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Abbreviations

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

AMA GUIDES	American Medical Association Guides to the Evaluation of Permanent Impairment
BARC	Back Assessment and Rehabilitation Clinic
CABPM	Claims Adjudication Branch Procedures Manual
CD	Case Description
CSDM	Claims Services Division Manual
D1	Initial FEL Determination
DDS	Decision Digest Service
DRC	Downsview Rehabilitation Centre
ESRTW	Early and Safe Return to Work
FAE	Functional Abilities Evaluation
FAF	Functional Abilities Form for Timely Return to Work
FEL	Future Economic Loss
HRC	Hospital and Rehabilitation Centre
IDSP	Industrial Disease Standards Panel
LMR	Labour Market Re-entry
LOE	Loss of Earnings
MAPP	Merit Adjusted Premium Program
MMR	Maximum Medical Rehabilitation
NEER	New Experimental Experience Rating Plan
NAE	Net Average Earnings
NEL	Non-economic Loss
NOC	National Occupational Classification
ODP	Occupational Disease Panel
OEA	Office of the Employer Adviser
OWA	Office of the Worker Adviser
PSEM	Psychological and Social Evaluation Module
R1	First FEL Review
R2	Second FEL Review

REC	Regional Evaluation Centre
RMA	Regional Medical Adviser
SAB	Statutory Accident Benefits
SIEF	Second Injury and Enhancement Fund
TCO	Tribunal Counsel Office
TENS	Transcutaneous Electrical Nerve Stimulation
TNS	Transcutaneous Nerve Stimulation
TOJ	Training on the Job
TWP	Transitional Work Program
VR	Vocational Rehabilitation
VRC	Vocational Rehabilitation Counsellor
VRD	Vocational Rehabilitation Division
WBS	Workers' Benefit System
WCAT	Workers' Compensation Appeals Tribunal
WCATR	Workers' Compensation Appeals Tribunal Reporter
WCB	Workers' Compensation Board
WSIAT	Workplace Safety and Insurance Appeals Tribunal
WSIATR	Workplace Safety and Insurance Appeals Tribunal Reporter
WSIB	Workplace Safety and Insurance Board



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Decision No. 1672/04

Vice-Chair: E. Smith

Decision — January 19, 2009

Neutral Citation: 2009 ONWSIAT 150

Accident (definition of) – Chance event (interpretation) – Disablement – Presumptions (entitlement) (applicability).

Consideration of the definition of accident, the determination of whether an accident is a chance event or disablement and the applicability of the presumption clause.

The worker appealed a decision of the Appeals Resolution Officer denying entitlement for low back disability, which the worker claimed was related to an accident that took place in 1989 when he lifted a heavy steel beam. The appeal was dismissed.

The definition of accident includes a chance event occasioned by a physical or natural cause and a disablement arising out of and in the course of employment. Section 3(1) of the pre-1989 *Workers' Compensation Act* provides entitlement for personal injury by accident arising out of and in the course of employment. The presumption clause in s. 3(3) does not apply to disablements. Current Board policy defines a chance event as an identifiable event which causes an injury and states that the injury itself is not a chance event. A disablement is defined in the policy as a condition which emerges gradually over time or an unexpected result of working duties.

There has been dispute about what statutory provision applies when a worker experiences a sudden onset injury in the course of carrying out normal workplace duties. Some early Tribunal decisions took a view that the injury is the accident and that an accidental injury was a chance event. Other s took a view that the chance event type of case was intended to apply only to acts of God type facts.

The Tribunal is now bound by Board policy, which states that an injury itself is not a chance event. Thus, the view that the injury itself can constitute an accident under the chance event branch of the definition of accident, without identification of an external injuring process, is not open to the Tribunal. Further, more recent decisions have been interpreting chance event more broadly than an act of God.

Board policy defines disablement as a condition that emerges gradually over time or an unexpected result of work duties. Since injuries that emerge gradually over time are almost always an unexpected result of work duties, the second branch of the definition must refer to unexpected result of work duties that is not otherwise a chance event. It may refer to injuries which occur over a short period of work duties, such as a shift, but in the absence of a discrete triggering event.

Thus, the substantive issue seems to be whether an alleged work-related theory of entitlement involves an injuring process that is sufficiently discrete to constitute a chance event, resulting in sudden onset injury, or whether it operates over time and results in a disablement.

Regarding the presumption, some Tribunal decisions have found that the presumption has most relevance when there are unknown facts about the accident history while other decisions have found that the presumption applies in every case of a chance event and is rebutted only on clear and convincing evidence. The Supreme Court of Canada recently clarified in *F.H. v. McDougall* that there is only one standard of proof in civil law and this is the balance of probabilities. It was not necessary to decide in this case but the Vice-Chair noted that, if McDougall is

applicable, relatively few cases would likely turn on the presumption.

The Vice-Chair adjudicated this case on the broader interpretation of chance event, and concluded that the lifting accident was a chance event.

The worker experienced back pain after lifting a steel beam in 1989. The question of whether the worker suffered an accident at work is determined on the balance of probabilities. The presumption does not apply to the course of employment issues because it is necessary to decide whether there was an accident in the course of employment before considering application of the presumption. The Vice-Chair was satisfied that an accident occurred in the course of employment.

The injuring process resulting from lifting was an identifiable unintended chance event. The presumption applied to the question of causation. Low back symptoms at the time were likely the result of the heavy lifting.

The worker later experienced abdominal pain. The presumption does not apply to the question of whether symptoms or conditions that a worker experiences later in time are related to a prior injury. It is not presumed that all future conditions are related to a prior injury. The presumption only applies to the question of a causal connection between symptoms or conditions that arise in the course of employment and the work being done at the time. The worker did not have entitlement for the later symptoms.

The Vice-Chair concluded that the worker suffered a back injury in 1989 but that the condition resolved. Later symptoms were not related to the compensable injury.

Accident (définition) – Événement fortuit (interprétation) – Incapacité – Présomptions (admissibilité) (applicabilité).

Le Tribunal examine la définition du terme accident, comment déterminer si un accident est un événement fortuit ou une incapacité et la question de l'applicabilité de la disposition de présomption.

Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de lui reconnaître le droit à une indemnité pour une lombalgie invalidante qu'il disait reliée à un accident survenu en 1989 en soulevant une lourde poutre d'acier. Le Tribunal a rejeté l'appel.

La définition du terme accident inclut un événement fortuit dû à une cause physique ou naturelle et une incapacité survenu du fait et au cours de l'emploi. Le paragraphe 3 (1) de la *Loi sur les accidents du travail* d'avant 1989 prévoit le droit à une indemnité pour les lésions corporelles accidentelles survenant du fait et au cours de l'emploi. La disposition de présomption au paragraphe 3 (3) ne s'applique pas aux incapacités. Aux termes de la politique actuelle de la Commission, le terme événement fortuit s'entend d'un événement identifiable et non intentionnel qui produit une lésion, et la lésion elle-même ne constitue pas un événement fortuit. Toujours aux termes de cette politique, le terme incapacité s'entend entre autres de l'état pathologique qui se manifeste progressivement et du résultat inattendu des tâches liées à l'emploi.

La question de savoir quelle disposition législative s'applique dans le cas de l'apparition soudaine d'une lésion au cours de l'exécution des tâches normales liées à l'emploi est sujette à controverse. Dans quelques-unes de ses premières décisions, le Tribunal a conclu que la lésion était l'accident et que la lésion corporelle accidentelle était un événement fortuit. Dans d'autres décisions, le Tribunal a conclu que la composante événement fortuit devait être réservée aux faits indépendants de la volonté humaine.

Le Tribunal est maintenant tenu d'appliquer la politique de la Commission, et celle-ci stipule que la lésion elle-même ne constitue pas un événement fortuit. Le Tribunal n'est donc pas libre de conclure que la lésion elle-même peut constituer un accident aux termes de la composante « événement fortuit » de la définition du terme accident sans identifier un procédé dommageable externe. En outre, dans des décisions plus récentes, le Tribunal a interprété le terme événement fortuit de façon plus extensive que simplement des faits indépendants de la volonté humaine.

Aux termes de la politique de la Commission, le terme incapacités s'entend d'un état pathologique qui se manifeste progressivement ou du résultat inattendu des tâches liées à l'emploi. Puisque les lésions qui se manifestent graduellement sont presque toujours le résultat inattendu des tâches liées au travail, la deuxième composante de

la définition doit faire référence au résultat inattendu des tâches liées à l'emploi qui ne serait pas autrement considéré comme un événement fortuit. Elle peut référer à des lésions survenues au cours d'une courte période de tâches liées à l'emploi, comme un quart de travail, mais en l'absence d'un événement déclencheur distinct.

Il semble donc qu'il faut déterminer si une théorie à l'appui du droit à une indemnité fait intervenir un procédé dommageable suffisamment distinct pour constituer un événement fortuit entraînant l'apparition soudaine d'une lésion ou si elle fait intervenir un procédé dommageable exerçant son action à long terme qui aboutit à une incapacité.

En ce qui concerne la présomption, dans certaines décisions, le Tribunal a conclu que c'est dans les cas où il y a des faits inconnus au sujet de l'accident qu'elle est la plus pertinente, alors qu'il a conclu dans d'autres décisions qu'elle s'applique dans tous les cas d'événement fortuit et qu'elle est réfutée seulement en présence d'une preuve claire et convaincante. Dans l'arrêt *F.H. c. McDougall*, la Cour suprême du Canada a récemment clarifié qu'il y a seulement une norme de preuve en droit civil, à savoir celle de la prépondérance des probabilités. Même s'il n'était pas nécessaire de trancher la question en l'espèce, la vice-présidente a noté que relativement peu de cas dépendrait de la présomption si *McDougall* était applicable.

La vice-présidente a donné une interprétation plus extensive au terme événement fortuit, et elle a conclu que l'incident survenu en soulevant une charge était un événement fortuit.

Le travailleur avait eu mal au dos après avoir soulevé une poutre d'acier en 1989. Il faut régler la question de savoir si un travailleur a subi un accident au travail en fonction de la prépondérance des probabilités. La présomption ne s'applique pas à la question de savoir si un accident est survenu au cours de l'emploi parce qu'il faut régler cette question avant de considérer l'application de la présomption. La vice-présidente était convaincue qu'un accident était survenu au cours de l'emploi.

Le procédé dommage résultant du soulèvement d'une charge constituait un événement fortuit involontaire identifiable. La présomption s'appliquait à la question de la causalité. Les symptômes de lombalgie étaient probablement attribuables au soulèvement de charges lourdes.

Le travailleur avait ensuite ressenti des douleurs abdominales. La présomption ne s'appliquait pas à la question de savoir si les symptômes ou les états pathologiques observés tardivement étaient reliés à une lésion antérieure. On ne présume pas que tous les états pathologiques futurs sont liés à une ancienne lésion. La présomption s'applique seulement à la question de savoir s'il existe un lien de causalité entre les symptômes ou les états pathologiques qui surviennent au cours de l'emploi et du travail effectué au moment en question. Le travailleur n'avait pas droit à une indemnité pour ses symptômes ultérieurs.

La vice-présidente a conclu que le travailleur avait subi une lésion au dos en 1989 mais qu'elle s'était résorbée. Les symptômes ultérieurs n'étaient pas reliés à la lésion indemnisable.

Tribunal Decisions Considered:

Decision No. 72 (1986), 2 W.C.A.T.R. 28 consd

Decision No. 559/87 (1988), 9 W.C.A.T.R. 103 refd to

Decision No. 42/89 (1989), 12 W.C.A.T.R. 85 consd

Decision No. 615/02 (May 31, 2002) [2002 ONWSIAT 1285] consd

Decision No. 694/02 (June 5, 2002) [2002 ONWSIAT 1309] refd to

Decision No. 900/06 (July 13, 2006) [2006 ONWSIAT 1546] refd to

Decision No. 1798/06 (December 14, 2006) [2006 ONWSIAT 2935] consd

Decision No. 2441/06 (December 12, 2006) [2006 ONWSIAT 2913] consd

Decision No. 1147/07 (July 18, 2007) [2007 ONWSIAT 1881] consd

Other Decisions Considered:

Canada Post Corp. v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2007 NSCA 129, 261 N.S.R. (2d) 96 consd

F.H. v. McDougall, 2008 SCC 53, [2008] 3 S.C.R. 41 consd

Fenton v. J. Thorley & Co., [1903] A.C. 443 (H.L.) consd

New Brunswick (Workmen's Compensation Board) v. Theed, [1940] 3 D.L.R. 561 (S.C.C.) consd

Review of Decision No. 72 (1988), 12 W.C.A.T.R. 85 at 152 (WCB Bd. of Directors) consd

Workplace Insurance Legislation Considered:

Workers' Compensation Act, R.S.O. 1980, c. 539, as am. S.O. 1984, c. 58

s. 1(1) “accident”

s. 3(1)

s. 3(3)

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A

s. 126

Other Statutes and Regulations Considered:

Government Employees Compensation Act, R.S.C. 1985, c. G-5

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 15-02-01

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DISPOSITION

APPEAL by the worker from a decision of the Appeals Resolution Officer denying entitlement for a back injury.

January 19, 2009. THE TRIBUNAL: —

BEFORE: E.J. Smith, Vice-Chair

HEARING: September 22, 2008, at Sault Saint Marie, Oral

DECISION(S) UNDER APPEAL:

WSIB ARO Decisions dated May 22, 2000 and July 9, 2007

APPEARANCES:

For the worker: Mr. G. Sirois, Office of the Worker Adviser (OWA)

For the employer: Ms. C. Nichols, Office of the Employer Adviser (OEA)

Interpreter: Mr. D. Manticelli, Italian

REASONS

(i) The Issue

[1] The worker appeals the Appeals Resolution Officer (ARO) decision of May 22, 2000, which denied entitlement for the low back based on an accident that Mr. Sirois submitted likely took place in about March 1989.

[2] Alternatively, the worker appeals the ARO decision of July 9, 2007, which denied entitlement for his low back condition on a disablement basis, based on his heavy work.

(ii) The Worker's Testimony

[3] The worker testified that his back symptoms started in 1989 after a lifting accident. He testified that he had no back problems prior to coming to Canada from Italy in 1986, at about age 33. He worked at the employer from 1987, with some periods of lay-off, until about 1992. He was a labourer and a bricklayer's helper. He then did this work for other employers until 1997. In 1997 he worked for a different employer on the canals. He stopped work in 1998, when his then employer would not hire him back because of his back condition, and made a claim to the Board.

[4] The worker testified that his back pain started when he was working at the "Q" street construction site. He was lifting a seven or eight foot steel beam with eight to 10 people. They were lifting the beam and placing it at the top of a window, into a recessed ledge. It was very heavy. He was at the front end of the beam. He testified that at one point in time the other workers let the beam go, and the worker didn't, with the result that he had its full weight. The beam did not hit the floor. He held on to it. He felt a pain in his lower abdomen, on the left side, radiating to his back. The back pain was just below the waist. He mentioned his pain to the other workers and to his supervisor. The supervisor said he should go to his doctor, because maybe he had a hernia. However, he testified that he kept working and finished his shift.

[5] He testified that he saw his doctor only some days or weeks later. He didn't go to the doctor right away because he thought he would get better. The worker was sure that he told his doctor about both the abdominal pain and the back pain when he first saw him. He testified that his symptoms were in both areas from the date of the accident. He could not understand why his family doctor refers only to abdominal pain and does not refer to back pain in the initial reporting. He testified that he also told the doctor about the lifting accident. He could not explain why the doctor's note says that he did not remember what set the abdominal pain off.

[6] The worker testified that he continued working over the years, although he had continuing back symptoms. After a couple of years he was prescribed a corset. He did not file a claim with the Board until 1998, when he found that he could not manage the heavy work any more. His doctors took him off work, and he filed a claim. At that time, he told the Board that the accident had happened in November 1989. He testified that that was a guess that his wife made. He now thinks that it did not happen in November. He recalled that it was winter when it happened. Mr. Sirois submitted that, based on the medical reporting, below, the lifting accident likely happened in about March 1989.

[7] The worker described his duties as a labourer and assistant bricklayer. He mixed the mortar and lined up the bricks for two to three bricklayers. He put the mortar on the mortar board with a shovel, put it into a pail, and carried the pails to the bricklayers. His job was to keep them supplied. He used five gallon pails. Sometimes he carried two pails. Sometimes there were as many as five or six bricklayers. Sometimes he carried the bricks, although generally he used a wheelbarrow for this. He was able to continue to do this work until 1997, although he had back complaints over the years and he also had periods of lay-off due to shortages of work. In 1997, he did another labouring job on the canals, for a different employer, shovelling and cleaning and filling holes with grout. In 1998, his doctor took him off work. From the file, he had a number of different medical difficulties by that date.

(iii) The Testimony of the Co-worker

[8] A co-worker testified that he recalled the lifting incident. He thought it had occurred in January 1989. He was able to estimate the date first, because he recalled the site where they were working, and secondly because he recalled that the owner of the company had been away when the workers were doing this job. He thought the owner had been in Florida. He thought the owner had been away in January. He also recalled that it was winter.

[9] His description of the events was somewhat different from that of the worker. Like the worker, he recalled that several workers were lifting a beam to place it in a ledge above a window. Like the worker, he recalled that the worker was lifting the front end of the beam. He himself was positioned at the middle of the beam. However, he did not remember anybody letting go of the beam. In his recollection the beam was placed smoothly into its intended spot. The worker placed his end in first and so was the first to be relieved of the full weight of the beam. Then the others lifted the rest of the beam into place. He recalled that after the beam was in place the worker complained of a pinch in his back. The co-worker told him to see a doctor, but the worker continued to work. He didn't bother to go to a doctor. He said it was just a little pinch. The co-worker worked with the worker for two or three years after this. He recalled that the worker complained about his back from time to time. The co-worker did not see the worker slowing down in any way while doing his work, however. The worker was a hard worker. It was a very physical job.

(iv) Evidence on File

[10] The clinical notes of the worker's family doctor for 1989 are on file, and read in critical part as follows:

June 20, 1988: Pt complains of rt sided neck pain, present for 2 mths. Occurred after prolonged periods of working with his arms above his head...

March 28, 1989: Pt complains of pain in the lt inguinal region, present for 2 wks. He does heavy work in construction industry with brick laying. He does not remember what set the pain off. Pain radiated down into the inguinal region. He noticed a small lump on the testicle.

[11] On May 8, 1989, the doctor describes that the worker continues to have some lower abdominal discomfort on the left side. He is referred to a specialist, Dr. Mohamed. In this note the doctor also states "WCB-Pt dropped a large rock on his rt foot...Xray, no treatment".

[12] Therefore there are two entries in the spring of 1989, in March and May, which identify abdominal pain. Neither of them identifies low back pain. Neither refers to a lifting accident, although the March note indicates that the worker was asked about how the pain started. The note indicates that the worker does not recall anything specific. The doctor's notes carefully identify the work related aspects of various injuries, i.e., they note that the right foot injury is a "WCB" injury, and that, while the neck symptoms are not noted as "WCB" they did come on after activity at work. With respect to the abdominal pain, the doctor notes that the worker does heavy work but his notes do not describe any specific mechanism of accident.

[13] On January 3, 1990, the doctor describes elbow pain and notes again "no history of injury". He has again inquired about, and recorded, whether there was a specific accident involved in the elbow pain.

[14] On March 30, 1990 a note states:

[Patient complains of] pain in the groin which continues from his injury from over 1 yr ago. He finds the pain is better when he puts pressure on his paravertebral muscles of his lumbar spine.

[15] Examination reveals no tenderness in the spine. The worker is sent for an x-ray of his lumbar spine. This entry is the first reference to back pain.

[16] This note also states: "Pain between the scapula. No [history] of injury".

[17] On April 11, 1990 a note states:

[Patient] continues to have back pain. Xray reveals spina bifida occulta at the S1 level. I do not think this has anything to do with his pain.

[18] There are several aspects of these clinical notes that I consider important. First, the diagnosis in March 1989 is of abdominal wall strain. There is no reference to back pain. In addition, the doctor states that the worker has had the pain for two weeks, which would place its onset in early March and not in January, which is when the co-worker thought the accident occurred. The worker did not have a reliable memory of when the accident occurred. Further, the worker is described as not remembering what set the abdominal pain off. There is no reference to a lifting accident

[19] The doctor's notes, over all, suggest that he has a practice of asking about, and recording, how symptoms arose, and of noting possible WCB implications. The doctor describes the fact that the neck pain arose while the worker was doing overhead lifting, although he does not note this as "WCB" and, I infer, was only describing a possible relationship to work rather than a clear relationship to work. In similar manner, he is careful to note that the worker's job is heavy when he describes the abdominal pain. With respect to the foot injury, his note states "WCB". That indicates that he identified that injury as a work related incident. I infer that the cost of the health care for that injury would have been billed to the WCB, although no records of that claim have been provided and may not still be available. The doctor also notes that later pain that the worker experienced in his scapular area is not associated with any history of injury.

[20] Given the care taken by Dr. Moine to address these matters in his notes, I find it unlikely that he would have made a mistake. I find that in March 1989 it is most likely that the worker complained only of lower abdominal pain, and did not complain of back pain. I also find that he told Dr. Moine that he did not recall how the pain started.

[21] However that does not mean that the worker did not have an incident of back pain in January 1989, as the co-worker described. However, I must conclude that this was not the same injury as the abdominal pain that he felt in March and May 1989. Further, he did not tell his doctors about the lifting incident until much later. The first reference to a lifting accident is found in the report of October 10, 1989 of the urologist, Dr. Mohamed. Dr. Mohamed's letter to Dr. Moine states:

This patient had sustained injury while lifting a heavy object several months ago and noted pain in the left groin extending to the left testis. This is actually worse when he bends forward. There is left lumbar pain.

[22] This is the first time the worker gave a history of specific injury associated with his groin pain. Dr. Mohamed also identifies the presence, at that time, of low back symptoms. However, the history provided at this time, that the worker experienced groin pain when lifting a heavy object, is not consistent with the prior medical reporting. I find it likely that the worker was confusing how his symptoms arose.

[23] There is continued medical reporting of back symptoms from this time forward. In a report of Dr. Fyfe, dated July 8, 1993, the history is:

He got injured in 1989 when he and some other chaps were lifting a beam and he developed what he thought was a kink in his back. He kept on working...

[24] This is the first reference to the worker feeling a kink in his back at the time of the lifting incident. It is over four years after the date of the purported accident.

[25] In a report of Dr. Woolford, an orthopaedic specialist, dated June 17, 1994, the worker states that his back has been bothering him since about 1984. He is described as reporting that his back started bothering him after he was lifting a bin, which I accept was probably a misunderstanding of the worker's reference to a "beam". I also accept that the reference to 1984 is likely an error.

[26] In a report of Dr. Jacqmin dated January 5, 1995, the worker states that his back pain began "while lifting a large beam".

[27] By 1997, the worker is described as having multiple aches and pains in his muscles in his arms and legs as well as cervical, thoracic and lumbar symptoms. Investigations also describe degenerative disc disease, scoliosis and osteoarthritis.

[28] The worker was interviewed by a Board investigator in July 1998. He told the investigator that he was lifting an eight-foot I-beam with eight to 10 other individuals when he strained hard and felt pain in his lower back at belt level radiating into his left testicle.

[29] There is no reference to anybody dropping the beam. There is no reference to groin or abdominal pain per se.

[30] The Form 6 dated June 1998 and signed by the worker states: "Lifted an 8 foot beam and felt a pull in my lower back".

[31] Again, there is no history of anybody dropping the beam. There is no reference to abdominal pain.

[32] In a report dated March 6, 2000 Dr. Leung describes the history as that the worker was trying to lift a heavy beam but the other people dropped it. He was caught holding on to it. This is the first reference to anybody dropping the beam. It is eleven years after the accident.

[33] An MRI dated May 1, 2001 describes degenerative changes and some minimal osteoarthritis at several levels. At L5-S1 there is narrowing of the disc associated with mild osteophyte formation, which is a finding associated with osteoarthritis. There is a postero left lateral osteophyte which could be irritating the left transversing nerve root. The opinion provided is that there are degenerative changes without evidence of spinal stenosis, but that the left S1 nerve root could be in contact with a bony bar.

[34] Mr. Sirois also refers me to the *Textbook of Pain*, edited by Patrick D. Wall and Ronald Melzack, 2nd edition, Churchill Livingstone (1989), which indicates that nerve root compression in the lumbar spine can result in pain in the groin. At L3, 4, and 5 this "sometimes occurs". In the case of S1 root compression ("usually L5-S1 disc") pain is "rarely" found in the groin.

[35] On the issue of disablement, Mr. Sirois refers to articles from the internet that the work of bricklayers may be associated with an increased risk of musculoskeletal injuries.

[36] He refers me to the Tribunal's Medical Discussion Paper on *Back Pain* (March 1997), in which Drs. W.R. Harris and J.F. Ross Fleming state that there is tenuous evidence of a relationship between repetitive strain and back symptoms [at p. 10]:

There is no evidence that the progression of x-ray changes is altered by a single injury (unless it is very severe) or by repetitive movement. However people with aging change might be more prone to develop back symptoms with repetitive strain although the evidence is tenuous.

(v) Submissions

[37] Mr. Sirois submitted that we should accept the worker's testimony about how his injury arose. There is evidence that he suffered other injuries that were not reported to the Board, such as his neck symptoms. The worker testified that he told his supervisor about a "pinch" at the time, but the supervisor failed to report the accident. He did not go to a doctor right away because he was hoping his back would get better. There is frequent reference to the lifting accident in the medical reporting, even in the time period that the worker was not making a claim to the Board.

[38] He submitted that the medical reporting suggests that back conditions can result in groin pain. The worker was ultimately diagnosed with nerve compression at L4-S1. Language barriers might have affected the doctor's reporting of the worker's symptoms.

[39] Mr. Sirois also submitted that the worker's job duties were sufficiently heavy that I should allow the appeal on a disablement basis. He refers me to Tribunal decisions that granted entitlement on a disablement basis in the case of heavy work.

[40] Ms. Nichols submitted that the worker's testimony is not reliable. There are three different dates proposed for the accident: January, March and November 1989. The only report of symptoms in the medical reporting in this time period is in March 1989. However, the doctor's note indicates that the worker did not provide a history of a lifting accident. The worker is testifying to events that happened 19 years ago. He has a diagnosis of degenerative disc disease, which is an explanation of his symptoms.

[41] I also asked both representatives for their opinion on whether the purported lifting accident is properly adjudicated as a chance event or as a disablement. There was some inconsistency at the Board on this question, discussed below. Both representatives submitted that this mechanism of accident should be adjudicated as a chance event. I have addressed that question below, because the Board's adjudication raises some issues that are fundamental to workplace insurance adjudication.

(vi) Was the Lifting Accident a Chance Event or a Disablement: The Prior Adjudication

[42] In this case, the operations branch originally denied the worker's claim on September 18, 1998, on the basis that there was no proof of accident. The worker appealed. Mr. Sirois asked the operations branch to adjudicate whether entitlement was allowable on a disablement basis, based on the worker's long term heavy work. The Board's Claims Adjudicator wrote on September 27, 2000 stating that the claim had already been adjudicated as a disablement claim:

I would like to advise you at this time that this claim file was looked at as a disablement injury. The accident history of November 1, 1989 was not a chance event.

[43] It is important to recognize that at this point in time there was nothing in the Board file that provided a history that the beam had been dropped, which might have led to different adjudication. The worker had told the Board on his Form 6 that he felt pain in his lower back while lifting the beam, without describing any other mechanism of injury.

[44] Mr. Sirois responded by letter dated October 4, 2000:

[The worker] had identified a specific point in time when he hurt himself-and that was when he lifted a steel beam. If that is not a chance event injury, I don't know what is.

I see no indication in the file documentation that the Board even considered the nature of his *work duties over the years* as contributing to his back disability.

[45] The Claim's Adjudicator responded:

The injury which occurred on November 1, 1989 was not a chance event, it is in fact a disablement injury. Policy interpretation,

a disablement arising out of and in the course of employment;

(a) unexpected result of working duties, characteristics-performing regular job duties-sudden onset of pain-no identifiable occurrence preceding the injury-cannot see the personal injury.

[46] It is not clear what policy guideline the Claims Adjudicator was using. This is not the wording of Board policy.

[47] A further letter of the Board dated November 17, 2000, again describes a chance event as the type of accident that can be seen by other people. The Claim's Adjudicator states:

... A chance event is an identifiable, unintended occasion preceding injury which is specific and traumatic such as a motor vehicle accident, falling off a building, striking a body part against something. The chance event is the type of accident that can be seen by other people.

A disablement injury arises out of and in the course of employment and is a condition which emerges gradually over time or the unexpected result of working duties...In summary, the worker did not suffer a chance event. He allegedly suffered a disablement injury as an unexpected result of his job duties (lifting a beam).

[48] The Claims Adjudicator also made a general statement that the Board did not allow entitlement for “wear and tear” injuries.

[49] Again, the distinction that a chance event must involve an injuring process that “can be seen” is not found in Board policy. Board policy also does not deny entitlement for “wear and tear” injuries.

[50] By this time, the Appeals Branch had denied the worker’s appeal for what was then being identified as a November 1989 lifting injury. Given that the Claims Adjudicator interpreted the ARO decision as a final decision of the Board on a disablement claim, the Claims Adjudicator referred Mr. Sirois to the Tribunal with respect to both theories of causation. I understand the Claims Adjudicator’s reasoning to be that, because she thought that the ARO had addressed a disablement claim, the Claims Adjudicator was not able to address a different medical theory about how the disablement arose. That would have to be addressed by the Tribunal. However, in stating that the Board did not grant entitlement for “wear and tear injuries”, she was also, in substance, denying the disablement claim as it related to the new medical theory.

[51] When the matter was scheduled before a Tribunal Panel, Mr. Sirois made both alternative arguments: that the back condition was due to the lifting injury in 1989, and that it was the result of the worker’s heavy work over time. A memo of October 25, 2004, of Mr. A. Signoroni, Mr. M. Meslin, and Mr. D. Broadbent, found that the Tribunal did not have jurisdiction on the disablement issue because there was no final decision of the Board on that issue. The ARO had not addressed whether the back condition was the result of the worker’s heavy work over time. The Panel’s memo states:

The issue properly placed before the Tribunal as identified in the Hearing Ready letter dated June 15, 2003 is initial entitlement for a *later 1980s work-related accident, in the nature of a chance event*, that allegedly precipitated a low back injury.

At the start of the hearing, the worker’s representative raised the issue of an alternative work-related accident, in the nature of a disablement, that allegedly could also explain the ongoing low back problems reported by the worker...this alternative theory of entitlement was raised by the worker’s representative [at the Board] but never ruled on for reasons not clear....Given that both representatives agreed that the Tribunal does not have jurisdiction on the alleged work-related accident by disablement theory, there was a joint request that the pending appeal be adjourned. [Emphasis added]

[52] To clarify, the characterization of the lifting accident as a chance event is not found in the hearing ready letter and is the characterization that the Panel gave to the alleged November 1989 accident. In the decision of May 22, 2000, the ARO had addressed only the incident of November 1989.

[53] After the Panel’s memo was issued, the matter was returned to the Board.

[54] In a Decision dated July 9, 2007, Appeals Resolution Officer Ms. Maier-Pessoa stated:

In an October 4, 2000 letter, Mr. Sirois *quite correctly pointed out [the worker’s] history of lifting a steel beam as a chance event*, and in considering the file record saw no indication of consideration of [the worker’s] work duties over the years...WSIAT confirmed the appeal was adjourned until a final decision of the Board relating to the issue of entitlement on a disablement basis was addressed. [Emphasis added]

[55] ARO Maier-Pessoa then addressed the disablement issue, but denied the appeal on the basis that the worker’s back condition was more likely the result of degenerative disc disease than of his heavy work.

(vii) What Is a Chance Event: The Statute, the Case Law and Board Policy

(a) The Provisions of the Act and Board Policy

[56] For convenience I will set out the sections of the Act and Board policy that relate to a chance event and a disablement. The worker's symptoms arose in 1989, and so the provisions of the pre-1989 *Workers' Compensation Act*, R.S.O. 1980, c. 539, as am. S.O. 1984, c. 58, apply. However, the substance of these provisions remains the same in the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A.

[57] The definition of accident states:

1(1) In this Act,

(a) "accident" includes,

- (i) a wilful and intentional act, not being the act of the worker,
- (ii) a chance event occasioned by a physical or natural cause, and
- (iii) a disablement arising out of and in the course of employment.

[58] Section 3(1) provides entitlement for personal injury by accident arising out of and in the course of employment.

[59] Section 3(3) provides that where the accident arose out of employment, unless the contrary is shown, it shall be presumed that it occurred in the course of employment and, where the accident arose in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.

[60] The Board's current policy, *Operational Policy Manual* Document No. 15-02-01, defines a chance event as:

A chance event is defined as an identifiable unintended event which causes an injury. An injury itself is not a chance event.

[61] It defines a disablement as:

- a condition that emerges gradually over time
- an unexpected result of working duties.

[62] This wording was also found in the predecessor policy in place from November 4, 1991. Prior to that date, the Board used a Claims Adjudicator Branch Procedures Manual, but that manual does not meet the Board's "policy on policy" test for binding policy under section 126. Therefore, at the time of this worker's alleged 1989 accident, there was no policy that was binding under section 126.

[63] However, the matter has been adjudicated by the Board under the wording of the policy in place in 1998, when the claim was made, and so I have considered the matter under the wording of that policy. There would be no different result, in my view, if the matter were considered as of the time of the accident, given that there was no binding Board policy at that time.

[64] The importance of the distinction between a chance event and a disablement relates to whether the presumption applies. If the mechanism of injury is a "chance event" that occurred while the worker was at work (in the "course of employment"), it is presumed that the injury "arose out of the employment" (was caused by it) unless the presumption is rebutted. The presumption does not apply in the case of a disablement. The statutory definition of "accident" refers to a disablement "arising out of and in the course of employment". Accordingly, in the case of a disablement, both branches of the test of work-relatedness must be proved on the balance of probabilities, subject only to the benefit of the doubt.

[65] This distinction can be important when the outcome depends on whether the presumption applies. Therefore, in the early days of the Tribunal, there was considerable discussion about what constituted a chance event and what did not. The cases in which the issue was addressed are sometimes referred to as "injury-is-the-accident" cases, because they are cases in which the common law, about whether the "injury" can be considered the "accident", was addressed. The issue arises in fact situations in which the mechanism of injury is either unknown or, as in this case, arises in the course of the worker's normal working duties, in the absence of an outward

“fortuitous” or “untoward” occurrence. The Claims Adjudicator in this case distinguishes these facts on the basis of whether the accident could be “seen”, and I infer that that distinction may have been used by the Board in training. However, it is not a distinction found in Board policy or in the case law. Current Board policy uses the terms “identifiable” and “unintended” to describe the mechanism of injury that constitutes a chance event. The case law addresses the concepts of whether something “untoward” or “unexpected” has occurred.

[66] I have found, below, that the worker’s initial description of the 1989 accident was likely more accurate than his later description of the facts, and that the steel beam was not dropped. Rather, I have found that the worker felt a pain in his low back after lifting, most likely in January 1989. I therefore must address whether this alleged theory of accident is a chance event. Given that history, there are three theories of how the worker’s initial onset of low back symptoms arose:

1. the symptoms were the manifestation of his underlying low back condition, and not causally related to his work;
2. the initial injury was a sudden onset injury caused by the lifting of the steel beam.
3. the back symptoms were causally related to the worker’s heavy work over time.

[67] I must decide which theory of injury is most likely. The first, non-work-related, theory only applies if I am satisfied that neither the second nor the third theory of injury is applicable. However, in order to determine whether one of the work-related theories applies, I must decide whether the presumption applies to that determination.

[68] There is no dispute that the presumption does not apply to the third theory of injury, because an injury that arises from work duties over time is, indisputably, a disablement. The question is whether a “sudden onset” injury that arises in the course of a worker’s carrying out his regular work duties is a “chance event”, in which case the presumption applies, or a disablement, in which case the presumption does not apply. The Claims Adjudicator refers to the words: “an unexpected result of working duties” in the definition of disablement, in Board policy, and reads those words to apply to the adjudication of a claim for an alleged sudden onset injury, even when the claim is based on a theory of a clearly defined mechanism of injury, the heavy lifting. She describes the term disablement as referring to all the instances in which the mechanism of accident cannot be “seen”, whether or not there is a sudden onset injury.

[69] The distinction she refers to arises in the case law. However, the case law does not turn on the concept of whether the accident can be “seen”. The discussion in the case law originates in the question of what may be considered an “accident” and in the concept that a chance event involves something “untoward” or “unexpected” or, under current Board policy, “unintended”. The case law addresses the facts in which an injury arises in the course of the worker’s normal working duties in light of these concepts.

(b) The Issue at Common Law: Fenton and Theed

[70] The early British common law case of *Fenton v. Thorley*, [1903] A.C. 443 and the Supreme Court of Canada case of *New Brunswick (Workmen’s Compensation Board) v. Theed*, [1940] S.C.R. 553, addressed these questions. It is important to note that the Courts in these cases were not addressing a statutory definition of the word “accident”, such as that now found in the Ontario compensation legislation. They were also not considering the issue of causation. There was no issue, on the facts of *Theed*, about whether the work had caused the worker’s injuries. That was conceded. The issue was what type of work-related injury was covered by the applicable workers’ compensation legislation as an “accident”. The Courts were addressing facts which, under current Ontario law, are indisputably accidents, given the presence of the term “disablement” in the definition of accident. Also, the Courts were not considering the language found in the chance event branch of the definition of accident. They were considering the meaning of the term “accident” itself.

[71] In *Fenton*, a worker over-exerted himself while turning the wheel of a machine and sustained an internal rupture. The Court found that the word “accident” in the relevant legislation was used in the popular and ordinary

sense, and meant a “mishap or untoward event not expected or designed”. The Court found that [at p. 449]:

“if a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in ... this is accidental injury in the sense of the statute”.

[72] In *Theed*, the Supreme Court considered the case of a worker who had been pushing a heavy lever and developed symptoms in her mid back, requiring surgery. The Court found that, on the facts of that case, “the injury itself constitutes an accident in the sense of a mishap or untoward event not expected or designed.”

[73] These decisions found that the fact that a worker suffered an injury while performing work duties was sufficient to mean that there was an “accident” at work. Therefore it was not necessary to address whether there had been an “untoward” “external” event causing the injury. It was only necessary to find that there was an untoward or unexpected injury.

[74] In Ontario, any earlier debate about what facts fell within the definition of accident was clarified when the provision governing disablements was added to the legislation in 1963. However, Tribunal decisions have been consistent in finding that disablements fell within the definition of accident even prior to that date, and that finding is based on the *Theed* analysis.

[75] However, in my view, the introduction of the term disablement into the definition of accident had two results: it clarified that a disablement that “arises out of and in the course of employment” falls within the definition of accident; and it provided that the presumption does not apply to such disablements. Prior to that change in the Act, under the *Fenton* and *Theed* analysis, the presumption in the Ontario Act applied to an accident covered by the Act, including even a disablement case on appropriate facts.

[76] There has been no dispute in the case law that an injury that arises over time is a disablement and now falls within the disablement provision. There has been no dispute that under the present-day definition of “accident”, as including a disablement arising out of and in the course of employment, the presumption does not apply to a disablement.

[77] The remaining dispute has been about what statutory provision applies when a worker experiences a sudden onset injury in the course of carrying out his or her normal workplace duties or, in some cases, while engaged in an activity of daily living while at work. These cases may involve a wide range of facts, with different degrees of compellability when causation is considered: the case for causation will be stronger when the worker lifts a heavy steel beam than when he lifts a lighter object, or than when he experiences an onset of pain while merely walking or turning or getting out of a car. However, in my view, the question of causation involves evidentiary issues. It is not the question being addressed in this case law. The early definitions of accident, considered in *Fenton* and *Theed*, defined the term accident as something that involved an “untoward event”. Until the statutory changes in wording introduced in 1963, the wording in the Ontario definition referred to a “fortuitous event”. The words were changed to “chance event” in 1963. The reasoning of a number of early cases was that an accident had occurred only when it was possible to identify a “fortuitous” external event that caused the injury. That was interpreted to mean that something unexpected had happened, other than the activities that the worker did intentionally in the course of his work. In other words, on that interpretation, even the act of lifting a heavy beam would not constitute an accident if it was a normal workplace duty.

[78] *Fenton* and *Theed* found that, for an accident to have occurred, it was not necessary for there to have been an external untoward occurrence of this type. It was necessary only for the injury itself to be unexpected, or untoward, and not the mechanism of the accident. Therefore these cases resolved a dispute found in earlier case law about what types of occurrences constituted an accident.

(c) *The Injury Is the Accident: Tribunal Decision No. 72*

[79] The first important Tribunal Decision to consider this law was *Decision No. 72* (1986), 2 W.C.A.T.R. 28. In that case, the worker had an acute onset of back pain while she was at work. She had a pre-existing back condition. The Board found that her symptoms were the result of her pre-existing condition, and were not causally related to her work. At the Tribunal hearing, the worker testified that her symptoms started when she bent

over to get something for the purposes of her work duties. However, that history was disputed. She had not provided that history in the early medical reporting. The Tribunal Panel did not make a finding about whether she had bent over for a work-related purpose or not. It considered the analysis of *Fenton* and *Theed* on the issue of what constituted an accident. It found that, whether or not the worker had bent over at the time of the onset of her pain, her injury fell within the definition of an accident because, at common law, the “injury is the accident”. Given that it was possible to make the finding that the onset of the worker’s symptoms occurred at work, this was sufficient for the symptoms to fall within the term “accident”. The Panel found that the accidental injury was a “chance event”. The presumption applied.

[80] After applying the presumption, the Panel found that the worker was entitled to benefits under section 3(1) because the accident not only occurred in the course of employment but also arose out of the employment. Under section 3(1), it is not sufficient that there be an accident in the course of employment. It is also necessary to find that it arose out of the employment. The Panel found that the accident arose out of the employment based on the following analysis [at p. 40]:

It is sufficient to conclude ... that the unexpected injury occurred suddenly and was caused by some particular movement of the back in the course of the worker’s routine duties following a period of employment-related back stress [sitting for several hours].

[81] The Panel relied on a medical report that supported this theory of causation.

[82] It is notable that, in *Decision No. 72*, the finding that there was a chance event was not based on an analysis that the “particular movement” in combination with the “sitting” constituted an external injuring process sufficient to be a “chance event”. The decision assumed implicitly that a movement made in the course of routine duties was not an external “chance” event or injuring process. The Panel adjudicated the appeal under the chance event heading only based on its determination that the “injury” was the chance event.

(d) The Board’s Review of Decision No. 72 under Section 86n

[83] The Board did not accept the Tribunal’s interpretation in *Decision No. 72*, which was, as stated above, that the injury that the Panel found resulted from the carrying out of normal work duties constituted a chance event, because the “injury” was the “accident”.

[84] The Board reviewed *Decision No. 72*, under section 86n of the pre-1989 Act. The Board took the position that the chance event branch of the definition of accident requires that there be an external “chance event” that is distinct from the injury. The Board took the position that when there is no external “unexpected” chance event, the matter is properly adjudicated under the disablement branch of the definition of accident. Interestingly, the Board considered the issue on the basis that the worker had been bending over, although the Tribunal Panel had not made a finding on that fact. The Board did not consider even that movement to constitute a chance event when carried out in the course of normal duties.

[85] In its *Review of Decision No. 72* (1988), 12 W.C.A.T.R. 85 at 152, the Board’s position was not only that an external cause had to be identified. The chance event had to be “unexpected”. Because it was the chance event (as distinct from the injury) that had to be “unexpected” the Board excluded from the “chance event” cases those cases in which every day work activities constituted the alleged injuring process. It found that those cases were appropriately adjudicated as disablements.

[86] However, in its section 86n review, the Board determined that it would not request reconsideration of *Decision No. 72*. Therefore these issues were next addressed by the Tribunal in a different decision, *Decision No. 42/89* (1989), 12 W.C.A.T.R. 85.

(e) Decision No. 42/89: The Definitions of Chance Event and Disablement

[87] The Tribunal addressed this issue again in *Decision No. 42/89*. In that case, the Panel addressed facts in which it was known that the worker died of a heart attack, at a remote location, while he was in the course of his employment. It was not known what led to the heart attack. There were work-related and non-work-related

theories of injury, but no evidence with respect to them, and so the benefit of the doubt did not apply. The question was whether the presumption applied. If it applied, the widow was entitled to benefits, because there was no evidence to rebut the work-related theory that exertion had led to the heart attack. However, if the presumption did not apply, the widow was not entitled to benefits, because it could not be established that the heart attack had been caused by the work.

[88] In *Decision No. 42/89*, while the Panel did not agree with the Board's analysis of the term "chance event", it found that the Board's analysis was not patently unreasonable. It then re-interpreted the definition of accident in a way which, in its effect, acquiesced in the Board's determination that an external injuring process was required by the "chance event" definition. It did not adjudicate the facts of *Decision No. 42/89* under the chance event heading. Instead, it developed a new analysis that, in effect, narrowed the import of those words to an even greater extent than the analysis offered by the Board. *Decision No. 42/89* took a very narrow view of what constituted a chance event. It stated [at p. 125]:

However, when one looks at the *Workers Compensation Act's* legislative history it becomes apparent that the chance-event language in 1(1)(a)(ii) was in fact introduced to the legislation in 1914 only to ensure that injuries caused by what were known in tort law as acts of God – bolts of lightening and the like – and injuries caused by natural conditions such as cold or heat (frostbite and the like) would be compensable if they arose out of and in the course of employment. Such injuries would not be understood to be "accidental" in normal parlance and were typically not covered by the tort-law system of personal injury compensation. Thus if the legislature wished to be sure that such injuries were compensable under the Act, explicit wording was necessary.

[89] Therefore, *Decision No. 42/89* interpreted the chance event type of case as intended to apply only to "acts of God" type facts. It is clear that "acts of God" type facts involve an external injuring process. The decision then described the *Decision No. 72* facts as follows [at p. 93]:

Decision No. 72...dealt with the issue of the right to compensation for a back disability which the Tribunal Panel found was the result of a sudden "acceleration" of a pre-existing degenerative disc disease. *The acceleration consisted of a sudden, severe and unexpected pain attack triggered, the Panel found, by physical movements that were part of the worker's normal job duties. The attack was not associated with an accident in the nature of an external chance event.* [Emphasis added]

[90] *Decision No. 42/89* described the facts of *Decision No. 72*, in which the worker's pain was triggered by work-related physical activities and movements, as insufficient to constitute a chance event. It found explicitly that those movements did not constitute an accident in the nature of an external chance event.

[91] However, *Decision No. 42/89* did not accept the Board's reasoning that, as a result, this type of injury was a disablement. It found that a disablement was an injury that arose over time. Further, the Panel found that it was not subject to the findings of the section 86n review in making this determination. The 86n review decision had considered the finding made in *Decision No. 72* that the facts of that case fell within the definition of a "chance event". However, *Decision No. 72* did not address whether the facts of that case constituted a disablement. This was an important factor in the *Decision No. 42/89* Panel's decision that the normal deference owed to the Board's section 86n determination was outweighed when it considered what constituted a disablement. The Panel found that it was considering that question for the first time. It found that the accident was not a disablement.

[92] It is not necessary for me to consider the Panel's reasoning on this issue for the purposes of this decision.

[93] However, 1) because the Panel did not consider that the facts fell within the definition of a disablement, and 2) because of its finding about the narrow purview of the chance event branch of the definition, the Panel found that the facts of *Decision No. 72* and those of *Decision No. 42/89* fell within the introductory words of the definition of accident. The introductory words provide that an accident "includes" the specific types of accident that are listed. Therefore the list provided in the definition is not exhaustive. The Panel determined that the facts did not fall within any of the specific types of accident that are listed, but that the facts still constituted an accident, under the analysis of *Fenton* and *Theed*.

[94] Further, since the Panel found that the facts did not fall within the definition of a disablement, *Decision No. 42/89* found that the presumption applied to the issue of causation.

(f) *What Has Changed Since Decision No. 42/89*

[95] The law has changed in a number of ways since *Decision No. 42/89* was issued. Those changes, in my view, mean that the reasoning of *Decision No. 42/89* needs to be applied today with care.

[96] The first important change is that the Tribunal is now subject to section 126 of the WSIA. The introduction of that section has two implications for the earlier analysis. The first applies to the requirement in Board policy that there be an identifiable unintended mechanism of injury in the case of a chance event which is distinct from the injury itself. The second pertains to the *Decision No. 42/89* analysis of what constitutes a disablement.

[97] In my view, there are also two further changes in how the law is interpreted. The first change pertains to how Tribunal and Board adjudicators are now interpreting the term “chance event”. The second pertains to the standard of proof applicable to rebutting the presumption.

1) Board Policy: Chance Event

[98] Board policy with respect to a chance event states:

An injury itself is not a chance event.

[99] In my view, at least since the introduction of section 126 into the Act in 1998, Tribunal decisions have been applying this provision of Board policy, without dispute. I note that the Panel in *Decision No. 42/89* found that the Board’s reasoning in its review of *Decision No. 72* was not patently unreasonable on this point. Further, while that Panel developed a different analysis of the definition of accident as a basis for its approach in that case, it acquiesced in the Board’s view of the chance event definition at least in its substantive effect. It did not adjudicate the *Decision No. 42/89* facts under that branch of the definition. To the contrary, its analysis that the chance event wording was intended to apply only to “acts of God”, narrowed the interpretation of that provision even further than the analysis of the Board.

[100] In my view, the analysis that an injury itself can constitute an accident under the chance event branch of the definition of accident, without the identification of an external injuring process, is not now open to the Tribunal unless that matter were to be addressed under section 126(4).

[101] This is despite the fact that the 2007 decision of the Nova Scotia Court of Appeal, *Canada Post Corp. v. Nova Scotia (Workers’ Compensation Appeals Tribunal)*, 2007 NSCA 129, 261 N.S.R. (2d) 96, determines entitlement based on an analysis that is essentially consistent with the finding of *Decision No. 72* that the accident was a chance event. In the *Canada Post* case, the worker was sorting mail boxes when she felt a snap in her lower back. The matter was subject to the *Government Employees Compensation Act* (GECA) and that Act does not include a definition of disablement. Canada Post took the position that the injury was not an accident. The Court considered the wording of the GECA, which defined an accident to include a “fortuitous event occasioned by a physical or natural cause.” The Court states [at para. 22]:

The result reached by WCAT is, as I will explain in a moment, readily explained on the basis that there had been an accident in the sense specified in GECA of “a fortuitous event occasioned by a physical ...cause”.

[102] In proceeding to explain the basis for this finding the Court relied on the analysis of *Theed*, that the injury itself is the accident in the sense of a mishap or untoward event not expected or designed. The Court stated [at para. 28]:

WCAT, in my view, accepted the worker’s submission that “...back was fine and she was fully able to work prior to her back injury on September 17, 2002. [She] stated that she was working, sorting mail into mail boxes, she went to move to the right and she felt a snap in her back and the difficulties with her back and her related disability commenced from that point in time.” To find that this constituted an “accident” was consistent with [the following statement of Kerwin J in *Theed*]:

... if a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in, I consider that this is accidental injury in the sense of the Statute.

[103] Therefore the Court adopts the analysis of *Theed* as the basis for its finding that the facts fell within the

words: “fortuitous event occasioned by a physical...cause.” By implication, the Court found that the worker had suffered an accident because the injury was the accident. It was not required to address wording such as that found in the current Ontario Board policy, that: “an injury itself is not a chance event.”

[104] However, as already stated, in my view, it would not now be possible to address the analysis of the *Theed* case in Ontario without addressing the wording of the Board policy and section 126(4).

[105] However, the Court in *Canada Post* noted that the worker did not concede in that case that an accident under GECA must consist of some specific and identifiable accident, or that the accident for the purposes of GECA does not include a disablement. It did not find it necessary to determine whether the term accident also included a disablement that arose over time.

[106] In my view, there is nothing in the *Canada Post* case that is inconsistent with or would prohibit the broader approach to the definition of the term “chance event” that I have described below.

2) Board Policy: Disablement

[107] It is also important to understand that the Panel in *Decision No. 42/89* was not subject to section 126 of the Act when it considered what constituted a disablement. The Panel’s determination that the facts of the above cases did not fall within the definition of disablement was not subject to the deference that the Panel indicated it considered appropriate in the case of a section 86n review under the former Act. It found that the Board’s approach to the definition of a chance event was not patently unreasonable. It is not clear how that Panel would have approached the definition of a “disablement” under section 126.

[108] Today, the question of whether these cases constitute a disablement would need to be considered in light of section 126.

[109] Therefore, if I were to interpret Board policy on what constitutes a disablement in the way that the Claims Adjudicator interprets that policy, it would be necessary to inquire whether that policy were unauthorized by or inconsistent with the Act, under section 126(4), before it would be possible for me to reject that analysis and adopt the analysis of *Decision No. 42/89*. If the wording of the Board’s disablement provision were found to address all sudden onset injuries arising in the course of the worker’s normal work duties, then those words would apply to this case, because the disablement provision is arguably more specific than the introductory wording of the definition of accident. There is now no dispute that the disablement provision applies to injuries that arise over time, because the wording of the Act that refers to a disablement is more specific than the introductory words of the definition of accident, although, prior to the introduction of the disablement provision, at least based on the analysis of *Decision No. 42/89*, those injuries would arguably have been adjudicated under the general words of the definition.

[110] However, I have considered how this case law applies under the current wording of Board policy. That policy did not exist in 1987, when the Board reviewed *Decision No. 72*. I have not found it necessary to address section 126(4).

3) A Broader Definition of Chance Event

[111] In my view, the law has also evolved in another way, since the days of *Decision No. 72* and *Decision No. 42/89*. In my view, Tribunal decision-makers, and, it appears, the Board’s Appeals Branch, have evolved to using a broader definition of the term “chance event” than is contemplated by the law discussed above. In my view, that broader interpretation is open to adjudicators both under the wording of the Act and under the current wording of Board policy. The current wording of the policy is:

A chance event is defined as an identifiable unintended event which causes an injury. An injury itself is not a chance event.

[112] Much of the debate about the injury-is-the-accident law at the Tribunal has evolved around the question of whether it was necessary to identify an external injuring process in order for the alleged facts to fall under the

“chance event” branch of the definition. However, I do not consider that the crux of the issue. In order to establish entitlement, Tribunal Panels and Vice-Chairs are required to weigh different theories of how the accident occurred. Some theories involve possible mechanisms of accident that, if accepted, would constitute chance events, and some are based on theories of accident that, if accepted, would constitute disablements. Prior to deciding the causation issues, it may be necessary for the Panel or Vice-Chair to decide if the theory being considered involves an alleged chance event or disablement. That may be necessary in order to know if the presumption applies. However, for entitlement, there must be a work-related injuring process, and that means, in effect, something external to the injury. Accordingly, it is necessary that the theory of accident identify an alleged external injuring process. In either case, if no possible external injuring process can be identified the result will always be, in my view, that there is no work-related injury, irrespective of the application of the presumption. The task of the Tribunal Vice-Chair or Panel is to weigh the work-related and the non-work-related theories of injury.

[113] *Even in Decision No. 72*, the Panel identified an external work-related injuring process. It identified the fact that the worker had been sitting too long, and then turned in her seat, as the work-related aspect of the injuring process. In *Decision No. 42/89*, after applying the presumption, the Panel determined as a matter of law that the heart attack was related to the exertion involved in the work-related tasks. If no possible theory of external, work-related, causation had been identified on the facts of the case, the presumption would have been rebutted.

[114] At that time, the Tribunal Panels determined that these injuring processes did not constitute chance events. However, in my view, under current case law, it appears likely that these alleged mechanisms of injury would be adjudicated as chance events.

