar approach was taken in a subsequent decision, *Decision No. 2035/05* (2006), 76 W.S.I.A.T.R. (online), in which a Vice-Chair sitting alone agreed with *Decision No. 465/05* that the Tribunal did not have jurisdiction to issue a declaration pursuant to section 31(1)(c) where a SABs claimant was not a plaintiff. The Vice-Chair also concluded that the Tribunal did not have jurisdiction to issue a declaration that a claimant’s right to receive SABs was taken away, pursuant to section 31(1)(a). The Vice-Chair concluded that a SABs application did not constitute an action under the WSIA.

A third Tribunal decision distinguished *Decisions No. 465/05* and *2035/05*. In *Decision No. 1362/06I* (2006), 80 W.S.I.A.T.R. (online), a Vice-Chair sitting alone concluded that the interpretation of section 31(1)(c) found in the two prior decisions led to a result that made the literal application of section 31(1)(c) unreasonable. At paragraph 41 of the decision, the Vice-Chair

stated:

I conclude therefore that in order to interpret the WSIA and the *Insurance Act* harmoniously and purposively, the word plaintiff found in section 31(1)(c) also includes a claimant and that [the SABs insurer] may bring this application to the Tribunal under section 31(1)(c) of the WSIA.

To summarize, the problem faced in the above decisions was that, on the one hand, giving section 31(1)(c) its plain meaning resulted in a change to the legislation that the Legislature had not likely intended, limiting as it did the access of a SABs insurer to the Tribunal for a remedy it possessed under the previous legislation. On the other hand, to retain the previous harmony that existed between the WSIA and the *Insurance Act*, R.S.O. 1990, c. I.8, it became necessary to read into the word “plaintiff” in section 31(1)(c) the word claimant when the word plaintiff was a legal term with a precise legal definition.

### *(c) The Applicant’s Submission*

In his arguments on behalf of the SABs insurer, Mr. McGoey submitted that each of the three Tribunal decisions noted above had focussed their attention on the wrong portion of section 31(1). In his submission, a SABs insurer’s remedy was not found under section 31(1)(c), but, rather, under section 31(1)(a).

In his submission, when the legislation was amended, the intention of the Legislature was to simplify and clarify the complex wording found in section 17(1) and (2) of the pre-1997 Act. He argued that section 31(1)(a) was intended by the Legislature to reflect a comprehensive distillation of most of the provisions found in section 17 of the pre-1997 Act. In his view, the other two clauses in section 31(1), clauses (b) and (c), were intended to address ancillary issues that could arise under the right to sue provisions. He submitted that a careful analysis of the right to sue provisions in the WSIA supported his submission by showing interplay between the WSIA and the *Insurance Act*.

As will be seen in the reasoning below, I am in agreement with Mr. McGoey’s submission and have incorporated it into my analysis.

### *(d) The Application of Section 31(1) to a SABs Insurer*

Any application under section 31 of the WSIA will result following the application of section 30 of the Act. Section 30(1) stipulates:

**30(1)** This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan with respect to an injury or disease and is also entitled to *commence an action* against the person in respect of the injury or disease.  
[Emphasis added]

That section distinguishes between a claim for benefits and a right to “commence an action”. Section 30 goes on to stipulate that a person described in section 30(1) “shall” elect whether to claim benefits or commence legal action. The section imposes time limits regarding an election and states at section 6:

**30(6)** If an election is not made or if notice of election is not given, the worker or survivor shall be deemed, in the absence of evidence to the contrary, to have elected not to receive benefits under the insurance plan.

I infer from that latter stipulation that, in the absence of an actual election, a person shall be deemed to have elected not to

receive benefits and, thus, will be treated as if he had elected to have commenced legal action.

The wording of the provisions of section 59 of O. Reg. 403/96 (Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996) under the *Insurance Act* becomes germane at this point. Section 59(1) of the Regulation stipulates that an insurer is not required to pay SABs benefits to a person who is entitled to “receive benefits under any workers’ compensation law or plan”. Section 59(2) then stipulates that section (1) does not apply in respect of an insured person “who elects to bring an action referred to in section 30 of the [WSIA]”. Reading those provisions together, I interpret them as meaning that, once an insured person “elects to bring an action”, an insurance company is required to pay SABs benefits regardless of whether the person is entitled to receive the benefits under the WSIA.

What is crucial in the wording of the stipulations noted above is that legal action *per se* is not required to trigger the provisions in issue. The words continuation or maintenance of a legal action do not appear in the provisions. Rather, the wording speaks of the right to commence or elect to bring an action. In short, in my view, section 31(1)(a) is intended to apply from the moment section 30(1) defines a person’s status. That is, from the moment that an accident occurs in circumstances that confer on a worker the right either to claim benefits or to “commence an action” under section 30(1), then the parties described in section 31(1) are permitted to seek a declaration under section 31(1)(a) to determine whether the right to commence the action described in section 30(1) is, in fact, taken away. The action need not actually be commenced. What triggers the right to invoke the provisions of section 31(1)(a) is an evidentiary basis sufficient to initiate the right of election under section 30. Once such an election is either made, pursuant to section 30(2), or deemed, pursuant to section 30(6), an insurer’s right to seek a declaration under section 31(1)(a) crystallizes. If the evidence establishes a right of election that is followed either by an actual election or a deemed election, then at that point, a party to an action or a SABs insurer may apply to the Tribunal for a declaration whether the electing party’s right to commence an action is taken away. In my view, this interpretation fits with the provision in Regulation under the *Insurance Act*, found in section 59(2), which appears to remove an insurance company’s right to make an independent assessment regarding entitlement to benefits under a compensation plan once an insured person “elects” to bring an action.

As Mr. McGoey noted in his submissions, such an interpretation reflects a sensible legislative intent to reduce the complex wording found in the previous legislation into a simpler jurisdictional question. Whether section 30(1) applies to the circumstances of a particular accident depends on the facts of the case. If section 30(1) does apply, the injured worker must either seek benefits from the insurance plan or elect to commence an action. If the worker elects to receive benefits, then a SABs insurer is no longer required to pay SABs benefits pursuant to section 59(1) of the Regulation under *Insurance Act*. If, on the other hand, the injured worker either elects or is deemed to have elected to “commence an action”, then the SABs insurer is required to continue to pay SABs under section 59(2) of the Regulation but is then entitled to bring an application under section 31(1)(a).

Regarding the remaining clauses in section 31(1), Mr. McGoey argued that each of these clauses has a particular but narrow function.

Section 31(1)(b) addresses matters that arise out of section 29 of the WSIA limiting joint and several liability for a person otherwise protected from legal action by the WSIA.

Section 31(1)(c) addresses limited circumstances where a plaintiff’s right to claim benefits under the insurance plan may require adjudication apart from a determination regarding a right to commence action. These could include:

1. whether a plaintiff is an independent operator or a worker;
2. a plaintiff's entitlement to benefits in addition to damages under section 30(14);
3. determining the status and rights of parties where a lawsuit has been commenced and a Schedule 1 employer is found to be negligent in that lawsuit.

I fully agree with the interpretation suggested by Mr. McGoey and apply it to the present case. I find that the Tribunal has jurisdiction under section 31(1)(a) to determine whether the respondent's right to commence action is taken away in the present case. In doing so, I distinguish the three Tribunal decisions noted above on the basis that their analysis considered only the Tribunal's jurisdiction under section 31(1)(c). In my view, it is not necessary to address that provision. I note that one of the decisions in question, *Decision No. 2035/05*, also addressed section 31(1)(a) but did so in the context of the question of whether the Tribunal had jurisdiction under the clause to take away the SABs claimant's right to claim such benefits. The Vice-Chair concluded that there was no jurisdiction to make such a declaration. But that is not the nature of the application made in the present case, in which the applicant seeks a declaration that the SABs claimant's right to commence legal action is taken away.

#### *(e) The Present Case*

In the present case, I am persuaded by the evidence presented to me that the respondent sustained an injury in circumstances that he believed entitled him to make an election under section 30 of the WSIA. It is, therefore, not necessary to consider the effect of the deeming provision in section 30(6). The respondent in this case made such an election, as evidenced by the letter sent to the Board by the respondent's former lawyer specifying that the worker elected to commence legal action. The evidence also indicates that notice was given to potential defendants of such a legal action. I am persuaded on this evidence that the applicant was entitled to bring an application to the Tribunal pursuant to section 31(1)(a) for a declaration that the respondent did not have a right to commence legal action as he believed. I find that the Tribunal has jurisdiction to issue such a declaration, provided that the facts establish that the respondent's right to commence legal action is taken away by section 28 of the WSIA.

#### *(f) Is the Respondent's Right to Commence an Action Taken Away?*

Having reviewed the evidence and submissions presented to me, I am persuaded that the respondent's right to commence legal action is taken away in the present case.

The worker's testimony and the documentary evidence presented persuades me of the following facts:

- the respondent was a deemed worker with optional coverage under the WSIA;
- the was a deemed worker of a trucking company that the Board considered to be a Schedule 1 employer;
- the respondent was in the course of that employment when he was injured;
- the party against whom the worker issued a notice of liability was a Schedule 1 employer who paid premiums to the Board;
- the negligence alleged to have caused the worker's injury was attributed to that employer's workers while they were in the course of their employment.

I note, regarding this latter point, that the respondent argued that, when he was actually injured, the potential defendant's workers were not necessarily in the course of their employment. However, it is settled law in the Tribunal's caselaw that alleged negligence by the workers of another Schedule 1 employer need not be contemporaneous with a claimed injury for the provisions of section 28 to apply (for discussion, see *Decision No. 299/92* (1993), 26 W.C.A.T.R. 155).

The respondent also stated, in his closing submissions, that he was advised by the Board regarding his "rights" and he followed the Board's advice. However, my review of several memoranda written by Board representatives indicates that the respondent was not told that he was not entitled to compensation benefits but rather that, if the worker felt that his injury resulted from the negligence of a third party, he may have a right to elect to commence legal action, a course of action the worker subsequently chose to pursue. The memoranda also indicate that the applicant insurance company advised the respondent almost immediately that, in their view, the worker's injury was work-related and thus could affect his entitlement to SABs. The worker none the less elected not to claim benefits under the WSIA. The fact that the worker made a choice that was not legally supportable is not a basis for not applying the law in the present case. The WSIA anticipates that disputes about whether a worker may elect to sue will be resolved by a section 31 application.

I am persuaded therefore that, at the time of his injury, the respondent was a worker employed by a Schedule 1 employer, and that the workers of a Schedule 1 employer whose negligence allegedly contributed to the worker's injury were acting in the course of their employment in the circumstances that allegedly gave rise to the injury. On that finding, the worker's right to commence an action against that employer and its workers is taken away by section 28 of the WSIA. It follows that the respondent has no right to elect to commence a lawsuit.

I note for the benefit of the respondent that the respondent has already filed a claim with the Board, a claim that was put into abeyance when the respondent elected not to receive benefits. Given my finding that the worker is not entitled to make such an election and that the election is of no force or effect, the worker is entitled to pursue a claim for benefits from the insurance plan.

## DISPOSITION

The application is allowed. In the circumstances of this case, the respondent's right to commence legal action is taken away and the respondent's election to commence legal action is of no force or effect. The previously filed claim by the respondent for benefits under the WSIA may proceed.

*Application granted.*





## Decision No. 2500/06

Vice-Chair: Silipo

Decision — January 22, 2007

Neutral Citation: 2007 ONWSIAT 172

**Loss of earnings (level of benefits) – Labour market re-entry (co-operation) – Suitable employment.**

**Worker who did not participate in ESRTW or LMR activities but was capable of working in some capacity was entitled to LOE benefits based on earnings achievable without training.**

The worker suffered a back injury on February 18, 2002. The Board granted LOE benefits until April 11, 2002. The worker died in 2004. The worker's estate appealed a decision of the Appeals Resolution Officer denying LOE benefits after April 11, 2002. The appeal was allowed in part.

On the evidence, the worker was capable of performing suitable modified work by April 11. The employer did not offer modified work at that time. The employer terminated the worker's employment on May 29, 2002. The worker did not make any efforts for find modified work, either from the employer or elsewhere.

Under s. 43(1) of the *Workplace Safety and Insurance Act, 1997*, a worker has a right to LOE benefits until the loss of earnings ceases, which in this case, was in February 2003. Section 43(2) states that LOE benefits are the difference between pre-accident earnings and actual post-injury earnings or deemed post-injury earnings. Since the worker did not make any efforts to find modified work, the LOE benefits in this case should be based on deemed earnings.

Section 43(2) is subject to sections (3) and (4). Section 43(3) provides for full LOE benefits when a worker is co-operating in health care measures and ESRTW or all aspects of an LMR assessment or plan. While there was some limited participation in health care measures in this case, the worker was capable of working in some capacity and did not participate in ESRTW or LMR activities.

Section 43(4) provides a mechanism for deeming when the Board has provided LMR services or determined that LMR services are not required. That was not the situation in this case.

The Vice-Chair referred to the Board's Adjudicative Advice Practice Guidelines for Ordering LOE Benefit Arrears under the WSIA. Considering those guidelines, the Vice-Chair found that the worker was entitled to LOE benefits based on earnings achievable without training.

In the circumstances, the worker was entitled to LOE benefits based on deemed earnings working part-time at minimum wage.

**Perte de gains (niveau des prestations) – Réintégration sur le marché du travail (collaboration) – Emploi approprié.**

**La travailleuse n'avait pas participé à des activités de RTRS ou de RMT mais elle avait une certaine capacité de travail et elle avait droit à des prestations pour PG fondées sur les gains possibles sans formation.**

La travailleuse avait subi une lésion au dos le 18 février 2002. La Commission lui avait reconnu le droit à des prestations pour perte de gains (PG) jusqu'au 11 avril 2002. La travailleuse est décédée en 2004. La succession de la travailleuse a interjeté appel de la décision par laquelle le commissaire aux appels refusait de reconnaître le droit à des prestations pour PG après le 11 avril 2002. L'appel a été accueilli en partie.

La preuve indiquait que la travailleuse était apte à effectuer du travail modifié après le 11 avril. L'employeur ne lui avait pas offert de travail modifié à ce moment-là, et il l'avait remerciée de ses services le 29 mai 2002. La travailleuse n'avait pas fait d'effort pour trouver du travail modifié, que ce soit pour l'employeur ou ailleurs.

Aux termes du paragraphe 43 (1) de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997), un travailleur a droit à des prestations pour PG jusqu'à ce que sa perte de gains cesse, soit en février 2003 en l'espèce. Le paragraphe 43 (2) stipule que les prestations pour PG correspondent à la différence entre les gains d'avant l'accident et les gains réels ou réputés d'après la lésion. Comme la travailleuse n'avait pas fait d'effort pour trouver du travail modifié, les prestations pour PG devaient être fondées sur des gains réputés.

Le paragraphe 43 (2), qui est sous réserve des paragraphes 43 (3) et (4), prévoit le plein montant des prestations pour PG quand le travailleur collabore à un programme de traitement médical et à un programme de retour au travail rapide et sécuritaire (RTRS) ou à tous les aspects d'une évaluation de ses possibilités de réintégration sur le marché du travail (RMT). Bien qu'il y ait eu une participation limitée à un programme de traitement médical en l'espèce, la travailleuse avait une certaine capacité de travail et elle n'avait participé ni à un programme de RTRS ni à des activités de RMT.

Le paragraphe 43 (4) prévoit un mécanisme pour juger quand la Commission a fourni des services de RMT ou quand elle a déterminé que de tels services ne sont pas nécessaires. Ce n'était pas le cas en l'espèce.

Le vice-président s'est référé au document de la Commission intitulé *Adjudicative Advice Practice Guidelines for Ordering LOE Benefit Arrears under the WSIA*. Compte tenu de ces lignes directrices, le vice-président a conclu que la travailleuse avait droit à des prestations pour PG fondées sur ses gains possibles sans formation.

Dans les circonstances, la travailleuse avait droit à des prestations pour PG fondées sur des gains réputés à temps partiel au salaire minimum.

**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. 112
  - s. 126

**Board Directives and Guidelines Considered:**

- *Adjudicative Advice – Practice Guidelines For Ordering LOE Benefit Arrears Under the WSIA*
  - Director, Appeals Branch, March 1, 2002

APPEAL by the worker's estate from a decision of the Appeals Resolution Officer denying entitlement for colon cancer.

July 21, 2006. THE TRIBUNAL: —

BEFORE: A.V.G. Silipo, Vice-Chair

HEARING: December 8, 2006 at Toronto, Oral

DECISION(S) UNDER APPEAL: WSIB ARO decision dated December 6, 2004

**APPEARANCES:**

For the worker: Ms. Mariela Morales, Office of the Worker Adviser

For the employer: Ms. Lee Anne Farrow, Office of the Employer Adviser

**REASONS****(i) Introduction**

The worker's estate, through his spouse, appeals the decision of Appeals Resolutions Officer Mrs. N. Berman (ARO) dated December 6, 2004. That decision, rendered without an oral hearing, concluded that, arising from a compensable injury to his back that he sustained on February 18, 2002, the worker was not entitled to loss of earnings (LOE) benefits beyond April 11, 2002.

**(ii) Background**

The worker was as a delivery helper with the accident employer. On February 18, 2002, he injured his low back in a compensable injury and went off work.

On April 30, 2002, a Claims Adjudicator granted the worker entitlement to physiotherapy treatment but denied him entitlement to LOE benefits on the basis that the injury had not caused his low back impairment to significantly deteriorate below the 20% non-economic loss (NEL) level that the Board had granted him for a previous low back injury which he had sustained on November 13, 1992.

On June 20, 2002, the Claims Adjudicator granted the worker LOE benefits from February 18, 2002 until April 11, 2002, on the basis that it could not be established that the worker was below the 20% NEL level prior to that date and also noting that

the accident employer could not confirm that it had made an offer of modified work in writing.

The worker objected. In her decision of December 6, 2002, the ARO denied the worker's objection for the same reasons as the Claims Adjudicator. The worker appealed to the Tribunal.

The worker passed away on August 4, 2004. The worker's estate, through his spouse, has continued his appeal to the Tribunal.

### **(iii) Analysis and Conclusions**

On January 1, 1998, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) took effect and applies in this appeal. Pursuant to sections 112 and 126 of WSIA, the Appeals Tribunal is required to apply any applicable Board policy when making decisions. The Board has identified certain policies applicable to this appeal and I have considered them as necessary.

As noted, the worker had sustained an injury to his back prior to the compensable injury of February 18, 2002. In fact, the record indicates that he first injured his back in March 1989. The Board did not accept that he sustained a work-related injury at that time. In October 1989 the worker underwent an L5-S1 disctomy for problems which included radiating pain down the right leg. He apparently recovered well from the surgery. On November 18, 1991, the worker injured the left side of his low back in a compensable accident. He returned to work in March 1992. On November 13, 1992, the worker injured his low back in a compensable accident. He had radiating pain down his right thigh. That injury left him with a permanent impairment for which the Board granted him a 20% NEL award. Finally on February 18, 2002, the worker injured his low back with radiating pain down the left leg.

On March 19, 2002, Dr. Van Dorsser reported that he expected the worker to make a complete recovery in six to eight weeks. A March 14, 2002 Functional Abilities Evaluation indicates restrictions.

On April 11, 2002, Dr. Dorsser reported range of motion findings of 30° flexion, 10° extension, 15° left and right lateral flexion. On April 16, 2002, Dr. Dorsser reiterated that the worker would make a complete recovery but indicated no date.

On April 29, 2002, the Board's Medical Consultant, Dr. Germansky, advised that proposed physiotherapy was acceptable noting the worker's subjective symptoms even though the findings did not indicate an objective deterioration. The Claims Adjudicator allowed the worker physiotherapy treatment until June 2002.

On May 22, 2002, the accident employer terminated the worker's employment for abandonment.

A CT scan done on August 19, 2002, showed mild central disc bulging or herniation at the L4-5 level and minimal bulging at L5-S1.

On October 10, 2002, Dr. Dorsser reported that in October 1989 the worker had undergone an L5-S1 disctomy for an L5-S1 protruding disc with symptoms in his right leg. He noted that the surgery relieved the right leg symptoms. He added:

His current symptoms are the direct result of his work related injury of February 18, 2002. He has pain radiating down his left leg from the sacroiliac region of his back. His CT scan demonstrates herniation of the L4-5 lumbar disc – a different finding from his

previous injury.

It is my considered opinion that this is a problem unrelated to his old injury...

On November 19, 2002, a physiotherapist recommended treatment three times per week for twelve weeks with full recovery expected in three to four weeks. The Board denied that treatment. The worker's representative submits that the worker advised her that he proceeded with the treatment on his own. The accident employer's representative does not question that assertion. I accept that the worker underwent that physiotherapy treatment.

The ARO relied on the opinion of the Board's Medical Consultant, Dr. D. Kanalec, to whom she referred the file. He reviewed the worker's two compensable back injuries and advised that the findings confirmed a return to the previous NEL level as of April 11, 2002. He added:

In addition, the disc bulge at L4-5 appears to be an age-related disc bulge likely secondary to degenerative changes at that particular level and secondary to degenerative changes due to the prior L5-S1 discectomy resulting in increased motion at that particular segment. This would be unlikely directly related to the accident of February 18, 2002. There are no absolute signs of nerve root irritation...

The worker's representative does not dispute the similarity of range of motion findings between the worker's NEL assessment on February 10, 1994, arising from his 1992 back injury, and the range of motion findings which the family doctor, Dr. G.J. Van Dorsser, reported on April 11, 2002. However, Ms. Morales submits that the worker injured a different part of his low back on February 18, 2002, and had not recovered sufficiently to return to work despite those findings. She argues that based on the medical reporting, the worker is entitled to full LOE benefits until February 2003 or, in the alternative, until October 10, 2002.

The accident employer's representative acknowledges that the employer did not make the offer of modified work in writing but submits that the employer's oral offer of modified work in March 2002 indicated that the accident employer was willing to offer the worker modified work. Ms. Farrow points out that the worker had injured his back on various occasions before February 2002 and relies on the similarity of range of motion findings to argue that the worker was not below his previous 20% NEL level after April 11, 2002.

The range of motion findings reported in April 2002 are one indicator of the worker's level of impairment resulting from the February 18, 2002 injury. There appears to be some difference of opinion between Dr. Dorsser and Dr. Kanalec regarding whether the worker's injury of February 2002 was responsible for the L4-5 disc herniation. However, I note that the referred pain following that injury was to the worker's left leg rather than to his right leg as had been the case previously. Therefore, there is greater validity in the argument that the worker did injure a different part of his back on February 18, 2002, than he did previously. As a result, we cannot determine the worker's entitlement to LOE benefits simply by comparing the range of motion findings. Instead, it is more appropriate to consider the nature and extent of the worker's back and related left leg symptoms following the April 18, 2002 injury.

In Dr. Dorsser's reporting, there is little information about the impact of the injury on the worker's ability to return to work. Except for the reference to complete recovery in six to eight weeks in his initial report of March 19, 2002, there is no indication that the worker was unable to work in some capacity as of April 11, 2002. His report of October 10, 2002 distinguishes the worker's back injuries, but gives no indication that the injury of February 2002 prevented the worker from

returning to work in some capacity by that time. Therefore, the similarity of the range of motion findings reported in April 2002 to those of the NEL assessment in February 1994 are useful in that they support the conclusion that the worker was also capable of working in some capacity in April 2002. I also reach that conclusion noting that the worker managed to carry out regular duties with the accident employer since August 2001 despite the 20% NEL impairment from the November 1992 back injury. I further note that in November 2002 the physiotherapist indicated that the worker could have worked while undergoing treatment.

Therefore, as of April 11, 2002, the worker was capable of performing modified work with restrictions against heavy lifting, repetitive bending and prolonged sitting. There is some indication that the accident employer offered the worker modified work in March 2002 but the Board found that it made the offer improperly since there was no written record to confirm it. The accident employer then terminated the worker's employment on May 29, 2002, choosing not to wait until the worker had exhausted his right to object to the Board's decision to deny benefits. As a result, I must conclude that the accident employer did not offer the worker modified work at any time after April 11, 2002, and eliminated any possibility of doing so on May 29, 2002. At the same time, I find that the worker did not make any efforts to seek modified work from the accident employer or elsewhere.

What LOE benefits flow to the worker from my findings?

A worker who sustains a loss of earnings because of a compensable injury is entitled to LOE benefits pursuant to section 43 of the WSIA. Section 43(1) sets out a worker's right to LOE benefits and indicates that those benefits continue, under the particulars of this case, until the worker's loss of earnings ceased in February 2003 or in October 2002.

Section 43(2) to 43(4) sets out how to determine the quantum of a worker's LOE benefits. They state:

**43(2)** Subject to sections (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.

Section 43(2) states that a worker's "full" LOE benefits are 85% of the difference between the net average earnings before the injury and the net average earnings that the worker "earns or is able to earn in suitable employment or business after the injury." That means that under section 43(2) LOE benefits are calculated using the worker's actual post-injury earnings or an amount that estimates what the worker is *able* to earn in suitable employment after the injury (i.e., a *deemed* amount).

Given my findings, in this case the calculation of the worker's LOE benefits would use deemed post injury earnings.

The provisions of section 43(2) are subject section 43(3) and 43(4) which provides alternative methods of calculating workers' LOE benefits. Therefore, it is necessary to canvass those sections to determine if they apply. They indicate:

**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.

(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.

Pursuant to section 43(3) workers are entitled to full LOE benefits if they co-operate in health care measures *as well as* either his or her early and safe return to work or all aspects of a labour market re-entry assessment or plan. In this case, the worker was engaged in some health care measures. It appears that he continued to see his family doctor. Dr. Dorsser sent the worker for a CT scan in August 2002 and recommended a second course of physiotherapy in November 2002. However, I find that the worker's participation in those health care measures was limited and, in any event, would not entitle him to full LOE benefits since I have found that he was capable of working in some capacity. That capacity to work would have allowed him to participate in some return to work or LMR activities. I have also found that the worker did not engage in an early return to work or in any aspects of LMR. Therefore, section 43(3) does not apply in this case to entitle the worker to full LOE benefits. Rather, he is entitled to partial LOE benefits.

Section 43(4) provides a mechanism for deeming the worker's earnings after the injury, indicating them 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, the section which provides for an LMR assessment and LMR services. In this case the worker became entitled to LMR services as of May 29, 2002, when the accident employer laid off the worker and thereby was no longer capable of or interested in offering the worker early and safe return to work. The Board did not offer the worker LMR services nor did it determine if the worker required such services. Therefore, I must deem the worker's post injury earnings without the benefit of those decisions and tools.

To deal with such cases, the Board has developed *Adjudicative Advice Practice Guidelines for Ordering LOE Benefit Arrears Under the WSIA*. Although these Guidelines are not Board policy, various Tribunal decisions have concluded that they provide a reasonable process for determining LOE benefits in these circumstances. I agree with that assessment and have considered them in this appeal.

The Guidelines dated March 1, 2002, list a number of factors that ARO's will assess in ordering retroactive LOE benefits and it describes circumstances warranting payment of different levels of LOE benefits. They describe levels of LOE benefits payable in circumstances where a worker has refused to accept an offer of suitable employment at a wage loss, or at no wage loss, and circumstances where a worker has found another job, either when no suitable employment has been offered to the worker, or when the worker has been offered suitable employment at a wage loss, but has obtained an alternate job at a wage loss. With respect to circumstances in which a worker has an impairment that prevents him/her from returning to pre-injury employment and the accident employer has not offered suitable employment, the Guidelines state:

**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 suitable employment or engaging in other activities (e.g. active health care treatment) reasonably aimed at improving employability and minimizing LOE.

**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...

Based on my findings, in this case I should base the worker's post-injury earnings on the SEB that he would have achieved without training. That essentially requires a determination of what work the worker would have been able to find and perform as of April 11, 2002. In light of the medical treatment that he was undertaking and his continuing restrictions, I find that he would not have been capable of working on a full-time basis, but would have been capable of working on a half-time basis. I also find that it is likely that he could not have found such part-time work at more than minimum wage. The medical reporting indicates that this situation continued until the end of February 2003 by which time he was capable of returning to work comparable to his pre-injury work. The Board shall recalculate his LOE benefits from April 11, 2002 until February 28, 2003, on that basis.

## DISPOSITION

The appeal is allowed in part.

The worker is entitled to LOE benefits from April 11, 2002 until February 28, 2003, on the basis that he could have worked on a half-time basis at minimum wages.

*Appeal allowed in part.*





## Decision No. 2165/04R

### (Rouskov v. Les Services JAG Inc.; Stables v. DeMerchant)

Indexed as: Decision No. 2165/04R

Vice-Chair: Josefo

Decision — January 19, 2007

Neutral Citation: 2007 ONWSIAT 157

**Reconsideration (error of law) – Reconsideration (subsequent Tribunal decision) – Natural justice (procedural error) (full and fair hearing) – Right to sue – In the course of employment (distinct departure test) – In the course of employment (travelling).**

**It is not improper for adjudicators to refer to decisions not referenced by parties so long as it can be fairly said that parties had the opportunity to reference such decisions had they wished to do so – In any event, in circumstances, decisions were not novel or unusual and did not represent a departure from the law in the area.**

The plaintiffs in two civil actions were workers of a Schedule 1 employer. They drove in a rented car from Toronto to Detroit to attend a business meeting at 11 a.m. The meeting lasted only about half an hour. After the meeting, the plaintiffs went for lunch and then went shopping at an outlet mall. While proceeding on the highway back to Toronto, they were stopped by the police in what was described as a high risk takedown. They were, incorrectly, suspected of having been involved in a jewelry robbery. One of the police vehicles was stopped partially in a lane of traffic. The accident occurred when a passing truck struck that police vehicle, pushing it into the other stopped vehicles.

The defendants in the two civil cases applied to determine whether the plaintiffs' rights of action were taken away regarding the motor vehicle accident. In *Decision No. 2165/04*, the vice-chair found that the plaintiffs were not in the course of employment at the time of the accident and that, accordingly, their right of action was not taken away. The defendants applied for reconsideration of *Decision No. 2165/04*.

The defendants were attempting to re-argue findings of fact made by the vice-chair. There were no grounds to reconsider on that basis.

The defendants submitted that the vice-chair relied on Tribunal decisions that had not been discussed at the hearing. The

Vice-Chair noted that any decisions referred to in *Decision No. 2165/04* were available to all parties through the Tribunal's public internet site. It is not improper for adjudicators to refer to decisions not referenced by the parties so long as it can be fairly said that the parties had the opportunity to reference such decisions had they wished to do so. In any event, the decisions were not novel or unusual and did not represent a departure from the law in the area.

The defendants submitted that there is a critical difference between commuting to and from work and travelling for purposes of the employer's business, and that the vice-chair used the wrong test and the wrong line of decisions when he considered cases concerning commuting to and from work.