[115] To review more recent case law, in *Decision No. 1798/06 (December 14, 2006)*, the Vice-Chair found that the external rotation of the worker’s left arm was a chance event. In *Decision No. 2441/06 (December 12, 2006)* the worker experienced right knee pain at work while climbing the stairs to his bus. The Vice-Chair states [at para. 28]:

Decisions of the Tribunal have concluded that, where a worker is doing his normal job but experiences a sudden, sharp pain, the unexpected result of his normal job duties may be considered to be a chance event within the definition of the Act.

[116] In my view, this wording would have been more precise if it had stated “the unexpected result of his normal job duties may be considered to be the result of a chance event (i.e., of an injuring process) within the definition of the Act.” Board policy identifies a chance event as the injuring process, not the injury. However, *Decision No. 2441/06* is correct, in my view, in describing the fact that the Tribunal has been adjudicating these types of injuring processes as chance events.

[117] In *Decision No. 615/02 (May 31, 2002)* the Vice-Chair considered the case of a worker who felt a “pop” when getting out of a vehicle. The worker was engaged in a relatively normal body movement but suffered a right medial tear. In *Decision No. 1147/07 (July 18, 2007)*, the Vice-Chair considered the case of a worker who experienced sudden onset back pain when standing up after his lunch break. In both cases the Vice-Chairs applied the presumption without considering the wording of the Board policy with respect to disablements or the application of section 126. Implicitly, in my view, the Vice-Chairs adjudicated the movements of getting out of the vehicle, and of standing up, as sufficient to constitute external unexpected injuring processes, or chance events.

[118] This is not to say that all Tribunal decision makers have found such minimal alleged mechanisms of injury sufficient for entitlement, even after the application of the presumption. In some cases Tribunal decision makers have found that the mechanism of injury argued to constitute the chance event was insufficient to have been the likely cause of the symptoms, and that the symptoms were, to the contrary, merely the manifestation of an underlying or pre-existing disease. (See, for instance, *Decisions No. 900/06 (July 13, 2006)* and *694/02 (June 5, 2002)*). However, that distinction goes to the question of whether the presumption is rebutted, because it is not likely, based on the medical and other evidence, that the alleged injuring process was the cause of the symptoms. It does not go to the question of whether the injury is adjudicated as a chance event.

[119] In my view, the narrow approach to what constituted an external cause, first as reflected in *Decision No. 72*,

and then as arguably narrowed further in *Decision No. 42/89*, has been overtaken in the case law. Whatever the historical concerns that led to its use, the phrase “chance event” as it is found in the Act is broad. In my view, the narrow definition discussed in *Decision No. 42/89*, as limited to an act of God, has not been followed.

[120] Further, in my view, the reason that the Panel in *Decision No. 72* did not consider the identified mechanism of injury to be a chance event was not because there was no injuring process that was external to the injury. It was because it did not consider that a normal work activity constituted an “unexpected” chance event. On one view, nothing “untoward” or “fortuitous” had happened. The worker was doing her normal work. In my view, the critical question has never turned on whether there is an external mechanism of injury. It turned on whether the alleged mechanism was something that was “untoward” or “unexpected” or, now, under the wording of the current Board policy, “unintended”.

[121] If the concept of “unexpected” (the phrase generally used in the *Decision 72 Review*) or “unintended” (the phrase now used in Board policy) is to be found in the statutory language, it has to be found in the word “chance”. The word “chance” modifies the word “event”. If the injury is not the chance event, then it is not sufficient that the injury be unexpected or unintended for the purposes of this branch of the definition. The “event” (the accident) must be unexpected or untoward. In its *Decision No. 72 Review*, the Board took the position that the chance event definition meant that there had to be an *unexpected* external event. Therefore it excluded injuries occurring in the course of a worker’s normal work duties from the definition of chance event, whether or not the worker had a sudden onset injury, because the activity that caused the injury was not “unexpected”.

[122] The Oxford dictionary defines “chance” as an “undesigned occurrence”. The Board was taking the view that it was the external cause that had to be a “chance” event, and the unexpected occurrence, not the injury.

[123] The early cases address the issue on the basis that when the injury was the unexpected result of the worker’s usual work activities, the external injuring process was not “untoward” or unexpected. They assume that if the worker was not doing anything out of the ordinary there was no external “chance” event.

[124] However, the wording used in the current Board policy is the word “unintended”. Does the word “unintended” mean that the activity that caused the injury had to be unintended? Does it exclude a lifting accident from the definition of a chance event, because the worker did the lifting intentionally, as a part of his normal work?

[125] The wording of the policy on “chance event” does not refer explicitly to the work activity. It refers to an unintended “event”. Given the wording of Board policy, the event is not the injury. However, arguably, it also need not be read to refer to the work activity, whatever its interpretation was in the past. In my view, the wording of the Act, and Board policy, is open to interpretation on this point. I consider the better interpretation to be that the “event” is the injuring process (or the alleged injuring process, given that causation must be separately addressed.) Therefore when the worker lifts a steel beam, the “event” consists of the physiological stressors associated with the lifting. And, it would appear that, if those stressors cause injury, they are unlikely to have been intended. I think that recent Tribunal decisions – and, it appears, at least some decisions of the Appeals Branch at the Board - are now interpreting this wording to mean that the injuring process must be unintended, not that the work activity done must be unintended. This may be implicit in the analysis, rather than explicit.

[126] On this interpretation, the wording distinguishes chance event cases from the cases that are subject to the first criteria of the definition of accident, of “when there are wilful and intentional acts not being the Act of the worker.” In those cases, the event that causes the injury, i.e. the injuring process, is intended, not unintended.

[127] My view that this is the better interpretation of these words is supported in this case by the fact that all the persons involved in this adjudication, except for the Claims Adjudicator, were of the opinion that the alleged lifting accident was a chance event. The representatives are experienced representatives. The prior Tribunal Panel agreed with their submissions about what constituted a chance event, and sent the matter back to the Board. The ARO who addressed the matter in 2007 also agreed with that position. None of these experienced participants in the workplace insurance community took the position that a sudden onset injury was not the result of a chance

event mechanism of injury just because it arose in the course of the worker's normal working duties or because the accident could not be "seen" in the way that a slip-and-fall accident can be seen.

[128] In my view it is tempting, but wrong, to distinguish the cases based on whether the alleged mechanism of injury is one that would be commonly understood to cause an injury. In other words, a decision maker might more readily consider that an injuring process constitutes a chance event when a worker lifts a heavy steel beam than when he lifts something light or when he simply walks or twists or turns. However, in my view, that is an evidentiary distinction. It goes to whether causation can be established. Under the provisions of the Act, the question of whether the injury observed at the time of the alleged accident is caused by the alleged injuring process is addressed separately from the question of which branch of the definition of accident applies. That is because causation is addressed subject to the presumption, as set out, in this case, in section 3 of the pre-1989 Act, except when the theory of accident involves a disablement. Therefore the question of whether it is likely that the injury was caused by the work is not a relevant basis for determining whether the facts fall to be adjudicated as a chance event.

[129] Further, the Board's definition of disablement refers to the "unexpected result of the worker's working duties". It distinguishes on the basis of whether the worker was doing his work duties, not on the basis of what type of work duties were being done. If the worker was doing his work duties, it must be inferred that an injury is virtually always unexpected. If the injury were expected, the work duties would not be safe, and would not be assigned.

[130] Therefore, in my view, the question that arises when there is a minimal alleged triggering mechanism of accident and a sudden onset injury is not whether there is a chance event. It is whether causation is established, or in other words, whether the injury resulted from the accident, even after the application of the presumption.

[131] However, I have next considered how the words of the disablement provision of Board policy are to be interpreted, and how that matter affects the analysis.

4) How Is the Analysis Affected By the Definition of Disablement in Board Policy?

[132] Only the Claims Adjudicator interpreted the words of the disablement provision to mean that the lifting accident was a disablement, because it was the "unexpected result of the worker's normal working duties".

[133] To repeat, Board policy defines a disablement as:

- a condition that emerges gradually over time
- an unexpected result of working duties.

[134] As already stated, disablement injuries that emerge gradually over time are almost always the unexpected result of working duties because, if the result were expected, the work would be unsafe and would not be assigned.

[135] Further, in my view, the words "an unexpected result of working duties" must be understood to refer to an unexpected result that is not the result of a "chance event" within the terms of the second branch of the definition. Generally, statutory definitions are seen as having discrete meanings. Therefore I understand the definition of accident in the Act to intend that the three branches of the definition are discrete. However, when a worker falls off a ladder, or slips and falls, that event is also an unexpected result of working duties. Therefore I read these words in Board policy to refer to an unexpected result of working duties that is not, otherwise, a chance event. Otherwise, the provisions would be overlapping.

[136] However, it is necessary to give some meaning to the second bullet found in the Board policy definition of a disablement. One possible interpretation is that the second bullet refers to injuries which occur over a short period of work duties, such as a shift, but in the absence of a discrete triggering event. The injuring process on those facts, in my view, is not sufficiently discrete to constitute a chance "event". The injury is not a sudden onset injury. The facts are appropriately adjudicated as a disablement. In any event, the words also have meaning as a

descriptor of the type of facts that generally form the basis for a condition that emerges gradually over time, irrespective of whether the time period involved in the injuring process is long or short. The words describe the circumstances under which an injury that arises over time is likely to occur.

[137] In my view, however, these words do not affect the analysis of what constitutes a chance event as previously discussed.

5) Summary of This Point: How a Broad Approach to the “Chance event” Provision Has Made the “Injury-is-the-accident” Case Law of Less Importance

[138] In summary, in my view, given the current broader approach to the meaning of the term “chance event” found in Tribunal case law, and in the application of the law by the Appeals Branch in this case, the substantive issue seems to be whether the alleged work-related theory of entitlement involves an injuring process that is sufficiently discrete to constitute a chance event, resulting in a sudden onset injury, or whether it operates over time and results in a disablement. If the theory of injury is that there is a chance event, then the presumption applies to the consideration of that theory.

[139] There is no dispute that the definition of accident is inclusive. However, there has been little recent adjudication which explicitly addresses the *Decision No. 42/89* analysis. In my view that is because both the Tribunal, and the Appeals Branch, are now interpreting the current wording in Board policy more broadly. In addition, the section 86n review process which provided the basis for the Panel’s review of this issue in *Decision No. 42/89* is no longer in existence. The Tribunal is now required to apply Board policy under section 126 of the Act.

[140] I have adjudicated the alleged lifting accident in this case on the basis that the broader interpretation of the term chance event is correct, and that the lifting accident was a chance event.

6) How the Presumption Applies

[141] In any event, there is another development in the law that may affect the importance of this distinction.

[142] Some Tribunal decisions have found that the presumption has most relevance when there are unknown facts about the accident history. Where evidence exists, the Act provides that the evidence is to be weighed on the balance of probabilities, and the benefit of the doubt applies.

[143] In other cases, Tribunal decisions have found that the presumption applies in every case of a chance event, and is rebutted only on clear and convincing evidence. Those decisions adopt reasoning developed in the civil law context that there is a sliding scale with respect to degrees of probability within the civil standard and find that clear and convincing evidence is necessary to rebut the section 3(3) presumption. Some decisions suggest that the application of the presumption requires a higher test for rebuttal, and therefore provides a lower threshold for entitlement, than the adjudicative effect of the benefit of the doubt provision.

[144] However, the Supreme Court of Canada case of *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, has recently clarified that there is only one standard of proof in civil law: the balance of probabilities. It found that there are no degrees of probability within the civil standard. Context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, the Court finds that these considerations do not change the standard of proof. Speaking for the Court, Rothstein, J. states in paragraph 49:

In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[145] The Court’s reasoning is not directly relevant in this case, because the result, in my view, is the same in any event. Accordingly, I have not asked for submissions from the parties on the effect of the Supreme Court of Canada’s decision, which was released shortly after the hearing of this matter. However, if the presumption is rebuttable by evidence on the balance of probabilities, as that test applies generally in civil cases, there may be

fewer cases in which the application of the presumption affects the outcome.

[146] On that interpretation, the question of whether the presumption applies is most important on facts such as those of *Decision No. 42/89*, when the circumstances of the injury are unknown and the principle of the benefit of the doubt cannot be applied. Those were the kind of facts referred to in the Meredith Report to explain the reason for the presumption.

[147] However, the presumption would not necessarily affect decision making in other cases. In many cases, there would be no reason to address it. I note that, even under current analyses, in many cases, Vice-Chairs and Panels do not explicitly address the presumption, because the evidence is sufficient to support the decision and the matter does not turn on the application of that provision. As *Decision No. 559/87* (1998), 9 W.C.A.T.R. 103, notes, it is generally not necessary to decide which branch of the definition of accident applies, unless the outcome turns on the presumption. Even if the presumption applies in every case involving a chance event, that fact does not mean that the matter turns on the application of the presumption in every case. If the analysis of *McDougall* applies then, in my view, relatively few cases are likely to turn on the application of the presumption.

(viii) The Worker's Entitlement

(a) Findings of Fact

[148] Turning to the facts of this case, I prefer the evidence of the co-worker, and the findings in the concurrent medical reporting, to the testimony of the worker, where inconsistencies exist. In my view, the worker has little reliable memory of when or how the lifting accident occurred or of his symptoms after it. He testified at hearing that he initially accepted his wife's guess that the lifting accident had occurred in November 1989, but that he now thinks that that date is wrong, because he now recalls that it occurred in winter. However, he did not have a clear enough recollection of that fact to reject the November date proposed by his wife when she suggested it. The claim was made to the Board on the basis that the accident occurred in November 1989.

[149] Further, the worker testified that he told his doctor about back pain after the lifting accident, and that he also told his doctor that his pain was the result of lifting a beam at work. However, that history was not recorded by his doctor in either March or May 1989.

[150] The worker testified to having both abdominal pain and back pain after the lifting accident. However, the co-worker only recalled the worker referring to back pain in January 1989. In March, 1989, and in May 1989, Dr. Moine's records refer only to complaints of abdominal pain.

[151] The worker testified at hearing that the other workers who were lifting the beam dropped it, so that he had to take its full weight. That history is not found in the medical reporting until 2000. It is not found on the Form 6 submitted in 1998. The co-worker testified that the beam was placed smoothly into its spot. It was not dropped.

[152] In each of the above respects, I prefer the other evidence to that of the worker.

[153] However, on the other hand, the co-worker did recall the worker complaining of back pain after a lifting incident, and the worker referred to this incident many times to his doctors, long before he made a claim to the Board.

[154] Therefore I accept that the worker did experience back pain after lifting a steel beam on an occasion long ago, likely in January 1989. However, I do not accept that he felt abdominal pain after the lifting accident or that he saw a doctor about his symptoms. There is no concurrent medical reporting of that incident. In my view, that incident was not the cause of the abdominal pain reported to the worker's doctor in March and May 1989. In March and May, the symptoms were different, had been ongoing for only two weeks, and the worker told his doctor that he did not know what had caused them. In my view, those symptoms were not continuous from the time of the lifting accident.

[155] I have analyzed how the law applies to these findings as follows.

(b) The Presumption Does Not Apply to the Issue of Proof of accident: The Course of Employment Issue

[156] The question of whether the worker suffered an accident at work is to be determined on the balance of probability, subject to the benefit of the doubt. The presumption does not apply to the course of employment issue because it is necessary to decide whether there was an accident in the course of employment before considering the application of the presumption.

[157] I accept the worker's testimony that he recalls back pain after lifting a steel beam, for the reasons given above. I find it likely this occurred in about January 1989. Therefore I find that there was an accident that occurred in the course of employment.

(c) The Application of the Presumption; The Benefit of the Doubt

[158] Based on my analysis, above, I have therefore adjudicated the appeal on the basis that the injuring process resulting from the lifting was an identifiable unintended chance event which occurred in January 1989. The presumption applies to the question of causation. The benefit of the doubt also applies. Based on any interpretation of these provisions, I find that the worker's symptoms at the time of this event were likely the result of the heavy lifting. It is well known that heavy lifting can cause back pain.

[159] However, I have found, above, that the only symptoms that the worker had in January 1989 were symptoms of back pain. That is what the co-worker recalled. In my view, if the worker had had abdominal pain at that time, he would have mentioned the lifting accident to his doctor in March and May 1989 when he complained about abdominal pain. The doctor's notes refer to the abdominal pain as having commenced only two weeks prior, in early March 1989, and as not associated with any identifiable incident. I prefer the contemporaneous documentary evidence. The worker's testimony was very unclear on dates.

[160] I have therefore next considered whether the back pain experienced in January 1989 was causally related to the abdominal pain that the worker felt in March and May 1989, and to the later low back symptoms that were first identified in October 1989.

(d) Was the Ongoing Back Condition Work-Related: The Presumption Does Not Apply to Symptoms that Arise Later in Time

[161] In my view, it is most likely that the lifting accident was not a significant contributing factor in the worker's later back symptoms.

[162] From the medical reporting, the worker did not complain to his doctor of back pain when he saw his doctor in March and May 1989. He complained of abdominal symptoms. The co-worker did not describe the worker as having any abdominal symptoms in January 1989 and there is no medical evidence to this effect.

[163] Given the different histories, I find it likely that the worker has developed, over time, an unreliable memory of how his symptoms arose. I find it likely that the low back pain that he felt after the lifting incident was transitory and was not a causative factor in his later symptoms. He did not seek medical attention for that back pain. There is no continuity of complaint between January 1989 and October 1989, when back symptoms were first diagnosed. The fact that the worker saw his family doctor in the intervening time period, but did not complain of low back pain, means that it is unlikely that he had any ongoing back symptoms attributable to the lifting accident. It is very common for back symptoms to be transitory, and resolve. The Tribunal's Medical Discussion Paper on *Back Pain* states [at p. 4]:

In common back strain, it is these ligaments and muscles that are stretched and become painful. It is not possible to determine precisely which ligament or muscle is affected. Most heal in a few days or at most a few weeks and are not likely to be a source of continuing pain.

[164] Mr. Sirois suggests that disc compression may result in groin pain and that these symptoms are all related. However, the worker's doctor diagnosed an abdominal injury in March 1989, not a back injury. The worker's later MRI identified disc compression at L5-S1. The medical reporting suggests that it would be "rare" for a disc injury at that level to result in groin pain.

[165] In any event, even if the abdominal pain was related to a low back condition, that pain did not start until March, and the worker did not relate it to the prior January lifting accident when he was asked about how the pain started at the time. Therefore the symptoms cannot be reliably related to the symptoms that the worker had after the lifting accident. While it is possible that all the symptoms were related to the underlying degenerative disc disease, the lack of continuity, and the change in the manifestation of the symptoms, suggests that the back pain after the lifting accident was unlikely to have played an ongoing causal role. Workers engaged in physical labour may experience transitory back pain. As explained in the Tribunal's Medical Discussion Paper on *Back Pain*, not all aches and pains are signs of permanent injury.

[166] In my view, the presumption does not apply to the question of whether symptoms or conditions that a worker experiences later in time are related to a prior injury. It is not presumed that once a worker has a work related injury all future medical conditions are related to that injury. The presumption applies to the question of the causal connection between the symptoms or conditions that arise in the course of employment and the work being done at the time.

(e) The Disablement Claim

[167] I also do not find any basis in the evidence to relate the worker's symptoms to the nature of his heavy work. It is true that the worker did heavy work, and that he has low back symptoms. However, those two facts, taken alone, are not sufficient for entitlement. There must be evidence to support a causal connection.

[168] That evidence does not exist in this case. Mr. Sirois refers me to articles that discuss musculoskeletal injuries in bricklayers. I do not need to consider how much weight to attribute to these articles, because this worker's current diagnosis is not of a musculoskeletal injury. Given my findings, above, the commencement of his current symptoms is not clearly associated with his carrying out any specific heavy work tasks. Further, his back symptoms were not sufficient for him to lose any time from work until 1998. They gradually worsened over the years. He has been diagnosed with degenerative disc disease and osteoarthritis not only in his lumbar spine, but also in his thoracic and cervical spines. Again, as discussed in Medical Discussion Paper on *Back Pain*, these conditions are often the result of normal aging changes, which provide an alternative explanation for his symptoms. The pattern of worsening symptoms over time is consistent with those diagnoses. I find it more likely that these significant non-compensable conditions are the reason for his symptoms than that his heavy work played any significant role.

DISPOSITION

[169] The appeal is denied.

[170] While the worker suffered a personal injury by accident to his back in January 1989, that condition resolved. Neither the January 1989 accident nor the nature of the worker's work made a significant contribution to his ongoing back condition.

Appeal dismissed.

Decision No. 182/09I

Panel: Lang (Vice-Chair), Tracey, Ferrari

Decision — February 19, 2009

Neutral Citation: 2009 ONWSIAT 439

Adjournment (additional Board decision) (offence under WSIA).

Hearing of appeal was adjourned pending resolution of a charge against the worker under the WSIA.

The worker appealed a decision of the Appeals Resolution Officer regarding a SEB and regarding his FEL award.

At the commencement of the hearing, it was noted that the worker had been charged with an offence under the *Workplace Safety and Insurance Act, 1997*, involving failure to report a material change in circumstances.

The hearing was adjourned to wait for resolution of the matter regarding the charge.

Ajournement (décision supplémentaire de la Commission) (infraction à la Loi de 1997).

L'audition de l'appel a été ajournée en attendant le règlement d'accusations d'infraction à la Loi de 1997 portées contre le travailleur.

Le travailleur a interjeté appel d'une décision du commissaire aux appels au sujet d'un emploi ou entreprise approprié (EEA) et de son indemnité pour perte économique future (PÉF).

Au début de l'audience, on a noté que le travailleur avait été accusé d'avoir enfreint la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* en négligeant de déclarer un changement important dans les circonstances.

L'audition a été ajournée en attendant le règlement de l'affaire relative aux accusations.

Tribunal Decisions Considered:

Decision No. 1544/06 (2006), 80 W.S.I.A.T.R. (online) refd to

Decision No. 2611/06I (October 30, 2008) [2008 ONWSIAT 2847] refd to

Decision No. 234/07 (April 17, 2007) [2007 ONWSIAT 1027] refd to

Other Decisions Considered:

Toronto (City) v. Canadian Union of Public Employees, Local 79 (2003), 232 D.L.R. (4th) 385 (S.C.C.) consd

Workplace Insurance Legislation Considered:

Workers' Compensation Act, R.S.O. 1990, c. W.11

s. 85(2)

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[DISPOSITION](#)

ADJOURNMENT of a hearing pending resolution of a charge against the worker under the *Workplace Safety and Insurance*.

February 19, 2009. THE TRIBUNAL: —

BEFORE: J.B. Lang, Vice-Chair
E. Tracey, Member Representative of Employers
M. Ferrari, Member Representatives of Workers

HEARING: January 27, 2009, at Toronto, Oral

DECISION(S) UNDER APPEAL: WSIB ARO decision dated January 17, 2008

APPEARANCES:

For the worker: J. Glasgow, Paralegal

For the employer: Did not participate

REASONS

(i) Introduction

[1] The worker appeals the decision of Mr. B.J. Martlin, an Appeals Resolution Officer (ARO), dated January 17, 2008. In that decision the ARO denied the worker's objections and found that the job category of Other Elemental Service Occupations (NOC 6668) was a suitable employment or business (SEB) and that the date of February 1, 2006 was the correct date for the initial determination (D1) of the worker's future economic loss (FEL) award.

[2] In appealing the ARO's decision, the representative for the worker submitted that the worker is claiming that as of January 31, 2000, she was competitively unemployable and therefore entitled to a 100% FEL award as of that date. He further submitted that the initial date of the FEL determination (D1) should be January 31, 2000 rather than February 1, 2006, the date set by the Board.

[3] The accident date for this appeal is December 3, 1997. Consequently the pre-1997 *Workers' Compensation Act*, R.S.O. 1990, c. W.11, applies to this appeal.

(ii) Preliminary Matters

[4] The worker's representative noted that his submissions to the Appeals Resolution Officer, dated January 8, 2008 were not included in the Case Record. These submissions are referred to in the ARO's decision of January 17, 2008. The Panel agreed to admit these submissions into evidence at the hearing.

(iii) Parallel Proceedings Before the Court

[5] At the commencement of the hearing, the Panel noted that a Board memo, dated September 29, 2008 had been added to the Case Record on December 29, 2008. This memo, which was addressed to the Board's Operations Department from the Appeals Branch, stated that "the worker has either been charged with an offence under the Workplace Safety and Insurance Act or there is sufficient evidence to suggest non compliance". The memo went on to state: "In light of the RSD [Regulatory Services Division] activity and the provision of new evidence the Appeals Branch will now review and reconsider past, current and future entitlements in this claim to ensure the worker's entitlements are consistent with legislation and policy".

[6] In response to questions from the Panel, the worker's representative informed the Panel that the worker had not been notified of any new decision having been made by the Appeals Branch. The worker's representative, however, advised the Panel that the worker had been charged with an offence under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A. The allegation involves not reporting a material change in circumstances with respect to benefit entitlement and to work allegedly performed by the worker. The worker has denied the allegation and is awaiting a trial date to be set.

[7] After considering this information, the Panel decided to adjourn the hearing until the matter of this charge is resolved. The Panel's reasons for reaching this decision are as follows.

[8] Where possible, courts and tribunals endeavour to avoid overlapping proceedings on the same issues. One of the central issues before this Panel is whether the worker was competitively unemployable from January 31, 2000 onwards. On the basis of the information received at the hearing, the Panel finds that this issue significantly overlaps with the issue that is before the criminal court. If we proceeded with the hearing, a decision in both legal proceedings could be made simultaneously without the Tribunal being informed of the court decision or *vice versa*. In order to avoid this possibility, the Panel has decided to exercise its discretion to adjourn the hearing until the matter that is before the court is resolved.

[9] The Panel recognizes that, at the present time, there is no outcome from the court proceedings and the worker has denied the allegations that have been made. However, the Panel also recognizes that the Supreme Court of Canada in *Toronto (City) v. Canadian Union of Public Employees, Local 79* (2003), 232 D.L.R. (4th) 385 (S.C.C.) has held that administrative tribunals are required to give full effect to criminal convictions. In *Decision No. 1544/06* (2006), 80 W.S.I.A.T.R. (online) and *Decision No. 234/07* (April 17, 2007) this Tribunal has found that this principle applies to convictions for offences under the *Workplace Safety and Insurance Act, 1997*.

[10] The Panel is of the view that the natural consequence of this principle is that in matters of a criminal nature, administrative tribunals should generally defer to the completion of the criminal proceedings. The Panel finds that this is an additional reason for it to exercise its discretion and adjourn the matter until the matter before the court is resolved.

(iv) Effect of Decisions of the Board's Regulatory Service Division

[11] In considering how to proceed with this appeal, the Panel also considered the effect that a decision of the Board's Regulatory Service Division (RSD) has on the jurisdiction of the Tribunal. The Panel did not have before it a decision of the Regulatory Services Division. However, the Board memo of September 29, 2008 implies that the Regulatory Services Division has made a decision that led to charges being laid under WSIA. The memo also gives notice that the Appeals Branch is reviewing and reconsidering "past, current and future entitlements" pertaining to the claim. This memo also refers to the "provision of new evidence" which does not appear to be included in the Case Record.

[12] Pursuant to section 85(2) of the pre-1997 Act, the Tribunal has jurisdiction to determine appeals from final decisions of the Board. In this appeal, the ARO's decision of January 18, 2008 is a final decision. The question which the Panel considered was whether a decision of the Regulatory Services Division – or a decision of the Appeals Branch – which alters the Board's final decision, has any effect on the Tribunal's jurisdiction over the original decision. There is also a concern about overlapping processes and potentially inconsistent decisions.

[13] The Panel notes that the Panel in *Decision No. 2611/06I* (October 30, 2008) was confronted with a similar situation. In that appeal, the Panel had before it a decision of an officer from the Regulatory Services Division which altered the worker's earnings basis on which his loss of earnings benefits were calculated. Loss of earnings benefits was an issue under appeal before the Panel. The RSD decision was made after the Panel had commenced hearing evidence and in a period when the hearing was adjourned while the Panel obtained additional medical evidence.

[14] After reviewing the chronology of events, the Panel in *Decision No. 2611/06I* was concerned that the RSD decision might affect the jurisdiction of the Tribunal. The Panel adjourned the proceedings and requested that the

Tribunal Counsel Office obtain information from the Board, including an explanation of how “the administrative review it conducted fits into its decisional process and how it sees its results as affecting the issue of the final decision of the Board”. The Tribunal Counsel Office was also asked to provide submissions.

[15] It does not appear that the Board has provided the requested explanation as of this date. The Panel is of the view that the Board’s explanation may be relevant to determining whether the ARO’s decision of January 17, 2008 is, indeed, a final decision of the Board. The final decision of this Tribunal flowing from *Decision No. 2611/01I* may also be relevant depending on subsequent developments at the Board. Since this Panel is not seized of the matter, we will leave consideration of these issues to the Panel assigned to the reconvened hearing.

DISPOSITION

[16] The hearing is adjourned without setting a date for a new hearing. The worker and her representative are instructed to advise the Tribunal when the matter before the court relating to charges under the *Workplace Safety and Insurance Act, 1997* is resolved. The worker’s appeal will be re-scheduled for a hearing upon receipt of such notice.

[17] The Panel is not seized.

Hearing adjourned.

Decision No. 123/09

Vice-Chair: Noble

Decision — February 27, 2009

Neutral Citation: 2009 ONWSIAT 491

Arising out of employment – Dizziness – Presumptions (entitlement).

Worker had entitlement for accident when she felt dizzy and fell at work.

The worker felt dizzy, fell to the floor and broke her wrist. The worker appealed a decision of the Appeals Resolution Officer denying entitlement for the accident. The appeal was allowed.

The Board found that the accident was caused by non-compensable dizziness. However, the Vice-Chair found that the worker had entitlement. The accident occurred in the course of employment. Thus, the presumption applied that the accident also arose out of employment. There were two theories advanced to establish that the accident did not arise out of employment. The first was that the worker had a significant medical condition that caused chronic dizziness. The second was that the worker was taking medication that caused dizziness. However, the evidence did not support either of these theories. The worker had once had a dizzy spell but there was no indication of chronic dizziness. The worker was taking medication but incidence of dizziness as a side effect of the medication was extremely low."

There was also some further support for the finding that the accident arose out of employment. There was indication that the worker grabbed a wheeled chair at the time of the fall, that gave way.

Du fait de l'emploi – Étourdissement – Présomptions (admissibilité).

La travailleuse avait droit à une indemnité pour un accident survenu quand elle était tombée au travail par suite d'un étourdissement.

La travailleuse était tombée au sol par suite d'un étourdissement et s'était cassé un poignet. La travailleuse a interjeté appel de la décision par laquelle le commissaire aux appels refusait de lui reconnaître le droit à une indemnité pour cet accident. Le Tribunal a accueilli l'appel.

La Commission avait conclu que l'accident avait été causé par un étourdissement non indemnisable. La vice-présidente a toutefois conclu que la travailleuse avait droit à une indemnité. Comme l'accident était survenu au cours de l'emploi, il était présumé être survenu du fait de l'emploi. Deux théories avaient été avancées pour établir que l'accident n'était pas survenu du fait de l'emploi. La première était que la travailleuse souffrait d'une importante affection occasionnant des étourdissements chroniques. La deuxième était que la travailleuse prenait une médication qui occasionnait des étourdissements. La preuve n'appuyait ni l'une ni l'autre de ces théories. La travailleuse avait déjà eu un étourdissement mais rien n'indiquait qu'elle souffrait d'étourdissements chroniques. La travailleuse prenait une médication mais l'incidence des étourdissements comme effet secondaire était extrêmement faible.

Il y avait aussi des éléments de preuve à l'appui de la constatation que l'accident était survenu du fait de l'emploi puisque la travailleuse avait saisi un fauteuil roulant au moment de sa chute et qu'il avait cédé.

Tribunal Decisions Considered:

Decision No. 413/07 (July 4, 2007) [2007 ONWSIAT 1706] apld

Workplace Insurance Legislation Considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A

s. 2(1) “accident”

s. 13

s. 13(1)

s. 13(2)

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 15-02-01 (October 12, 2004)

Document No. 15-02-02 (October 12, 2004)

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

February 27, 2009. THE TRIBUNAL: —

BEFORE: J. Noble, Vice-Chair

HEARING: January 15, 2009, at Ottawa, Oral

DECISION(S) UNDER APPEAL: WSIB ARO decision dated December 18, 2007

APPEARANCES:

For the worker: Mr. R. MacCrimmon, Lawyer

For the employer: Not participating

REASONS

(i) Issues

[1] The issue to be decided in this appeal is whether the worker should have initial entitlement for an injury which the worker claims arose out of and in the course of her employment on February 11, 2007.

(ii) Background

[2] The worker was employed as a housekeeper in a hotel. The worker claimed that on February 11, 2007 she was attempting to dust a mirror on the wall at work when she had a dizzy spell and fell to the floor. The worker claimed that as a result of the fall she sustained a fracture of a bone in her right wrist.

[3] The ARO decision under appeal dated December 18, 2007 concluded that the worker did not have initial entitlement for the injury on the grounds that the injury to the right wrist did not arise out of the worker's employment. The ARO stated that the worker had experienced dizzy spells previously. The ARO concluded that the evidence did not establish that the worker's work duties had anything to do with the worker's dizzy spell on February 11, 2007. The ARO concluded that the injury to the right wrist did not arise out of the employment since the worker had a dizzy spell for reasons unrelated to any of her work duties, or her work situation. The ARO decision denied initial entitlement.

[4] The worker appeals this decision.

(iii) Medical Evidence

[5] In a Hospital Emergency Report dated February 11, 2007, a physician (name illegible) stated:

Pt was dizzy, went to hold on to chair for support. Chair moved and pt used right hand to break fall. Pt does not usually get dizzy. Pulses present on R arm. Obvious deformity. Pt had dizzy spells 2 years ago. Had carotid ... [illegible].

[6] Another hospital report dated February 11, 2007 stated that the worker had chronic dizzy spells and vertigo, and that she lost her balance and fell. The diagnosis was colles fracture, right wrist.

[7] In a Health Professional's Report to the Board (Form 8) dated February 22, 2007, Dr. D. Gardiner, family physician, stated that the worker had a fall that resulted in a right wrist injury on February 11, 2007. Dr. Gardiner stated that the worker's diagnosis was "Colles fracture R wrist" and he stated that a cast would most likely be required for six weeks.

(iv) Other Information in the Case Record

[8] In a Worker's Report of Injury (Form 6) to the Board, the worker stated that on February 11, 2007 at 9:30 a.m. she sustained a right wrist injury. The Form 6 stated:

While attempting to dust a mirror, on the wall, with a soft cloth, I had a dizzy spell and fell to the floor. I tried to brace myself on an office chair but fell to the floor instead.

(v) Law and Policy

[9] Section 13 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) is applicable to this appeal and provides as follows:

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.

(3) Except as provided in sections 18 to 20, the worker is not entitled to benefits under the insurance plan if the accident occurs while the worker is employed outside of Ontario.

(4) Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.

(5) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.

[10] Pursuant to section 126 of WSIA, the Board advised that the following Policy Packages are applicable to this appeal: # 1 (Revision #7) – Initial Entitlement; # 107 – Aggravation Basis/SIEF; and #300 – Decision Making/Benefit of Doubt/Merits and Justice.

[11] Included in these Policy Packages is Board *Operational Policy Manual* (OPM) Document No. 15-02-02 – Accident in the Course of Employment – which provides in part as follows:

POLICY

A personal injury by accident occurs in the course of employment if the surrounding circumstances relating to **place, time,** and **activity** indicate that the accident was work-related.

GUIDELINES

In determining whether a personal injury by accident occurred in the course of employment, the decision-maker applies the criteria of **place, time,** and **activity** in the following way:

Place

If a worker has a fixed workplace, a personal injury by accident occurring on the premises of the workplace generally will have occurred in the course of employment. A personal injury by accident occurring off those premises generally will not have occurred in the course of employment.

If a worker with a fixed workplace was injured while absent from the workplace on behalf of the employer or if a worker is normally expected to work away from a fixed workplace, a personal injury by accident generally will have occurred in the course of employment if it occurred in a place where the worker might reasonably have been expected to be while engaged in work-related activities.

Time

If a worker has fixed working hours, a personal injury by accident generally will have occurred in the course of employment if it occurred during those hours or during a reasonable period before starting or after finishing work.

If a worker does not have fixed working hours or if the accident occurred outside the worker's fixed working hours, the criteria of place and activity are applied to determine whether the personal injury by accident occurred in the course of employment.

Activity

If a personal injury by accident occurred while the worker was engaged in the performance of a work-related duty or in an activity reasonably incidental to (related to) the employment, the personal injury by accident generally will have occurred in the course of employment.

If a worker was engaged in an activity to satisfy a personal need, the worker may have been engaged in an activity that was incidental to the employment. Similarly, engaging in a brief interlude of personal activity does not always mean that the worker was not in the course of employment. In determining whether a personal activity occurred in the course of employment, the decision-maker should consider factors such as

- the duration of the activity
- the nature of the activity, and
- the extent to which it deviated from the worker's regular employment activities.

In determining whether an activity was incidental to the employment, the decision-maker should take into consideration

- the nature of the work
- the nature of the work environment, and
- the customs and practices of the particular workplace....

(vi) Conclusions

[12] On the issue of whether the worker should have initial entitlement for an injury which the worker claims arose out of and in the course of her employment on February 11, 2007, I find for the worker.

[13] I find that the evidence indicates that the worker felt dizzy and fell, injuring her right wrist, on February 11,

2007. I find that the weight of the evidence indicates that the worker's accident occurred in the course of her employment, and that the worker's accident arose out of her employment. I find therefore that entitlement should be granted under the Act.

[14] I observe at the outset that section 13(1) and (2) of the WSIA provides as follows:

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.

[15] We see that section 13(1) provides that a worker who sustains a personal injury by accident arising out of and in the course of her employment is entitled to benefits. Section 13(2) provides that 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, and 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.

[16] The definition of accident in section 2(1) of the WSIA includes a "chance event occasioned by a physical or natural cause". Board OPM Document No. 15-02-01 defines a chance event as "an identifiable unintended event which causes an injury."

[17] The worker's representative submits that the worker's accident did occur in the course of her employment with the employer. I accept this submission for the following reasons. I find that the evidence indicates that while performing her duties of cleaning a hotel room for the employer on February 11, 2007, the worker fell and as a result of her fall, she fractured her right wrist. I observe in this regard that the worker was treated in hospital on February 11, 2007 for a right wrist injury and I note that the hospital records from February 11, 2007 indicate that the worker suffered a fall on that date from a dizzy spell. I find that the weight of the evidence before me, including the Worker's Report of Injury to the Board (Form 6), the Employer's Report of Injury to the Board (Form 7), the worker's testimony, and the hospital reports, indicate that the worker's injury occurred while she was cleaning a room, and more particularly while she was dusting a mirror within a room in the employer's hotel. I also note that there is no evidence before me to the contrary in this respect.

[18] I observe that Document No. 15-02-02 provides that a personal injury by accident occurs in the course of employment if the surrounding circumstances relating to place, time, and activity indicate that the accident was work-related. Applying the elements of this policy to the facts before me in this appeal, I note that the evidence establishes that the *place* in which the accident occurred was the employer's workplace. I note that the *time* at which the accident occurred was during the worker's working hours. And finally, I note that the *activity* which the worker was engaged in was the cleaning of a hotel room – an activity which was a central and core aspect of her duties as a hotel cleaner. I find, based on the foregoing, that the worker's accident occurred in the course of her employment.

[19] Having determined that the worker's accident occurred in the course of her employment, I must consider whether the worker's accident arose out of her employment. I observe that the ARO decision under appeal dated December 18, 2007, denied the worker's request for initial entitlement on the grounds that the right wrist injury did not arise out of her employment. The ARO concluded, rather, that the worker's injury arose out of a non-compensable dizzy spell.

[20] The worker testified at the hearing before me that she did not feel dizzy at the time of her fall on February 11, 2007 while cleaning in the hotel room. I find, based on the weight of the evidence before me, that I am unable to accept this testimony. I find that the weight of the evidence indicates that the worker was likely dizzy at the time of her fall on February 11, 2007. I make this finding for the following reasons.

[21] First, I note that in the emergency nursing record contained in the Case Record dated February 11, 2007, the triage nurse stated as follows:

[Patient] was dizzy, went to hold onto chair for support. Chair moved and [patient] used right hand to break fall. [Patient] does not usually get dizzy.

I find that this notation in the emergency nursing report indicates that the worker likely advised the triage nurse that she was dizzy at the time of her fall.

[22] Secondly, I note that the Case Record contains an emergency hospital report from a medical resident, Dr. K. Armstrong, dated February 11, 2007. In this emergency hospital report, Dr. Armstrong noted that the worker had a fall from a dizzy spell. I find that this notation indicates that the worker likely advised Dr. Armstrong on February 11, 2007 that she fell at work because of a dizzy spell.

[23] Thirdly, I note that the worker signed a Worker's Report of Injury to the Board dated February 20, 2007. The worker testified that this Worker's Report of Injury was completed by her sister-in-law and that she (the worker) only signed the document. I accept the worker's testimony in this regard since I note that the handwriting in the body of the report is significantly different from the worker's signature. The Worker's Report of Injury to the Board states that the worker had a dizzy spell and fell to the floor. The worker testified at the hearing that she did not advise her sister-in-law that she had a dizzy spell at the time that her sister-in-law assisted her in completing this form. I cannot accept his testimony. I find that it is unlikely that the worker's sister-in-law would have indicated on this form that the worker was dizzy if the worker had not advised her sister-in-law that she was dizzy. I also find that given that the worker advised the healthcare professionals at the hospital that she was dizzy at the time of her fall, on February 11, 2007, it is also likely that the worker advised her sister-in-law that she was dizzy at the time of her fall, when the sister-in-law completed the Worker's Report of Injury to the Board on behalf of the worker.

[24] I have found in this decision that the worker's accident did occur in the course of her employment for the employer. I have also found that the worker was dizzy at the time that she fell and injured her right wrist. I must now address the question of whether the worker's accident arose out of her employment with the employer, notwithstanding my finding that the worker was dizzy at the time of the accident.

[25] I find that the evidence indicates that the worker's accident did arise out of her employment with the employer for the following reasons.

[26] I find that although the worker may have had a dizzy spell just prior to, or at the time of her fall on February 11, 2007, this is not sufficient to establish that the accident did not arise out of the employment. It is important to consider, at this point in the analysis, the application of section 13, including the section 13 presumption, to the facts in this appeal.

[27] I observe that the question of the application of section 13, including the section 13 presumption, has been considered in other Tribunal decisions. In *Decision No. 413/07* (July 4, 2007), the Vice-Chair considered a case in which a worker sustained a skull fracture and eye laceration when she fainted and fell at work. The Vice-Chair granted entitlement for the skull fracture and eye laceration. The Vice-Chair stated as follows [at paras. 48-55]:

Did the worker's accident occur in the course of her employment for the employer? There is no dispute that the worker fainted and fell, striking her head, at work on December 21, 2001 while en route from her classroom to the photocopy room to photocopy material to use with her students. I find that the worker's accident meets the criteria of place, time and activity described in Board policy #03-01-02. The worker was on the employer's premises during her normal working hours and was engaged in an activity reasonably incidental to her employment at the time of the accident.

Did the worker's accident arise out of her employment for the employer? Subsection 13(2) provides that, if an accident occurs in the course of employment, as it did in this case, the accident is presumed to have arisen out of employment *unless the contrary is shown*. The effect of the presumption is to shift the onus of proof. Thus, the worker is not required to show that her accident arose out of her employment, but, rather, the evidence must persuasively demonstrate that the accident *did not* arise out of the employment.

The employer's representative submitted that the worker fainted and fell due to a non-compensable medical condition. In support of this submission, the employer's representative refers to the worker wearing a Holter Monitor before 2001, the opinion of Dr. Cantlie that the "likely scenario" was that the worker had an "initial syncope which may or may not be of cardiogenic origin (cardio tests and final opinion still pending)," the comment by Dr. Hughes in November 2004 the worker "had a difficult time with syncopal episodes which at one time prompted a diagnosis of prolonged QT," and the

opinion of Dr. Roussev that the worker “fell because of a medical condition, namely a suspected arrhythmia.”

My review of the evidence indicates that, although the worker underwent assessments and investigations, it is not clear what caused the worker to faint on December 21, 2001. The worker was a “well-trained athlete and enthusiastic runner” who had participated in marathons. She did not have pre-existing heart disease, angina, heart attack, hypertension or diabetes, and had not fainted or had a seizure in the past. The worker told Dr. Lan in January 2002 that the results of the Holter Monitor she wore in the past were normal. A CAT scan and EEG taken on the day of the accident were reported by Dr. Lan on January 3, 2002 as “normal” and “perfectly normal, with no focal asymmetry or seizure activity” respectively. Dr. Hughes, who saw the worker on several occasions between January 2001 and November 2004, commented on January 21, 2002 that the etiology of the worker’s “very serious syncope episode on December 21, 2001” was “not clear and apparently [did] not represent identifiable seizure focus.” Dr. Hughes reviewed the results of an electrocardiogram, echo-doppler, Holter Monitor and stress test administered in January 2002, and commented on January 30, 2002 that “tests have not really demonstrated anything significant.” Dr. Hughes commented on February 27, 2002 that “there was some discussion about long QT” which he did not think she had based on any ECG he had seen. Dr. Roussev stated that the worker fell because of a medical condition, “namely a suspected arrhythmia according to the cardiology results,” but also stated that she was “investigated extensively for that without conclusive results.”

With respect to the comment by Dr. Hughes in November 2004 referred to by the employer’s representative, Dr. Hughes noted “syncopal episodes” because the worker suffered an episode in December 2001 and September 2003 and that this had “at one time prompted a *tentative* diagnosis of prolonged QT” (emphasis added).

There was a suggestion that the worker might have suffered dizziness on the day of the accident following a “heavy work out” the previous day, but there is no indication that the worker had experienced this in the past following similar work outs.

The worker’s representative submitted that the worker’s dizziness was caused by her bending over quickly to retrieve a book, straightening up quickly and hurrying to the door of her classroom and down the hall towards the photocopier room.

In my view, the non-work-related theories are not sufficient to rebut the statutory presumption. I am also satisfied that the work-related theory advanced by the worker’s representative is plausible.

[28] I concur with, and adopt, the reasoning set out in *Decision No. 413/07*, and I note that the facts in that decision were rather similar to the facts now before me. I now turn back to an analysis of the facts before me in the instant appeal.

[29] We have seen that *Decision No. 413/07* provides that if an accident occurs in the course of employment, as it did in the case before me, the accident is presumed to have arisen out of employment unless the contrary is shown. *Decision No. 413/07* provides that the effect of the section 13 presumption is to shift the onus of proof such that the worker is not required to show that her accident arose out of her employment but rather, the evidence must persuasively demonstrate that the accident *did not* arise out of the employment.

[30] I have considered the two theories that have been advanced in this case to establish that the worker’s accident did not arise out of her employment, and in my view these theories are not persuasive.

[31] First, there is the theory that the worker had a significant medical condition that caused chronic dizziness.

[32] I find on the facts before me in this appeal, that the evidence does not support a finding that the worker suffered from a condition of chronic dizziness that would have explained her fall in the workplace such that the dizziness could be considered to be a non-compensable chronic condition which would be the significant contributing factor to the worker’s fall. The evidence before me indicates that the worker spoke to her doctor on one occasion about a dizziness episode while she was hanging curtains approximately two years prior to the accident of February 2007. I am not prepared to accept based on this evidence that the theory that the worker’s dizziness caused the fall is sufficient to rebut the statutory presumption. The worker’s representative submitted that the worker worked for the accident employer for 23 years prior to this accident, and that there were no previous problems in the workplace with dizziness. I find that this submission is persuasive. I do not find that the evidence indicates that the worker had a pre-existing condition that manifested as chronic dizziness or falls. I find that there is a lack of clear or persuasive evidence to this effect. I am aware that there is a hospital report dated February 11, 2000 that stated that the worker had chronic dizzy spells. The worker testified that she had once seen her doctor with respect to a dizzy spell that occurred two years before the February 2007 accident. I accept the worker’s testimony in this regard, and I note that the worker’s testimony is supported by the emergency nursing

record contained in the Case Record dated February 11, 2007, in which the triage nurse stated that the patient “does not usually get dizzy.”

[33] In summary, I find that the evidence does not support a finding that the worker had a pre-existing chronic dizziness condition that would have caused her fall.

[34] Secondly, there is the theory that that the worker was taking medication that would have caused the dizziness and her subsequent fall.

[35] I note that the Board indicated that there was a concern that the worker’s dizziness was caused in whole or in part by the medication Celebrex since the Board was of the view that a side effect of the medication Celebrex was dizziness. I am not persuaded that this theory is sufficient to rebut the presumption in section 13 for the following reasons.

[36] First, I find that there is insufficient evidence before me to indicate that dizziness is a serious side effect of the medication Celebrex. I note in this regard that the worker’s representative submitted evidence in the form of a report from the pharmaceutical company that manufactures the drug Celebrex. According to this report, the incidence of the side effect of dizziness is extremely low for patients taking Celebrex. I am prepared to accept this evidence, in light of the fact that there is no compelling scientific evidence before me to the contrary.

[37] Secondly, I note that the worker testified that on the day of the accident, she actually did not take any Celebrex. I am prepared to accept the worker testimony in this regard, since there is no clear evidence to the contrary.

[38] Finally, I find that there is further support in the evidence for my finding that the worker’s accident arose out of her employment. In this regard I note that the worker testified that a chair on wheels was partially responsible for her fall. The worker testified at the hearing that she stepped on or grabbed a chair with wheels and it gave way, at the time of her fall. I find that there is support for the worker’s version of the events in the documents contained in the Case Record. I note in this regard that the worker’s Report of Injury to the Board dated February 20, 2007 stated that the worker tried to brace herself on a chair but fell to the floor instead. I further note that in the emergency nursing report completed by the triage nurse on February 11, 2007, the triage nurse stated that the worker went to hold on to a chair for support but the chair moved and the patient used her right hand to break her fall. I find that this evidence indicates that the accident history involves a chair on wheels and that this chair was, according to the worker’s testimony, the desk chair located in the hotel room that the worker was cleaning. The worker testified that the mirror that she was dusting was the mirror in front of the desk and she attempted to steady herself by holding on to the desk chair on wheels. I find that this account of the accident history is plausible, is supported by documents in the Case Record, and I accept the worker’s testimony in this regard. I find that the evidence indicates that the presence of the wheeled chair contributed to the worker’s fall, and I find that the worker was engaged in activities incidental to her employment when she was dusting the desk mirror and when she attempted to steady herself by holding on to the desk chair on wheels that was located in the worker’s place of employment. I find that the evidence, when considered together, indicates that the worker’s injury arose out of and in the course of her employment with the employer.

[39] Based on all of the foregoing, the appeal is allowed and the worker has initial entitlement for the workplace accident that occurred on February 11, 2007.

DISPOSITION

[40] The appeal is allowed.

[41] The worker has initial entitlement for the workplace accident that occurred on February 11, 2007.

Appeal allowed.

Decision No. 17/04

Vice-Chair: Keil

Decision — January 12, 2009

Neutral Citation: 2009 ONWSIAT 73

Benefits (deductions) – Future economic loss (review) (material change in circumstances) – Supplements, FEL.

Payments made by the employer to the worker pursuant to an arbitration could be deducted from FEL supplementary benefits but not from FEL benefits.

In *Decision No. 17/041*, the Vice-Chair found that the worker had entitlement for a neck condition but not for chronic pain and no permanent entitlement for psychotraumatic disability. The worker was entitled to some temporary benefits and a FEL sustainability award at D1 in January 1998 and R1 in January 2000.

In this decision, the Vice-Chair dealt with the remaining issues of material change in circumstances in May 2002 and the worker's final FEL award in January 2003. The appeal was allowed in part.

The employer sponsored the worker for a job search, but terminated the worker's employment in May 2002 when the worker was unable to find other employment. An arbitrator found fault with both parties in that the worker had not co-operated and that the employer had not fulfilled its duty to accommodate. The arbitrator awarded moneys to reflect the worker's salary from when her employment was terminated in May 2002 until the date of the arbitration award in August 2003.

Even though the worker bore some responsibility for the events that led to termination of her employment in May 2002, the termination was a material change in circumstances. As result of amendments to the pre-1997 *Workers' Compensation Act* by the *Workplace Safety and Insurance Act, 1997*, payments could be reviewed at times other than the specified FEL reviews. However, there was no specification as to the type of payments that should then flow.

The worker submitted that she should be entitled to FEL supplementary benefits under s. 43(9) of the pre-1997 Act from May 2002 until R2 in January 2003, as she was involved in self-directed vocational rehabilitation activity. The Vice-Chair accepted that it would be appropriate to consider s. 43(9) benefits during this period.

Section 45(1) of the pre-1997 Act provides for having regard to any payment to the worker by the worker's employer in respect of the worker's accident. Board *Operational Policy Manual*, Document No. 18-01-11, also provides that the Board can deduct payments by the employer when providing FEL supplements. In this case, the arbitrator awarded payments equivalent to wages from May 2002 to August 2003. This constituted payments by the employer in respect of the worker's accident.

The Vice-Chair concluded that there was a material change in circumstances in May 2002, that the supplementary benefits under s. 43(9) would generally have been available but that the worker was not entitled to any additional benefits because she already received payments from the employer as a result of the arbitration.

The situation was different regarding the R2 FEL award in January 2003. The Board policy states that FEL benefits are exempt from deductions in respect of payments made by the employer. This will result in a period of overcompensation until the arbitrator's award runs out but, if the payments were deducted, there would be a

much longer period of undercompensation until FEL benefits stopped at age 65 in 2024.

The worker was entitled to an R2 FEL award based on deemed earnings without deduction of the payments pursuant to the arbitration award.

Indemnités (déductions) – Perte économique future (révision) (changement important dans la situation) – Suppléments, PÉF.

Les paiements que l'employeur faisait à la travailleuse par suite d'une décision arbitrale pouvaient être déduits du supplément pour PÉF mais non de l'indemnité pour PÉF.

Dans la *décision n° 17/041*, la vice-présidente a conclu que la travailleuse avait droit à une indemnité pour des problèmes de cou. Elle a aussi conclu qu'elle n'avait droit ni à une indemnité pour douleur chronique ni à une indemnité permanente pour invalidité psychotraumatique. La travailleuse avait droit à certaines prestations temporaires et à une indemnité de maintien pour perte économique future (PÉF) au moment de la détermination initiale (D1) en janvier 1998 et au moment du premier réexamen (R1) en janvier 2000.

Dans cette décision, la vice-présidente a réglé les questions restantes : changement important dans les circonstances en mai 2002; droit à une indemnité pour PÉF définitive en janvier 2003. Le Tribunal a accueilli l'appel en partie.

L'employeur avait financé une recherche d'emploi pour la travailleuse; cependant, il l'avait licenciée en mai 2002 quand elle avait été incapable d'en trouver un. Un arbitre a estimé que les deux parties étaient en faute : la travailleuse n'avait pas collaboré et l'employeur n'avait pas tenu compte des précautions imposées comme il était tenu de le faire. L'arbitre a enjoint à l'employeur de verser des sommes équivalents au salaire de la travailleuse du moment de son licenciement en mai 2002 jusqu'à la date de la décision arbitrale d'août 2003.

Même si la travailleuse était jusqu'à un certain point responsable des événements ayant mené à son licenciement en mai 2002, le licenciement constituait un changement important dans les circonstances. Par suite de modifications apportées à la *Loi sur les accidents du travail* d'avant 1997 (Loi d'avant 1997), les versements pouvaient être réexaminés à des moments autres qu'à ceux prévus pour les réexamens de l'indemnité pour PÉF mais rien ne stipulait le type de versements devant s'ensuivre.

La travailleuse soutenait qu'elle avait droit à un supplément pour PÉF aux termes du paragraphe 43 (9) de la Loi d'avant 1997 de mai 2002 jusqu'au deuxième réexamen (R2) en janvier 2003 puisqu'elle participait à une activité autonome de réadaptation professionnelle. La vice-présidente a estimé qu'il était approprié d'envisager un supplément aux termes du paragraphe 43 (9) pour cette période.

Le paragraphe 45 (1) de la Loi d'avant 1997 prévoit de tenir compte de tout versement fait au travailleur par l'employeur à l'égard de l'accident du travailleur. Le document n° 18-01-11 du *Manuel des politiques opérationnelles* prévoit aussi que la Commission peut déduire les paiements effectués par l'employeur quand elle calcule le supplément pour PÉF. En l'espèce, l'arbitre avait alloué des versements équivalents au salaire de mai 2002 à août 2003. Cela constituait des versements faits par l'employeur à l'égard de l'accident de la travailleuse.

La vice-présidente a conclu qu'il y avait eu un changement important dans les circonstances en mai 2002, qu'un supplément aux termes du paragraphe 43 (9) aurait normalement été possible mais que la travailleuse n'avait droit à aucune indemnité supplémentaire parce qu'elle recevait déjà des paiements de l'employeur par suite de la décision arbitrale.

La situation était différente en ce qui concerne l'indemnité pour PÉF au moment du R2 de janvier 2003. Aux termes de la politique de la Commission, l'indemnité pour PÉF ne fait l'objet d'aucune déduction pour les versements faits par l'employeur. Il y aura paiement excédentaire jusqu'au terme des versements alloués dans la décision arbitrale mais la déduction des versements aurait entraîné une période beaucoup plus longue d'indemnisation insuffisante jusqu'à l'arrêt de l'indemnité pour PÉF au 65^e anniversaire de naissance de la travailleuse en 2024.

L'indemnité pour PÉF au moment du R2 devait être calculée en fonction de gains réputés sans déduction des paiements faits aux termes de la décision arbitrale.

Tribunal Decisions Considered:

Decision No. 498/01R (2002), 61 W.S.I.A.T.R. 132 refd to
Decision No. 1865/02 (January 20, 2003) [2003 ONWSIAT 104] refd to
Decision No. 2455/06 (2007), 81 W.S.I.A.T.R. (online) refd to

Workplace Insurance Legislation Considered:

Workers' Compensation Act, R.S.O. 1990, c. W.11
s. 43(9)
s. 43(13)
s. 45(1)
Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A
s. 44
s. 107
s. 107(4)

Board Directives and Guidelines Considered:

Operational Policy Manual
Document No. 11-01-06 (May 24, 2002)
Document No. 18-01-11 (October 12, 2004)
Document No. 18-04-14 (June 15, 1999) (since revised)

Cross-References:

Decision No. 17/04I (April 30, 2008) [2008 ONWSIAT 1183]

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DETERMINATION of entitlement to benefits after a material change in circumstances.

January 12, 2009. THE TRIBUNAL: —

BEFORE: M. Keil, Vice-Chair

HEARING: August 24, 2006, and May 10, 2007, at Toronto , Oral
Post-hearing activity completed on September 4, 2008

DECISION(S) UNDER APPEAL: WSIB ARO decision dated June 2, 2002, and a later one dated February 4, 2005

APPEARANCES:

For the worker: D. Covelli, Consultant

For the employer: S. Regenbogen, Lawyer

REASONS

(i) Introduction

[1] Originally, I was to determine whether the worker has entitlement: to temporary total disability benefits from January 17, 2000, until October 30, 2000; to chronic pain disability or psychotraumatic disability, for a neck injury; and, for a future economic loss (FEL) award and labour market re-entry (LMR) services.

[2] In *Decision No. 17/04I* (April 30, 2008), I granted the worker's appeal in part. I found the worker had entitlement for her neck condition and to a NEL assessment. Any award was to be retroactive to the date of the original NEL award for her shoulders and wrists. I found the worker had no entitlement for chronic pain disability and no permanent entitlement for psychotraumatic disability. She was entitled to full compensation benefits (less any other benefits received) for the period from April 22 until August 15, 2001, for a depression that then resolved. The worker is entitled to a sustainability FEL award as of January 1998 and as of January 2000. There was no entitlement for additional benefits from January to October 2000 to reflect a material change in circumstances.

[3] This left me with two remaining issues as set out in the interim decision [at paras. 53-55]:

This brings me to the period from the time the worker was terminated in May of 2002 and ongoing. The representatives did not make submissions on FEL benefits as amended by the current Act. That is, Mr. Covelli suggested that early 2003 would have been the final FEL determination date and Ms. Regenbogen did not disagree. However, it appears to me that the worker's termination would arguably have constituted a material change in circumstances. I also note that neither representative made submissions on the effect, if any, of the arbitrator's 2006 award: that the worker receive monies to reflect her salary from the time of her May 2002 termination until the arbitration award date of August 2003, as well as 21 months' severance (one month for every year of service). Neither of the representatives made submissions on how or if these monies should be considered when it came to determining the worker's final FEL award.

The representatives may wish to make submissions on whether the fact the worker was terminated suggests suitable, modified work was not available and benefits would be in order or, whether the opportunities given the worker during the preceding period would be sufficient to suggest that there was no future loss of income resulting from the injury.

Also, given the intertwining of the pre-1997 Act and the current Act as far as FEL benefits are concerned, the last date for any review of the worker's entitlement to FEL benefits would be, given, my earlier findings, January of 2003. I would note that the representatives did not make specific submissions on what kind of FEL benefits, if any, should be awarded as of that date. Accordingly, before reaching a final decision on this point and on LMR services, I find it appropriate to give the parties a final opportunity to make submissions on the following three issues:

- Whether there was a material change in circumstances in May of 2002 such as would warrant a change to the worker's January 2000 D1 sustainability award. [***This is an error in the interim decision and should read "R1 sustainability award" as the D1 ran from 1998 to 2000***]
- What the worker's final FEL award as of January 2003 should be. The parties may wish to address the issue of lack of accommodation by the employer as ruled upon by the arbitrator and the effect, if any, on my decision. The representatives may also wish to make submissions on the effect of the worker's actual earnings were as of January 2003 (mindful of her testimony as to her child care work).
- What effect any of the above would have on the issue of LMR services. The parties may also wish to address whether LMR services can be offered past the final FEL date and what the authority for it would be.

The submissions on the three points are to be made mindful of my finding that the worker has entitlement for her neck condition and a NEL award retroactive to the one already given for her shoulders and wrists. The worker does not have entitlement for chronic pain disability or for psychotraumatic disability (on a permanent basis).

[4] I then adjourned the issues of a material change in circumstances as of May 2002, the final FEL review of January 2003 and, the issue of LMR services pending submissions from the representatives.

[5] These are the issues now before me for a final decision.

(ii) Relevant Law and Policy

[6] As noted, this appeal falls under the pre-1997 *Workers' Compensation Act*, R.S.O. 1990, c. W.11. Prior to

1998, section 43(13) of that legislation required the Board to determine a worker's FEL entitlement at the three points in time: an initial determination (D1), a 24-month review (R1) and a 60-month review (R2). However, pursuant to the combined effect of sections 44 and 107 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, after January 1, 1998 the Board "may" review a FEL benefit "every year or if a material change in circumstances occurs."

[7] Board *Operational Policy Manual* No. 18-04-14 on reviewing FEL benefits confirms that the FEL may be reviewed for material change in circumstances, and adds that it may also be reviewed "if FEL benefits are paid for an extended period without a material change review".

[8] Document No. 11-01-06 defines a material change in circumstances as "any change that affects a person's entitlement to benefits and services under the Act."

[9] As a result of the changes to the FEL review provisions, the issue of a worker's ongoing FEL benefit after January 1, 1998 can no longer be seen as related to fixed periods of time. Tribunal decisions interpreting the post-January 1, 1998 FEL review provisions have generally found that, on such appeals, the issue is now most appropriately characterized as entitlement to ongoing FEL benefits, and the Tribunal has jurisdiction over that issue, subject to the usual appropriate issue agenda considerations (see, e.g., *Decision No. 1865/02* (January 30, 2003); *Decision No. 498/01R* (2002), 61 W.S.I.A.T.R. 132).

[10] Board *Operational Policy Manual* Document No. 18-04-14, entitled "Reviewing FEL Benefits", states the following:

Every year, or if a material change in circumstances occurs, the WSIB may review payments for future economic loss (FEL), and may confirm, vary or discontinue them.

The WSIB cannot review the payments more than 60 months after the date the FEL benefit is first determined by the WSIB unless, before the 60-month period expires, the worker failed to notify the WSIB of a material change or engage in fraud or misrepresentation in connection with the worker's claim for benefits.

[11] In discussing a material change in earnings Board decision-makers are directed to compare the recently reported net average earnings (NAE) to the NAE being used to pay the FEL benefits. As a guide a significant material change is usually 5% or greater. The policy goes on to stipulate that the WSIB only increases a FEL benefit if a worker suffers a significant reduction in earnings due to the work-related injury, such as a reduction due to:

- a recurrence (see 15-02-03)
- a deterioration in the impairment (see 18-05-10), or
- a job change related to the injury.

[12] This policy applies to all FEL decisions made on or after January 1, 1998.

[13] Originally, sections 44 and 107 of the *Workplace Safety and Insurance Act, 1997*, did not allow for a review beyond the above specified 60 month period. Subsequent amendments in late 2002 allowed for exceptions as follows:

44(1) Every year or if a material change in circumstances occurs, the Board may review payments to a worker for loss of earnings and may confirm, vary or discontinue the payments.

(2) Subject to subsection (2.1), the Board shall not review the payments more than 72 months after the date of the worker's injury.

(2.1) The Board may review the payments more than 72 months after the date of the worker's injury if,

(a) before the 72-month period expires, the worker fails to notify the Board of a material change in circumstances or engages in fraud or misrepresentation in connection with his or her claim for benefits under the insurance plan;

(b) the worker was provided with a labour market re-entry plan and the plan is not completed when the 72-month period

expires; or

(c) the worker suffers a significant deterioration in his or her condition that results in a redetermination of the degree of the permanent impairment under section 47.

(2.2) If clause (2.1)(a) applies, the Board may review the payments at any time.

(2.3) If clause (2.1)(b) applies, the Board may review the payments,

(a) within the 30 days after the date on which the plan is completed; and

(b) at any time, if the worker, at any time on or before the day that is 30 days after the date on which the plan is completed, fails to notify the Board of a material change in circumstances, or engages in fraud or misrepresentation in connection with his or her claim for benefits under the insurance plan.

(2.4) If clause (2.1)(c) applies, the Board may review the payments,

(a) within the 24 months after the date on which it redetermines the degree of permanent impairment; and

(b) at any time, if the worker, at any time on or before the day on which the Board reviews the payments under clause (a), fails to notify the Board of a material change in circumstances, or engages in fraud or misrepresentation in connection with his or her claim for benefits under the insurance plan.

(2.5) Clause (2.1)(b) and subsection (2.3) apply with respect to,

(a) a worker who has been provided with a labour market re-entry plan that is not completed before the day subsection 5(5) of Schedule J to the *Government Efficiency Act, 2002* comes into force;

(b) a worker who is provided with a labour market re-entry plan on or after the day subsection 5(5) of Schedule J to the *Government Efficiency Act, 2002* comes into force.

(2.6) Clause (2.1)(c) and subsection (2.4) apply with respect to a worker whose degree of permanent impairment is redetermined by the Board on or after the day subsection 5(5) of Schedule J to the *Government Efficiency Act, 2002* comes into force.

(3) A worker may direct the Board not to review the payments for loss of earnings,

(a) if the worker is 55 years old or more when the Board determines that he or she is entitled to payments for loss of earnings;

(b) if he or she has reached maximum medical recovery; and

(c) if a labour market re-entry plan for the worker has been completed.

(4) The direction must be given within 30 days after the later of,

(a) the date on which the worker reaches maximum medical recovery; and

(b) the date on which the worker's labour market re-entry plan is completed.

(5) If the worker gives the direction to the Board, he or she is entitled to receive the payments until he or she reaches 65 years of age. The direction is irrevocable.

(6) If the worker gives the direction to the Board, the Board shall review payments to the worker only if, before the direction was given, the worker failed to notify the Board of a material change in circumstances or engaged in fraud or misrepresentation in connection with his or her claim for benefits under the insurance plan.

(iii) Submissions

[14] Mr. Covelli submitted there was a significant material change as of May 2002, such as would warrant a change to the sustainability award, making a FEL supplement appropriate until the R2 determination date in January of 2003. He pointed out that the worker was terminated in May of 2002 and had a loss of earnings directly flowing from her compensable injury. The employer had acknowledged it could not accommodate the worker's additional restrictions as of January 2002 and had thus entered into a job search phase within the company that proved unsuccessful. Mr. Covelli argued that as of May 2002 the worker had significant restrictions and no earnings. She took proactive steps to find alternate employment and located work in the child care field. It was Mr. Covelli's position that, as of the R2 FEL determination in January of 2003, the worker's award should be

based on the specified difference between the worker's pre-accident earnings and her actual wages in the child care field.

[15] Ms. Regenbogen submitted that there was no material change in circumstances in May of 2002 that would warrant a change to the sustainability award. In her view, the worker was terminated for her failure to cooperate in the process designed to secure alternate employment within or external to the accident employer. In Ms. Regenbogen's view, the fact the worker did not co-operate signified that her termination was not directly related to the workplace injury.

[16] The employer's representative also noted that the August 2003 arbitration award resulted in the worker receiving wages from the date of her termination until the date of the award (August 12, 2003) and then an additional 21 months' salary with a 15% top-up. Ms. Regenbogen submitted this had the effect of continuing the worker's full earnings until May of 2005, past the R2 FEL date of January 2003. As such, there should be no final FEL award since, at that point, the worker had no loss of earnings. She further argued that any FEL payment would have the effect of forcing the employer to compensate the worker twice for the same period, resulting in an absurd and unjust result.

[17] In the event that I was not persuaded by the above argument, Ms. Regenbogen argued that there was a statutory direction to calculate a worker's FEL benefits based on 90% of the difference between the worker's net average pre-accident earnings and the net average earnings she was "likely" to earn after the injury in "suitable and available employment." Suitable employment is set out in Document No. 18-04-06 as work that is safe, consistent with the worker's functional abilities and reduces or eliminates the future loss of earnings resulting from the injury. The employer's representative suggested that the worker's actual childcare work did not constitute suitable employment because she was capable of earning more than that. Ms. Regenbogen submitted the worker would have been able to approximate her pre-accident earnings but chose to take a lesser paying job and that did not represent a wage loss flowing from the compensable injury. The result would be a zero FEL award which would then preclude the worker from entitlement to further LMR services.

[18] In response, Mr. Covelli submitted that the employer's characterization of the worker's final termination was inaccurate. In December 2001 the employer was made aware of further restrictions as they applied to the worker and, as a consequence, the previously offered modified employment was no longer suitable. The employer then offered a five month job search for alternate employment which was unsuccessful. In the arbitrator's significant 2003 decision he found the employer had failed in its duty to accommodate. Therefore, the worker's termination in May 2002 did result in a material change that in part flowed from the worker's compensable injury.

[19] Mr. Covelli disagreed that the arbitration award meant that the worker had the equivalent of her salary as of May 2002. He pointed out that the worker had no wages as of May 2002, had only her child care salary as of the R2 date in January 2003 and only received the arbitration award in August 2003.

[20] Mr. Covelli submitted that the worker did not have a university degree and her employment history had been with the accident employer. Accordingly, as of the final FEL date, the worker had few transferable skills and considerable physical restrictions. There was no basis for arguing that she could approximate her pre-accident earnings as she had been unable to do so with the accident employer. Flowing from this, Mr. Covelli argued the worker would be entitled to LMR services per Document No. 18-04-11.

(iv) The Vice-Chair's Findings

[21] The first issue to be addressed is whether there was a material change in May 2002 and collaterally, what effect, if any, the arbitration award of August 2003, would have in determining whether such a change occurred.

[22] Between January and May 2002, the worker was engaged in a job search sponsored and paid for by the employer, this in an effort to secure the worker suitable, modified work within or external to the accident employer. This was undertaken because physiatrist Dr. Lacerate had increased her restrictions to include no SAP or IPS work. As noted in the arbitration award, while the employer did not necessarily agree with Dr. Lacerate's position, it accepted the worker had extra restrictions that precluded a return to her previous modified work.

[23] The worker did not find employment within the allotted time and the employer terminated her. As set out in Arbitrator Rayner's 2003 award, he found fault with both parties, concluding that the worker had not co-operated but also that the employer had not fulfilled its duty to accommodate. Neither party disagreed with this characterization when the matter came before the Tribunal. This then is the fact situation before me. The worker was without employment in May 2002 in part because the employer did not fully accommodate her with respect to her compensable injury.

[24] I acknowledge that the worker was not without responsibility in this matter. She could have acted in a manner more likely to produce employment opportunities. None the less, the fact remains that, as of May 2002, the worker was suffering a loss of earnings flowing from her compensable injury, resulting physical restrictions, and the employer's failure to accommodate those restrictions.

[25] The fact that the worker bears some responsibility for the events that led to her unemployment in 2002 does not preclude my finding there was a material change as contemplated by the Act. The accepted test is whether the compensable injury made a significant contribution and, in this instance I find it did.

[26] Since there was a material change, I must now consider what benefits would flow from that. While the amendments to the pre-1997 Act by the *Workplace Safety and Insurance Act*, allow for a review of payments at other than the specified FEL periods, it does not specify what type of payments should then flow. Section 43(9) benefits under the pre-1997 Act are the benefits that Mr. Covelli has argued would be applicable to the period from May 2002 until the final FEL review in January of 2003. It would appear that he makes this argument based on the fact that, once the worker was terminated she became involved in a self-directed job search (which Tribunal case law has accepted in certain cases as being analogous to a Board authorized vocational rehabilitation program) and supplementary benefits would be appropriate.

[27] I accept that the worker was involved in a self-directed vocational rehabilitation program after May 2002 and supplementary benefits would be the appropriate manner to address this situation.

[28] This then leads to a consideration of Ms. Regenbogen's alternative argument to the effect that the arbitrator's award compensates for the change in circumstance by providing de facto wages for the period in question. Let us consider what the relevant section of the pre-1997 Act says on this matter:

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.

[29] 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.

[30] Mr. Covelli has asked for supplementary benefits for the period from May of 2002 until the final FEL determination in January of 2003. As I read the policy above and as supported by the analysis in Tribunal *Decision No. 2455/06* (2007), 81 W.S.I.A.T.R. (online), the Board can deduct payments made from another source when providing FEL supplements. This is so if the situation meets 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".

[31] In this case, arbitrator Rayner awarded the worker the equivalent of her wages for the period between May

2002 and August 2003 owing to the employer's failure to accommodate the worker's compensable injuries. In my view, this constitutes a payment by the employer in respect to the worker's accident. "In respect of" is a broad and general phrase that can reasonably encompass the facts of the instant case. Per the arbitration award, the employer paid the worker the equivalent of lost wages to reflect its failure to accommodate the worker. The worker needed accommodation only for her compensable injury and, accordingly, I find this was a payment "in respect of" the work-related accident.

[32] I also note that any other interpretation would signify that the worker would in effect be receiving double payments from the Schedule 2 employer for the period between May 2002 and January 2003, when she would have been eligible for section 43(9) benefits. The purpose of the Act is fairly to compensate, not to compensate twice.

[33] Accordingly, while I find there was a material change in May 2002 such that would have occasioned supplementary benefits (under section 43(9) of the pre-1997 Act as amended by section 107(4) of the *Workplace Safety and Insurance Act*), the payment already made by the employer flowing from the arbitration award will result in the worker not receiving any additional payment for this period.

[34] I turn now to the issue of the final FEL determination in January 2003. The Board policy referred to above states that FEL benefits are exempt from deductions in respect of other payments made by the employer. In my view, this directs me not to consider the effect of the arbitrator's award when it comes to determining the amount of the worker's final FEL award. While there will be an extent to which the worker may be overcompensated for a discrete period, this is preferable to including the award and making a zero R2 determination, which would result in an under compensation of the worker's loss of earnings from the time the arbitrator's award ran out (in 2005) until the worker turns 65 years of age in July of 2024.

[35] This having been said, it remains a matter of determining the worker's FEL quantum. Mr. Covelli has argued that it should be based on the worker's actual part time earnings as a child care worker, while Ms. Regembogen has submitted the worker has the capacity to approximate her pre-accident earnings and would be entitled to a zero FEL award. I accept neither argument.

[36] If the worker had the ability to approximate her pre-accident earnings, the most likely place to have done so would have been with the accident employer. The worker had been employed there since 1981 and it was her sole work experience. She has little in the way of transferable skills and needs accommodation for her physical restrictions. Without LMR assistance, I find it unreasonable to find the worker was capable of securing safe, available employment at no wage loss.

[37] Having said this, I cannot conclude that part time child care work is a reasonable alternative in the circumstances or one that reflects the worker's abilities. In late 2001, Dr. Lacerte did not state the worker was capable only of part time work and I find no medical reasons for concluding she could not work full time as of January 2003. I accept the worker finds it easier to work part time hours, but that is not the same as concluding she can only work part time or that it would cause her harm to work fulltime. I find the worker's current hours of employment to represent a personal choice on the worker's part, rather than reflecting a loss of earnings flowing from the compensable injury.

[38] I find, as of the R2 FEL determination, the worker has entitlement to a partial FEL award based on the difference between her escalated pre-accident earnings and the amount she would be making if she worked full time as a child care worker (using her actual hourly remuneration in 2003).

[39] Finally, this is not to say that I find the child care position the ideal SEB. It does not approximate the worker's pre-accident earnings and it is possible that there might be work that would do so. Given my findings as to the worker's ongoing loss of earnings and as no LMR assessment took place in the past, I find she is entitled to an LMR assessment and consultation with the Board as to the suitability of further LMR services. This would be for the purpose of determining whether a SEB that would approximate the worker's pre-accident earnings is viable. If, following the LMR assessment, the Board determines no further LMR services are in order, the R2 FEL award remains in effect. Any decision by the Board on this matter is subject to the usual rights of appeal.

DISPOSITION

[40] The appeal is allowed in part. The worker would be allowed supplementary benefits under section 43(9) of the pre-1997 Act for the period from May 2002 until January 2003 but, owing to Board policy, any benefits payable would be offset by the arbitration award she received. The worker is entitled to a partial FEL award as of her R2 determination date in January 2003. FEL benefits are to be based on full time earnings in the child care field (based on the worker’s actual, hourly remuneration for the work she does on a part-time basis). Lastly, the worker is entitled to an LMR assessment to ascertain if an LMR plan to approximate her pre-accident earnings is feasible.

Appeal allowed in part.

Decision No. 371/09

Vice-Chair: Noble

Decision — April 2, 2009

Neutral Citation: 2009 ONWSIAT 861

Worker (status) (during rehabilitation) – Board Directives and Guidelines (consequences of injury) (treating agent's premises) – Consequences of injury.

Worker did not have entitlement for injury suffered on premises of treating agency but which did not occur during course of treatment itself.

The worker suffered a back injury when he fell at work in February 2005. He was referred by the Board for a functional rehabilitation program (FRP). While attending the FRP in January 2006, the worker suffered a finger injury when he attempted to close a window and the window suddenly dropped on his hand. The worker appealed a decision of the Appeals Resolution Officer denying entitlement for the finger injury. The appeal was dismissed.

The injury occurred on the premises of the treating agent but did not occur in the course of the treatment itself. According to Board *Operational Policy Manual*, Document No. 15-05-02, there is generally no entitlement for a new accident that occurs on the premises of the treating agent. Applying the policy, the Vice-Chair concluded that the worker did not have entitlement for the finger injury.

Travailleur (statut) (pendant la réadaptation) – Directives et lignes directrices de la Commission (conséquences d'une lésion) (lieux de traitement) – Conséquences d'une lésion.

Le travailleur n'avait pas droit à une indemnité pour une lésion subie dans les locaux de l'établissement de soins parce qu'elle n'était pas survenue pendant le traitement.

Le travailleur avait subi une lésion au dos quand il est tombé au travail en février 2005. La Commission l'avait envoyé à un programme de réadaptation fonctionnelle (PRF). Il avait subi une lésion à un doigt dans les locaux du PRF en janvier 2006 quand une fenêtre qu'il essayait d'ouvrir était soudainement tombée sur sa main. Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de lui reconnaître le droit à une indemnité pour sa lésion au doigt. Le Tribunal a rejeté l'appel.

Le travailleur avait été blessé dans les locaux du PRF mais sa lésion n'était pas survenue pendant le traitement. Selon le document n^o 15-05-02 du *Manuel des politiques opérationnelles*, un nouvel accident survenant dans les locaux d'un établissement de traitement n'ouvre généralement pas droit à une indemnité. La vice-présidente a appliqué cette politique et elle a conclu que le travailleur n'avait pas droit à une indemnité pour sa lésion au doigt.

Tribunal Decisions Considered:

Decision No. 89/95 (1996), 38 W.C.A.T.R. 111 consd

Decision No. 1242/99 (December 4, 2000) [2000 ONWSIAT 3399] refd to

Decision No. 1024/00 (2000), 54 W.S.I.A.T.R. 228 refd to

Workplace Insurance Legislation Considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A

s. 13(1)

s. 13(2)

s. 126

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 03-04-03 (May 1, 1991) (since revised)

Document No. 15-05-01 (October 12, 2004)

Document No. 15-05-02 (October 12, 2004)

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[DISPOSITION](#)

APPEAL by the worker from a decision of the Appeals Resolution Officer denying entitlement for an injury suffered on premises of treating agency.

April 2, 2009. THE TRIBUNAL: —

BEFORE: J. Noble, Vice-Chair

HEARING: February 23, 2009, at Toronto, Oral

DECISION(S) UNDER APPEAL: WSIB ARO decision dated March 6, 2008

APPEARANCES:

For the worker: Ms. M. Zare, Paralegal

For the employer: Not participating

Interpreter: Mr. A. Tahir, Punjabi language

REASONS

(i) Issues

[1] The issue to be decided in this appeal is whether the worker should have secondary entitlement for a left hand injury that occurred while attending the Workplace Safety and Insurance Board sanctioned Functional Rehabilitation Program (FRP) on January 31, 2006.

(ii) Background

[2] The worker, who was employed as a labourer with a temporary agency, suffered injuries to the lower and upper back on February 17, 2005 when he slipped and fell on ice.

[3] The worker was referred by the WSIB to attend a Functional Rehabilitation Program as part of the treatment for the work related injuries. The worker's initial assessment took place on December 20, 2005.

[4] While attending the FRP program on January 31, 2006, the worker attempted to close a window when it

suddenly dropped on his left hand resulting in a partial amputation of the tip of his fourth (ring) finger. The worker subsequently had surgery performed on the finger. The worker's treatment at the FRP was put on hold, and the worker resumed his treatment at the FRP on September 11, 2006 and continued until October 20, 2006.

[5] The worker claimed entitlement for the injury on the basis that it occurred while he was attending a WSIB sanctioned medical program. The Claims Adjudicator denied entitlement for the injury in a decision dated March 21, 2006. In the decision dated March 21, 2006, the Claims Adjudicator stated that the worker was injured while in a Functional Rehabilitation Program, and that pursuant to Board *Operational Policy Manual* Document No. 15-05-02 – Accidents Resulting from Treatment – there was no entitlement for benefits with respect to a new accident sustained on the premises of a treating agency, since the worker was neither a worker in respect of the treating agency, nor was the new injury a result of the worker's first accident.

[6] The worker appealed this decision.

[7] The ARO decision under appeal of March 6, 2008 considered the worker's appeal. The ARO stated that although the finger injury did occur as described by the worker on January 31, 2006, entitlement for the injury was denied pursuant to Document No. 15-05-02, which stated that entitlement was generally not granted for accidents that occur while an injured worker is receiving treatment on the premises of a treating agent. The ARO also stated that there were no unusual circumstances as prescribed in the policy to indicate that the second accident arose as a result of the first accident, since the back injuries did not result directly in the finger injury.

[8] The worker appeals this decision.

[9] A memo to the file dated November 4, 2008 stated that the worker had been assessed for a non-economic loss (NEL) award with respect to the cervical and lumbar back, and the NEL award was rated at 40%. The worker's NEL award pertained to lumbar and cervical strains. The memo also stated that the worker would not benefit from labour market re-entry (LMR) services, and that the worker was therefore entitled to full LOE benefits to age 65.

(iii) Medical Evidence

[10] In a report dated February 9, 2006, Dr. J. Anastakis stated that the worker was seen in the Hand Clinic on that date, and Dr. Anastakis stated:

On January 31, 2006, while attending a WSIB course on the fourth floor here at the [name of hospital], [the worker] tried to close a window and had a traumatic amputation of his left fourth fingertip. He was seen in the Emergency Department where he had x-rays showing an amputation of his distal phalanx. The emergency physician debrided the area and closed it primarily...

Examination today reveals an amputated left D4 distal phalanx. His thumb strength is 18 on the right and 11 on the left. His grip strength is 20 on the right and 13 on the left. His grip strength is 20 on the right and 13 on the left. Neurovascular status is intact. The incision has large amount of clotted blood on it. There is no evidence of cellulitis. Range of motion is limited secondary to pain.

Overall impression is that of a traumatic tip amputation of his left fourth phalanx. At this point, we will wash the distal aspects of his hand and affix protective dressing. He will see our hand therapist to start early range of motion activity. We will see him in one week's time and remove his sutures at that time as well.

[11] In an operative report dated May 30, 2006, Dr. J. Anastakis, surgeon, stated that he performed the procedure of "revision amputation left ring finger". The postoperative diagnosis was "traumatic amputation neuroma, left ring finger."

[12] In a medical note dated August 21, 2006, Dr. Y. Dhaliwal, family physician, stated:

To WSIB:

May restart functional restoration as finger amputation has healed up.

(iv) Other Information in the Case Record

[13] In a memo to the file dated February 1, 2006, the Board Nurse Case Manager, Ms. M. Ang, recorded a

telephone call placed to the worker. The Nurse Case Manager stated:

Call placed to [the worker]. He forwarded the phone to his nephew who translated what had happened. The group went to another room after the relaxation session. The therapist was not in this room yet. The window was open about 5-6 inches. [The worker] decided he wanted to close the window and pushed down on the window. The window was stuck and so he tried moving the window upwards before pushing it down to try to move it. The window came down on his finger amputating the left ring finger. He was taken to emergency. Surgery was done by Dr. Al-Rashdi. The area from the nailbed upwards has been amputated. His nephew is taking him in to see the family Dr. today. He is aware that FRP will be calling to set up further dates to continue with the program.

[14] In a letter dated February 6, 2006, Dr. H. Hamer, Medical Director of the Functional Rehabilitation Program (FRP), stated in part as follows:

Please find below a complete account of the incident that recently occurred with a client enrolled in the Functional Rehabilitation Program.

Incident Description:

Patient incident occurred Tuesday January 31st, 2006 at 12:45 p.m. in the Functional Rehabilitation Program. Client attempted to close a window in room 150-4-Fell. The window closed onto the client's finger and amputated the tip of the 4th digit on client's left hand. The impact of the incident was classified as Critical Type I.

Immediate Medical Response:

Incident was detected as 12:45 pm.

Medical Director was notified and on the scene immediately.

First aid was provided and the medical doctor retrieved the amputated tip from the windowsill.

Client was transported by chair to the emergency room.

Amputated tip was passed to the Emergency Room (ER) staff and

Care of the client was transferred to ER department.

Occupational Therapist stayed with client in the ER until client was taken for x-ray.

Client appeared to be dealing well with the incident, voicing no concerns at that time...

(v) Law and Policy

[15] Section 13 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) is applicable to this appeal and provides in part as follows:

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.

[16] Pursuant to section 126 of the WSIA, the Board advised that the following Policy Packages are relevant to this appeal: #31 (Revision #7) – Secondary or Non-Compensable Conditions; and #300 – Decision Making/Benefit of Doubt/Merits and Justice.

[17] Included in these Policy Packages is *Operational Policy Manual* (OPM) Document No. 15-05-02 – Accidents Resulting from Treatment – which provides as follows:

POLICY

A worker may have entitlement if a second accident results from treatment for a work-related condition or if a second accident occurs while a worker is travelling at the direction of the WSIB

GUIDELINES

The decision-maker ensures that a second accident has occurred and that the injury is not a complication of treatment or a pre-existing condition.

Going for treatment

If an accident happens while travelling to or from a treating agency, for treatment of a work-related condition, which has not been specifically directed by the WSIB, there is no entitlement.

Travelling at WSIB direction

There may be entitlement if the

- work-related disability/impairment dictates the means of travel, and
- the worker takes the specified pre-arranged means of travel.

If there is third party involvement see 15-01-05, Third Party Rights of Action.

If the second accident is allowed, the costs associated with it are charged to the accident employer.

Accident on treating agent's premises

If a worker sustains a new accident on the premises of a treating agency, there is generally no entitlement to benefits. The worker is neither a worker in respect of the treating agency, nor in the absence of unusual circumstances, is the new injury a result of the worker's first accident.

Injury resulting from treatment

The worker may have entitlement, but if negligence on the part of the treating agent is involved, the worker may have a right of action against the treating agent (see 15-01-05, Third Party Rights of Action).

Application date

This policy applies to all decisions made on or after July 1, 1991, for all accidents.

(vi) Conclusions

[18] On the issue of whether the worker should have secondary entitlement for a left hand injury that occurred while attending the Workplace Safety and Insurance Board sanctioned Functional Rehabilitation Program, I do not find for the worker.

[19] I find that the worker sustained the left hand injury on the premises of a treating agency, on January 31, 2006. I find that the left hand injury was not a result of the worker's first accident. I find that there is an absence of unusual circumstances in this case, and pursuant to the applicable legislation and policy, there is no entitlement to benefits with respect to the left hand injury.

[20] I observe at the outset that pursuant to section 126 of WSIA, the Board advised that Document No. 15-05-02 – Accidents Resulting from Treatment – is applicable to this appeal. Having reviewed this policy document, I find that I agree that it is applicable to this appeal.

[21] The contents of Document No. 15-05-02 are set out above in this decision, and we see that this policy document provides that if a worker sustains a new accident on the premises of a treating agency, there is generally no entitlement to benefits. Document No. 15-05-02 states that a worker in these circumstances is neither a worker in respect of the treating agency, nor in the absence of unusual circumstances is the new injury a result of the worker's first accident. In my view, this policy reflects the fact that if a worker sustains a new accident on the premises of a treating agency, that accident and the resulting injury cannot be said to have arisen out of and in the course of the worker's employment in accordance with the wording of section 13(1) of WSIA (absent unusual circumstances). It is a requirement of section 13(1) that an injury by accident must arise out of and in the course of employment, in order for a worker to be entitled to benefits under the Act.

[22] The evidence before me indicates that the worker was in attendance at the Functional Rehabilitation Program on January 31, 2006 when he attempted to close a window and the window dropped onto his left hand causing a partial amputation of the tip of the worker's fourth (ring) finger. The ARO decision concluded that the worker was on the premises of a treating agent when the accident occurred, and there were no unusual circumstances, and so pursuant to Document No. 15-05-02 there was no entitlement for the finger injury. Based on the evidence before me, I agree with this reasoning.

[23] I observe that the worker's representative advanced two alternative arguments at the hearing. I will turn now to a consideration of these arguments.

[24] First, the worker's representative submitted that the worker's left finger injury was causally related to the worker's compensable cervical spine strain injury. The worker's representative submitted that when the worker attempted to lift the window on January 31, 2006 he felt pain in the neck which led to the window falling on his finger. The worker's representative submitted that the left finger claim should therefore be allowed notwithstanding the contents of Document No. 15-05-02 because the left finger injury was simply a secondary condition resulting from the work-related neck disability, and therefore was subject to a different Board policy document, that is, Document No. 15-05-01 – Secondary Conditions; Resulting from Work-Related Disability. The worker's representative acknowledged that this version of the accident history had not previously been related to the Board by the worker, and had not previously been the subject of adjudication by the Board.

[25] The worker testified at the hearing about his version of the accident history. The worker testified that he was sitting in a room at the Functional Rehabilitation Program on January 31, 2006 and the window was open four inches and he tried to close the window. The worker states that the window was old and it was stuck and when he applied more stress on the window he felt a sharp pain in the left area of his neck, and at that moment the window fell down from his hands and his finger was cut.

[26] I have considered the worker's testimony at the hearing before me, that is, that he felt a sharp pain in his neck at the time of his finger injury, in the context of all the evidence before me pertaining to this appeal. I conclude that I cannot accept the worker's testimony for the following reasons.

[27] First, I note that the medical reporting with respect to the worker's finger injury does not indicate that the worker had neck pain at the time of the finger injury, or that the finger in any way resulted – directly or indirectly – from neck pain. In this regard I note that in a medical report dictated on January 31, 2006, which is apparently the initial hospital report, Dr. C. Culligan stated that there had been an amputation of the distal phalanx of the left ring finger, and there is no mention in this report of neck pain. I also note in this regard that in his report dated February 9, 2006, Dr. Anastakis stated that the worker tried to close a window and had a traumatic amputation of the left fourth fingertip. Dr. Anastakis did not state in that report that the worker had neck pain at the time of the incident. I further note in this regard that in a consultation report form dated June 31, 2006, Dr. Anastakis stated that a window dropped down on the worker's left ring finger, and Dr. Anastakis did not state that there was any neck pain reported at the time. Finally, I note that in his Incident Description Report dated February 6, 2006, Dr. Hamer stated that the worker attempted to close a window and the window closed onto the worker's finger. Dr. Hamer did not state that there was any neck pain reported by the worker at the time, nor did he state that neck pain played any role in the incident. I place significant weight on the accuracy of Dr. Hamer's incident report since it is a thorough and detailed report in which the incident is clearly set out. I observe that the worker was asked at the hearing whether he told anyone at the hospital that he had neck pain at the time of the window incident, and the worker testified that no one asked him and he did not tell anyone. I find that it is likely that, had the worker suffered neck pain that caused the window to fall on his finger, he would have reported this to his treating physicians and the treating physicians would have referred to this in their medical reporting.

[28] Secondly, I conclude that I cannot accept the worker's testimony because it does not correspond to the version of the accident history that the worker presented to the Board in his Worker's Report of Injury (Form 6) to the Board dated January 31, 2006. I observe that the worker provided the following information in the Worker's Report of Injury:

I was attending Functional Restoration Programme at [Hospital name] at floor No. 4 Room No. 150. I was closing the

window and window fell down on my finger and amputated. So I do not know who would be my employer... I was closing the window in the classroom of [Hospital name]. It fell down on my left ring finger and cut it off.

[29] According to the version of the accident history set out by the worker in his Form 6 Report to the Board, neck pain was not a factor in the incident that occurred on January 31, 2006. I find that it is likely that the worker would have indicated in the Form 6 Report to the Board that neck pain was a factor in the incident if in fact it was a factor. I also note that the Form 6 Report was completed on January 31, 2006, the same day as the accident, whereas the worker's testimony at the hearing was provided more than three years after the incident, and I find that the version provided by the worker on the day of the incident in the Form 6 Report to the Board is likely more reliable since that version is contemporaneous with the events that it records.

[30] Thirdly, I conclude that I cannot accept the worker's testimony because it does not correspond to the version of the accident history that the worker presented to the Board at the time that the worker and his nephew related the accident history to the Board Nurse Case Manager on February 1, 2006. I observe that the Nurse Case Manager stated, in the memo to the file dated February 1, 2006, that she called the worker and that the worker's nephew translated what had happened. The Nurse Case Manager stated that it was related to her that the worker decided he wanted to close the window and pushed down on the window, and the window came down on his finger. There is no indication in this memo that the worker's nephew advised that the worker experienced neck pain at the time of the incident, or that neck pain played any role in the incident with the window. I think that it is likely that, had the worker experienced neck pain that played a role in the incident with the window, he would have advised the Nurse Case Manager when he described the incident to her through his nephew on February 1, 2006, the day after the incident.

[31] The worker testified at the hearing that when the Nurse Case Manager called him, he gave her his nephew's telephone number, and he was not aware of what his nephew told the Nurse Case Manager. The worker was then advised of the contents of the Nurse Case Manager's memo, which indicated that the nephew was present with the worker at the time and was translating for the worker. The worker then amended his testimony at the hearing to state that he could not remember whether his nephew was present with him when the discussion with the Nurse Case Manager took place. I conclude based on all of this testimony that the worker was not a reliable witness. Furthermore, as between the worker's memory of this discussion, and the version recorded in the memo dated February 1, 2006 from the Nurse Case Manager, I prefer the version recorded in the memo dated February 1, 2006 from the Nurse Case Manager since it was recorded contemporaneously with the discussion it recorded.

[32] Finally I conclude that I cannot accept the worker's testimony that neck pain played a role in the finger injury since the worker did not previously raise this issue with the Board. I observe that the worker's appeal for entitlement for the finger was initially denied by the Claims Adjudicator in a decision dated March 21, 2006. The worker and his representative did not request an oral ARO hearing in order to clarify the mechanics of the accident; rather they chose to proceed with an ARO hearing on the basis of written submissions. I also note that the ARO decision under appeal dated March 6, 2008 did not state that the worker or the worker's representative took the position that the Board had misunderstood the accident mechanics. I find that it is likely that the worker would have raised this issue with the Board prior to the date of the Tribunal hearing on February 23, 2008, if the accident mechanics from the incident on January 31, 2006 had indeed been misunderstood by the Board.

[33] At any rate, even if I were to accept that the worker experienced neck pain at the time of the window incident, I further find that there is insufficient evidence before me to establish that neck pain caused the window to fall on the worker's finger. The worker testified that the window was old and it was stuck and when he applied more stress on the window he felt a sharp pain in the left area of his neck, and at that moment the window fell down from his hands and his finger was cut. This testimony does not clearly indicate how neck pain would have caused the window to fall on the worker's finger.

[34] Based on all of the foregoing, I do not accept the submission of the worker's representative that the worker's left finger injury was causally related to the worker's compensable cervical spine strain injury.

[35] I turn now to a consideration of the second alternative argument advanced by the worker's representative. The worker's representative submits that entitlement for the left finger injury should be granted pursuant to Document No. 15-05-02 because the worker was in quasi-employment at the time that he was attending the FRP,

and he would not have been there but for the compensable injury. The worker's representative relies on Tribunal *Decision No. 89/95* (1996), 38 W.C.A.T.R. 111, which is a case in which the worker appealed a decision which denied him benefits for a left wrist fracture. I have carefully reviewed *Decision No. 89/95* and I find that it does not support the worker's claim for entitlement in the instant appeal. The worker in *Decision No. 89/95* sustained the fracture when he slipped and fell in the parking lot adjacent to the building which housed the facility where he was undergoing physiotherapy treatment for his compensable injury. *Decision No. 89/95* considered the application of a policy which was formerly in effect, that is, Document No. 03-04-03, and which was similar to the policy that is applicable in this appeal, that is, Document 15-05-02. The Panel in *Decision No. 89/95* stated as follows with respect to the applicable policy and the submissions of the worker's representative in that appeal [at pp. 117-118]:

Mr. Robinson also submitted that the worker's left wrist fracture should be compensable, as it represents an accident resulting from the treatment of a compensable injury. The relevant Board guidelines, set out in the Board's *Operational Policy Manual* at Document No. 03-04-03 (May 1, 1991), provide that an accident resulting from treatment of a compensable injury is also compensable. However, it provides that accidents occurring while travelling to or from a treating agency for the treatment of a work-related condition are not considered to be compensable unless the work-related disability dictates the means of travel and the worker takes the specified pre-arranged means of travel. As well, the guidelines provide that there is no entitlement for accidents occurring on the premises of the treating agent.

Mr. Robinson argued that the guidelines with respect to accidents resulting from treatment are too restrictive. In Mr. Robinson's submission, the worker was in the course of treatment of a compensable injury while proceeding to and from the physiotherapy office, and not just while actually undergoing the treatment.

Mr. Robinson relied upon an analysis of similar circumstances advanced by Professor Larson in his text *The Law of Workmen's Compensation*, Desk Edition (Matthew Bender: New York, 1996) at Chapter 13.11(d). In this portion of his text, Professor Larson refers to the "quasi-course of employment" concept which deals with the consequences of a compensable injury. Professor Larson acknowledges that in the strict sense, consequential injuries do not occur in the course of employment. However, although certain activities undertaken by an employee following his injury may take place outside the time and space limits of the employment, they "are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury" (page 3-166). The reasonableness of the activity is determined with reference to the category of activity, and not to the method used in the activity. Professor Larson suggested that the following principles be applied in determining whether a particular activity undertaken as a result of a compensable injury would fit within the "quasi-course of employment concept". He writes (at p. 3-166):

When the injury following the initial compensable injury arises out of the quasi-course activity, such as a trip to the doctor's office, the chain of causation should not be deemed broken by mere negligence in the performance of that activity, but only by intentional conduct which may be expressly or impliedly prohibited by the employer.

Mr. Robinson noted that the Board's own guidelines recognize entitlement to benefits for injuries which are sustained in activities which are not directly in the course of employment, such as injuries sustained in an employer's parking lot (see, for example, the Board's *Operational Policy Manual* at Document No. 03-02-10 (August 9, 1991)). According to these guidelines, workers are considered to be in the course of their employment upon entering the employer's premises at the proper time, using an accepted entrance. Mr. Robinson argues that by analogy, an injury sustained in the parking lot of the treating facility should receive the same treatment as an injury sustained in an employer's parking lot.

[36] The Panel in *Decision No. 89/95* concluded as follows with respect to the submissions heard in that appeal [at pp. 118-119]:

The difficulty in applying the "quasi-course of employment" concept advanced by Larson is in defining its limits. The Board has recognized that injuries sustained in the actual treatment of a compensable injury should also be compensable, as the causal connection between the compensable injury and the effects of its treatment is direct. Entitlement to compensation for such injuries does not depend upon an artificial course-of-employment analogy, but arises out of the effects of the injury itself. The same cannot be said of accidents which occur on the premises of a treating facility but do not arise out of the treatment itself. In these cases, the worker is clearly in the same position as the general public, and is not in the course of his or her employment. Injuries caused by the negligence of third parties in such cases would clearly give rise to a right of action against such parties, unlike those cases in which a worker is injured in the course of employment on an employer's premises, and has no right of action against the employer by virtue of the Act.

In any case, even if we were to accept Mr. Robinson's analysis, it is our view that the facts before us do not support the worker's position. According to information received from the management of the facility where the worker was injured, the physiotherapy clinic was located in a building which was owned by a Hospital Association. The parking areas

adjacent to this building were owned either by the Association, or the Association had permission from the local municipality to use the land for free public parking. The physiotherapy clinic was a tenant of the building, and operated independent of the Hospital Association. The maintenance of the lot was carried out not by the physiotherapy clinic, but by the owner of the building.

[37] I observe that in *Decision No. 89/95* the Panel stated that there are reasons that injuries sustained in the actual treatment of a compensable injury should also be compensable, since the causal connection between the compensable injury and the effects of its treatment is a direct causal connection. *Decision No. 89/95* also stated that the same cannot be said of accidents which occur on the premises of a treating facility but do not arise out of the treatment itself, because in these cases, the worker is in the same position as the general public and is not in the course of his or her employment. I accept and adopt this reasoning.

[38] Applying the reasoning set out in *Decision No. 89/95* to the facts before me in this appeal, we see that the worker in the instant appeal was not injured during the actual treatment of his compensable injury; I note in this regard that the worker was not undergoing any treatment with respect to the compensable back or neck injury at the time that the window fell on his finger. The worker, rather, was injured on the premises of the treating facility – the FRP hospital – but the injury did not arise out of the treatment itself, and hence Document No. 15-05-02 applies with the effect that the finger injury is not compensable. I find that the reasonable conclusion to draw is that the worker was in the same position as the general public when he attempted to close the window at the FRP, and he was not in the course of his employment. To find that the finger injury arose out of the neck and back injury because the worker would not have been in the room at the FRP attempting to close the window *but for* the neck and back injury is, in my view, an analysis dependant upon an artificial “course of employment” analogy of the type that was rejected by the Panel in *Decision No. 89/95*. I conclude that Document No. 15-05-02 is clear on its face and it provides that if a worker sustains a new accident on the premises of a treating agency, there is no entitlement to benefits. In this case I find on the evidence that there was a new accident sustained on the premises of the treating agency, and the evidence indicates that the injury did not arise out of the treatment itself. Entitlement for the finger injury is therefore not appropriate in accordance with the applicable legislation.

[39] The worker’s representative also relied on Tribunal *Decision No. 2142/99* (December 4, 2000) and *Decision No. 1024/00* (2000), 54 W.S.I.A.T.R. 228. I find that these decisions are distinguishable and do not apply to the facts on appeal before me since both decisions dealt with workers injured while involved in a vocational rehabilitation program, rather than treatment.

[40] Based on all of the foregoing, the appeal is denied.

DISPOSITION

[41] The appeal is denied.

[42] The worker does not have secondary entitlement for a left hand injury that occurred while attending the Functional Rehabilitation Program on January 31, 2006.

Appeal dismissed.



Decision No. 122/09

Vice-Chair: Netten

Decision — January 27, 2009

Neutral Citation: 2009 ONWSIAT 222

Earnings basis (long-term) – Earnings basis (recurrences) (LOE) – Board Directives and Guidelines (earnings basis) (permanent employment) (break in employment pattern).

Temporary change from part-time to full-time employment did not constitute break in employment pattern.

The worker started working for the employer part-time in July 1989. In June 1998, she started a temporary full-time assignment. She was still working on this temporary full-time assignment when she suffered a compensable accident in February 1999. She returned to modified part-time work in March 1999 but stopped working again in May 1999.

The Board determined the worker's long-term benefits based on her earnings in the 12 months prior to the accident. The worker appealed a decision of the Appeals Resolution Officer confirming the worker's long-term earnings basis. The appeal was dismissed.

If the change from part-time employment to full-time employment in June 1998 had been permanent, it would have constituted a break in the worker's employment pattern, so that the 12-month period for determining the long-term earnings basis would have been reduced to the eight-month period from June 1998, and the worker's benefits would have been based on her full-time earnings only. However, only permanent changes constitute a break in the employment pattern warranting a shorter calculation period. In this case, the full-time assignment was temporary. Therefore, use of the full 12-month period was correct.

The worker returned to work in March 1999 and stopped working again in May 1999. Under s. 53(6) of the *Workplace Safety and Insurance Act, 1997*, the Board determines average earnings using the greater of average earnings on the date of the accident and average earnings when most recently employed. The average earnings based on the 12 months prior to the accident in February 1999 was about \$565 per week. The average earnings based on the 12 months prior to stopping work in May 1999 (excluding the five-week non-earning period from February to March) was only \$555 per week. Accordingly, the Board correctly determined the long-term benefits based on the earnings during the 12 months prior to the accident.

Base salariale (long terme) – Base salariale (récidives) (PG) – Directives et lignes directrices de la Commission (base salariale) (emploi permanent) (changement du profil d'emploi).

Le changement temporaire d'un emploi à temps partiel à un emploi à plein temps ne constitue pas un changement du profil d'emploi.

La travailleuse avait commencé à travailler à temps partiel pour l'employeur en juillet 1989. En juin 1998, elle avait débuté une affectation temporaire à plein temps. Elle était encore à cette affectation temporaire quand elle a subi un accident indemnisable en février 1999. Elle est retournée à un emploi modifié à temps partiel en mars 1999 mais elle a cessé de travailler de nouveau en mai 1999.

La Commission a déterminé les prestations à long terme de la travailleuse à partir de ses gains au cours des 12

mois antérieurs à l'accident. La travailleuse a interjeté appel de la décision par laquelle le commissaire aux appels a confirmé sa base salariale à long terme. Le Tribunal a rejeté l'appel.

Si le changement d'un emploi à temps partiel à un emploi à plein temps en juin 1998 avait été permanent, il aurait été considéré comme un changement du profil d'emploi de sorte que la période pour déterminer la base salariale à long terme aurait été réduite de 12 mois à huit mois à partir de juin 1998 et que les prestations auraient été fondées sur les gains à plein temps seulement. Cependant, seuls les changements permanents sont considérés comme un changement du profil d'emploi justifiant une période de calcul plus courte. En l'espèce, comme l'affectation à un emploi à plein temps était temporaire, il était correct d'utiliser toute la période de 12 mois.

La travailleuse était retournée au travail en mars 1999 et elle avait cessé de travailler de nouveau en mai 1999. Aux termes du paragraphe 53 (6) de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail*, la Commission détermine les gains moyens en utilisant les gains moyens à la date de l'accident ou les gains moyens au cours de l'emploi le plus récent, selon le plus élevé de ces montants. Les gains moyens calculés à partir des 12 mois antérieurs à l'accident de février 1999 étaient d'environ 565 \$ par semaine. Les gains moyens calculés à partir des 12 mois antérieurs à l'arrêt de travail de mai 1999 (en excluant les cinq semaines sans gains de février à mars) étaient de 555 \$ par semaine seulement. La Commission avait donc déterminé les prestations à long terme correctement en se fondant sur les gains au cours des 12 mois antérieurs à l'accident.

Workplace Insurance Legislation Considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A
s. 53(6)
s. 126

Board Directives and Guidelines Considered:

Bill 99 Operational Policies Manual
Document No. 4.1

Cross-References:

Decision No. 1022/04 (June 24, 2004) [2004 ONWSIAT 1318]

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

January 27, 2009. THE TRIBUNAL: —

BEFORE:

S. Netten, Vice-Chair

HEARING:

January 15, 2009, at Toronto, Written

DECISION(S) UNDER APPEAL:

WSIB ARO decision dated June 21, 2007

APPEARANCES:

For the worker: W.P. Linley, Lawyer

For the employer: E. Persad, Lawyer

REASONS

(i) Issue

[1] The issue in this appeal is the long-term earnings basis used in the calculation of the worker's loss of earnings (LOE) benefits.

(ii) Overview

[2] This former sales support clerk was hired on a part-time basis in July 1989, working 21 hours per week. On June 14, 1998, the worker began working full-time (37.5 hours per week) as a sales support clerk. The worker subsequently developed a work-related disablement injury of bilateral forearm tendonitis, for which an accident date of February 12, 1999 was accepted.

[3] The worker was granted full LOE benefits from February 15 to March 22, 1999, after which she returned to part-time work in a graduated program of modified duties. The worker stopped working on May 31, 1999. In accordance with Tribunal *Decision No. 1022/04* (June 24, 2004), the worker was granted partial LOE benefits for the tendonitis from May 31, 1999 to October 25, 1999. The worker was also granted entitlement for fibromyalgia, as a secondary condition resulting from the compensable injury, and full LOE benefits from October 26, 1999 based on the significant contribution of the fibromyalgia to her inability to work. Full LOE benefits were "locked in" in 2005 and will be paid until 2015 when the worker turns 65.

[4] In order to implement the 2004 Tribunal decision, the Board calculated the worker's long-term average earnings on the basis of her gross earnings, including overtime, in the 12 months up to February 12, 1999.

[5] The worker's objection to the earnings basis was denied by the Appeals Resolution Officer on June 21, 2007. The worker appeals this decision to the Tribunal, taking the position that the long-term average earnings ought to be based on her full-time wages only. This appeal was selected for a written hearing pursuant to the Tribunal's Practice Direction on *Written Appeals* (2007), 81 W.S.I.A.T.R. (online).

(iii) Law and Policy

[6] The compensable accident occurred in 1999; accordingly, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) applies to this appeal. All statutory references in this decision are to the WSIA. Section 126 of the WSIA requires the Tribunal to apply Board policy when making its decisions.