The Vice-Chair stated that reliance on some commuting cases did not provide grounds for reconsideration. The commuting cases were referred to by way of analogy. The key question to be decided was whether the plaintiffs made a distinct departure on a personal errand at the time of the accident. The common question in the situation of commuting or of longer distance travel is still whether the worker was in the course of employment at the relevant time. In either situation, it is necessary to determine whether there has been a distinct departure on a personal errand.

The application to reconsider was denied.

**Réexamen (erreur de droit) – Réexamen (décision subséquente du Tribunal) – Justice naturelle (erreur de procédure) (audition complète et équitable) – Droit d'intenter une action – Au cours de l'emploi (critère du retrait indiscutable) – Au cours de l'emploi (déplacements).**

**Il n'est pas inapproprié de la part des décideurs de faire référence à des décisions auxquelles les parties n'ont pas fait référence dans la mesure où il appert qu'elles auraient pu s'y référer si elles avaient voulu le faire – De toute manière, dans les circonstances, les décisions n'étaient ni nouvelles ni exceptionnelles et elles ne s'écartaient pas de la jurisprudence dans le domaine.**

Les requérants dans deux actions civiles étaient les travailleurs d'un employeur de l'annexe 1. Ils se sont rendus de Toronto à Détroit dans une voiture louée pour assister à une réunion d'affaire à 11 h. La réunion a duré seulement une demi-heure environ. Après la réunion, les requérants sont allés déjeuner et magasiner à un centre de magasins d'usine. En retournant à Toronto, la police les a arrêtés sur l'autoroute dans le cadre d'une arrestation décrite comme à risque élevé. Ils avaient été incorrectement suspectés de vol de bijoux. Un des véhicules de police bloquait partiellement une voie de circulation. L'accident est survenu quand un camion a frappé ce véhicule de police et l'a poussé dans les autres véhicules arrêtés.

Les parties intimées dans les deux actions civiles ont demandé au Tribunal de déterminer si la Loi supprimait le droit d'action des requérants au sujet de l'accident de véhicules automobiles. Dans la *décision no 2165/04*, le vice-président a conclu que les requérants n'étaient pas en cours d'emploi au moment de l'accident et que la Loi ne supprimait donc pas leur droit d'action. Les parties intimées ont demandé un réexamen de la *décision no 2165/04*.

Les parties intimées ont tenté de plaider de nouveau les constatations de fait du vice-président. Il n'y avait aucun motif de réexamen.

Les parties intimées ont soutenu que le vice-président s'était fondé sur des décisions du Tribunal dont il n'avait pas été question pendant l'audience. Le vice-président a noté que toutes les parties avaient accès aux décisions mentionnées dans la *décision no 2165/04* sur le site Web du Tribunal. Il n'est pas inapproprié de la part des décideurs de faire référence à des décisions auxquelles les parties n'ont pas fait référence dans la mesure où il appert qu'elles auraient pu s'y référer si elles avaient voulu le faire. De toute manière, les décisions n'étaient ni nouvelles ni exceptionnelles, et elles ne s'écartaient pas de la jurisprudence dans le domaine.

Les parties intimées ont soutenu qu'il y a une différence cruciale entre les déplacements pour se rendre au travail et en revenir et les voyages aux fins des activités commerciales de l'employeur et que le vice-président s'était fondé sur de mauvais critères et de mauvaises décisions quand il avait tenu compte de cas concernant les déplacements pour se rendre au travail et en revenir.

Le vice-président a déclaré que le fait de s'être fondé sur certains cas de déplacements ne constituait pas un motif de réexamen. Il s'était référé aux cas de déplacements seulement à titre d'analogie. La question clé à régler était la question de savoir si les requérants s'étaient indiscutablement retirés du travail en faisant des courses personnelles au moment de l'accident. La question commune dans la situation des déplacements ou des voyages plus longs demeure celle de savoir si le travailleur était en cours d'emploi au moment visé. Dans les deux situations, il est nécessaire de déterminer s'il y a eu retrait indiscutable en raison des courses personnelles.

La demande de réexamen a été rejetée.

#### **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. 228/87* (April 2, 1987) refd to
- *Decision No. 850/87R* (1990), 14 W.C.A.T.R. 1 refd to
- *Decision No. 297/06* (March 10, 2006) [2006 ONWSIAT 545] refd to

#### **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

#### **Cross-References:**

- *Decision No. 2165/04* (September 19, 2006) [2006 ONWSIAT 2083]

APPLICATION by the defendants in two civil cases to reconsider *Decision No. 2165/04*.

January 19, 2007. THE TRIBUNAL: —

BEFORE: J. Josefo, Vice-Chair

HEARING: January 12, 2007 at Toronto, Written

**DECISION(S) UNDER APPEAL:** Applicants' request for reconsideration of *Decision No. 2165/04* dated September 19, 2006, which denied the application for order removing the right to sue

**APPEARANCES:**

|                                    |                                                                   |
|------------------------------------|-------------------------------------------------------------------|
| For the Applicants:                | Mr. B. Sunohara<br>Mr. S. Ross, Barristers & Solicitors           |
| For the Respondents, the Rouskovs: | Mr. S. Wayne Morris<br>Ms. Delora Deravi, Barristers & Solicitors |
| For the Respondents, the Stables:  | Ms. E. Farrell and Mr. T. Boland, Barristers & Solicitors         |
| For the Interested Parties:        | Mr. C. Prince, Barrister & Solicitor                              |

**(i) The Reconsideration Request**

Counsel for the applicants Messrs. Ross and Sunohara, Barristers & Solicitors, request reconsideration of Tribunal *Decision No. 2165/04* (September 19, 2006). That decision denied the applicants the order they sought removing the right to sue of the respondents, the Stables and the Rouskovs.

The reconsideration request was assigned to me on December 12, 2006. I had before me the reconsideration record dated November 27, 2006. That record contained, amongst other items, submissions on reconsideration from the applicants, the respondents, and the interested parties. The record also contained Tribunal *Decision No. 2165/04* which the applicants, in their reconsideration submissions attached to the request form dated October 23, 2006, assert ought to be reconsidered because errors of law were committed when the wrong legal tests were applied, evidence was misinterpreted and overlooked, and the decision is "clearly wrong based upon the evidence". The applicants further submit that these combination of errors led to "significant defects" which, if corrected, would change the result of the original decision.

**(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) The Findings and Conclusions from Tribunal Decision No. 2165/04**

Tribunal *Decision No. 2165/04* is about 12 pages long. Accordingly, it is unnecessary as well as impractical to repeat it all here. In order to situate the matter in factual context, however, the following excerpts from *Decision No. 2165/04* are

reproduced [at paras. 1-40]:

This matter was described in my detailed memo completed on December 22, 2004 after the first hearing day. That memo described the within matter as follows:

This right to sue application was commenced on December 20, 2004 before me as Vice-Chair.

#### *The Application and the Parties*

Two civil actions arise out of a June 7, 2000 motor vehicle accident (“MVA”). In the Ontario Superior Court of Justice (“Toronto”) action (Court File No. 00-CV-201367), the Applicants in the right to sue application, Les Services JAG Inc (“Jag”), Terry David DeMerchant and General Electric Capital Equipment Finance Inc., some of the Defendants in that civil action, are all represented by Mr. S. Ross, assisted by Mr. B. Sunohara, both of the Rogers, Moore law firm. The Plaintiffs in that civil action, Svet and Amelia Rouskov, the Respondents in the right to sue application, are represented by Mr. W. Morris, assisted by Ms. D. Deravi, both of the Dutton, Brock law firm.

In Court File No. 57366/00, Ontario Superior Court of Justice (“Newmarket”) action, in addition to the Defendants DeMerchant, JAG and General Electric, additional Defendants include various Ontario Provincial Police Constables, including the estate of a deceased constable who died in the aforesaid motor vehicle accident and other parties. These parties are represented by Mr. C. Prince, of the law firm of Foster, Townsend. Mr. Prince is attending representing the Queen in Right of Ontario and the police constables, for the purposes of obtaining an Order under Section 29 of the WSIA for his clients if the application succeeds.

The Plaintiffs in the Newmarket action are Stephen, June and David Stables. These parties are also Respondents in the right to sue application. The Stables are all represented by Mr. T. Boland, assisted by Ms. E. Farrell, both of the firm of Boland, Howe.

The Applicants seek orders that Mr. Svet Rouskov and Mr. Stephen Stables, who, it was agreed at the hearing, were both workers employed by a Schedule 1 employer in Ontario, Windo-Motion, are barred from continuing their action against DeMerchant and JAG. The Applicants further request an Order that the related (spousal) Plaintiffs are barred from continuing with their family law claims. The Applicants further seek an Order declaring that no damages, contribution or indemnity are recoverable from General Electric with respect to any loss or damage for which DeMerchant and JAG may be found at fault.

#### *Background*

As indicated above, the application arises out of a motor vehicle accident that occurred on June 7, 2000. At that time Mr. Rouskov, Mr. Stables and a fellow co-worker were travelling from a business meeting in Detroit, when, on the 401 highway in Ontario, they were involved in a motor vehicle accident involving several parties. One of the parties involved in the motor vehicle accident, Terry DeMerchant, was a truck driver at the time engaged by or working for JAG. JAG is a company established in the Province of Quebec. It is not disputed that Mr. DeMerchant, as he was driving the truck, was in the course of his employment.

The circumstances of the accident involved what has been described as a “high risk” takedown, involving the Ontario Provincial Police stopping the vehicle in which Messrs. Rouskov and Stables were travelling. It was thought that this vehicle matched the description of a vehicle that had been involved in a jewellery robbery in the City of Windsor. Accordingly, they were pulled over by the Ontario Provincial Police for investigation.

In the course of this police-requested stop, which involved one or more OPP cruisers blocking the right traffic lane of the 401 highway, the accident ensued. One of the OPP officers was killed while other parties, including the Plaintiffs in the two civil actions (the Respondents in this proceeding) allegedly suffered severe injuries.

*The issues to be determined upon the application*

In the course of the hearing it was conceded, properly, that Messrs. Rouskov and Stables were workers of a Schedule 1 employer at the time. It was not conceded, however, that these individuals were in the course of their employment when the accident occurred. Indeed, that issue remains very much a live one.

It was also agreed that General Electric Capital Finance Corporation is the registered owner of the truck in question.

Other issues to be determined include whether or not JAG, a Quebec company, is a Schedule 1 employer within the meaning of Section 28(1) of the WSIA, or whether JAG is a “stranger to the Act”, as that expression has been used in some Tribunal decisions. In addition, it remains to be determined whether or not truck driver Mr. DeMerchant was a worker or was an independent operator. It also is very much an issue whether DeMerchant and JAG have a “substantial connection” to Ontario, as that expression has also been used in a number of Tribunal decisions.

Mr. Ross agreed that the Applicant has the burden of proof in establishing that the application should be granted.

A more detailed description of the actual motor vehicle accident (“MVA”) is found in the reasons for judgement of the Honourable Mr. Justice J. Kerr dated June 17, 2002. These reasons were issued following the conclusion of the trial of truck driver Mr. DeMerchant for the Criminal Code offences of driving causing death and dangerous driving causing bodily harm. Mr. Justice Kerr acquitted Mr. DeMerchant of these charges. The background facts described by Mr. Justice Kerr in his reasons help to better contextually situate the issues that are before me. Mr. Justice Kerr described the facts as follows:

The accused before the court faces one count of dangerous driving causing death, and four counts of dangerous driving causing bodily harm. All of these counts arise as a result of a motor vehicle accident occurring on June the 7th, 2000 in the eastbound portion of Highway 401, approximately one kilometer east of the overpass for Highway 40.

The following facts have been admitted:

On the day set forth in the indictment, at 3:30 p.m., a tractor-trailer, operated by the accused in an easterly direction in the driving or southerly lane of Highway 401, was involved in a collision with Sgt. Margaret J. Eve’s police cruiser, which was parked partially in that lane. The tractor-trailer then struck a second police cruiser, and thereafter a civilian motor vehicle. Following the initial impact between the truck and the Eve cruiser, that cruiser was in collision with a third police vehicle. It is admitted that as a result of the collisions Sgt. Margaret J. Eve was killed, while the persons named in counts two to five inclusive, two police officers and two civilians were injured. It was also admitted that there were no mechanical defects or other flaws in the tractor-trailer unit operated by the accused. A formal admission relating to these and other matters was filed at trial as Exhibit 134.

As described in my post-hearing memo dated December 22, 2004, there are a number of issues to be addressed in this hearing. Mr. Ross, one of [the] counsel for the applicants, correctly acknowledged that the applicant must establish that:

- a. Jag, the Quebec trucking firm, falls within the definition of a Schedule 1 employer,

- b. truck Driver DeMerchant was a worker (and not an independent contractor) employed by that employer,
- c. DeMerchant and Jag each have a substantial connection to Ontario,
- d. Messrs. Rouskov and Stables were in the course of their employment at the time of the MVA.

If the applicants do not succeed on any one of those points, then the application fails and the respondents Messrs. Rouskov and Stables, and their related family law claimants, may continue their respective civil actions.

As I am able to conclusively determine this matter by only addressing one of the four issues above, despite comprehensive evidence and submissions led on all issues, these reasons will only address the issue that I find determines this application. That issue is whether or not Messrs. Rouskov and Stables were in the course of employment at the time of the MVA.

...

It is not disputed that the meeting in Detroit commenced at about 11 a.m. on June 7, 2000 and ended no more than an hour and a half later. The uncontroverted evidence of both respondents is that, after this meeting, they were “off duty” although of course as salaried employees they continued to draw their pay. The evidence is persuasive that, having gotten up quite early in the morning of June 7, 2000 in order to drive from the greater Toronto area to Detroit, the respondents and their manager who accompanied them on the trip all concluded that their business day was over shortly after the conclusion of the parts meeting with the auto manufacturers’ representatives in Detroit.

After a short de-brief session following the meeting with the auto manufacturer, the testimony of both respondents was again uncontroverted that the “shop talk” came to an end. Rather, the respondents, who also socialized after work, and who enjoyed a pleasant working relationship with their manager, put aside work related issues and matters.

The respondents were not returning to their office in the afternoon. The respondents were not taking the most direct route home on their return to Ontario. Rather, as was described at the hearing, it was a “pleasant day in June” and the respondents and their manager planned to enjoy a leisurely lunch followed by shopping at an outlet mall in the Windsor area.

...

In essence, it is clear to me that they enjoyed what was described as a pleasant early summer afternoon in which they, to put it colloquially, decided collectively to “goof off” following having begun their working day at quite an early hour. Because of the early start to the day, the respondents concluded that they had already contributed sufficiently to their employer’s benefit for that day and, given the flexible nature of their work hours, which would occasionally see them working past regular hours or on the weekend depending upon business needs, the respondents, and presumably their manager, felt that there was no problem in their essentially taking the afternoon off.

...

Instead of taking the most direct route home, and instead of returning to the office or even conducting business while driving, the respondents chose to first stop for lunch. After lunch, they planned to and did in fact go shopping. These were clearly personal errands, wholly unrelated to work, with no work purpose or benefit to their employer.

The risks involved in stopping for lunch, driving along the 401, going into and then leaving from an outlet mall, were also not employment related risks. Rather, these were the same risks encountered by the travelling public and were unrelated to the risks encountered by these workers in the course of their employment.

The facts of this case are, as can be determined from the summary set out above, unusual as well as tragic. The “high risk take

down” of the respondents, who were wrongly suspected of being involved in a serious criminal offence, was what led to the MVA.

But at the time of the MVA it further cannot be said that the respondents were, in any way, under the control of their employer. Rather, as the evidence amply demonstrates, the respondents were under the control, direction and authority of officers of the Ontario Provincial Police who had stopped their vehicle. The evidence is clear that the officers did not request but instructed or directed the respondents to stand, move, and position themselves as these officers required.

The evidence is also convincing that the officers were on high alert and ready to draw their firearms if the officers determined that this course of action was necessary. The evidence reveals that, while the officers were about ready to release the respondents from the highway stop, at the time the MVA occurred the respondents had not yet been released. The respondents, along with their manager, were still under control of the OPP at the time of the MVA.

...

This within application is, in my view, similar to what are often described as the “travelling” cases that have regularly been adjudicated upon by this Tribunal. In this case, moreover, it cannot be said that the respondents Rouskov and Stables were travelling (back) to work at the time of the MVA. Rather, considering the question posed in the English court of appeal decision, *Nancollas*, wherein it was asked whether “this was a journey to work or whether the journey itself was part of his work?”, in this case the afternoon journey was to have lunch, go shopping, and ultimately to return home. Thus, as it has been long held that the journey to or from work is, unless exceptions apply, not in the course of employment, it can hardly be concluded that a journey other than to work would be in the course of employment.

On the morning of June 7, 2000 the respondents were, in my view, clearly travelling “as part of [their] work. As I stated, had the accident occurred while the respondents were travelling as part of their work, they would have no right to sue. But the return trip, which was indirect, meandering and unrelated to work, is entirely different. At its most highest, the return trip could be described as a journey *from* work, *albeit* a very indirect journey.

As the excerpt from Tribunal *Decision No. 297/06* indicates, the issue of the employer’s control at the relevant time, and the nature of risk with which the respondents were then faced, are also important factors. I find for reasons discussed above that the respondents were anything but under the control of their employer at the time of the MVA.

Moreover, I further conclude that the risk they faced was, leaving aside the highly unusual and unfortunate nature of it, anything but the type of risk these individuals would have encountered as part of their employment. Rather, the tragic circumstances in which they were enmeshed could have occurred to any other Ontario road user who happened to be driving a vehicle that matched the description of the vehicle used in the commission of the crime earlier in the day.

...

Mr. Sunohara attempted to rely upon Tribunal *Decision No. 550/93* which involved a sole proprietor who had a “mixed day” of meetings in the morning and other meetings in the afternoon. In that case while that decision correctly held that plaintiff was in the course of her employment with her right of action being taken away, the facts are clearly distinguishable from the facts before me. In the matter before me, again, there was no business purpose for the afternoon journey. Rather, that was a personal journey involving work colleagues who were also friends, and involved entirely a personal errand.

As the evidence indicates, instead of these work colleagues and friends using the more direct highway # 402 to return to the office, the respondents chose to use highway 401, stopping for lunch and shopping, which that highway would better facilitate.

I do not agree with Mr. Sunohara that the stop at the outlet mall was only a “temporary deviation” and after that deviation for a personal errand the parties resumed being within the course of employment. If the respondents had been involved in a journey in the afternoon which itself was work that argument might succeed. Again, however, those are not our facts.



Tribunal *Decision No. 1297/04* also does not apply to the facts of this case. In that decision the individual was clearly involved in a drive for a work purpose – to test the vehicle when the MVA occurred. Again, these are not our facts.

To summarize, the Respondents on their afternoon journey took an indirect route home in order to facilitate personal errands in which they voluntarily chose to engage. They had a leisurely lunch, went shopping and then encountered an unfortunate and ultimately tragic police stop. During their afternoon activities it cannot be found that the respondents were under the control of their employer, nor were they engaged in any work activity or work purpose. Rather, they were engaged in personal activities that had nothing to do with their employment and, when stopped by the OPP, the respondents were entirely under the custody, control and direction of the OPP.

...

It is also established that the right to sue, an ancient common law right, has long existed before the “historic bargain”. In my view only upon clear evidence should this legal right of long-standing be removed. In this matter, given that workers ordinarily travelling to and from employment would maintain the right to sue, it is clear to me that workers not travelling to employment, but rather travelling for purposes entirely unrelated to employment, may maintain their civil action.

Thus, the application does not succeed and the respondents maintain their right to sue. Having come to this conclusion I need not address the submission of Mr. Prince for the interested parties.

#### **(iv) Submissions of the Applicants**

The applicants assert that the decision for which reconsideration is sought applied the wrong test and focussed on a line of cases which address workers who proceed to or from work. Yet, it is asserted that the facts in the within matter involve two workers who travelled out of town on a business trip and who are not simply *commuting* to or from work. It was submitted that the Board’s *Operational Policy Manual* document makes the distinction between “proceeding to and from work” and “travel on employer’s business”.

In addition to asserting that the wrong test was used and the wrong case law applied, it is submitted that the conclusions drawn from the evidence by the Vice-Chair were “clearly wrong” and that material evidence was overlooked. It is further asserted that the Vice-Chair referred to certain Tribunal decisions that were not raised in argument before him, and without the parties having had an opportunity to address these decisions.

Thus, continuing to summarize from the submissions of the applicant on reconsideration, it is asserted that these combination of errors led to significant defects in the decision which, if these defects were corrected, would likely change the result of the decision.

#### **(v) Discussion and Conclusions**

The above of course is my summary of the thorough submissions of the applicant. The respondents also provided detailed and thorough written submission opposing the reconsideration request. I need not address these in any detail because I have found that the request for reconsideration ought to be denied. My reasons for so concluding are as follows.

The attempt by the applicants to re-argue the facts does not succeed. The evidence considered and discussed in the original decision amply supports the finding that the respondents were on a distinct departure for a personal errand when the accident

occurred. The evidence also well supports the finding that the activities in which the respondents were involved when the MVA occurred were clearly not work-related. Thus, while the applicants assert that these factual findings are “clearly wrong” because it is submitted (again) that the personal activity in which the respondents may have been engaged was over by the time the accident occurred, I conclude that the original decision amply sets out how and why those various factual findings were reached. I further confirm the factual findings as reasonable and based upon the evidence.

The same observation must be made regarding the applicant’s attempt to re-argue the question of whether or not the respondents were under the control of the Ontario Provincial Police at the time of the accident. The evidence considered and discussed in the original decision sets out how and why it was concluded that the respondents were under the control of the OPP. The attempt to re-argue these and other issues, without more, does not meet the threshold test. Accordingly, the attempts to re-argue findings of fact do not succeed.

The submission of the applicants that the Vice-Chair relied upon Tribunal decisions that had not been discussed at the hearing similarly does not succeed. Any Tribunal decisions referenced in the reasons were available to all parties on the Tribunal’s public internet site, and these decisions were available well before all submissions were concluded. Indeed, as the respondents noted in reply submissions, it is not improper for Adjudicators to refer to decisions not referenced by the parties, so long as it can be fairly said that the parties had the opportunity to reference such decisions had they wished to do so. Moreover, the decisions referenced do not represent any departure from the law in this area; they are not novel or unusual cases, and nor were they cases that counsel could not have been able to find, if counsel had looked for them. Thus, this ground for reconsideration also does not succeed.

The submission that the wrong test and wrong line of cases were used, because there is a critical distinction between “proceeding to and from work/commuting” and “travel on the employer’s business”, and the various cases discussed under each of these subheadings, also does not succeed. That the Vice-Chair relied upon some of the so-called “*commuting* cases” is not, in my view, grounds to allow the reconsideration request.

The original decision referenced some of the “commuting cases” by way of clear analogy. Indeed, it was noted in the original decision that some of the facts from this within application are similar to some facts in what are described as the “commuting cases” decided at the Tribunal. The use of analogies in reasons for decision, and the ability to reference various lines of case law when similar principles apply whether one is “commuting” or engaged in “travel on the employer’s business”, is not inappropriate.

The reason it was appropriate to refer to either line of cases in this matter is that the key question was whether the respondents had made a “distinct departure on a personal errand” from the nature of their work activities at the occurrence of the MVA. As well-argued in the written submissions of Ms. Farrell, counsel for the respondents Stables, whether one is addressing an individual travelling to and from work/commuting, or someone engaged in longer distance travel for the business of his employer, the common issue still often is whether or not the worker in either situation was in the course of employment at the relevant time.

To determine whether or not a worker in either scenario is in the course of employment, one must ask whether or not there has been a “distinct departure on a personal errand”. Ms. Farrell submitted in this respect in part as follows in her cogent written submissions opposing the reconsideration request:

The common ground in both types of situations for ruling that a worker was not in the course of employment is the consideration of whether there has been a distinct departure on a personal errand. Clearly, both types of cases are relevant to the determination of whether, at the time of the accident, there was a distinct departure on a personal errand, and the same result would be achieved irrespective of which type of case is considered. It is too simplistic to draw a distinction between cases involving “travel on employer’s businesses” and what the applicants have termed as “commuting cases” for the purpose of considering the issue of “distinct departure on a personal errand.

It is also submitted, correctly, by the respondents that the case law referenced in the original decision for which reconsideration is sought is applicable to the within facts. It is noted that Tribunal *Decisions No. 297/06* (March 10, 2006) and *228/87* (April 2, 1987) involved workers who were travelling out of town to job sites. Ms. Farrell correctly notes that in those cases, as in the within matter, the issue or question to be addressed nevertheless remains “whether the worker was under the ‘control’ of his employer [or] whether [the worker] was on a ‘personal errand’ at the time of the accident.”

I agree with those submissions. The real issues and thus questions in the within matter involved the nature of the activities of the respondents at the relevant time. Who, if anyone, was in control of the respondents? Could be concluded that they were involved in personal errands, or were they nevertheless in the course of their employment at the time of the MVA?

The original reasons stated in some detail that the respondents were not under the control of their employer. Nor were they engaged in a work activity or work purpose. Nor were they having a “mixed day”, and in the course of returning to work activities after only a temporary deviation for a personal errand. Rather, the original reasons explained in detail that, on the evidence, the respondents were in the afternoon of the fateful day in question engaged solely in personal activities that had nothing whatsoever to do with their employment duties, and that the risk from these activities had no relationship with their typical employment risk. The decision also concluded that the respondents were under the control of the OPP at the time of the MVA.

Nothing in the submissions for the applicants leads to a conclusion that the factual findings and legal analysis applied in the original decision were incorrect or not based upon a reasoned consideration of the evidence. The questions most germane to the live issues were carefully addressed and answered in the original reasons.

Accordingly, I conclude that the Tribunal’s threshold test for granting a reconsideration request has not been met. The respondents maintain the right to sue in the civil action which has been outstanding since November 2000. It is hoped that the parties now get on with that ageing civil matter.

## **DISPOSITION**

The request for reconsideration is denied.

*Application denied.*



## Decision No. 126/07

Vice-Chair: B. Cook

Decision — February 12, 2007

Neutral Citation: 2007 ONWSIAT 337

**Permanent disability (hearing loss) – Occupational disease – Pensions (Rating Schedule) (hearing loss) – Board Directives and Guidelines (hearing loss) – Interest (pre-1990 accident).**

**Worker had hearing loss sufficient for permanent disability award dating back to 1963 but was not entitled to pension at that time due to s. 116(1) of Workmen's Compensation Act, R.S.O. 1960, c. 437, which was applicable at the time, and limited compensation for occupational disease to circumstances where worker was disabled from earning full wages at work at which he was employed – Worker was entitled to pension retroactive to 1970 when he left the employment that caused the hearing loss.**

The worker was exposed to hazardous noise from 1945 to 1970. He made a claim for hearing loss in 1963, but the claim was allowed for health care benefits only. In June 1988, the Board adopted a new policy on hearing loss, which allowed a pension for hearing loss of 35 decibels in one ear and 25 decibels in the other ear. Previously, hearing loss of 35 decibels in each ear was required. In 2004, the Board granted the worker a pension for hearing loss retroactive to June 1988. The worker appealed a decision of the Appeals Resolution Officer denying the pension prior to June 1988, and denying interest on the delayed pension payment. The appeal was allowed.

The audiogram in 1963 indicated hearing loss of 38.3 decibels in one ear and 30 decibels in the other ear. However, it appears that the hearing loss findings were based on the average of three frequencies (500 Hz, 1,000 Hz and 2,000 Hz). Even prior to the 1988 policy change, the Board based hearing loss findings on the average of four frequencies (500 Hz, 1,000 Hz, 2,000 Hz and 3,000 Hz). Evidence given for *Decision No. 434/89A* indicated that, to equate the calculation based on three frequencies with a calculation based on four frequencies, it would be necessary to add 7 or 8 decibels to the loss calculated using the three frequencies. Thus, the worker's hearing loss would have been about 44 decibels and 37.5 decibels using four frequencies. This was sufficient for a pension even in 1963.

However, the worker was not entitled to a pension retroactive to 1963. Section 116(1) of the *Workmen's Compensation Act*, R.S.O. 1960, c. 437, which was in force at the time, provided that a worker suffering from an industrial disease who was thereby disabled from earning full wages at the work at which he was employed was entitled to compensation. Thus, according to the Act at the time, a worker could not be paid a pension unless the worker was disabled from earning full

wages in the work that caused the disease. This provision continued until amendments to the Act in 1973 (*Workmen's Compensation Amendment Act, 1973 (No. 2)*, S.O. 1973, c. 173, s. 9).

In this case, the worker did not leave the employment that caused the hearing loss until 1970. Therefore, the worker was entitled to a pension dating from 1970.

The Board denied interest because the decision to grant the pension was made by the Claims Adjudicator, not at the appeal level. The delayed benefit was now the result of this decision of the Tribunal. Accordingly, the worker was also entitled to interest according to Board policy from January 6, 1989.

**Invalidité permanente (déficience auditive) – Maladie professionnelle – Pensions (barème des taux) (déficience auditive) – Directives et lignes directrices de la Commission (déficience auditive) – Intérêts (accident d'avant 1990).**

**La déficience auditive du travailleur remontant à 1963 était suffisante pour ouvrir droit à une pension d'invalidité permanente mais il n'avait pas droit à une telle pension en raison du par. 116 (1) de la *Workmen's Compensation Act*, L.R.O. 1960, chap. 437, applicable à ce moment-là, qui limitait l'indemnisation pour maladie professionnelle aux cas d'incapacité à gagner le plein salaire dans l'emploi occupé – Le travailleur avait droit à une pension rétroactive à 1970, quand il a quitté l'emploi à l'origine de sa déficience auditive.**

Le travailleur a été exposé à des bruits dangereux de 1945 à 1970. Il a fait une demande d'indemnité pour déficience auditive en 1963 mais la Commission a accepté sa demande seulement pour des prestations de soins de la santé. En juin 1988, la Commission a adopté une nouvelle politique sur la déficience auditive permettant une pension pour les déficiences auditives de 35 décibels dans une oreille et de 25 décibels dans l'autre oreille, alors qu'il fallait auparavant une déficience auditive de 35 décibels dans chaque oreille. En 2004, la Commission a reconnu au travailleur le droit à une pension pour déficience auditive rétroactive à juin 1988. Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels refusait de lui reconnaître le droit à une pension avant juin 1988 et à des intérêts sur la pension versée en retard. L'appel a été accueilli.

L'audiogramme de 1963 indiquait une déficience auditive de 38,3 décibels dans une oreille et de 30 décibels dans l'autre oreille. Il semblait toutefois que la déficience auditive avait été établie à partir de la moyenne de trois fréquences (500 Hz, 1 000 Hz et 2 000 Hz). Même avant le changement de politique de 1988, la Commission déterminait la déficience auditive à partir de la moyenne de quatre fréquences (500 Hz, 1 000 Hz, 2 000 Hz et 3 000 Hz). Selon la preuve déposée dans le cas examiné dans la *décision no 434/89A*, pour évaluer un calcul fondé sur trois fréquences avec un calcul fondé sur quatre fréquences, il faudrait ajouter 7 à 8 décibels à la déficience auditive calculée au moyen de trois fréquences. Par conséquent, la déficience auditive du travailleur aurait été de 44 décibels et de 37,5 décibels à partir de quatre fréquences. Cette déficience était suffisante pour ouvrir droit à une pension en 1963.