[7] Loss of earnings benefits under the WSIA are calculated based on the worker's net average earnings. Pursuant to section 53, average earnings are to be determined by the Board in consideration of the worker's weekly remuneration at the time of the injury, any pattern of employment resulting in a variation of earnings, and other appropriate information. Average earnings are to be recalculated if the initial determination is unfair.

[8] Board policy on determining average earnings applicable to accidents occurring between January 1, 1998 and September 30, 1999 is set out in *Bill 99 Operational Policies Manual* (OPM) Document No. 4.1. This policy states that the Board recalculates LOE benefits using the long-term earnings basis after 12 weeks,¹ so that long-term compensation fairly reflects long-term earnings.

[9] According to this policy, a worker is considered to be in permanent, regular employment if he or she "is employed 52 weeks a year with no termination date". The policy goes on to state that there is no need to automatically determine a long-term earnings basis for most workers in permanent employment unless requested by the worker or employer. The long-term earnings basis is then based on earnings in the 12 months before the

accident. The 12-month period may be reduced if there has been a break in the employment pattern, including “permanent changes from full-time to part-time, or vice-versa” and other permanent changes in status. The effect of this is to eliminate the period of earnings associated with the previous employment pattern.

[10] Where there is a recurrence of loss of earnings, the earnings date may change:

53(6) When a worker becomes entitled to payments for a loss of earnings arising out of an accident in respect of which he or she previously received benefits under the insurance plan, the worker’s average earnings (for the purpose of calculating the amount payable for the loss of earnings) are the greater of,

- (a) his or her average earnings at the date of the accident; or
- (b) his or her average earnings when he or she was most recently employed.

(iv) Discussion

[11] The worker was in permanent, regular employment as of the accident date of February 12, 1999: she was employed 52 weeks a year, with no termination date.

[12] The worker had worked on a part-time basis as a sales support clerk for almost nine years. For the eight months leading up to the accident date, the worker was working on a full-time basis in the same position.

[13] The worker’s Report of Injury dated March 12, 1999 indicates that her job at the time of injury was full-time. The employer’s Report of Injury dated February 23, 1999 identified the worker as a part-time employee, working full-time hours on an “acting” basis. The employer’s letter to the Board of March 1, 1999 states “In June of 1998, she volunteered to take a temporary position as a full time clerk...” The worker’s supervisor described her position as a “temporary assignment of full time duties” in October 2000.

[14] Following the worker’s five-week absence from work in February and March 1999, the worker returned to modified duties within her prior part-time schedule: she worked Mondays, Tuesdays and Wednesdays, starting at four hours per shift and intending to increase to the previous seven hours for a total of 21 hours. The worker explained to the Claims Adjudicator on April 23, 1999 that the employer no longer had full-time hours for her so returned her to her part-time position. There is no indication that the worker or employer expected the worker to return to the full-time position when she was physically able.

[15] On September 20, 2000, the worker described herself to a Board investigator as a part-time support clerk. I find no reference in the case materials to any statement from the worker contradicting the employer’s characterization of her full-time employment as temporary. Her return to the part-time schedule in March 1999 suggests that the worker had no ongoing right to full-time employment. I note also that the employment setting is large, unionized and structured; I do not believe that the worker’s full-time duties could have informally become permanent. While the worker’s representative wrote on September 10, 2004 that the worker had been on a waiting list for a full-time position leading up to June 1998 and it was her “intention to engage in this full-time position until the age of retirement”, I cannot accept this submission as evidence that the full-time position was available to the worker on a permanent basis. The evidence from the employer, uncontradicted by the worker, is that it was not.

[16] In light of the evidence on this point, I find as a matter of fact that the worker was a part-time employee, on a temporary full-time assignment at the date of accident.

[17] Given the statutory requirement to consider a pattern of employment resulting in a variation of earnings, the overriding consideration of fairness set out in both law and policy, and the employer’s evident request that the long-term earnings basis reflect the employment pattern, I find that it was incumbent upon the Board to determine a long-term earnings basis.

[18] Board policy requires that the long-term earnings basis be derived from earnings in the 12 months before the accident. While the worker’s representative expressed concern about the use of earnings after February 1999, the Board in fact used only the 12 months of earnings up to February 12, 1999 to determine the long-term earnings basis.

[19] Had the worker's switch to full-time employment been permanent, this would constitute a break in the employment pattern; the 12-month period would be reduced such that only the full-time earnings from June 1998 to February 1999 would be considered. This would result in average earnings based on full-time wages only, as the worker's representative requests. However, Board policy is explicit that only permanent changes constitute a break in the employment pattern warranting a shorter calculation period. In this case, I have accepted that the full-time assignment was temporary and consequently there is no justification for using anything other than 12 months of earnings to calculate average earnings.

[20] This is consistent with the goal of achieving fairness. Just as it would be unfair to base the worker's average earnings only on part-time employment, it would also be unfair to base the average earnings on full-time wages which may or may not have continued into the future had the worker not been injured. A 12-month calculation generates a reasonable compromise, substantially weighted in favour of the recent full-time employment (given the length of this employment), while reflecting the reality that the worker was entitled to part-time employment only and may or may not have worked full-time in the future. The result, gross average earnings of \$568.66 per week, is approximately equivalent to a 35-hour work week at the worker's highest pre-accident wage.

[21] In accordance with section 53(6) of the WSIA, the Board should also have determined the long-term earnings basis derived from the worker's earnings up to May 31, 1999: the worker is entitled to the higher average earnings of the two. Based on the earnings information provided by the employer, and eliminating the five-week non-earning period in February and March 1999, the worker's gross average earnings from June 1998 through May 1999 were approximately \$555 per week. This is lower than the gross average weekly earnings from February 1998 to February 1999 of \$568.66; as a result it is correct and to the worker's benefit to use the average earnings at the date of the accident rather than the date most recently employed.

(v) Conclusion

[22] Unlike "most workers" in permanent employment, this worker had experienced a significant change in working hours on a temporary assignment during the previous year, and the resulting variation in earnings warranted a determination of a long-term earnings basis to fairly reflect long-term earnings. The change in June 1998 from part-time to full-time hours was not permanent and therefore did not constitute a break in the employment pattern justifying a reduced period for calculation of average earnings. Applying the usual 12-month earnings period was required by Board policy and fair in the worker's circumstances.

[23] The long-term average earnings based on the date of accident were higher than the average earnings based on the most recent date of employment. The gross average weekly earnings of \$568.66, based on earnings from February 12, 1998² to February 11, 1999, are the correct long-term average earnings upon which benefits are to be calculated.

DISPOSITION

[24] The appeal is denied.

Appeal dismissed.

1. I note that in this case the Board apparently did not grant 12 weeks of benefits based on the short-term earnings basis prior to using the long-term earnings basis. The parties have limited the issue agenda in this appeal to the long-term earnings basis and accordingly I make no decision on this point.

2. The earnings information from the employer begins with February 15, 1998, a Sunday. The worker would not have had earnings from February 12 to 14 in accordance with her part-time schedule.

Decision No. 15/09

Vice-Chair: Moore

Decision — March 09, 2009

Neutral Citation: 2009 ONWSIAT 539

Interest (pre-1990 accident) – Board Directives and Guidelines (interest) – Merits and justice.

There are distinct criteria for what constitutes exceptional circumstances for entitlement to interest on claims registered prior to 1990 and different distinct criteria for what constitutes exceptional circumstances for payment of interest prior to January 6, 1989.

The worker suffered a severe crush injury to his right arm in 1976, requiring below elbow amputation. The worker was granted a 50% pension for organic disability. In 1980, he was granted a two-year provisional pension for psychological disability. The award expired in 1982 without further review. In 2007, the worker requested review of the provisional psychological award. The Board granted a 10% permanent pension with arrears to 1982. The worker appealed a decision of the Appeals Resolution Officer denying payment of interest on the retroactive award. The appeal was allowed in part.

There were two issues to consider: 1) whether the worker was entitled to interest; and 2) if so, whether interest should be payable for the period prior to January 6, 1989.

According to Board policy, for claims registered prior to 1990, the Board pays interest if the delayed benefit was granted by an appeal level decision. Tribunal decisions have found that the intent of Board policy is to pay interest on claims registered prior to 1990 only in exceptional circumstances. Exceptional circumstances are defined in the policy as cases that are decided at the appeal level. This was reasonable because cases pursued to the appeal level were more likely to correct a significant injustice. However, the Tribunal decisions have noted that there are cases in which a significant injustice is corrected at the operating level. If the error is significant enough, the merits and justice could apply to grant payment of interest.

In this case, the Board granted a two-year provisional award based on a report from a Board medical consultant. The consultant noted that review would be necessary after the two years. But no review took place. The Vice-Chair found that the Board made a clear and significant error. Considering the merits and justice of the case, the Vice-Chair concluded that the worker was entitled to payment of interest.

Considering the Board policy and a review of Tribunal decisions, the Vice-Chair found that there are distinct criteria for what constitutes exceptional circumstances for entitlement to interest and for payment of interest prior to January 6, 1989. Regarding entitlement to interest, the policy distinguishes among workers. It was cognizant that there would be exceptional circumstances that would require waiving its particular criteria. Tribunal decisions extended the spirit of that exemption somewhat. However, regarding payment of interest prior to January 6, 1989, Board intended that no interest be paid to any worker. In the view of the Vice-Chair, to allow a worker entitlement to a benefit that is not generally available ought to require particularly exceptional circumstances.

Reviewing the Tribunal decisions, the Vice-Chair found that the particularly exceptional circumstances were cases in which a family lost significant income replacement benefits as distinct from situations in which an individual was deprived of a portion of benefits for a period of time. In this case, the worker lost a portion of his pension for a period of time. It was a significant loss but not of such significance as to warrant payment of interest prior to

January 6, 1989.

The worker was entitled to interest on the retroactive payment of the 10% pension, payable from January 6, 1989.

Intérêts (accident d'avant 1990) – Directives et lignes directrices de la Commission (intérêts) – Bien-fondé et équité.

Des critères distincts régissent les circonstances exceptionnelles ouvrant droit à des intérêts selon que la demande d'indemnité a été enregistrée avant 1990 ou qu'elle a été enregistrée le 6 janvier 1989 ou avant cette date.

Le travailleur a subi une grave lésion par écrasement au bras droit en 1976, et cette lésion a dû se faire amputer l'avant-bras. Il a obtenu une pension de 50 % pour invalidité organique. En 1980, il a obtenu une pension provisoire de deux ans pour des troubles psychologiques invalidants. Cette pension a pris fin en 1982 sans autre réexamen. En 2007, le travailleur a demandé un réexamen de sa pension provisoire pour troubles psychologiques. La Commission lui a reconnu le droit à une pension permanente de 10 % avec arriérés à 1982. Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de lui reconnaître le droit à des intérêts sur sa pension rétroactive. Le Tribunal a accueilli l'appel en partie.

Le Tribunal devait examiner deux questions : 1) si le travailleur avait droit à des intérêts; 2) le cas échéant, si les intérêts étaient payables pour la période antérieure au 6 janvier 1989.

Aux termes de la politique de la Commission, pour les demandes d'indemnité enregistrées avant 1990, la Commission paie des intérêts si les prestations en retard découlent d'une décision de deuxième instance. Dans ses décisions, le Tribunal a conclu que, dans le cas des demandes enregistrées avant 1990, la politique prévoit le versement d'intérêts seulement dans des circonstances exceptionnelles. Aux termes de la politique « circonstances exceptionnelles » s'entend des circonstances dans lesquelles des prestations sont allouées en appel, ce qui est raisonnable puisque de telles prestations sont plus susceptibles d'être le résultat de la rectification d'une injustice importante. Cependant, dans ses décisions, le Tribunal a noté qu'il y a des cas dans lesquels une injustice importante est rectifiée par le secteur opérationnel. Si l'erreur est assez importante, on pourrait allouer des intérêts au motif du bien-fondé du cas et de l'équité.

En l'espèce, la Commission avait reconnu le droit à une pension provisoire fondée sur un rapport du médecin consultant de la Commission. Le médecin avait noté qu'un réexamen serait nécessaire après deux ans mais aucun réexamen n'avait eu lieu. Le vice-président a conclu que la Commission avait manifestement commis une importante erreur. Compte tenu du bien-fondé du cas et de la justice, le vice-président a conclu que le travailleur avait droit à des intérêts.

Au vu de la politique et de la jurisprudence du Tribunal, le vice-président a constaté que des critères distincts régissent les circonstances exceptionnelles ouvrant droit à des intérêts selon que la demande d'indemnité a été enregistrée avant 1990 ou qu'elle a été enregistrée le 6 janvier 1989 ou avant cette date. Au sujet du droit à des intérêts, les travailleurs se distinguent selon le moment de la demande. Dans sa politique, la Commission reconnaît l'existence de circonstances exceptionnelles dans lesquelles il faudrait renoncer à ces critères. La jurisprudence du Tribunal élargit quelque peu cette exemption. Au sujet du paiement d'intérêts avant le 6 janvier 1989, la Commission prévoit qu'il n'y aurait aucun versement d'intérêts. Selon le vice-président, il aurait fallu des circonstances particulièrement exceptionnelles pour reconnaître à un travailleur le droit à un avantage qui n'est généralement pas offert.

À l'examen de la jurisprudence du Tribunal, le vice-président a conclu que « circonstances particulièrement exceptionnelles » s'entendrait d'un cas dans lequel une famille perdrait une indemnité de remplacement de revenu par opposition à un cas dans lequel une personne est privée d'une portion de ses prestations pendant un certain temps. La perte était importante en l'espèce mais pas suffisamment pour justifier le paiement d'intérêts avant le 6 janvier 1989.

Le travailleur avait droit à des intérêts sur le paiement rétroactif de sa pension de 10 %, et ces intérêts étaient payables à partir du 6 janvier 1989.

Tribunal Decisions Considered:

Decision No. 75/95 (September 13, 1995) consd
Decision No. 549/90 (1991), 21 W.C.A.T.R. 25 consd
Decision No. 2444/00 (January 31, 2002) [2002 ONWSIAT 256] consd
Decision No. 24/02 (2003), 65 W.S.I.A.T.R. 43 consd
Decision No. 656/02 (July 30, 2002) [2002 ONWSIAT 1642] refd to
Decision No. 1343/02 (March 30, 2003) [2003 ONWSIAT 693] refd to
Decision No. 568/03 (April 4, 2003) [2003 ONWSIAT 827] refd to
Decision No. 924/03 (June 25, 2003) [2003 ONWSIAT 1493] consd
Decision No. 1873/03 (February 2, 2004) [2004 ONWSIAT 200] consd
Decision No. 164/06 (July 26, 2006) [2006 ONWSIAT 1650] consd
Decision No. 1750/08 (December 24, 2008) [2008 ONWSIAT 3377] consd
Decision No. 1948/08 (October 1, 2008) [2008 ONWSIAT 2594] consd

Workplace Insurance Legislation Considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A
s. 119(1)
s. 124(1)

Board Directives and Guidelines Considered:

Operational Policy Manual
Document No. 18-01-08 (October 12, 2004)

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[DISPOSITION](#)

APPEAL by the worker from a decision of the Appeals Resolution Officer denying payment of interest on a retroactive pension award.

March 5, 2009. THE TRIBUNAL: —

BEFORE: J.P. Moore, Vice-Chair

HEARING: December 30, 2008, at Toronto, Written

DECISION(S) UNDER APPEAL: WSIB ARO decision dated February 1, 2008

APPEARANCES:

For the worker: P. Celli, Paralegal

For the employer: Not participating

REASONS

(i) Introduction

[1] On November 4, 1976, the worker suffered a significant crush injury to his right upper extremity. After several unsuccessful surgeries, the worker underwent a below elbow amputation on November 20, 1976. The worker was fitted with an elbow prosthesis in 1977 and granted a 50% permanent disability award on November 6, 1978 in recognition of a permanent organic impairment.

[2] In January 1980, the worker was also granted a 20% provisional psychological award. This award expired in March 1982 with no further review.

[3] In February 2007, the worker's representative requested a review of the provisional psychological award. In August 2007, the Workplace Safety and Insurance Board granted the worker a permanent 10% award for a psychotraumatic disability. The worker received full arrears for the pension.

[4] The decision to allow the worker the additional pension was made by a Claims Adjudicator. When the worker subsequently requested interest on the retroactive award, his request was denied on the basis that the interest request did not fall within the criteria in the Board's policy for allowing retroactive interest payments.

[5] The worker objected to that decision. His objection was denied by an Appeals Resolution Officer (ARO) in a decision dated February 1, 2008. The worker now appeals to the Tribunal.

(ii) The Issues

[6] The issue in this appeal is whether the worker is entitled to interest on a retroactive pension granted to him by the Board's operating level in 2007. Resolving that issue requires addressing two questions:

1. whether the worker is entitled to retroactive interest; and
2. if so, whether that interest is payable prior to January 6, 1989.

(iii) The Decision

[7] On the evidence and submissions presented to me, I am persuaded that the worker is entitled to interest on the retroactive amount granted to him by the Board's operating level in August 2007, but only from January 6, 1989.

(iv) Analysis

[8] The worker is seeking entitlement to interest retroactive to the start date of the initial pension award granted to the worker by the Board in 2007. The award was made "fully retroactive", which implies that the award was made retroactive to the date the worker's 20% provisional psychological pension ended, March 1982. The worker seeks interest from that date.

[9] The applicable policy is found in *Operational Policy Manual* Document No. 18-01-08, entitled "Interest Payments." The relevant portions of the policy read as follows:

The WSIB pays interest on delayed benefit payment to workers or, in case of death, to their survivors. Delayed benefit payments are payments issued after the standard payment due date...

This policy is intended to place workers in the same financial position that they would have been in had the WSIB originally made the appropriate decision, or processed the benefit payment on or before the standard payment due date.

[10] However, that stipulation is qualified for workers whose claims were "registered" before January 1, 1990. In that case, interest is only paid if the delayed benefit resulted from the decision of an ARO or the Tribunal. Moreover, where interest is payable in those circumstances, interest is payable only from January 6, 1989, at the earliest.

[11] In the present case, the worker's claim for full retroactive interest fails to meet the Board criteria in the following respects:

1. the worker's claim was registered with the Board prior to January 1, 1990;

2. the delayed benefit entitlement was granted by the Board's operating level and not by a decision of the Board's Appeals Branch or of the Tribunal; and
3. if the worker's request did meet those criteria, interest would only be payable retroactive to January 6, 1989 and not to the date of the commencement of the additional benefit.

[12] In this decision I will consider separately 1) whether the worker is entitled to retroactive interest, and 2) if so, the date from which such interest should be paid.

(a) Is the Worker Entitled to Retroactive Interest?

[13] Sections 119(1) and 124(1) of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, stipulate that the Board and the Tribunal are required to base their decisions on "the merits and justice of a case." A number of Tribunal decisions have discussed that legislative requirement in relation to Board policy and its application. Tribunal decisions generally have concluded that the merits and justice provision is not to be used to circumvent Board policy. Rather, it is to be used in those cases where exceptional circumstances exist such that the application of Board policy would result in manifest unfairness.

[14] There is some ambiguity on the face of the Board policy applicable to this appeal. The policy states on the one hand that the goal of the policy is to place workers in the same financial position they would have been in had the Board originally made the appropriate decision. On the other hand, the policy appears to narrow the scope of the policy's intent by placing a limitation on the availability of interest benefits and the start date for the payment of interest benefits.

[15] In the Tribunal's *Decision No. 549/90* (1991), 21 W.C.A.T.R. 25, a panel of the Tribunal concluded that the creation of policy time limitations constituted a reasonable exercise of the Board's discretion. However, subsequent Tribunal decisions have also recognized that there can be "exceptional circumstances" in which interest will be payable notwithstanding the fact that the Board's policy criteria are not met. I note the following discussion in the Tribunal's *Decision No. 24/02* (2003), 65 W.S.I.A.T.R. 43, at paras. 14, 15 and 43:

The policy thus distinguishes among different groups of workers, depending on when the claim is registered. If the claim is registered before January 1, 1990, interest is only payable if the delayed payment arises from a Board appeal decision or a decision of the Tribunal (providing that decision is dated January 6, 1989 or later).

If the claim is registered with the Board on or after January 1, 1990, interest accrues for delayed payments that should have been paid on or after January 1, 1990, and the level of adjudication does not matter.

...

The policy thus contemplates that in general, interest is not payable in pre-1990 claims except in exceptional circumstances. Under the terms of the policy, an exceptional pre-1990 case is defined as a case that is decided at the appeal level. This is reasonable since cases that have to be pursued to the appeal level are more likely to be cases in which a significant injustice had been corrected than cases that are decided only at the Claims Adjudicator level. However, it is clear that in some cases, a significant injustice may be identified and corrected at the operating level. A determination that the worker is not entitled to interest only because the injustice was corrected at the claims level and not at the appeals level can clearly lead to an arbitrary result. The legislative requirement that claims be determined with regard to their merits and justice means that exceptional circumstances of individual cases still need to be considered.

[16] I note the reference in that decision to the "arbitrary" impact of the Board policy when an "injustice was corrected" at the claims level rather than at the appeals level. That concern has been expressed in a number of other Tribunal decisions in this area. In those decisions where interest was made payable to a worker with a pre-1990 accident, the nature of the "corrected injustice" was often noted as the principal factor in determining the outcome. Those decisions seemed to ask: how substantial was the error that led to the non-payment of benefits? The decisions imply that the more significant the error, the greater the unfairness of not allowing the worker interest on a pre-1990 claim. The Board's policy seems to imply that significant errors are more likely to be detected on appeal. But Tribunal decisions have concluded that occasionally such errors will be found before the appeals level is reached. They have found that, if the error is significant enough, merits and justice require the inclusion of the "victim" of that error within the scope of those workers who are entitled to interest.

[17] In my view, that interpretation of the Board's policy reflects an appropriate application of the merits and justice provisions of the legislation. In applying that interpretation to the present case, I find that the facts of this case reveal the occurrence of a significant error on the part of the Board. The provisional award granted to the worker by the Board in 1980 resulted from the recommendation of a Board medical consultant, Dr. Doyle. In an undated memorandum written in January 1980, Dr. Doyle recommended granting the worker a "lump sum award equivalent to 20% for two years." Dr. Doyle then added: "Review would be necessary at the end of this time".

[18] There was, in fact, no such review and the worker's non-organic pension expired at the end of the two-year period.

[19] The Board decided to reconsider the worker's entitlement to a pension for a non-organic impairment after receiving a report from Dr. L. Kiraly, a psychiatrist who assessed the worker on September 27, 2006. Dr. Kiraly prepared a report dated November 20, 2006 in which he described symptoms experienced by the worker since the accident and stated: "He has not been able to recover from his psychological symptoms since the accident".

[20] The 10% award the worker was granted was based on an assessment by a Board Psychiatric Consultant, Dr. Rosenbluth. Dr. Rosenbluth concluded that the worker had experienced a permanent psychiatric reaction to the initial injury.

[21] According to Tribunal decisions that have considered the underlying rationale for the time limitations in the Board's policy on interest, the time limitations reflect administrative changes in the Board's benefit processing system. In *Decision No. 24/02*, the Vice-Chair stated [at para. 41]:

While there is ambiguity, it does seem to me that the Board intended to make a distinction between claims where the injury occurred before January 1, 1990 and claims where the injury occurred after that date. As a general rule, the Board intended that interest was payable in claims where the injury occurred after January 1, 1990. In pre-1990 claims, the policy intended that interest was payable only in respect of appeal level decision. The Board intended to limit the number of cases in which a manual calculation was necessary to those cases that were allowed at the appeal level.

[22] In the present case, I am persuaded on the facts that it would be unfair not to allow the worker interest on the retroactive benefit granted to him by the Board in August 2007. I am persuaded that the Board made a clear and significant error. When the provisional award was granted in 1980, the medical consultant who recommended the award clearly intended that the award be reviewed at the end of the two-year period to consider further entitlement. As a result of the failure to review the award as directed, the worker lost the opportunity to be considered for a further award.

[23] In my opinion, these were significant oversights that had an impact on the worker. The fact that the error was discovered and corrected at the operating level rather than at the appeals level does not, in my opinion, mitigate the significance of the errors. I am persuaded that there would be manifest unfairness in not granting the worker interest as though the error had been discovered and corrected at the appeals level.

[24] I conclude, therefore, that, notwithstanding the fact that the worker's claim was registered prior to January 1, 1990, he is entitled to the payment of interest on the retroactive benefit granted to him in August 2007. I find that the merits and justice of the case require such a disposition.

(b) Is Interest Payable Before January 6, 1989?

[25] I note again that the Board's policy contains two elements. It creates a new right – interest after January 6, 1989 – but limits entitlement to that new right. Only claims registered before January 1, 1990 are eligible to receive that new right, subject to exceptions discussed above. Hence, certain workers can receive the benefit of interest after January 6, 1989; others cannot. However, no workers are entitled to interest before January 6, 1989.

[26] After this policy was implemented, a number of Tribunal decisions allowed interest on a pre-1990 claim, but denied such interest before January 6, 1989. The rationale for doing so was discussed in several Tribunal decisions. I note in particular the following excerpt at p. 51 of *Decision No. 549/90*:

In the case before the panel, we find that the Board has attempted to exercise its discretion in a manner that attempts to

balance the financial integrity of the accident fund against maintenance of a fair economic value for compensation benefits. It has done so by fixing on January 1989 as the date for an interim policy with respect to interest payments and has incorporated this policy into a similar final policy effective January 1990. The policy should dovetail with employer assessments. In our view, this represents a reasonable exercise of the Board's discretion in accordance with the requirements of good public administration. We find there is no reasonable basis for interfering with such an exercise of the Board's discretion.

[27] After that decision was released, there were several Tribunal decisions in which a worker with a pre-1990 claim was granted interest but only after January 6, 1989 (see, for example, *Decision No. 1343/02* (March 20, 2003) and *Decision No. 568/03* (April 4, 2003)). Those decisions did not discuss whether interest should be payable before January 6, 1989, but appeared simply to defer to the Board policy.

[28] The first Tribunal decision that allowed interest prior to January 6, 1989 was *Decision No. 75/95* (September 13, 1995). The decision allowed interest before that date primarily on the basis of the substantial financial hardship that the Board error had engendered on the worker's family.

[29] Over the subsequent years, some Tribunal decisions continued to deny interest before January 6, 1989, without extensive reasons. Others allowed it, but seemed to do so only by implication after concluding that a worker with a pre-1990 claim was entitled to interest. The decisions directed that interest be payable on a fully retroactive basis. In some cases, this involved payment of interest prior to January 6, 1989 (see, for example, *Decision No. 656/02* (July 30, 2002)).

[30] In *Decision No. 2444/00* (January 31, 2002), a Tribunal panel allowed interest before January 6, 1989 on the basis of the fact that the Board apparently "lost" the worker's file over a 17 year period.

[31] In *Decision No. 924/03* (June 25, 2003), a Vice-Chair sitting alone addressed a request for interest before January 6, 1989 in a case where the Board had granted interest on a pre-1990 claim. The Vice-Chair cited and distinguished *Decisions No. 2444/00* and *656/02*. At paragraph 31, the Vice-Chair stated:

Mr. McKinnon relied on other Tribunal decisions that have allowed pre-1989 interest. In my view, however, those decisions can be distinguished from the present appeal. In *Decision No. 2444/00*, the Panel relied on the Board's loss of the worker's file for some 17 years. In *Decision No. 656/02*, the worker passed away and had been without funds for the periods of time of his permanent disability. In the present appeal, the worker received benefits on a timely basis following his accident; it is the quantum of those benefits that were in error. While the earnings basis increase may have been significant, the worker was not without any funds during the period of time that his pension was based on lower earnings.

[32] *Decision No. 1873/03* (February 2, 2004) came to a similar conclusion. In that case, a Vice-Chair sitting alone made two distinct findings: he allowed interest on a pre-1990 claim, but denied interest prior to January 6, 1989. The Vice-Chair stated [at paras. 30-31]:

As I have discussed, the policy also provides that in general, in pre-1990 claims, interest will only be paid if the delayed payment is granted at an appeal level. However, in my view, in certain cases, interest should be payable under the terms of the policy if a significant injustice was corrected at the Operating level rather than at the appeals level. In my view, this case falls under that exception.

There might be cases where the facts are so fundamentally exceptional that the merits and justice of the case would require that interest be paid before January 6, 1989, notwithstanding the fact that the Board's policy provides that interest can only accrue from January 6, 1989. In my view, the circumstances of this case are such that interest should be payable even though the injustice was corrected at the claims level rather than at the appeal level. However, I am also of the view that the circumstances are not so fundamentally exceptional that interest should be payable before January 6, 1989, the date that the Board's interest policy took effect.

[33] Although the Vice-Chair in that decision did not assess in detail the factors that contributed to the two respective conclusions in that case, it can be inferred from the reasoning that the Vice-Chair felt that there were exceptional circumstances that warranted the payment of interest on a pre-1990 claim but not exceptional circumstances that warranted the payment of interest prior to January 6, 1989.

[34] Two subsequent decisions, *Decisions No. 164/06* (July 26, 2006) and *1948/08* (October 1, 2008) allowed interest on a pre-1990 claim and granted that interest prior to January 6, 1989. In each of those decisions, the Vice-Chairs emphasized the impact of the Board's error on the worker or the worker's family. I note the

following excerpt from *Decision No. 164/06*
[at para. 21]:

What was lost to the family, as a result of the Board's decision in 1956, was the full panoply of compensation benefits that a dependent family can have access to under the legislation. This was not a case where an individual was deprived of a portion of benefits for a period of time. What happened in the present case was that the family lost access to benefits intended to replace the income they lost as a result of the death of the late worker. The impact on the family of not recognizing that entitlement can be, as was noted in *Decision No. 206A*, potentially devastating. Where survivors' benefits have not been granted to someone who is in fact, entitled to such benefits, it is reasonably likely that the family would either need to find money from some other source, by way of borrowing (which would necessitate the payment of interest) or by refuge to some form of public support. In my view, it is unlikely that there can be a greater loss than the loss of survivors' benefits when a family's breadwinner has died. It seems to me, therefore, that the circumstances of the present case are extraordinarily compelling and would constitute the kind of fundamentally exceptional circumstances that would warrant payment of interest prior to the start date stipulated in the Board's policy.

[35] The Vice-Chair who issued *Decision No. 1948/08* cited the nature of Board's error, but also indicated that, as a result of the Board's error [at para. 16]:

...The worker then spent the remainder of his working life as a janitor, which surely was not his anticipated career path when he began working as a machine operator at a young age.

[36] Finally, I note *Decision No. 1750/08* (December 24, 2008), in which a Vice-Chair of the Tribunal denied a worker interest before January 6, 1989. At paragraph 39, the Vice-Chair stated:

However, I note again that it is well established that exceptional circumstances in such matters are not always found where there is simply a delay in providing benefits and a financial impact on a worker. Panels have tended to look for circumstances that were more than simply financial.

[37] The Vice-Chair went on to cite *Decisions No. 75/95* and *164/06*, and then stated, at paragraph 41:

In my view, the circumstances were much more extreme in the cases noted than those at hand given the workers' deaths and the traumatic personal circumstances that impacted the survivors. Certainly the worker in this matter has a long period of time during which he was paid benefits incorrectly. However, I did not find that the facts of the case at hand were so extraordinary and fundamentally exceptional that they warranted going behind the 1989 date in the policy.

[38] On the basis of the discussion noted above from the Tribunal's case law, I am persuaded that, in addressing the two distinct criteria in the Board's policy on interest, the standard for what constitutes exceptional circumstances is different in determining: a) whether a worker will get interest, and b) whether that interest should be payable prior to January 6, 1989. In my view, there are valid reasons for approaching the two criteria differently. Under the policy, the Board intends that no interest be payable to any workers prior to January 6, 1989. In my opinion, allowing a worker entitlement to a benefit that is not generally available ought to require particularly exceptional circumstances. In exercising its discretion in establishing that new benefit, the Board no doubt took into account issues of administration and cost.

[39] The other criterion in the Board's policy – that there is no entitlement to the interest benefit for pre-1990 accidents – looks not at what the benefit is but, rather, who shall be entitled to that benefit. The January 6, 1989 date does not distinguish among workers. In theory, no worker is entitled to interest prior to that date. However, the January 1, 1990 date does distinguish among workers. In making such a distinction, the Board was obviously cognizant of the fact that there will be exceptional circumstances that would require waiving this particular criterion. The Board defined the terms of such an exemption but, as numerous Tribunal decisions have concluded, the spirit of that exemption will be met in a number of circumstances that do not necessarily meet the precise wording of the exemption. Putting it succinctly, the Board's policy criteria with respect to the January 1, 1990 date appears to be more flexible than the policy stipulation regarding the January 6, 1989 deadline. Tribunal decisions appear to reflect a similar approach, showing substantially more flexibility in allowing interest than they show in allowing the payment of interest prior to January 6, 1989.

[40] In my review of the case law above, it appears that the decisions that allowed payment of interest prior to January 6, 1989 did so because the facts were "so fundamentally exceptional" that the merits and justice required that interest be paid before January 6, 1989. In each of those cases, the families of deceased workers had lost

access to a substantial amount of money because of a Board error. I note again the following discussion from *Decision No. 164/06* [at para. 21]:

What was lost to the family, as a result of the Board's decision in 1956, was the full panoply of compensation benefits that a dependent family can have access to under the legislation. This was not a case where an individual was deprived of a portion of benefits for a period of time. What happened in the present case was that the family lost access to benefits intended to replace the income they lost as a result of the death of the late worker.

[41] In my view, the distinction made in that paragraph is pertinent for the present case. As the Vice-Chair noted in that statement, fully retroactive interest was payable because the worker's family had lost significant income replacement benefits. The Vice-Chair indicated that such a circumstance was distinct from the case "where an individual was deprived of a portion of benefits for a period of time."

[42] In my view, the present case exemplifies that latter example. In the present case, the worker lost a portion of a permanent pension. While that is a significant loss, it is not one that warrants the payment of interest before the date authorized by Board policy, January 6, 1989. I am not persuaded that it is a loss of such significance that it warrants payment of interest prior to the date when interest is generally available to injured workers. In my view, the facts of this case do not reflect such manifest unfairness that the worker should be given a benefit not otherwise available. In coming to this conclusion, I adopt and follow the approach taken in *Decision No. 1873/03*.

[43] For these reasons, I allow the worker's appeal in part. The worker is entitled to retroactive interest, but not prior to the time limits established in Board policy – January 6, 1989.

DISPOSITION

[44] The worker's appeal is allowed in part:

1. the worker is entitled to retroactive interest on the 10% pension granted to him retroactively by the Board in August 2007;
2. such interest shall be payable from January 6, 1989 until the date the additional delayed benefit was granted by the Board.

Appeal allowed in part.

Decision No. 396/08R

Vice-Chair: E. Smith

Decision — February 26, 2009

Neutral Citation: 2009 ONWSIAT 479

Reconsideration (standard of proof) – Non-economic loss (pre-existing condition) – Permanent impairment (rating schedule) (AMA Guides) (combined values) – Board Directives and Guidelines (NEL) (pre-existing condition) – Board policies (applicability of Board policy) – Retroactivity (policy change).

Review of law regarding retroactive application, retrospective application, immediate application and interference with vested rights – Application of Board policy based on accident date may be appropriate in some circumstances but not in other circumstances – With regard to NEL assessments, key relevant fact is date of maximal medical rehabilitation – Vice-Chair determined applicable policy with regard to applicability of combined values chart in AMA Guides when there is a prior NEL award for impairment of different body area.

The worker suffered a neck injury in 1992, for which she was granted a 20% NEL award. In 1997, she underwent neck surgery, following which the NEL award was increased to 33%. After the neck surgery, she developed severe symptoms in her low back. In *Decision No. 2470/05*, the Tribunal found that the worker had entitlement for the low back injury as a consequence of the neck injury. The Board then rated the low back impairment at 37%. The Board applied the combined values chart in the AMA Guides to arrive at a whole person impairment of 58%. The worker appealed, claiming that she was entitled to separate awards of 33% for the neck and 37% for the low back.

In *Decision No. 396/08*, the vice-chair found that Board *Operational Policy Manual*, Document No. 05-06-07, was applicable, rather than Document No. 18-05-05, and that, following the reasoning in *Decision No. 594/02*, the combined values chart did not apply when the worker who is being rated for permanent impairment has a pre-existing NEL award and is rated for a second award to a different body area.

The Board applied for reconsideration of *Decision No. 396/08*.

In *Decision No. 396/08*, the vice-chair found that Document No. 18-05-05 was not applicable because it applied to accidents occurring after January 1, 1998. However, the Board submitted that the vice-chair was referring to a version of the policy that was in effect only from June 15, 1999 to June 14, 2004. On that date, Document No. 05-06-07 was rescinded and Document No. 18-05-05 was revised to apply to all decisions made after January 1, 1998, for accidents on or after January 2, 1990. The Vice-Chair noted that Document No. 18-05-05 has been interpreted to provide that the chart applies when there are two sequential NEL assessments to different body parts.

The Vice-Chair found that there was an error in the original decision in the failure to provide any reasoning as to why the 2004 version of Board policy did not apply. However, in order to meet the threshold test for reconsideration, an error must be of sufficient significance that correction would probably change the result of the original decision. Thus, it was necessary for the Vice-Chair to consider what policy applied and whether the combined values chart would be applicable under that policy.

The Vice-Chair reviewed the law regarding retroactive application, retrospective application, immediate application and interference with vested rights. The question of whether the 2004 policy applies or interferes with vested rights does not turn on the accident date. The application of Board policy based on accident date may be appropriate in some circumstances but in other circumstances the Board may choose an application date based on other circumstances. With regard to a NEL assessment, the Vice-Chair found that the key relevant fact is the MMR date. The relevant facts with respect to the assessment are complete by that date.

In this case, it was difficult to determine the exact MMR date used by the Board, but the Vice-Chair found that it was prior to June 2004. Document No. 05-06-07 was the policy that was then applicable to pre-1998 accidents. Application of the 2004 policy would give the policy retroactive effect and interfere with the worker's interest or expectation of benefits under the old policy.

Document No. 05-06-07 has been interpreted in different manners. The vice-chair at the original hearing accepted the interpretation in *Decision No. 594/02*. The Vice-Chair was of the view that the difficulties associated with the interpretation in *Decision No. 594/02* are sufficiently extensive that it is likely that the wording used in that document was inadvertent and that it is likely that the Board intended the reference to pre-existing conditions in the policy statement in Document No. 05-06-07 to be limited to pre-existing conditions under the prior legislation or to non-compensable pre-existing conditions. Thus, it is possible to interpret the 2004 revision to Document No. 18-05-05 as merely a clarification of prior policy as it affects pre-1998 injuries. The Vice-Chair preferred this approach to that of *Decision No. 594/02*.

However, the Tribunal has a high threshold for reconsideration. The original vice-chair adopted a different interpretation of Document No. 05-06-07, one that had been adopted in other Tribunal decisions.

The application to reconsider was denied.

Réexamen (norme de preuve) – Perte non économique (état pathologique préexistant) – Déficience permanente (barème des taux) (guides de l'AMA) (valeurs combinées) – Directives et lignes directrices de la Commission (PNÉ) (état pathologique préexistant) – Politiques de la Commission (applicabilité de la politique de la Commission) – Effet rétroactif (modification de la politique).

Le Tribunal examine le droit en matière d'application rétroactive, d'application retrospective, d'application immédiate et d'atteinte aux droits acquis – L'application de la politique de la Commission en fonction de la date de l'accident peut être appropriée dans certaines circonstances mais non dans d'autres – La date de réadaptation médicale maximum est le fait pertinent clé lors de l'évaluation de la perte non financière – La vice-présidente détermine la politique voulue pour déterminer l'applicabilité du tableau des valeurs combinées des guides de l'AMA quand un travailleur a déjà droit à une indemnité pour PNF pour une déficience à une autre partie du corps.

La travailleuse a subi une lésion au cou en 1992. Elle a obtenu une indemnité pour perte non financière (PNF) de 20 %. En 1997, elle a subi une chirurgie au cou, après quoi son indemnité pour PNF a été portée à 33 %. Après sa chirurgie au cou, elle a commencé à présenter de graves symptômes au bas du dos. Dans la *décision n° 2470/05*, le Tribunal a conclu qu'elle avait droit à une indemnité pour le bas du dos à titre de séquelle de sa chirurgie au cou. La Commission a alors établi un taux de 37 % pour la déficience au bas du dos. Elle a ensuite appliqué le tableau des valeurs combinées des AMA Guides (guides de l'AMA) et elle est parvenue à un taux de déficience globale de 58 %. La travailleuse a interjeté appel en soutenant qu'elle avait droit à des indemnités séparées de 33 % pour le cou et de 37 % pour le bas du dos.

Dans la *décision n° 396/08*, le vice-président a conclu que c'était le document n° 05-06-07 du *Manuel des politiques opérationnelles* (MPO) qui était applicable, plutôt que le document n° 18-05-05. Il a indiqué que, selon l'analyse contenue dans la *décision n° 594/02*, le tableau des valeurs combinées ne s'applique pas quand le travailleur évalué pour déterminer un taux de déficience permanente à une partie du corps a déjà droit à une indemnité pour PNF pour une autre partie du corps.

La Commission a demandé un réexamen de la *décision n° 396/08*.

Dans la *décision n° 396/08*, le vice-président a conclu que le document n° 18-05-05 n'était pas applicable parce

qu'il s'appliquait aux accidents survenus après le 1^{er} janvier 1998. La Commission a toutefois soutenu que le vice-président faisait référence à une version de ce document qui avait été en vigueur seulement du 15 juin 1999 au 14 juin 2004. À cette date, la Commission a annulé le document n^o 05-06-07 et elle a révisé le document n^o 18-05-05 de manière à ce qu'il s'applique à toutes les décisions rendues après le 1^{er} janvier 1998, pour les accidents survenus le 2 janvier 1990 ou après cette date. Le vice-président a noté que le document n^o 18-05-05 a été interprété de façon à ce que le tableau s'applique dans les cas où il y a deux évaluations séquentielles de la perte non financière inhérente à deux parties du corps différentes.

La vice-présidente a conclu que la décision initiale était entachée d'une erreur parce qu'on avait négligé d'expliquer pourquoi la version de 2004 de la politique ne s'appliquait pas. Cependant, pour remplir les critères voulus pour un réexamen, il faut que l'erreur soit d'une importance telle que sa rectification changerait probablement le résultat de la décision initiale. La vice-présidente a donc dû examiner quelle politique s'appliquait et si le tableau des valeurs combinées était applicable en vertu de cette politique.

La vice-présidente a examiné le droit en matière d'application rétroactive, d'application rétrospective, d'application immédiate et d'atteinte aux droits acquis. La question de savoir si la politique de 2004 s'applique ou si elle porte atteinte à des droits acquis ne dépend pas de la date de l'accident. L'application de la politique en fonction de la date d'accident peut être appropriée dans certaines circonstances mais, dans d'autres circonstances, la Commission peut choisir une date d'application fondée sur d'autres circonstances. En ce qui concerne l'évaluation aux fins de l'établissement du taux d'une indemnité pour PNF, la vice-présidente a conclu que le fait pertinent clé était la date de réadaptation médicale maximum (RMM). Les faits pertinents relatifs à l'évaluation étaient complets à cette date.

En l'espèce, il était difficile de déterminer la date exacte du RMM utilisée par la Commission mais la vice-présidente a conclu qu'elle était antérieure à juin 2004. Le document n^o 05-06-07 était la politique applicable aux accidents d'avant 1998. L'application de la politique de 2004 aurait rendu la politique rétroactive et aurait porté atteinte aux intérêts de la travailleuse ou à ses attentes en matière de prestations en application de l'ancienne politique.

Le Tribunal a interprété le document n^o 05-06-07 de différentes manières. Le vice-président auteur de la décision initiale a accepté l'interprétation donnée dans la *décision n^o 594/02*. La vice-présidente a estimé que les difficultés associées à cette interprétation étaient suffisamment importantes pour qu'il soit probable que le libellé utilisé dans ce document avait été utilisé par inadvertance. Elle a aussi estimé probable que, dans l'énoncé de politique du document n^o 05-06-07, la Commission avait l'intention de limiter la référence aux états pathologiques préexistants aux états préexistants aux termes de l'ancienne législation ou aux états préexistants non indemnisables. Il était donc possible d'interpréter la révision de 2004 du document n^o 18-05-05 comme une simple clarification de la politique précédente en ce qui concerne les lésions d'avant 1997. La vice-présidente a préféré cette interprétation à celle donnée dans la *décision n^o 594/02*.

Le Tribunal a toutefois des critères élevés pour les réexamens. Le vice-président auteur de la décision initiale a adopté une interprétation différente du document no 05-06-07, interprétation qui avait déjà été adoptée dans d'autres décisions du Tribunal.

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. 850/87R (1990), 14 W.C.A.T.R. 1 refd to
Decision No. 809/98 (March 2, 2000) [2000 ONWSIAT 547] consd
Decision No. 103/01 (December 11, 2001) [2001 ONWSIAT 3767] consd
Decision No. 2021/01R (2005), 72 W.S.I.A.T.R. 16 consd
Decision No. 2828/01 (2003), 67 W.S.I.A.T.R. 81 consd
Decision No. 594/02 (2002), 63 W.S.I.A.T.R. 139 consd
Decision No. 871/02R2 (2006), 81 W.S.I.A.T.R. (online)
Decision No. 1119/04R (2005), 76 W.S.I.A.T.R. (online) consd
Decision No. 1529/04I (2007), 81 W.S.I.A.T.R. (online) refd to

Decision No. 1357/05 (2006), 79 W.S.I.A.T.R. (online) consd
Decision No. 230/06R (2008), 87 W.S.I.A.T.R. (online)
Decision No. 878/06R (2007), 81 W.S.I.A.T.R. (online) consd
Decision No. 2237/08 (October 29, 2008) [2008 ONWSIAT 2836] consd

Other Decisions Considered:

Gowling v. Ontario Workplace Insurance and Appeals Tribunal, [2004] O.J. No. 919 (Div. Ct.) consd

Workplace Insurance Legislation Considered:

Workers' Compensation Act, R.S.O. 1990, c. W.11

s. 70

s. 92

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A

s. 126(4)

s. 129

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 05-06-07 (September 4, 1991) (since revised)

Document No. 18-05-05 (October 12, 2004)

Cross-References:

Decision No. 2470/05 (January 6, 2005) [2005 ONWSIAT 30]

Decision No. 396/08 (February 26, 2009) [2009 ONWSIAT 479]

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APPLICATION by the Board for reconsideration of *Decision No. 396/08*.

February 26, 2009. THE TRIBUNAL: —

BEFORE: E.J. Smith, Vice-Chair

HEARING: September 16, 2008, at Toronto, Written
Post-hearing activity completed on December 9, 2008

DECISION(S) UNDER APPEAL: WSIB request for reconsideration of *Decision No. 396/08* dated May 5, 2008

APPEARANCES:
For the Board: Ms. E. Brown, Lawyer
For the worker: Mr. F. DiLena, Paralegal

For the employer:

Not participating

REASONS

(i) The Issue

[1] The Board requests reconsideration of the determination in *Decision No. 396/08* (February 26, 2009) that the American Medical Association (AMA) Combined Values Chart does not apply to the two NEL awards granted to the worker in respect of the pre-1998 injuries to her neck and low back.

(ii) Background

[2] The worker suffered an injury to her cervical spine on October 2, 1992. She was awarded a 20% NEL award on March 10, 1995. The worker had decompression/fusion surgery on June 27, 1997. Her NEL award for her neck was increased to 33% on December 21, 1998.

[3] Following the 1997 surgery the worker developed severe symptoms in her lumbar spine, which were found to be compensable in Tribunal *Decision No. 2470/05* (January 6, 2006). The Board assessed the worker for a permanent impairment of the low back on May 16, 2006, and rated the impairment at 37%. The Board applied the Combined Values Chart and awarded a total NEL award of 58%. The worker appealed on the basis that the Chart should not have been applied. She submits that she is entitled to a NEL award of 70%, being the sum of the 33% for the neck and the 37% for the low back applicable in the absence of combination under the Chart.

[4] In *Decision No. 396/08* the Vice-Chair adopted the reasoning of Tribunal *Decision No. 594/02* (2002), 63 W.S.I.A.T.R. 139, that, under the terms of *Operational Policy Manual* Document No. 05-06-07, the Chart did not apply to combine two NEL awards when the worker being rated for the permanent impairment has a pre-existing NEL award and is rated for a second award to a different body area. The Vice-Chair found that OPM Document No.

05-06-07 was the applicable Board policy, rather than OPM Document No. 18-05-05, because both accidents occurred prior to January 1, 1998. The Vice-Chair refers to Document No. 18-05-05 as having application only to accidents that occurred after January 1, 1998.

(iii) The Submissions of the Board

[5] The Board requests reconsideration of this decision on the basis that the Vice-Chair has applied the wrong policy. The Vice-Chair found that OPM Document No. 18-05-05 was not applicable because it applied to accidents that occurred after January 1, 1998. However, the Board submits that the Vice-Chair is referring to a version of this policy that was in effect only from June 15, 1999 until June 14, 2004. On that date, Document No. 05-06-07 was rescinded and Document No. 18-05-05 was revised to apply to “all decisions made on or after January 1, 1998 for accidents on or after January 2, 1990”.

[6] In this case the worker’s NEL assessment took place in 2006. At that time, on its face, the 2004 version of OPM Document No. 18-05-05 was the policy applicable to that NEL assessment. By its terms, it applied to accidents from January 2, 1990.

[7] I note that OPM Document No. 18-05-05 was interpreted in Tribunal *Decisions Ns. 1119/04R* (2005), 76 W.S.I.A.T.R. (online) and *1357/05* (2006), 79 W.S.I.A.T.R. (online) to provide that the Chart applies when there are two sequential NEL assessments to different body areas. The Vice-Chair in *Decision No. 396/08* did not disagree with that interpretation of that policy. His decision rested on his interpretation of the earlier policy, Document No.

05-06-07, and his finding that that policy was the applicable policy.

(iv) The Reconsideration Test

[8] 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.

[9] 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.

[10] As discussed in *Decision No. 871/02R2* (2006), 81 W.S.I.A.T.R. (online), one of the fundamental concepts which guides the entire Tribunal process is a duty of fairness. The Tribunal has gone to considerable lengths, in spite of limited resources, to promote a fair process. The threshold test and the role of the reconsideration process must be understood in the context of the Tribunal's processes generally. Most parties have the option of an oral hearing, which is a hearing *de novo* at the Tribunal. This is very unusual at the final level of appeal within any adjudicative system. The Tribunal invests considerable resources in preparing cases for hearing and assisting parties to identify the issues in dispute so that parties can in turn be fully prepared for the hearing. The reconsideration process should not be so generally available that it undermines the important role of the original hearing or the finality of decisions which are reached after a fair hearing process.

[11] Because of limited resources, the Tribunal must also carefully balance its processes to ensure that parties awaiting their first hearing are not penalized because of the expenditure of scarce resources on reconsideration requests.

[12] It is instructive to refer to *Decision No. 871/02R2*'s analysis of the threshold test that a reconsideration request must meet and the reasons for this [at paras. 11-13]:

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 re-opened.

[13] The Divisional Court has reviewed and upheld the Tribunal's reconsideration process in *Gowling v. Ontario Workplace Safety and Insurance Appeals Tribunal*, [2004] O.J. No. 919 (Div. Ct.) In particular, the Court found [at para. 23]:

- 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.

(v) Submissions of the Parties

[14] Because the issue is a narrow one, I notified the parties that I would address the threshold test and the merits of the appeal together, i.e., I would address: 1) whether there was a significant defect in the administrative process or content of *Decision No. 396/08* which, if corrected, would probably change the result of the original decision, and
2) whether the Chart applies to the calculation of the worker's NEL awards.

[15] Mr. DiLena submits that the 1999 policy was included in Addendum No. 1 at pages 48 to 79. He refers to Tribunal decisions about retroactive decision making. He refers to Tribunal decisions that determine that like decisions should be decided alike.

[16] However, in the latter submission, he does not address the fact that there were two different lines of Tribunal decisions about whether OPM Document No. 05-06-07 intended the Chart to be applied to the case of two sequential NEL awards (see the discussion in *Decision No. 1357/05*).

[17] The employer did not make submissions.

(vi) The Threshold Test

[18] Turning to the threshold test, I accept the position of the Board that the prior Vice-Chair referred to the wrong version of OPM Document No. 18-05-05 in *Decision No. 396/08* when he reasoned that that policy did not apply. He referred to the version of the policy discussed in several prior Tribunal decisions. However, the application provisions of the policy were changed in June 2004.

[19] I have reviewed Addendum No. 1 for this appeal, and have confirmed that the Board notified the Tribunal of the 2004 version of the policy. The notification letter is found at page 89 of Addendum No. 1 and includes the 2004 version of the policy at page 103. The application date is found at page 105 and states that the 2004 policy applies to all decisions made after January 1, 1998 for accidents on or after January 2, 1990.

[20] Somewhat confusingly, the Addendum also includes a package of material about NEL assessments attached to a letter of Mr. Dan Revington, General Counsel, dated May 26, 2003, asking that the Board provide some general information about NEL assessments. Selected Board policies are attached to Mr. Revington's letter. The versions attached are the versions current at the time of Mr. Revington's letter. They include the 1999 version of OPM Document No. 18-05-05. The package is part of a "NEL Quantum Casebook for Written Appeals" dated December 18, 2003, which has been included in Addendum 1, apparently by Tribunal staff.

[21] The material that Tribunal staff included in the Casebook does not appear to have been updated since 2003. It appears to have been the source of the confusion in this case, because the 1999 version of the policy was placed in Addendum No. 1. However, that was not the Board's doing. The Board notified the Tribunal of the 2004 version of the policy.

[22] I note that it was open to the Vice-Chair to decide that the 2004 policy was not the policy applicable to the subject matter of the appeal, and to apply a different policy, despite the fact that the Board notified the Tribunal of the 2004 policy. (See the reasoning of *Decision No. 878/06R* (2007), 81 W.S.I.A.T.R. (online), addressing issues of retroactive decision making in the context of an appeal for the inclusion of employment insurance benefits in earnings basis.) However, in this case, the Vice-Chair did not provide any reasoning for why the 2004 policy did not apply, possibly because, inadvertently, both he and the representative mistook what policy had been sent by the Board. Therefore he did not address why the 2004 version of the policy might not apply. He erred in failing to give full reasons for his finding that OPM Document No. 05-06-07 was the applicable policy.

[23] In order for the threshold test to be met, it is not sufficient to find that there was an error in the prior Tribunal decision. I must also find that the defect was of sufficient significance that, if corrected, it would probably change the result of the original decision. Therefore I must address:

1. what policy applied to the Vice-Chair's determination, and

2. whether the Chart applies to the worker's NEL award, based on that policy.

(vii) What Policy Applies: The Doctrines of Retroactive, Retrospective and Immediate Application

[24] The policy in place at the date of the worker's NEL assessment for the low back was the 2004 version of OPM Document No. 18-05-05. The Board notified the Tribunal of this policy under section 126. On its face, it applies to the facts of this appeal. It states that it applies to all decisions made after January 1998 for accidents that occurred after January 2, 1990. The NEL decision took place in 2006, which was after January 1, 1998. The worker injured her low back in 1997, as a sequelae to a 1992 accident, and therefore the accident occurred after January 2, 1990.

[25] However, I must also consider whether giving effect to the wording of the 2004 policy, on these facts, would give the policy retroactive or retrospective effect or would interfere with vested rights. Tribunal decisions have previously found that the presumption against retroactivity applies to section 126 policy, because the Tribunal is required by the Act to apply section 126 policy. Alternatively, I must consider whether the 2004 policy has immediate application to the facts of this appeal.