Cependant, le travailleur n'avait pas droit à une pension rétroactive à 1963. Le paragraphe 116 (1) de la *Workmen's Compensation Act*, L.R.O. 1960, chap. 437, applicable à ce moment-là, prévoyait une indemnité pour un travailleur souffrant d'une maladie professionnelle l'empêchant de gagner son plein salaire dans l'emploi occupé. Par conséquent,

selon la Loi alors en vigueur, un travailleur ne pouvait pas toucher une pension à moins d'être incapable de gagner son plein salaire dans l'emploi à l'origine de sa maladie. Cette disposition est demeurée en vigueur jusqu'au moment des modifications apportées à la Loi en 1973 (*Workmen's Compensation Amendment Act, 1973 (No. 2)*, S.O. 1973, c. 173, s. 9).

En l'espèce, comme le travailleur a quitté l'emploi à l'origine de sa déficience auditive seulement en 1970, il a droit à une pension rétroactive à 1970.

La Commission a refusé de verser des intérêts parce que la décision de reconnaître le droit à une pension a été prise par un agent d'indemnisation, et non en appel. Comme les prestations versées en retard sont maintenant le résultat de cette décision du Tribunal, le travailleur a droit à des intérêts à partir du 6 janvier 1989 conformément à la politique de la Commission.

#### **Tribunal Decisions Considered:**

- *Decision No. 434/89A* (1993), 27 W.C.A.T.R. 1 consd

#### **Workplace Insurance Legislation Considered:**

- *Workers' Compensation Act*, R.S.O. 1960, c. 437
  - s. 116(1)

#### **Board Directives and Guidelines Considered:**

- *Operational Policy Manual*
- Document No. 04-03-06 (July 1989) (since superseded)
  - Document No. 18-01-08 (October 12, 2004)

APPEAL by the worker from a decision of the Appeals Resolution Officer regarding the retroactivity of a pension for hearing loss and interest on the delayed payment.

February 12, 2007. THE TRIBUNAL: —

BEFORE: B.L. Cook, Vice-Chair

HEARING: January 18, 2006 at Toronto, Written appeal

DECISION(S) UNDER APPEAL: Appeals Resolution Officer N. Grunenko, dated June 19, 2006

APPEARANCES:

For the worker: Emy Abitbol, Consulatant

For the employer: Not participating

## **REASONS**

### **(i) Introduction**

The worker worked in hazardous noise from 1945 to 1970. In 1970, he changed jobs and was no longer exposed to hazardous noise. He submitted a claim for hearing loss in 1963. The claim was allowed for medical aid (now health care) benefits only

as the Board concluded that the worker did not have sufficient loss to warrant a permanent disability award.

In June 1988, the Board adopted a new policy. Previously, a worker had to have a loss of at least 35dB in each ear in order to receive a pension for hearing loss. Under the new policy, a worker had to have a loss of at least 35 dB in one ear and 25 dB in the other ear in order to receive a pension for hearing loss.

In 2004, the worker submitted a new audiogram and a second audiogram was submitted in 2005. These showed that the worker had a marked hearing loss. The Board determined that the worker was entitled to a pension, but dating only from June 1988, the date of the change in policy. The Board also determined that the worker was not entitled to interest on the delayed pension payments because the worker's claim did not meet the Board's criteria for payment of interest.

The worker has now appealed to the Tribunal.

## **(ii) Issues**

The issues in this appeal are:

1. whether the worker is entitled to a pension for hearing loss for any period before June 1988;
2. whether the worker is entitled to interest on the delayed pension payments.

## **(iii) Background**

The 1963 audiogram was done by Dr. Morgan Brosnan, an otolaryngologist. He forwarded it to the Board along with a report dated September 13, 1963. Dr. Brosnan reported that the physical examination of the worker's ears was not remarkable. There was no history of any ear problems and no family history of deafness. Dr. Brosnan noted that the worker was employed in hazardous noise and that the worker complained that after leaving the workplace, "it takes him several hours to get adjusted to the effect of the acoustic trauma on his ears... He has a particular problem with discrimination of sound."

The worker's claim for hearing loss was approved in 1963 and he was granted entitlement for a hearing aid. The claim was reviewed by Dr. Hogarth, of the Board's medical staff, in October 1963. He commented: "[The worker] would be entitled to a permanent disability award if and when he retires or before if he changes jobs."

It appears that there was then no further action in the claim until 2005, more than 40 years later. At that time, Mr. Abitbol contacted the Board and asked the Board to grant the worker a pension retroactive to 1963.

The Claims Adjudicator reviewed the claim. The Claims Adjudicator noted the memo from Dr. Hogarth, and noted that it suggested that the worker would be entitled to a permanent disability award in 1963. However, the Claims Adjudicator indicated: "This information is incorrect as worker had to have had 35 dB in both ears which worker did not have at that time."

The Claims Adjudicator noted that the Board changed its hearing loss policy in 1988. Under the new policy, a pension was granted if the worker had at least a 35 dB loss in one ear and at least a 25dB loss in the other ear. The Claims Adjudicator concluded that the worker was entitled to a pension retroactive only to June 3, 1988, the effective date of the policy change.

Mr. Abitbol objected. He submitted various Tribunal decisions which concluded that a pension for hearing loss could be granted under the terms of the new policy for periods prior to 1988. In particular, the Panel majority in *Decision No. 434/89A* (1993), 27 W.C.A.T.R. 1, found that while June 3, 1988, was “not unreasonable” as the start date for the policy change, August 9, 1976 was a better date. Mr. Abitbol referred the Board to some subsequent decisions that followed *Decision No. 434/89A*.

The Appeals Resolution Officer agreed with the Claims Adjudicator that the worker was not entitled to a pension retroactive to 1963 on the grounds that the worker did not have enough hearing loss in 1963 to warrant a pension. The Appeals Resolution Officer also found that under the Board’s policy, the new approach took effect in June 1988, and that the worker was entitled to a pension only as of that date. The Appeals Resolution Officer also found that the worker was not entitled to interest on the delayed payments under the terms of the Board’s policy.

#### **(iv) Conclusions**

As mentioned above, the 1963 audiogram was done by Dr. Brosnan, an otolaryngologist. In his report of September 13, 1963, Dr. Brosnan indicated:

[The audiogram shows] a marked hearing loss of the sensori-neural type, in both ears. He has a 30 to 40 dB. hearing loss in the speech frequencies as well as greater loss at 4,000 and 8,000.

[The worker] is aged about thirty-six and with this degree of loss it is certainly a handicap and will probably continue to be more of a handicap as he grows older. This is a bilateral sensori-neural hearing loss and he probably would be benefited by a hearing aid.

The copy of the 1963 audiogram in the record is unfortunately almost illegible. A Board Ear Calculation Chart was completed in 1963 on the basis of the audiogram. The Chart refers only to the loss at the 500, 1,000 and 2,000 frequencies. For the left ear, the chart indicates a loss of 35 dB at 500, and 40 dB at 1,000 and 2,000. For the right ear, a loss of 30 dB at 500, 1,000 and 2,000 was recorded. The average of the three readings for the left ear was 35 dB and the average for the right was 30.

From the audiogram, it appears that readings were taken at higher frequency levels in addition to the 500, 1,000 and 2,000 frequency levels. Dr. Brosnan’s commented that the worker’s hearing loss was greater at 4,000 and 8,000.

*Decision No. 434/89A*, noted above, reviewed a great deal of evidence about hearing loss and the process that led to the development of the 1988 policy change. The decision notes (at p. 19) that “[s]ince 1973 the Ontario Board has used the average of four frequencies – 500, 1K, 2K and 3K – for its audiometric testing.”

Before 1973, the Board seemingly did not use the average of these four frequencies. On the basis of the Ear Calculation Chart, it appears that only the loss at 500, 1,000 and 2,000 frequencies was considered.

Among other witnesses, the *Decision No. 434/89A* Panel heard testimony from Dr. Alberti, an otolaryngologist, and Dr. Doyle, a Board medical consultant. The Panel stated (at pp. 19-20):

Dr. Alberti testified that one could compare a low fence quoted at an average of 500, 1K and 2K with an average at the four frequencies of 500, 1K, 2K and 3K by *adding* seven to eight decibels to the first-quoted low fence. To compare a low fence quoted



for 1K, 2K and 3K frequency average with the low fence at the four frequencies of 500, 1K, 2K and 3K, one would have to *subtr*Act seven decibels from the first-quoted low fence. A concrete example was given at p. 11 of Dr. Alberti's letter dated April 2, 1991, as follows:

Because of the predominantly high frequency hearing loss experienced by those with noise induced hearing loss, a 35 dB loss at average 1, 2 and 3 kHz equates to an approximate 27 dB loss at average  $\frac{1}{2}$ , 1 and 2 and 3 kHz and 22 dB at loss at average  $\frac{1}{2}$ , 1 and 2 kHz.

Dr. Doyle agreed with Dr. Alberti's equivalencies. He testified that, although he had done no independent research on this issue, he had no reason to doubt them.

In the present case, in 1963, the Board considered only the three frequencies 500, 1,000 and 2,000 Hertz. (This is the same as  $\frac{1}{2}$ , 1 and 2 kHz) referred to by Dr. Alberti. Even considering only those frequencies, the worker had a 38.3 dB loss in his left ear and a 30 dB loss in his right ear.

According to Dr. Alberti's evidence, to equate a loss calculation that considers only the three frequencies of 500, 1,000 and 2,000 Hertz with a calculation that considers the four frequencies of 500, 1,000, and 2,000, and 3,000, which is the calculation used by the Board since 1973, it is necessary to add seven or eight decibels to the loss calculated using only the three frequency method.

If this is done in this case, the worker's hearing loss in 1963 was 45.3 or 46.3 dB in the left ear, and 38 or 39 dB in the right ear.

That degree of loss would have qualified the worker for a pension under the terms of the Board's policy even before the 1988 policy change.

It is not clear exactly what approach the Board took in 1963 in terms of determining what level of hearing loss was necessary to attract entitlement to a pension. Prior to the 1988 policy change, a loss of at least 35 dB in each ear was required. However, this was on the basis of the average of the loss at four frequencies, 500, 1,000, 2,000 and 3,000. As noted, it appears that in 1963, the Board had regard only to the loss at three frequencies, 500, 1,000 and 2,000. According to the evidence from Dr. Alberti, the 30 dB loss that was calculated using the three frequency method would be the equivalent of a loss of 38 or 39 dB using the four frequency method. Dr. Alberti's reason for this is that the noise induced hearing loss usually results in a greater loss in the higher frequencies.

In this case, there is evidence that indicates that the worker had sufficient hearing loss in 1963 to entitle him to a pension using the methods that the Board used at that time. As noted above, the worker's claim was reviewed by Dr. Hogarth, of the Board's medical staff, in October 1963. Dr. Hogarth stated that worker "would be entitled to a permanent disability award if and when he retires or before if he changes jobs."

The reason that the worker was not entitled to a pension in 1963 was that he first would have to retire or change jobs. The worker could not receive a pension unless he retired or changed jobs because of the provisions of the legislation.

The legislation at the time was the *Workmen's Compensation Act*, R.S.O. 1960, c. 437. Section 116(1) read as follows:

**116(1)** Where a workman suffers from an industrial disease *and is thereby disabled from earning full wages at the work at which*

*he was employed* or his death is caused by an industrial disease and the disease is due to the nature of any employment in which he was engaged, whether under one or more employments, the workman or his dependants are entitled to compensation as if the disease was a personal injury by accident and the disablement was the happening of the accident, subject to the modifications hereinafter mentioned or contained in the regulations, unless at the time of entering into the employment he had wilfully and falsely represented himself in writing as not having previously suffered from the disease. [Emphasis added]

The Board has always considered occupational hearing loss to be an industrial disease. Under the Act as it read at the time, a worker could accordingly not be paid a pension unless the worker was disabled from earning full wages in the work that caused the disease.

This is what Dr. Hogarth was referring to when he indicated that the worker would be entitled to a pension “if and when he retires or before if he changes jobs.” Dr. Hogarth accordingly confirmed that the worker had sufficient hearing loss to qualify for a pension, but noted that, under the Act, a pension could not be paid unless the worker retired or changed jobs.

The provision that a worker had to be disabled from earning full wages in the employment that caused the disease before the worker could be paid compensation continued until 1973 when the Act was amended.

In this case, the worker apparently left the employment that caused the hearing loss in 1970. It would therefore appear that the worker is entitled to a pension dating from 1970.

The Board has granted the worker a pension of 4.2%. According to the pre-1990 Occupational Noise Induced Hearing Loss Rating Schedule [OPM Document No. 04-03-06], this award is granted when there is a bilateral loss of between 37.5 and 42.4. The Rating Schedule applies the four-frequency method to determine the degree of loss. The Board appears accordingly to have accepted Mr. Abitol’s submission that the worker’s loss should be based on a loss of 40 dB bilaterally.

The degree of the worker’s hearing loss was not a matter that was considered by the Appeals Resolution Officer and I find that I do not have the jurisdiction to deal with that issue. I therefore make no finding on the amount of the pension that the worker is entitled to for his hearing loss.

The worker had requested interest on the delayed payment regarding his pension. The Board’s interest payment policy is set out in *Operational Policy Manual* Document No. 18-01-08, which provides in part:

Two groups of workers are entitled to interest on delayed benefit payments

- workers whose claims are registered **before** January 1, 1990, only if the delayed benefit payment is the result of an Appeals Resolution Officer (ARO) or the Workplace Safety and Insurance Appeals Tribunal (WSIAT) overturning a decision and now granting entitlement to compensation benefits
- workers whose claims are registered **on or after** January 1, 1990.

Under the policy, interest is payable from January 6, 1989.

Interest was denied in this case because the worker’s delayed benefit was the result of a Claims Adjudicator’s decision and not an appeal level decision. Since the delayed benefit is now the result of this decision, it follows that the worker is entitled to interest from January 6, 1989.

## DISPOSITION

The appeal is allowed.

The worker is entitled to a pension for his occupational noise-induced hearing loss dating back to 1970, when he left the employment that caused his hearing loss.

The worker is entitled to interest on the delayed benefit from January 6, 1989.

*Appeal allowed.*



## Decision No. 1529/04I

Panel: McCutcheon (Vice-Chair), Donaldson, Beattie

Decision — January 12, 2007

Neutral Citation: 2007 ONWSIAT 100

**Non-economic loss (pre-existing condition) – Permanent impairment (rating schedule) (AMA Guides) (combined values).**

**Worker suffered injuries to shoulder, wrist and ankle as result of accident in 1998 – Board policy provided for use of Combined Values Chart in AMA Guides in such circumstances.**

The worker suffered a left shoulder and wrist injury in December 1998, for which he was granted a NEL award. The ratings for the wrist and the shoulder were combined using the Combined Values Chart in the AMA Guides. After *Decision No. 724/03*, the Board granted the worker a NEL award for a left ankle injury resulting from the 1998 accident. That rating was also combined with the wrist and shoulder ratings. The worker also had a previous accident in 1997 in which he suffered an eye injury and hearing loss, and for which he was granted a NEL award.

The worker appealed a decision of the Appeals Resolution Officer confirming the use of the Combined Values Chart for the determination of the NEL award for the injuries resulting from the 1998 accident. The worker challenged the interpretation and application of Board policy and, alternatively, raised arguments pursuant to the Ontario *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*.

The applicable Board policy in this case is *Operational Policy Manual*, Document No. 18-05-05. It governs all accidents occurring after January 1, 1998. There was a prior policy, Document No. 05-06-07. There were two schools of thought in Tribunal decisions regarding interpretation of the prior policy. One line of decisions concluded that the intent of the policy was not to apply the Combined Values Chart where there were two or more impairments unless they involved the same body area. Regarding Document No. 18-05-05, there were two key Tribunal decisions. *Decision No. 1119/04* applied the Policy section of the document over the Guidelines section of the document and concluded that impairments from two accidents should be rated independently and that the Combined Values Chart should not be used. *Decision No. 1119/04R* did not agree that the Policy statement should be given more weight than the Guidelines. *Decision No. 1119/04R* found that the different parts of the document could be read together consistently to avoid an absurd result, and that the specific provisions of the policy clearly indicated that prior NEL awards are to be combined with a current NEL award by application of the Combined Values Chart.

The Panel agreed with *Decision No. 1119/04R*. Document No. 18-05-05 is quite explicit in its language and intentions. The Board clearly intended to use the Combined Values Chart to reduce NEL awards of workers with prior NEL awards, but not for workers with prior non-compensable impairments or impairments subject to a pension award. The Panel did not exclude the possibility that Document No. 05-06-07 could apply to the NEL awards for the worker's pre-1998 accidents, but the calculation of those NEL awards was not before the Panel in this appeal.

The worker may view the Board policy as unfair, but the Panel found that the plain reading of the policy did not lead to an absurd result. The Board clearly intended to treat workers with prior NEL awards differently from workers with other types of prior impairments. If the policy were genuinely ambiguous, the Panel might take into account the worker's arguments that the policy was unfair and arbitrary. However, the Panel was not persuaded that the policy was genuinely ambiguous.

The arguments regarding fairness and arbitrariness will be considered in the context of consideration of the Ontario *Human Rights Code* and the Charter of Rights. The hearing will reconvene to consider those issues.

**Perte non économique (état pathologique préexistant) – Déficience permanente (barème des taux) (guides de l'AMA) (valeurs combinées).**

**Le travailleur a subi des lésions à l'épaule, au poignet et à la cheville par suite d'un accident en 1998 – La politique de la Commission prévoyait l'utilisation du tableau des valeurs combinées dans de telles circonstances.**

Le travailleur a été blessé à l'épaule gauche et au poignet gauche en décembre 1998, et il a obtenu une indemnité pour perte non financière (PNF). La Commission a combiné les taux pour le poignet et l'épaule au moyen du tableau des valeurs combinées des AMA Guides (ci-après les guides de l'AMA). Après la *décision no 724/03*, la Commission a reconnu au travailleur le droit à une indemnité pour PNF pour une lésion à la cheville gauche résultant de l'accident de 1998. La Commission a combiné ce taux aux taux pour le poignet et l'épaule. Le travailleur avait eu un accident en 1997 qui avait entraîné une lésion à un œil et une déficience auditive, et il avait obtenu une indemnité pour PNF pour ces lésions.

Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels a confirmé l'utilisation du tableau des valeurs combinées pour déterminer l'indemnité pour PNF pour les lésions résultant de l'accident de 1998. Le travailleur a interjeté appel de l'interprétation et de l'application de la politique de la Commission, et il a soulevé des arguments subsidiaires aux termes du *Code des droits de la personne* de l'Ontario et de la *Charte canadienne des droits et libertés*.

Le cas en l'espèce relevait du document no 18-05-05 du *Manuel des politiques opérationnelles* de la Commission. Ce document s'applique à tous les accidents survenus après le 1er janvier 1998. Le document antérieur à ce document était le document no 05-06-07. La jurisprudence du Tribunal comportait deux écoles de pensée au sujet de l'interprétation de la politique antérieure. Dans une série de décisions, le Tribunal conclut que la politique n'envisageait pas d'appliquer le tableau des valeurs combinées quand il y avait deux déficiences ou plus, à moins qu'elles affectent la même région du corps. Il y a deux décisions clés au sujet du document no 18-05-05 : dans la *décision no 1119/04*, le Tribunal applique la section de la politique du document plutôt que la section des directives en concluant que les taux pour deux déficiences devraient être établis indépendamment l'un de l'autre et qu'il ne faudrait pas utiliser le tableau des valeurs combinées;

dans la *décision no 1119/04R*, le Tribunal n'est pas d'accord qu'il faut accorder plus de poids à l'énoncé de politique qu'aux directives. Dans la *décision no 1119/04R*, le Tribunal conclut que les différentes parties du document pourraient être interprétées invariablement ensemble pour éviter un résultat absurde et que les dispositions particulières de la politique indiquaient manifestement que les anciennes indemnités pour PNF doivent être combinées à la nouvelle indemnité pour PNF en appliquant le tableau des valeurs combinées.

Le comité a été d'accord avec la *décision no 1119/04R*. Le libellé et le sens du document no 18-05-05 sont très clairs. La Commission avait manifestement l'intention d'utiliser le tableau des valeurs combinées pour réduire les indemnités pour PNF des travailleurs ayant déjà des indemnités pour PNF mais non pour les travailleurs présentant d'anciennes déficiences non indemnissables ou des déficiences pour lesquelles ils touchaient une pension. Le comité n'excluait pas la possibilité que le document no 05-06-07 puisse s'appliquer aux indemnités pour PNF pour les travailleurs victimes d'accidents avant 1998 mais il n'était pas saisi de la question du calcul de ces indemnités pour PNF en l'espèce.

Le travailleur considère peut-être que la politique de la Commission est injuste mais le comité a conclu que l'interprétation normale de la politique ne menait pas à un résultat absurde. La Commission avait manifestement l'intention de traiter les travailleurs ayant déjà droit à des indemnités pour PNF différemment des travailleurs présentant d'autres types de déficiences antérieures. Le travailleur soutenait que la politique était injuste et arbitraire, et le comité aurait tenu compte de ses arguments en ce sens si la politique avait vraiment été injuste et ambiguë. Le comité n'était toutefois pas convaincu que la politique était vraiment ambiguë.

Les arguments relatifs au caractère injuste et arbitraire de la politique seront examinés dans le contexte du *Code des droits de la personne* de l'Ontario et de la *Charte canadienne des droits et libertés*. L'audience se poursuivra à une date ultérieure pour examiner ces questions.

#### **Tribunal Decisions Considered:**

- *Decision No. 439/99* (March 14, 2000) [2000 ONWSIAT 632] refd to
- *Decision No. 103/01* (December 11, 2001) [2001 ONWSIAT 3767] consd
- *Decision No. 2628/01* (October 24, 2001) [2001 ONWSIAT 3226] refd to
- *Decision No. 594/02* (2002), 63 W.S.I.A.T.R. 139 consd
- *Decision No. 1185/03* (December 12, 2003) [2003 ONWSIAT 2704] refd to
- *Decision No. 1119/04* (November 22, 2004) [2004 ONWSIAT 2418] consd
- *Decision No. 1119/04R* (2005), 76 W.S.I.A.T.R. (online) apld

#### **Other Decisions Considered:**

- *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 consd

#### **Workplace Insurance Legislation Considered:**

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
  - s. 46
  - s. 47
  - s. 124
  - s. 126

#### **Regulations Under the Workplace Insurance Legislation Considered:**

- O. Reg. 175/98
  - s. 18

#### **Board Directives and Guidelines Considered:**

- *Operational Policy Manual*
  - Document No. 05-06-07 (September 4, 1991) (since superseded)
  - Document No. 11-01-03 (October 12, 2004)
- Document No. 18-05-05 (June 15, 1999) (since revised)

#### **Cross-References:**

- *Decision No. 724/03* (April 30, 2003) [2003 ONWSIAT 1012]

APPEAL by the worker from a decision of the Appeals Resolution Officer applying the Combined Values Chart in the AMA Guides to injuries to different areas of the body.

January 12, 2007. THE TRIBUNAL: —

|                           |                                                                                                                                    |
|---------------------------|------------------------------------------------------------------------------------------------------------------------------------|
| BEFORE:                   | R. McCutcheon, Vice-Chair<br>J.J. Donaldson, Member Representative of Employers<br>D.B. Beattie, Member Representatives of Workers |
| HEARING:                  | July 25, 2006, at Burlington, Oral<br>Post-hearing activity completed on August 2, 2006                                            |
| DECISION(S) UNDER APPEAL: | WSIB Appeals Resolution Officer (ARO), N. Berman, dated March 19, 2003                                                             |
| APPEARANCES:              |                                                                                                                                    |
| For the worker:           | D. Drury and L. Gianfelice, Office of the Worker Adviser                                                                           |
| For the employer:         | Not participating                                                                                                                  |
| Tribunal counsel:         | C. Zimmermann, Lawyer                                                                                                              |
| Interpreter:              | E. Pistarelli, Italian                                                                                                             |

## **REASONS**

### **(i) Introduction**

The worker appeals a decision of the Appeals Resolution Officer (ARO), which concluded that his non-economic loss (NEL) award for the left shoulder and left wrist was appropriately rated at 14%. This appeal raises the issue of whether it is appropriate for the Workplace Safety Insurance Board (WSIB) to apply the combined values chart (CVC) of the AMA Guides to reduce a worker's NEL award when the worker has a pre-existing impairment of a different part of the body which was also caused by a post-1990 work-related accident.

This issue was recently reviewed in great detail in Tribunal *Decision No. 1119/04R* (2005), 76 W.S.I.A.T.R. (online). That decision considered the issue in the context of the WSIB's request for reconsideration of *Decision No. 1119/04* (November 22, 2004), which had concluded that a worker's NEL award should not have been reduced by combination with a previous NEL award. In *Decision No. 1119/04R*, the Reconsideration Vice-Chair disagreed with the analysis in the original decision, but concluded that the Tribunal's threshold test for a reconsideration had not been met.

While this appeal revisits that issue, the worker's representatives have raised novel arguments that have not yet been directly raised in previous Tribunal decisions. Although the worker's representatives argued that the Panel should conclude that

*Decision No. 1119/04* represents the correct interpretation of Board policy, the main arguments focussed on the alleged unfairness of the policy. If the worker's representatives are not successful at this stage of the appeal process, they intend to raise arguments pursuant to the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, and the *Canadian Charter of Rights and Freedoms*, R.S.C. 1985, App. II, No. 44.

## **(ii) Background**

On December 3, 1998, this worker slipped on the washroom floor at work, sustaining injuries to his left wrist, left shoulder and left ankle.

The worker had suffered a previous compensable injury to the right eye. Following an objection, the NEL for the right eye was increased from 13% to 19% in January 2000. The worker had also been granted entitlement for noise-induced hearing loss. The NEL award for tinnitus and hearing loss was independently rated at 10%. However, using the Combined Values Chart of the AMA Guides, the NEL for tinnitus and hearing loss was reduced to 4% because it was "combined" with the worker's previous NEL for the right eye.

The WSIB eventually recognized that the worker had a permanent impairment of the left shoulder and left wrist as a result of the 1998 accident. The NEL Clinical Specialist explained the rating calculation in a letter to the worker dated September 10, 2002:

Your left wrist was rated at 9% using Table 10 page 42 (AMA Guides) allowing for a sensory deficit of grade 3 at 26% of the major peripheral nerve.

Your left shoulder using range of motion was rated at 22%. A combination of the 22% shoulder and 9% (wrist ) equalled 29% (upper extremity). The 29% upper extremity was reduced to a 17% impairment of the whole person. Since you were previously rated for the right eye (19%) and nihl/tinnitus (3%), these values were combined with the 17% and subtracted. The current NEL rating for your left shoulder/wrist is 14%.

The worker objected to the reduction of his NEL award from 17% to 14% through the use of the CVC.<sup>1</sup> In the decision under appeal, the ARO denied the worker's objection, finding that the worker's NEL award for the left arm was correctly calculated.

Pursuant to Tribunal *Decision No. 724/03* (April 30, 2003), the worker was granted entitlement to a NEL assessment for the left ankle. The NEL assessment for the left ankle took place in December 2003. Rated independently, the worker was found to have a 9% permanent impairment of the left ankle. When combined with NEL awards for the worker's other post-1990 injuries, the NEL for the left ankle was reduced to 8%. The NEL evaluation for the left ankle summarized the worker's claim and the calculation of the NEL award as follows:

### PREVIOUS PENSIONS AND/OR NEL BENEFITS:

1. 10% PD...Not included in this calculation.
2. 15% PD...Not included in this calculation
3. 19% NEL for right eye claim...
4. 4% NEL for NIHL with tinnitus claim...(10% before offset)



5. 14% NEL for left shoulder and wrist this claim.

\*Combine previous NELs (19%, 17% & 10%) with 9% NEL this claim and subtract 37% NEL already awarded.  
 = 45% - 37% = 8% net NEL.

The calculation of the NEL award for the left ankle is not directly before the Tribunal in this appeal, as it occurred after the ARO decision.

As noted in the above excerpt from the NEL assessment report, the worker does have other pre-1990 injuries for which he received pension awards. However, pursuant to applicable Board policy, these pension awards were not “combined with” or otherwise factored into the NEL awards calculated under the 1998 claim.

In pursuing the appeal to the Tribunal, the worker’s representatives challenged the interpretation and application of Board policy; in the alternative, they advanced arguments pursuant to the *Human Rights Code* and the Charter of Rights.

Prior to the hearing, the Panel addressed procedural matters. It was determined that the hearing of this appeal would progress in stages. The first day of hearing was designated for presentation of arguments on the statute, Board policy, and Tribunal case law. Mr. Drury and Ms. Gianfelice made submissions. Depending on the outcome of the appeal after the first stage of hearing, the hearing would be reconvened to address the *Human Rights Code* and Charter arguments.

### **(iii) Issue**

The issue is whether the worker’s NEL award for the left arm was correctly calculated. Specifically, the Panel must address whether the worker’s NEL award ought to have been reduced by “combining” the value of this NEL award with his previous NEL awards by using the Combined Values Chart of the AMA Guides. This entails consideration of the following questions:

- What is the applicable Board policy?
- Does applicable Board policy require application of the CVC to prior NEL awards as took place in this case?
- Is the WSIB’s application of the CVC in these circumstances required by the statute?
- If not, is the WSIB’s policy inconsistent with the statute?
- Do the real merits and justice of the case warrant an exception to the application of Board policy?
- If the policy is not inconsistent with the Act, does the Tribunal have jurisdiction to refuse to apply the policy on the grounds that the policy is otherwise arbitrary or unfair?

### **(iv) Law and Policy**

#### *(a) Relevant Statutory and Regulatory Provisions*

Since the worker was injured in 1998, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) is

applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

Sections 46 and 47 of the WSIA govern entitlement to a NEL award. The relevant provisions state:

**46(1)** If a worker's injury results in permanent impairment, the worker is entitled to compensation under this section for his or her non-economic loss.

**(2)** The amount of the compensation is calculated by multiplying the percentage of the worker's permanent impairment from the injury (as determined by the Board) and,

(a) \$51,535.37 plus \$1,145.63 for each year by which the worker's age at the time of the injury was less than 45; or

(b) \$51,535.37 less \$1,145.63 for each year by which the worker's age at the time of the injury was greater than 45.

However, the maximum amount to be multiplied by the percentage of the worker's impairment is \$74,439.52 and the minimum amount is \$28,631.22.

**(3)** If the amount of the compensation is greater than \$11,452.07, it is payable as a monthly payment for the life of the worker. If it is \$11,452.07 or less, it is payable as a lump sum.

**(4)** Despite section (3), within 30 days of the worker being notified by the Board of the amount of compensation under this section the worker may elect to receive in a lump sum the amount otherwise payable monthly. The election is irrevocable.

**47(1)** If a worker suffers permanent impairment as a result of the injury, the Board shall determine the degree of his or her permanent impairment expressed as a percentage of total permanent impairment.

**(2)** The determination must be made in accordance with the prescribed rating schedule (or, if the schedule does not provide for the impairment, the prescribed criteria) and,

(a) having regard to medical assessments, if any, conducted under this section; and

(b) having regard to the health information about the worker on file with the Board.

**(3)** The Board may require a worker to undergo a medical assessment after he or she reaches maximum medical recovery.

**(4)** The worker shall select a physician from a roster maintained by the Board to perform the assessment. If the worker does not make the selection within 30 days after the Board gives the worker a copy of the roster, the Board shall select the physician.

**(5)** The physician who is selected to perform the assessment shall examine the worker and assess the extent of his or her permanent impairment. When performing the assessment, the physician shall consider any reports by the worker's treating health professional.

**(6)** The physician shall promptly give the Board a report on the assessment.

**(7)** The Board shall give a copy of the report to the worker and to the employer who employed him or her on the date of the injury.

**(8)** The Board may request a physician to perform a second assessment of the worker if the Board considers the initial assessment or the report on it to be incomplete or inaccurate.

(9) If the degree of the worker's permanent impairment is greater than zero and if the worker suffers a significant deterioration in his or her condition, the worker may request that the Board redetermine the degree of the permanent impairment.

(10) The worker is not entitled to request a redetermination until 12 months have elapsed since the most recent determination by the Board concerning the degree of his or her impairment.

(11) Sections (1) to (8) apply with respect to the redetermination.

(12) The Board shall pay the physician for performing the medical assessment and providing the report and shall fix the amount to be paid to him or her.

(13) For the purposes of this Act, a worker shall be deemed not to have a permanent impairment if the degree of his or her permanent impairment is determined to be zero.

Section 47(2) provides that the NEL determination is to be made according to the "prescribed rating schedule". Under section 18 of O. Reg. 175/98, enacted pursuant to the WSIA, the prescribed rating schedule is the American Medical Association *Guides to the Evaluation of Permanent Impairment*, 3rd ed. (revised) (Chicago: American Medical Association, 1990) as it read on January 14, 1991 (referred to throughout this decision as the AMA Guides).

Section 126 of the WSIA states that "if there is an applicable Board policy with respect to the subject-matter of an appeal, the Appeals Tribunal shall apply it when making its decision". Section 126(4) to (8) describes a referral process to be followed in cases where the Tribunal concludes that a Board policy is inconsistent with or unauthorized by the Act:

**126(4)** If the tribunal, in a particular case, concludes that a Board policy of which it is notified is inconsistent with, or not authorized by, the Act or does not apply to the case, the tribunal shall not make a decision until it refers the policy to the Board for its review and the Board issues a direction under section (8).

(5) The tribunal shall make the referral in writing and state the reasons for its conclusion.

(6) If there is a referral under section (4), the Board shall review the policy to determine whether it is consistent with, or authorized by, the Act or whether it applies to the case.

(7) The Board shall provide the parties to the appeal in respect of which there is a referral an opportunity to make written submissions with respect to the policy.

(8) Within 60 days after a referral to it, the Board shall issue a written direction, with reasons, to the tribunal that determines the issue raised in the tribunal's referral under section (4).

Section 124 of the Act provides that the "Appeals Tribunal shall make its decision based upon the merits and justice of a case and it is not bound by legal precedent".

### *(b) Overview of Board Policy*

Pursuant to section 126(2) of the WSIA, the Board stated that the following policy packages, Revision #5, would apply to the subject-matter of this appeal:

- #172 – NEL Quantum – DOA as of January 1, 1998;

- #300 – Decision Making/Benefit of Doubt/Merits and Justice.

Policy package #172 includes Document No. 18-05-05 of the *Operational Policy Manual* (OPM), “Effect of a Pre-existing Impairment”, which is central to this appeal.

The document begins with the following general policy statement:

## **POLICY**

When calculating NEL benefits for workers who have a pre-existing permanent impairment, the WSIB

- rates the area of the body affected by the new permanent impairment
- disregards any pre-existing permanent impairments affecting other areas of the body, and
- factors out pre-existing permanent impairments affecting the same area of the body.

If there is a NEL benefit for the pre-existing permanent impairment, the WSIB calculates a second NEL benefit for the new permanent impairment.

*NOTE: The WSIB only combines values when rating multiple impairments eligible for a NEL.*

## **GUIDELINES**

### **General**

Pre-existing permanent impairments include

- non-work-related impairments
- work-related impairments for which there is a permanent disability pension, and
- work-related impairments for which there is a NEL benefit.

For the purposes of the arguments raised in this appeal, it is important to understand the scheme of the policy as a whole, not just as it applies to prior NEL awards. The policy goes on to address specific situations as follows:

### **Pre-existing non-work-related impairments**

#### *New injury affecting a different area of the body*

If a worker has a pre-existing permanent impairment that is not work-related, and a new work-related permanent impairment to a different area of the body, the WSIB rates the work-related impairment on its own.

#### *New injury affecting the same body area*

If both impairments affect the same area of the body, and the pre-existing impairment is measurable, the WSIB

- rates the total impairment to the area
- determines the rating for the pre-existing impairment, and

- subtracts the rating for the pre-existing impairment from the total impairment rating to get the rating for the new work-related impairment.

If the pre-existing impairment is not measurable, the WSIB

- rates the total area's impairment, and
- reduces this rating according to the significance of the pre-existing impairment (see 08-01-05\*, Other Prior Conditions).
  - if minor, there is no reduction
  - if moderate, there is a 25% reduction
  - if major, there is a 50% reduction.

*NOTE: A pre-existing impairment is "measurable" or "non-measurable" depending on whether it can be rated using the American Medical Association's Guides to the Evaluation of Permanent Impairment, 3rd edition (revised). This determination is based strictly on the medical information available at the time of the work-related injury.*

### **Pre-existing permanent disability pensions**

#### *New injury affecting a different area of the body*

If a worker suffered an injury before January 2, 1990 which resulted in a permanent disability pension, and then suffers a work-related permanent impairment to a different body area on or after January 2, 1990, the WSIB rates the post-January 2, 1990 impairment on its own.

#### *New injury affecting the same area of the body*

If a worker suffered an injury before January 2, 1990 which resulted in a permanent disability pension, and then suffers a work-related permanent impairment to the same body area on or after January 2, 1990, the WSIB

- rates the total impairment to the area, and
- subtracts the permanent disability rating from the total area's rating.

### **Pre-existing NELs**

#### *New injury affecting a different area of the body*

If a worker with a pre-existing NEL benefit has a new permanent impairment that affects another area of the body, the WSIB determines the second NEL benefit by

- rating the new impairment independently of the prior impairment
- combining the old and new ratings using the Combined Values Chart (see 18-05-04), and
- subtracting the prior impairment's rating from the combined value.

#### *New injury affecting the same area of the body*

If a worker with a pre-existing NFL benefit has a new injury that results in an increased impairment to the same area of the body, the WSIB determines the second NEL benefit by

- rating the total impairment to the area, and
- subtracting the existing NEL rating from the total rating (see 18-05-04).

*NOTE: The WSIB may redetermine a NEL benefit if an impairment worsens as a result of a recurrence or deterioration (see 18-05-09).*

#### *New injury to the same and different body areas*

If a worker with a pre-existing NEL benefit has a new injury resulting in both an increased impairment to the same area of the body, and a new impairment to a different area of the body, the WSIB determines the second NEL benefit by

- rating the total impairment to the area for which a NEL already exists, and subtracting the pre-existing NEL
- rating the impairment to the different area of the body, and
- combining the above values, using the Combined Values Chart.

#### Example

In 1993, Mac had an injury to his right knee which resulted in a 5% NEL. In 1998, Mac had another accident, injuring his right knee again and injuring his left elbow. At MMR, the WSIB rates Mac's right knee (in its totality) at 12%, and his left elbow at 6%. To determine the new rating for the knee, the WSIB subtracts the pre-existing 5% from the knee's total rating of 12%. The WSIB then combines the resulting 7% with the elbow's 6% rating. The combined value, 13%, is Mac's second NEL rating.

#### **Occupational disease**

For occupational disease claims, a permanent impairment for a non-work-related disease is factored out of a work-related occupational disease rating only if

- the diseases are the same, and
- the pre-existing non-work-related disease is measurable.

OPM Document No. 18-05-05 was brought into effect by WSIB Administrative Minute #11, October 13, 1998, Page 238, which stated:

Effective January 1, 1998, Bill 99 repeals the *Workers' Compensation Act* and replaces it with the *Workplace Safety and Insurance Act*. The attached policy entitled, "Effect of a Pre-Existing Impairment" is in support of the legislative changes. I would therefore recommend:

1. THAT the attached revised policy entitled, "Effect of a Pre-Existing Impairment," govern all accidents occurring on or after January 1, 1998.
2. THAT Minute #2, August 16, 1991, Page 132 remain in effect for all accidents occurring on or before December 31, 1997.

Minute #2 dated August 16, 1991, referred to above, brought OPM Document No. 05-06-07 into effect, which was applied to accidents occurring before January 1, 1998. That Minute adopted a discussion paper entitled "The Effect of a Pre-existing

Condition or Impairment on the Determination of a Non-economic Loss Benefit”. The Discussion Paper addressed a range of issues raised by the implementation of Bill 162 (what we now refer to as the pre-1997 Act). Bill 162 introduced a scheme of dual benefits for permanent impairment: the NEL award and the future economic loss (FEL) benefit to compensate for financial losses. The prior scheme provided for a single permanent disability pension, generally calculated according to the Ontario Rating Schedule, with the possibility of pension supplements in various types of situations.

At the time the Discussion Paper was written, no NEL awards had yet been rated under the new scheme, pursuant to the AMA Guides. OPM Document No. 05-06-07 addressed several different scenarios involving pre-existing conditions and how they would affect a NEL award. That policy did not specifically address how a prior NEL award should be taken into account in the calculation of a subsequent NEL award affecting a different part of the body. However, the policy concluded with a blanket statement: “in all other cases, a rating of impairment should follow the *Guides*, using the combined values chart”. This catch-all statement was subject to different interpretations in Tribunal decisions, as will be discussed further below.

OPM Document No. 11-01-03, “Merits and Justice”, states in part:

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).

By applying relevant legislative and policy provisions to similar situations, decision-makers ensure that

- similar cases are adjudicated in a similar manner
- each participant in the system is treated fairly, and
- the decision-making process is consistent and reliable.

### **Scope of authority**

The obligation to decide each case on the basis of merits and justice does **not** authorize a decision-maker to disregard the relevant provisions of the Act or WSIB policies. The Act and the policies must be taken into consideration, and cannot be ignored if they apply to a particular case.

The policy identifies situations which may justify a departure from the application of Board policy to a particular case:

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.

### **(c) AMA Guides**

There has been much discussion about whether the AMA Guides require the use of the CVC to combine the value of a current impairment with a prior impairment to an unrelated area of the body.

The AMA Guides specifically require the use of the CVC in certain situations. The calculation of the worker's NEL award for the left arm is an example of such a situation. Chapter 3 requires the assessor to determine the impairments of each region of the upper extremity (hand, wrist, elbow, and shoulder joints) as described in the preceding sections. Then, the assessor is to use the CVC to combine impairments of the upper extremity contributed by each region. Then, Table 3 is used to convert the impairment of the upper extremity to an impairment of the whole person. In this claim, the WSIB followed this method to combine the worker's impairment of the left shoulder and wrist and convert it to a whole person impairment rating. There appears to be little dispute about this particular use of the CVC to determine a regional impairment rating.

However, the AMA Guides are not as clear about the use of the CVC in other situations. Many excerpts from the AMA Guides were reproduced in *Decision No. 1119/04R*. The Foreword to the third edition of the AMA Guides states (at p. xviii)

The *Guides* continues to espouse the principles that all impairments affect the individual as a whole and that all impairments should be expressed as impairments of the "whole person." This is done with the aid of the "Combined Values Chart" (p. 254). Practically all impairment values involving several organ systems or multiple parts of the same system should be combined using the Combined Values Chart unless the text gives other instructions.

The Foreword to the Second Edition, which has been included in the Third Edition as pages xix and xx, states at the bottom of page xix:

The Guides continue to espouse the philosophy that all physical and mental impairments affect the whole person, and therefore, all impairment ratings should be combined to be expressed as impairment of the whole person. This is done with the aid of a "Combined Values Chart".

Chapter 1 of the Guides is entitled "Concepts of Impairment Evaluation". Part 1 of Chapter 1 is the Introduction to those concepts. At section 1.2: "Structure and Use of the *Guides*", on page 3 of the Introduction, the AMA Guides state:

First, Chapter 2 of the *Guides* lists the kinds of information needed to document the nature of an impairment...

Second, the chapters about the organ systems contain medical evaluation protocols or descriptions of specific procedures for evaluating a particular body part, function, or system, each developed by qualified medical consultants.

...

Third, the chapters contain reference tables specifically keyed to the evaluation protocols. If the protocols and tables have been followed, the clinical findings may be compared directly with the impairment criteria and related to impairment percentages. The use of other tables, including the Combined Values Chart (p. 254) may be necessary to express the impairment in terms of the "whole person" that is, the general physiologic functioning of the impaired person,

At page 4 of Chapter 1, the AMA Guides state:

Because not all conditions that can arise out of an injury are accounted for in a schedule, there is likely to be a provision of state



law, as in Maryland, that in cases of permanent disability other than those that are specifically listed, the workers' compensation commission must determine the percentage by which the "industrial use" of the employee's body was impaired, considering the nature of the injury and the employee's occupation, experience, training, and age, and then award a proportional amount of compensation.

...

It is evident that the *Guides* does not offer a solution for this situation, nor is it intended to do so. Each administrative or legal system using permanent impairment as a basis for disability rating should define its own process for translating knowledge of a medical condition into an estimate of the degree to which the individual's capacity to meet personal, social or occupational demands, or to meet statutory or regulatory requirements, is limited by the impairment.

At pages 6 to 7 of the Introduction, under 2.2: "Evaluating the Whole Person", the *Guides* state:

To support systems that require such determinations, the reference tables of the *Guides* take into account all relevant considerations in reaching "whole person" impairment ratings. A final impairment percentage, whether the result of single or combined impairments, may be rounded to the nearer of the two nearest values, ending in "0" or "5".

...

If "apportionment" is needed, the analysis must consider the nature of the impairment and its possible relationship to each alleged factor, and it must provide an explanation of the medical basis for all conclusions and opinions. To establish that a factor *could* have contributed to the impairment, the analysis must include a discussion of pathophysiology of the particular condition and of pertinent host characteristics. A conclusion that a factor *did* contribute to an impairment must rely on documentation of the circumstances under which the factor was present and verification that the type and magnitude of the factor were sufficient and bore the necessary temporal relationship to the condition. The existence of an impairment does not create a presumption of contribution by a factor with which the impairment is often associated.

The 1991 Discussion Paper addressed the use of the CVC in part as follows:

#### 1. A.M.A. *Guides* Combined Values Approach

The American Medical Association (A.M.A.) *Guides* for evaluating permanent impairment have been adopted for rating non-economic loss benefits. These *Guides* treat the rating of multiple impairments quite differently than the rating schedule in use for pre-Bill 162 cases.

The *Guides* espouse the principle that all impairments affect the individual as a whole, and that all impairments should be expressed as impairments of the "whole Person." Thus, where multiple impairments are involved, the method for combining impairments is based on the principle that each impairment acts not on the whole, but only on the remaining portion after the preceding impairment has acted. Where multiple impairments arise from the same work-related accident, the A.M.A. *Guides* use a combined values approach (derived from a specific formula) to determine the percentage loss.

It is arguable that this approach is appropriate for the determination of non-economic loss. The previously used Ontario Rating Schedule assessed injuries for purposes of estimating loss of earning capacity. It was reasonable to assume that each worker had a 100% capacity to earn what he was earning at the time of the injury. Where a person has sustained an impairment prior to a work-related injury, it is more difficult to estimate what that worker's "non-economic" loss may potentially be.

However, the use of the combined values approach results in smaller permanent impairment percentages than would be determined if the values were simply added. The *Guides* declare, in effect, that with each impairment, the person becomes less of a whole

person (in percentage terms), by the percentage amount of the impairment. For example, the award associated with the total amputation of the thumb is 22%. Where two thumbs are involved the award using the combined values approach would be 39% rather than the 44% that would be derived if the awards were added.

In addition to the effect the combine values approach has in determining permanent percentages, the *Guides* do not provide for an enhancement or multiple factor. This increases the difference in treatment between the old rating schedule approach and that of the *Guides*, particularly when the assessment involves a worker with a pre-existing condition.

The Discussion Paper goes on to review the use of the AMA Guides in other jurisdictions:

It does not appear that the A.M.A. Guides are necessarily designed to apply to pre-existing conditions or impairments when assessing a new impairment. A 1986 publication entitled *The Use of the A.M.A. Guides in Workers' Compensation Cases...* declares that the *Guides* do not deal directly with the issue of how a prior industrial or non-industrial injury or deformity should be dealt with when rating permanent impairment. The U.S. Courts have dealt with the issue in a number of ways: some have held that compensation for a scheduled injury will not be reduced due to a prior permanent injury to the same member; some have stated that the award for a subsequent injury is limited to the difference between the first impairment and the additional impairment caused by the second accident, and other jurisdictions provide that if the first accident is a scheduled industrial injury, the benefits for the second injury must be awarded on an unscheduled basis. A court in North Dakota has stated that the A.M.A. *Guides* do not apply where a worker injured his left eye and had a prior defect in his right eye.

It is also true, however, that the *Guides* do not specifically exclude the application of the combined values approach to pre-existing conditions or impairments. Therefore, it would appear open to the Board to develop its own approach regarding this issue.

#### *(d) Tribunal Decisions*

It is not necessary to review the history of the Tribunal's decisions in this area in extensive detail. One may consult *Decision No. 1119/04R* for a summary of the Tribunal's decisions in this area.

For the purposes of this decision, it is sufficient to note that there were two schools of thought regarding the interpretation of the prior policy, OPM Document No. 05-06-07. One line of decisions interpreted the policy to mean the CVC would not be used when assessing impairments in cases where there was a pre-existing impairment of a different body area. Foremost among these decisions was *Decision No. 594/02* (2002), 63 W.S.I.A.T.R. 139. *Decision No. 594/02* addressed the issue in the context of a worker's claim that an "enhancement factor" should apply to increase the worker's NEL awards for a back injury and a knee injury as it might have been under the pension scheme. The Vice-Chair in *Decision No. 594/02* found that an enhancement factor did not apply. However, the Vice-Chair noted that there was ambiguity in the policy documents. Upon consideration the language of the policy, the Discussion Paper, and the AMA Guides, the Vice-Chair concluded that the intent of the Board policy was not to apply the CVC where there are two or more impairments unless they involve the same body area.

In *Decision No. 103/01* (December 11, 2001), the Vice-Chair considered the provisions of the AMA Guides and the Discussion Paper, and concluded that the WSIB had correctly used the CVC to combine the worker's NEL for the right shoulder with a previous NEL award for hearing loss.

Regarding the interpretation of the current policy, OPM Document No. 18-05-05, there are two key Tribunal decisions to consider: *Decision No. 1119/04* (November 22, 2004) and *Decision No. 1119/04R*. In *Decision No. 1119/04*, the Vice-Chair noted that the Policy section at the beginning of the documents states that the Board will disregard any pre-existing permanent

impairment affecting other parts of the body and that the Board only combines values when rating multiple impairments eligible for “a” NEL, which the Vice-Chair interpreted to mean that the Board only combines values if a worker suffers multiple impairments in one accident. The Guidelines section of the document states that the Board combines old and new ratings and subtracts the prior impairment from the combined value. The Vice-Chair applied the Policy section of the document and concluded that the impairments from two accidents should be rated independently, and that the combined values chart should not be used.

As noted above, in *Decision No. 1119/04R*, the Vice-Chair considered a request for reconsideration from the WSIB. The Vice-Chair reviewed the wording of the policy, the AMA Guides, the Discussion Paper, and Tribunal decisions, and concluded [at paras. 58-67]:

There is no distinction in section 126 of the Act between different portions of a Board policy. Both the introductory “policy” statement and the guidelines are part of the policy and in my view are subject to section 126 of the Act. Therefore, as above, I consider the first rule of interpretation to be whether the different parts of the policy can be read together in a consistent way, to avoid an absurd result.

In this policy, the wording of the guideline is very clear. It states explicitly that the Combined Values Chart is to be used in the case of multiple NEL-rated injuries...

I consider these words open to more than one interpretation. In *Decision No. 1119/04* the Vice-Chair placed emphasis on the reference to “a” NEL rating and on the requirement to “disregard any pre-existing impairments affecting other areas of the body”. She therefore interpreted the Note to apply only to multiple impairments that involved a pre-existing impairment of the same body area.

However, that reading is inconsistent with the above-referenced portion of the guidelines.

I consider that there is an alternative possible reading, which would be consistent with the guidelines. In my view, the statement can be read as a step-by-step description of how the rating is derived. For the purposes of the first step the pre-existing permanent impairments of the other areas of the body are disregarded. Then, as a second step, I read the Note to indicate that if there are multiple impairments that are each eligible for a NEL award, the Combined Values Chart is applied.

That is not to say the wording of the policy statement is clear or satisfactory. I do find it confusing. However I find this a possible interpretation. It is also the interpretation that allows the different provisions in the policy to be read consistently.

Further, again with greatest respect, even if the policy statement and the guideline are considered inconsistent, I do not agree that the interpretation should be based on a firm rule that the policy statement is to be given more weight than the guidelines. Section 126 applies equally to all portions of the policy. I consider that the next rule of statutory interpretation to be applied is whether one provision of the policy is more specific. In this case, I consider the wording in the guidelines more specific than the wording in the general policy statement.

It is also permissible and relevant, if statutory wording is unclear, to consider the intent by reference to documents that provide insight into the policy context. In the case of statutory provisions, reference may be made to Hansard. In this case, my interpretation is informed by my view of the Act, the Regulation, the AMA Guides, and the Minute. I have considered those provisions below. They suggest to me that the guidelines best express the intent of the policy.

It is only after these rules of interpretation have been applied and found inconclusive that I would consider it necessary to assign different weight to different parts of the policy document. However, I do not find that that consideration needs to be addressed in this case. I am satisfied that the words may be read together.

In *Decision No. 1119/04R*, the Vice-Chair noted that the prior policy was ambiguous; however, the Vice-Chair preferred the interpretation adopted in *Decision No. 103/01*.

Under the heading of “General Concerns,” the Vice-Chair went on to give the opinion that the approach adopted in OPM Document No. 18-05-05 was consistent with the Discussion Paper, and in fact the preferable approach to this issue.

## **(v) Submissions**

Mr. Drury began by reviewing the history of the NEL provisions. Bill 162 replaced the “meat chart” (the Ontario Rating Schedule) with the AMA Guides. NEL awards were first processed in approximately 1992.

Mr. Drury argued that the use of the combined values chart was inherently unfair. Workers are being deprived of significant amounts of money as a result of the application of the combined values chart.

Mr. Drury argued that Board policy is discriminatory against workers injured after 1990; it does not apply to other compensable or non-compensable injuries. Mr. Drury argued it was the duty of the Tribunal to apply the *Human Rights Code* and the Charter. Mr. Drury argued that the WSIB should not discriminate against certain workers. The Board’s approach also penalizes workers with injuries in Ontario.

Mr. Drury reviewed the history of the worker’s compensable accidents. The worker has had only one compensable injury after 1998. The other injuries occurred during the 1990s. Mr. Drury argued that the prior policy applied to the worker’s pre-1998 accidents. In the claim at issue, the worker was injured on December 13, 1998. He was granted a 14% award for the left arm (shoulder and wrist). In 2002, he received a 9% NEL award for the left ankle. On June 18, 1997, the worker injured his right eye. He was rated a 20% NEL, which was reduced by 1% due to a pre-existing condition in the left eye.<sup>2</sup> The claim for noise-induced hearing loss and tinnitus was established in 1995 and the worker received a 10% award.

Mr. Drury used examples from the application of the Combined Values Chart to argue that it led to absurd and unfair results. He noted that discounting does not begin until approximately 7% or 8% and the more serious the injury, the greater the discount. If a worker has a pre-existing condition rated at 99%, then the subsequent injury would have to be rated at 50% to produce a 100% NEL. If a worker had a prior NEL rated at 94%, and then suffered an injury rated at 70%, that worker would only receive a 98% total NEL award.

Mr. Drury argued that this is not a large part of the WSIB’s budget, relative to other items, such as health care. Mr. Drury argued that the use of the combined values chart does have a big impact on this individual worker. Mr. Drury noted that the worker’s NEL for the right arm was reduced from 17% to 14%. To the worker, this means the difference between a NEL award of \$4,567 (the amount he received) and approximately \$5,100. Mr. Drury suggested that the NEL assessment itself probably cost more than this.

To treat everyone equally, the WSIB would have to give a full physical to everyone assessed, but this would be too costly. Administratively, it is easier for the Board to use the combined values chart for post-1990 work injuries because the claims are imaged.

Mr. Drury argued that the application of the policy leads to absurd and unfair results in several situations. For example, if a

worker loses different limbs in different injuries, then the NEL award for the second injury will be reduced. The use of the Combined Values Chart makes it difficult for a worker with severe injuries to reach a NEL of 60%, which is the threshold for an independent living allowance.<sup>3</sup>

Mr. Drury noted that under the pension regime, there was an enhancement factor where a worker had more than one injury.

Mr. Drury reviewed a number of Tribunal decisions that have considered the policies at issue, including *Decisions No. 439/99* (March 14, 2000), *1185/03* (December 12, 2003), *2628/01* (October 24, 2001), *594/02*, and *1119/04R*. Mr. Drury submitted that few of these cases address the issue of fairness.

Mr. Drury noted that the issue of fairness is discussed at paragraph 88 of *Decision No. 1119/04R*, but not in many other cases. Mr. Drury takes issue with the fairness analysis in that case, arguing that fairness dictates that the Combined Values Chart not be used, whether the multiple injuries occurred in once accident, or more than one accident. Mr. Drury argues that it is not fair that workers who suffer the same injuries are treated differently. One class of workers is being paid less than others for the same injury. Mr. Drury takes issue with the notion that a worker is a “part-person” due to a prior injury for which a NEL has been granted. One class of workers is being paid less than others for the same injury. This is not good policy because it penalizes workers for going through the compensation system.

Ms. Gianfelice noted that there have been different interpretations of OPM Document No. 18-05-05. Ms. Gianfelice argued that *Decision No. 1119/04R* relied heavily on the 1991 Administrative Minute, which is itself contradictory. Ms. Gianfelice submitted that the policy is unclear and the Panel should rely on *Decision No. 1119/04* as sound law.

## **(vi) Discussion and Conclusions**

The Panel is unable to allow this appeal on the basis of the statutory and policy arguments presented, for the reasons that follow.

The Panel concludes that the predecessor policy, OPM Document No. 05-06-07, is not applicable to this appeal. The issue in this appeal is the appropriate calculation of the worker’s NEL award for the left arm (wrist and shoulder) as a result of an injury that occurred in December 1998. The Board recognized a permanent impairment arising from this accident and the NEL rating took place in September 2002. OPM Document No. 18-05-05, dated June 15, 1999, states that it applies to all accidents occurring on or after January 1, 1998<sup>4</sup>. The Administrative Minute creating the policy specifically states that the policy was brought about by the introduction of the WSIA and there is no reason for the Panel to find that OPM Document No. 18-05-05 should not apply to accidents that are governed by the WSIA. In addition, OPM Document No. 18-05-05 was clearly in place when the NEL assessment took place in September 2002. Although the worker’s prior NEL awards are factored into the calculation, the fact remains that the NEL award at issue relates to a post-1998 accident. The worker’s NEL awards for pre-1998 accidents are not being affected by the use of the CVC in the calculation of the worker’s NEL for the post-1998 accident. Thus, it is appropriate to apply the 1998 policy to this worker’s impairments arising from the 1998 accident.

The Panel does not exclude the possibility that OPM Document No. 05-06-07 may apply to the NEL awards for the worker’s pre-1998 accidents; however, the calculations of those NEL awards are not before the Panel in this appeal.

OPM Document No. 18-05-05 is quite explicit in its language and its intentions. The WSIB clearly intended to use the Combined Values Chart to reduce the NEL awards of workers with prior NEL awards, but not for workers with prior non-compensable impairments or impairments subject to a pension award. That policy states in part:

**Pre-existing NELs**

*New injury affecting a different area of the body*

If a worker with a pre-existing NEL benefit has a new permanent impairment that affects another area of the body, the WSIB determines the second NEL benefit by

- rating the new impairment independently of the prior impairment
- combining the old and new ratings using the Combined Values Chart (see 18-05-04), and subtracting the prior impairment's rating from the combined value.

The Panel must agree with the interpretation of the policy that was enunciated and explored thoroughly in *Decision No. 1119/04R*. As a matter of interpretation, a policy's provisions should be read together consistently to avoid an absurd result and specific provisions of the policy prevail over general statements. Those specific provisions clearly indicate that prior NEL awards are to be combined with a current NEL award by the application of the CVC. In any event, the Panel is not persuaded that the general preamble to the policy is inconsistent with the specific guidelines, since it states: "The WSIB only combines values when rating multiple impairments eligible for a NEL". This statement signals the WSIB's intention to treat prior NEL awards differently from other types of pre-existing impairments. This statement can readily be interpreted in a manner that is consistent with the specific policy provisions applicable to prior NEL awards.

Section 126 of the Act requires the Tribunal to apply Board policy in its decision-making. Pursuant to section 124, the "merits and justice" provision, the Tribunal may conclude that a particular appeal is exempt from the application of Board policy due to exceptional circumstances. However, in this case, it was not argued that the worker's circumstances were exceptional.<sup>5</sup> In fact, the impact of the Board policy on the worker's NEL awards may well be typical. In this case, if all of the worker's NEL awards had been rated separately without the CVC, he would have received a total of 55% in NEL awards. Instead, through the application of the CVC, his NEL awards totalled 45% – a 10% difference. Nevertheless, this would appear to be the very outcome intended by the Board's policy. The worker's representatives are challenging the policy itself, rather than its application to the facts of this case.

Section 126(4) provides a mechanism for situations in which the Tribunal considers Board policy to be inconsistent with or not authorized by the Act. In this appeal, the worker's representatives conceded that the Board policy cannot be construed as inconsistent with the Act. The AMA Guides are the prescribed rating schedule, and the AMA Guides neither proscribe nor require the application of the CVC for prior impairments to different regions or systems. Therefore, the WSIB's application of the CVC in Board policy may be characterized as an exercise of discretion that falls within the scope of the WSIB's policy-making power.