[26] The difference between a provision which has retroactive or retrospective effect, or which affects vested rights, and a provision which has "immediate application" has been previously addressed in a number of Tribunal decisions. *Decision No. 809/98* (March 2, 2000) found that a policy in which the Board purported to limit entitlement for occupational stress was inconsistent with, and not authorized by the Act, under section 126(4), because it had retroactive effect. *Decisions No. 2828/01* (2003), 67 W.S.I.A.T.R. 81, and *878/06* applied similar reasoning to changes in the Board's section 126 policies governing the inclusion of employment insurance in earnings basis. These decisions found that section 126 cannot be read to bind the Tribunal to apply a Board policy to the extent that the policy has retroactive effect, because of the strong presumption against retroactivity. However, *Decisions No. 2021/01R* (2005), 72 W.S.I.A.T.R. 16, and *230/06R* (2008), 87 W.S.I.A.T.R. (online) address situations in which the principles of immediate application applied. Those decisions found that policies on the collection of overpayments and on interest on health care benefits had immediate application, and were not retroactive in effect, on the facts of those cases. *Decision No. 2021/01R* also contemplated that policies addressing matters such as suitable work may have application from their effective dates to determinations about the relevant subject matter, irrespective of, for instance, the date of accident.

[27] The principles applicable to the law confirming retroactive and retrospective effect have been previously set out in *Decision No. 2021/01R* as follows [at paras. 83-90]:

The law on retroactive and retrospective application has been subject to further consideration in further editions of *Driedger*. In the fourth edition, R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), Professor Sullivan defines: 1) a retroactive application as occurring when legislation is applied so as to change the past legal effect of a past situation; 2) a retrospective application as occurring when legislation is applied so as to change the future legal effect of a past situation; 3) an immediate application as occurring when legislation applies to change the future legal effect of an on-going situation; and 4) a future application as occurring when legislation is applied to change the future effect of a future situation. She defines: 5) an interference with "vested, accrued or accruing rights" as occurring when legislation takes away or diminishes a protected expectation of interest.

Professor Sullivan states [at p. 546]:

Retroactive applications are generally considered to be the most objectionable since they involve changing the past. Retrospective and immediate applications are less objectionable because they involve changes for the future only. Any of these three categories of application may, in a given case, turn out to interfere with vested rights. Such interference is considered objectionable because it amounts to expropriation of a form of property without compensation. The only category that avoids any possibility of objection is (4). Since it applies to situations that will not even begin until after the new legislation commences, there is no possibility of undermining security, disrupting plans, or interfering with vested rights.

While Professor Sullivan states that there is a strong common law presumption against retroactive effect, and a weaker presumption against interference with vested rights, she states [at p. 547]:

At common law there is no presumption against the retrospective or immediate application as those

terms are defined here. However, many cases of retrospective or immediate application are covered by the presumption against interference with vested rights...

With respect to the law on retrospective effect, Professor Sullivan describes considerable confusion in the case law. She notes that cases that describe a presumption against retrospective effect may be describing effects that would be considered retroactive if the definitions found in *Driedger* are used. She notes that in Charter cases retrospective application has been defined to mean an application that changes the future effects of a past situation, and that prospective application has been defined to include immediate application, i.e. an application that changes the future effects of an ongoing situation. She applies that use of these terms to her analysis of non-Charter cases.

Under this analysis, she notes that it becomes critical to identify the "situation". Situations have been distinguished based on whether a situation relates to a status or to an event, and based on whether the situation is short-term, continuing or successive. Professor Sullivan states [at p. 551]:

A situation defined in terms of successive facts is not complete and does not become part of the past until the final act in the series, whether short-term or continuing, comes to an end. If a situation is viewed as short term, application of new law is likely to be viewed as retrospective. Conversely if the situation is analyzed as continuing or successive, application of the new law is likely to be viewed as immediate.

She summarizes her view of the relevant principles as follows [at pp. 590-591]:

The rules governing the temporal application of legislation may be restated as follows:

1. It is presumed that legislation is not meant to have a retroactive application. This presumption applies to procedural provisions and provisions designed to protect the public interest. Arguably, it applies to beneficial legislation as well. In most circumstances the presumption is strong, but it may be rebutted either expressly or by necessary implication.
2. It is presumed that legislation is not meant to interfere with vested rights. When the impact of applying legislation is an arbitrary or unfair diminishment of a protected interest, the legislation is presumed not to apply. The greater the unfairness, the stronger the presumption. By definition, provisions that are purely procedural or beneficial do not interfere with vested rights.
3. It is presumed that legislation is meant to have an immediate effect if it is not retroactive and does not interfere with vested rights. However this presumption may be subject to qualification when applying legislation that would have a retrospective effect.

There is also a distinction, in Tribunal adjudication, because the retroactive or retrospective effect considered may be a question of the effect of a change in Board policy and not a question of interpretation of the statute itself. However, given the effect of section 126 of the WSIA, Board policy is not simply a guideline for adjudicators. The Tribunal is required to apply Board policy, unless it finds that it is inconsistent with or not authorized by the Act. Therefore Board policy is given a legislative effect, in that the Tribunal Vice-Chair or Panel must address the effect of the policy under the provisions of that section. Any rule against retrospective effect must be considered first as applicable to the question of whether the Tribunal is bound by section 126 of the WSIA to apply a policy.

In my view, if a revision to Board policy is found to have a retrospective effect (or to interfere with vested rights) in a manner that is not supportable under the rules described above, the Panel of Vice-Chair should read section 126 of the WSIA, and the policy, together, to determine whether a presumption applies to negate the application of section 126 in the particular circumstance, because there is nothing in section 126 to suggest that the legislature intended the section to apply in that circumstance.

[28] I agree with this analysis. I have considered how these principles apply in this case.

[29] In my view, the question of whether the 2004 policy applies retroactively or affects vested rights does not turn on the accident date. There is nothing, in my view, that requires that all Board policies be frozen in place for all adjudicative decisions from the date of accident. That would not be a reasonable approach to the Board's authority to make policy. It would be too inflexible. It would prevent the Board from making changes to its policies that would be beneficial to workers, as well as those that might affect workers in a negative way, because employers would be negatively affected by the changes made to the benefit of workers. Employers are interested parties with respect to worker benefits, and might also be found to have vested interests. There are many determinations that come into play after the date of accident.

[30] Within the confines of the legislative provisions found in the relevant Acts, which, admittedly, are largely governed by the date of accident, the Board has the discretion to set policy. It therefore has the discretion to

determine the start date for policies, when those policies are within the exercise of its discretion. In some cases it may choose to define the application of its policies based on the accident date. That may often be appropriate, given the different statutory regimes. Policies must be consistent with the statutory regime applicable to the accidents to which they apply. However, in other cases, the Board may select the application date for its policies based on other factors. The only limitation, in my view, is that the Board cannot bind the Tribunal with respect to a change in a section 126 policy in a way that gives the policy retroactive effect, or which affects vested rights, by changing the benefits that would have been paid if the adjudication had proceeded in the normal course.

[31] However, a change may have immediate application. As discussed in *Decisions No. 2021/01R* and *230/06R*, determining whether a policy has immediate application requires a determination about what facts are relevant facts for the purpose of the application of the policy. It must be determined whether those facts are complete, or ongoing, at the time that the new law (or, in this case, policy) was introduced.

[32] In my view the relevant facts in this case, for the purposes of the application of the NEL policies, were that: 1) the worker's neck was injured in 1992; 2) her low back was injured as a consequence of surgery on her neck in 1997; the low back injury was therefore a sequelae of the 1992 accident, and continued to be subject to adjudication based on the 1992 accident date; 3) the injury was therefore subject to the pre-1997 *Workers' Compensation Act*; 4) the worker did not fully recover from the 1997 back injury and suffered a permanent impairment; 5) the worker likely reached maximum medical recovery (MMR) prior to June 2004 (as discussed below); 6) the worker's entitlement to a NEL award accrued from the date of MMR: to the extent that the NEL assessment was carried out after the MMR date, arrears were payable to the MMR date; 7) at the MMR date for this injury the applicable policy for a pre-1998 injury was Document No. 05-06-07.

[33] In my view, the MMR date is the key relevant fact which determines which policy applies to the NEL assessment. The relevant facts with respect to the NEL assessment were complete as of that date. If the relevant facts are treated as complete only on the date of the assessment, rather than on the MMR date, the worker's benefit entitlement would be affected by the fact that it was necessary for her to appeal for the low back entitlement. In my view, the fact of the appeal was not a relevant fact for the purposes of determining her NEL entitlement. In my view the relevant facts for that determination were complete at the MMR date. The facts after that date were adjudicative facts, related to the processes necessary for the recognition of her entitlement rather than to the entitlement itself.

[34] I note that I have had some difficulty in ascertaining from the file the MMR date used by the Board for the worker's low back award in this case. However, I am satisfied that it was prior to June 2004. Tribunal *Decision No. 2470/05* found that the worker's back injury occurred at the time of the 1997 surgery. Although it does not identify the arrears date, the 2006 NEL letter contains a significant retroactive payment. The FEL adjudicator retroactively changed the worker's 2000 FEL R2 award to recognize total disability at that date after learning of the extent of the NEL award for the low back. Therefore the arrears date was prior to 2000. In my view, the arrears date used by the Board was likely the 1997 date that the Tribunal decision referred to as the date of the commencement of the compensable low back symptoms. In any case, I am satisfied that the MMR date would have been prior to the introduction of the changed policy in June 2004.

[35] Therefore, if the adjudication had taken place promptly, the worker's NEL award would have been granted prior to June 2004. OPM Document No. 05-06-07 was the policy then applicable to pre-1998 accidents. Based on the prior Vice-Chair's interpretation of OPM Document No. 05-06-07, the application of the 2004 policy on these facts would be to give that policy retroactive effect. It would interfere with the worker's interest or expectation of benefits under the old policy.

[36] To be clear, in my view, the 2004 policy would not have retroactive effect if applied to NEL assessments for permanent impairments when the MMR date was reached at or after the effective date of the 2004 policy, even for pre-1998 accidents. In that case, the effect would be one of immediate application. Under Board policy, a worker is not entitled to a NEL assessment prior to the MMR date. In my view, a change in policy that affects the calculation of the NEL award does not have retroactive effect if the worker had no entitlement to the NEL assessment when the changed policy was introduced. In my view, its application to those workers would be immediate, not retroactive or retrospective, under the analysis of Professor Sullivan. The relevant facts would be

ongoing at the time that the new policy was introduced.

[37] I have considered whether this analysis is consistent with the other Tribunal decisions that have addressed the application of the Chart (See *Decisions No. 1119/04, 594/02, 1529/04I* (2007), 81 W.S.I.A.T.R. (online), *1357/05*, and *2237/08* (October 29, 2008)). Those cases refer generally, at least in some respects, to the dates of the respective accident as determining the applicable policy. However that is because, until June 2004, different policies applied based on the date of accident. It was only in June 2004 that the terms of Board policy were changed to provide that OPM Document No. 18-05-05 applied to both accidents under the pre-1997 Act and those under the WSIA.

[38] Therefore the question that I am addressing only arises when a worker with a pre-1997 accident is assessed for a NEL award after June 2004, in the circumstances that the worker has already been granted NEL awards for injuries to other body areas, so that it is necessary to consider the application of the Chart. From the head notes of the cases, those facts did not apply to *Decisions No. 1119/04R, 594/02, 1529/04I*, or *1357/05*.

[39] *Decision No. 2237/08* involved the application of the Chart to a NEL assessment carried out in 2005 with respect to psychological impairment that was found to be a sequelae of a 1991 accident. There were prior NEL awards. However, there is no discussion of arrears in that case. The psychological impairment appears to have been addressed on the basis that it arose in 2005. In any event, while I recognize that the arrears date for the psychological impairment might have been prior to June 2004, the issue that the earlier policy might have been applicable on that basis was not raised or considered. There is also a line of Tribunal decisions that have found that the effect of the two policies is not different. It must also be recognized that the Tribunal case law in this area is still developing. I do not consider my interpretation on these facts necessarily inconsistent with the findings of the other decisions on this issue.

[40] In my view, the date that MMR was reached is the relevant date for determining whether the change in policy interfered with vested rights and/or had retroactive effect with respect to this worker. At the date of MMR, Document No. 05-06-07 applied.

(viii) How to Understand the Policy

[41] This does not end the matter. There remains the question of how OPM Document No. 05-06-07 is to be understood. The prior Vice-Chair adopted the analysis of *Decision No. 594/02*. However, other Tribunal decisions have interpreted that policy differently. (See the discussion in *Decision No. 1357/05*.)

[42] In *Decision No. 1119/04R*, the Vice-Chair accepted that the wording of OPM Document No. 05-06-07 was contradictory and that the analysis of *Decision No. 594/02* offered an approach which addressed that contradiction. However, *Decision No. 1119/04R* also identified a number of legal and policy difficulties with that approach. It considered the meaning and likely intent of the Minute which led to the introduction of OPM Document No. 05-06-07, and found that the Minute had been imperfectly implemented in the wording of the policy. It preferred the analysis of OPM Document No. 05-06-07 found in *Decision No. 103/01* (December 11, 2001). *Decision No. 1119/04R* stated [at paras. 87-88]:

Finally, I have a further concern. I have some concern generally about an approach that rates impairment differently based on whether the ultimate compensable impairment arose from a single accident or from multiple accidents, when all the impairments are subject to the same legislation. Under my interpretation of the 1998 Policy, the effect of the Chart is excluded in the case of non-compensable pre-existing conditions as well as pre-existing conditions rated under the pre-1989 legislation. The result is that the “line is drawn” between all NEL rated injuries, and other injuries. The distinction is based on what legislation applies. There is no distinction based on whether or not the ultimate impairment results from one compensable accident or from more than one compensable accident, unless the injuries are subject to different legislation.

In my view, it is fair that two workers that have the same ultimate level of NEL-rated compensable physical impairment should receive the same NEL award, irrespective of the history of how that impairment arose. It is not clear to me that the legislation suggests that two workers who have identical levels of compensable impairment will receive different awards because one worker suffered his injuries entirely as a result of one accident, and the other suffered his impairment as a result of multiple accidents. I find nothing in the AMA Guides that suggests that result. Section 46 provides that a worker is entitled to compensation for his or her non-economic loss. It is difficult to understand how, under that provision, one

worker can be entitled to a 32% NEL award, and the other a 29% NEL award, for the same ultimate compensable impairment. Assuming that both workers were assessed at 16% for the first-rated injury, this approach effectively grants a 16% NEL award to one worker and 13% to the other worker for the identical (second-rated) compensable injury.

[43] This view was endorsed by the Vice-Chair in *Decision No. 1357/05*.

[44] I am of the view that the legal and policy difficulties associated with the *Decision No. 594/02* interpretation of Document No. 05-06-07 are sufficiently extensive that it is likely that the wording used in the policy statement in that policy was inadvertent. On consideration, and especially in light of the introduction of the revised policy, I consider it likely that the Board intended the reference to pre-existing conditions in the policy statement in Document No.

05-06-07 to be limited to pre-existing conditions under the prior legislation or to non-compensable pre-existing conditions. That would reflect the policy discussion, as referred to in *Decision No. 1119/04R*, which took place at the time of the introduction of OPM Document No. 05-06-07 in 1991, as well as the intention of the Board Minute that approved the policy. The policy discussion took place when the NEL provisions of the Act were new, and virtually all pre-existing conditions would have arisen during the time period of the prior legislation, with the result that the less than precise wording is understandable.

[45] If the reference to pre-existing conditions in Document No. 05-06-07 is read as subject to that limitation, then there would be no inconsistency between that reference and the guidelines. The Chart would apply to the case of a worker with two NEL awards in the same manner as it does under the 2004 policy.

[46] Therefore it is possible to interpret the 2004 revision to OPM Document No. 18-05-05 as merely a clarification of the prior policy, as that policy affects pre-1998 injuries. If I were interpreting these OPM Documents for the first time, in this case, I would prefer the approach of *Decision No. 103/01* to that of *Decision No. 594/02*. I would find that the effect of the 2004 OPM Document was to clarify the prior policy on this point. Therefore I would find no reason not to apply the 2004 policy in accordance with its terms.

[47] The prior Vice-Chair did not consider what effect the Board's 2004 revision of Document No. 18-05-05 might have in clarifying which of the two prior lines of Tribunal decisions was correct in interpreting the intent of OPM Document No. 05-06-07 and/or the provisions of the Act, the Regulation, and the Board Minute in applying the AMA Guides. Therefore I have considered whether, having found an error in the prior Decision, I should substitute my view of Document No. 05-06-07 for the view of the prior Vice-Chair.

[48] However, the Tribunal has a high threshold for reconsideration. The Tribunal has endorsed the view that finality in decision making is a higher value even than correctness, when more than one view of the law is possible. Therefore I find that the threshold test is not met. In my view, the prior Vice-Chair's determination that OPM Document No.

05-06-07 was the relevant policy document was not incorrect. That document was the document in effect at the time that the worker's permanent impairment for her low back arose. The Vice-Chair's interpretation that, under that policy, the Chart did not apply to these facts is a possible reading of that Document. The fact that the Vice Chair did not consider the 2004 version of Document No. 18-05-05 does not go to the heart of his analysis. Given his analysis of Document No. 05-06-07, I find that a correction of the error with respect to the date of the applicable version of OPM Document No. 18-05-05 would likely not have changed the result of his decision.

[49] Accordingly, I find that the Tribunal's threshold test for granting a reconsideration request has not been met.

DISPOSITION

[50] The request for reconsideration is denied.

Application denied.

Decision No. 523/09

Vice-Chair: Noble

Decision — March 12, 2009

Neutral Citation: 2009 ONWSIAT 630

Notice of accident (by worker) (disablement) – Board Directives and Guidelines (notice of accident).

According to Board policy, six-month limit for filing a claim in disablement cases begins from the date the worker reports the disablement as work-related – This appropriately reflects the discoverability principle that time limit should only begin to run from the date the worker discovers the condition is work-related.

The worker appealed a decision of the Appeals Resolution Officer finding that the worker did not meet the requirement of s. 22 of the *Workplace Safety and Insurance Act, 1997*, and Board policy to file a claim within six months after an accident. The appeal was allowed.

The worker wanted to file a claim for carpal tunnel syndrome in July 2006. The Board would not let the worker file the claim, finding that the worker had been experiencing symptoms related to CTS for seven or eight years.

Board policy states that, in disablement claims, the six-month claim period begins from the date the worker reports the disablement as work-related. This reflects what is known as the discoverability principle, which turns on a subjective awareness by the worker of the existence of both an injury and the possibility of a claim. According to the discoverability principle, the time limit under s. 22 should begin to run from the date the worker discovers that the condition was work-related.

In this case, the worker had been experiencing symptoms for seven or eight years and he had seen his family doctor, but it was not until July 2006, when he attended a consultation with a surgeon, that he first learned that his condition was potentially work-related. Thus, when the worker filed a Form 6 Report of Injury in August 2006, he was reporting the accident within the deadline.

Avis d'accident (par le travailleur) (incapacité) – Directives et lignes directrices de la Commission (avis d'accident).

Selon la politique de la Commission, dans un cas d'incapacité, le délai de six mois applicable au dépôt d'une demande d'indemnité commence à courir à partir de la date à laquelle le travailleur déclare son incapacité comme étant liée au travail – Cela est conforme au principe de la possibilité de découvrir la preuve selon lequel un délai commence à courir seulement à partir de la date à laquelle le travailleur découvre que son état est lié au travail.

Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels concluait qu'il ne remplissait pas le critère prévu à l'article 22 de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail*. Le Tribunal a accueilli l'appel.

Le travailleur voulait faire une demande d'indemnité pour un syndrome du canal carpien (SCC) en juillet 2006. La Commission ne l'a pas laissé déposer une telle demande après avoir appris qu'il avait des symptômes de SCC depuis sept ou huit ans.

La politique de la Commission stipule que, dans les dossiers d'incapacité, le délai de six mois applicable au dépôt d'une demande d'indemnité commence à courir à la date où le travailleur déclare que son incapacité est liée au travail. Cela est conforme à ce que l'on appelle le principe de la possibilité de découvrir la preuve, lequel est fonction du moment où le travailleur prend subjectivement conscience de l'existence d'une lésion et de la possibilité de demander une indemnité. Selon le principe de la possibilité de découvrir la preuve, le délai prévu à l'article 22 devait commencer à courir à partir de la date à laquelle le travailleur découvrait que son état était lié au travail.

En l'espèce, le travailleur avait eu des symptômes pendant sept ou huit ans et il se faisait suivre par son médecin de famille; cependant, il avait appris seulement en juillet 2006, lors d'une consultation avec un chirurgien, que son problème pouvait être lié au travail. Par conséquent, le travailleur avait déclaré l'accident dans les délais en août 2006 quand il avait rempli un *Formulaire 6 – Avis de lésion*.

Tribunal Decisions Considered:

Decision No. 1454/08 (July 8, 2008) [2008 ONWSIAT 1893] apld

Other Decisions Considered:

Peixeiro v. Haberman, [1997] 3 S.C.R. 549 (S.C.C.) consd

Workplace Insurance Legislation Considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A
s. 22

Board Directives and Guidelines Considered:

Operational Policy Manual
Document No. 15-01-03 (November 1, 2005) (since superseded)

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APPEAL by the worker from a decision of the Appeals Resolution Officer denying an extension of the time to file a claim.

March 12, 2009. THE TRIBUNAL: —

BEFORE: J. Noble, Vice-Chair

HEARING: March 11, 2009, at Toronto, Written

DECISION(S) UNDER APPEAL: WSIB ARO decision dated August 2, 2007

APPEARANCES:

For the worker: Ms. L. Kent, Lawyer

For the employer: Not participating

REASONS

(i) Issue

[1] The issue in this appeal is whether the worker's claim to the Board was commenced within the six-month time limit under section 22 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA), or in the alternative, whether the worker should have entitlement to an extension of the time limit to report a work-related injury under section 22 of the WSIA.

(ii) Background

[2] The worker was employed by the accident employer since 1994 as an apprentice journeyman, and according to the information before me he was responsible for duties including cleaning cooling towers and boilers, and performing maintenance work on pumps and other equipment. The worker became a licensed journeyman in April 1999 and according to the information before me in the file his duties included major and minor repair work, inspection and routine maintenance of cooling towers, pumps and boilers as well as installation.

[3] In a Health Professional's Report to the Board (Form 8) dated June 7, 2006, Dr. S. Jamani, family physician, stated that the worker started having symptoms of CTS around seven to eight years earlier. Dr. Jamani stated that the worker was due to have surgery on September 15, 2006 and would be off work as determined by the plastic surgeon.

[4] In an Employer's Report of Injury to the Board (Form 7), the employer stated that the worker had reported the injury to the employer on July 11, 2006.

[5] In a Worker's Report of Injury to the Board (Form 6) dated August 14, 2006, the worker claimed that he had carpal tunnel syndrome (CTS) caused by years of heavy labour with his hands. The worker stated that he noticed the problem starting in approximately 1998, but he did not know if it would get worse or go away. The worker stated that he sought health care for the injury on May 1, 2006.

[6] The ARO decision under appeal dated August 2, 2007 stated that the evidence indicated that the worker started having significant CTS symptoms from 1994 to 1999 and these symptoms continued to deteriorate. The ARO stated that therefore the disablement condition which qualifies as an accident was recognized long before 2006 when it was reported to the WSIB and the employer. The ARO stated that the condition should have been reported to the employer when the symptoms began as the symptoms were severe enough for the worker to mention it to his family doctor in 1999 and to his co-workers. The ARO stated that it was not the case that the worker did not learn of the disease until the EMG study in 2006 since that study only confirmed the diagnosis that had been causing a functional impairment for years.

[7] The ARO decision dated August 2, 2007 concluded that the worker did not meet the requirement to claim and consent in accordance with Board *Operational Policy Manual* Document No. Document No. 15-01-03, and therefore a WSIB claim could not be established for the bilateral CTS.

[8] The worker appeals this decision.

(iii) Submissions

[9] The worker's representative submits that the worker reported his injury to the Board and his employer within the required deadline. The worker's representative submits that the six-month reporting deadline set out in Document No. 15-01-03 began from the date that the worker learned that his disablement CTS condition was work-related, which was on July 5, 2006. The worker's representative submits that pursuant to Document No. 15-01-03 the six-month time limit for filing a claim does not begin running from the date the worker is informed that he has a particular condition, but rather from the date the worker discovered that this condition was work-related, and the first evidence of discussion regarding the work-relatedness of the worker's condition took place on July 5, 2006 between the worker and Dr. Hynes. It is submitted that there was no delay in reporting and there is no basis to deny entitlement to the worker under section 22(1) of the Act.

[10] The worker's representative submits, in the alternative, that should the Tribunal conclude that the worker's claim was commenced outside of the six-month time period, it is requested that the Tribunal grant entitlement to an extension of the time limit to report a work-related injury under section 22 of the Act.

(iv) Law and Policy

[11] Section 22 of the WSIA provides as follows:

22(1) A worker shall file a claim as soon as possible after the accident that gives rise to the claim, but in no case shall he or she file a claim more than six months after the accident or, in the case of an occupational disease, after the worker learns that he or she suffers from the disease.

(2) A survivor who is entitled to benefits as a result of the death of a worker shall file a claim as soon as possible after the worker's death, but in no case shall he or she file a claim more than six months after the worker's death.

(3) The Board may permit a claim to be filed after the six-month period expires if, in the opinion of the Board, it is just to do so.

(4) A claim must be on a form approved by the Board and must be accompanied by such information and documents as the Board may require.

(5) When filing a claim, a worker must consent to the disclosure to his or her employer of information provided by a health professional under subsection 37(3) concerning the worker's functional abilities. The disclosure is for the sole purpose of facilitating the worker's return to work.

(6) If the claimant does not file the claim with the Board in accordance with this section or does not give the consent required by subsection (5), no benefits shall be provided under the insurance plan unless the Board, in its opinion, decides that it is just to do so.

(7) The claimant shall give a copy of his or her claim to the worker's employer at the time the claim is given to the Board.

(8) A copy of the claim for an occupational disease must be given to the employer who has most recently employed the worker in the employment to the nature of which the disease is due.

[12] Pursuant to section 126 of WSIA, the Board advised that the following Policy Packages were relevant to this appeal: #195 (Revision #7) – Reporting of Accidents – DOA as of March 1, 2000; and #300 – Decision Making/Benefit of Doubt/Merits and Justice.

[13] Included in these Policy Packages is Board *Operational Policy Manual* (OPM) Document No. 15-01-03 – Workers' Requirement to Claim and Consent – which provides in part as follows:

LAW

As soon as possible after an accident, workers must file a claim for benefits. They must also consent to disclose their functional abilities information, which is provided by the treating health professional.

A claim must be filed within six months of an accident or, in the case of an occupational disease, within six months of the worker learning of the disease. The WSIB may extend the six-month deadline, or waive the dual requirements altogether if in the WSIB's opinion it is just to do so.

If the worker does not file the claim for benefits, or consent to the disclosure of functional abilities information within the six-month deadline, the WSIB does not provide benefits unless, in its opinion, it is just to do so.

Workers must give their employers a copy of the claim for benefits at the same time they give a copy to the WSIB. In the case of occupational diseases, workers must give a copy of the claim to the employer who most recently employed them in the employment to which the disease is associated.

In some cases, workers may ask the Workplace Safety and Insurance Appeals Tribunal (WSIAT) to determine whether they have the right to pursue a legal action against a third party under the *Workplace Safety and Insurance Act*. If WSIAT rules that they do not have that right, the deadline for filing a claim for benefits is six months following WSIAT's decision.

...

GUIDELINES

...

Disabilities

In disability claims (conditions that emerge gradually over time), the six-month deadline begins from the date the worker reports the disability as work-related. This can be reported to the employer, health professional, or the WSIB.

(v) Conclusions

[14] On the issue of whether the worker's claim to the Board was commenced within the six-month time limit under section 22 of the WSIA, or in the alternative, whether the worker should have entitlement to an extension of the time limit to report a work-related injury under section 22 of the WSIA, I find for the worker.

[15] I find that the weight of the evidence indicates that the worker reported his injury to the Board and his employer within the required deadline. I find that the evidence indicates that there was no delay in reporting and there is, accordingly, no basis to deny entitlement to the worker under section 22(1) of the Act. The worker is permitted to file a claim for the bilateral CTS and the Board is directed to rule on the merits of his claim and any benefits the worker may be entitled to with all usual rights of appeal.

[16] As I have stated, I find that the evidence indicates that the worker reported his injury to the Board and his employer within the required deadline. In this regard I observe the worker's representative submits that the worker first learned that his disability CTS condition was potentially work-related on July 5, 2006. My own review of the evidence in the Case Record satisfies me that this submission is accurate and I accept the submission. I observe that in a report dated July 5, 2006, Dr. N. Hynes, plastic surgeon, stated:

Thank you for sending [the worker] to see me regarding bilateral carpal tunnel syndrome. He has had symptoms for seven or eight years but has been putting it off. He gets symptoms at night as well as when he drives. He drops things at work. He has tried a splint which does not help. An EMG study confirms the diagnosis.

Past history is otherwise non-contributory.

On examination, he had a negative Tinel's sign bilaterally but a positive Phalen's test.

We discussed carpal tunnel syndrome in detail. He does fairly heavy work with his hands and so this may well be work-related and he is going to look into making a WSIB claim. I think that he would benefit from surgical release. Risks were reviewed.

[17] I find that this evidence indicates that the worker was advised by Dr. Hynes during the consultation dated July 5, 2006 that his CTS condition was likely work-related. I am prepared to accept that this was when the worker first learned that the CTS condition was potentially work-related for the following reasons.

[18] First, although Dr. Jamani stated in his report dated February 28, 2007, and in the Form 8 Report to the Board that the worker had been experiencing symptoms related to carpal tunnel syndrome for seven or eight years, there is no evidence to indicate that Dr. Jamani advised the worker prior to June or July 2006 that the condition was potentially work-related. I note in particular in this regard that there is no evidence to indicate that Dr. Jamani reported a potential work-related CTS injury to the Board prior to June or July of 2006. I infer from this evidence that Dr. Jamani did not likely form the medical opinion that the worker had a potentially work-related condition, and/or communicate such an opinion to the worker, prior to June or July of 2006.

[19] Secondly, I observe that whereas the date on the Health Professional's Report to the Board (Form 8) from Dr. Jamani the family physician is June 7, 2006, it appears that this report was back-dated, since the report also stated that the worker *had seen* Dr. Hynes the plastic surgeon on July 6, 2006. I infer from this evidence, and the other evidence before me, that Dr. Jamani completed the Form 8 report to the Board once he had received Dr. Hynes' report dated July 5, 2006 indicating that the worker's CTS condition was likely work-related. I find based on all the evidence that it is more likely than not that Dr. Jamani and the worker first became aware of the potential that the worker's CTS symptoms were work-related when they were advised of Dr. Hynes opinion on or about July 5, 2006.

[20] Thirdly there is no evidence before me to indicate that any other health care professional advised the worker, prior to June or July 2006, that the worker had a potentially work-related CTS condition.

[21] I have concluded in this decision that the worker likely first became aware that the CTS condition was potentially work-related when he was advised by Dr. Hynes during the consultation dated July 5, 2006. I further conclude that, pursuant to the applicable legislation and Board Policy, the six-month time limit for filing a claim under section 22 does not begin running from the date the worker experiences symptoms of a condition or is informed that he has a particular condition, but rather from the date the worker also discovers that this condition was work-related.

[22] I observe that Board OPM Document No. 15-01-03 – Workers’ Requirement to Claim and Consent – provides in part as follows:

Disabilities

In disability claims (conditions that emerge gradually over time), the six-month deadline begins from the date the worker reports the disability as work-related. This can be reported to the employer, health professional, or the WSIB.

[23] I agree with the submissions of the worker’s representative that this Board policy properly reflects what is known as the “discoverability principle” which turns on a subjective awareness by the worker of the existence of both an injury and the possibility of a claim. The time limit under section 22, according to the discoverability principle, should begin to run from the date the worker discovers that the condition was work-related.

[24] The Supreme Court of Canada applied and upheld the discoverability principle in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549. The Supreme Court stated in *Peixeiro* that the discoverability principle applies to avoid the injustice of precluding an action before the person is able to sue, by providing that time limits do not begin to run until it is reasonably discoverable that the person has a cause of action.

[25] I observe that this approach has been followed in other decisions of the Tribunal included *Decision No. 1454/08* (July 8, 2008), in which Vice-Chair E. Smith stated [at para. 24]:

However I accept Mr. Jones’ position that the facts are not sufficient to meet the terms of the Board’s policy that set out what is required to make a finding that a worker knows that an injury is work-related. Board policy reflects the position recognized by the Courts, that a limitation period cannot run against a person until the person knows of the facts to which the time limit applies. A disability is an injury that occurs gradually over time. It is very difficult to know when and whether it has been caused by a workplace activity, because that relationship is not necessarily clear. Board policy provides that the time limit runs from the time that a worker reports his injury as work-related to his health professionals, employer or the Board. That is a reasonable approach to determining when a worker is sufficiently aware that his injury may be work-related to establish a start-date for the time limit.

[26] I accept and adopt the reasoning set out in *Decision No. 1454/08*.

[27] As I have stated above, I have concluded in this decision that the worker likely first became aware that the CTS condition was potentially work-related when he was advised by Dr. Hynes during the consultation dated July 5, 2006. I find that, pursuant to the applicable Board policy which reflects the discoverability principle, the six-month time limit for filing a claim under section 22 does not begin running in this case until July 5, 2006. Accordingly, since the worker reported the injury as work-related to the employer on July 11, 2006, and since the worker filed a Form 6 Report of Injury to the Board dated August 14, 2006, I conclude that the worker reported his injury to the Board and his employer within the required deadline pursuant to section 22.

[28] As I have concluded that the worker reported his injury within the required deadline pursuant to section 22 of the WSIA, it is not necessary for me to consider whether the worker should have entitlement to an extension of the time limit to report a work-related injury under section 22 of the WSIA.

[29] Based on all of the foregoing, the worker’s appeal is allowed.

DISPOSITION

[30] The appeal is allowed.

[31] The worker is permitted to file a claim for the bilateral CTS condition and the Board is directed to rule on the merits of his claim and any benefits the worker may be entitled to with all usual rights of appeal.

Appeal allowed.



Decision No. 1803/07

Panel: Mitchinson (Vice-Chair), Wheeler, Grande

Decision — February 18, 2009

Neutral Citation: 2009 ONWSIAT 416

Second Injury and Enhancement Fund (severity of pre-existing condition) – Board Directives and Guidelines (SIEF) (permanent impairment) – Psychotraumatic disability.

Board policy appears to allow an award of greater than 50 % SIEF relief only after finding that a worker has sustained a permanent impairment.

The employer appealed a decision of the Appeals Resolution Officer granting the worker entitlement for psychotraumatic disability and awarding the employer only 50% SIEF relief. The appeal was dismissed.

On the evidence, the worker had entitlement for psychotraumatic disability.

The ARO did not elaborate on the awarding of 50% SIEF relief but it appeared that he applied the provision in Board *Operational Policy Manual*, Document No. 14-05-03, that, if there is an aggravation of a pre-existing condition or if there is evidence that the disability following the accident has been enhanced because of a pre-existing condition, 50% of the cost of the claim is charged to SIEF.

The Panel referred to a note in the policy stating that, if an employer applies for relief in excess of 50% and a permanent impairment is not evident, the degree of relief is reviewed again when the claim is closed.

The Panel found that the employer's request for increased SIEF relief was premature. It appeared from the policy that an award greater than 50% could only be made after a finding that a worker has sustained a permanent impairment. In this case, the Board has not yet made a decision regarding permanent impairment.

Fonds de garantie pour travailleurs réintégrés (gravité de l'accident) – Directives et lignes directrices de la Commission (FGTR) (déficience permanente) – Invalidité attribuable à un traumatisme psychique.

La politique de la Commission semble permettre une exonération de plus de 50 % seulement après constatation que le travailleur est atteint d'une déficience permanente.

L'employeur a interjeté appel de la décision par laquelle le commissaire aux appels lui a reconnu le droit à un virement de 50 % au Fonds de garantie pour travailleurs réintégrés (FGTR) et par laquelle il a reconnu au travailleur le droit à une indemnité pour invalidité attribuable à un traumatisme psychique. Le Tribunal a rejeté l'appel.

Au vu de la preuve, le travailleur avait droit à une indemnité pour invalidité attribuable à un traumatisme psychique.

Le commissaire aux appels n'a pas élaboré au sujet du virement de 50 % au FGTR. Il semblait toutefois avoir appliqué une disposition du document n^o 14-05-03 du *Manuel des politiques opérationnelles* selon laquelle 50 % des coûts de la demande sont imputés au FGTR quand il se produit une aggravation d'un état pathologique préexistant ou quand les faits montrent que la déficience consécutive à l'accident a été aggravée par un état préexistant.

Le comité a noté une remarque dans la politique selon laquelle, dans les cas où l'employeur demande une exonération supérieure à 50 % et où une déficience permanente n'est pas évidente, le taux de l'exonération financière est examiné de nouveau au moment de la fermeture du dossier.

Le comité a conclu que la demande d'augmentation du virement au FGTR était prématurée. La politique de la Commission semblait permettre une exonération de plus de 50 % seulement après constatation que le travailleur est atteint d'une déficience permanente. La Commission n'avait pas encore rendu de décision sur la question de la déficience permanente.

Tribunal Decisions Considered:

Decision No. 556/07 (March 30, 2007) [2007 ONWSIAT 877] consd
Decision No. 2016/98 (May 31, 2001) [2001 ONWSIAT 1769] consd
Decision No. 2739/00 (August 15, 2002) [2002 ONWSIAT 1751] refd to

Workplace Insurance Legislation Considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A
s. 43
s. 132(1)

Board Directives and Guidelines Considered:

Operational Policy Manual
Document No. 15-04-02 (March 15, 2005)
Document No. 18-03-02 (October 12, 2004)
Document No. 14-05-03 (October 12, 2004)

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APPEAL by the employer from a decision of the Appeals Resolution Officer awarding the employer only 50% Second Injury and Enhancement Fund relief.

February 18, 2009. THE TRIBUNAL: —

BEFORE: T. Mitchinson, Vice-Chair
B. Wheeler, Member Representative of Employers
A. Grande, Member Representatives of Workers

HEARING: July 14, 2008 at Toronto, Oral
Post-hearing activity completed on January 16, 2009

DECISION(S) UNDER APPEAL: WSIB ARO decision dated October 4, 2006

APPEARANCES:

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

REASONS

(i) Introduction

[1] This appeal was heard in Toronto on July 14, 2008. The employer appeals the October 4, 2006 decision of Appeals Resolution Officer (ARO) M. Flaherty.

[2] The worker was granted entitlement for psychotraumatic disability stemming from a workplace incident on July 13, 2004. The worker returned to the workplace after the incident, but laid off under medical care due to psychological problems that developed. The Claims Adjudicator assigned to the worker's file concluded that the worker was unfit for any sort of work and awarded full loss of earnings (LOE) benefits from August 5, 2004, following his last day of work. The Adjudicator also denied the employer's request for relief under the Second Injury and Enhancement Fund (SIEF). The employer objected to these decisions.

[3] ARO Flaherty upheld the Adjudicator's decisions regarding entitlement for psychotraumatic disability and LOE benefits, but found that the worker's pre-existing maladaptive personality, while minor in nature, did contribute to his ability to recover from the workplace-generated psychological problems and on that basis granted the employer 50% SIEF relief.

[4] The employer appealed the ARO's decision to the Tribunal, claiming that entitlement should not have been awarded and asking for an increase in the quantum of SIEF relief.

[5] The employer attended the hearing and was represented by Robert Cronish, a lawyer. Despite extensive efforts on the part of Tribunal staff to ensure his attendance, the worker did not come to the hearing. The employer's Operations Manager and Director of Safety & Compliance both testified at the hearing, and Mr. Cronish made submissions on behalf of his client.

(ii) Preliminary Issues

[6] After the hearing was completed, Mr. Cronish sent a brief fax to the Tribunal, attaching four pages from the Case Record as evidence of his position that the worker had exaggerated what had occurred at the time of the workplace accident on July 13, 2004. He asked the Tribunal to "request the treatment notes of all treating physicians if necessary to validate the worker's fabrication of injury".

[7] Tribunal staff advised the Panel that, based on past experience in processing this file, they had been unable to contact the worker, and pointed out that it may be very difficult to obtain the worker's consent should the Panel decide that further medical records were necessary.

[8] The Panel sought submissions from Mr. Cronish on this issue. We received a November 28, 2008 letter from one of his colleagues, Ms. Bird. She suggested that section 132(1) of the *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A, gives the Tribunal authority to require production of documents necessary to make decisions, and recommended that we issue a summons compelling the attendance of the worker's doctor together with his complete clinical notes. In the alternative, Ms. Bird submitted that it might be appropriate to make one further attempt to contact the worker before taking this action.

[9] After reviewing these submissions, the Panel provided the following direction to Tribunal staff:

...before determining whether [the procedure suggested by Ms. Bird colleague] is appropriate in the circumstances, the Panel must first decide whether the clinical records are "necessary to properly adjudicate [the] appeal", as required by the

Tribunal Practice Direction on *Post-Hearing Procedures*. In that context, the Panel has decided to seek submissions from the employer's lawyer as to what specific clinical records from which treating physicians are relevant and why they are necessary in this case.

[10] On January 9, 2009, the Tribunal received a response from Ms. Bird. She submitted that any records relating to the worker's psychological problems both before and after the workplace accident are relevant and necessary to properly adjudicate the appeal.

[11] In support of her position, Ms. Bird makes reference to statements made by the Board's medical consultant regarding the worker's pre-accident psychological condition that were relied on by ARO Flaherty in concluding that the worker suffered from a "mild pre-existing condition" for purposes of determining SIEF relief. She also refers to references of prior psychological issues contained in reports prepared by the Centre for Addiction and Mental Health (CAMH) which, in her view, suggest that the worker's pre-existing condition was more serious than the medical consultant's opinion. Finally, Ms. Bird points out that traumatic life events, such as separating from his former wife, have triggered past psychological problems for the worker, and that it is necessary to obtain treatment records in order to determine whether similar events may have been the cause of the worker's psychological ill health in the summer of 2004.

[12] The Panel finds that it is not necessary to obtain additional records in this case in order to properly adjudicate the issues before us.

[13] In his original request that the Panel consider obtaining treatment records, Mr. Cronish identified three examples of where he felt that the worker had exaggerated the description of the workplace accident. On this issue, it is important to recognize that the accident that occurred on July 13, 2004 has already been accepted by the Board. The employer did not object to the Board's decision to grant entitlement for the organic injuries sustained by the worker, and there is no evidence before us to suggest that the issue of exaggerated reporting was raised prior to August 4, 2004 when the worker stopped working.

[14] To the extent that the circumstances of the accident are relevant to the issues before us here, the Panel is confident that we have sufficient evidence available through the testimony of the employer's two witnesses, the various forms filed by the parties with the Board in the context of the worker's claim, as well as memoranda notations and other relevant documents in the Case Record to properly determine what happened at the time of the workplace accident. Any inconsistencies between the worker's description of events, as identified by Mr. Cronish, can and will be taken into account in that context.

[15] As far as broader issues of credibility are concerned, the Panel finds that Ms. Bird has expanded the rationale put forward by Mr. Cronish for the need for additional records far beyond what he originally intended. Mr. Cronish suggested that additional treatment notes might be necessary "to validate the worker's fabrication of injury", yet Ms. Bird's submissions suggest that the worker may not have been sufficiently fulsome in describing pre-injury psychological conditions while under assessment by CAMH, and further that treatment notes may provide evidence of other contributing factors not reported by the worker or his family doctor that may be relevant to his claim.

[16] The Panel has heard detailed submissions from Mr. Cronish on the issue of what caused the worker's PTSD, and we will take them into account in making our findings on entitlement to psychotraumatic disability and the related issue of LOE benefit entitlement.

[17] Mr. Cronish has also made arguments as to why SEIF relief should be increased from 50% to 90%, on the basis that the Board has mischaracterized the seriousness of the worker's pre-existing condition. ARO Flaherty's rationale for his ruling on this issue is outlined in his October 4, 2006 ruling, and in our view, we have sufficient evidence before us in the various CAMH reports and other file materials to determine whether Mr. Cronish's submission for increased relief is supportable. The Panel finds that additional treatment notes are not necessary for this purpose.

(iii) The Issues on Appeal

[18] There are three issues in this appeal:

1. entitlement for psychotraumatic disability;
2. entitlement to LOE benefits from August 5, 2004 and ongoing; and
3. increase in quantum of SIEF relief.

(iv) Applicable Law

[19] The compensable workplace accident giving rise to the worker's claim occurred on July 13, 2004. Accordingly, the *Workplace Safety and Insurance Act* applies.

(v) Background

[20] The worker was employed as a tire repair technician with the accident employer, a trucking company, on July 13, 2004 when a tire he was working on blew up, primarily injuring his right eye. The worker reported the injuries to his supervisor, sought medical treatment and filed a claim with the Workplace Safety and Insurance Board.

[21] The worker returned to his regular job duties on July 19, 2004, but developed emotional stress and stopped working again on August 4, 2004. The worker's family doctor, Dr. Armstrong, diagnosed post-traumatic stress disorder (PTSD) and recommended four to six weeks off work. The Claims Adjudicator reactivated the worker's claim based on this diagnosis and granted LOE benefits for six weeks. He also referred the worker for an assessment at the Psychological Trauma Program at the Centre for Additional and Mental Health (CAMH).

[22] The employer wrote to the Adjudicator on November 8, 2004, maintaining that the worker had pre-existing emotional issues that needed to be taken into account in determining entitlement under his original organic claim.

[23] After reviewing the results of the CAMH assessment and consulting with Board medical advisors, the Adjudicator confirmed the worker's entitlement for psychotraumatic disability, concluded that the worker was unable to work in any capacity and awarded ongoing full LOE benefits, and declined SIEF relief on the basis that the worker's minor pre-existing psychological did not prolong recovery. This decision was outlined in a August 30, 2005 letter to Mr. Cronish, who by this point had been retained to represent the employer.

[24] The employer objected, and the file was referred to ARO Flaherty. As noted above, the ARO confirmed the Adjudicator's decisions regarding entitlement for psychotraumatic disability and full LOE benefits, but granted the employer 50% SIEF relief.

(vi) The Employer's Position

[25] The employer takes the position that the worker returned to his regular job for a three-week period without evidence of difficulty, and stopped working on August 4, 2004 for reasons unrelated to his workplace injury. Specifically, the employer maintains that the worker was experiencing family problems during this period and he stopped working to stay home and look after his child.

[26] The employer's Operations Manager testified at the hearing. He explained that the company was a trucking business with an on-site tire repair function. The worker was the company's "tire man", and was hired and supervised by the Manager.

[27] The Manager explained that the truck the worker was working on at the time of the workplace accident had both inside and outside tires. The worker first mounted the inside tire on the truck axel and inflated it with an air compressor gun. He was in the process of mounting the outside tire when the inside tire exploded. According to the Manager, the outside tire did not move on the axel and it was only dust that blew out on the worker at the time of the explosion.

[28] The Manager testified that he offered to take the worker to hospital, but the worker declined. According to the Manager, the worker had dust in his eyes but he was not aware of any other injuries.

[29] The Manager testified that the worker was off for four days and came back to work on July 19, 2004. According to the Manager, the worker was able to handle all aspects of his regular job, including the use of the air compressor gun, and did not ask for any modified duties or voice any complaints.

[30] The Manager also testified that after returning to work the worker mentioned difficulties he was having at home, particularly with child care arrangements. The Manager understood from these conversations that the worker was living with his parents and they did not want to continue looking after his young son. According to the Manager, the worker demonstrated emotional stress associated with these issues.

[31] The Manager testified that on August 4, 2004, the worker told him that he had to stop working due to his family difficulties. The Manager advised the worker that he would have to replace him, since the tire repair job was critical to business operations. According to the Manager, he was reluctant to let the worker go, because a "tire man" was hard to recruit, but he could not recall whether he spoke to the worker about the possibility of accommodated duties during this August 4, 2004 conversation.

[32] The Manager first testified that he did not actually witness the tire explosion and only observed the worker after the incident. However, on questioning from the Panel, the Manager changed his evidence, claiming that he was there at the time of the explosion and was aware that the worker was not wearing coveralls or safety glasses as required by company policy.

[33] The employer's Director of Safety & Compliance also testified at the hearing. She testified that she filed the Form 7 Employer's Report of Injury on July 13, 2004, and also a second Form 7 on August 5, 2004. The Director explained that she filed the second form on the advice of the Claims Adjudicator, indicating that the worker was off due to stress, because stress was not referenced at the time of the original claim.

[34] The Director testified that she recalled having a conversation with the worker after he resumed work on the week of July 19, 2004. Specifically, she remembers a conversation on July 20 where the worker told her he was a bit nervous about working on tires. She advised him to slowly reintegrate his job duties and to speak to her again if problems persisted. According to the Director, the worker did not speak to her again before stopping work on August 4, and she did not receive any complaints from him regarding his return to the workplace.

[35] The Director also testified that she was on vacation for the last two weeks of August 2004 and did not contact the worker again until after her return. She recalled speaking to him by phone and asking if he could come back to work in any capacity. According to the Director, the worker said he was unable to work, but she does not recall if the worker explained why. The Director testified that she had a general discussion with the worker about possible modified duties, but was not specific because the worker said he was unable to work at all. She did not have any discussions with the Adjudicator concerning modified job duties.

[36] Mr. Cronish submits that the workplace incident involving the exploding tire was not significant enough to trigger PTSD. He points to the fact that the worker was able to return to his regular job duties after five days and to perform those duties from July 19 to August 4, 2004 without accommodation by the employer or complaint. He also makes reference to the time sheets for this period contained in the Case Record, which confirm that the worker actually worked longer than his regular hours on his first week back on the job.

[37] Mr. Cronish takes the position that the tire did not in fact explode in the worker's face, pointing to the Manager's testimony that it was the inner and not the outer tire that blew up, and that the worker's sole injury was dust in his eyes stemming from the fact that he was not wearing protective glasses as required. Mr. Cronish submits that the Claims Adjudicator mischaracterized the circumstances of the worker's injury, introducing the inaccurate phrase "the tire blew up in his face", and that his mischaracterization was relied on in all subsequent discussions and decision making processes, to the detriment of the employer.

[38] In Mr. Cronish's view, the worker's family doctor, Dr. Armstrong, was acting as an advocate for the worker when he drew the link between the worker's PTSD symptoms and the workplace injury. Instead, according to Mr. Cronish, the worker's psychological condition is attributable to a combination of pre-existing psychological factors and the stress associated with child care arrangements.

[39] Mr. Cronish also questions the worker's credibility. He submits that the worker did not suffer a serious workplace injury, as evidenced by his ability to resume working, and his linkage of psychological difficulties to the accident is an effort to take advantage of an opportunity to claim additional compensation benefits. In support of his position, Mr. Cronish refers to prior Tribunal decisions where credibility assessments were made in the context of balancing evidence, and where entitlement was denied on the basis of symptom exaggeration.

[40] In Mr. Cronish's view, the worker in this case also exaggerated his symptoms, claiming at various times in the Case Record that the explosion "pushed him backwards a couple feet", "threw him across the parking lot", and "blew him across the room". Mr. Cronish claims that these descriptions grossly exaggerate what actually occurred, and call the worker's credibility into question.

[41] Mr. Cronish takes the position that the worker is "street smart" and knew how to manipulate the system in order to get compensation benefits. He also identifies the fact that the worker refused to participate in the hearing as raising a credibility issue.

[42] As far as SIEF relief is concerned, Mr. Cronish submits that the worker had major pre-existing psychological conditions that were not adequately taken into account by the Board. In his view, the worker had serious anger management issues in the past as well as past troubles with the law, and that these factors should be characterized as major pre-existing conditions warranting 90% SIEF relief, rather than minor conditions as recognized by ARO Flaherty in assigning 50% relief.

(vii) Analysis and Findings

[43] Mr. Cronish has made much of what he characterizes as "symptom exaggeration" on the part of the worker in describing the July 13, 2004 workplace accident. We will deal with this issue first, before proceeding with a discussion of the three specific issues outlined in the Hearing-ready letter.

[44] The Form 6 Worker's Report of Injury filed with the Board on July 27, 2004 identifies three areas of injury, the left hand, chest and right eye. In describing the accident that led to these injuries, the worker states that:

... the tire exploded near my face. It spun me 5 feet backward, until I hit the ground. I was cut on my left hand, around my eye, in my eye, and had a lump on my upper chest.

[45] The employer's corresponding Form 7 report, which was filed on July 15, 2004, describes the accident as follows:

Worker reports he had repaired and replaced inside tire; was replacing outside tire when inside tire blew, knocking him back, abrasions to chest and left eye.

[46] The Physician's First Report from a Dr. McLeod at the Oshawa Clinic, dated July 14, 2004, makes no reference to the worker's hand or chest, but describes the injury as "tire explosion injuring right eye". Dr. McLeod's July 16, 2004 note approving the worker to be off work until July 10 also refers to his "eye injury".

[47] Family doctor, Dr. Armstrong, completed a Form 8, Physician's First Report on August 26, 2004. It was at this point that he first diagnosed the worker with PTSD, but he also described the organic injuries as caused by "truck tire exploded in front of him – numerous abrasions".

[48] At his first meeting with the CAMH Psychological Trauma Unit on November 5, 2004, the worker is reported as describing the accident as "blowing him across the room . . . with blood on his hands and face". He also makes references to superficial lacerations on the side of his face and contusions on his chest. Subsequent CAMH reports reference the worker being "thrown across the parking lot" and being "pushed backwards a couple of feet" at the time of the accident.

[49] The Director was clear in her evidence that she did not witness the accident. The Manager, on the other hand, gave conflicting evidence on this issue. He first testified that he did not actually witness the explosion, but heard it and then came out of his office and offered to transport the worker to the hospital. Later, he testified that he did witness the accident and that the injuries were restricted to dust in the worker's eyes.

[50] Taking all of this evidence into account, the Panel finds that the tire exploded in an area very close to the worker's face and startled him to the point that he was jolted backwards a short distance and may have fallen to the ground. The main area of injury was the worker's right eye, but it may also have been treated for superficial injuries to his face, hand and/or chest, none of which were serious. We accept that it was the inner and not the outer tire that actually exploded, but that the explosion was nonetheless significant, as evidenced by both the worker's decision to seek medical treatment and by the Manager's offer to take the worker to the hospital, an offer that would not have been made had he felt the worker had simply got dust in his eyes.

[51] In our view, the phrase "the tire blew up in his face", which was used by the Claims Adjudicator in his original decision, was a reasonably accurate characterization of the accident, and, on the evidence, we are not persuaded that the various descriptions attributed to the worker in the CAMH reports identified by Mr. Cronish constitute symptom exaggeration or call the worker's credibility into question.

[52] Mr. Cronish has also referenced a number of prior Tribunal decisions in support of his client's position, and we will deal with each of them briefly.

[53] The Panel in *Decision No. 556/07* (March 30, 2007) finds that the worker's testimony was not credible because he had consistently exaggerated his symptoms to various insurers and the Board. The Panel denied entitlement primarily on that basis. In *Decision No. 2016/98* (May 30, 2001), the Panel identifies cautions in assessing the credibility of interested witnesses, and points to a British Columbia court decision that stands for the proposition that the truth of any such witness' evidence must be consistent with "the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions". This same standard is referenced in *Decision No. 2739/00* (August 15, 2002).

[54] In the Panel's view, none of these decisions are particularly helpful in the present appeal. We have no difficulty in accepting the standard described by the court when dealing with the issues of credibility of interested witnesses, but issues of credibility are fact and circumstance specific and findings in prior decisions involving different workers, employer, circumstances and evidence are of limited value here.