Mr. Drury stated that the Panel's interpretation should avoid an absurd result. While the worker may view the policy as unfair, the Panel is unable to conclude that the plain reading of the language of the policy leads to an absurd result. The WSIB clearly intended to treat workers with prior NEL awards differently from workers with other types of prior impairments. In OPM Document No. 18-05-05, the WSIB has given effect to its intention in quite clear terms. Paragraph 58

of *Decision No. 1119/04R* stated the Vice-Chair considered the first rule of interpretation to be whether the different parts of the policy can be read together in a consistent way to avoid an absurd result. Where the meaning of the policy is clear, the Panel cannot undermine the clearly stated purpose of the policy to avoid the very result that policy intends to create.

Representatives for the worker advanced a number of arguments challenging the alleged unfairness and arbitrariness of this policy. Where the meaning of a policy is genuinely ambiguous, a Panel might take such arguments into account in its interpretation. In *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, Iacobucci J. noted [at para. 30]: “ambiguity cannot reside in the mere fact that several courts...have come to differing conclusions on the interpretation of a given provision”. Accordingly, the Panel is not persuaded that the policy presents genuine ambiguity simply because *Decision No. 1119/04* and *Decision No. 1119/04R* reflect different interpretations of the policy. Where the meaning of a policy is clear and unambiguous, as the Panel finds OPM Document No. 18-05-05 to be, the Tribunal lacks the jurisdiction to impose its own view instead of that policy, outside the ambit of the policy referral process defined in section 126(4).

The Panel acknowledges that this is an area of the Tribunal’s case law that has been somewhat fraught with confusion and divergent opinions. OPM Document No. 05-06-07 was less clearly worded and genuinely subject to differing interpretations. Arguably, decisions such as *Decision No. 594/02* applied an interpretation that was guided by notions of fairness expressed in the Discussion Paper:

Using the combined values approach can, in some cases, lead to an unintended and, indeed unfair result for a worker with a prior impairment. An example which highlights the potential difficulty and unfairness of using this approach is as follows: a worker loses an arm in a work-related accident and subsequently loses an arm in a non-work-related accident. The worker’s impairment would be assessed at 60%. However, should the worker have lost an arm in a non-work-related accident first, and subsequently loses the other arm in a work-related accident, the application of the combined values approach would result in the worker’s impairment being assessed at 24%.

Clearly this is consistent with (though not dictated by) the A.M.A. Guides, but is not a satisfactory result. The worker’s entitlement to non-economic loss benefits is reduced because the worker suffered a prior non-work-related impairment. Under the previous rating schedule, the worker would have received the 60% award plus an enhancement factor. It becomes apparent that the philosophy of an enhancement factor, which was part of the previous rating schedule, is also required for assessing prior impairments under the *Guides*.

Using the A.M.A. Guides without applying the combined values approach for pre-existing conditions or impairments will result in more equitable permanent impairment ratings. This can be viewed as the “new enhancement factor.”

Review of the Discussion Paper led the Vice-Chair in *Decision No. 594/02* to conclude [at paras. 60-62]:

It is apparent that the proposed “new enhancement factor” is not an enhancement factor as that term was used in the pre-1989 system. The proposal was not to increase impairment ratings when there was more than one impairment, but rather not to decrease the ratings by using the Combined Values Chart in respect of pre-existing conditions.

It may, however, be noted that the principle enunciated in the Discussion Paper was that the Combined Values Chart would not be used when assessing impairments in cases where there was a pre-existing impairment.

The Discussion Paper formed the basis for the policy set out in *Operational Policy Manual* Document No. 05-06-07. The reference to a “new enhancement factor” in that paper does not provide a basis for an additional impairment rating because the worker has two impairments. It does, however, add further support for the proposition that the intent of the Board’s policy was to not apply the Combined Values Chart where there are two or more impairments unless they involve the same body area.

On the other hand, the Discussion Paper also seemed to indicate that the above-noted fairness concerns only applied to pre-existing impairments that were not caused by a “Bill 162 claim”:

Under the American Medical Association *Guides*, which will be used to assess permanent impairments for Bill 162 claims, there is no provision for multiple or enhancement factors. However, the Guides contain a combined values table which combines impairments on the basis that, with each impairment, the person becomes less of a whole person by the percentage of impairment. Although the use of the combined tables is appropriate where two or more impairments occur in Bill 162, it is not appropriate if it is used for either non-work-related or pre-Bill 162 pre-existing impairments.

Section 126 codifies the WSIB’s role as the creator of policy. It is incumbent upon this Tribunal to fulfil its duties in accordance with the enabling statute. This appeal does not fall under section 126(4), since there is no dispute that the policy is consistent with the Act. The Panel also cannot rule upon the general fairness of the policy; to do so would be to usurp the policy-making power that has been clearly been conferred by statute upon the WSIB. Although *Decision No. 1119/04R* did comment on the perceived fairness and rationality of the policy,<sup>6</sup> this reasoning was not integral to the interpretation of the policy itself. Therefore, these remarks may be seen as *obiter*.

In the Panel’s view, the worker’s arguments may raise potential questions about the fairness of policy, but, at this stage in the proceedings, it would be premature for the Panel to reach any conclusions regarding these arguments. In summary, in the Panel’s view, the remainder of the worker’s arguments are more appropriately addressed in the context of the applications pursuant to the *Human Rights Code* and the Charter of Rights.

## INTERIM DISPOSITION

The appeal is denied on the basis of the statutory and policy arguments submitted.

The worker’s representatives have expressed an intention to raise arguments pursuant to the *Human Rights Code* and the Charter of Rights. The hearing will be reconvened after the worker’s representatives have filed a Statement of Fact and Law in support of their arguments. The Tribunal Counsel Office may ask the Panel for further procedural directions as necessary. Procedural issues may include whether notice should be served pursuant to section 109 of the *Courts of Justice Act* and whether to obtain *amicus curiae* submissions from the WSIB.

*Order accordingly.*

<sup>1</sup> The CVC was also used to combine the separate ratings for the wrist and shoulder, for a regional impairment rating. The worker does not object to this use of the CVC.

<sup>2</sup> This reduction did not result from the application of the Combined Values Chart. The pension for the right eye was reduced on the presumption that the worker had a pre-existing condition affecting the right eye.

<sup>3</sup> See OPM Document No. 17-06-02, “Independent Living Allowance.”

<sup>4</sup> In October 2004, the WSIB amended the policy to state that it applies to all accidents after January 2, 1990. In view of the issue in this appeal, it is unnecessary for the Panel to consider whether the October 2004 amendment represents an inappropriate retroactive policy change.

<sup>5</sup> *Decision No. 2255/05* (January 12, 2006) stands for the proposition that, in exceptional cases, the AMA Guides do contemplate an additional award for rare cases in which the measured anatomical impairment does not appropriately rate the severity of the condition. However, that argument was not advanced in this appeal.



6 See paragraphs 70 to 88.



## Decision No. 2504/06

Vice-Chair: E. Smith

Decision — December 21, 2006

Neutral Citation: 2006 ONWSIAT 3028

**Permanent impairment (rating schedule) (unlisted condition) – Permanent impairment (degree of impairment) (costochondritis).**

**Board correctly determined NEL award for costochondritis, which is not listed in AMA Guides, by considering most analogous listed condition, which in the circumstances was intercostal neuralgia.**

The worker suffered a chest and upper back injury in 1995. The Board granted a 3% NEL award for costochondritis. The worker appealed a decision of the Appeals Resolution Officer denying an increase in the NEL award. The appeal was dismissed.

Costochondritis is not listed in the AMA Guides. The Board determined the NEL award using the AMA Guides for intercostal neuralgia, which the Board considered to be the listed condition most analogous to costochondritis. Three per cent is the maximum in the AMA Guides for intercostal neuralgia.

The worker submitted that the Vice-Chair should take into account references to back and neck symptoms. However, the Vice-Chair noted that the entitlement was granted for costochondritis only. The fact that costochondritis is not listed in the AMA Guides and the NEL rating must be carried out by way of analogy, does not give the Vice-Chair jurisdiction to rate conditions for which entitlement has not been allowed.

The worker submitted that a back injury would be a more analogous condition to costochondritis than intercostal neuralgia. The Vice-Chair noted that costochondritis involves injury to the muscles of the chest rather than to the nerves. None the less, intercostal neuralgia was more analogous than a back injury, given that the area of the body is more similar.

The Vice-Chair found insufficient evidence that the 3% NEL award was too low.

**Déficiencie permanente (barème des taux) (état non énuméré) – Déficiencie permanente (degré de déficiencie) (costochondrite)**

**La Commission avait correctement déterminé l'indemnité pour PNF pour costochondrite, laquelle n'est pas incluse dans les AMA Guides, en se fondant sur l'affection la plus analogue, qui était dans les circonstances la névralgie intercostale.**

Le travailleur a subi une lésion au thorax et au haut du dos en 1995. Il a obtenu une indemnité pour perte non financière (PNF) de 3 % pour costochondrite. Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de lui reconnaître le droit à une augmentation de son indemnité pour PNF.

La costochondrite n'est pas incluse dans les *AMA Guides* (guides de l'AMA). La Commission a déterminé l'indemnité pour PNF du travailleur à partir des taux prévus dans les guides de l'AMA pour la névralgie intercostale, affection qu'elle considérait comme la plus analogue à la costochondrite. Les guides de l'AMA prévoient un maximum de 3 % pour la névralgie intercostale.

Le travailleur soutenait que la vice-présidente devait tenir compte des références aux symptômes au dos et au cou. Cependant, la vice-présidente a noté que le travailleur avait droit à une indemnité pour costochondrite seulement. Le fait que la costochondrite n'est pas incluse dans les guides de l'AMA et que le taux de l'indemnité pour PNF doit être déterminé par analogie n'autorise pas le décideur à déterminer un taux pour des troubles pour lesquels le droit à une indemnité n'a pas été reconnu.

Le travailleur soutenait qu'une lésion au dos serait plus analogue à la costochondrite que la névralgie intercostale. La vice-présidente a noté que la costochondrite fait intervenir une lésion aux muscles plutôt qu'aux nerfs thoraciques. Néanmoins, la névralgie intercostale était plus analogue qu'une lésion au dos étant donné que la région du corps était plus similaire.

Selon la vice-présidente, la preuve était insuffisante pour conclure que l'indemnité pour PNF était trop basse.

#### **Workplace Insurance Legislation Considered:**

- *Workers' Compensation Act*, R.S.O. 1990, c. W.11
  - s. 42
- *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A
  - s. 46
  - s. 47(2)

#### **Regulations Under the Workplace Insurance Legislation Considered:**

- O. Reg. 175/98
  - s. 18(2)

APPEAL by the worker from a decision of the Appeals Resolution Officer denying an increase in the worker's non-economic loss award.

December 21, 2006. THE TRIBUNAL: —

BEFORE: E.J. Smith, Vice-Chair

HEARING: December 8, 2006 at Toronto, Written

DECISION(S) UNDER APPEAL: WSIB decision dated March 23, 2006

APPEARANCES:

For the worker: Ms. Connie Oliverio, Consultant

For the employer: Ms. Sandy Perry-Jardine, Human Resources Consultant

## **(i) Background**

The worker appeals the decision of the Board Appeals Resolution Officer (ARO) dated March 23, 2006. That decision concluded that the worker was not entitled to an increase in the quantum of his award for non-economic loss (NEL).

The issue is whether the worker's NEL award was correctly assessed at 3% percent.

The worker injured his chest and upper back on August 30, 1995, at age 47, when loading garbage bags on a truck. The worker had suffered a prior compensable chest injury in 1981, and had been on restricted duty since that time. The worker had been assessed for a permanent disability in 1983, with respect to the 1981 accident, but had been awarded a 0% pension.

After the 1995 accident, the worker returned to light duties. In 2000 the worker's representative requested further benefits because the symptoms had never resolved. A review of Ms. Oliverio's letter dated May 5, 2003 indicates that she raised several issues at that time. In particular:

1. she requested that the 1995 claim be amalgamated with the 1981 claim and that consideration be given to periods of aggravation between 1981 and 1995; and
2. she requested that the Board consider entitlement for chronic pain disability (CPD).

Her letter also made reference to the fact that the worker injured his back as well as his chest wall in August 30, 1995, and states that he has remained symptomatic. In her specific requests for action, she makes no further reference to the low back. However, at least by implication, I read the letter to be also requesting a permanent impairment assessment for the low back, as distinct from the chest wall injury.

The Board responded by letter dated June 22, 2004. The claims adjudicator states:

You requested a review of these two claims to determine entitlement for a permanent disability award and/or a non-economic loss (NEL) award and/or entitlement to chronic pain disability...

The letter continues by stating that there were no objective findings to indicate a permanent disability after the 1981 accident. CPD is also denied, on the basis that the adjudicator has been unable to determine that a significant marked life disruption has occurred as a result of the worker's injury, and because the worker had periods of time when his pain was not consistent or constant.

However, the adjudicator informs the representative that, despite the opinion of the Board's medical consultant that there

remained no objective physical findings to indicate a permanent impairment, he and the nurse case manager had reviewed the diagnosis of costochondrial inflammation or costochondritis provided by Dr. Holtby, and determined that the worker had suffered a permanent impairment following the 1995 accident and was entitled to a NEL assessment. I read this determination to be that the NEL assessment is granted for the condition of costochondritis, only. Although the adjudicator states that the worker's entitlement for permanent impairment has been reviewed generally, the letter does not grant entitlement for the back or neck.

This letter notifies Ms. Oliverio of a deadline for appeal of December 22, 2004. There is no indication on file that these rulings were appealed to a Board ARO. There is no final decision of the Board on these entitlement issues. Therefore I do not have jurisdiction to address the worker's entitlement to a NEL award for a back or neck condition, or for CPD, in this appeal.

As a result of the Board's determination, the worker was given a NEL assessment for his costochondritis and granted a 3% award. The ARO decision of March 23, 2006 addresses the worker's appeal of the quantum of the NEL award.

The worker was also assessed for a FEL award. However, the employer has modified the workplace and the worker has continued to work. Therefore he has not been awarded ongoing FEL benefits.

## **(ii) Law and Policy**

Section 46 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) and section 42 of the pre-1997 *Workers' Compensation Act*, R.S.O. 1990, c. W.11, provide that if a worker's injury results in permanent impairment, the worker is entitled to compensation for non-economic loss.

Impairment means a physical or functional abnormality or loss (including disfigurement) which results from an injury and any psychological damage arising from the abnormality or loss.

Permanent impairment means impairment that continues to exist after a worker reaches maximum medical recovery (formerly referred to as maximum medical rehabilitation under the pre-1997 Act). Legislation and Board policy provide that the degree of a worker's permanent impairment is determined in accordance with the prescribed rating schedule or criteria, any medical assessments, and having regard to the health information on file. The prescribed rating schedule for most impairments is the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 3rd ed. (revised) (Chicago: American Medical Association, 1990).

In this case however, the AMA rating schedule does not include a rating for costochondritis. Section 47(2) of the WSIA provides that if the prescribed rating schedule does not provide for an impairment, the NEL determination is to be made in accordance with the prescribed criteria.

In all cases, the determination is to be made having regard to medical assessments, if any, conducted under section 47, and having regard to the health information about the worker on file with the Board.

Section 18(2) of O. Reg. 175/98 states:

**18(2)** The criteria prescribed for the purposes of subsection 47(2) for impairments not provided for in the rating schedule are the criteria in the listings in the rating schedule for those body parts, systems or functions which are most analogous to the conditions

of the worker.

Therefore the Regulation provides that costochondritis is to be rated based on the most analogous ratings found in the AMA Guides.

### **(iii) The Basis for the NEL Rating in This Case**

Because the condition of costochondritis was not listed in the AMA Guides, the NEL clinical specialist made a determination about what listing in the AMA Guides was most analogous to the condition of the worker. The Board specialist determined that intercostal neuralgia was the condition most analogous to costochondritis. The worker was awarded the maximum amount listed in the AMA Guides for this condition, which was 3%.

I note that in his report dated December 3, 2004, the NEL assessor, Dr. Hiraki, described the worker's symptoms as follows:

The examination was confined to the chest.

The patient states that the pain has persisted and it is worse when he tries to bend down and it is relieved completely by lying down in the supine position.

On examination there was no evidence of infection, inflammation or swelling of the anterior chest. On palpation there was some mild tenderness near the xiphoid and in the lower costal anterior margin. There was no tenderness over the costochondrial junction. The patient was able to raise his arm fully and bend down, without any severe discomfort.

There was other complaint that seemed to be related to the injury that the worker sustained.

In his description of the worker's symptoms, he describes sharp pain, every day, all day, from sternum to back, aggravated by any movement of the trunk.

### **(iv) Other Medical Evidence**

A number of medical reports have been provided to the file. The most pertinent of these are the following.

The emergency room report dated September 7, 1995 describes pain radiating to the back and chest. I note that the Board initially allowed entitlement for both the chest and the back.

A report of Dr. Abramson, a specialist at North York Branson Hospital, dated September 18, 1995, provided a stress test consultation, addressed to determining whether there were cardiac symptoms. The stress test was negative. Dr. Abramson describes retrosternal pain radiating to the back. There was no chest pain with exertion. The worker denied pain with walking.

Ms. Oliverio notes that the worker's progress reports dated September 25, 1995 and November 5, 1995, refer to back complaints.

A CBI report dated December 5, 1995 states:

The above assessment findings do not reveal a clear mechanical pattern of pain. The patient's symptoms appear to be secondary to soft tissue structures. His current symptoms may be related to a decrease in his mobility and in the strength of the surrounding tissues.

A Canadian Back Institute report dated January 23, 1996 reported functional spinal mobility. In her submissions, Ms. Oliverio describes this report as reporting back pain that has improved but not resolved. However this description is not fully accurate. A reference to the report itself indicates that the worker described chest wall pain that had decreased in intensity but that the worker's back had been pain free for a week.

This report recommended that the worker return to work within listed functional abilities, and gradually progress to regular duties. The report estimated at that time that the worker would be capable of returning to his regular job duties in approximately two to three weeks.

A report of the family doctor, Dr. Grossman, dated September 23, 1997, describes pain in the chest wall, radiating around into the rib cage and going through the chest wall into the worker's back. The worker is advised not to do any heavy lifting, straining, or repetitive bending.

In a report dated October 4, 1999, Dr. Grossman described that the worker continues to complain of pain and discomfort in the lower rib cage and chest wall, especially in the region of the xiphoid. The pain often radiates through the back. There was a flare-up of pain on January 11, 1999. Dr. Grossman states:

There is not risk of this condition progressing, however it can disable the patient from performing more strenuous physical activities. It is my professional opinion that [the worker] will be able to continue with the modified physical work duties. However he will continue to experience some form of disabling pain from time to time and will need to take days off work until the intensity of the pain decreases.

In a report dated March 4, 2003, Dr. Grossman states:

It was my impression that this gentleman suffers from chronic pain, with the pain increasing in severity from time to time...In answer to your question for an objective medical opinion regarding permanent impairment, I can say that in my medical opinion [the worker] does have a permanent disability as a result of the work related injury of 1981, with the injury being further aggravated by the second work related incident in 1995. I believe that the disability became permanent most likely as a result of the second accident in 1995. He should continue to work at his modified duties with his restrictions being no heavy lifting, no repetitive bending, and no stand or sitting for long periods of time.

Dr. Grossman refers to the worker as still frequently complaining of pain in his chest, lower rib cage and lower back area. Sometimes the pain radiates between his shoulder blades.

A report of Dr. Grossman, dated March 31, 2005, states:

[The worker] recently presented to my office on March 7, 2005 at which time he was still complaining of tenderness in the lower sternum, with the pain radiating around the lower ribcage. Even simple movements of his neck, arms or lower back area produced pain and discomfort in his chest or lower sternum area. He advised that since the August 1995 injury, his life has been restricted and he has been unable to do many things he was doing prior to the injury, such as morning stretching and exercises, helping his wife with household duties, or even doing work around the outside of the house...I agree that the disability pension awarded to him should be reviewed, as I strongly believe that he should qualify for more than he has been awarded.

Dr. Grossman refers to the worker having been seen by Dr. R. Holtby in March 1997. Dr. Holtby's report is not in the file material provided by the Board, but Dr. Grossman describes it as diagnosing the worker with inflammation of the lower sternum and over the costochondral junctions of the lower ribs on both sides.

### **(v) Submissions**

Ms. Oliverio submits that the Board has determined that the only impairment resulting from this injury is that of a chest wall strain with the accepted diagnosis of costochondritis. She notes that the Board determined that the worker's back pain was resolved and has not awarded a NEL for back impairment. She disputes this finding. She submits that the 3% NEL awarded clearly does not encompass the true reflection of the worker's restrictions remaining in the worker's upper back and neck.

She submits that these are areas of injury in this claim, which have not resolved, and which warrant a NEL award. She submits that, because the worker's costochondritis is not listed in the AMA Guides, the Board must consider what body parts are affected and what loss of function has resulted from this injury.

She submits that a number of the symptoms referred to in the medical reports are not accounted for in the NEL rating. She refers me to the portions of the above reports that describe symptoms of pain in the back or neck.

She refers me to the report of the NEL assessor, Dr. Hiraki, dated December 3, 2004, and the description of areas of pain from the sternum to the low back which can be aggravated by simple activities. She submits that no rationale is provided for the use of intercostal neuralgia- central spinal nerve disorders as the analogous rating, given that it is incompatible with the diagnosed multiple areas of injury, with the permanent restrictions, and with the worker's severe pain. She submits that the NEL award should be treated in a similar fashion to a back injury, because the worker has been given standard back restrictions, and because, from the accident history, the back is part of the areas of entitlement in the claim. She requests that the NEL award be increased to a more appropriate level which encompasses both the chest wall/lower sternum and the back.

Ms. Perry-Jardine submits that the physiotherapy report of January 23, 1996 indicated that the worker's pain was resolved. The restrictions on lifting provided in that report, of between 35 and 40 pounds, indicate that the worker was very close to meeting the requirements for the full lifting duties of a driver/loader at that date. The NEL report of December 3, 2004 revealed no inflammation or swelling. There were no objectively defined limitations of movement, but only subjective complaints. She notes that the findings of the NEL assessment were confirmed on reconsideration.

### **(vi) Conclusions**

There are a number of jurisdictional considerations that must be addressed, prior to considering Ms. Oliverio's submissions.

I read Ms. Oliverio's submissions to be requesting that I take into account, for the purposes of the worker's NEL rating, injuries to the worker's back and neck, which she submits were the result of the 1995 accident. She refers me to references to back and neck symptoms in the medical reporting. She also refers me to the fact that the restrictions provided by Dr. Grossman for the worker are the type of restrictions that are provided for a back injury.

However I do not have jurisdiction to consider whether the worker had injuries to the back or neck in the 1981 or 1995 accidents, except as those symptoms might involve radiating pain from the costochondritis. The worker was granted entitlement only for costochondritis. The Board's letter defining the areas of the worker's entitlement was not appealed.



The fact that costochondritis is not listed in the AMA Guides, and that the NEL rating must be carried out by way of analogy, does not give me jurisdiction to rate conditions for which entitlement has not been allowed.

It is difficult to ascertain from the reports of the treating physicians to what extent the symptoms referred to in the worker's back are radiating pain from the costochondritis or represent a separate organic back condition. The treating physicians do not distinguish the worker's symptoms on that basis. However, Dr. Hiraki is careful to note that the worker has complaints that are not related to the costochondritis. He therefore excludes them from his consideration. Given that the entitlement has been granted only for the costochondritis, in my view, that approach was correct. Therefore I consider Dr. Hiraki's report the most reliable description of the worker's symptoms, as related to the costochondritis, as of the date of his report. Dr. Hiraki does refer to radiating pain. Therefore that pain has not been excluded.

However Dr. Hiraki states that there was "other complaint that seems to be related to the injury that the patient sustained". If this is a reference to back or neck symptoms, then this doctor seems to be suggesting that the view of Ms. Oliverio is also his view, i.e., that these other symptoms are the result of the workplace accident. It appears that the worker may have given Dr. Hiraki that history. However, that fact is insufficient for me to have jurisdiction to consider these symptoms in the NEL award, when entitlement has not been granted by the Board, and the issue of that entitlement has not been appealed to an ARO. Further, although Dr. Grossman refers to chronic pain, I do not have jurisdiction to consider CPD. The Board's denial of CPD was also not appealed.

Therefore I have jurisdiction to consider the worker's pain complaints only as they relate to the organic injury of costochondritis.

I note also the submission that a back injury is analogous to this injury because Dr. Grossman provided restrictions of a type that would normally apply for a back condition. However, given the submissions made by the representative, and the comments of Dr. Hiraki, it is not entirely clear whether these restrictions relate entirely to the costochondritis, or relate partially, also, to a back condition. Further, NEL ratings are not based on a worker's restrictions.

I note that in his 2004 assessment Dr. Hiraki did not note any signs of inflammation, which had been reported in earlier findings. While the evidence suggests fluctuating symptoms, entitlement for flare ups is not appropriately addressed in a NEL award. I have jurisdiction only to consider the degree of the worker's permanent impairment.

I have considered whether intercostal neuralgia constitutes a reasonable analogous rating. The AMA Guides describe this impairment as being an impairment of the intercostal and abdominal nerves. As I understand it, costochondritis involves injury to the muscles of the chest wall, rather than to the nerves. However, the condition of intercostal neuralgia is more analogous, in my view, than the analogy of a back condition, given that the body area is more similar and given the jurisdictional complications, above.

Finally, I note the opinion of Dr. Grossman that the worker's award should be increased. However Dr. Grossman does not provide any basis for this statement that addresses the principles of the WSIA. For instance, she does not indicate awareness of the fact that the workplace insurance system is a dual award system, in which the most significant payments are often related to loss of earnings benefits. In this case, the worker has not suffered any significant loss of earnings because he has been able to continue in the modified work provided by his employer. She does not indicate that she is aware that the worker

does not have entitlement for symptoms related to a back or neck condition, or that the worker did not appeal the Board's denial of benefits for chronic pain disability. Although Ms. Oliverio expressly asked Dr. Grossman to provide an objective medical opinion regarding permanent impairment, the report of August 30, 1995 describes impairment based on subjective complaints of pain rather than based on objective factors.

Ms. Oliverio does not suggest any other possible analogous rating, other than a rating for the back.

I find the evidence insufficient to establish that the 3% award for organic impairment, for the worker's costochondritis, is too low.

## **DISPOSITION**

The appeal is denied.

*Appeal dismissed.*



## Decision No. 1679/06R

Vice-Chair: E. Smith

Decision — January 12, 2007

Neutral Citation: 2007 ONWSIAT 91

### **Reconsideration (procedural error) – Procedure (reconsideration) (constitution of Panel).**

**Appellant does not have right to assignment of any particular vice-chair or panel – There was no defect in administrative process by failure to assign vice-chair who heard issue of SIEF to distinct issue of retroactive NEER adjustment.**

In *Decision No. 812/05*, the Tribunal granted the employer an increase in SIEF relief from 50% to 90%. The vice-chair hearing that appeal did not take jurisdiction over the issue of retroactive adjustment of the employer's NEER experience rating account.

The employer returned to the Board to request the retroactive adjustment, but the Board denied the adjustment. The employer appealed the denial of the retroactive adjustment. In *Decision No. 1679/06*, a different vice-chair from the one that issued *Decision No. 812/05* dismissed the employer's appeal.

The employer now applied for reconsideration of *Decision No. 1679/06*. The application to reconsider was denied. When the employer appealed the denial of the retroactive adjustment, it requested that the appeal be assigned to the same vice-chair who decided *Decision No. 812/05*, on the basis that he was already familiar with the merits of the case. That request was denied.

There was no significant defect in the administrative process or content of *Decision No. 1679/06*. The vice-chair from *Decision No. 812/05* did not take jurisdiction over the NEER issue. An appellant does not have the right to the assignment of any particular vice-chair or panel. Although the employer was not informed that its request for the vice-chair from *Decision No. 812/05* had been denied, that was a matter of courtesy or practice only and did not affect the adjudicative process.

The SIEF and NEER issues were distinct, involving different considerations and different policies. There was no defect in the process by failure to assign the vice-chair who considered the SIEF issue.

### **Réexamen (erreur de procédure) – Procédure (réexamen) (constitution du comité).**

**L'appelant n'a pas le droit de demander que son cas soit confié à un vice-président ou à comité particulier – Le fait de ne pas avoir confié le cas relatif au rajustement du compte dans le cadre de la NMETI au vice-président qui avait entendu le cas relatif au virement au FGTR ne constituait pas un vice administratif.**

Dans la *décision no 812/05*, le Tribunal a reconnu à l'employeur le droit à une augmentation de 50 % à 90 % de son virement au Fonds de garantie pour travailleurs réintégrés (FGTR). Le vice-président qui a entendu cet appel ne s'est pas saisi de la question du rajustement rétroactif du compte de l'employeur dans le cadre de la Nouvelle méthode expérimentale de tarification par incidence (NMETI).

L'employeur est retourné à la Commission pour demander un rajustement rétroactif mais cette dernière à refuser de lui en accorder un. L'employeur a interjeté appel du refus de lui accorder le rajustement rétroactif demandé. Dans la *décision no 1679/06*, une autre vice-présidente a rejeté l'appel de l'employeur.

En l'espèce, l'employeur demandait un réexamen de la *décision no 1679/06*. La demande de réexamen a été rejetée. Quand l'employeur a interjeté appel du rejet de sa demande de rajustement rétroactif, il avait demandé que son cas soit confié au vice-président auteur de la *décision no 812/05* au motif qu'il était déjà au courant du bien-fondé du cas. Cette demande a été rejetée.

Il n'y avait aucun vice important dans le traitement administratif ou dans le fond de la *décision no 1679/06*. Le vice-président auteur de la *décision no 812/05* ne s'est pas saisi de la question relative à la NMETI. Un appelant n'a pas le droit de demander que son cas soit confié à un vice-président ou à un comité particulier. Le Tribunal n'avait pas informé l'employeur du refus de confier son appel au vice-président auteur de la *décision no 812/05*; cependant, il s'agissait là d'une question de courtoisie ou de pratique n'ayant aucun rapport avec le processus décisionnel.

Les questions relatives au FGTR et à la NMETI étaient des questions distinctes faisant intervenir des considérations et des politiques différentes. Il n'y avait aucun vice administratif du fait que le Tribunal n'avait pas confié le cas au vice-président qui avait examiné la question du FGTR.

#### **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

#### **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

#### **Cross-References:**

- *Decision No. 812/05* (June 13, 2005) [2005 ONWSIAT 1314]
- *Decision No. 1679/06* (September 21, 2006) [2006 ONWSIAT 2121]

APPLICATON by the employer for reconsideration of *Decision No. 1679/06*.