[55] In this case, we have determined that the worker's various descriptions of his workplace injuries are reasonably accurate and do not in themselves raise credibility concerns. The only other pertinent evidence, with the exception of the employer's Form 7 that was prepared by the Director who did not witness the accident, is the testimony of the Manager. His two versions of what took place on July 13, 2004 are irreconcilable and, in fact, raise credibility concerns regarding his evidence on this issue.

[56] All in all, the Panel is not persuaded on the evidence that there are issues of credibility as they relate to any suggested symptom exaggeration on the part of the worker in the circumstances of this appeal.

(a) Psychotraumatic Disability

[57] Entitlement for psychotraumatic disability is set out in Board *Operational Policy Manual* (OPM) Document No. 15-04-02 (15 March 2005). It provides:

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

[58] To establish entitlement, one of the following circumstances must exist:

1. organic brain syndrome secondary to traumatic head injury, toxic chemicals, hypoxic conditions, or conditions related to decompression sickness;
2. as an indirect result of a physical injury by emotional reaction to the accident or injury, severe physical disability/impairment or reaction to the treatment process;
3. the psychotraumatic disability is shown to be related to extended disablement and to non-medical,

socioeconomic factors, the majority of which can be directly and clearly related to the work-related injury.

[59] Based on the medical evidence, the Panel finds that the requirements for psychotraumatic disability have been established, on a balance of probabilities.

[60] In order to be entitled to benefits based on psychotraumatic disability, the disability must become manifest within five years of the workplace injury. The medical evidence in this case establishes that requirement.

[61] The first evidence of psychological problems is found in the Form 8 submitted by Dr. Armstrong on August 4, 2004. He diagnoses the worker with PTSD, and describes his symptoms as “recurrent panic spells/[decreased] appetite/flash backs/headaches”.

[62] In order to get a clear diagnosis of the worker’s ongoing psychological condition, the Adjudicator referred him to CAMH for assessment at the Psychological Trauma Program. He was assessed three times, on October 28, 2004, November 1, 2004 and November 10, 2004, and three separate reports were submitted to the Adjudicator.

[63] The CAMH reports are consistent in diagnosing psychological impairment, specifically PTSD. The October 28, 2004 report from psychiatrist, Dr. Bender, also links the worker’s condition to the workplace accident:

There is a direct and major relationship between the workplace accident which occurred on July 13, 2004 and his Posttraumatic Stress Disorder.

[64] Psychologist, Dr. Bagby, confirms the worker’s PTSD symptoms in his November 8, 2004 report, and recommends cognitive behaviour therapy as a treatment strategy. In her November 10, 2004 report, occupational therapist, Ms. Clark, identifies that the worker’s high level of anxiety surrounding automobiles is limiting his occupational options and recommends treatment if the worker is interested in returning to a job in the automotive sector.

[65] The worker began treatment in February 2005 with psychologist, Dr. Parthun. Dr. Parthun describes the issues presented by the worker and the progress made in the initial treatment period:

These issues included panic attacks when driving in a car or riding as a passenger, or being near trucks. This in turn created social phobias, which resulting in not wanting to leave his house. Initially a friend had to drive him to appointments with me.

Currently, he has just started driving short distances, but not on major roads or highways. He is also getting out of the house more frequently.

[66] The worker’s claim was reviewed by Board psychologist, Dr. Piccolo, in August 2005. After reviewing the medical evidence gathered to that point, he offers the following opinion to the Claims Adjudicator:

The diagnosed post traumatic stress disorder is clearly related to the work accident. Therefore, there is definite justification for psychotraumatic entitlement. The proposed psychological treatment is appropriate and can be funded.

[67] Mr. Cronish suggests that the workplace accident was not significant enough to trigger PTSD, but this view is clearly at odds with all of the medical evidence in the Case Record. Treating physicians and assessors all draw a direct linkage between the exploding tire and the development of PTSD, and none of them identify any relevance to the fact that the worker was able to return briefly to his regular job before his psychological symptoms developed to the point that he had to stop working. It is also significant that the worker voiced his nervousness about working with tires the day after he returned to work in July 2004, an indication that anxieties relating to the circumstances of the accident were present essentially from the time the worker attempted to resume working.

[68] Accordingly, the Panel finds that the requirements of OPM Document No. 15-04-02 are established on the evidence, and the worker has entitlement for psychotraumatic disability as claimed.

(b) LOE Benefits from August 5, 2004 and Ongoing

[69] Section 43 of the Act provides for entitlement to LOE benefits. LOE benefits are intended to minimize wage losses arising from workplace injuries.

[70] LOE entitlement and the statutory provisions governing its administration are reflected in Board OPM Document No. 18-03-02 (12 October 2004). It states that a worker who has a loss of earnings as a result of a work-related injury is entitled to payment of LOE benefits, beginning when the loss of earnings start. The policy also outlines various termination dates for LOE benefits, the one relevant for this appeal being “the day on which the worker is no longer impaired as a result of the injury”.

[71] The following guideline issued under OPM Document No. 18-03-02 permits payment of full LOE benefits in the following circumstances where there has been no actual return to work:

If the nature or seriousness of the injury completely prevents a worker from returning to any type of work, the worker is entitled to full LOE benefits, providing the worker co-operates in health care measures as recommended by the attending health care practitioner and approved by [the Board]. If the worker does not co-operate, [the Board] may reduce or suspend the worker’s LOE benefits.

[72] The employer takes the position that the worker did not keep in contact with the company after August 4, 2004, thereby failing to discharge his obligations to consider a return to modified duties. Suitable duties may have been available, but the worker’s actions in severing contact with the employer made communications impossible and frustrated any efforts on the employer’s part to assist the worker to return to gainful employment.

[73] On August 4, 2004, Dr. Armstrong provided the worker with a note stating that he was “unfit to work for medical reasons”. This note accompanied Dr. Armstrong’s Form 8, which explained the reasons the worker was unable to work, which focused on the PTSD diagnosis that had just been made. Dr. Armstrong stated that identifying any required medical restrictions for a return to work was premature, and approved four to six weeks off work.

[74] As noted earlier, the worker was assessed at CAMH in late October and early November 2004. In his October 28, 2004 report, psychiatrist, Dr. Bender, concludes that the worker has a “fair to good” prognosis for returning to work, with treatment, but states:

[The worker] is currently unable to work in any capacity due to prominent anxiety symptoms and resulting avoidance of tires and vehicles.

[75] By April 2005, the worker remained unable to work, but was responding to psychological treatments. In his April 1, 2005 report to the Board, Dr. Parthun states:

We have also started the process of examining his return to some kind of work. He has very few skills to market and very limited exposure to a variety of work setting. My suggestion at this point in his treatment is to have him undergo a complete occupational interest assessment with a view to retraining for some type of work. I suggested that he get in touch with you, so you can arrange for this assessment.

[The worker] impresses as being motivated to work and he has participated in treatment to the best of his ability to help him overcome his difficulties and thereby return to work.

[76] When the worker’s file was assessed by Board psychologist, Dr. Picollo, on August 23, 2005, he confirmed that the worker was not able to work at that point, but suggested that an eventual return to some kind of work was likely:

MMR [maximum medical recovery] has not yet been reached for the psychological condition, as [the worker] is still in treatment. The date of MMR will be reviewed with updated progress reports in 2-3 months time. A permanent psychological impairment is not likely, as it appears that [the worker] is making gains in treatment and he is overcoming his anxieties.

[77] In our view, evidence in the Case Record is sufficient to establish that the worker’s psychological condition rendered him incapable of returning to any type of work in August 2004, and the Board’s decision to award full LOE benefits as of August 5, 2004 is supportable.

[78] The duration of LOE entitlement is an issue between the worker and the Board, but on the available medical

evidence before the Panel here, the worker is co-operating in health case measures as recommended by his treating psychologist and is entitled to full benefits until such time as MMR is reached and a determination is made as to the level of permanent impairment, if any, and restrictions that would apply to the worker's ability to return to the workforce.

[79] As noted by ARO Flaherty in his decision, the question of whether the worker was discharging his obligations to co-operate with the employer in finding a way to allow him to return to modified work does not come into play. The worker's employment relationship ended in August 2004, and at that time it was clear that the worker was unable to resume work of any sort. The Director appears to acknowledge this in her testimony, where she explains that she did not initiate a conversation with the worker regarding specific modified duties because she was under the impression that no work of any sort was possible at that time.

(c) SIEF Quantum

[80] OPM Document No. 14-05-03 (12 October 2004) provides that if a prior disability caused or contributed to the compensable accident, or if the period resulting from an accident becomes prolonged or enhanced due to a pre-existing condition, all or part of the compensation and health care costs may be transferred from the accident employer to the SIEF. Both physical and psychological disabilities are included.

[81] The policy defines "pre-existing disability" as a condition which has produced periods of disability in the past requiring treatment and disrupting employment; and "pre-existing condition" as an underlying or asymptomatic condition which only becomes manifest post-accident.

[82] When reviewing medical and other information present in the claim file, it must be determined whether the information suggests that a pre-existing condition is present and whether it:

- contributed to the work-related accident, or
- prolonged or enhanced the work-related disability.

[83] If it is likely that such circumstances exist, a SIEF award is recommended and the rate is set, according to the directions outlined in OPM Document No. 14-05-03.

[84] The SIEF relief is based on a combination of the medical significance of any pre-existing condition and the severity of the subsequent workplace accident.

[85] In his October 4, 2006 ruling, ARO Flaherty accepted that the worker in this case had a pre-existing condition, specifically a maladaptive personality, and that this condition would result in the worker having difficulty recovering from a psychological problem such as the PTSD condition stemming from his workplace accident.

[86] The ARO went on to assign 50% SEIF relief to the employer. Although he does not elaborate the rationale used in coming up with this figure, it would appear that he applied the following provision of OPM Document No. 14-05-03:

If there has been an aggravation of a pre-existing condition, or if there is evidence that the disability following the accident has been enhanced because of a pre-existing condition, 50% of the cost of the claim (compensation and health care) is charged to the SIEF.

[87] However, this same provision includes a note that applies to situations where a permanent impairment has not been granted:

NOTE

If an employer applies for relief in excess of 50%, and a permanent impairment is not evident, the degree of financial relief is reviewed again when the claim is closed.

[88] OPM Document No. 14-05-03 goes on to describe situations where 100% SIEF relief is granted, none of

which would appear to apply in the circumstances of this appeal.

[89] Mr. Cronish argues that the employer should be entitled to 90% rather than 50% SIEF relief. The only place where a 90% SIEF figure appears in OPM Document No. 14-05-03 is in the chart that is used when identifying the level of SIEF relief following a finding that the worker has sustained a permanent impairment. Relief of 90-100% SIEF is assigned when the medical significance of the pre-existing condition is “major” and the severity of the compensable workplace accident causing the permanent impairment is “minor”.

[90] Setting aside whether the PTSD suffered by the worker in this case is accurately characterized as resulting from a “minor” accident, in the Panel’s view, the employer’s request for an adjustment to the level of SIEF relief is premature. It would appear on our reading of OPM Document No. 14-05-03 that an award of 90% SIEF relief, as requested, could only be made after a finding that the worker sustained a permanent impairment. On the evidence before us here, it would appear that a decision on this issue has not yet been made by the Board.

DISPOSITION

[91] The appeal is dismissed.

Appeal dismissed.

Decision No. 933/07R

Vice-Chair: Moore

Decision — January 15, 2009

Neutral Citation: 2009 ONWSIAT 117

Reconsideration (Board policy) – Stress, mental – Board Directives and Guidelines (stress, mental) (traumatic event) – Board Directives and Guidelines (stress, mental) (cumulative trauma).

Consideration of Board's mental stress policy regarding cumulative trauma and traumatic events.

The worker was a communicator for a police department. She took 911 calls and co-ordinated the response to the calls. The worker appealed a decision of the Appeals Resolution Officer denying entitlement for stress-related disability. In *Decision No. 933/07*, the hearing panel allowed the appeal and granted entitlement.

The employer applied for reconsideration of *Decision No. 933/07*.

The worker had direct contact to a number of traumatic events. The final event, however, was when she read the report of a hostage-taking involving victims whom she knew. Board policy provides that a final reaction to a series of sudden and traumatic events is considered to be the cumulative effect. It also anticipates that the final event need not be the most traumatic. The hearing panel was of the view that the final event, although indirect, was as traumatic as the other events. The policy provision on direct contact with traumatized individuals must be read in light of the policy provision on cumulative effect. This anticipates that a more minor incident could trigger a reaction to the direct contact events. In the view of the Vice-Chair, this triggering event does not itself have to be directly witnessed.

In this case, the culminating event, though indirect, had a significant and lasting impact on the worker and was, therefore, under Board policy, an event that could reasonably trigger a psychiatric response.

The Vice-Chair also found that Board policy on cumulative effect fully reflects the wording of s. 13(5) of the *Workplace Safety and Insurance Act, 1997*, by stating that the last event in a cumulative effect traumatic injury is a singular event.

The employer did not identify any significant error in the original decision. The application to reconsider was denied.

Réexamen (politique de la Commission) – Tension mentale – Directives et lignes directrices de la Commission (tension mentale) (événement traumatique) – Directives et lignes directrices de la Commission (tension mentale) (traumatismes cumulatifs).

Le Tribunal examine la politique sur le stress en ce qui concerne l'effet cumulatif d'événements traumatisants multiples.

La travailleuse était répartitrice pour un service de police. Elle prenait les appels 911 et coordonnait la réponse à ces appels. La travailleuse a interjeté appel de la décision par laquelle le commissaire aux appels refusait de lui reconnaître le droit à une indemnité pour des troubles liés au stress. Dans la *décision n^o 933/07*, le comité d'audience a accueilli l'appel et a reconnu le droit à une indemnité.

L'employeur a demandé un réexamen de la *décision n^o 933/07*.

La travailleuse avait été directement en contact avec plusieurs événements traumatisants. Le dernier événement était toutefois la lecture d'un rapport de prise d'otages concernant des victimes de sa connaissance. Selon la politique de la Commission, la réaction finale à une série d'événements soudains et traumatisants est considérée comme l'effet cumulatif. La politique prévoit aussi que le dernier événement peut ne pas être le plus traumatisant. Le comité d'audience a estimé que, même s'il avait été indirect, le dernier événement était aussi traumatisant que les autres. La disposition de la politique au sujet du contact direct avec les personnes traumatisées doit être interprétée à la lumière de la disposition sur l'effet cumulatif. Cette disposition prévoit qu'un incident moins important peut provoquer une réaction aux événements avec lesquels il y a eu contact direct. Selon le vice-président, il n'était pas nécessaire que le travailleur ait été directement témoin de l'événement provoquant la réaction.

En l'espèce, l'incident culminant, bien qu'indirect, avait eu des conséquences importantes et persistantes sur la travailleuse et il s'agissait donc, aux termes de la politique, d'un événement pouvant raisonnablement provoquer une réaction psychique.

Le vice-président a aussi conclu que la politique sur l'effet cumulatif reflète parfaitement le libellé du paragraphe 13 (5) de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* en déclarant que la réaction finale à une série d'événements soudains et traumatisants est un événement singulier.

L'employeur n'a pas identifié d'erreur importante dans la décision initiale. 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. 850/87R (1990), 14 W.C.A.T.R. 1 refd to
Decision No. 871/02R2 (2006), 81 W.S.I.A.T.R. (online) consd

Other Decisions Considered:

Gowling v. Ontario Workplace Safety and Insurance Appeals Tribunal, [2004] O.J. No. 919 (Div. Ct.) consd

Workplace Insurance Legislation Considered:

Workers' Compensation Act, R.S.O. 1990, c. W.11
s. 70
s. 92
Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A
s. 13
s. 13(5)
s. 129

Other Statutes and Regulations Considered:

Legislation Act, 2006, S.O. 2006, c. 21, Schedule F
s. 67

Board Directives and Guidelines Considered:

Operational Policy Manual
Document No. 15-03-02 (October 12, 2004)

Cross-References:

Decision No. 933/07 (August 15, 2007) [2007 ONWSIAT 2102]

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APPLICATION by the employer to reconsider *Decision No. 933/07*.

January 15, 2009. THE TRIBUNAL: —

BEFORE: J.P. Moore, Vice-Chair

HEARING: November 5, 2008, at Toronto, Written

DECISION(S) UNDER REVIEW: *Decision No. 933/07*, dated August 15, 2007

APPEARANCES:

For the worker: Not participating in these proceedings

For the employer: I. Johnstone, Lawyer

REASONS

(i) Introduction

[1] The facts of this case are summarized in paragraph 1 of the *Decision No. 933/07* (August 15, 2007) under review:

The worker was a communicator for a police department. Her job was to take 911 calls, and to co-ordinate the response to the calls she took. From 1991 until February 2003, she took a number of emergency calls that concerned what the employer in its report called “major incidents” that “created a cumulative effect on the mental well-being of the employee”. On February 19, 2003, after learning at work of a home invasion in which the victims were people she knew, the worker broke down emotionally. She was diagnosed with major depression and incipient post-traumatic stress disorder and has not been able to work since. She claims entitlement for post-traumatic stress disorder as a result of the cumulative effect of the emergency calls she took over the course of her employment. In the decision under appeal, the ARO denied entitlement because the events in question were not objectively traumatic, sudden or unexpected; taking such calls was an accepted risk of such work and this was a case of a stress reaction that developed gradually over time to general workplace conditions.

[2] In *Decision No. 933/07*, a panel of the Tribunal allowed the worker’s appeal and granted the worker entitlement to benefits pursuant to section 13 of the *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Schedule A. Citing the legislation and the applicable policy of the Workplace Safety and Insurance Board, which is found in Document No. 15-03-02 of the Board’s *Operational Policy Manual*, the Panel concluded at [para. 21]:

We find that the February 19, 2003 event of reading the report of the hostage taking was sudden, unexpected and traumatic. While this event may have been less traumatic than other calls that the worker herself took, we find nevertheless that it was sudden, unexpected and shocking in the circumstances that she knew the victims and could not have expected that this would happen to them. It was in our view a culminating traumatic event, triggering an acute stress reaction to all of the previous traumatic calls that she took. As a result, we find that the worker is entitled under the terms of the Board policy with respect to cumulative effect, even though the last event was not the most traumatic or significant.

[3] The employer now seeks reconsideration of *Decision No. 933/07*.

(ii) The Reconsideration Test

[4] The *Workers’ Compensation Act*, R.S.O. 1990, c. W.11, 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.

[5] 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 finality and the prejudice to any party if the decision is reopened. The threshold test has been discussed 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.

[6] As discussed in *Decision No. 871/02R2* (2006), 81 W.S.I.A.T.R. (online), one of the fundamental concepts which guides the entire Tribunal process is a duty of fairness. The Tribunal has gone to considerable lengths, in spite of limited resources, to promote a fair process. The threshold test and the role of the reconsideration process must be understood in the context of the Tribunal's processes generally. Most parties have the option of an oral hearing, which is a hearing *de novo* at the Tribunal. This is very unusual at the final level of appeal within any adjudicative system. The Tribunal invests considerable resources in preparing cases for hearing and assisting parties to identify the issues in dispute so that parties can in turn be fully prepared for the hearing. The reconsideration process should not be so generally available that it undermines the important role of the original hearing or the finality of decisions which are reached after a fair hearing process.

[7] Because of limited resources, the Tribunal must also carefully balance its processes to ensure that parties awaiting their first hearing are not penalized because of the expenditure of scarce resources on reconsideration requests.

[8] It is instructive to refer to *Decision No. 871/02R2*'s analysis of the threshold test that a reconsideration request must meet and the reasons for this [at paras. 11-13]:

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 re-opened. [emphasis in original]

[9] The Divisional Court has reviewed and upheld the Tribunal's reconsideration process in *Gowling v. Ontario Workplace Safety and Insurance Appeals Tribunal*, [2004] O.J. No. 919 (Div. Ct). In particular, the Court found that [at para. 23]:

- 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) Findings and Conclusions

[10] In the present case, I am not persuaded that the Tribunal's threshold test has been met. In written submissions filed on behalf of the employer, the employer's counsel, Mr. Johnstone, made four arguments.

[11] The first two of those arguments can, in my opinion, be addressed together. The first of Mr. Johnstone's arguments was that a "sudden and unexpected traumatic event" under the Board's policy cannot include an event in which a worker is an indirect witness to a traumatic incident. His second argument was that the reading of a report of a traumatic incident could not constitute exposure to a sudden and unexpected traumatic event. In making these arguments, Mr. Johnstone cited the following excerpt from Board policy:

The worker must have suffered or witnessed the traumatic event *firsthand*, or heard the traumatic event *firsthand through direct contact* with the traumatised individual(s) (e.g., speaking with the victim(s) on a radio or telephone *as the traumatic event is occurring*). [Emphasis added]

[12] Mr. Johnstone added, regarding the second submission, that the "cumulative effect" portion of the Board's policy required that the culminating event that triggers a traumatic injury must itself be an unexpected traumatic event.

[13] In reaching its conclusions, the Panel in *Decision No. 933/07* began by citing the relevant sections of the Act, and Board policy that the Tribunal is required to apply under section 126. For convenience, I set out the following extracts here. Section 13 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.

(3) Except as provided in sections 18 to 20, the worker is not entitled to benefits under the insurance plan if the accident occurs while the worker is employed outside of Ontario.

(4) Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.

(5) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.

The Board's *traumatic mental stress* policy (Board *Operational Policy Manual* Document No. 15-03-02) provides:

POLICY

A worker is entitled to benefits for traumatic mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment.

A worker is not entitled to benefits for traumatic mental stress that is a result of the employer's employment decisions or actions.

GUIDELINES

Sudden and unexpected traumatic event

In order to consider entitlement for traumatic mental stress, a decision-maker must identify that a sudden and unexpected traumatic event occurred. A traumatic event may be a result of a criminal act, harassment, or a horrific accident, and may involve actual or threatened death or serious harm against the worker, a co-worker, a worker's family member, or others.

...

Sudden and unexpected traumatic events include

- witnessing a fatality or a horrific accident
- witnessing or being the object of an armed robbery
- witnessing or being the object of a hostage-taking

- being the object of physical violence
- being the object of death threats
- being the object of threats of physical violence where the worker believes the threats are serious and harmful to self or others (e.g., bomb threats or confronted with a weapon)
- being the object of harassment that includes physical violence or threats of physical violence (e.g., the escalation of verbal abuse into traumatic physical abuse)
- being the object of harassment that includes being placed in a life-threatening or potentially life-threatening situation (e.g., tampering with safety equipment; causing the worker to do something dangerous)

The worker must have suffered or witnessed the traumatic event first hand, or heard the traumatic event first hand through direct contact with the traumatized individual(s) (e.g., speaking with the victim(s) on the radio or telephone as the traumatic event is occurring).

Acute reaction

An acute reaction is a significant or severe reaction by the worker to the work-related traumatic event that results in a psychiatric /psychological response. Such a response is generally identifiable and must result in an Axis 1 Diagnosis in accordance with the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

An acute reaction is said to be immediate if it occurs within four weeks of the traumatic event.

An acute reaction is said to be delayed if it occurs more than four weeks after the traumatic event. In the case of a delayed onset, the evidence must be clear and convincing that the onset is due to a sudden and unexpected traumatic event, which arose out of and in the course of the employment.

Workers who develop mental stress gradually over time due to general workplace conditions are not entitled to benefits.

Cumulative effect

Due to the nature of their occupation, some workers, over a period of time, may be exposed to multiple, sudden and unexpected traumatic events resulting from criminal acts, harassment, or horrific accidents. If a worker has an acute reaction to the most recent unexpected traumatic event, entitlement may be in order even if the worker may experience these traumatic events as part of the employment and was able to tolerate the past traumatic events. A final reaction to a series of sudden and traumatic events is considered to be the cumulative effect.

The WSIB recognizes that each traumatic event in a series of events may affect a worker psychologically. This is true even if the worker does not show the effects until the most recent event. As a result, entitlement may be accepted because of the cumulative effect, even if the last event is not the most traumatic (significant).

[14] The Panel in *Decision No. 933/07* emphasized that the event that triggered the worker's reaction was the last in a series of traumatic events that the worker witnessed through the communication medium of her employment. In paragraph 5 of the decision, the Panel listed the history of such prior traumatic incidents. All such prior incidents were witnessed by the worker firsthand through direct contact with victims. It was only the final event noted by the Panel that was witnessed by the worker indirectly.

[15] Board policy provides: "A final reaction to a series of sudden and traumatic events is considered to be the cumulative effect". It also anticipates that the final event in a series of events that have a cumulative effect need not be the "most traumatic (significant)." In my view, Board policy is thereby recognizing that the prior impact of cumulative traumatic events can leave a person vulnerable to an injury that might not otherwise be injurious. In my opinion, the Panel that issued *Decision No. 933/07* found that there was an immediacy between the reading of the report of violence to people she knew and the prior traumatic events directly witnessed by the worker. As I understand the decision, the Panel was of the view that the final event, although indirect, was as traumatic as the traumatic events which she had witnessed directly. This conclusion was open to them on the evidence, given that the report related to a violent hostage-taking/home invasion incident involving family friends.

[16] In my view, the policy requirement that a traumatic event be witnessed firsthand or through direct contact

with traumatised individuals must be read in light of the policy provision on cumulative effect. The policy provision on cumulative effect clearly anticipates that a more minor incident could trigger a reaction to the prior directly witnessed traumatic events. In my view, this triggering event does not itself have to be directly witnessed; otherwise a person suffering from the cumulative effect of prior directly witnessed traumatic events could be denied entitlement.

[17] On the evidence, I am persuaded that the culminating event in the present case, though indirect, had a significant and lasting impact on the worker and was, therefore, under the policy, an event that could reasonably trigger a psychiatric/psychological response. It falls within the policy statement that “A final reaction to a series of sudden and traumatic events is considered to be the cumulative effect.”

[18] Mr. Johnstone’s third argument was that a sudden and unexpected traumatic event cannot occur where the event is a normal occurrence in the context of the worker’s employment.

[19] In my opinion, paragraphs 12 and 13 of *Decision No. 933/07* addressed that argument. Those paragraphs read:

To say that traumatic calls were part of her job does not detract from the fact that nevertheless, we would consider them to be objectively traumatic events and to be sudden and unexpected. By “objectively traumatic”, we mean that the average person taking such a call would in our view be traumatized. We conclude that the calls, in addition to being traumatic, were sudden and unexpected. We accept the worker’s testimony that she could not predict the type of emergency calls she would receive. Each call was, in effect, a surprise.

Far from becoming “used to” these trauma calls over time, the psychological evidence referred to in the Board’s policy on cumulative trauma and Dr. Diane Whitney in her Discussion paper on Post Traumatic Stress Disorder, prepared for the Workplace Safety and Insurance Appeals Tribunal (May 2002), suggests that persons exposed to a series of traumatic events may likely at some point suffer an acute traumatic reaction although they have not done so before.

[20] I see no error in that reasoning. I would add that Board policy anticipates that a sudden and unexpected traumatic event can occur when the event is a normal occurrence in the context of the worker’s employment. The section of the policy on cumulative effect reads in part:

Due to the nature of their occupation, some workers over a period of time may be exposed to multiple, sudden and unexpected traumatic events resulting from criminal acts, harassment or horrific events. If a worker has an acute reaction to the most recent unexpected traumatic event, entitlement may be in order *even if the worker may experience these traumatic events as part of the employment and was able to tolerate the past traumatic events.* [Emphasis added]

[21] In my view, the Panel’s reasoning in paragraphs 12 and 13 of *Decision No. 933/07* is consistent with that excerpt of the Board policy and gives a full answer to Mr. Johnstone’s submission. The worker’s occupation and the type of events she witnessed due to the nature of her occupation fall well within the policy wording.

[22] Mr. Johnstone’s fourth and final submission was that the cumulative effect portion of the Board’s policy is unlawful in that it is in conflict with section 13(5) of the *Workplace Safety and Insurance Act*. Section 13(5) reads:

13(5) A worker is entitled to benefits for mental stress that is an acute reaction to *a* sudden and unexpected traumatic event arising out of and in the course of his employment...[Emphasis added]

[23] Mr. Johnstone went on to argue:

The WSIA clearly restricts benefits for mental stress to “a” single, sudden and unexpected traumatic event. The Legislature did not contemplate that a series of traumatic events would give rise to entitlement to benefits for mental stress.

[24] In my opinion, Mr. Johnstone’s submission reflects a misinterpretation of the Board’s policy. In my view, the Board’s policy fully reflects the wording of section 13(5) by stating that the last event in a cumulative effect traumatic injury is a singular event. I note again, the cumulative effect policy which stipulates:

A final reaction to a series of sudden and traumatic events is considered to be *the* cumulative effect. [Emphasis added]

[25] The policy stipulates that the final reaction is to be considered the injury where it is part of a cumulative effect. I would further add that this particular policy stipulation reconciles section 13(5) with the disablement definition of accident in the legislation.

[26] I also note section 67 of the *Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, which provides that:

67 Words in the singular include the plural and words in the plural include the singular.

[27] Mr. Johnstone's argument that section 13(5) must be read as limited to a singular traumatic event does not appear to be consistent with the *Legislation Act*. It would have the effect of disentitling workers who are exposed to more than one sudden and unexpected traumatic event arising out of and in the course of their employment. While I do not need to decide this for the purpose of this reconsideration request, it seems questionable the Legislature would have intended this, as Mr. Johnstone submits.

[28] I conclude, therefore, that the Board's policy on a cumulative effect injury is fully consistent with the legislation and that there was no jurisdictional error on the part of the Panel in its application of the Board's cumulative effect policy in the present case.

[29] For these reasons, therefore, I conclude that the employer has not identified an error the significance of which would likely result in a different decision. The Tribunal's threshold test has not been met and the reconsideration request should be denied.

DISPOSITION

[30] The employer's request for reconsideration is denied.

Application denied.



Decision No. 2238/07

Panel: E. Smith (Vice-Chair), Christie, Ferrari

Decision — January 20, 2009

Neutral Citation: 2009 ONWSIAT 175

Consequences of injury (iatrogenic illness) (treatment) – Significant contribution (of compensable disability to death) – Heart condition – Cancer (lung) – Dependency benefits (death results from an injury).

Worker was unable to undergo optimal treatment for non-compensable lung cancer due to compensable heart condition – Heart condition was significant contributing factor to worker's death.

The worker suffered a serious compensable heart attack in 1991. He was diagnosed with non-compensable lung cancer in 2000 and died in 2001. The worker's widow appealed a decision of the Appeals Resolution Officer denying survivor benefits. The appeal was allowed.

The worker was not able to be given optimal treatment for his lung cancer due to his heart condition. He was given radiation therapy but not chemotherapy or surgery. The worker had to continue taking a drug for his heart condition during the radiation even though the drug put the worker at increased risk for a toxic reaction to the radiation. Such a toxic reaction occurred.

The worker did not die due to progression of the cancer. Rather, he died due to the treatment for it. There was medical evidence indicating that the expected survival would have been longer if the worker had been able to undergo optimal treatment.

The worker's heart condition was a significant contributing factor to the worker's death.

Conséquences d'une lésion (maladie iatrogène) (traitement) – Contribution importante (de l'invalidité indemnisable au décès) – Cardiopathie – Cancer (poumon) – Indemnités de personnes à charge (décès résultant d'une lésion).

Le travailleur n'avait pas pu recevoir un traitement optimal pour un cancer du poumon non indemnisable en raison de problèmes cardiaques indemnissables – Les problèmes cardiaques étaient un facteur contributif important du décès du travailleur.

Le travailleur avait fait une grave crise cardiaque indemnisable en 1991. Il avait reçu un diagnostic de cancer du poumon non indemnisable en 2000 et était décédé en 2001. La veuve du travailleur a interjeté appel de la décision par laquelle le commissaire aux appels refusait de lui reconnaître le droit à des prestations de survivant. Le Tribunal a accueilli l'appel.

Le travailleur n'avait pas pu recevoir un traitement optimal pour son cancer du poumon en raison de ses problèmes cardiaques. Il avait reçu de la radiothérapie mais n'avait pas reçu de chimiothérapie et ne s'était pas fait opérer. Le travailleur avait continué sa médication pour ses problèmes cardiaques pendant la radiothérapie même si cela augmentait ses risques de réaction toxique à la radiation, et il avait eu une telle réaction.

Le travailleur n'était pas décédé en raison de la progression de son cancer mais plutôt en raison du traitement de cette affection. La preuve médicale indiquait que la perspective de survie du travailleur auraient été plus longue

s'il avait pu recevoir un traitement optimal.

Les problèmes cardiaques étaient un facteur contributif important du décès du travailleur.

Cross-References:

Decision No. 2238/071 (November 22, 2007) [2007 ONWSIAT 2963]

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[DISPOSITION](#)

APPEAL by the worker's widow from a decision of the Appeals Resolution Officer denying dependency benefits.

January 20, 2009. THE TRIBUNAL: —

BEFORE:

E.J. Smith, Vice-Chair
M. Christie, Member Representative of Employers
M. Ferrari, Member Representatives of Workers

HEARING:

September 26, 2007, at Toronto, Oral
Post-hearing investigations completed on November 6, 2008

DECISION(S) UNDER APPEAL:

WSIB ARO decision dated May 30, 2002

APPEARANCES:

For the worker: R. Vanderploeg, Consultant

For the employer:
Not participating

REASONS

(i) The Issue

[1] The issue is whether the worker's compensable heart condition was a significant contributing factor in his death from non-compensable lung cancer.

[2] The appeal was previously the subject of *Decision No. 2238/071* (November 22, 2007).

(ii) Background

[3] This now deceased worker suffered a serious heart attack on July 12, 1991. He was ultimately awarded a 60% NEL (non-economic loss) award and a 100% FEL (future economic loss) award.

[4] In June 2000, a shadow was seen on a routine x-ray of his right lung. He was diagnosed with lung cancer. He died on January 17, 2001. The Board has determined that the lung cancer caused the death. The widow claims that the worker's heart condition was a significant contributing factor in the worker's death, because it precluded the

worker from having surgery, or chemotherapy. He was also taking medication which increased his risk of radiation toxicity as a result of the radiation treatment that he was given.

(iii) Submissions

[5] The representative submitted that if it had not been for the worker's heart condition, the doctors might have been able to successfully treat the lung cancer.

(iv) Medical Evidence

[6] The medical evidence is set out in the interim decision, but for convenience we repeat the key medical reports here. There is considerable evidence that the worker had suffered a very serious heart attack in 1991, although in 1998 the worker's doctors were able to reduce his medication and in 1999 and 2000 his condition was described as stable.

[7] An intraoperative pathology consultation report of Dr. Marcus, dated July 28, 2000 diagnoses lung cancer. The carcinoma is metastatic. The worker's doctors were in agreement that he was not a candidate for surgery, or for combined chemotherapy and surgery or radiation, because of his heart condition. It was felt that high dose radiation therapy alone would be the treatment of choice.

[8] A clinical note of Dr. A. Bezjak dated September 26, 2000 states:

I think radical radiation would probably be safe although there is a concern about the increased side effects due to the location of the subcarinal nodes behind the heart, and also the fact that he is on Amiodarone, which may increase radiation toxicity on mucosal and cutaneous tissues especially. Given the potential exaggerated acute effects, further increasing the acute toxicity by combining radiation with chemotherapy is likely going to prove more risky and indeed both the patient and his wife were more comfortable with the idea of radical radiation alone. [Emphasis added]

[9] A clinic note, apparently of Dr. Bezjak, dated January 8, 2001, describes that the worker has symptoms of pneumonia, which is possibly radiation pneumonitis. He notes that in patients on Amiodarone the radiation reaction can be more brisk and that this may be an explanation of why the worker's reaction may be earlier than usual. The note states that in view of the worker's significant cardiac problems the pneumonitis may be very serious or indeed life-threatening.

[10] A discharge report describes death on January 17, 2001, based on a diagnosis of:

1. Death secondary to bronchogenic carcinoma.
2. Severe L.V. [left ventricle] dysfunction.

[11] The Board's medical consultant, Dr. C. Smith, considered if the worker's death was compensable in a memo dated May 1, 2001. He states:

There is no indication that the worker's compensable cardiac condition or treatment significantly caused the death or aggravated the cause of the death.

(v) Conclusions

[12] In our interim decision, the Panel requested the assistance of a Tribunal Medical Assessor.

[13] We were provided with two opinions dated April 4, 2008 and September 23, 2008 from Dr. Mark David Vincent, an oncologist, who is an associate professor at the University of Western Ontario. He provided us with his opinion on the effect of the worker's heart condition on his treatment for lung cancer, and the worker's prognosis if he had had the optimum treatment. Dr. Vincent has provided a very detailed and thorough review of the relevant epidemiology. We address here only what we understand from his conclusions, which is as follows.

[14] It is likely that the worker's lung cancer was terminal on any view of the facts.

[15] However, his compensable heart problem meant that he was not able to be given the optimal treatment for

the lung cancer. He was given radiation therapy but not chemotherapy or surgery. If he had had the optimal treatment, the assessor suggests that a reasonable expectation would have been that he would have survived about 14 to 24 months if his cancer was Class III. The median survival would only have been about 11 months even with either surgery and/or chemotherapy and radiation if it is assumed that his cancer was Class IV. The assessor also expresses the opinion that it is more likely that the cancer was Class IV than Class III.

[16] The assessor refers to the time that the worker lived, in terms of a comparator to this 11-month estimate, as three months. We are not entirely sure of the basis for the assessor's reference to three months. From our review of the file, his cancer was first investigated in June 2000, it was confirmed in July 2000, and he died on January 17, 2001. Therefore, if the measurement is from the date of diagnosis, the worker lived about five or six months. On the other hand, if the measurement is from the end of the relevant treatment, the worker ended radiation treatment on November 27, 2000, and lived less than two months from that date. However, the worker started his radiation on October 10, 2000. Therefore January 17, 2001 is three months from the date of the start of this treatment. Therefore we understand that the date that the assessor is using as a point of reference for comparison to the eleven month median is most likely to the start of the relevant treatment.

[17] We note that our decision, in any event, does not turn on the differences between these dates.

[18] The assessor estimates that, assuming Class IV cancer, the worker's death occurred eight months before the median survival expectation of eleven months, and the Panel notes that, on any understanding of these dates, it occurred at least five or six months prior to the median date.

[19] In the Panel's view, some level of variation around the median survival time because of the impact of a compensable condition on treatment would not be sufficiently significant to entitle a survivor to benefits, if the cause of the death is the non-compensable cancer. Some variation around a median outcome is within the parameters of what would be expected.

[20] However, in this case, there is also evidence that the heart condition had a direct causal impact on the death. The worker did not die of the progression of his cancer. He died of the treatment for it. He was taking Amiodarone, a medication for his heart condition, which Dr. Vincent describes as putting him at risk of a toxic reaction from the radiation treatment. We asked the assessor to consider the significance of the fact that the worker was taking Amiodarone, for his heart, while undergoing the radiation treatment. Dr. Vincent states:

On the basis of the mechanistic and empirical evidence, it must be concluded that there exists the very real potential for synergistic lung toxicity between RT [radiation therapy] and amiodarone...If it can be established that he was on amiodarone during the RT period (? 10 October – to 24 November, 2000) then I think (as does Dr. Bezjak) that there is good reason to believe it may well have exacerbated the severity of what looks like (in other respects) a fairly typical, if somewhat early, case of RT pneumonitis. As there was underlying cavitation in the site of the primary cancer, it is likely that the cancer itself was responding to the RT, and so it is unlikely he died of disease progression.

[21] We accept Dr. Vincent's opinion on the cause of the worker's death. We find this sufficient to mean that the heart condition was a significant contributing factor in the worker's death. We understand the medical report of Dr. Bezjak above, to indicate that the Amiodarone could not be stopped during the radiation treatment. Therefore the Amiodarone put the worker at increased risk for a toxic reaction to the radiation treatment. He suffered a toxic reaction. Dr. Vincent states that he likely died of that toxic reaction, and not of the progression of the lung disease. His heart condition was a significant contributing factor in why that toxic reaction occurred. We note also that the worker's underlying heart condition is referred to in the report of Dr. Bezjak as a reason why the toxic reaction was life threatening.

[22] It is not possible to know what the progression of the lung cancer would have been if the worker had been able to undergo the optimum treatment. However, the median expected survival would have been at least five months and likely eight or nine months longer (depending on how Dr. Vincent has analyzed these figures). We understand from the literature referred to by Dr. Vincent that there was some chance of survival even at five years. It cannot be said that the progression of the lung cancer would have been substantially the same absent the compensable factors.

[23] The heart condition was a significant contributing factor to the worker's death. We find that the widow is

entitled to survivor benefits.

DISPOSITION

[24] The appeal is allowed.

[25] The widow is entitled to survivor benefits.

Appeal allowed.

Decision No. 835/08

Vice-Chair: E. Smith

Decision — January 20, 2009

Neutral Citation: 2009 ONWSIAT 173

Notice of accident – Right to sue – Subrogation – Election – Jurisdiction, Tribunal (right to sue).

Consideration of interrelationship between time limits under s. 22 of the Workplace Safety and Insurance Act to file a claim and under s. 30 to elect whether to commence an action.

The worker suffered neck and back injuries in February 2002, when his vehicle collided with a truck in the employer's parking lot. Neither the worker nor the employer reported the accident to the Board, apparently both thinking that it was not compensable. However, the hospital clinic that treated the worker submitted a Form 8 to the Board. The worker received statutory accident benefits from his motor vehicle insurer.

The worker commenced a number of legal actions against his employer, the driver of the truck, the trucking company and the snow removal company. The actions were later discontinued.

Because a Form 8 had been filed, the Board contacted the worker in December 2002, asking for a Form 6 but the worker did not respond. In March 2005, the worker contacted the Board. The worker appealed a decision of the Appeals Resolution Officer denying an extension of the time to file a claim. The appeal was dismissed.

Section 30 of the *Workplace Safety and Insurance Act, 1997*, deals with situations in which a worker is entitled to benefits under the WSIA and to commence an action. Section 30(2) requires a worker to elect whether to claim benefits or commence an action. Section 30(4) provides a three-month time limit for the election and s. 30(5) gives the Board discretion to extend the time limit. Under s. 30(10), if a worker elects to claim benefits, the Board is subrogated to the rights of the worker. Under s. 30(14), if the worker elected to pursue an action, the worker may still have rights to benefits above the amount awarded in the action, if there has been a judgment in the action or if the Board approved a settlement.

There is some difficulty in the interrelationship between the time limits in s. 22 and s. 30. For s. 30(14) to apply, the worker must be entitled to benefits. If there is no extension of time to file the claim, there would appear to be no entitlement to benefits. Thus, provisions of s. 30 may only apply if a time extension is granted under s. 22. Alternatively, approval under s. 30(14) may be seen to constitute an implicit extension of time to file the claim.

The Vice-Chair also noted that the Tribunal does not have jurisdiction on appeals from decisions of the Board under s. 30, although it does have jurisdiction on appeals under s. 22. Thus, even if the Tribunal extended the time to claim under s. 22, it would still be open to the Board to make determinations under s. 30. However, if the Tribunal denied an extension under s. 22, the s. 30 determinations would become moot because no benefits are in issue.

In this case, the Vice-Chair found that the worker was not entitled to an extension of the time to file the claim under s. 22. The worker had been told by the hospital clinic that the accident was compensable. The clinic filed a Form 8. The worker did not respond to requests by the Board to file a Form 6. The worker did not contact the Board until three years after the accident.

Avis d'accident – Droit d'intenter une action – Subrogation – Choix – Compétence du Tribunal (droit

d'intenter une action).

Le Tribunal examine les rapports mutuels entre les délais prévus à l'article 22 de la Loi de 1997 pour le dépôt d'une demande et à l'article 30 pour le choix d'intenter une action.

Le travailleur avait subi des lésions au cou et au dos en février 2002, quand son véhicule était entré en collision avec un camion dans le stationnement de l'employeur. Ni le travailleur ni l'employeur n'avait déclaré l'accident à la Commission, apparemment parce qu'ils le croyaient non indemnisable. La clinique qui avait traité le travailleur avait toutefois soumis un Formulaire 8 à la Commission. Le travailleur avait touché des indemnités d'accident légales de son assurance automobile.

Le travailleur avait intenté plusieurs actions en justice contre son employeur, le conducteur du camion, l'entreprise de camionnage et l'entreprise d'enlèvement de la neige. Les actions avaient ensuite été discontinuées.

En raison du Formulaire 8, la Commission avait communiqué avec le travailleur en décembre 2002 pour lui demander un Formulaire 6 mais ce dernier n'avait pas répondu. En mars 2005, le travailleur avait communiqué avec la Commission. Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de proroger le délai applicable au dépôt d'une demande d'indemnité. Le Tribunal a rejeté l'appel.

L'article 30 de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997) traite des situations dans lesquelles un travailleur est à la fois en droit de demander des prestations dans le cadre du régime d'assurance et d'intenter une action. Aux termes du paragraphe 30 (2), un travailleur est tenu de choisir de demander des prestations ou d'intenter une action. Le paragraphe 30 (4) prévoit un délai de trois mois pour ce choix et le paragraphe 30 (5) investit la Commission du pouvoir discrétionnaire de proroger ce délai. Aux termes du paragraphe 30 (10), si un travailleur choisit de demander des prestations, la Commission est subrogée dans ses droits. Aux termes du paragraphe 30 (14), s'il choisit d'intenter une action, le travailleur peut avoir droit à des prestations en sus du montant obtenu à la suite d'un jugement rendu dans l'action ou si la Commission approuve le règlement au préalable.

Les rapports mutuels entre les délais prévus à l'article 22 et à l'article 30 présentent certaines difficultés. Pour que le paragraphe 30 (14) s'applique, le travailleur doit avoir droit à des prestations. Si le délai applicable au dépôt d'une demande n'est pas prorogé, il semblerait ne pas y avoir droit à des prestations. Par conséquent, les dispositions prévues à l'article 30 peuvent seulement s'appliquer si le délai est prorogé aux termes de l'article 22. Subsidiairement, on pourrait considérer que l'approbation aux termes prévue au paragraphe 30 (14) constitue une prorogation implicite du délai applicable au dépôt de la demande.

La vice-présidente a aussi noté que le Tribunal n'est pas compétent à l'égard des appels interjetés contre les décisions rendues par la Commission aux termes de l'article 30 bien qu'il soit compétent à l'égard des appels interjetés aux termes de l'article 22. Par conséquent, même si le Tribunal prorogeait le délai applicable au dépôt de la demande aux termes de l'article 22, la Commission pourrait encore rendre des décisions aux termes de l'article 30. Cependant, si le Tribunal refusait d'accorder une prorogation aux termes de l'article 22, les décisions rendues aux termes de l'article 30 perdraient toute portée pratique puisqu'aucune prestation ne serait en jeu.

En l'espèce, la vice-présidente a conclu que le travailleur n'avait pas droit à une prorogation pour déposer une demande d'indemnité aux termes de l'article 22. On avait dit au travailleur que son accident était indemnisable quand il se trouvait à l'hôpital, et la clinique avait déposé un Formulaire 8. Le travailleur n'avait pas répondu à la Commission quand elle lui avait demandé de déposer un Formulaire 6. Le travailleur avait communiqué avec la Commission seulement trois ans après l'accident.

Workplace Insurance Legislation Considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A

s. 22

s. 30

s. 30(2)

s. 30(4)

s. 30(5)

s. 30(10)

s. 30(14)

s. 31
s. 123(2)

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 15-01-03 (October 12, 2004)

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APPEAL by the worker from a decision of the Appeals Resolution Officer denying an extension of time to file a claim.

January 20, 2009. THE TRIBUNAL: —

BEFORE: E.J. Smith, Vice-Chair

HEARING: 9, 2008, at Toronto, Written
Post-hearing investigations completed October 22, 2008

APPEAL BY THE WORKER OF ARO DECISION DATED
OCTOBER 2, 2006, FOR ORDER EXTENDING THE TIME
TO APPEAL UNDER SECTION 22 OF THE WSIA

APPEARANCES:

For the worker: Mr. R.G. Ferguson, Lawyer

For the employer:
Not participating

REASONS

(i) The Issue

[1] This decision addresses the worker's appeal of an ARO decision dated October 2, 2006, denying an application for an extension of time to appeal under section 22 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA).

[2] It was considered in writing by Tribunal Vice-Chair E.J. Smith.

(ii) Background

[3] The worker injured his neck and low back on February 13, 2002, when his vehicle collided with a truck in the employer's parking lot. He continued to work on that day, but went to the hospital the next day, when his neck symptoms worsened. Neither the worker nor the employer reported the accident to the Board. However, the hospital clinic provided a Form 8 (Doctor's First Report of Injury) to the Board.

[4] The worker collected accident insurance benefits. He was off work until June 2002, when he returned to work with restrictions, as set out in the physiotherapist's report of June 10, 2002, of no lifting objects over 10 kilograms, avoid repetitive movements of the neck and back, and avoid prolonged overhead work.

[5] There is medical reporting of continued back and neck pain in this time period. A report of Dr. Lemoine dated June 14, 2002 describes some persistent pain in the neck and back. The neck pain has improved but the worker is taking MS-Contin. Dr. LeMoine recommends that he try to reduce taking MS-Contin.

[6] Also, the worker saw a psychiatrist in this time period, Dr. G. Khan. Dr. Khan wrote the worker's family doctor describing that he had seen the worker previously in 1984 for anger problems and phobias. He had been abused as a child, had a Grade 10 education, and had been in jail three times. The worker told Dr. Khan of his accident of February 13, 2002, and that he was taking physiotherapy. Mentally, Dr. Khan reports that he was "quite well balanced, talk was quite free and mood was fairly appropriate." His diagnosis was of an Anger Management Disorder and a Panic Disorder. Dr. Khan recommended referral to an orthopaedic specialist for his physical complaints.

[7] Dr. Khan saw the worker from June 5, 2002 until October 25, 2002, when the worker missed an appointment and did not return.

[8] Dr. Khan describes the worker's condition in this time period again in a later report dated June 15, 2006, addressed to the worker's lawyer. The letter states that there was no discussion with the worker of his injuries and he did return to work. When Dr. Khan last saw him on September 5, 2002 he was still working and so the prognosis was reasonable.

[9] Because a Form 8 had been filed, the Board wrote the employer and the worker in December 2002 asking for a Form 7 (Employer's Report of Injury), and a Form 6 (Worker's Report of Injury), respectively, with respect to an injury on February 14, 2002. February 14, 2002 was the date of the Form 8 forwarded by the hospital clinic, and so the Board mistook that for the accident date. The worker informed the Board when he made the claim in 2005 that he did not get this letter asking for the Form 6. The employer responded to the request for a Form 7 by informing the Board that the worker had not been at work on February 14, 2002, and that it was not aware of a workplace accident. However, it later confirmed information about an accident in its parking lot on February 13, 2002, and filed a Form 7. However, it informed the Board that the worker had left its employment by the time of this correspondence.

[10] The Board wrote the worker again on February 10, 2003. The letter states:

I have not yet received the information requested on the following document(s):

6 Worker's Report of Injury or Disease.

Six month filing deadline has not been met.

If I do not receive this information within 14 days from the date of this letter, I will take no further action in your claim.
Please call me if you have any questions.

[11] A telephone number is provided.

[12] There was no further action with the Board until the worker's lawyer contacted the Board in March 2005. That was more than three years after the accident and two years after this letter was sent.

[13] A memo of the Claims Adjudicator dated April 15, 2005 records a telephone conversation with the worker. The worker told the Claims Adjudicator that he had returned to light duties at the employer and quit a short time after. He told the Claims Adjudicator that "His injuries feel essentially resolved." He told her that he received

payment from his car insurance company and didn't know WSIB would be available. He told her that he was pursuing civil action against the employer.

[14] In a memo dated May 27, 2005, the Claims Adjudicator records another telephone call with the worker in which the worker acknowledged receiving the second (2003) letter from the Board, but stated that he understood it to mean that his file had already been closed. The worker describes the results of the accident as that he missed several months off work and that the car was totalled.

[15] Oddly, given the position now provided by his representative about the extent of his injuries, the worker does not relate any ongoing symptoms to this accident in either of these telephone calls with the Board.

(iii) The Insurance Benefits; The Legal Actions

[16] The file indicates that after the 2002 accident the worker was paid benefits by his motor vehicle insurer. The benefits provided by the motor vehicle insurer appear to relate primarily to the time that the worker was off work prior to his return to work in June 2002. His lawyer also commenced several Court actions, against the employer, the driver of the truck that hit the worker's car, the trucking company, and the maintenance company responsible for the snow removal in the parking lot. Although the dates that these actions were filed is not clear, I assume that, because of limitation periods, they would have been filed before March 2005, which is when the worker's lawyer contacted the Board and asked to pursue the claim.

[17] I asked Mr. Ferguson to clarify the current status of these claims. He responded in a letter dated July 4, 2008 that, in his view, there was no liability against the ice and snow removal contractor and that that action was allowed to be dismissed. He stated that the action against the other vehicle was settled on the following basis:

The action was and is under case management and we were being pressed to get on to trial before an appeal could be heard, which is still being considered by the WSIAT. An offer was made by the trucking company on a nuisance value basis which we decided to accept, having considered that their threat to bring a s. 31 application would probably be successful. The trucking company was a Quebec company, but it appears that a large percentage of its operations were conducted in Ontario. The settlement did not cover our legal fees to date.

[18] I note that there is an earlier memo of the ARO which states:

Mr. Ferguson explained that the worker is suing the employer and the driver and company of the truck that hit him. They are having settlement meetings. Mr. Ferguson believes that the fact that the driver of the truck that hit the worker was from Quebec removes the restriction from a Schedule 1 worker suing another Schedule 1 worker/firm for damages.

[19] Therefore at the time of the ARO proceedings the ARO was aware of the Court actions and that Mr. Ferguson was discussing settlement with a third party defendant. However, the ARO did not alert Mr. Ferguson to the Board's subrogated rights or to section 30 of the Act, as discussed below; did not provide the worker with an election form, and did not refer the matter to the Board's legal branch for a determination about whether the worker was entitled to sue a third party. Under Board policy, matters related to section 30 elections are determined by the legal branch.

[20] With respect to the action against the employer for the injury, Mr. Ferguson states that it was discontinued:

Continuing the claim against [the employer] with respect to the condition of the icy driveway was inconsistent with the application to the Board and that aspect of the claim has been discontinued. However, an action is continuing against [the employer] in negligence for negligently telling our client that he had no right to make a claim for workers' compensation.

[21] In his letter dated July 4, 2008, Mr. Ferguson also states:

I realize that there were steps that could have been taken to obtain a right to sue order from the Board. Time would not permit that and, in any case, the Board had clearly demonstrated that our client would not be entitled to any Workers' Safety and Insurance Board benefits.

(iv) The Effect of Sections 30 and 31 of the Act

[22] These sections are relevant because they relate to how Court actions and WSIB claims interrelate. They are

relevant to how the Board and Mr. Ferguson proceeded in this matter.

[23] Section 30 applies when a worker is entitled to benefits under the WSIA with respect to an injury and is also entitled to commence an action against a person in respect of the injury. In that case, section 30(2) provides that the worker “shall elect whether to claim benefits or to commence the action and shall notify the Board of the option elected”. Section 30(4) provides that the election must be made within three months after the accident occurs. Under section 30(5) the Board may extend the time for the election, if it is just to do so. If an election is not made or if notice of the election is not given, the worker shall be deemed to have elected not to receive benefits under the insurance plan.

[24] Under section 30(10), if the worker elects to claim benefits, the Board is subrogated to the rights of the worker. The Board is solely entitled to determine whether or not to commence, continue or abandon the action and whether to settle it and on what terms. Section 30(14) provides that, even when a worker pursues the action, he may have rights to benefits over and above the amount awarded in the Court action. However, the section applies only when there has been a judgement in a Court action, or the Board has approved the settlement.

[25] There is some difficulty in interpreting how the two time limits, of section 22, and section 30, interrelate. For section 30(14) to apply, the worker must be entitled to benefits under the WSIA. If there has been no extension of the time to file the claim, there would appear to be no entitlement to benefits. Therefore, one reading of this section is that it provides that benefits are not owed, in any case, unless the time to the claim is extended under section 22. Therefore the provisions of Board policy that refer determinations under section 30 to the Board’s legal branch may be intended to come into play only if a time extension is granted under section 22.

[26] However, it is also possible that the Board intends the provisions of Board policy to mean that, if a matter is referred to the Board’s legal branch, and the legal branch extends the time for election under section 30, and/or a settlement is approved under section 30(14), this constitutes an implicit extension of the time to appeal, where otherwise relevant, at least if the matter is considered by the legal branch in the first instance. Under Board policy, determinations under section 30 are made by the Board’s legal branch. In making such a determination, the legal branch would be in a position to be aware of any issues arising under section 22.

[27] However, the time limit matter was not referred to the legal branch in this case. It is for the Board to establish its practice in this respect. In any event, the statutory provisions providing for the extensions of time are distinct, and may well relate to different considerations. Certainly, the considerations relevant to whether the Board will approve a settlement are distinct from the considerations that go to whether the time should be extended under section 22, if a worker has delayed making a claim.

[28] It is also relevant that, under section 123(2) of the WSIA, the Tribunal does not have jurisdiction to hear appeals from determinations of the Board made under section 30. Therefore the appeal provisions related to the two determinations are different. Tribunal decisions have found that a determination under section 22 is appealable to the Tribunal. However, from the statute, a determination under section 30 is not.

[29] I read section 123(2) to restrict my jurisdiction with respect to a determination made by the Board about whether the worker has elected under section 30(2), or whether the Board will extend the time to elect under section 30(5) or whether the Board will approve a settlement for the purposes of section 30(14) or pay benefits under section 30(14).

[30] I do not read section 30, on its face, to restrict my jurisdiction to consider an appeal with respect to whether the time to make the claim is to be extended under section 22. That is the case irrespective of how that issue is addressed at the Board, so long as there is a final decision of the Board. However, if I were to extend the time under section 22, I interpret sections 30 and 123(2) to mean that it would remain open to the Board’s legal branch to determine whether the facts of section 30(1) applied (i.e., if the worker was entitled both to benefits under the insurance plan and to commence an action against another party); if so, to determine if the three month time limit under section 30(4) had been met, and, if not, to decide whether the Board would extend the time for election under section 30(5). It would also be open to the Board to determine whether the worker’s entitlement to benefits under section 30(14) was effected by the settlement with the Quebec company. I do not have jurisdiction to effect

the Board's jurisdiction under section 30.

[31] Therefore, in my view, in effect, if I deny the extension under section 22, the section 30 determinations become moot, because no benefits are in issue. However, I do not find that the reverse implication applies. If I allow the time extension, under section 22, that cannot be read to provide for an extension of time under section 30 or for the approval of a settlement under section 30(14). The considerations are different. Further, those determinations are referred by Board policy to its legal branch, and the statute removes the jurisdiction of the Tribunal with respect to them. Therefore, in my view the Board's determinations under section 30 might render moot a WSIAT decision extending the time.

[32] However, section 30 only applies if the worker has both a right to compensation and is entitled to commence an action against a third party. Mr. Ferguson's submission also raises questions about whether those facts apply, despite the fact that the worker pursued legal actions. Section 30 gives the Board the jurisdiction to consider if those facts apply. However, the Tribunal also has a limited jurisdiction to determine that issue, under section 31 of the Act.

[33] Section 31 provides that a party to an action may apply to the Tribunal to determine whether, because of the Act, a right to commence an action is taken away. In my view, if the Tribunal has made a determination that there is no right to sue a third party, that determination would be binding on the Board and section 30 would not apply. In addition, if a ruling is made under section 31, that the right of action is taken away, the statute provides for a new six-month time limit to file a claim for benefits from the date of that ruling.

[34] However, a section 31 application can only be brought by a party to an action. The action must be extant. From Mr. Ferguson's letter, I understand that the only continuing action is the action against the employer for negligent misrepresentation. A section 31 application with respect to that action would not result in a determination of whether the worker had a right to sue the Quebec company or the employer with respect to the accident itself.

[35] Therefore the jurisdiction to address the matters to be determined under section 30 in this case rests entirely with the Board. There is now no basis for a relevant application to the Tribunal under section 31.

[36] However, the Board has not made determinations under section 30. I have concluded that, if I were to extend the time to appeal under section 22, in my view, it would remain open to the Board to consider the matter under section 30. The Tribunal has no jurisdiction in that matter. However, it follows from that finding that, for the same reason, it is not necessary for me to consider the implications of section 30, or 31, or the representative's actions in the Court matters, for the purposes of my determination under section 22.

[37] As a result, I have addressed that matter without reference to those sections.

(v) The Action for Negligent Misstatement

[38] However, I find the pleadings about the alleged negligent misstatement relevant to the reasons why the claim was not filed when the accident occurred.

[39] The worker's position in the statement of claim is that following the collision the employer advised him that the accident was not a work related injury and no WSIB coverage was available to him. The statement of claim asserts that the worker relied on the advice and did not file a claim.

[40] The statement of defence of the employer states that the workplace was unionized and the worker benefited from independent third party representation for all work-related questions. The employer asserts that the worker received advice from his union. It asserts that the worker was seen in the cafeteria after the collision and said he was feeling fine. He did not report work-related injuries or a work-related accident. On February 14, 2002 a health care centre filed a WSIB claim but the employer was not told about that claim at the time. The worker's last day of work was October 3, 2002. The employer only learned of the claim to the Board when the Board wrote it in December 2002.

[41] The employer states that the worker resigned from his employment by letter dated August 14, 2003, retroactive to October 3, 2002. I note that this circumstance is unusual and the retroactive resignation is suggestive of the settlement of a labour relations matter. There are later documents in which the worker gives a history that he was fired, although he told the Board he quit this job.

(vi) The Medical Evidence

[42] The initial medical reporting is described above. The worker was seen by Dr. St-Pierre at the Pitt Street Medical Centre from February 21, 2002 to May 2002, when he was still having back pain. There are then no entries about the back or neck until March 22, 2004

[43] On May 14, 2003, the worker was seen by Dr. Reen, a specialist in physical medicine and rehabilitation, for a difficulty with his elbow, which I understand to be unrelated to the car accident. There is no reference to the neck or low back.

[44] Dr. St-Pierre saw the worker again on March 22, 2004. The worker had complaints of back pain again, “times two years” There is a note that the worker was off work for four months after an accident, and will run out of unemployment insurance in two weeks.

[45] A report of Dr. Reen dated April 14, 2004 describes ongoing neck and back pain. The worker is described as alert, oriented and in no acute distress. He is described as “still has pain but apparently coping well and on no pain medication.”

[46] The worker was seen by Dr. B. Young at the Pitt Street Medical Centre with complaints of depression and trouble sleeping and back pain between December 1, 2004 and September 15, 2005. In a report dated December 16, 2005, Dr. Young states that he saw him on December 1, 2004 for a cough and stomach flu and in February 1, 2005 for stress. He referred him to Dr. Lalla for treatment of anxiety and depression.

[47] A report of Dr. Lalla, a psychiatrist, dated August 17, 2005, provides a history that the worker became depressed after the tractor trailer accident. The history states that the worker did not receive WSIB or insurance benefits for reasons he cannot articulate. The report states that he left his employment because of pain and depressive symptoms and also because he was given an inordinate amount of responsibilities in his position and could not cope under the circumstances. Dr. Lalla diagnoses a major depressive disorder, moderate, with some treatment resistance, anxiety disorder, some symptoms of PTSD, and “rule out personality disorder”.

[48] A report of Dr. P. Butler, a psychiatrist, dated March 6, 2007, addressed to Mr. Ferguson, provides an assessment of the worker based on an evaluation on December 22, 2006 and February 20, 2007. He describes complaints of insomnia, panic, and depressed mood. He states that the worker was dismissed after his return to work “for reasons that are not clear to me”. He obtained work elsewhere but the company did not continue. He found he was too weak to work elsewhere and the pain was prohibitive. He declared bankruptcy. He was suicidal in 2004. He is unable to work. The diagnosis is of major depression and chronic pain disorder, which Dr. Butler relates to the motor vehicle accident based on the worker’s history.

[49] A further report of Dr. Lalla, addressed to Mr. Ferguson, dated February 23, 2008, states that the worker had difficulties as an adolescent which were reactivated by the workplace accident. He states:

He describes never having recovered from the pain caused by that accident. Also, as a result of the accident, he underwent a series of what he describes as administrative gaffs and workplace inequities where he was fired and denied the possibility of WSIB benefits. He described never emotionally being able to get over this series of unfortunate events and of tumbling into a melancholy state.

[50] There is also evidence on file that indicates that the worker had been treated for back pain in 2001, which was prior to the accident in issue, and was referred to a specialist at that time.

(vii) The Time Limit Issue: The Law and Board Policy

[51] Section 22 of the WSIA provides:

22(1) A worker shall file a claim as soon as possible after the accident that gives rise to the claim, but in no case shall he or she file a claim more than six months after the accident or, in the case of an occupational disease, after the worker learns that he or she suffers from the disease.

...

(3) The Board may permit a claim to be filed after the six-month period expires if, in the opinion of the Board, it is just to do so.

(4) A claim must be on a form approved by the Board and must be accompanied by such information and documents as the Board may require.

(5) When filing a claim, a worker must consent to the disclosure to his or her employer of information provided by a health care professional under subsection 37(3) concerning the worker's functional abilities. The disclosure is for the sole purpose of facilitating the worker's return to work.

(6) If the claimant does not file the claim with the Board in accordance with this section or does not give the consent required by subsection (5), no benefits shall be provided under the insurance plan unless the Board, in its opinion, decides that it is just to do so.

[52] The Board's *Operational Policy Manual* (OPM) Document No. 15-01-03, *Workers' Requirement to Claim and Consent*, states:

As soon as possible after an accident, workers must file a claim for benefits. They must also consent to disclose their functional abilities information...

A claim must be filed within six months of an accident...

The WSIB may extend the six-month deadline, or waive the dual requirements altogether if it is in the WSIB's opinion that it is just to do so.

[53] The policy states that workers should meet their requirements by signing either a Form 7 (Employer's Report of Injury) or a worker's claim/consent form. If they do not use either of these forms they can use the Form 6 (Worker's Report of Injury) which is available at the WSIB website.

[54] The policy also states:

Whether or not the WSIB issues an initial benefit payment, the WSIB does not accept a worker's claim and consent past the six-month deadline unless it agrees to waive the requirements, or extend the deadline.

[55] The policy continues:

Exceptional Circumstances

If a worker fails to file a claim by the respective deadline, the WSIB allows the claim to be filed at a later date if the worker can show exceptional circumstances existed at the deadline.

Exceptional circumstances can include

- compelling personal reasons, such as serious health problems or accident (experienced by the party or the party's immediate family) or the party leaving the province/country due to the ill health or death of a family member.
- the worker's inability to understand the time limit requirements and the consequences of not meeting them (i.e. was the worker made aware at the workplace of the requirement to claim and consent; were language difficulties a factor?)
- whether the worker reported the accident to the employer, health care professional, or co-workers.

[56] Like all Board policies, this policy is subject to the merits and justice provisions of the Act and Board policy.

(viii) Submissions

[57] Mr. Ferguson seeks an extension of time on the basis that:

1. the worker was misled by the employer and told that the accident was not compensable;
2. the worker had mental health issues that precluded him from have the mental ability to file a claim;
3. the worker's morphine would have interfered with his mental state and his ability to file a claim;
4. the worker did not get the initial letter from the Board and interpreted the subsequent letter to mean it was too late to file a claim.

[58] The employer is not participating in the WSIAT appeal. However, it wrote the Board and supported the request for an extension of time, on the basis that neither the worker nor the employer realized that the accident was in the course of employment when it occurred.

(ix) Conclusions

[59] I find that the worker is not entitled to an extension of time to appeal.

[60] From the way that both the worker and the employer approached the issue, at the time, it appears that they were likely under a common understanding – or misunderstanding – that the accident in the parking lot was not compensable. They both proceeded on that view. Therefore I have approached the issue on the assumption that the worker may have been given wrong information by his employer about whether the car accident was compensable. I do not find it necessary to decide that issue.

[61] I am satisfied, from the file, that there is no evidence that the employer had a coercive workplace that would have made the worker afraid to file a claim, within the terms of Board policy. There is no evidence to that effect.

[62] Even if the worker was misled (which has not been established in evidence), I find that by the time that his representative contacted the Board, in March 2005, it was too late to file a claim. It was more than three years after the accident. From the file, the worker had been told by the Hospital clinic that the accident was compensable. They had filed a Form 8. Even if he was told by the employer after that filing that the claim was not compensable (again, which has not been established in evidence) it would have been prudent for the worker to confirm that with the Board, given the view of his doctors.

[63] Further, he was sent two follow up letters by the Board. I will assume that he did not get the first letter. However, he did get the second letter. It told him to call the Board, and gave him a phone number. His position is that he understood the letter to be telling him that he was out of time. The letter points out that he is beyond the six month time limit. However, it also indicates that he should call the Board within 14 days. The implication is that the Board is willing to consider extending the time if he acts quickly. He did not do so. His lawyer did not contact the Board for over two years after the date of the December 2003 letter.

[64] The worker was a member of a Union. Given the date of the August 2003 letter which retroactively terminated his employment, it appears that the worker may have continued to be in contact with the Union for a period of time after he left work in October 2002. It appears he had ongoing labour relations issues. In any event, he could have asked the Union for assistance in telling him how to make a WSIB claim, if he was having ongoing pain. There is no evidence that he attempted to get assistance from the Union.

[65] Further, in my view, it would have been reasonable for the worker to expect that there might be time limits on how long a person can delay in claiming insurance benefits after an accident.

[66] The worker saw a psychiatrist, Dr. Khan, in the time period after his motor vehicle accident. There is no indication that his mental state precluded filing a claim at that time, either because of his intake of morphine or otherwise. Dr. Khan reports that he was "quite well balanced, talk was quite free and mood was fairly appropriate." He had returned to work. His prognosis was reasonable. From the evidence, his mental status deteriorated later, in about 2004. It did not prevent him from filing the claim in the relevant time period.

Therefore it does not provide a basis for the time to be extended.

DISPOSITION

[67] The worker's appeal is denied.

[68] The worker is not entitled to an extension of the time to file a claim under section 22 of the WSIA with respect to an accident to his neck and back that occurred on February 13, 2002.

Appeal dismissed.

Decision No. 1166/07

Vice-Chair: E. Smith

Decision — February 19, 2009

Neutral Citation: 2009 ONWSIAT 430

Section 20 of the Workplace Safety and Insurance Act, 1997, requires an election whether to receive benefits under the WSIA or the laws of another jurisdiction – Section 20 does not exclude recovery under the WSIA and the laws of another jurisdiction when a worker has suffered two different accidents – Section 20 applies when there is only one accident.

The worker died of mesothelioma in 2005. The worker's estate claimed entitlement based on exposure to asbestos in Ontario between 1971 and 1973. The Board granted entitlement but reconsidered and reopened the matter after finding that the employer did not receive notice. The matter was scheduled for rehearing but, before the matter was reheard, the estate advised that the worker had been granted benefits for mesothelioma by Veterans Affairs Canada under the *Pension Act* (Canada) based on exposure to asbestos while the worker was in the Navy from 1959 to 1968.

The Board then decided that the estate was not entitled to receive benefits from both Veterans Affairs and the Board, and that the estate would have to elect what benefits it would receive under s. 20(3) of the *Workplace Safety and Insurance Act, 1997*. The estate appealed that determination. The appeal was dismissed.

Section 20 applies when a worker is entitled to receive benefits under the Act relating to an accident and is also entitled to compensation under the laws of another jurisdiction in respect of the accident.

The Vice-Chair found that nothing significant turned on the difference between use of the word “benefits” and use of the word “compensation” in s. 20 in this context. The question was whether the *Pension Act* falls within the wording of section 20. The question is not whether the provisions of the different Acts are exactly the same but whether the payments under the *Pension Act* fall within the wording of s. 20 as entitling the worker to 1) compensation 2) under the laws of another jurisdiction 3) in respect of the accident.

Section 20 applies when a worker is entitled under two regimes in respect of the same accident. Generally, cases have addressed apportionment of benefits when there are different sequential accidents to the same body area. Those cases are not actually addressing apportionment but, rather, the proper attribution of injuries to different accidents. Section 20 does not exclude recovery under both the WSIA and the *Pension Act* when a worker has suffered two different accidents, the second of which causes an aggravation of the earlier injury. In such a case, each regime is responsible only for the injury that occurred within the area of its jurisdiction. Section 20 does apply to duplicate entitlement for the same accident.

In this case, it is likely that only one of the relevant exposures caused the mesothelioma. Thus, there was only one accident. The facts of the case do not suggest that there were two accidents with the second accident aggravating the mesothelioma that had already been caused by the first accident. Rather, once the worker had the mesothelioma, which was terminal in his case, further exposure would not have worsened his degree of impairment.

The Vice-Chair identified a number of different scenarios to help understand when s. 20 applies. For example, a worker suffers a stress-related injury at one employer and experiences further stressors at a second employer,

worsening the impairment. In this example there are two accidents, and no issue under s. 20. In another example, a worker suffers a psychological disability while working concurrently for two employers with evidence supporting a finding that both employments are concurrently significantly contributing factors to the disability. In this example, there is one accident but two causes, and s. 20 would apply.

In other circumstances, there may be a pre-existing vulnerability that becomes symptomatic because of events at the second employer, or just becomes manifest at the second employer. In these circumstances, the problems are evidentiary.

In the case of this worker, there is one accident but some facts are unknown. There are two possible theories of how the accident arose but there is only one accident. The difficulty is evidentiary in determining where the accident took place. Dual entitlement could arise if the two different adjudicative bodies were to make inconsistent findings about which employment exposure to the asbestos caused the mesothelioma. Thus s. 20 is applicable.

Section 20 requires consideration of whether the payments under the *Pension Act* entitle the worker to compensation under the laws of another jurisdiction in respect of the accident.

The accident in this case is the injuring process that caused the initiation of the mesothelioma. The Vice-Chair found that the payments claimed are with respect to the same accident. The payments made under the *Pension Act* are, in substance, a form of workers' compensation benefits payable under the laws of another jurisdiction.

The Vice-Chair concluded that the facts of this case fall within the terms of s. 20. The estate must elect whether to receive benefits under the WSIA or the *Pension Act*.

Choix (recouvrement double).

L'article 20 de la Loi de 1997 prévoit que le travailleur doit le cas échéant choisir de demander des prestations aux termes de cette loi ou aux termes de lois d'une autre autorité législative – L'article 20 n'exclut pas le recouvrement aux termes de la Loi de 1997 et des lois d'une autre autorité législative quand un travailleur a subi deux accidents distincts – L'article 20 s'applique quand il y a un seul accident.

Le travailleur est décédé d'un mésothéliome en 2005. Sa succession a demandé une indemnité pour une exposition à l'amiante en Ontario entre 1971 et 1973. La Commission a reconnu le droit à l'indemnité demandée mais elle a réexaminé sa décision et rouvert l'affaire après avoir constaté que l'employeur n'avait pas été notifié. L'affaire devait être entendue de nouveau quand la succession a indiqué que le travailleur avait déjà obtenu une indemnité pour son mésothéliome du ministère des Anciens Combattants en application de la *Loi sur les pensions* (Canada) pour une exposition à l'amiante pendant qu'il était dans la marine de 1959 à 1968.

La Commission a alors décidé que la succession n'avait pas droit à des prestations du ministère des Anciens Combattants et du régime ontarien d'assurance contre les accidents du travail. La Commission a indiqué que la succession devait choisir de demander des prestations de l'un ou de l'autre aux termes du paragraphe 20 (3) de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997). La succession a interjeté appel de cette décision. Le Tribunal a rejeté l'appel.

L'article 20 s'applique quand un travailleur a droit à des prestations en application de la Loi relativement à un accident alors qu'il a aussi droit à une indemnité à l'égard du même accident en application de lois d'une autre autorité législative.

La vice-présidente a conclu que la différence entre l'utilisation des mots « prestations » et « indemnisation » à l'article 20 n'avait aucune conséquence importante dans ce contexte. Il fallait régler la question de savoir si la *Loi sur les pensions* cadrait avec le libellé de l'article 20. La question n'était pas de savoir si les dispositions des différentes lois étaient exactement les mêmes mais plutôt de savoir si les paiements aux termes de la *Loi sur les pensions* constituaient 1) une indemnisation 2) aux termes d'une loi d'une autre autorité législative 3) à l'égard de l'accident, comme prévu à l'article 20.

L'article 20 s'applique quand le travailleur a droit à une indemnité de deux régimes distincts à l'égard du même accident. Le Tribunal traite généralement de répartition des prestations dans les cas où il y a différents accidents

séquentiels touchant la même région du corps. Dans de tels cas, il ne s'agit pas vraiment de répartition mais plutôt de la détermination de l'attribution adéquate des lésions aux différents accidents. L'article 20 n'exclut pas le recouvrement aux termes de la Loi de 1997 et de la *Loi sur les pensions* quand un travailleur subit deux accidents distincts et quand le deuxième accident entraîne une aggravation de la lésion initiale. Dans de tels cas, chaque régime s'occupe seulement de la lésion survenue sous son autorité législative. L'article 20 s'applique bien à la duplication du droit à une indemnité pour un même accident.

En l'espèce, il était probable que le mésothéliome avait été causé par une seule des expositions pertinentes. Il y avait donc un seul accident. Les faits ne semblaient pas indiquer qu'il y avait eu un accident à l'origine d'un mésothéliome et qu'un deuxième accident l'avait aggravé. Une fois que le travailleur eu contracté le mésothéliome, lequel était terminal en l'espèce, toute autre exposition n'était pas susceptible d'accroître son degré de déficience.

La vice-présidente a identifié plusieurs scénarios pour illustrer quand l'article 20 s'applique. Par exemple, un travailleur contracte des troubles liés au stress pendant qu'il est au service d'un employeur et il est soumis à d'autres facteurs de stress au service d'un deuxième employeur, ce qui aggrave sa déficience. Il y aurait deux accidents dans un tel cas, et l'article 20 ne s'appliquerait pas. Dans un autre exemple, un travailleur contracte des problèmes psychologiques invalidants pendant qu'il est au service de deux employeurs et la preuve indique que les deux emplois sont des facteurs contributifs d'importance égale. Dans cet exemple, il y aurait un accident mais deux causes, et l'article 20 s'appliquerait.

Dans d'autres circonstances, il peut y avoir une vulnérabilité préexistante qui devient symptomatique en raison d'événements survenus au service d'un deuxième employeur ou qui se manifeste chez le deuxième employeur. Dans de telles circonstances, il faudrait régler des problèmes de preuve.

En l'espèce, il y avait un accident mais certains des faits étaient inconnus. Il y avait deux théories possibles pour expliquer comment l'accident était survenu mais il n'y avait qu'un seul accident. Le problème était de nature probatoire car il était difficile de déterminer où l'accident était survenu. Une indemnisation double pourrait survenir si les deux organismes de décision parvenaient à des constatations incohérentes au sujet de l'exposition professionnelle à l'origine du mésothéliome. L'article 20 est donc applicable.

L'article 20 exige d'examiner si les paiements faits en application de la *Loi sur les pensions* ouvrent droit à une indemnité d'une autre autorité législative à l'égard de l'accident.

L'accident en l'espèce est le processus dommageable qui a causé l'apparition du mésothéliome. La vice-présidente a conclu que les paiements demandés étaient à l'égard du même accident. Les paiements faits en application de la *Loi sur les pensions* étaient essentiellement une forme de prestations d'assurance contre les accidents du travail payable aux termes d'une loi d'une autre autorité législative.

La vice-présidente a conclu que les faits cadraient avec l'article 20 en l'espèce. La succession devait choisir de recevoir des prestations en application de la Loi de 1997 ou de la *Loi sur les pensions*.

Tribunal Decisions Considered:

Decision No. 1019/87 (June 17, 1998) consd

Decision No. 420/88 (1990), 14 W.C.A.T.R. 7 consd

Decision No. 562/90 (May 7, 1991) refd to

Decision No. 877/90 (September 12, 1991) consd

Decision No. 32/94 (September 15, 1994) consd

Decision No. 286/96 (1996), 40 W.C.A.T.R. 20 consd

Decision No. 1135/99 (July 8, 1999) refd to

Decision No. 36/00 (2002), 63 W.S.I.A.T.R. 20 consd

Decision No. 3170/00 (October 3, 2001) [2001 ONWSIAT 3288] consd

Decision No. 201/02R3 (May 18, 2005) [2005 ONWSIAT 1156] refd to

Decision No. 2273/03I (2004), 68 W.S.I.A.T.R. 197 consd

Decision No. 1403/07 (October 15, 2007) [2007 ONWSIAT 2589] consd

Workplace Insurance Legislation Considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A
s. 1

- s. 2(1) “accident”
- s. 17
- s. 20(1)
- s. 20(2)
- s. 20(3)
- s. 20(4)
- s. 30
- s. 159(7)

Other Statutes and Regulations Considered:

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50
Pension Act, R.S.C. 1985, c. P-6

- s. 2
- s. 21(2)
- s. 25
- s. 48

Veterans Review and Appeals Board Act, S.C. 1995, c. 18

Other Decisions Considered:

Brownhall v. Canada (Ministry of National Defence) (2007), 87 O.R. (3d) 130 (Ont. Div. Ct.) refd to
Marsot v. Canada (Department of National Defence), 2002 FCT 226, [2002] 3 F.C. 579 refd to
Medwid v. Ontario (1988), 63 O.R. (2d) 578 (Ont. H.C.J.) refd to
Sarvanis v. Canada, 2002 SCC 28, [2002] 1 S.C.R. 921 refd to
Schut v. Canada (Attorney General), [2000] F.C.J. No. 424 (F.C. T.D.) consd
Stopford v. Canada, 2003 FC 994, [2004] 1 F.C.R. 431 consd

Board Directives and Guidelines Considered:

Operational Policy Manual
Document No. 15-01-09 (October 12, 2004)

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[DISPOSITION](#)

APPEAL by the worker’s estate from a decision of the Board requiring the worker’s estate to elect whether to receive benefits under the *Workplace Safety and Insurance Act, 1997*, or the *Pension Act* (Canada).

February 19, 2009. THE TRIBUNAL: —

BEFORE: E.J. Smith, Vice-Chair

HEARING: May 4, 2007, at Toronto, Written
Post-hearing activity completed on November 17, 2008

DECISION(S) UNDER APPEAL: WSIB ARO decision dated June 23, 2006

APPEARANCES:

For the worker: Mr. P. Laporte, Mr. K. Brown, Office of the Worker Adviser (OWA)

For the employer: Ms. JS, company personnel

REASONS

(i) The Issue

[1] The issue is whether the estate of the deceased worker is entitled to receive benefits from both Veterans Affairs Canada (VAC) and under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) for the same condition: mesothelioma.

(ii) The Adjudicative Background

[2] The worker died of mesothelioma on March 5, 2005, at age 63. On December 5, 2005, a Board Appeals Resolution Officer concluded that the mesothelioma which resulted in his death arose from exposure to asbestos during his employment at an Ontario employer between 1971 and 1973, or for a period of approximately three years. The ARO found:

- The employment in the navy from 1963 to 1971 as a medic on a naval ship did not expose the worker to airborne asbestos fibres because of the nature of his job.
- He had been employed at a medical clinic in Ontario (no dates or further details provided) which may have exposed him to airborne asbestos fibres, but this employer was not compulsorily covered.
- He was not specifically involved in a process at the alleged accident employer which would generate airborne asbestos within the terms of the presumption applicable to mesothelioma.
- However there would be various types of workers working on catwalks above the worker's workstation on a daily basis. Asbestos was being removed from the walls/pipes everywhere in the plant. The plant was extremely dirty and the air quality was terrible. The asbestos might have been being removed in the early 1970s. There was information that before 1976 the ceilings/walls were full of loose asbestos and the casings were breaking down. Workers would simply break through the casing and the scrap/dust was dropped to the floor and the sweepers swept it up. Therefore entitlement was allowed.

[3] However, the employer had not been given notice of the appeal that led to these findings and this decision, and objected to the decision. The Board reconsidered the decision and re-opened the matter, to be scheduled for a new hearing.

[4] Before the matter was reheard, in January 2006, the estate representative advised the Board that the worker had been granted benefits for mesothelioma and chronic obstructive lung disease (COPD) by Veteran Affairs Canada as related to asbestos exposure in the Royal Canadian Navy from 1959 until 1968. I assume therefore, that the evidence before the VAC was not the same as that provided to ARO Franchi, who accepted evidence that there had been no exposure to asbestos in the navy.

[5] Therefore there are three different periods of exposure to asbestos in issue. There is a first period of possible exposure which occurred when the worker worked for the Royal Canadian Navy for a period of about nine years. There is a second, subsequent, alleged period of exposure which occurred when the worker worked for the Ontario accident employer for a further approximately three years. There is also reference to a third period of exposure, with a non-covered Ontario employer, but the ARO has not provided any details with respect to that exposure.

[6] The worker representative submits that it cannot have known with certainty which exposure caused the mesothelioma. The possibilities in that respect are discussed further below.

[7] In a decision dated June 23, 2006, Mr. G. McCaffrey, Appeals Manager of the Board Appeals Branch, found that the worker's estate was not entitled to receive benefits from both VAC and the Board for the mesothelioma which resulted in the worker's death. Mr. McCaffrey determined that the worker's estate was required to elect what benefits it would receive under section 20(3) of the WSIA. If the estate elected benefits under the WSIA, it was required to notify the WSIB of that election and to withdraw the VAC claim.

[8] The worker's estate appeals that determination. The re-hearing of the matter on the merits is deferred pending this decision. The worker has been granted an extension of time to elect, under section 20, pending the outcome of the appeal.

(iii) The Statutory Provisions

(a) The Provisions of the WSIA

[9] The relevant provisions of the WSIA are as follows:

2(1) In this Act,

“accident” includes,

- (a) a wilful and intentional act, not being the act of the worker,
- (b) a chance event occasioned by a physical or natural cause, and
- (c) disablement arising out of and in the course of employment;

...

20(1) This section applies if a worker is entitled to benefits under the insurance plan relating to an accident and is also entitled to compensation under the laws of another jurisdiction in respect of the accident regardless of where the accident occurs. This section also applies with necessary modifications if the worker’s survivors are so entitled.

(2) The worker shall elect whether to receive benefits under the insurance plan or to receive compensation under the laws of the other jurisdiction and shall notify the Board of the option elected. If the worker is employed by a Schedule 2 employer, the worker shall also notify the employer.

(3) The election must be made within three months after the accident occurs or, if the accident results in death, within three months after the date of death. However, the Board may permit the election to be made within a longer period.

(4) If an election is not made or if notice of the election is not given, the worker is presumed to have elected not to receive benefits under the insurance plan unless the contrary is shown.

...

159(7) The Board may enter into agreements with the government of Canada or of a province or territory of Canada or with the appropriate authority of such a government providing for co-operation in matters relating to the prevention of injury and disease and workers’ compensation and return to work and providing for the avoidance of any duplication in compensation.

[10] Section 1 of the WSIA addresses the intention of the Act. It provides, in part:

1 The purpose of this Act is to accomplish the following in a financially responsible and accountable manner:

...

4. To provide compensation and other benefits to workers and to the survivors of deceased workers.

(b) The Provisions of WSIB Policy

[11] Board *Operational Policy Manual* (OPM) Document No. 15-01-09 states:

LAW

The *Workplace Safety and Insurance Act* provides:

s. 20

Ontario workers or survivors may, in connection with an accident inside or outside Ontario, be entitled to benefits from the Ontario WSIB and from another jurisdiction. However, they can only claim benefits from one jurisdiction.

To claim benefits from the Ontario WSIB, claimants must make an election within three months of the date of accident or date of the worker’s death.

Another jurisdiction is defined in the policy as “any other workplace insurance authority.”

[12] The policy further states:

Claiming benefits

To help determine who can claim benefits from another jurisdiction, decision-makers must consider all the relevant circumstances, such as

- the residence of the worker
- the location of the employer's business and chief place of business, and
- the location where the worker is regularly employed.

If it is determined that the claimant has entitlement in Ontario and in another jurisdiction, the WSIB sends the claimant the appropriate election form.

The WSIB does not adjudicate a claim without a completed election form on file.

In addition to completing an election form, the claimant must provide the WSIB with additional information (see 15-01-03, Workers' Requirement to Claim and Consent, and 15-01-04, Survivors' Requirement to Claim for Benefits).

(c) The Pension Act

[13] Part III of *The Pension Act*, R.S., 1985, c. P-6, states:

21(2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,

(a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule I;

(b) where a member of the forces dies as a result of an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall be awarded in respect of the member in accordance with the rates set out in Schedule II;

...

25 The Minister shall reduce a pension by a monthly amount determined under section 26 if, in respect of the same death or same disability for which the pension is payable,

(a) an amount arising from a legal liability to pay damages is collected by or in respect of the pensioner; or

(b) compensation is payable to or in respect of the pensioner under

(i) the *Merchant Seamen Compensation Act*,

(ii) the *Government Employees Compensation Act*,

(iii) any provincial workers' compensation legislation,

(iv) a compensation plan established by any other legislation of a similar nature, whether legislation of Canada, a province or another jurisdiction, other than

(A) a compensation plan to which the pensioner has contributed, or

(B) a compensation plan that provides a payment or payments that are in substance a continuation of the pay or benefits of a member of the forces, or

(v) a compensation plan of a similar nature established by the United Nations or by or under an international agreement to which Canada is a party, other than

(A) a compensation plan to which the pensioner has contributed, or

(B) a compensation plan that provides a payment or payments that are in substance a continuation of the pay or benefits of a member of the forces.

...

48(1) For the purposes of this section and section 49, "dependant" means a survivor or child of a member of the forces to whom a pension may be paid under this Part.

(2) Where an application for a pension or allowance, or for an increase thereof, that was made by a member of the forces is pending at the time of the member's death, the application shall, if the member is survived by a dependant, be

proceeded with and determined in the same manner as if the member had not died.

[14] The *Pension Act* also contains provisions addressing its purpose. The *Pension Act* is stated to be:

An Act to provide pensions and other benefits to or in respect of members of the Canadian naval, army and air forces and of the Canadian Forces.

[15] Section 2 of the *Pension Act* provides:

2 The provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependants, may be fulfilled.

(iv) The Position of the Board

[16] The Appeals Manager relies on the fact that section 20 refers to “compensation under the laws of another jurisdiction in respect of the accident”, and that Board *Operational Policy Manual* Document No. 15-01-09 refers to the definition of another jurisdiction as “any other workplace insurance authority”. The Appeals Manager takes the view that, while there is no prohibition on a worker collecting both workplace insurance and private insurance, this wording distinguishes private insurance. The question becomes whether the *Pension Act* constitutes another workplace insurance authority or jurisdiction. He refers to the fact that the purpose of that Act is to provide pensions and other benefits to or in respect of members of the Canadian Armed Forces. He takes the view that this purpose is similar to the purpose of section 1 of the WSIA, to provide compensation and other benefits to workers.

[17] The Appeals Manager notes that the *Pension Act* contains provisions to adjust benefits if the worker has received benefits under workers’ compensation legislation. However, he interprets that fact to support his finding that the two statutes have the same intent, which is to compensate for injury, disease or death arising out of employment.

[18] The Tribunal Counsel Office (TCO) contacted the Board to obtain information about the Board’s practice with respect to VAC pensions. The Board responded by letters dated July 26, 2007 and December 28, 2007, advising that the WSIB does not have an established practice or procedure that would apply. The Board also advises that there is no agreement between the WSIB and Veteran Affairs Canada related to this matter.

[19] Tribunal counsel also wrote to the WSIB to inquire about how it had implemented an earlier Tribunal decision, *Decision 562/90* (May 7, 1991). The issue before that Panel was whether the worker’s 1941 work accident and/or his 1951 work accident was a significant cause of the back disability which led to surgery in 1952. The worker had a back disability rated at 15% by the Canadian Pension Commission for the Department of Veterans’ Affairs, under predecessor provisions of the relevant legislation. The Commission awarded the worker three-fifths of the pension entitlement because the Commission decided that the worker had had a back disability before he entered the army and that the worker’s army duty made that condition “worse by three fifths during active duty”. The Tribunal Panel held that it was likely the 1941 accident was a significant cause of the back problems, which eventually required surgery.

[20] The Panel in *Decision No. 562/90* did not make findings as to what benefits should be paid as a result of its decision: that issue was left to the WSIB to determine. In response to TCO’s request for clarification of how the WSIB had implemented the Tribunal decision, the WSIB indicated, by letter dated December 28, 2007, that because the case was unusual, and because the Board does not have any established practice or procedure that would apply, it would not provide information regarding the implementation of this decision.

(v) The Positions of the Parties

[21] I have set out the submissions of the parties, below. For ease of reference I have also addressed, below, some aspects of those submissions, I have deferred other aspects of the submissions to the discussion under “Conclusions: How Section 20 Applies” below.

[22] For the most part, none of the parties have directly addressed the submissions of the other parties, and so

their submissions are considered separately.

(a) The Terms “benefits” and “compensation”: Submissions by Mr. Brown

[23] Mr. Brown submits that the payments made under the *Pension Act* do not constitute compensation as that term is used in the WSIA. He submits that Tribunal decisions have found that the word “compensation” has a narrower meaning than the word “benefits”. He submits that in *Decision No. 2273/03I* (2004), 68 W.S.I.A.T.R. 197, the Panel found that the term “benefits” refers to both health care and wage loss benefits, and the term “compensation” refers only to the latter. Part IV of the WSIA, entitled Health Care, sets out the provisions pertaining to health care. Part VI is entitled “Insured Payments”. It is subtitled “compensation”. It addresses loss of earnings, loss of retirement income, and non-economic loss benefits. *Decision No. 2273/03I* states [at para. 39]:

It would appear, therefore, that the Legislature intended that benefits include both health care coverage and compensation for lost earnings. I am persuaded that the Legislature intended the word compensation to have a narrower meaning than the word “benefits” in the Act, rather than the broader meaning attributed to it by [the respondent’s counsel].

[24] Mr. Brown submits that, consequently, section 20 of the WSIA requires an election only if the worker is entitled to wage loss benefits in another jurisdiction. He submits that benefits under the *Pension Act* are not wage loss benefits. The values of the *Pension Act* pension are determined according to the schedules of the Act and are relative to the degree of disability. The same schedules apply to all pensioners regardless of income.

(b) Conclusions: The Terms “benefits” and “compensation”

[25] Inconsidering Mr. Brown’s submission, I note that in *Decision No. 2273/03I*, the respondent was submitting that the term “benefits under the insurance plan” in section 20 had a narrower meaning than the words “compensation under the laws of the other jurisdiction”. In rejecting this argument, the full analysis of the Panel was as follows [at paras. 38-41]:

Part IV of the WSIA, entitled “Health Care”, sets out the provisions pertaining to entitlement for that form of benefit. Part VI of the Act entitled “Insured Payments” and subtitled “Compensation” sets out the provisions pertaining to entitlement for loss of earnings, loss of retirement income, and non-economic loss benefits.

It would appear, therefore, that the Legislature intended that benefits include both health care coverage and compensation for lost earnings. I am persuaded that the Legislature intended the word compensation to have a narrower meaning than the word “benefits” in the Act, rather than the broader meaning attributed to it by [the respondent’s counsel].

Alternatively, I am persuaded that the Legislature did not intend that the two terms have any significant difference in meaning in the provisions in issue, given their legislative history.

The predecessor provisions were found in sections 9 and 9.1 of the pre-1997 *Workers’ Compensation Act* [R.S.O. 1990, c. W.11]. Those sections used the terms compensation exclusively. Under the WSIA the term compensation was replaced with the term benefits to describe an injured worker’s general entitlement. Hence, it is likely that the reference in section 20 of the WSIA to “benefits under the insurance plan” as opposed to “compensation under the laws of another jurisdiction” reflects the new use of the term “benefits” in the WSIA while maintaining the more traditional term “compensation” with respect to entitlement in other jurisdictions.

[26] Mr. Brown has omitted reference to the Panel’s alternative finding and the analysis that supports it. That analysis suggests that the words may have essentially the same meaning in this context.

[27] Further, Part VI of the Act refers not only to wage loss (loss of earnings) benefits but also to retirement and non-economic loss (NEL) benefits. While NEL benefits are calculated based on a worker’s earnings basis, they are determined based on the degree of his physical impairment. Further, they are not wage loss benefits. They are benefits to compensate for “non-economic loss”. Therefore the word compensation does not only refer to benefits intended to compensate for wage loss or that are based on specific calculations of wage loss.

[28] In my view, nothing significant turns on the difference between the use of the word “benefits” and the use of the word “compensation” in section 20, in this context. At the most, the importance of the word “compensation” may be that it connotes payments that reflect the “historic bargain” of compensation law. In other words, it may be read as a reference to payments made under other legislation for work-related injuries on a no fault basis, provided subject to the statutory condition that the right to sue for that injury is taken away. However, the actual

words of section 20 do not necessarily go even that far. The requirement is only that the payments amount to “compensation” in some form; that the payments are in respect to of the same accident for which compensation is sought in the other jurisdiction, and is provided under the laws of that other jurisdiction.

[29] Mr. Brown has made separate submissions on the nature of the pension payments in light of the historic bargain contemplated by the Meredith report. I have considered below Mr. Brown’s submission about whether the payments made by the VAC are in the nature of compensation payments of the sort contemplated by the Meredith report, and the relevance of that consideration under section 20, below.

(c) Mr. Brown’s Submission: The “workplace insurance” Wording

[30] Mr. Brown submits that the *Pension Act* is not workplace insurance, within the terms of OPM Document No. 15-01-09, because Veterans Affairs Canada is not a workplace insurance authority. He submits that the term workplace insurance does not appear in the legislation of any other province or in federal legislation. Therefore, given that its enabling legislation does not define Veterans Affairs Canada as a workplace insurance authority or the pension scheme under the *Pension Act* as a workplace insurance plan – either explicitly or implicitly – he submits that Veterans Affairs Canada cannot be considered a workplace insurance authority.

(d) Conclusions: The “workplace insurance” Wording

[31] I do not consider that the matter turns on the fact that the title of the legislation governing workplace injuries changed in 1998 from the *Workers’ Compensation Act* to the *Workplace Safety and Insurance Act*, and that the language of the Act changed accordingly, which appears to be the substance of this submission. The essential elements of the scheme that constituted the historic bargain between workers and employers, described below, remained the same.

[32] This submission suggests that a worker would not be required to make an election even with respect to compensation entitlement from other Workers’ Compensation Boards of other provinces. That cannot have been intended.

(e) Is Veterans Affairs Canada a Workers’ Insurance Authority; Is the Pension Act a Workers’ Compensation Scheme

[33] Mr. Brown submits that even if the term “workplace insurance” is read to mean workers’ compensation, Veterans Affairs Canada is not a workers’ compensation authority and the *Pension Act* is not a workers’ compensation scheme. He relies on the case of *Schut v. Canada (Attorney General)* [2000] F.C.J. No. 424, which he submits held that the benefits scheme established under the *Pension Act* is not analogous to workers’ compensation.

(f) Conclusions: Is the Pension Act Workers’ Compensation Legislation: The Schut Case

[34] In *Schut*, the Federal Court, Trial Division, considered an application for judicial review of a decision of the Veterans Review and Appeal Board rejecting an applicant’s claim for pension benefits. The applicant was in a car accident while returning from a military base, where he had gone to check over his gear before a dangerous assignment the next day. He stopped off at a hotel and had two beers. After leaving the hotel he was chased by the police because of apparent speeding. He hit a tree and was injured. The question before the Board was whether this circumstance “arose out of or was directly connected with” the worker’s military service. The Board determined that the serviceman broke the causal link to the military service when, *inter alia*, he went to the hotel. The applicant relied on Alberta workers’ compensation decisions that used a “necessarily incidental” test, which he argued was a broader test. In rejecting the application of those cases to the facts as a basis for the application for judicial review, the Court, among other reasons, stated [at para. 30]:

Second, the provincial pension regime in Alberta, including its appurtenant legislation and policy directives, cannot be considered as analogous to the federal one and, in particular, the *Pension Act*.

[35] However, I do not consider that statement determinative in this case. The context is very different. The Court is stating that the legal interpretations of “employment nexus” issues may not be same under the two legislative regimes. I understand that this is because the wording of the statutory provisions and of the policy guidelines may be different. The statutory provisions of each Act govern the determinations under that Act, but are not directly applicable to determinations under the other Act.

[36] However, in my view, the question of whether the *Pension Act* falls within the wording of section 20 is a different matter. Section 20 of the WSIA addresses whether there is compensation payable under the laws of another jurisdiction in respect of the same accident. The question is not whether the provisions of the different Acts are exactly the same. The question is whether the payments under the *Pension Act* fall within the wording of section 20, as entitling the worker to 1) “compensation” 2) under “the laws of another jurisdiction” and 3) “in respect of the accident”.

[37] I have considered the broader aspects of Mr. Brown’s submission further, under “Conclusions: How Section 20 Applies” below.

(g) The Apportionment Provisions

[38] Mr. Brown submits that the fact that the *Pension Act* specifically contemplates that a recipient may be in receipt of compensation benefits under provincial legislation, and includes mechanisms to reduce benefits in that circumstance, suggests that it is not contemplated that an election is necessary. The Acts are integrated by statute.

[39] Given that all the parties have addressed the question of apportionment, I have considered that matter under “Conclusions: How Section 20 Applies”, below.

(h) Tribunal Decisions on Concurrent Entitlement

[40] Mr. Brown refers me to two Tribunal decisions. He submits that *Decisions No. 32/94* (September 15, 1994) and *877/90* (September 12, 1991) do not preclude a worker from receiving both types of benefits.

[41] However, in my view, these decisions do not address the issue that arises in this case.

[42] In *Decision No. 32/94*, the appeal was denied. There was no need for the Panel to address the question of double compensation, and, in any event, that issue was not before it. There was also no evidence that established that the pension paid under the *Pension Act* was for the same accident for which compensation was sought under the Ontario legislation.

[43] In *Decision No. 877/90*, there is reference to the fact that the worker is receiving both a veterans’ pension and Canada Pension Disability benefits. The reference to the veterans’ pension is referred to by the worker’s doctor in a report which supports the worker’s claim for psychiatric disability through the WSIB. The decision indicates that there were non-compensable issues prior to the alleged Ontario accident in 1980 which was the subject of the Ontario claim.

[44] The Panel denied entitlement for psychotraumatic illness, and so there was again no issue of double recovery.

[45] In any event, again, the evidence does not establish that the veterans’ pension was paid for the accident that was the basis of the WSIB claim. The facts described in the decision suggest that the WSIB claim was, to the contrary, for an aggravation of the pre-existing condition for which the veteran’s pension was paid, and not for the same accident. In any event, the question was moot because the appeal was denied on this issue.

(i) Submissions of Mr. Brown: The Meredith Report

[46] Mr. Brown submits that a workers’ compensation scheme or workplace insurance scheme is based on four fundamental principles, first enunciated in the 1913 report of Mr. Justice William Meredith, and as set out in *Medwid v. Ontario* (1988), 63 O.R. (2d) 578 (Ont. H.C.J.):

1. compensation paid to injured workers without regard to fault;

2. injured workers should enjoy security of payment;
3. administration of the compensation schemes and adjudication of claims handled by an independent commission;
4. compensation to injured workers provided quickly, without court proceedings.

[47] He submits that the VAC does not meet the terms of those principles.

1) Submissions of Mr. Brown: No Fault Compensation

[48] Mr. Brown submits that benefits can be withheld under the *Pension Act* based on fault, regardless of the seriousness of the injury or disability. Under section 22(1) an applicant “shall not be awarded” a pension when “the disability...was due to improper conduct.” Section 3(1) defines “improper conduct” as including “wilful disobedience of orders, wilful self-inflicted wounding and vicious or criminal conduct”. The Minister of Veterans Affairs has a discretion under section 22(2) to award a pension in those circumstances if the member is “in a dependant condition”, but he or she is not required to do so.

[49] Mr. Brown submits that this discretion is far greater than that afforded under the WSIA. He submits that, under section 17 of the WSIA, the Board has no discretion to withhold benefits in cases of “serious and wilful misconduct” if the injury results in “death or serious impairment.”

2) Conclusions: No Fault Compensation

[50] I do not accept that the differences in the legislation are as great as Mr. Brown submits. The Tribunal has not addressed issues of criminal and malicious acts only under section 17. Tribunal decisions have found that a worker who engages in a criminal or violent act may take himself out of the course of employment, even when his victim remains in the course of employment. See *Decision No. 286/96* (1996), 40 W.C.A.T.R. 122, which states that “workers are not in the course of their employment when they commit malign acts with the predictable result of harm to another person.” Tribunal decisions with respect to workers fighting have addressed whether work-related issues led to the fighting or whether, if one worker assaults another worker for personal reasons, that fact is sufficient to take the assaulter out of the course of employment, and disentitle him to benefits even for severe injury if he is injured in the fight, quite aside from the effect of section 17.

[51] Therefore, both Acts provide for “no fault” insurance subject to some limitations. Some egregious forms of conduct are not covered. The difference is that in the *Pension Act* what is considered sufficiently egregious to take the action outside the framework for recovery is more explicitly defined. While I do not have the benefit of any decisions under the Pensions Act, it may be that the exclusions under that Act are somewhat broader. However, I do not read section 20 to require that the Acts be identical. In my view, the general principles applied are analogous.

3) Submissions of Mr. Brown: Security of Payment

[52] Mr. Brown submits that the principle of security of payment encompasses two important recommendations made by Meredith: that the benefits are paid as long as the disability lasts, and that the amount paid be relative to the worker’s earnings. He does not identify any issue with respect to the first criteria. However, he submits that the amount paid under the *Pension Act* bears no relation to the recipient’s earnings.

[53] Given that both the employer and Ms. Adams have addressed how to characterize the payments made under the *Pension Act*, I have considered this difference in the statutes under “Conclusions: How Section 20 Applies”, below.

4) Submissions of Mr. Brown: Independent Commission

[54] Mr. Brown also submits that Veterans Affairs Canada is not an independent commission. The *Pension Act*

scheme does not have an independently-maintained accident fund.

5) Conclusions: Independent Commission

[55] Although Mr. Brown has not provided direct evidence on this issue, I will assume that Veterans Affairs Canada is a government department rather than a crown agency or independent commission. Under the *Pension Act*, the power to grant pensions is given personally to the Minister of Veterans Affairs. I also understand that payments under the *Pension Act* are paid directly from federal government revenues.

[56] However, I do not consider that this difference puts the *Pension Act* payments outside the wording of section 20 or, in substance, outside the framework of the *Medwid* criteria. There is a designated person with the responsibility and authority to provide pensions, and a government administrative body, Veterans Affairs Canada, with the responsibility and authority to assist in that process. The *Pension Act* and the *Veterans Review and Appeal Board Act* indicate that there is an independent appeals process for persons denied VAC pensions. Appeals are considered first by a Review Panel and may then be considered by an Appeal Panel. Under section 26 of the *Veterans Review and Appeal Board Act* the Board has full and exclusive jurisdiction to hear, determine and decide all appeals that may be made to the Board from determinations under the *Pension Act*. Section 31 provides that decisions of the Board are final and binding. There is no right of appeal identified. The effect of the privative clause is apparent from the *Schut* case, which addresses an application for judicial review from a decision of the Veterans Review and Appeal Board.

[57] Therefore the adjudicative system established for veterans' pensions has a dedicated appeal structure leading only to judicial review. That is sufficient, in my mind, to establish the degree of administrative and quasi-judicial independence contemplated in *Medwid* and by the Meredith Report.

[58] There is no requirement in *Medwid* for the establishment of a separate fund, *per se*, although I recognize that is a feature of most provincial compensation legislation. In my view, the purpose of the establishment of a separate fund is to ensure security of payment and to make sure that employers pay. However, in the case of the *Pension Act*, the employer is the federal government. Payments out of the Consolidated Revenue Fund are sufficiently secure, in my view, to meet the purpose and to be considered analogous.

[59] In any event, whether or not these are fundamental characteristics of the Meredith recommendations, they are not requirements expressly referred to in section 20 of the WSIA. I have considered the implications of that aspect of the matter further under "Conclusions: How Section 20 Applies", below.

6) Timely Adjudication

[60] Mr. Brown has not addressed the *Medwid* requirement for timely adjudication without recourse to the Courts. There is no evidence of any distinction between the *Pension Act* procedures and compensation Boards on that basis.

7) The Right To Sue: The Stopford Case

[61] Mr. Brown submits that a key component of workers' compensation in Ontario is the removal of the workers' right to sue in exchange for the benefit scheme: the so-called historic compromise. Although section 111 of the *Pension Act* and section 9 of the *Crown Liability and Proceedings Act* remove the rights of members of the Armed Forces and their survivors to sue the Crown in cases where a pension is payable, he submits that the prohibition on law suits is not as strong as under the WSIA.

[62] He submits that the right to sue has been upheld in *Stopford v. Canada*, 2003 FC 994, [2004] 1 F.C.R. 431. He submits that, in that case, the Federal Court permitted a soldier to sue the Crown for breach of fiduciary duty, negligence, and breach of statutory duty relating to the injury for which he had received a 100% pension.

[63] The soldier was in receipt of a 100% pension as a result of "poisoning by harmful substances" that occurred while he was on active duty. The Court dismissed a motion for summary dismissal of an allegation that the military knew that certain of the soldier's men had poisoned him and that these soldiers had been investigated.

The injured soldier was not informed of this fact until 1999. The Court found that there was authority to support that the soldier's claim for damages would go beyond the compensation available under the *Pension Act*. That was particularly so where allegations of breach of duty and negligence were involved. Given that there were serious issues to be tried, summary dismissal was inappropriate.

[64] However, I note that the allegations did not involve negligence or breach of duty in causing the injury. They raised the issue of how the apparently criminal aspects that led to the injury had been investigated and/or disclosed by the military authorities after the injury.

[65] It is not clear to me that an action based on that allegation would be barred under the WSIA. Although I am not aware of any similar case in Ontario, the facts are not dissimilar to those raised in actions for negligent representation that arise after an accident. An action of that nature has been found not to be barred in *Decision No. 36/00* (2002), 63 W.S.I.A.T.R. 20. Further, the stronger line of Tribunal decisions has found that actions for wrongful dismissal are not barred. Therefore the Tribunal decisions have recognized that there are Court actions that are not barred despite reliance on overlapping facts.

[66] The *Stopford* case followed *Marsot v. Canada (Department of Natural Defence)*, 2002 FCT 226, [2002] 3 F.C. 579. However, in that case, the Court dismissed a motion for summary judgement dismissing an action because the defendant had not established that the plaintiff was seeking double or enhanced recovery for the same injuries for which she had received a pension. Under section 111 of the *Pension Act*, it is required that the pension must be for the same disability as claimed in the action, which was not established.

[67] I note that similar distinctions are found in *Brownhall v. Canada (Ministry of National Defense)*, (2007), 87 O.R. (3d) 130.

8) Conclusions: The Right To Sue

[68] In my view, the two Acts are similar in providing that the right of action is taken away with respect to the injury for which the compensation or benefit is paid. Other rights of action that involve overlapping facts but which are not directly addressed to that matter may not be taken away. Based on a review of the jurisprudence referred to by Mr. Brown, and the *Brownhall* case, I find the issues related to the parameters of the prohibition on Court actions are essentially similar in the two regimes.

(j) The Submissions of the Employer

1) The Characterization of the Pension Act; The Tax Status of the Payments

[69] The employer submits that the *Pension Act* benefits are compensation benefits. They are not retirement benefits. They are identified in that Act as reflecting a "compensation principle which provides pension coverage for disability or death which was directly related [to service]."