January 12, 2007. THE TRIBUNAL: —

BEFORE: E. Smith, Vice-Chair

HEARING: December 15, 2006, at Toronto, Written

DECISION(S) UNDER APPEAL: Employer request for reconsideration of *Decision No. 1679/06* dated September 21, 2006

APPEARANCES:

For the employer: Ms. A. Eagle, lawyer

For the worker: Not participating

## REASONS

### (i) Background

The employer requests reconsideration of *Decision No. 1679/06* (September 21, 2006), which denied the employer a retroactive NEER adjustment with respect to SIEF relief granted by a Tribunal Vice-Chair in *Decision No. 812/05* (June 13, 2005).

The employer alleges a procedural error with respect to *Decision No. 1679/06*. *Decision No. 812/05* was heard by a different Vice-Chair than *Decision No. 1679/06*. In *Decision No. 812/05*, the first Vice-Chair, Vice-Chair Nairn, granted the employer's appeal for SIEF relief. However, he denied a request by the employer that he take jurisdiction to consider whether the employer was entitled to a retroactive NEER adjustment with respect to that award. He referred that matter back to the Board. The Board denied a retroactive NEER adjustment. The employer appealed the Board's NEER decision, requesting that the matter be assigned to Vice-Chair Nairn, on the basis that the findings of the prior Vice-Chair in *Decision No. 812/05* led directly to the subsequent proceeding and ruling, that that Vice-Chair was already familiar with the merits of the case, and that review by him would avoid undue duplication. The employer stated that it was its position that the issue of a retroactive NEER adjustment was directly related to the first Vice-Chair's decision regarding the level of cost relief granted. In essence, the employer states, it was asking that the Vice-Chair who saw fit to allow an increase in relief of costs be asked whether it would be fair and just for the employer to receive the financial benefit of the decision in the circumstances.

The employer did not receive a formal response to its request for the same Vice-Chair. The NEER matter was assigned to me, a different Vice-Chair, to be heard based on the employer's written submissions. I denied the NEER appeal. The employer found out that a different Vice-Chair had been assigned to the NEER issue only when it received *Decision No. 1679/06*.

Therefore the employer wrote asking for an explanation of why its request was not granted, and asked that *Decision No. 1679/06* be reconsidered by Vice-Chair Nairn for consistency in decision making, on the basis that the issue involved is directly connected to his ruling in *Decision No. 812/05*.

The Tribunal Chair, Mr. Ian Strachan, responded to this letter as follows:

While it is unfortunate that you were not previously advised that your request that this matter be assigned to Vice-Chair Nairn was not being granted, a party does not have the right to request a particular Vice-Chair or Panel. Assignment decisions must be made in light of the availability of Vice-Chairs and Panel Members and their other workload. In this case, the matter was assigned to Vice-Chair Smith who, like Vice-Chair Nairn, has significant expertise in revenue issues. I note as well that if Vice-Chair Nairn had felt that there was a significant relationship between the issues decided in *Decision No. 812/05* and the retroactivity issue which subsequently formed the basis of *Decision No. 1679/06*, he could have indicated this in some fashion in *Decision No. 812/05* – for example by indicating that the matter could be assigned to him if convenient. There is, however, no such indication in *Decision No. 812/05*. The fact that Vice-Chair Nairn referred the retroactivity question back to the Board rather than taking a broader approach to jurisdiction, also suggests that he saw the issues involved as distinct and that there was no particular value in him considering retroactivity.

With respect to your request that the reconsideration be assigned to Vice-Chair Nairn as opposed to Vice-Chair Smith, the Tribunal's Practice Direction on Reconsiderations indicates that a reconsideration may be assigned to the original adjudicator. In my view, the original adjudicator is generally in the best position to decide whether any matters raised on a reconsideration request meet the threshold test for re-opening an otherwise final Tribunal decision. The issues in dispute in *Decision No. 1679/06* are quite different from those in *Decision No. 812/05* and I do not see how the value of consistency in decision-making would be promoted by assigning the reconsideration request of *Decision No. 1679/06* to Vice-Chair Nairn rather than Vice-Chair Smith.

Therefore this reconsideration request has been assigned to me.

The appellant now requests reconsideration on the basis that the failure for this appeal to have been assigned to the Vice-Chair Nairn constituted procedural error.

## **(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) Conclusions**

I find that there is no significant defect in the administrative process or content of *Decision No. 1679/06*. Vice-Chair Nairn did not take jurisdiction to address the NEER issue, and therefore was not seized of this issue when the employer appealed to the Tribunal for a retroactive NEER adjustment. An appellant does not have a right to the assignment of any particular Vice-Chair or Panel. Therefore the question of how the Tribunal responded to the appellant's request, and the question of when the appellant was informed of how the matter was being assigned, was a matter of courtesy or practice. It was not a matter that affected the adjudicative process. Generally, I understand that it is not practice for appellants to be informed of the names of

Vice-Chairs or Panels assigned to their appeals until the date of the hearing, or, for written matters, until the decision is released. I note also that assignments are made by the Chair and/or the scheduling department, without consultation with Vice-Chairs or Panel members.

It is not uncommon for Tribunal decisions to adjudicate some issues and to refer other matters, which flow from those rulings, back to the Board, subject to the right of the party to appeal again. In this circumstance, the original Vice-Chair or Panel may sometimes note in its decision that the subsequent matter may be scheduled with that Vice-Chair or Panel, at the convenience of the scheduling department, or that there is no reason that the subsequent matter may not be assigned to the same Vice-Chair or Panel again. However, even in those circumstances, that Vice-Chair or Panel is not seized of the subsequent matter. When the original Vice-Chair or Panel is not seized, a party has no right to demand or to refuse the assignment of the appeal to the same Vice-Chair or Panel. The matter is in the discretion of the Chair, and may involve administrative convenience.

In this case, in my view, the SIEF and NEER issues were distinct. Different policies and different considerations apply to the issue of a retroactive NEER adjustment than apply to the granting of SIEF relief. I find that there is no defect in the process or content of the prior decision.

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. 871/02R2

Panel: Strachan (Tribunal Chair), Wheeler, Jackson

Decision — December 21, 2006

Neutral Citation: 2006 ONWSIAT 3023

**Procedure (reconsideration) (multiple applications) – Reconsideration (standard of proof) – Reconsideration (new evidence) – Cancer (lung) – Exposure (asbestos).**

**The reconsideration process is a special remedy, and the Tribunal's power to reconsider is invoked only in unusual circumstances – It is not intended as a routine process for any party unhappy with a Tribunal decision – The process is not an opportunity to re-argue a case, review existing evidence or present the same evidence in a different form, and it is not designed to consider multiple reconsideration requests.**

The worker worked in the paint department of a manufacturer of windows and doorframes from aluminum extrusion, from 1967 to 1988. He died from lung cancer at age 46 in 1989. The worker's widow appealed a decision of the Appeals Resolution Officer denying entitlement for lung cancer.

In *Decision No. 389/92*, the Tribunal found that the worker's lung cancer was not related to workplace chromium exposure. In *Decision No. 871/02*, the Tribunal found that the lung cancer was not related to asbestos exposure.

Previous applications by the widow for reconsideration of those decisions have been denied. The widow now applied again for reconsideration of *Decisions No. 389/92, 389/92R, 871/02* and *871/02R*. The widow submitted that there was significant new evidence in the form of a new diagram of the location where the worker worked, which could affect exposure findings.

One of the most fundamental concepts guiding the entire Tribunal process is the duty of fairness. The Tribunal has gone to considerable lengths, in spite of limited resources, to promote fairness in its process. Parties generally have the option of an oral hearing *de novo*. This is very unusual in a final level of appeal within any adjudicative system. While this promotes fairness, it does place significant strain on Tribunal resources. The Tribunal must carefully balance its resources to ensure that parties awaiting their first hearing date are not penalized due to expenditure of scarce resources on reconsideration requests.

While the Tribunal has the discretionary power to reconsider, this remedy is an exceptional one. The reconsideration process is a special remedy and the Tribunal's power to reconsider is invoked only in unusual circumstances. It is not



intended as a routine process for any party unhappy with a Tribunal decision.

To be successful on a reconsideration application, the applicant must discharge the onus to satisfy the Tribunal that an otherwise final decision should be reopened. Essentially, an applicant must: a) demonstrate that there was a fundamental error of law or process which, if corrected, would likely produce a different result, or b) introduce substantial new evidence which was not available at the time of the original hearing, which would likely have resulted in a different decision had the evidence been introduced at the original hearing.

A review of the process of other boards and tribunals shows that some do not have statutory authority to reconsider, and of those that do, most have significant restrictions on the process, such as short time limits, application fees or limits on the number of applications.

The reconsideration process is not an opportunity to re-argue the case, review existing evidence or present the same evidence in a different form, and it is not designed to consider multiple reconsideration requests.

The Panel also noted the investigative powers of both the Board and the Tribunal, and the extensive reviews at multiple levels of adjudication.

In this case, the adjudicative process began in 1989. Since then, the claim has been reviewed by at least 14 different adjudicators at the Board and the Tribunal, including three different panels of the Tribunal. In addition to the reconsideration decisions that have been released, there have also been seven other applications to reconsider, for which the worker was advised by letter that there was no substantive new issue which would justify further review by a vice-chair or panel.

Even if the original diagram was somewhat inaccurate, the new diagram did not represent substantial new evidence which would produce a different finding. It was not sufficiently weighty as or persuasive as to counteract the medical and other evidence.

The application to reconsider was denied.

**Procédure (réexamen) (demandes multiples) – Réexamen (norme de preuve) – Réexamen (nouveaux éléments de preuve) – Cancer (poumon) – Exposition (amiante).**

**Le processus de réexamen est un recours spécial, et le Tribunal invoque son pouvoir de réexamen seulement dans des circonstances inhabituelles – Le processus de réexamen n'a pas pour objet de servir de processus routinier à la disposition de toute partie mécontente d'une décision du Tribunal – Le processus de réexamen n'offre pas l'occasion de plaider un cas de nouveau, de revoir la preuve existante ou de présenter les mêmes éléments de preuve différemment, et il ne vise pas à permettre des demandes de réexamen multiples.**

Le travailleur avait travaillé à l'atelier de peinture d'un fabricant de fenêtres et de dormants de porte en extrusion d'aluminium de 1967 à 1988. Il est décédé d'un cancer du poumon à l'âge de 49 ans en 1989. La veuve du travailleur a

interjeté appel de la décision par laquelle le commissaire aux appels a refusé de reconnaître le droit à une indemnité pour cancer du poumon.

Dans la *décision no 389/92*, le Tribunal a conclu que le cancer du poumon du travailleur n'était pas lié à une exposition au chrome sur les lieux du travail. Dans la *décision no 871/02*, le Tribunal a conclu que le cancer du poumon du travailleur n'était pas lié à une exposition à l'amiante.

Le Tribunal avait déjà rejeté des demandes de réexamen provenant de la veuve. En l'espèce, la veuve demandait de nouveau le réexamen des *décisions nos 389/92, 389/92R, 871/02 et 871/02R*. La veuve soutenait qu'elle avait un nouvel élément de preuve important : un nouveau diagramme du lieu de travail susceptible d'influer sur les constatations faites au sujet de l'exposition.

Le devoir d'équité procédurale est l'un des concepts les plus fondamentaux guidant l'ensemble du processus du Tribunal. Le Tribunal fait des efforts considérables, en dépit de ressources limitées, pour promouvoir l'équité dans son processus. Les parties peuvent généralement obtenir une nouvelle audition, ce qui est très inhabituel pour le dernier recours d'un système décisionnel. Une telle façon de procéder promeut l'équité mais elle impose un fardeau considérable sur les ressources du Tribunal. Le Tribunal doit prendre soin de bien équilibrer ses ressources limitées de manière à ne pas pénaliser les parties en attente d'une première date d'audience en utilisant ces ressources pour traiter les demandes de réexamen.

Bien que le Tribunal ait le pouvoir discrétionnaire de réexaminer ses décisions, il s'agit d'un recours exceptionnel. Le processus de réexamen est un recours spécial, et le Tribunal invoque son pouvoir de réexamen seulement dans des circonstances inhabituelles. Le processus de réexamen n'a pas pour objet de servir de processus routinier à la disposition de toute partie mécontente d'une décision du Tribunal.

Pour qu'une demande de réexamen soit accueillie, le demandeur doit convaincre le Tribunal qu'une décision définitive devrait être rouverte. Le demandeur doit essentiellement : a) démontrer que la décision est entachée d'une erreur de droit ou d'une erreur administrative fondamentale dont la rectification aurait probablement pour effet d'entraîner un résultat différent ou b) introduire de nouveaux éléments de preuve importants qui n'étaient pas disponibles au moment de l'audition initiale de l'appel et qui auraient probablement entraîné une décision différente s'ils avaient été produits au moment de l'audition initiale de l'appel.

Un examen des procédés d'autres commissions et tribunaux révèle que certains n'ont pas de pouvoir légal de réexamen et que, parmi ceux qui en ont un, la plupart le restreigne de façon importante au moyen de courts délais, de frais de demande ou de limites relativement au nombre de demandes permises.

Le processus de réexamen ne constitue pas une occasion de plaider un cas de nouveau, de revoir la preuve existante ou de présenter différemment les mêmes éléments de preuve, et il ne vise pas à permettre des demandes de réexamen multiples.

Le comité a aussi noté les pouvoirs d'enquête dont la Commission et le Tribunal sont investis ainsi que les examens

approfondis effectués à plusieurs étapes du processus décisionnel.

En l'espèce, le processus décisionnel a débuté en 1989. Depuis lors, le dossier a été examiné par au moins 14 décideurs différents à la Commission et au Tribunal, y compris trois comités différents du Tribunal. En plus des décisions de réexamen émises, il y a eu sept autres demandes de réexamen au sujet desquelles le Tribunal a répondu qu'il n'y avait aucune nouvelle question de fond justifiant un autre examen par un comité ou un vice-président.

Même si le diagramme original était quelque peu inexact, le nouveau diagramme ne constituait pas un nouvel élément de preuve important pouvant entraîner une constatation différente. Cet élément de preuve n'était pas assez important ou convaincant pour l'emporter sur la preuve médicale et le reste de la preuve.

La demande de réexamen a été rejetée.

#### **Workplace Insurance Legislation Considered:**

- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
  - s. 123
  - s. 129

#### **Other Decisions Considered:**

- *Gowling v. Ontario Workplace Safety and Insurance Appeals Tribunal*, [2004] O.J. No. 919 (Ont. Div. Ct.) consd

#### **Cross-References:**

- *Decision No. 389/92* (March 22, 1996)
- *Decision No. 389/92R* (August 31, 1998)
- *Decision No. 871/02I* (July 18, 2002) [2002 ONWSIAT 1559]
- *Decision No. 871/02* (August 27, 2003) [2003 ONWSIAT 1903]
- *Decision No. 871/02R* (July 9, 2004) [2004 ONWSIAT 1425]

APPLICATION by the worker's widow for reconsideration of *Decisions No. 389/92, 389/92R, 871/02 and 871/02R*.

December 21, 2006. THE TRIBUNAL: —

BEFORE: I.J. Strachan, Tribunal Chair  
 B. Wheeler, Member Representative of Employers  
 F. Jackson, Member Representative of Workers

HEARING: April 13, 2006 at Toronto, Written

DECISION(S) UNDER APPEAL: Applicant request for reconsideration of *Decision No. 389/92* dated March 22, 1996, *Decision No. 389/92R* dated August 31, 1998, *Decision No. 871/02* dated August 27, 2003, and *Decision No. 871/02R* dated July 9, 2004

## **THE RECONSIDERATION REQUEST**

This reconsideration application was considered in writing by I.J. Strachan, Tribunal Chair, F. Jackson, Member Representative of Workers and B. Wheeler, Member Representative of Employers.

The applicant is the worker's widow and she is requesting that the Tribunal reconsider both *Decisions No. 389/92* (March 22,

1996) and 389/92R (August 31, 1998) as well as *Decisions No. 871/02* (August 27, 2003) and 871/02R (July 9, 2004). *Decisions No. 389/92* and 871/02 involved the same appellant, addressed different WCB claims based upon the effect of different workplace exposures on the same medical condition, but were issued by different panels. This Panel had before it *Decisions No. 389/92, 389/92R, 871/02* and 871/02R together with the two reconsideration records dated February 27, 2006. These reconsideration records included material from several other reconsideration requests made by this applicant. The Panel also had the following materials for *Decision No. 871/02*:

- the original appeal record Volumes 1-4,
- Post-hearing Addendum No. 1
- the three-volume transcript of the original 1993 Tribunal hearing
- various correspondence and written submissions.

For *Decision No. 389/92* the Panel had before it:

- the reconsideration record,
- the original appeal record together with the 20 addenda,
- a transcript of the Tribunal hearing,
- a transcript of the Workers' Compensation Board hearing together with various correspondence, written submissions and books of authorities.

The Panel also had copies of the 52 exhibits.

### **(i) Issues and Background**

The worker died of lung cancer in 1989 at age 46. He had been employed for 20 years in the paint department of a company involved in aluminium extrusions for the manufacture of windows and doors. In *Decision No. 389/92*, the applicant claimed that her husband's cancer was caused by his exposure to chromium.

In *Decision No. 871/02*, she subsequently argued that her husband's lung cancer was caused by exposure to asbestos.

The facts and evidence are set out in great detail in the Tribunal's various decisions, including evidence of a significant smoking history. Board adjudicators and Tribunal panels examined all evidence to determine whether a causal relationship existed between the worker's lung cancer and his employment in the paint department.

In brief, the worker's lung cancer cell type was adenocarcinoma and there was evidence that the worker was a heavy smoker. Memo #1 from the Board file was written by a Claims Adjudicator following a conversation with the worker's wife. Her husband was alive at the time and she had approached the Board to establish a claim for lung cancer. Memo #1 states in part "the worker smoked for 20 years, 200 cigarettes a week". The clinical notes from the St. Joseph's Health Centre, where the worker was admitted prior to his death, record: "heavy smoker 30 cig-day x 20/30 years". Records from the Ministry of Labour Occupational Health and Safety Chest Clinic, which performed periodic tests on the employer's work force, indicate that the worker reported he smoked 35 cigarettes a day at the time of an assessment in 1987. For the assessments made in 1983 and 1985, he reported that he smoked 25 cigarettes per day. The worker died on May 9, 1989 at age 46.

The applicant now submits that the Panel should consider "significant new evidence" in the form of a diagram of the two

buildings indicating the location where her husband began his employment. In her submission, this diagram is different from the diagram which was produced at the two hearings and it could affect the exposure findings.

## **(ii) The Reconsideration Process**

Before considering the argument raised in the applicant's current reconsideration request, it is worth noting the context in which the reconsideration request is made. One of the most fundamental concepts which guides the entire Tribunal process is a duty of fairness. Fairness is a basic principle which should guide the adjudication process at all levels throughout the workplace safety and insurance (WSI) system.

The Tribunal has gone to considerable lengths, in spite of limited resources, to promote fairness in its process. For example, parties generally have the option of an oral hearing, which is a hearing *de novo* at the Appeals Tribunal. This is a very unusual process at the final level of appeal within any adjudicative system. The final level of appeal within the Canadian judicial system and within the administrative justice system usually involves a paper review in which considerable deference is given to the original decision-maker's findings of fact. In the interest of fairness, the Tribunal has determined that each party should have the opportunity or option to tell his or her story at some stage in the WSI adjudicative process. In the majority of Tribunal appeals, parties have chosen a paper process at the Board level and thus the first time a person usually testifies under oath occurs at the Appeals Tribunal stage. While this process promotes the concept of "fairness", it does place a significant strain on Tribunal resources because the Tribunal normally receives approximately 4,000 new appeals each year. Many of these appeals involve complex medical and legal issues. To make effective use of scarce resources, the Tribunal must carefully balance its processes to ensure that parties awaiting their *first* hearing date are not penalized because of the expenditure of scarce resources on reconsideration requests. While fairness is the guiding principle, fairness to *all* WSI parties includes the right to a timely hearing and timely decision-making.

Section 123 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, provides that a decision of the Appeals Tribunal under the Act is final. While the Appeals Tribunal does have the discretionary power to reconsider its decision under section 129 of the Act, this remedy is an exceptional one. Because the integrity of the appeal process and the finality of Tribunal decisions are important considerations in any reconsideration application, the standard of review or threshold which must be met in the reconsideration process is a high one. Although some representatives may advise their clients that a reconsideration application is merely a routine step in the WSI appeal process, this advice is wrong. The reconsideration process is a special remedy and the Tribunal's power to reconsider is invoked only in unusual circumstances; it is not intended as a routine process for any party or representative unhappy with a Vice-Chair or Panel decision. To treat reconsiderations as a routine, insignificant process would effectively undermine the statutory principle of finality, suggest that parties could routinely discount the original hearing process, and put successful parties at risk of multiple proceedings.

To be successful on a reconsideration application, an applicant must discharge the onus to satisfy the Tribunal that an otherwise final decision should be reopened. Essentially, an applicant must:

- (a) demonstrate that there was a fundamental error of law or process which, if corrected, would *likely produce a different result*, or
- (b) introduce substantial new evidence which was not available at the time of the original hearing and which *would likely have resulted in a different decision* had this substantial evidence been introduced at the original hearing.

Any error and its resulting effects must be sufficiently significant to outweigh the importance of decisions being final and the prejudice to any party of the decision being reopened.

In the case of *Gowling v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, [2004] O.J. No. 919 (Div. Ct.), the applicant on a Judicial Review contended that the Tribunal's reconsideration process offended the principles of natural justice. After reviewing the Tribunal's reconsideration process, the Court commented on the principles of natural justice [at paras. 21-23]:

Concerning the denial of natural justice we are of the view that:

- The Tribunal did not breach principles of natural justice by arriving at a conclusion on an issue in the absence of submissions from counsel;
- The Tribunal's reconsideration process does not offend the principles of natural justice.

...

- a reconsideration is not an appeal, but rather a further review of a decision by the decision maker in which an applicant may request that the Tribunal reconsider its original decision due to extenuating circumstances;
- the principle of *nemo iudex in causa sua* (no one shall be a judge in his or her own cause) does not apply, insofar as a reconsideration is a discretionary process entirely within the Tribunal's statutory power;
- because a reconsideration is distinct from an appeal, a high threshold test is required to balance the interests of the Tribunal and other parties, and the original adjudicator is in the best position to evaluate the proceedings to address natural justice allegations.

### (iii) Other Reconsideration Processes

In considering the "fairness" of the Appeals Tribunal reconsideration process, it is instructive to compare the Tribunal's process with that of other tribunals and boards. Some tribunals do not have statutory authority to reconsider their decisions and, of those that do, most impose significant restrictions on the reconsideration process. The most common restriction is a short time limit in which a reconsideration application can be submitted. Some tribunals also require an application fee in connection with any reconsideration application. A number of tribunals also allow only one reconsideration. Some tribunals restrict reconsiderations in substantive ways, such as allowing only reconsiderations based on new evidence and not on errors of law (which then require an appeal to the courts).

The workers' compensation tribunals of Manitoba<sup>1</sup>, Nova Scotia<sup>2</sup> and Prince Edward Island<sup>3</sup> do not have the same power to reconsider decisions as this Tribunal. In PEI, the Tribunal once had this power, but this was changed by legislative amendment in 2001. In both PEI and Nova Scotia, there is a right of appeal to the courts. In Manitoba, a party may ask the Workers' Compensation Board's Board of Directors to reopen the case, or the party may present new evidence to the Commissioner of Appeals of Manitoba, but the Tribunal itself cannot reconsider its decisions.

For purposes of developing a reasonable perspective on the WSIAT process, the following is a brief overview of the procedures for reconsideration at certain other tribunals, boards and commissions:

### *Rental Housing Tribunal (RHT)*

The RHT can review an order; a written request for a review must be made within *30 days* of the date of the order, and must include a \$75 filing fee<sup>4</sup>. This request must explain in detail the error or errors believed to have been made and specify what changes ought to be made in the order.

### *Financial Services Commission*

All reviews of interim or final decisions go back to the original panel or member who made the initial decision. An application for review must be made within *10 days* of the decision,<sup>5</sup> although a panel or member may consider a late application if satisfied that there is good reason for the delay. Only one request for review will ever be considered. The request for review must include all relevant information including the reasons for requesting the review, the outcome sought, and any documents which support the request. The panel or member will conduct the review in writing, unless otherwise ordered, and will consider the following in deciding whether it is advisable to review the order:

- 1) whether there is a material error of law or fact;
- 2) the extent to which the order has been relied upon;
- 3) whether the order is under appeal or being judicially reviewed; and
- 4) whether the public interest in finality is outweighed by the prejudice to the requestor.

### *Ontario Municipal Board (OMB)*

According to its website, the OMB rarely grants reviews of its decisions and rarely changes a decision.

The OMB has a high threshold for review of its decisions. For the OMB to consider a review, a party must prove that an error was made which may have changed the resulting decision. This would involve the OMB:

- 1) acting out of its jurisdiction;
- 2) violating the rules of natural justice;
- 3) making a material error of fact or law;
- 4) having heard false or misleading evidence; or
- 5) concluding that the OMB should now consider new evidence which was not available at the time of the hearing and could change the decision.

The OMB may turn down requests for review which rely upon the same evidence or re-argue the same issues, which are filed more than 30 days after the OMB decision, or is a second request from the same party.<sup>6</sup> In addition, a filing fee of \$125 is required with a review application.

### *Pay Equity Hearings Tribunal (PEHT)*

A request for reconsideration must be filed within 20 days of the decision,<sup>7</sup> unless the Tribunal gives permission to extend this time period. Reconsideration will only be given in compelling and extraordinary circumstances, including:

- 1) new evidence or legal submissions that *could not* have been presented at the hearing and that would be *practically conclusive* of the case;
- 2) new circumstances of such significance that the decision should change; or
- 3) the decision is wrong in law.

### *Environmental Review Tribunal (ERT)*

Under the ERT's current Rules of Practice, which came into effect July 21, 2006, a party may make a request for reconsideration within 30 days of the date of the decision, except in the case of orders and decisions made under the *Environmental Bill of Rights* or the *Consolidated Hearings Act*, in which case the request must be made within 10 days (Rule 207). The Rules of Practice outline the relevant circumstances for the ERT to consider when reviewing its decisions, including whether the ERT acted outside its jurisdiction, whether there was a material error of law or fact such that the ERT would likely have reached a different decision but for that error, and the extent to which any person or any other Party has relied on the order or decisions.

### *Ontario Labour Relations Board (OLRB)*

Requests for reconsideration must be made within 20 days and must include complete submissions supporting the request.<sup>8</sup> The Board can extend the 20-day period. The Board will generally not reconsider its decision unless there is new evidence that is *practically conclusive* and could not have been obtained earlier, or there are new objections or arguments which the party had no opportunity to raise earlier.

Once a request is received, the Board either dismisses it or, if it has merit, gives the other party an opportunity to make written submissions. The Board then reviews all submissions and issues a decision granting or dismissing the request. The Board rarely holds another oral hearing for reconsiderations.

The reconsideration usually goes before the same panel; because it is not an appeal, but a question of new information, the panel which heard the case originally is in the best position to make that determination.

### *Canadian Industrial Relations Board*

An application for reconsideration must be brought within 21 days of the decision. The application must set out all the relevant arguments for the reconsideration. Reconsideration requires new evidence, an error of law or policy, or a failure to respect a principle of natural justice.<sup>9</sup>

As mentioned earlier, some representatives who, apparently, are not familiar with reconsideration processes at other tribunals, boards and commissions, incorrectly regard the reconsideration process at the Appeals Tribunal as merely a routine step in the WSI appeals process. The reconsideration process at the Appeals Tribunal is not an opportunity to re-argue the case, review existing evidence or present that same evidence in a different form. The reconsideration process is also not designed to consider multiple reconsideration applications, although a small number of parties seem to be under the mistaken impression that multiple reconsideration applications are acceptable. That is not the case and it does not accord with treatment of a reconsideration process as a truly exceptional remedy. It would also strain resources, which would normally be allocated to injured worker and employer appeals awaiting a first hearing date, and prejudice successful parties relying upon the finality of



the process.

#### **(iv) Workplace Safety and Insurance Context**

A further reason why the reconsideration process at the Appeals Tribunal is treated as an exceptional remedy is the thorough, systemic review of a claim or appeal within the WSI system.

Employer and injured worker cases are first considered by a WSIB Claims Adjudicator (CA), who is usually a knowledgeable individual assigned to a specific WSI area where the CA develops significant expertise. CAs also work with experienced managers who can provide assistance in reviewing complex or difficult cases. CAs also may access the Board's internal medical resources and receive opinions from Board Medical Advisors and Occupational Health specialists involved in occupational disease claims. Parties dissatisfied with CAs' decisions can appeal those decisions to an Appeals Resolution Officer (ARO) at the Board's internal Appeals Branch, or request a reconsideration of the original decision in accordance with the Board's policy and practice. Most AROs are long-term Board employees with extensive experience in compensation issues. An employer or injured worker who is still dissatisfied after these reviews at the Board level, may then appeal the final Board decision to the Appeals Tribunal.

#### **(v) The Appeals Tribunal Process**

At the Appeals Tribunal, the appeal will be considered by either a single Vice-Chair or a full Panel of three adjudicators, usually after an oral hearing. It follows that, once a final Appeals Tribunal decision is released, the case has been thoroughly reviewed throughout the entire WSI system by at least three or five adjudicators (depending on whether the Tribunal appeal was heard by a full Panel of three or a single Vice-Chair) trained in WSI law, in addition to Board adjudicators and managers involved in any reconsideration processes at WSIB. The process should have provided balanced and objective adjudication resulting in well-reasoned written decisions based upon the best available evidence.

The Board and Tribunal both have investigative powers under the Act and may exercise these powers where appropriate to obtain further evidence, particularly expert opinion evidence from an independent and recognized medical specialist. After thorough reviews of the evidence and merits of a case at three different levels within the WSI system, it should be understandable that any reconsideration remedy at a subsequent stage of the Appeals Tribunal process would be utilized only in very unusual circumstances. While the basic underlying principle within the WSI adjudicative system is fairness, the thorough review of the merits of a case at three different levels of adjudication involving a minimum of three different adjudicators, should normally ensure a fair resolution of the principal issues. Most other adjudicative systems do not involve three different levels of review and yet many of those systems have more stringent requirements for their reconsideration process – if indeed any reconsideration process even exists, other than a judicial review. When it comes to the basic principle of fairness, it would appear that the WSI system, by most objective standards, has gone the extra distance to ensure a correct result or outcome in most cases.

When a reconsideration application at the Appeals Tribunal involves substantial new evidence or an issue requiring a review of all evidence in the appeal, the reconsideration application is normally referred to the original Vice-Chair or Panel. The original Adjudicator is usually in the best position to weigh *all* evidence (including testimony at the original Tribunal hearing) to determine whether or not the new evidence is sufficiently persuasive that it would probably have produced a different result at the original hearing. In unusual cases where the issue is an error of law on the face of the record, or an issue which does

not involve consideration of all evidence including testimony, the reconsideration application *may* be referred to a different Vice-Chair or Panel by the Tribunal Chair.

When an applicant files for a reconsideration on the grounds of “substantial new evidence” (which, if introduced at the original hearing, would “likely” have produced a different result), there is a significant onus on that applicant to demonstrate that the “new” evidence would, on a balance of probabilities, have been sufficiently persuasive or “substantial” to effectively outweigh all of the evidence which led to the original finding. While Tribunal decisions have not generally used the words “practically conclusive” to describe this “substantial” new evidence, obviously the new evidence must be very powerful and persuasive in order to overcome all other evidence which led to the original conclusions of the Vice-Chair or Panel. Simply introducing an updated medical report setting out similar findings or opinions is not the type of “substantial” new evidence which would likely have changed the original decision. For evidence to be sufficiently substantial that it would likely have produced a different result at the original hearing, that substantial evidence must be of superior quality and so logically persuasive that it could be described as “practically conclusive” of the issue under appeal. It must obviously also be relevant to the issue in dispute. For example, where the issue of causation is in dispute, new medical evidence is of little assistance if it does not address causation in a clear and cogent way. In our view, it follows that when an applicant requests a reconsideration based on substantial new evidence, such new evidence should be clearly decisive or practically conclusive of the issue under appeal.

After these extensive reviews at multiple levels of the WSI adjudicative process, those parties who are still convinced that there was a fundamental defect in the appeal process have the option of securing yet another opinion from the Office of the Ombudsman. The Appeals Tribunal acts as a safety valve within the WSI adjudicative system for persons convinced that a significant adjudicative error has been made at the Board. Similarly, the Office of the Ombudsman is the provincial safety valve for persons convinced that a significant error has been made by a provincial Agency, Board or Commission. The Ombudsman’s Office will provide an impartial review of government actions without requiring parties to resort to the complexities and costs of a Court application. While the Ombudsman’s principal focus is currently on systemic issues, individual complaints are still investigated to determine whether they have any substantial merit. In addition, there is also the possibility of an application to the Divisional Court for a judicial review.

## **(vi) The Panel’s Conclusions**

In this reconsideration decision, the Panel has considered the applicant’s request and submission as a combined reconsideration application affecting all of *Decisions No. 389/92, 389/92R, 871/02, and 871/02R*.

As mentioned earlier, the adjudicative process began in March 1989, when the worker’s spouse filed a claim with the Board alleging that his lung cancer was attributable to his employment. Her husband had worked in the paint department of a window and doorframe manufacturer, and unfortunately passed away at age 46 on May 9, 1989, from “diffuse adenocarcinomatosis”.

In August 1989, a Claims Adjudicator denied the claim after reviewing the worker’s job duties and possible exposures, including a possible asbestos exposure. Although the 1989 claim was based upon the worker’s possible exposure to chromium, the Claims Adjudicator reviewed possible asbestos exposure and appeared to dismiss any possible exposure to asbestos. In 1989, the Workers’ Compensation Board had three internal levels of adjudication: first, the Claims Adjudicator level; secondly, the Decision Review Branch level; and, thirdly, the Appeals Branch level. Following denial of the

applicant's claim by the Claims Adjudicator, a Decision Review Specialist considered the applicant's appeal and, on March 5, 1990, concluded that there was no causal relationship between the worker's employment involving paints and chemicals and his lung cancer. This Review Specialist noted that the issue of asbestos exposure was reviewed and "it was determined that asbestos was not used in either of the plants where the worker worked". The applicant then appealed to the WCB Appeals Branch. In a June 5, 1991 decision, the Hearings Officer concluded that the worker's lung cancer was not related to his employment, but the decision did not specifically address the issue of asbestos exposure.

The applicant then retained the services of I. Outerbridge, a lawyer, and appealed to the Tribunal. Over the course of the 15-day hearing, the Panel heard testimony from 10 witnesses, attended at the accident employer's premises, and requested post-hearing medical information from a radiologist. On March 22, 1996, the Panel released *Decision No. 389/92*. The decision noted that, at the beginning of the hearing, there was some confusion over whether the issue was any causal relationship between the worker's lung cancer and exposures at work in general, or whether the claim was restricted to cancer resulting from exposure resulting from chromium. In its decision, the Panel stated [at p. 6]: "... Mr. Outerbridge was able to clarify that the widow was claiming that the worker's cancer resulted from exposure to chromium. Mr. Outerbridge confirmed this on a number of occasions. Accordingly, the issue in this case concerns only the question of exposure to chromium and whether the worker's cancer resulted from that exposure."

After reviewing all of the evidence, the Panel concluded that any exposure to chromium at work was not a significant contributing factor to the worker's lung cancer condition. The Panel reviewed evidence of the worker's possible exposure to chromium and concluded that the tasks involving chromium exposure were carried out by the chemist and not by the worker. The Panel commented in part [at p. 20]:

We turn now to the issue of the length and intensity of the worker's exposure to chromium. The major potential source of chromium exposure in his work place was clearly the alodine tunnel. There was some potential exposure through handling of the alodine chemicals, and the test which was done once or twice a shift to test for the intensity of the solutions. However, in our view the evidence establishes that these were tasks which were mostly handled by the chemist. The worker's exposure on this basis was not, in our view, significant.

Mr. Outerbridge, on behalf of the applicant, then filed a reconsideration request, which was reviewed by a different Panel and subsequently denied in an August 31, 1998, 15-page decision. The reconsideration Panel noted that the employer's facility had two main departments, anodizing and manufacturing. The worker worked in the paint department, a sub-department of the manufacturing department, while the hazardous substances were located in the anodizing department, where the worker did not work. The reconsideration Panel agreed with the hearing Panel on the conclusions relating to exposure to chromium. At paragraphs 60 to 61 of the decision, the reconsideration Panel concluded:

We also note the hearing Panel's statement in the decision that it was the contention of the applicant that "it was exposure to alodine and chromium acid in particular, which contributed to the worker's lung cancer". This emphasis on alodine rather than deoxylite or paint is evident in the applicant's factum. Exposure to chromium through deoxylite is referred to in only a few paragraphs of the applicant's factum. There are also only a few references to exposure to chromium through paint in the applicant's factum. The emphasis in the applicant's factum is clearly placed on exposure to chromium through alodine as the cause of the worker's cancer.

In these circumstances, we find no merit in the applicant's submissions on this point.

After further correspondence with the Tribunal in late 1998, the applicant next filed a claim with the Board alleging that her

husband's lung cancer was due to asbestos exposure. The Board then reopened her claim to consider entitlement on the basis of asbestos exposure. After further investigations, the Board's Adjudicator of Occupational Disease denied her claim that the lung cancer was the result of workplace exposure to asbestos. The applicant then appealed to the Board's Appeal Branch. In a November 30, 2000 decision, the Appeals Resolution Officer concluded that the evidence "... does not establish a causal relationship between the worker's employment and exposure to asbestos, nor does the evidence establish that his lung cancer was caused by asbestos..." The applicant then appealed again to the Tribunal.

At a pre-hearing proceeding on June 24, 2002, the Panel in *Decision No. 871/02* requested that the applicant define the issue on appeal. At paragraph 18 of that decision, the Panel noted:

She [the widow] originally replied that she was alleging that her husband's cancer was the result of carcinogenic substances in the workplace. We then asked her to specify the carcinogenic substances, to which she responded "asbestos and chromium". We again asked if she had identified any other substances, to which she responded "no". It was therefore clarified that the widow sought to pursue this appeal on the basis of asbestos and chromium exposure.

Prior to the hearing, the Panel released *Interim Decision No. 871/02I* (July 18, 2002), in which it noted the extensive prior Tribunal hearing and reconsideration process and concluded that [at para. 20]:

... the current appeal would only proceed on asbestos exposure and whether it significantly contributed to the worker's cancer. *The only extent to which we will consider the chromium issue is if there is any new evidence of a combination or synergy effect between chromium and asbestos*, since that is not an issue specifically dealt with in *Decision No. 389/92*. [Emphasis added]

In *Decision No. 871/02*, the Panel went into considerable detail concerning the Ministry of Labour's air sampling and the layout of the work premises. At paragraph 24 to 27 of that decision, the Panel noted:

Air sampling was then done on February 7, 1980. Four samples were done over 90 minutes near the press ovens. At the Tribunal hearing, Mr. F.C. was able to identify the general location of the ovens but was not able to identify exactly which ovens had been tested. The air sampling results were as follows:

| Air Samples      |                                       |              |               |                                                                 |
|------------------|---------------------------------------|--------------|---------------|-----------------------------------------------------------------|
| Hazard: Asbestos |                                       |              |               |                                                                 |
| Sample No.       | Location                              | Time Minutes | Volume Litres | Total Fibres Greater than 6 Micrometers in Length per cc of Air |
| 1.               | Approximately 1 ft south of oven E304 | 90           | 180           | 0.0                                                             |
| 2.               | Between oven E306 and E307            | 90           | 180           | 0.13                                                            |
| 3.               | About 1 ft south of oven E405         | 90           | 180           | 0.0                                                             |
| 4.               | On east side of E318                  | 90           | 180           | 0.35                                                            |

The air quality assessment report of March 20, 1980 noted:

A very little amount of sealing asbestos strips are used in this plant chiefly as an insulation agent around the ovens to prevent heat loss. The strips are about 2” wide and can be cut off at the required length. On the day of the air sampling no asbestos strips were cut, removed or replaced on the ovens. The application of asbestos strips may occur twice annually.

The final report by S. Guirguis, M.D., dated March 21, 1980, concluded that “air sampling for aluminium dust and asbestos fibres were within acceptable levels”.

The case materials include another report prepared in January 1987 by a heating and boiler service company concerning a visual inspection of all covered boiler jackets to check for asbestos insulation. The inspection did not detect any asbestos covering; all the insulation was fibreglass. In any event, the boiler rooms were in a separate part of the building than where the worker worked on the paint line.

On page 7 of the decision, the Panel set out the worker’s employment history and a description of the premises where he worked. At the end of paragraph 30, the Panel concluded:

Given that the Ministry of Labour’s field investigation team did not identify asbestos in the paint line ovens, *that the insulation material was different from the press ovens* in that it did not require replacing, we find that the *paint line ovens were not insulated with asbestos*. [Emphasis added]

In paragraph 31 of the decision, the Panel set out background information which is relevant to the latency for asbestos-related lung cancer. The Panel stated in part:

For latency purposes, it is important to note that the ovens containing asbestos insulation were not built until around 1972/1973. By then, the worker worked as a painter in the segregated portion of the paint line until around 1977. Around 1977, he became a lead hand, working mostly in an enclosed office and in the racking and unranking area. Even when the worker was working in the racking and unranking area, he was still at least 100 feet away from any of the ovens containing asbestos strip insulation. The asbestos air sampling results immediately next to those ovens or within 1 foot of the ovens were considered by S. Guirguis as “within acceptable levels”. In our view, therefore, the asbestos exposure 100 feet away from those ovens was negligible.

Dr. Mastromatteo testified that asbestos exposure falls off exponentially the further away you are from the asbestos source. In our view, this appeal may be disposed on the basis that the worker had no potential for asbestos exposure while working with the accident employer.

The Panel noted the 25-year latency period for asbestos-related lung cancer and commented at paragraph 32:

Dr. Mastromatteo testified that the latency for asbestos-related lung cancer is about 25 years. According to the widow, the worker first developed symptoms of his disease around early 1988. The latency between the date that the ovens containing asbestos insulation were added to the worker’s building (1972/1973) to the date of his first symptoms would be about 16 years. The latency between the date that the worker became a lead hand (and no longer segregated by a concrete wall from the heat-treat ovens and die-ovens) would be 11 years. Neither latency period fits the asbestos-related lung cancer theory.

At paragraph 34 of the decision, the Panel also noted the absence of lung tissue scarring and pleural plaques:

Dr. Mastromatteo also testified that there were no other medical markers indicative of asbestos exposure with this worker.

According to the medical reports on file, the worker did not have scarring of lung tissue, did not have pleural plaques and the post mortem pathology report prepared by Dr. Ritchie (at the Tribunal’s request in the widow’s prior appeal) did not identify any evidence of fibrosis or asbestos bodies. While Dr. Mastromatteo admitted that Dr. Ritchie’s pathology examination was not specifically for the purposes of identifying asbestos bodies, Dr. Mastromatteo noted that Dr. Ritchie was an extremely competent pathologist and would likely have identified such bodies even if not specifically requested to do so.

At paragraph 36, the Panel concluded:

Based on the evidence before us, we find that the asbestos in the employer's workplace, located a great distance from the worker's work areas, was not a factor that made a significant contribution to the worker's lung cancer.

The applicant next requested a reconsideration and in its *Decision No. 871/02R*, the Panel reviewed her submissions and noted [at para. 41] that: "... they are generally the same arguments she made at the appeal...". The applicant essentially disputed the Panel's finding on exposure and also disputed the findings concerning her husband's smoking history.

While the worker's death from lung cancer was obviously distressing, the claim had then been reviewed by at least 14 different Adjudicators at the Board and Tribunal, including three different Panels at the Appeals Tribunal. Notwithstanding the consistent findings of all Adjudicators at the Board and Tribunal, the applicant continues to refuse to accept those findings and has filed seven different Tribunal reconsideration requests, including three with respect to *Decision No. 378/92* and four with respect to *Decision No. 871/02*. These other reconsideration requests were not assigned to a Vice-Chair/Panel for review and the applicant was advised by Tribunal letter of the reasons why no substantive new issue had been raised by her which would justify a further review by a Vice-Chair/Panel. For the reasons which follow, this Panel is satisfied that the current request could also appropriately have been handled in the same way. Some of the correspondence is listed in Appendix A and gives some sense of the time and resources expended in an effort to satisfy this applicant.

Even if we were to accept the applicant's contention that the original sketch of the premises is somewhat inaccurate, we conclude that her revised sketch does not represent "substantial new evidence", which would produce a different finding. It is not sufficiently weighty or persuasive to counteract all of the other evidence which led the Board Adjudicators and Tribunal Panels to deny the applicant's claim. It is not "practically conclusive" of the issue of whether the worker's lung cancer was causally related to his employment. In particular, it does not contradict the medical evidence and the Panels' findings that:

- there was no significant exposure to chromium in the paint department;
- the worker did not have scarring of his lung tissue;
- the worker did not have pleural plaques;
- the pathology report prepared by Dr. Ritchie (at the Tribunal's request in the widow's initial appeal) did not identify any evidence of fibrosis or asbestos bodies;
- the latency period for asbestos-related lung cancer does not fit the worker's medical profile;
- the worker had an extensive smoking history, which is documented throughout the appeal records for both *Decisions No. 871/02* and *389/92*;
- clinical notes from St. Joseph's Health Centre indicate that the worker was a heavy smoker, 30 cigarettes per day for 20-30 years;
- the medical evidence in the case indicates that the worker's smoking habits "considerably increased his risk for

developing lung cancer”;

- the Ministry of Labour tests indicated that “air sampling for aluminium dust and asbestos fibres were within acceptable levels”.
- the asbestos air samplings immediately next to the ovens, or within one foot of the ovens, were considered as “within acceptable levels”, and the Panel found that the worker was segregated by concrete walls until 1973, and after that was at least 100 feet away from any of the ovens used in the press.

In conclusion, while the Panel appreciates that the death of the worker was traumatic and extremely stressful for the applicant, her repeated requests for review and her ongoing refusal to accept the findings of the numerous Adjudicators at the Board and Tribunal approaches an abuse of the appeal process. The evidence supporting these findings is extensive and the Adjudicators have given detailed reasons to explain their conclusions. While the applicant has filed at least seven different reconsideration requests with the Appeals Tribunal, none of her requests, including the present request, involves substantial new evidence which would likely change the result of either *Decision No. 389/92* or *Decision No. 871/02*. We find that the applicant has not met the threshold test for a reconsideration.

## DISPOSITION

The combined reconsideration request for *Decisions No. 389/92, 389/92R, 871/02* and *871/02R* is denied.

*Application denied.*

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## APPENDIX A

1. Worker Representative’s letter requesting reconsideration dated June 3, 1996
2. Counsel to the Tribunal Chair’s letter dated June 26, 1996
3. Secretary, Counsel to the Tribunal Chair’s letter dated July 4, 1996
4. Worker Representative’s reconsideration request and submissions dated July 15, 1996
5. Worker Representative’s submissions dated September 11, 1996
6. Secretary, Counsel to the Tribunal Chair’s letter dated September 30, 1996
7. WSIAT memorandum to reconsideration Panel dated October 1, 1996
8. Worker Representative’s letter dated November 14, 1996
9. Secretary, Counsel to the Tribunal Chair’s letter dated December 3, 1996

10. Worker Representative's letter dated December 6, 1996
11. Secretary, Counsel to the Tribunal Chair's letter dated December 10, 1996
12. Secretary, Counsel to the Tribunal Chair's letter dated December 19, 1996
13. Applicant's letter dated January 22, 1997
14. Applicant's letter with attachments dated January 23, 1997
15. Worker Representative's facsimile with attachments dated January 19, 1998
16. Applicant's letter requesting reconsideration December 4, 2003
17. Counsel to the Chair's letter dated January 12, 2004
18. Completed reconsideration request dated January 19, 2004
19. Applicant's letter dated February 27, 2004
20. Counsel to the Chair's letter dated March 23, 2004
21. Applicant's letter dated August 9, 2004
22. Applicant's second reconsideration request with attachments dated September 10, 2004
23. Reconsideration Services' letter dated September 14, 2004
24. Reconsideration Services' letter dated September 17, 2004.
25. Applicant's letter with attachments dated September 20, 2004
26. Reconsideration Services' letter dated September 24, 2004
27. Applicant's letter dated October 25, 2004
28. Tribunal Chair's denial letter of second reconsideration request dated October 26, 2004
29. Applicant's letter dated November 15, 2004
30. Applicant's letter dated December 6, 2004
31. Tribunal Chair's denial letter dated December 10, 2004



## 32. Applicant's letter dated January 20, 2005.

1 *Workers Compensation Act*, C.C.S. M. c. W 200:

**60.9(1)** Where the Board of Directors considers that the appeal commission has not properly applied the Act, regulations or a policy of the Board of Directors, it may stay the decision of the appeal commission pending rehearing of the matter under this section and

(a) in writing, direct a panel of three different commissioners of the appeal commission to rehear the matter; or

(b) on written notice to all persons who have a direct interest in the matter, direct that the matter be reheard by the Board of Directors, or by a committee of the Board of Directors, in which case the Board of Directors or the committee has all the powers and authority of the appeal commission, and sections 60.4, 60.7 and 60.8 apply with such modifications as the circumstances require.

...

**60.10(1)** A person who is directly interested in a decision of the appeal commission may apply to the Chief Appeal Commissioner for an order directing reconsideration of the decision on the ground that new evidence has arisen or has been discovered since the hearing.

**60.10(2)** The Chief Appeal Commissioner may direct the appeal commission to reconsider its previous decision where the Chief Appeal Commissioner considers that the evidence referred to in subsection (1) is substantial and material to the decision, and

(a) did not exist at the time of the previous hearing before the appeal commission, or

(b) was not known to the applicant at the time of the previous hearing before the appeal commission and could not have been discovered through the exercise of due diligence.

2 *Workers' Compensation Act*, S.N.S. 1994-95, c. 10:

**252(1)** The Appeals Tribunal may confirm, vary or reverse the decision of a hearing officer.

**(2)** The Appeals Tribunal shall not

(a) reconsider;

(b) rescind, alter or amend; or

(c) make any further or supplementary order in regard to,

(d) any decision already made by the Appeals Tribunal.

3 Any person directly affected by a final decision of the Appeal Tribunal may appeal the decision to the Supreme Court – Appeal Division on a question of law or jurisdiction. (See *Workers Compensation Act*, R.S.P.E.I. 1988, c. W-7.1, s. 56.2 (1)).

*Worker's Compensation Board Policy Number: POL 06-02:*

**14.** If a person with a direct interest is dissatisfied with the decision of the Appeal Tribunal on a question of law or jurisdiction, a request for appeal may be made to the Court of Appeal within thirty (30) calendar days of the date of the Appeal Tribunal's decision.

4 *Tenant Protection Act*, 1997, S.O. 1997, c. 24:

**195** Except where this Act provides otherwise, an order of the Tribunal is final, binding and not subject to review except under section 21.2 of the *Statutory Powers Procedure Act*. 1997, c. 24, s. 195.

**196(1)** Any person affected by an order of the Tribunal may appeal the order to the Divisional Court within 30 days after being given the order, but only on a question of law.

*Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22:

**21.2(1)** A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

From the Rules: *Rule 27 – Review of Orders:*

The 30-day time limit is outlined at 27.3.

5 *Rules of Practice and Procedure* (August 1, 2004), Part XI, ss. 48-51.

6 *Rules of Practice and Procedure* – 112-188 (Reviewing a Board Decision or Order).

7 Rule 81, PEHT Rules of Practice (November 2002).

8 *Rules of Procedure of the Ontario Labour Relations Board*

#### RULE 18 REQUESTS FOR RECONSIDERATION

**18.1** A request for reconsideration must include complete written representations in support of the request.

**18.2** Where a party is directed to file a response to the request, it must include complete written representations in support of its position.

**18.3** No request for reconsideration will be considered where it is filed more than twenty (20) days after the date of the Board's decision, except with the permission of the Board.

9 *Canada Labour Code* R.S., c. L-1, s. 1, ss. 44, 45.



## Decision No. 1684/06 (Sharman v. Loeb Canada Inc.)

Indexed as: Decision No. 1684/06

Vice-Chair: B. Cook

Decision — January 26, 2007

Neutral Citation: 2007 ONWSIAT 208

**Right to sue – Supplier of motor vehicle, machinery or equipment (purchase or rental basis) – In the course of employment (contemporaneity).**

**Plaintiff worker was truck driver who was injured on defendant's premises while using defendant's powered lift to unload truck – Lift was machinery or equipment that was supplied by defendant without also supplying workers to operate it but lift was not supplied on purchase or rental basis – Exception in s. 28(4) of Workplace Safety and Insurance Act, 1997, did not apply – Plaintiff's right of action was taken away.**

The plaintiff in a civil case worked as a truck driver. He delivered a load to a warehouse owned by the defendant. At the warehouse, he used powered lift owned by the defendant to unload the truck. He was injured while using the lift. The defendant applied to determine whether the plaintiff's right of action was taken away.

Section 28(1) of the *Workplace Safety and Insurance Act, 1997*, takes away a worker's right of action against Schedule 1 employers and workers of Schedule 1 employers. However, there are exceptions in s. 28(3) and (4).

Section 28(4) provides that the right of action is not taken away if an 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. In this case, the defendant was an employer other than the worker's employer. The defendant supplied machinery or equipment without supplying workers to operate it. However, the machinery or equipment was not supplied on a purchase or rental basis. Accordingly, s. 28(4) did not apply in this case.

Section 28(3) provides that, if workers of one or more employers were involved in the circumstances in which the worker was injured, s. 28(1) applies only if the workers were acting in the course of their employment. In this case, there was no evidence to suggest that the activities of any workers of the defendant who may have been involved in the circumstances in which the plaintiff was injured, were activities that fell out of the course of their employment. Accordingly, s. 28(3) did not apply in this case.

The Vice-Chair concluded that s. 28(1) applied in this case. The plaintiff's right of action was taken away.

**Droit d'intenter une action – Fournisseur de véhicule automobile, de machine ou d'équipement (achat ou location) – Au cours de l'emploi (contemporanéité).**

**Le travailleur demandeur, un chauffeur de camion, a été blessé sur les lieux du travail du défendeur en utilisant le monte-charge motorisé de ce dernier pour décharger son camion – Le monte-charge était une machine ou de l'équipement que le défendeur fournissait sans fournir également des travailleurs pour en assurer le fonctionnement mais ce matériel n'était pas fourni par location ou achat – L'exception prévue au par. 28 (4) de la Loi de 1997 ne s'appliquait pas – La Loi supprimait le droit d'action du demandeur.**

Le demandeur dans une instance au civil travaillait comme chauffeur de camion. Il a livré une charge à un entrepôt appartenant au défendeur. À l'entrepôt, il a subi une lésion en utilisant un monte-charge appartenant au défendeur pour décharger son camion. Le défendeur a demandé au Tribunal de déterminer si la Loi supprimait le droit d'action du demandeur.

Le paragraphe 28 (1) de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997) supprime le droit d'action du travailleur contre les employeurs de l'annexe 1 et les travailleurs des employeurs de l'annexe 1. Les paragraphes 28 (3) et (4) prévoient toutefois des exceptions.

Le paragraphe 28 (4) prévoit que la Loi ne supprime pas le droit d'action si un employeur autre que celui du travailleur a fourni un véhicule automobile, des machines ou de l'équipement, par location ou achat, sans fournir également des travailleurs pour en assurer le fonctionnement. En l'espèce, le défendeur était un employeur autre que celui du travailleur. Le défendeur fournissait la machine ou l'équipement sans fournir également des travailleurs pour en assurer le fonctionnement. Cependant, la machine ou l'équipement n'était pas fourni par location ou achat. Par conséquent, le paragraphe 28 (4) ne s'appliquait pas en l'espèce.

Le paragraphe 28 (3) prévoit que, si les travailleurs d'un ou de plusieurs employeurs ont été impliqués dans les circonstances dans lesquelles le travailleur a été blessé, le paragraphe 28 (1) s'applique seulement si ces travailleurs agissaient au cours de leur emploi. En l'espèce, rien n'indiquait que tout autre travailleur du défendeur pouvant avoir été impliqué dans les circonstances dans lesquelles le travailleur a été blessé ne se trouvait pas en cours d'emploi. Le paragraphe 28 (3) ne s'appliquait donc pas en l'espèce.

Le vice-président a conclu que le paragraphe 28 (1) s'appliquait en l'espèce. La Loi supprimait le droit d'action du demandeur.

**Tribunal Decisions Considered:**

- *Decision No. 309/90* (1991), 20 W.C.A.T.R. 108 cond
- *Decision No. 886/02* (2002), 62 W.S.I.A.T.R. 289 consd

**Other Decisions Considered:**

- *Meyer v. Ontario (Workers' Compensation Board)* (1986), 15 O.A.C. 202 (Ont. Div. Ct.) reversed in part (1988), 38 O.A.C. 398 (C.A.) consd

**Workplace Insurance Legislation Considered:**

- *Workers' Compensation Act*, R.S.O. 1990, c. W.11
  - s. 10(9)
- s. 10(10)
- *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A
  - s. 28(1)
  - s. 28(3)
  - s. 28(4)
- s. 31

APPLICATION by the defendant in a civil case for a determination of whether the plaintiff's right of action was taken away.

January 26, 2007. THE TRIBUNAL: —

BEFORE: B.L. Cook, Vice-Chair

HEARING: August 25, 2006, at Toronto

APPLICATION FOR ORDER

REMOVING THE RIGHT TO SUE

APPEARANCES:

|                     |                                                             |
|---------------------|-------------------------------------------------------------|
| For the applicant:  | John McNeil, Lawyer<br>Michael La Haise, Operations Manager |
| For the respondent: | Lesley Van Wynsberghe, Lawyer                               |

## 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 (WSIA). It is brought by Loeb Canada Inc., the defendant in an action filed in the Ontario Court under Court File No. 04-CV-279116 CM1. The plaintiff in that action, and the respondent in this application, is Philip Sharman.

Philip Sharman was employed as a truck driver by Thompson Terminals Limited. On July 12, 2004, Mr. Sharman was delivering a load of bottled water to a warehouse owned and operated by Loeb Canada Inc. Loeb operates food stores in Ontario and the warehouse was used to receive goods and to then distribute them to its stores.

In the course of unloading the cases of bottled water, Mr. Sharman suffered an accident. He was using a piece of equipment called a "BT unit", which is essentially a powered lift wagon. He was operating the unit at the loading dock. It fell off the loading dock, and Mr. Sharman suffered left foot and ankle problems. He was off work for several months after the accident. In the course of his testimony he indicated that he has a permanent impairment as a result of the injuries.

Mr. Sharman alleges that the accident happened because the BT unit was defective. This allegation has not been proved and has been denied by Loeb. Negligence would have to be determined by the court, but the parties agree that it will be assumed

that there is a cause of action for the purpose of this application.

The BT unit was supplied by G.N. Johnston Equipment Co. Ltd. Johnston had a service contract with Loeb in respect of the BT units and it did regular maintenance and repair of the units. The units were owned by Loeb.

A separate legal action was commenced by Mr. Sharman against Johnston. Johnston was advised of this application by the Tribunal. By letter dated August 28, 2006, its insurer advised the Tribunal that Johnston did not wish to participate in the application.

Thompson was also notified of the application and it too advised the Tribunal that it did not wish to participate.

At the hearing, Mr. Sharman appeared and testified. Michael La Haise, the Operations Manager at the Loeb warehouse also appeared and testified.

## **(ii) The Issues**

Most actions by workers against Schedule 1 employers are barred by the provisions of section 28(1) of the WSIA:

**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.

However, section 28(3) and (4) provides exceptions:

**28(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.

In this application, Loeb submits that section 28(1) applies to take away Mr. Sharman's right of action against Loeb. Mr. Sharman submits that section 28(4) applies, on the grounds that Loeb supplied the BT unit to Mr. Sharman but did not provide workers to operate the units.

In the alternative, Ms. Van Wynsberghe submits that section 28(3) applies. Assuming that workers of Loeb were involved in the circumstances in which Mr. Sharman sustained the injury, were those workers acting in the course of their employment in relation to those circumstances?

## **(iii) Background**

There is no dispute that both Thompson, Mr. Sharman's employer, and Loeb, are Schedule 1 employers. There is also no dispute that Mr. Sharman was in the course of his employment at the time of the accident.

Mr. Sharman delivered to a number of warehouses operated by different companies. He testified that at most warehouses, the workers at the warehouse unloaded the goods from the truck. At the Loeb warehouse, however, he was required to unload his own truck. The BT units were available for this purpose.

According to the testimony of Mr. La Haise, Loeb employees did not generally use the BT units. Loeb employees at the warehouse used forklift trucks and the BT units were generally used only by the drivers of the trucks who were making the deliveries to the warehouse.

Mr. La Haise testified that when a truck driver arrives at the warehouse, he must talk to the warehouse receiver. The receiver tells the driver which loading dock to use and also assigns the driver a BT unit.

Mr. Sharman agreed that he would talk to the receiver to find out which loading dock to use, but he testified that he was never assigned a particular BT unit. He instead walked to where the units were and took one. He indicated that he had gone to the Loeb warehouse on several occasions and that the procedure was always the same. He testified that on the day of the accident, he was using a BT unit on the loading dock. The brake mechanism failed, causing him to drive the unit backwards off the loading dock. The unit fell a distance of about five feet.

Mr. La Haise testified that the BT unit was inspected by Johnston after the accident. Johnston reported that there was damage to the unit as a result of the fall but that there was nothing wrong with the brakes. Mr. La Haise testified that procedures were changed at the warehouse as a result of the accident. There were a number of investigations, and Loeb pleaded guilty to a charge under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, for failing to ensure the lifting device was only operated by a person with proper training, or by a worker accompanied and being instructed by a trained person.

#### **(iv) Submissions on the Section 28(4) Issue**

On behalf of the applicant, Loeb, Mr. McNeil submitted that Mr. Sharman's right of action is taken away by section 28(1):

**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.

Mr. Sharman was employed by a Schedule 1 employer and so he is not entitled to bring an action against Loeb, which is a Schedule 1 employer in respect of his injury.

Mr. McNeil submits that section 28(4) does not apply to this case. Mr. McNeil submits that Loeb did not provide the BT unit on a purchase or rental basis to Mr. Sharman or to Thompson, Mr. Sharman's employer. Accordingly, in his view, section 28(4) does not apply, and Mr. Sharman's right of action against Loeb is taken away by section 28(1).

On behalf of the respondent, Mr. Sharman, Ms. Van Wynsberghe submits that section 28(4) does apply to this case.

In her view, Mr. Sharman and/or Thompson, effectively rented the BT unit each time Mr. Sharman unloaded his truck. She noted that at most warehouses, the trucks were unloaded by the employees at the warehouse, and not by Thompson employees. She argued that the “rent” for the use of the BT unit was paid in the form of Mr. Sharman’s labour.

Ms. Van Wynsberghe submitted that the BT units were not made available on a “casual basis” as suggested by Mr. McNeil, because they had to be used to do the unloading.

### **(v) Conclusions on the Section 28(4) Issue**

It is of note that this application concerns only Mr. Sharman’s right of action against Loeb, which owned the BT unit. It does not concern any right of action that he might have against Johnston, who supplied and serviced the BT unit.

The application turns on the interpretation of section 28(4):

**28(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.

There does not seem to be any dispute in this case that the BT unit was “machinery or equipment”. There also does not seem to be any dispute that Loeb “supplied” the BT units to Mr. Sharman and other drivers who came to the warehouse to unload goods. Loeb did not supply workers to operate the BT units. The application thus seems to turn on the issue of whether Loeb supplied the BT units “on a purchase or rental basis”.

Ms. Van Wynsberghe’s argument is that the BT units were “rented” to Mr. Sharman and the other drivers (or to the companies for whom the drivers worked) and that the “rent” was paid in the form of the labour done by the drivers in unloading the goods at the Loeb warehouse.

I am not satisfied that this is an interpretation of “rent” that the section can reasonably bear. In *Decision No. 886/02* (2002), 62 W.S.I.A.T.R. 289, a Vice-Chair considered the term “purchase or rental basis” [at paras. 20-26]:

Ms. Diaram cited and relied on the Tribunal’s *Decision No. 567/94* (February 8, 1996) in which a Tribunal panel concluded that the phrase “purchase or rental basis” was broad enough to include the provision of machinery or equipment in the course of the negotiation that took place before a purchase or rental arrangement was entered into by the parties.

On the facts of that case, the equipment in issue was provided by one party to the other party “for trial and evaluation only.” The equipment caused an injury during the evaluation. The facts also established that the equipment in question was ultimately purchased by one party from the other party. The panel in that decision, stated that there were “significant elements of a ‘purchase basis’ in the transaction involving the [equipment].” The panel noted that the trial and evaluation process reflected an intention on the part of the parties to place the equipment on-site “on a purchase basis.”

On the other hand, the panel also stated, at page 16 of the decision:

We agree with counsel that...an informal lending arrangement ought not to bring an employer within the scope of subsection 10(10) of the Act.

Counsel for the respondents cited and relied on the Tribunal’s *Decision No. 309/90* (1991), 20 W.C.A.T.R. 108, in which the panel concluded that the use of equipment on an “informal borrowing arrangement” did not amount to the supply of equipment on a



purchase or rental basis.

In *Decision No. 280/99* (April 14, 1999), a Tribunal vice-chair addressed a similar fact situation and found that, in the absence of evidence of a transfer of property rights in the “equipment” in question, it could not be said that the equipment was supplied on a “purchase or rental basis.” The vice-chair noted the reasoning in *Decision No. 567/94* but distinguished that case by noting that the parties in the case before her had no intention of passing title to the equipment in issue on either a purchase or a rental basis.

My interpretation of section 10(10) is that it is intended to apply where the evidence establishes the existence of a contract that is related to the machinery or equipment that ultimately causes injury. It appears that section 10(10) is intended to circumscribe a particular exemption to section 10(9). The use of the words “on a purchase or rental basis” suggests to me that the central fact that will trigger the application of section 10(10) is a contract relating to the equipment or machinery giving rise to injury.

In my view, *Decision No. 567/94* stands for the principle that the legal relationship contemplated by section 10(10) can be created prior to the existence of a contract, such as in the course of the negotiation of an eventual contract. But it also recognizes, in my opinion, the necessity of an intention to transfer property rights by means of an agreement that pertains to such a transfer.

The cases discussed above fell under section 10 of the pre-1997 *Workers’ Compensation Act*, R.S.O. 1990, c. W.11, but, at least for the purposes of this discussion, the interpretation of “rental or purchase basis” in section 10(10) of the pre-1997 *Workers’ Compensation Act* applies equally to the same phrase in section 28(4) of the WSIA.

It is clear that there was no contract, either express or implied, between Loeb and the drivers or the employer of the drivers, regarding the use of the BT units. Even if there were, I could not accept that the work done by the drivers in unloading the trucks would constitute the payment of “rent”.

I accordingly find that section 28(4) does not apply to this case.

## **(vi) The Section 28(3) Issue**

Under section 10(9) of the pre-1997 *Workers’ Compensation Act*, the right of action was taken away only “where the workers of both employers were in the course of their employment at the time of the happening of the injury.” This created some ambiguity in cases where negligence by a worker contributed to the accident when the negligence concerned something done (or not done) at an earlier time. For example, if an elevator repair worker failed to properly repair an elevator so that another worker was injured in the elevator some time later, both workers were not necessarily in the course of their employments at the time of the happening of the accident.

Tribunal decisions generally adopted the approach set out by Mr. Justice Rosenberg in the case of *Meyer v. Ontario (Worker’s Compensation Board)* (1986), 15 O.A.C. 202 (Ont. Div. Ct.). In that case, a truck driver was injured due to the alleged negligence of a mechanic, employed by a different employer, who had failed to properly repair the brakes on the truck. Mr. Justice Rosenberg considered whether it was necessary for both workers to be in the course of their employment at the moment the accident happened. This is sometimes referred to as the “contemporaneous” view. He concluded [at p. 18]:

... the interpretation referred to above as the “contemporaneity” interpretation makes no sense whatsoever. If the physical injury takes place even a few seconds after the negligence the section would not apply under that interpretation.

The absurdity of this interpretation is confirmed in this case by asking whether or not the workers who were allegedly negligent in regard to the brakes were in the course of their employment at the time the drivers were killed. Nobody knows and no evidence

was adduced in that regard. Miss Lax, in response to my question in that regard, said that no evidence was led and speculated that they were probably not in the course of their employment at that time because it was in the early hours of the morning and unless they were working overtime they would not have been in the course of their employment. Surely, that leads to irrelevant, immaterial and absurd considerations.

Mr. Justice Rosenberg concluded that the focus should be not on whether both workers were in the course of their respective employments at the time of the injury, but rather on whether the negligent worker is in the course of employment when the negligent act is committed.

As Mr. McNeil pointed out, section 28 of the *Workplace Safety and Insurance Act* appears to have been drafted so as to resolve the ambiguity. Section 28(3) provides:

**28(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.

Accordingly, even if negligence on the part of Loeb workers contributed to the circumstances of the accident, the right of action would be taken away if they were in the course of their employment at the time the negligence occurred.

As noted by Ms. Van Wynsberghe, there may be cases where the work-relatedness of the negligent act or omission is so remote that the legislation does not operate to remove the right of action. The Panel in *Decision No. 309/90* (1991), 20 W.C. A.T.R. 108, discussed this in the following terms [at pp. 125-126]:

When viewing the accident which gave rise to the injury for which benefits are payable under the Act, the panel must be satisfied that there is a sufficient degree of work-relatedness to bring that incident within the scope of the *Workers' Compensation Act*. In our view, it matters not whether this element of work-relatedness is characterized as an "employment context", "employment connection", "employment nexus", "work flavour", "employment character", "work connection", or "work-relatedness". The test is essentially the same. Does the evidence before the Panel lead to the conclusion, on a balance of probabilities, that the Defendant's workers have a significant temporal and causal connection with the accident and resulting injury for which benefits are payable to warrant removal of the right to sue pursuant to subs. 8(9) of the Act? If the evidence leads to an affirmative answer, the employer should enjoy the protection intended by the historical trade-off. If not, the panel may find that the incident is too "remote" and refuse to take away the right to sue. As stated earlier, the panel's position is a delicate one. It cannot usurp the jurisdiction of the court on the question of negligence; nevertheless, it must make certain basic findings in order to issue a decision on the s. 15 application. The situations are seldom clear-cut.

Some activity by a worker may be so negligent that the worker is found to be no longer in the course of his or her employment. If such negligence results in an injury to another worker, section 28(3) applies and the right of action is not taken away. In this case, there is no evidence of any such negligence on the part of any Loeb worker.

Ms. Van Wynsberghe noted that Loeb pleaded guilty to the charges under the *Occupational Health and Safety Act* that it failed to ensure the BT unit was only operated by a person with proper training, or by a worker accompanied and being instructed by a trained person. She suggested that the negligence in this case was thus attributable to Loeb as a company rather than to the negligence of any of its workers. She argued that section 28(3) only applies when there are "workers of one or more employers" who are involved. If there were no workers involved, but only the company, Ms. Van Wynsberghe suggested that section 28(3) does not apply.

I note that if section 28(3) does not apply (because there were no Loeb workers directly involved), then section 28(1) does

apply. As Mr. McNeil points out, section 28(1) is clear that a worker who is employed by a Schedule 1 employer is not entitled to bring an action against a Schedule 1 employer. The only exceptions to these are section 28(3) and (4). If neither of the exceptions is applicable, then the right of action is taken away by section 28(1).

In the circumstances of this case, I am unable to find that section 28(3) applies as there is no evidence to suggest that the activity of any Loeb workers who may have been involved in the circumstances in which Mr. Sharman was injured, were activities that fell out of the course of their employment.

Since section 28(3) and 28(4) does not apply to this case, section 28(1) does apply. As a result, Mr. Sharman's right of action against Loeb is taken away.

## **DISPOSITION**

The application is allowed.

Philip Sharman's right of action against Loeb Canada Inc. is taken away. Mr. Sharman may not pursue the legal action against Loeb Canada Inc., but may apply to the Workplace Safety and Insurance Board to have his entitlement to benefits under the *Workplace Safety and Insurance Act* determined.

I make no finding regarding Philip Sharman's right of action against G.N. Johnston Equipment Co. Ltd.

*Application granted.*



## Decision No. 2058/05

Panel: Dimovski (Vice-Chair), Sherwood, Grande

Decision — January 17, 2007

Neutral Citation: 2007 ONWSIAT 134

### **Supplements, transitional provisions (multiple supplements).**

**Worker was injured in 1987 and 1989 – Board granted supplement under s. 147(4) of the pre-1997 Workers' Compensation Act for the 1987 injury – Worker was entitled to second supplement for 1989 injury where 1989 injury eroded worker's ability to approximate pre-1989 earnings.**

The worker suffered back, neck, wrist and shoulder injuries in an accident in 1987, and a back injury in a new accident in 1989. The Board granted supplementary benefits under s. 147(4) of the pre-1997 *Workers' Compensation Act*, relating to the 1987 accident. The worker appealed a decision of the Appeals Resolution Officer denying a second s. 147(4) supplement related to the 1989 accident. The appeal was allowed.

Board policy does allow for multiple supplements. In this case, the Board found that the worker was unable to approximate his pre-injury earnings solely as a result of his 1987 accident. However, the Panel noted that the Board found that the worker had a permanent low back disability resulting from the 1989 accident. The Board should have considered whether the 1989 accident prevented the worker from approximating the earnings that the worker was capable of earning after the 1987 accident. The Panel was satisfied that the 1989 back injury eroded the worker's ability to approximate his pre-1989 earnings. Therefore, the worker was entitled to a s. 147(4) supplement for the 1987 accident and a second s. 147(4) supplement for the 1989 accident.

### **Suppléments, dispositions transitoires (suppléments multiples).**

**Le travailleur a été blessé en 1987 et en 1989 – La Commission a reconnu le droit à un supplément aux termes du par. 147 (4) de la Loi d'avant 1997 pour la lésion de 1987 – Le travailleur avait droit à un second supplément pour la lésion de 1989 parce que la lésion de 1989 l'avait rendu moins apte à rétablir approximativement ses gains d'avant 1989.**

Le travailleur a subi des lésions au dos, au cou, au poignet et aux épaules dans un accident survenu en 1987, et une lésion au dos dans un nouvel accident survenu en 1989. La Commission lui a reconnu le droit à un supplément aux termes du paragraphe 147 (4) de la *Loi sur les accidents du travail* d'avant 1997 en rapport avec l'accident de 1987. Le

travailleur a interjeté appel de la décision dans laquelle le commissaire aux appels a refusé de lui reconnaître le droit à un supplément aux termes du paragraphe 147 (4) en rapport avec l'accident de 1989. L'appel a été accueilli.

La politique de la Commission autorise les suppléments multiples. En l'espèce, la Commission a conclu que le travailleur était incapable de rétablir approximativement ses gains d'avant la lésion uniquement en raison de son accident de 1987. Cependant, le comité a noté que la Commission a conclu que le travailleur souffrait d'une déficience lombaire permanente par suite de son accident de 1989. La Commission aurait dû examiner si l'accident de 1989 empêchait le travailleur de rétablir approximativement ses gains d'après l'accident de 1987. Le comité était convaincu que la lésion dorsale de 1989 avait rendu le travailleur moins apte à rétablir approximativement ses gains d'avant 1989. Le travailleur avait donc droit à un supplément aux termes du paragraphe 147 (4) pour l'accident de 1987 et à un second supplément aux termes du paragraphe 147 (4) pour l'accident de 1989.

#### **Tribunal Decisions Considered:**

- *Decision No. 1069/03* (September 17, 2003) [2003 ONWSIAT 2045] consd

#### **Workplace Insurance Legislation Considered:**

- *Workers' Compensation Act*, R.S.O. 1990, c. W.11
  - s. 147
- *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A
  - s. 102
  - s. 110
  - s. 112
  - s. 126

#### **Board Directives and Guidelines Considered:**

- *Operational Policy Manual*
  - Document No. 18-01-03 (June 15, 1999) (since revised)

#### **Cross-References:**

- *Decision No. 169/93I3* (October 29, 1997)
- *Decision No. 169/93* (January 28, 1999)

APPEAL by the worker's estate from a decision of the Appeals Resolution Officer denying entitlement for colon cancer.

July 21, 2006.THE TRIBUNAL: —

BEFORE:

J. Dimovski, Vice-Chair  
R.C. Sherwood, Member Representative of Employers  
A. Grande, Member Representative of Workers

HEARING:

November 3, 2005 at Toronto, Oral

DECISION(S) UNDER APPEAL:

WSIB ARO decision dated January 22, 2003

APPEARANCES:

For the worker:

Mr. J. McKinnon, Consultant

For the employer:

No longer in business

# REASONS

## (i) Introduction

On May 18, 1987, this now 70-year-old worker, a self-employed home renovator at the time, fell from a stepladder injuring his back, neck, right wrist and right shoulder. The Board accepted the accident as compensable and allowed benefits, but by October, 1987, it decided the worker had made a full recovery from his injuries and as such, terminated payment of any benefits, effective December 1, 1987.

The worker, however, claimed that his injuries had persisted and prevented him from working. On April 26, 1989, the worker injured his low back in an attempt to return to work as a home renovator. In fact, the worker injured himself in the first hour during the first day of a job he had been contracted to perform. The Board accepted that the worker injured his back permanently as a result of the 1989 accident. The worker's back injury was not viewed as a recurrence of the worker's 1987 back injury and as such, the Board allowed benefits to the worker under a separate claim – the 1989 accident claim.

Interestingly, the Board then reviewed the worker's back condition that resulted from his 1987 accident and found that the worker was entitled to further benefits. The worker was provided temporary partial benefits from December 1, 1987 to November 1988. The Board also accepted that the worker aggravated his back during a prior to attempt to return to work, and as such, provided the worker total temporary benefits from November 1988 to February 1989.

Interestingly, the Board determined that the worker suffered a permanent disability as a result of his 1989 accident. The Board provided the worker a 15% permanent disability (PD) award under the 1989 accident claim.

Section 135 of the pre-1989 *Workers' Compensation Act*, R.S.O. 1980, c. 539, as am. S.O. 1984, c. 58, respecting supplements, came into force on July 26, 1989. That section continued under the *Workers' Compensation Act*, R.S.O. 1990, c. W.11, as section 147. Section 110 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) amends section 147 by replacing the phrase "vocational rehabilitation program" with "labour market re-entry plan" throughout the section.

The worker was referred for vocational rehabilitation or labour market re-entry (LMR) services shortly after his permanent disability was recognized. As a result, the Board concluded that the worker would not benefit from vocational rehabilitation to the extent that he would be capable of approximating his pre-accident earnings. In a letter dated March 15, 1991, the Board advised the worker that he was entitled to supplementary benefits since his employment goal of sales representative in building supplies would not approximate his pre-injury earnings.

Shortly thereafter, the Board stopped paying the worker a supplement because it found that he effectively withdrew from the program. Nevertheless, shortly afterward the Board reversed its decision to stop paying the supplement until a review of the worker's file could occur. In a letter dated March 19, 1993, the Board informed the worker that it had erroneously paid him supplementary benefits for almost two years, due to his lack of participation in his LMR program. Nevertheless, the Board continued to pay the supplement. At the 60-month review in 1996, the Board confirmed that the worker was unemployed and experienced a wage loss and thus extended the worker's entitlement to a supplement under section 147(4) of the pre-1997 Act.

Despite the Board's decisions with regard to his 1989 accident, the worker complained that he had suffered permanent injuries

as a result of his 1987 accident. The Board denied that the worker suffered any permanent disability as a result of his 1987 accident and as a consequence, the worker appealed to the Tribunal. In *Decision No. 169/93I3* (October 29, 1997) the Tribunal decided that the worker was permanently disabled by a right shoulder, wrist, hand and neck disability, resulting from the 1987 compensable accident and remitted the assessment of these disabilities back to the Board. After reviewing the Board's assessment, the Tribunal Panel in *Decision No. 169/93* (January 28, 1999) rejected the worker's claim for a 50% PD award, and instead affirmed that the worker was entitled to a 15% PD award to compensate him for all the disabilities (neck, wrist, shoulder), which arose from his 1987 accident.

After the release of *Decision No. 169/93*, the worker claimed that not only was he entitled to section 147(4) supplementary benefits in relation to his 1989 accident but, that he was also entitled to an additional section 147(4) supplement as a result of his permanent disabilities that arose from his 1987 accident. The Board rejected the worker's claim.

In a Board decision dated January 22, 2003, an ARO rescinded the worker's section 147(4) benefits awarded in relation to the 1989 accident, and instead decided that the worker's inability to approximate his earnings was the result of his 1987 accident. The ARO ordered that since the worker had been paid section 147(4) supplementary benefits from March 1991 under the 1989 accident claim, that he receive benefits for the period that he had not been paid for, which was from July 26, 1989 (when the supplement came into force) to March 1, 1991. The ARO based his decision on the following analysis:

In all likelihood based on the PD and his personal and vocational characteristics, LMR services would not have assisted the worker in approximating escalated pre injury earnings, and he would have been granted a section 147(4) award in this claim when the supplement first became payable in July 1989. Had it been acknowledged that the worker would not be physically capable of returning to work as a construction labourer/renovator, the return to the pre-injury occupation which occurred in April 1989 would not have occurred.

Although the worker did make an attempt to return to self-employment as a home renovator, the evidence suggests very clearly that he did not in any way establish an ability to return to this type of work. In fact, it is clear that subsequent to the initial work injury, this worker did not have any earnings from employment. Although he attempted to return to work, he re-injured himself within the first hour of commencing a job resulting in the establishment of claim...It is also very important to note this worker never received any financial compensation for this contract as he was unable to perform the work he had been hired to do. Since the worker never had actual earnings in the second claim, there are theoretically no earnings to restore/approximate.

The worker has a total PD award of 30 percent, however one must look at which of the injuries were most instrumental in precluding a return to the pre-injury job. Based on the available information, it is evident that subsequent to the first work injury that occurred in 1987, this worker never recovered to the point of being able to pursue self-employment as a home renovator, a conclusion confirmed by the Tribunal decision. Therefore, I find that entitlement to section 147(4) benefits should be paid under [the 1987 accident claim], as it was this injury that resulted in the worker being unable to approximate his escalated pre-injury earnings. It cannot reasonably be argued that this worker ever restored his earnings in the subsequent claim, but his inability to do so was not as a result of this subsequent claim but rather as a result of the original injury that occurred on May 18, 1987.

## CONCLUSION:

1. I have concluded the worker should be entitled to a supplementary benefit under section 147(4) of the pre 1998 Act under [the 1987 accident claim] effective July 26, 1989. However, [the worker] is not entitled to supplementary benefits under section 147(4) of the pre 1998 Act under both claims. Therefore, this supplement is not warranted under [the 1989 accident claim], and should be rescinded under that claim.

...

The worker now appeals the ARO decision dated January 22, 2003. Thus, the issue in dispute is whether the worker is entitled to two section 147(4) supplements.

## **(ii) Law and Policy**

On January 1, 1998, the WSIA took effect. However, pursuant to section 102 of the WSIA, the pre-1997 Act continues to apply to pre-1998 injuries. Since the worker's permanent disabilities related to accidents in 1987 and 1989, the pre-1989 Act and pre-1997 Act continue to apply, as amended by the WSIA. Section 147 of the pre-1997 Act provides:

**147(1)** In this section,

“amount awarded for permanent partial disability” means the amount awarded for permanent partial disability under,

(a) subsection 43(1) of the pre-1985 Act, with respect to a pre-1985 injury, and

(b) subsection 45(1) of the pre-1989 Act, with respect to a pre-1989 injury;

“worker” means a worker who is permanently disabled as a result of a pre-1985 injury or a pre-1989 injury.

**(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.

**(3)** A supplement under subsection (2) is payable for the period during which the worker participates in a Board-approved vocational rehabilitation program.

**(4)** Subject to subsections (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.

**(5)** A supplement under subsection (4) for a worker described in clause (4)(a) becomes payable as of the later of,

(a) the 26th day of July, 1989; or

(b) the day the Board determines the worker has a permanent disability.

**(6)** A supplement under subsection (4) for a worker described in clause (4)(b) becomes payable as of the latest of,

(a) the 26th day of July, 1989;

(b) the day the Board determines the worker has a permanent disability; or



(c) the day the worker ceases to participate in a vocational rehabilitation program.

(7) A supplement under subsection (4) shall continue until the worker becomes eligible for old age security benefits.

(8) The amount of a supplement under subsection (4) shall not exceed the amount of a full monthly pension for old age security under section 3 of the *Old Age Security Act* (Canada), including amendments thereto.

(9) The amount of a supplement under this section for a worker with a pre-1985 injury shall be calculated so that the sum of the supplement, the amount awarded for permanent partial disability, \$200 and 75 per cent of the worker's average earnings, if any, after the injury equals 75 per cent of the worker's pre-injury average earnings.

(10) The amount of a supplement under this section for a worker with a pre-1989 injury shall be calculated so that the sum of the supplement, the amount awarded for permanent partial disability, \$200 and 90 per cent of the worker's net average earnings, if any, after the injury equals 90 per cent of the worker's pre-injury net average earnings.

(11) In calculating the amount of a supplement under this section, the Board shall have regard to the effect of inflation on the worker's pre-injury earning rate and to any payments the worker receives under the Canada Pension Plan or the Quebec Pension Plan with respect to a disability arising from the injury.

(12) A supplement under this section shall be a monthly or other periodic payment.

(13) The Board shall review a supplement given under subsection (4) in the twenty-fourth month following the award and in the sixtieth month following the award and recalculate the amount of the supplement in accordance with subsections (9) and (10).

(14) The Board shall pay an additional \$200 per month to a worker who is receiving an amount awarded for permanent partial disability or who received a lump sum commuted from such an amount if the worker is entitled to a supplement under subsection (4) or would be but for subsection (7).

(15) Subsection (14) applies even if the amount of the supplement, as calculated under subsection (9) or (10), is zero.

...

(17) The payment under subsection (14), for a worker with a pre-1989 injury, shall be reduced, if necessary, so that the sum of the following amounts does not exceed 90 per cent of the worker's pre-injury net average earnings:

1. The payment under subsection (14).
2. The amount awarded for permanent partial disability.
3. 90 per cent of the worker's net average earnings after the injury, if any.
4. Any pension for old age security that the worker is eligible for under section 3 of the *Old Age Security Act* (Canada).

Pursuant to sections 112 and 126 of WSIA, the Appeals Tribunal is required to apply any applicable Board policy when making decisions. Pursuant to WSIA section 126, the Board has identified certain policies applicable to this appeal. We have considered these policies as necessary in deciding this appeal. In particular, we have considered *Operational Policy Manual* (OPM) Document No. 18-01-03, "Pre-1990 Pension Supplements" which provides the following in part:

Workers may receive more than one s. 147 supplement. If following the receipt of a s. 147(4) supplement, a worker is granted a permanent disability benefit under another claim, the worker is considered for either a s. 147(2) or 147(4) supplement under the other claim.

The WSIB may pay a s. 147(2) and a s. 147(4) supplement, or two s. 147(4) supplements to one worker, but it may not pay two s. 147(2) supplements to one worker.

Since the Vocational Rehabilitation Services provided to the worker in relation to his 1989 accident were closed, and he attempted to return to self-modified work after his 1987 accident, entitlement to a supplement falls under section 147(4).

### **(iii) The Submissions of the Worker**

Mr. McKinnon argued that the worker should receive two section 147(4) supplements. His submissions at the hearing mirrored the written submissions he provided us. In essence, he argues the following:

Essentially, the first accident significantly reduced [the worker's] earning capacity because it left him unfit to return to construction work. He was a right handed labourer with a significant permanent right hand, wrist and shoulder disability. With appropriate vocational rehabilitation assistance after the first accident it may have been possible to assist [the worker] to return to lower paying or part time employment. However, that was not available at the time and, left to his own devices, [the worker] did not see any alternatives to attempting to pursue his former construction work. The second accident left him unable to do any work known to him. The two are different disabilities but both disabilities are equally significant in terms of their impact on his earning capacity as evidenced by the fact that they were each rated at 15% pensions by the Board. Each of the two disabilities equally merits a supplement under s. 147(4), as evidenced by the fact that the Board has awarded supplements in both claims. This is precisely the situation envisioned by the Board's policy for the payment of supplements in more than one claim.

### **(iv) Analysis**

As noted by Mr. McKinnon, the legislation, Board policy and Tribunal case law do not preclude entitlement to multiple supplements. Mr. McKinnon referenced many Tribunal cases that assessed the eligibility of multiple supplements. In our view, *Decision No. 1069/03* (September 17, 2003) is particularly useful. In that case, the worker injured his back in 1982 and as a result accepted lower paying jobs in his trade until he was later provided a 10% PD award and a section 147(4) supplement. As a result of appeal decisions, the worker was provided an additional PD award for his neck. The worker also had other compensable permanent disabilities. While *Decision No. 1069/03* provides a useful discussion regarding the appropriateness of awarding multiple supplements, the Vice-Chair denied the worker entitlement to multiple supplements. He concluded [at para. 33]:

However, in the present case, the worker had one lay-off, and, notwithstanding that two disabilities were involved, I cannot find that, as a whole person, he is entitled to two supplements. The low back disability, the neck problem, personal factors, as well as a number of other factors, including the hand-arm syndrome, the carpal tunnel syndrome certainly fall into the litany of factors, along with age, education and transferable skills which have to be considered in making a determination on the worker's ability to be reinstated to his pre-injury level of earnings. The worker is one person with an over-all disability rendering him incapable of pursuing employment which would restore his earning status and therefore, he is entitled to one section 147(4) supplement only.

In this case, the Board accepts that as a result of his 1987 accident, the worker was unable to approximate his pre-injury earnings. In his decision dated January 23, 2003, the ARO wrote:

Based on the available information, it is evident that subsequent to the first work injury that occurred in 1987, this worker never

recovered to the point of being able to pursue self-employment as a home renovator, a conclusion confirmed by the Tribunal decision.

In the ARO's view, the worker was not able to approximate his pre-injury earnings not because of his 1989 accident, but solely as a result of his 1987 accident. While the Board accepted that the worker was not able to approximate his pre-injury earnings after his 1987 accident, the Board did not contrast any finding with regard to the worker's ability to approximate his pre-injury earnings in 1987 to the vocational rehabilitation results produced in 1990, without considering the worker's subsequent back disability.

It is clear that the worker's conclusions regarding the vocational rehabilitation were in reference to the worker's permanent back disability. Indeed, the evidence on record did not persuade us that the Board considered the worker's neck, right wrist and shoulder complaints in the development of his vocational rehabilitation.

Mr. McKinnon submitted that the worker would have been able to more closely approximate his pre-injury earnings prior to his 1989 accident, and since the 1989 back disability further reduced the worker's ability to approximate his pre-injury earnings, the worker should appropriately receive two section 147(4) supplements.

While the evidence indicates the worker had back aggravations prior to 1989, the Board determined that his back condition at the time did not warrant a permanent disability award. Instead, the Board has accepted that the worker's 1989 accident created the worker's permanent back disability. In 1990, it seems that the worker's vocational rehabilitation make-up was based on his back disability to the exclusion of his 1987 complaints and restrictions. Unlike *Decision No. 1069/03*, we did not find that the worker's 1990 vocational rehabilitation profile considered the neck, right hand and shoulder complaints and thus, we were not persuaded that the worker's over-all disability was considered.

In our view, it would have been appropriate to review whether the worker's 1989 accident prevented the worker from approximating the earnings the worker was capable of earning after his 1987 accident. The Board's analysis did not provide such an assessment. Therefore, we accept that based on the significance of the worker's back disability, the worker's 1989 condition eroded the worker's ability to approximate his pre-1989 earnings. Therefore, we find that the worker is entitled to two section 147(4) supplements, one under his 1987 accident and the other under his 1989 accident.

Mr. McKinnon made a submission regarding a concern that the worker's entitlement to multiple supplements might "over-compensate" him. We note that section 147(10) defines the maximum total supplement.

## DISPOSITION

The appeal is allowed. The worker has entitlement to two section 147(4) supplements attributable to the worker's 1987 and 1989 accidents, respectively.

*Appeal allowed.*