[70] The employer submits that both worker's compensation benefits and benefits under the *Pension Act* are tax free.

[71] The employer submits that the *Pension Act* requires the recipient to disclose whether he is in receipt of workers' compensation benefits and adjusts the pension accordingly, in order to provide for "the avoidance of any duplication in compensation." It submits that this also supports the argument that the legislation is workplace insurance legislation.

[72] Again, given that the other parties have addressed this issue, I have considered these submissions further under "Conclusions: how section 20 applies", below.

2) The Apportionment Issue

[73] The employer submits that section 159(7) of the WSIA also permits apportionment of responsibility for occupational disease through agreements between government authorities in Canada. OPM Document No. 15-01-09 identifies this provision as one of the legislative authorities for section 20.

[74] The employer refers me to the VAC website, which states that pension entitlement can be awarded in proportion (by 1/5 to 4/5 shares) if service played only a minimal part in the disability. However, the VAC has accepted 100% responsibility in this case.

[75] I have considered the apportionment issue under “Conclusions: How Section 20 Applies” below.

3) Res judicata

[76] The employer makes submissions about the principle of *res judicata*. However, the issue of *res judicata* was not addressed by the ARO. It does not need to be addressed at this stage of the proceedings. It will need to be addressed only if the matter proceeds at the Board. I have not addressed it.

(k) The Submissions of TCO

1) Submissions on the Apportionment Issue

[77] With respect to the issue of apportionment, Ms. Adams submits that section 25(b)(iii) of the *Pension Act* addresses apportionment. It provides the federal Minister with the power to reduce a pension with respect to the same death or disability for which compensation is payable to the pensioner under any provincial workers’ compensation legislation. The *Workplace Safety and Insurance Act* does not contain any similar provision.

[78] She submits that Tribunal cases have addressed entitlement issues and have generally not addressed whether pensions may be apportioned between the two jurisdictions. However, in *Decision No. 420/88* (1990), 14 W.C.A.T.R. 7, the Tribunal agreed with the Board’s apportionment of a pension to take into account the degree of the hearing disability for which the Veteran Affairs Department assumed responsibility. The Canadian Pension Commission had decided that three-fifths of the worker’s hearing loss resulted from aggravation caused by work with the Air Force and awarded a pension for that portion. The question for the Panel was whether or not the Board had the authority to apportion compensation benefits between a non-compensable and compensable disability involving the same part of the body. In the decision appealed to the Tribunal, the Board’s Appeal Board had granted a full (30%) pension, less the Air Force pension.

[79] The Panel noted that the Board interpreted the wording of the pre-1989 Act, s. 45(1) to permit apportionment. The section states “[w]here permanent disability results from the injury”. The Panel noted that the phrase “results from the injury” had not been interpreted by a Canadian court or in the workers’ compensation jurisprudence. The Board policy at the time stated that if a non-compensable pre-existing disabling condition was attributed to the permanent disability, only that portion of the disability attributable to the injury is compensable.

[80] The Panel in *Decision No. 420/88* found that the Pension Commission made a reasonable estimate of the extent of the worker’s hearing loss resulting from the work in the Air Force. The Panel was satisfied that the Board did not err in deducting the extent of the disability attributable to the worker’s Air Force Service when calculating entitlement to benefits.

[81] Ms. Adams submits that where the medical information regarding one condition or disability relates to its development over a period of time, as in the case of hearing loss, the decisions indicate that the WSIB and the Department of Veteran Affairs assess causation to determine the portion of the disability that results from the applicable accident, whether it occurred in the workplace or during a time of war respectively.

[82] However, she submits that, in this case, the latency period for mesothelioma makes it difficult to determine whether one location or another had more of a causal connection to the exposure and disease that resulted in the worker’s death. Because the Department of Veteran Affairs has awarded a pension at the full rate of 100%, it appears that there is no pension left to apportion. Rather, the OWA argues that the worker’s estate is entitled to receive benefits related to mesothelioma from both the WSIB and Veteran Affairs Canada.

[83] As noted, I have addressed the apportionment issues below, because all parties have addressed this issue.

2) Submissions about Other Tribunal Caselaw

[84] Ms. Adams refers me to *Decision No. 3170/00* (October 30, 2001), which considered dual entitlement without determining the issue. The Panel considered entitlement to a permanent impairment award as a result of conductive hearing loss. The worker was exposed to a bomb blast in 1944 while a partisan fighter in Yugoslavia and in 1951 underwent a left ear mastoidectomy. From 1963 to 1986 he worked as a welder with the employer. At paragraph 17, the Panel indicates that

On May 27, 1997, the worker withdrew his appeal of the [Appeals Officer] decision to the Tribunal without prejudice, so that he could pursue entitlement to benefits for damage to his ear with the Department of Veterans Affairs on the basis that his mastoidectomy was a result of his military service in World War II. On March 17, 1998, the worker agreed to pursue his claim only through the Board and the Tribunal.

[85] Ms. Adams notes that it is not clear from the decision why the workers' compensation appeal was withdrawn to pursue benefits through Veteran Affairs Canada or why the worker later agreed to pursue his claim only through the compensation legislation. I infer that the worker may have acted on the understanding that an election was required. However, that matter was not the subject of a determination by the Panel.

[86] Two other decisions have disposed of the issue by finding that there was no entitlement for the claim under the Ontario Act.

[87] In *Decision No. 1403/07* (October 15, 2001) a Vice-Chair considered a worker's entitlement to benefits for a low back injury related to work duties in 2005 and late 2004. In 2004, the worker was awarded a 10% disability pension by the Department of Veteran Affairs for a condition in the lumbar spine which was found to be related to the worker's earlier military service. The effective date of this pension was April 2001; an increase in the pension to 30% was effective in July 2005. The worker was also receiving a Canada Pension Plan disability pension and a pension from his disability insurer. The Vice-Chair decided that the worker's back condition was not related to his Ontario employment; therefore, he was not entitled to workers' compensation benefits.

[88] In *Decision No. 1019/87* (June 17, 1998), the worker sought entitlement to benefits due to a hearing loss disability. The worker was employed with the accident employer from 1965 to 1975; the main aspect of employment was maintenance of plant machinery. The worker was a tank operator during World War II; in 1976 the worker was awarded a pension for hearing loss by the Department of Veteran Affairs related to his activities during World War II. In 1984, the worker applied to the Workers' Compensation Board for benefits. The parties agreed that the worker was disabled by a hearing loss; the remaining issue related to the relationship to the worker's employment. The Panel found that the worker's hearing loss was not due to the nature of his Ontario employment.

[89] Therefore there are no decisions that directly address whether a worker may be entitled to benefits under both Acts without electing.

3) Submissions about How To Characterize the Requirements of Section 20

[90] Ms. Adams submits that both the *Pension Act* and the *Workplace Safety and Insurance Act* compensate for disabilities, deaths or injuries that arose from involvement in their specialized area of application.

[91] She submits that section 20 is similar to section 30 of the WSIA, which is the election section governing the right to sue provisions of the WSIA. Section 30 provides that where a worker has entitlement to benefits or a right to sue, an election shall be made within a certain period of time. Both sections 20 and 30 provide a process to avoid double compensation for the same accident.

[92] She submits that section 20 of the WSIA contemplates that a worker may be entitled to benefits under the insurance plans administered by separate jurisdictions, in this case federal and provincial. However, she submits that the section may be interpreted to prevent a worker from claiming benefits from both plans as a result of the same accident.

[93] I have addressed the submissions about how to characterize the *Pension Act* in this respect further, below.

(vi) Conclusions: How Section 20 Applies

(a) The Nature of the Appeal; The Apportionment Issue

[94] Mr. Brown submits that the fact that there are provisions governing apportionment in the *Pension Act* suggests that the worker may be permitted recovery under the two different regimes, because the possibility of duplicate benefits is addressed. The employer submits that those provisions are consistent with the principle that there should not be double recovery. It submits that the explicit reference to compensation legislation reflects the fact that both Acts provide compensation for work injuries.

[95] However, I do not consider it directly relevant that there are apportionment provisions in the *Pension Act*. I am interpreting the provisions of the WSIA. There is no methodology for apportionment of the benefits paid to workers in this circumstance found in the WSIA. Even under the provisions of section 159(7), the Act provides only for agreements between governments about how to implement other provisions of the Act. It does not provide for the reduction of amounts paid to the worker, under the WSIA, to reflect benefits received from the federal authority for the same accident. In any event, there is no agreement between the provincial and federal authorities in this case.

[96] The fact that there are no provisions in the WSIA addressing the apportionment of benefits paid for the same accident may reflect the fact that there is a provision requiring election in the WSIA. Apportionment and election are alternative statutory ways to address the issue of double recovery in the case of possible double recovery for the same accident.

[97] The issues are different when apportionment is used to attribute the effects of more than one accident between the responsible parties, which, as discussed below, is not strictly “apportionment”, although that term is often used in that situation.

(b) The Nature of the Issue

[98] The question of whether there was one accident or more than one accident is a central issue in this case. Section 20 applies only when a worker is entitled under both regimes “in respect of *the* accident” (emphasis added).

[99] There may be cases in which a worker has a straightforward accident, such as hurting his back, while in the navy, and has entitlement under both provincial legislation and under the *Pension Act* for that accident. The employer submits that the worker would have had entitlement for his navy exposures under the Nova Scotia compensation law as well as under the *Pension Act*, because he was stationed in Nova Scotia when he was in the navy. I do not know if that was the case. It is not the issue here.

[100] However, because section 20 applies only to entitlement for the same accident, it is unusual, in my view, that there would be double recovery under the *Pension Act* and the Ontario legislation with respect to two sequential employments. That may be why the issue has been so rarely addressed. For the issue to arise, the compensation under the two legislative regimes must be paid in respect of the same accident. The accident is the injuring process that caused the injury.

[101] Generally, the cases that have addressed this issue refer to how benefits may be “apportioned” when there are different sequential accidents to the same body area. In other words, a worker may have an injury to his low back while working in the military, and then aggravate that injury while working at an Ontario employer. Or he may suffer hearing loss or stressors leading to psychological impairment in the military, and then be subject to additional stressors in an Ontario workplace. Or vice versa. The principles apply in the same way, irrespective of which accident happens first.

[102] In law, in my view, these facts address different accidents. If there is an injury in the first workplace, and then an aggravation in the second, the second workplace is responsible only for the injury resulting from the aggravation. If the initial injury resulted in permanent disability or impairment, then there are rules, in my view, under both statutes, permitting “apportionment.” Under the *Pension Act*, there appear to be specific statutory rules.

Under the Ontario legislation, I agree with the Tribunal decisions that have found that this type of apportionment is supported by the words “results from”. The authority for this form of apportionment is also found in the Board’s SIEF policy, which provides for the reduction of a worker’s benefits in the case of a pre-existing symptomatic disability.

[103] In my view, the law governing an aggravation of a pre-existing disability is distinguishable from the case in which the stressors or work processes in the initial workplace merely predispose the worker to injury, but do not result in a symptomatic condition. In that case, the applicable legal principles of workplace insurance provide, in my view, that the second accident is fully responsible. See the analyses of *Decisions No. 201/02R3* and *1135/99* (July 8, 1999). That is because the worker might never have suffered the impairment absent the second event. The thin skull rule applies. In that case, there is only one relevant accident, arising from the second employment. An employer may be entitled to SIEF relief. However that does not mean there were two accidents. It also does not affect a worker’s benefits.

[104] As stated above, although these principles are often referred to as principles of apportionment, in my view they do not actually address apportionment. They address the question of what injuries are properly attributed to what accident. They are distinguishable from the principles applicable to apportioning responsibility when there is more than one tortious causative factor leading to the same accident. Apportionment of responsibility to reflect the different tortious causative factors responsible for a single accident is routinely assessed in the case of tort claims in the Courts, when determining responsibility for damages, and may reflect the negligence, for instance, even of the plaintiff. There is nothing in the WSIA that permits that type of apportionment with respect to a worker’s benefits. The significant contributing factor test applies. The only provisions of the WSIA that reflect this type of sharing of responsibility are found in the transfer of costs provisions applicable between two employers. There is no provision that affects a worker’s benefits.

[105] So, in summary, section 20 does not exclude recovery under both the WSIA and the *Pension Act* when the worker has suffered two different accidents, the second of which causes an aggravation of the earlier injury. However, in that case, each regime is responsible only for the injury that occurred within its area of jurisdiction. Because a worker’s employment at different employers is usually sequential, the legal principles that address the timing differences in how his symptoms arose will most often be sufficient to determine the responsibility of the different workplaces.

[106] Section 20 applies in different circumstances. It applies to duplicate entitlement for the same accident. Double entitlement may arise even in the case of sequential employment, for instance, when one or both of the legislative regimes provides for determinations based on the “significant contributing factor” test, and/or for presumptions of causation, and/or for entitlement on the benefit of the doubt. The WSIA contains such provisions. There could be different findings about the responsibility for an accident because of the application of these provisions, resulting in entitlement for the same accident under two different legislative regimes. In that circumstance, the double recovery would not arise because of differences in findings about the facts. It would arise from the application of the principles of the relevant law. Double entitlement might also arise because of different findings of fact. That could occur either because different evidence is presented to the two adjudicative bodies, or even when the same evidence is presented, if it is interpreted differently.

[107] However, section 20 has application only to the entitlements for the same accident.

[108] In my view, in this case, it is likely that only one of the relevant exposures caused the mesothelioma, with the result that there was only one accident. I do not understand the facts to suggest that there were two accidents, with a second accident aggravating the mesothelioma that had already been caused by the first accident. Once the worker had the illness of mesothelioma, which was terminal in his case, it is not clear that further exposure to asbestos would have worsened his degree of impairment.

[109] I have discussed my reasoning about this question further below. However, I note that I have confined my consideration of the application of section 20 to the claim for the accident that was the initial, originating cause of the disease. If medical evidence were to show an aggravation of an already existent mesothelioma, because of further exposure, I do not consider that aggravation subject to section 20. However, I do not consider that to be the

issue raised here.

[110] However, in this type of case, there are significant evidentiary difficulties in deciding in which workplace the relevant exposure occurred.

[111] To clarify these distinctions I have considered the evidentiary difficulties further below.

(c) How Can Double Entitlement Arise on These Facts? Were There One or Two Accidents?

[112] In my view, the facts of these cases involve four or five possible types of situation. It is necessary to determine which situation is involved. I will use examples of psychological disability to illustrate the first four distinctions that I see, because the evidentiary difficulties are somewhat less complex than in an occupational disease case, but that injury also involves a disablement. Let us consider these fact scenarios:

1. A worker (a policeman) suffers a stress related injury at employer A causing a mild permanent impairment under the psychotraumatic policy. He experiences further stressors at employer B, worsening that impairment, sufficient to support an increase in his pension level.

In this case, there are two accidents. The second accident causes an aggravation of the first injury. As apparent in the case law above, there are provisions, under the Ontario Act and Board policy, and also in the *Pension Act*, for how to attribute the responsibility for each component of injury to each responsible jurisdiction. There is no issue under section 20 because the injuries have been caused by two different accidents.

However, I am not addressing facts which suggest an aggravation of an already existent mesothelioma in this case. As stated above, I have confined my consideration of the application of section 20 to the claim for the accident that caused the mesothelioma in the first instance.

2. In a second situation, let us assume that the policeman is working at employer A, but also has a part time job for a different employer, B, a security firm, on weekends. Both jobs involve him in traumatic ongoing incidents. He develops psychological disability. Let us assume that the evidence supports the finding that both employments have concurrent effects, and are, concurrently, significant contributing factors in the disability, and that they entitle him to benefits under two different legislative regimes. In my view, there is one accident, but two causes. In my view, this is a type of case intended to be addressed under section 20.

However, on the facts of this case, the two exposures were not concurrent. They were sequential. Therefore this example does not describe these facts.

3. In a third situation, let us assume that the policeman has a pre-existing, non-symptomatic condition, of psychological vulnerability. It may be that events at employer A (or in his childhood) increased his psychological vulnerability, but let us assume that they did not cause impairment. He leaves employer A and goes to work at employer B. Therefore the exposures are sequential. He experiences a traumatic incident at employer B that causes the psychological vulnerability to become symptomatic. In my view, on these facts, there is only one accident, and only one employer is responsible: employer B. The thin skull rule applies. It cannot be known if the underlying vulnerability would ever have become symptomatic absent the stressors at the second employer.

Under the *Ontario Act*, employer B may be entitled to SIEF relief because of the pre-existing condition, but that does not affect the worker's entitlement. The different jurisdictions might also enter into agreements to share responsibility under section 159(7), but that also does not affect the worker's entitlement. Entitlement would be properly allowed for the accident at employer B. In my view, if the worker made a claim (to a different adjudicative body) for the exposures at employer A, it would be proper for that claim to be denied.

In my view, also, if the worker were to seek benefits under the two legislative regimes for this accident (perhaps because of confusion or uncertainty about the facts) section 20 would apply. While there might be two different theories of accident being argued in the two jurisdictions, there was only one accident. The worker is claiming for entitlement for the injuring process that caused his psychological symptoms. If he were to be granted entitlement under both regimes (because of what would be, based on these facts, in my view, wrong adjudication in one jurisdiction) this would constitute double recovery. This is especially the case when, as under the Ontario legislation, there is no mechanism to reduce compensation to reflect what was received from the other jurisdiction, when there is no finding of aggravation involving two accidents.

4. Let us assume the inverse facts. It may be that the worker suffered a psychological impairment at the first employer, A. Assume that he then went to work at B, where his psychological problems were manifest, but did not worsen. However, he claimed benefits for his psychological disability from both employers, under the two different jurisdictions.

In this case, the responsible employer was A. However, this is also a case, in my view, in which section 20 applies. The worker is claiming for the same accident. He is claiming for benefits for the injuring process that caused his psychological disability. The fact that he is arguing different theories of accident to the different jurisdictions doesn't mean there were two accidents.

[113] The problems in the last two cases are evidentiary. However, on the facts that I have stated, there was only one accident. It did not take place at both employers. The claim to the two different adjudicative bodies is with respect to the same accident. In my view, under the Ontario Act, the worker is required to elect.

[114] However, I have postulated cases with clear (assumed) facts. The assumption is that the facts are known or knowable. Let us consider a case in which the facts are not knowable. Let us assume that a worker had two part time jobs, one doing maintenance for a golf course, and one working for a construction employer. The construction employer takes on a project at the golf course and involves the worker in work on that project. The worker is killed in a car accident that occurs at the junction of two roads, one of which led to the location where he was to do golf course maintenance, and one of which led to the location where he was to do the construction work. He was generally left to schedule his own time, and so it was not known whether he was in the course of employment for employer A or employer B when he was killed. Given the time of day, it was unlikely he was going to do both tasks. Let us assume that two different jurisdictions are involved because the golf course was a non-covered employer. If he was working for the golf course he would be entitled to benefits under his motor vehicle insurance, and not under the WSIA.

[115] An adjudicative body addressing these facts would first address the evidence. What tools was he carrying? Had he told anybody where he was going? Were the wheels of the car turning one way or the other? However, in the end, under the WSIA, the matter would turn on the application of the benefit of the doubt. Depending on what legal tests applied in the other jurisdiction, there might be double entitlement, under a quite proper application of the law, even based on the same evidentiary facts.

[116] However, in my view, if the second jurisdiction fell otherwise within the wording of section 20, an election would be required. There was only one accident. If the worker's estate claimed benefits from both jurisdictions, based on different theories of injury, that fact would not mean that there were two accidents. The benefits claimed are with respect to the same accident. The issues are evidentiary.

[117] The evidentiary facts in this appeal are equally if not more difficult. It cannot be known with certainty at what employment the worker suffered the exposure that caused the mesothelioma. However, it appears likely that that exposure occurred at one employer or another: not at both (or all three) employers.

[118] In my view, this is not a case of there being two alleged concurrent causal factors leading to the worker's mesothelioma, each arguably sufficiently significant to lead to entitlement under each of the WSIA and the *Pension Act* (the second case, above). It is true that there are two (or three) employments that are argued to have exposed the worker to asbestos. Each, at least arguably, put him at risk for mesothelioma. However, if the Pension

Board is correct, that the exposure during the worker's military service caused the mesothelioma, then he incurred that disease –or the exposure that triggered it – before he left the military. Whatever the adjudication might be at law, logically, in my view, as a factual matter, the Ontario exposure would then likely not have caused or contributed to the disease.

[119] As already stated, also, if the navy exposure initiated the disease, it is not clear that there would have been any “aggravation” of the pre-existing disease process by the Ontario exposure, on this theory of injury, because the disease was already terminal. In any event, I am addressing here only the “accident” that caused the original, initiating disease process. Therefore the first scenario also does not apply.

[120] Therefore the relevant scenarios are the third or fourth scenario. However, as in the fifth scenario, there are evidentiary difficulties in knowing which theory of injury is correct.

[121] If the source of the asbestos fibre or fibres that led to the disease was the Ontario workplace, then the Ontario exposure caused the disease. The prior exposure may have put the worker at risk for the disease but, if this is the finding of fact, it did not cause it. Even if medical evidence or epidemiological evidence were to suggest that the prior exposure in the military led to an accumulation of fibres in the worker's lung that made him more susceptible to later exposure to fibres, then on those facts he would have incurred only a vulnerability to the disease during the military service. On that theory, the disease was not triggered until the later exposure. The thin skull rule would apply. This is the third fact scenario. The second employer would bear responsibility.

[122] On the other hand, if the exposure that triggered the disease occurred at one of the earlier employers, then that is the responsible jurisdiction.

[123] Which exposure caused the disease is a matter for medical and epidemiological evidence. However, the fact that it is not known with certainty which exposure caused the disease does not mean that it can be inferred that both exposures caused it. The fact that both exposures put the worker at risk for the illness does not answer the question of what exposure was the cause. The fact that a risk factor is established for an illness is not sufficient to establish causation. It is necessary to determine if that risk factor was the likely cause.

[124] Therefore I consider the evidentiary issues in this case similar to the fifth example above: there was one accident, but some facts are unknown. There are two possible theories of how the accident arose. But there was only one accident. The difficulty is in deciding whether the facts are those of the third or fourth scenario, above.

[125] The claims to the VAC and the Ontario Board are with respect to the same accident. They are with respect to the injuring process that caused the mesothelioma, wherever that injuring process occurred. If only one decision-maker were involved in this determination, then, in my view, it would be necessary for that decision-maker to determine which theory of injury was more likely, based on whatever evidence was available, and award benefits accordingly.

[126] Even given the separate adjudication in this case, in my view, dual entitlement would be likely to arise only if the two adjudicative bodies involved in determining entitlement make inconsistent findings of fact and law about which employment exposed the worker to the fibre or fibres that triggered the mesothelioma. However, that is a possible outcome. Subject to the submissions about estoppel, the Board is not bound by the findings of the VAC and is required to make its factual findings based on the benefit of the doubt. Under the WSIA, there is also a presumption applicable to mesothelioma. While the prior ARO found that that presumption did not apply to the facts of the Ontario employment, that matter would also fall to be addressed de novo in the new hearing.

[127] Therefore despite the fact that I consider the facts of the case anomalous, because of the implicitly inconsistent arguments made by the worker to the two adjudicative bodies, it is not possible for me to make a finding that there were two different accidents, so as to preclude the question under section 20. It appears to me likely that there was only one accident. I must address section 20.

(d) The Ruling on Entitlement; The Election

[128] I query, however, whether it would be appropriate for the Board to determine the question of the worker's

entitlement under the WSIA before requiring the election, given the evidentiary difficulties. Section 20 applies only when *there is entitlement under both jurisdictions*. It would appear that the provision contemplates that entitlement has been determined. However the time limit set by the section runs from the date of accident, which means that an extension of time is necessary if entitlement issues need to be adjudicated.

[129] When there are evidentiary questions, it may be difficult for a worker (or even the Board) to know whether there might, or might not, be entitlement in both jurisdictions. Given the uncertainties, in my view, it would be open to the Board to extend the worker's time to elect while the question of Ontario entitlement is determined.

[130] However, I have found, below, that section 20 applies to this claim, because of my finding that there was one accident, and the interpretation of section 20 discussed below.

(e) The Requirements of the Act

[131] Turning to section 20, I have found that the section applies to these facts, because both claims are for the same accident.

[132] I will consider first the wording of the Act. I will then address the wording of Board policy.

[133] As ready stated, in my view, section 20 requires consideration of three criteria: the question is whether the payments under the *Pension Act* entitle the worker to 1) "compensation" 2) under "the laws of another jurisdiction"

3) "in respect of the accident".

1) Whether "in respect of the accident"

[134] The accident in issue in this case is the injuring process that caused the initiation of the mesothelioma. In my view, the payments claimed are with respect to the same accident.

[135] I agree with the ARO that section 20 distinguishes disability payments under private insurance plans. I also find that the words "in respect of the accident" distinguish payments under the Canada Pension Plan (CPP). The Supreme Court of Canada decision in *Sarvanis v. Canada* [2002] 1 S.C.R. 921, found that the words "in respect of" in section 9 of the Crown Liability Act did not immunize the Crown from civil action when a person was in receipt of CPP. The WSIA refers to CPP payments in a number of specific sections of the statute and provides rules for integrating CPP benefits with amounts paid under the WSIA. Therefore it cannot be intended for those payments to be subject to section 20.

[136] In my view, those payments are not subject to section 20 also because general disability payments are not "in respect of" a specific accident.

[137] In my view, the word "compensation" also supports the analysis that this language distinguishes general disability benefits, as discussed below.

2) Whether Under the "laws of another jurisdiction"

[138] I have found, above, that the *Pension Act* provides for pensions under the "laws of another jurisdiction", on its face. There is nothing in the words of section 20 that requires that those laws provide for compensation in a manner that reflects the Meredith Report. The payments made under the *Pension Act* are made under the laws of Canada. They are not private insurance. I agree with the Appeals Manager that they distinguish private insurance. There are policy reasons for prohibiting double compensation from public accident insurance schemes.

[139] However, I have considered that matter further under the wording of Board policy, below.

3) Whether "compensation"

[140] On the face of the issue, I also consider the payments under the *Pension Act* "compensation." The Oxford English dictionary defines that term as "something, typically money, awarded to someone in recognition of loss,

suffering, or injury” Another meaning is “salary or wages”. However, that is listed as an alternative meaning. It is the first meaning that is relevant here.

[141] In my view, there is nothing in this term that requires that an award of compensation for loss, suffering or injury be calculated in a manner that reflects specific wages. Even the loss-of-earnings benefits provided by the WSIA do not do that fully. For instance, there is a cap on maximum benefits. Inflation is not fully reflected in benefits. NEL benefits are also referred to in the statute under “compensation” and they are for non-economic loss, not wage loss. They are calculated based on the degree of disability. Although earnings basis is incorporated into that calculation under the WSIA, age is also a factor. Age is a factor for survivor’s benefits and can be a factor for loss of earnings benefits. Under the pre-1989 legislation, although earnings basis was used in calculating pensions and temporary benefits, the degree of pension entitlement was based on the effect of the impairment on the average unskilled worker. It did not relate to the worker’s own specific wage loss.

[142] The fact that benefits for military employment are the same for all, for the same level of disability, may reflect the fact that wages in the military are less diverse than in the private sector. It may also reflect a philosophy that persons injured in the service of their country should receive similar entitlements. However, in my view, the amounts paid are to compensate for the loss, suffering and injury incurred. As the employer notes, the *Pension Act* refers to the payments as reflecting a “compensation principle which provides pension coverage for disability or death which was directly related [to service].”

[143] The fact that both workers’ compensation benefits and benefits under the *Pension Act* are tax free supports the position that the payments are compensation for loss and are not income. Damages are generally tax free because they compensate for loss. Again, they are intended to hold the recipient whole. They do not augment his position.

[144] I also agree with the employer that the provisions of the *Pension Act* which require the recipient to disclose whether he is in receipt of workers’ compensation benefits, and adjusts the pension accordingly, in order to provide for “the avoidance of any duplication in compensation.”, supports the argument that the legislation is providing “compensation” which is analogous to the compensation provided under the WSIA.

[145] However, while the matter is not directly addressed in the WSIA, it may also be reasonable to read the word “compensation”, at least when read with the phrase “in respect of the accident”, to contemplate compensation which is paid under principles which substantially reflect the Meredith Report. As stated above, it is clear from the statute that the wording is not intended to extend to general disability insurance schemes, even when publicly funded, such as CPP payments.

[146] Board policy interprets section 20 as limited in this manner. OPM Document 15-01-09 defines another jurisdiction as “any other workplace insurance authority.” Therefore I have considered the wording of Board policy.

(f) The Wording of Board policy

[147] The words of Board policy reflect a view that the section 20 election is required only in the case of payments that are in the nature of workplace insurance benefits. The Board interprets the words “laws of another jurisdiction” to mean “the laws of another workplace insurance authority.” This interpretation, in my view, limits the requirement for an election to compensation paid substantially under the principles of the Meredith Report, and distinguishes general disability insurance, whether private or public. While, in my view, this limitation is not expressly found in the word “jurisdiction” in the wording of the Act, I find it a possible interpretation of the references to “compensation” “in respect of the accident”.

[148] Therefore I consider it relevant to address the nature of the historic bargain referred to in Mr. Brown’s submissions, above. In my view, if the scheme of the legislation provides an authorized person or body to make payments on a basis that is consistent with the basic principles set out in the Meredith Report, then the person or body so authorized may be fairly described as a “workplace insurance authority” within the meaning of the policy. I do not think the fact that the words ‘workplace insurance’ or ‘workers’ compensation’ are not used in the *Pension Act* is determinative. I do not read the word “authority” to require the establishment of a separate

arms length agency, as long as authority has been established for the implementation of the scheme. If the word authority were read to require a separate arms length agency, I would consider it to be narrowing the ambit of section 20 in a way that is not necessary intended by that section. In section 20, the reference is only to the laws of another jurisdiction. There is no reference to a requirement for an “authority” in that narrow sense.

[149] I find that the provisions of the *Pension Act* constitute a scheme of the type contemplated in the Meredith Report.

[150] In my view, the military service covered in the *Pension Act* constitutes employment or is substantially analogous to employment. The *Pension Act* provides compensation “where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service”. Therefore the *Pension Act* provides a requirement for an “employment” nexus in order for entitlement to flow. As described above, the compensation is “no-fault”. There are only limited and specific exceptions to that rule, which I have found are not substantially different from the no-fault scheme of the WSIA. The right to sue is barred for the injuries for which compensation is paid. There is no access to the Courts for those injuries. I have also not accepted the other distinctions relied on by Mr. Brown, for the reasons set out above.

[151] In my view, the payments made under the *Pension Act* are, in substance, a form of workplace insurance or workers’ compensation benefit.

[152] In my view, the facts of the case fall within the terms of section 20 and the provisions of Board policy. The worker must elect whether to receive benefits under the WSIA or under the *Pension Act*.

DISPOSITION

[153] The appeal is denied.

Appeal dismissed.

Decision No. 1240/05

Panel: Ryan (Vice-Chair), Young, Crocker

Decision — January 13, 2009

Neutral Citation: 2009 ONWSIAT 76

Re-employment (exemption) (number of workers) – Firefighter (volunteer) – Worker.

Volunteer firefighters, despite their unique circumstances, are included within count of number of workers employed by an employer for determination of applicability of re-employment provisions.

The worker was an equipment operator for a small municipality of 750 residents. The worker suffered a compensable injury in 2001. The worker appealed a decision of the Appeals Resolution Officer finding that the employer was not subject to the re-employment obligation in s. 41 of the *Workplace Safety and Insurance Act, 1997*, because it regularly employed less than 20 workers. The appeal was allowed.

The issue in this case turned on whether volunteer firefighters should be included in the number of workers employed by the employer.

Section 41(1) requires an employer to offer to re-employ an injured worker. Section 41(2) provides an exception for employers who regularly employ less than 20 workers. Section 2(1) defines a worker as including a member of a municipal volunteer fire brigade. It was the intention of the Legislature to include firefighters under the definition of worker in order to ensure that they are subject to the same rights and obligations prescribed for all workers. Nevertheless, the Legislature recognized that volunteer firefighters are a class of worker distinct in important respects from other workers.

Section 41(6) provides that an employer shall accommodate the work for the worker to the extent that the accommodation does not cause the employer undue hardship. Section 41(16) provides that, if an emergency worker is injured, the deemed employer is not required to comply with the section. The actual employer is required to do so, but the deemed employer is required to pay the costs of compliance with s. 41(6). Section 41(17) provides that subsection (16) applies to a municipal volunteer fire brigade.

These provisions recognize the unique circumstances of a volunteer firefighter. The Panel found that, despite their unique status under s. 41(16), volunteer firefighters are to be included in the count for purposes of determining the threshold under s. 41(2). There was no qualifying language that excluded volunteer firefighters from s. 41(2). Section 41(16) is essentially a second exclusion to the general obligation to re-employ in s. 41(1) and not a qualifier of who is counted under s. 41(2).

The employer was subject to the re-employment obligations of the WSIA.

Rengagement (dispense) (nombre de travailleurs) – Pompier (auxiliaire) – Travailleur.

Les pompiers auxiliaires, en dépit de leurs circonstances uniques, sont inclus dans le compte des travailleurs fait pour déterminer l'applicabilité des dispositions relatives au rengagement.

Le travailleur était un conducteur d'équipement au service d'une petite municipalité de 750 résidents. Il a subi une lésion indemnisable en 2001. Le travailleur a interjeté appel de la décision dans laquelle le commissaire aux appels a conclu que l'employeur n'était pas sujet aux dispositions de rengagement prévues à l'article 41 de la *Loi*

de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail (Loi de 1997) parce qu'il employait régulièrement moins de 20 travailleurs. Le Tribunal a accueilli l'appel.

Pour régler la question, il fallait déterminer si les pompiers volontaires devaient être inclus dans le nombre de travailleurs au service de l'employeur.

Aux termes du paragraphe 41 (1), l'employeur est tenu d'offrir de rengager le travailleur blessé. Le paragraphe 41 (2) prévoit toutefois une exception pour les employeurs qui emploient régulièrement moins de 20 travailleurs. La définition de « travailleur » au paragraphe 2 (1) inclut un membre d'un corps municipal de pompiers auxiliaires. La législature entendait inclure les pompiers auxiliaires dans la définition de « travailleur » de manière à leur conférer les mêmes droits et obligations qu'à tous les travailleurs. La législature a néanmoins reconnu que les pompiers auxiliaires forment une classe distincte de travailleurs à plusieurs égards importants.

Le paragraphe 41 (6) prévoit qu'un employeur adapte le travail ou le lieu de travail aux besoins du travailleur dans la mesure où cela ne lui cause aucun préjudice injustifié. Le paragraphe 41 (16) prévoit que, si un travailleur dans une situation d'urgence est blessé, l'employeur réputé n'est pas tenu de se conformer à cette disposition. L'employeur réel est tenu de se conformer mais l'employeur réputé est tenu de payer les frais engagés pour se conformer au paragraphe 41 (6). Le paragraphe 41 (17) prévoit que le paragraphe 41 (16) s'applique à tous les membres d'un corps municipal de pompiers auxiliaires.

Ces dispositions reconnaissent les circonstances uniques inhérentes aux pompiers auxiliaires. Le comité a conclu que, en dépit de leur situation unique aux termes du paragraphe 41 (16), les pompiers auxiliaires sont inclus dans le nombre de travailleurs utilisé pour déterminer si le critère de base prévu au paragraphe 41 (2) est rempli. Il n'y avait pas de spécification excluant les pompiers auxiliaires du paragraphe 41 (2). Le paragraphe 41 (16) est pour ainsi dire une seconde exclusion à l'obligation générale de rengagement prévue au paragraphe 41 (1), et non une spécification indiquant qui est inclus dans le compte fait en vertu du paragraphe 41 (2).

L'employeur était sujet aux obligations de rengagement prévues dans la Loi de 1997.

Tribunal Decisions Considered:

Decision No. 1139/02 (2002), 63 W.S.I.A.T.R. 205 refd to
Decision No. 1902/03 (June 26, 2003) [2003 ONWSIAT 1515] refd to
Decision No. 2401/03 (May 27, 2005) [2005 ONWSIAT 1199] refd to

Other Decisions Considered:

Air Canada v. British Columbia, [1989] 1 S.C.R. 1161 refd to
Gray v. Ontario (Director, Disability Support Program) (2002), 59 O.R. (3d) 364 (Ont. C.A.) refd to
Rizzo and Rizzo Shoes Ltd. (Re) (1997), 154 D.L.R. (4th) 193 (S.C.C.) refd to

Workplace Insurance Legislation Considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A
s.1
s. 2(1) “worker”
s. 40(4.1)
s. 41(1)
s. 41(2)
s. 41(6)
s. 41(16)
s. 41(17)

Other Statutes and Regulations Considered:

Fire Protection and Prevention Act, 1997, S.O. 1997, c. 4
s. 1
s. 2
s. 41(1)
Legislation Act, 2006, S.O. 2006, c. 21, Sched. F
s. 64(1)

Board Directives and Guidelines Considered:

Operational Policy Manual
Document No. 12-01-03 (January 31, 2001)

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[DISPOSITION](#)

CONSIDERATION of whether volunteer firefighters are included in count of number of workers employed by an employer for re-employment purposes.

January 13, 2009. THE TRIBUNAL: —

BEFORE:

S. Ryan, Vice-Chair

B.M. Young, Member Representative of Employers

J.A. Crocker, Member Representatives of Workers

HEARING:

April 3, 2007 and February 13, 2008, at Sault Ste Marie, Oral

DECISION(S) UNDER APPEAL:

M. Dumais, Appeals Resolution Officer, August 4, 2004

APPEARANCES:

For the worker:

R. Hamilton, Office of the Worker Adviser

For the employer:

P. Cassan, Lawyer^{[1](#)}

REASONS

(i) Introduction

[1] In the Appeals Resolution Officer (ARO) decision of August 4, 2004, it was determined that the accident employer, a municipality, was not subject to the re-employment provisions of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) because it regularly employed less than 20 workers at the time of the worker's compensable injury. That decision is now the subject of the worker's appeal to the Tribunal.

(ii) Background

[2] In February 2001, the worker developed pain in her bilateral elbows. At that time, she was employed as an equipment operator for the accident employer, a municipality of approximately 750 residents. The Board accepted the claim and she was granted entitlement to loss of earnings (LOE) benefits and an 8% non-economic loss (NEL) award for bilateral elbow tendonitis.

[3] On December 27, 2002, following a functional abilities evaluation (FAE), a Board Claims Adjudicator (CA) advised the accident employer that the worker would require permanent medical restrictions as a result of her compensable disabilities including the avoidance of prolonged reaching, heavy lifting and fine motor activities.

[4] In correspondence dated January 23, 2003, MB, a "Clerk/Treasurer/Administrator" advised the Board that Town Council passed a resolution declaring that the Town did not have a permanent modified work program.

[5] On February 4, 2003, the worker wrote to the accident employer and asked that she "be granted a full return to work with accommodation".

[6] In correspondence dated February 26, 2003, a Board Return-to-Work (RTW) Mediator advised that he had reviewed the Town's employment records and determined that it had regularly employed, "less than 20 workers" at the time of the worker's compensable injury. Accordingly, he determined that the accident employer was not subject to the re-employment provisions set out in section 41(1) of the WSIA.

[7] As noted above, these determinations were upheld in the ARO decision of August 4, 2004. That decision is now the subject of the worker's appeal to the Tribunal.

[8] Following the first day of hearing on April 3, 2007, the Panel issued a memorandum dated April 4, 2007. We noted:

On its face, the issue appears to be a fairly straightforward and narrow one. However, as suggested by Mr. Hamilton, in this case the issue presents somewhat of a "chicken and egg" adjudicative challenge because of underlying issues respecting the legislative, policy and case law definitions of "worker" and how the number of workers is to be calculated pursuant to Board policy in the context of part-time, casual and seasonal employees as well as volunteer fire fighters. Potentially, these issues could require lengthy and complex adjudicative determinations. Our aim is to reach a correct decision as efficiently as possible.

The accident employer in this case is a Township with a population of approximately 750 residents. At the time of the compensable accident, the Township had an employment relationship with between approximately 12 and 43 individuals. The representatives agree that 12 of these individuals are correctly defined as "workers" of the Township. There is disagreement between the representatives on whether the remaining 31 individuals fit the definition of workers of the Township. Additionally, the representatives disagree on how many individuals that may ultimately be determined by the Tribunal to fit the legislative and policy definition of worker ought to be counted as "regularly employed".

Both representatives agree that *Operational Policy Manual* (OPM) Document #19-04-02, "Re-employment Provisions – Re-Employment Obligations" applies to this case (Exhibit 3). It sets out guidelines for determining the number of regularly employed workers when there is disagreement between the workplace parties on which workers are regularly employed. The policy states at page 2 of 8:

Generally, the number of workers employed by the accident employer on the day of injury is considered the number of workers "regularly employed". If the worker or employer disagrees with this number, the WSIB

- Determines the average number of workers employed in each of the 12 months before the worker's injury or the onset of the worker's disease
- Determines the 7 months that have the highest average number of workers, and
- Calculates the average number of workers in this 7-month period

The resulting figure represents the number of workers regularly employed

...

In his submissions prepared on behalf of the Township (Exhibit #6), Mr. Sarlo stated that when applying the formula set out in OPM Document #19-04-02, the Township regularly employed only 10 workers at the time of the worker's compensable accident.

Mr. Hamilton advised that neither he nor the Panel had sufficient payroll information to properly determine which seven months yielded the highest average number of individuals with an employment relationship with the Township. The representatives agreed to confer with each other in order to collect and review additional information. The representatives

also agreed to explore areas of mutual agreement on which individuals are properly characterized as workers and which months properly reflect the highest number of potential workers. Mr. Hamilton advised that, after reviewing additional information and conferring with Mr. Sarlo, he may alter his argument with respect to the number of workers regularly employed by the Township. It is possible that the representatives may agree on which seven months reflect the highest number of individuals with an employment relationship with the Township even if they do not agree on which of those individuals are workers. This collaborative approach may help to refine and/or reduce the determinations that are necessary in this appeal.

[9] Following the hearing on April 3, 2007, the representatives conferred with each other and were able to narrow the dispute and scope of inquiry in this appeal down to essentially three job categories. They agreed that a number of specific job categories should be excluded and they agreed that others should be included. However, they disagreed on the following job categories: Volunteer Fire Fighter, Librarian and Building Inspector.

[10] At the reconvening on February 13, 2008, it was agreed that it was not necessary to determine whether the job categories of Building Inspector and Librarian were workers within the WSIA and Board policy because even if we found them to be workers, the total number of workers that were regularly employed by the accident employer at the time of the compensable accident at issue in this appeal would still be less than 20. The only job category that could change the outcome in this appeal, therefore, is that of volunteer fire fighter.

[11] Thus, if we find that volunteer fire fighters are workers within the meaning of section 41 of the WSIA and Board policy, then the re-employment provisions of the WSIA apply to the accident employer.

(iii) Testimony of RT, Fire Chief

[12] RT testified that he has been a volunteer fire fighter for the accident employer for a period of 20 years. He heard about the position through “word of mouth”. Approximately eight years ago, the accident employer appointed him as Fire Chief. Prior to that, he served as Deputy Chief for about one year.

[13] As Fire Chief, RT is responsible for arranging training for fire fighters, preparing a budget for capital expenses and serving as “Incident Commander”. RT likened this role as that of a foreman. He recalled that in the year 2000, there were 19 part-time fire fighters and each of them held full-time or seasonal jobs. There were no full-time fire fighters.

[14] RT stated that he holds a full-time job (i.e., 40 hours per week) in a plant, but remains “on call” as a volunteer fire fighter 24 hours per day, seven days per week.

[15] RT set out the honorarium provided to each rank of fire fighter for the accident employer:

Rank	Honorarium Per Annum
Fire Chief	\$3,000
Deputy Chief	\$1,500
Captain	\$1,200
Training Officer	\$1,200
Fire Prevention Officer	\$1,000
Fire Fighter	\$600

[16] RT explained that volunteer fire fighters collect points for attending meetings and responding to calls. Twice per year, fire fighters receive an honorarium of \$300 if, during the previous six months, they attended meetings

and responded to calls. He stated that he fills out attendance forms and sends them to the Town. The Town keeps track of the accumulated points of fire fighters.

[17] RT testified that it was his responsibility to complete workplace safety insurance forms in the event of an injury to one of the volunteer fire fighters. He stated that the accident employer provides him with free membership at a municipally owned gymnasium, pays for his mileage and a pays him \$25 per diem to attend meetings.

[18] RT testified that for honorariums exceeding \$1,000, the accident employer deducts income for income tax purposes. He stated that some volunteer fire fighters might also have Canada Pension Plan (CPP) and Employment Insurance (EI) premiums deducted from their honorariums.

[19] RT testified that he conducts interviews with prospective volunteer fire fighters. He ensures that applicants are at least 18 years old and hold at least a Grade 10 education. RT stated that he then recommends individuals to Town Council which determines whether or not to accept the applicant. RT testified that he has the authority to refuse to recommend a prospective fire fighter for enlistment and has the authority to terminate fire fighters.

[20] Mr. Hamilton questioned RT about a document entitled, "Policy for Hiring Volunteer Fire Fighters" issued by the Town (Exhibit #11). Under Item #3 of that document, fire fighter applicants "must be willing to complete the Ontario Fire Service Curriculums made mandatory by the Municipality". RT explained that curriculum training involved basic Fire Fighter training and that the Town decided to adopt them. Under #4, applicants "must be willing to participate in volunteer work such as fundraising , car washes etc." RT testified that he encouraged fire fighters to participate in volunteer activities, but that he did not "demand it" because many fire fighters held full-time jobs. Item #5 reads:

Attendance is very important. If the candidate cannot attend a scheduled fire meeting, he must notify an officer or fellow firefighter. Lack of attendance without being excused will lead to dismissal.

[21] RT testified that this provision was, "not enforced".

[22] RT confirmed that there is a Fire Fighter Code of Ethics. The document includes such provisions as no consumption of alcohol while in uniform and no use of expletives. RT stated that he enforced those rules. However, he stated, there were other rules that he did not enforce. For example, he stated, he did not discipline fire fighters for missing some training. He stated that he encouraged them to attend.

[23] In answer to Mr. Cassan's questioning, RT stated that, as a matter of practice, he rarely disciplined other fire fighters. He stated that many of the volunteer fire fighters held full-time, seasonal jobs and were not available to attend meetings or respond to calls. He encouraged all fire fighters to attend meetings and respond to calls, but did not discipline those who failed to attend meetings or calls. RT testified that fire fighters were permitted to leave the scene of a fire before it was extinguished in order to return to their regular job. RT testified that it was possible that a call for emergency assistance could result in no fire fighters attending at all. RT stated that a Mutual Aid Organization permits assistance from nearby municipalities to respond to emergencies in small communities.

[24] RT testified that all equipment used in the job of fire fighting was provided by the accident employer. He stated that fire fighters require a D-Z license in order to drive a fire engine. He stated that the accident employer pays for the cost of obtaining a D-Z license.

[25] RT stated that, in his view, his "boss" is not Town Council. His "boss" is the Ontario Fire Marshall. He stated that he attends Town Council meetings to discuss the capital budget for fire fighters.

[26] RT stated that, in a typical year, there might be a total of 10 calls. Most of these would involve motor vehicle accidents. Perhaps once or twice per year, there could be calls for a fire.

(iv) Testimony of MB, Chief Administrative Officer (CAO)

[27] MB testified that there is no contract for employment between the Town and volunteer fire fighters.

[28] MB reviewed the provisions of a township by-law enacted in 1994 establishing a Fire Department. She explained that the language of the by-law was likely borrowed from similar by-laws of other municipalities and reflects the recommendations of the Ontario Fire Marshall.

[29] The by-law states that successful applicants for the position of fire fighter shall begin with a six-month probationary period. The by-law states, in part:

A person appointed as a member of the Department for fire fighting duties shall be on probation for a period of six months, during which period he/she shall take such training and examinations as may be required by the Chief of the Department.

...

If a probationary member appointed for fire fighting and fire prevention duties fails any such examinations, the Chief of the Department may recommend to the Council that he/she be dismissed.

[30] MB was questioned about section 16 of the by-law which states, in part:

(a) Every member of the Department shall report for duty at the time prescribed by the departmental rules and shall remain on duty until relieved.

(b) In the case of a member failing to report for duty, the officer in charge shall report this in writing, through his/her superior officer, to the Chief of the Department.

[31] MB testified that this provision applies for training sessions. She stated that there were no “prescribed shifts” for volunteer Fire Fighters.

[32] Section 17 of the by-law states that the Fire Department Chief may reprimand, suspend or recommend dismissal of any member for insubordination, inefficiency, misconduct, tardiness or non-compliance with any of the provisions of the by-law. The section also states a member may not be dismissed without being afforded an opportunity for a hearing before Council. MB testified that she was not aware of any disciplinary actions or hearings involving the accident employer. She stated that this section had never been applied.

[33] MB stated that the Fire Department submits an annual budget for approval by Town Council. She stated that approximately \$10,000 per annum is allocated for training. She confirmed that volunteer fire fighters are paid twice annually and that their remuneration is based upon a point system for attending meetings and responding to calls. With respect to income deductions on the cheques issued to fire fighters, MB stated that deductions were made for Canada Pension Plan (CPP) and Employment Insurance (EI) benefits, but recently the Town discovered that fire fighters were exempt from making contributions to these programs.

[34] MB stated that as with other municipal employees and members of council, fire fighters are covered by the Town for life insurance benefits and WSIB coverage. The Town does not cover other health care benefits or insurance.

(v) Submissions

(a) The Worker

[35] Under cover letter dated April 30, 2008, M. Keys, Legislative Interpretation Specialist and assistant to Mr. Hamilton, set out the worker’s position in this appeal.

[36] Ms. Keys cited section 41(2) of the WSIA which states:

41(2) This section does not apply in respect of employers who regularly employ fewer than 20 workers or such classes of employer as may be prescribed.

[37] She submitted that there is no requirement that the employment be “regular” in the sense accepted by general employment law, but that “regularly” is a characteristic of the employer’s use of workers’ services.

[38] Ms. Keys cited R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) and *Re Rizzo and Rizzo Shoes Ltd., (Re)* (1997), 154 D.L.R. 193, on the interpretation of statutory definitions. These authorities state that interpreters are bound to apply the meaning stipulated by the law-maker which may or may not incorporate conventional meaning and that specific words of an act are to be interpreted in a manner that is in harmony with the scheme of the Act. Ms. Keys added that pursuant to section 64(1) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, the WSIA is to be interpreted as being remedial and shall be given “such fair, large and liberal interpretation as best ensures it objects”.

[39] Ms. Key notes that the WSIA includes “volunteer fire fighters” within the definition of “worker”. She cited the *Oxford Dictionary* definition of the word “employ” which is “use the services of (a person) in return for payment” and “use (thing, time energy strategy, etc.) to good effect”.

[40] Ms. Keys cited section 2 of the *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4, which stipulates that every municipality is required to provide fire protection services. She noted that in this case, a by-law enacted by the municipality sets out the minimum requirements for fire fighters (Grade 10, good character, good medical condition etc.) It also sets out rules for behaviour and hiring procedures including interview questions. Ms. Keys noted that municipalities, like the one in this case, use the services of volunteer fire fighters in order to fulfil their responsibility to establish a fire department. Like other municipalities, the municipality in this case has the authority to hire, discipline and dismiss volunteer fire fighters pursuant to its By-law #94-35.

[41] With respect to remuneration, Ms. Keys noted that fire fighters receive payment for their services. They are also required to attend training sessions and are paid based upon an accumulation of points awarded for attending training sessions and responding to calls. Records of the points are kept by the municipality.

[42] Ms. Keys cited *Decision No. 2401/03* (May 27, 2005) and *Decision No. 1902/03* (June 25, 2003) which, she submitted, recognized that volunteer fire fighters are “employed” and that payments made to them are “earnings” for the purpose of calculating their earnings basis. Ms. Keys cited *Decision No. 1139/02* (2002), 63 W.S.I.A.T.R. 205, which, she submitted, suggests that volunteer fire fighters are not part-time employees. She submitted that the accident employer uses their services and pays them. She submitted that Tribunal case law considers the payments given to volunteer fire fighters as earnings and considers their jobs as “employment”.

[43] On the issue of whether the municipality “regularly employs” volunteer fire fighters, Ms. Keys cited the *Canadian Oxford Compact Dictionary* definition of “regularly”: 1) at regular intervals or times; 2) in a balanced or regular manner. Ms. Keys submitted that the using these definitions, “regular employ” means either “regularly use” or “use in a regular way”. She submitted that the first definition is dominant and best fits the context of section 41(2) of the WSIA.

[44] Ms. Keys submitted:

The employer regularly employs volunteer firefighters in the sense that every month, not just one or two months per year, the employer maintains a force of volunteer firefighters. Therefore, on a plain reading of the subsection, the employer regularly employs volunteer firefighters.

[45] In support of this interpretation, Ms. Keys cited *Operational Policy Manual* Document No. 19-04-02, “Re-employment Provisions – Re-employment Obligations” which set outs a formula for calculating the number of workers for the purpose of section 41(2). She submitted that the requirement to take the average of the highest number of workers in seven of twelve months supports a temporal definition of the word “regularly”. She noted that “workers” include full-time, part-time, seasonal and casual employment which, she submitted, further supports that a worker’s employment need not be regular in order for that work to be included in the count. She submitted that casual workers (i.e. workers with no set hours) who serve the purpose of the employer’s industry are expressly included in the policy. She submitted that because the definition of “worker” in the WSIA includes a volunteer fire fighter, they should be included in the count. She noted that the WSIA does not expressly exclude volunteer fire fighters from the count for the purpose of determining their re-employment rights.

[46] Ms. Keys noted that under the WSIA a volunteer fire fighter is considered to be in the course of employment if injured while performing duties as fire fighter. With respect to the analysis typically applied to a volunteer in

determining their status as a worker, Ms. Keys submitted:

...to be a volunteer firefighter, a person must apply for the position, pass some tests and be hired. The volunteer firefighter must abide by the terms set by the employer. Someone who did not go through this process cannot just show up at a fire and claim to be a “volunteer firefighter”. Volunteer firefighters are not “merely volunteers”.

[47] Ms. Keys emphasised section 64(1) of the *Legislation Act* which requires that an Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. She reviewed the purpose of the WSIA. She noted that section 41(2) limits the re-employment obligations to those workplaces with 20 or more workers. She submitted that in order to adopt a large and liberal interpretation of the legislation, that limit should be read narrowly. She cited *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 in which La Forest, J noted that an exception “should not be construed more widely than is necessary to fulfil the values which support it”. She submitted:

To read the exception narrowly means to exclude as few workplaces as possible from the obligation to re-employ. A large and liberal interpretation supports the inclusion of volunteer firefighters in the count.

...

We see nothing unfair or absurd in the result that would flow from adopting our interpretation of the section: the municipality would be obliged to re-employ the worker, who was injured during the course of employment. The re-employment obligation as set out in s. 41 is limited to two years after the date of injury, to the worker’s pre-injury job, if she can perform it with accommodation, and, if not, to an available suitable job. Section 41 does not require an employer to hire additional staff. The re-employment obligation is not particularly onerous.

(b)The Employer

[48] On behalf of the accident employer, Mr. Cassan offered submissions dated April 25, 2008. He stated that it was the accident employer’s position that volunteer fire fighters are not regular employees and, therefore, the accident employer had less than 20 regular employees and does not meet the threshold set out in section 41(2) of the WSIA. Mr. Cassan reviewed the testimony of the RT (Fire Chief) and MB (CAO).

[49] Mr. Cassan submitted that where the Legislature intended to include members of a volunteer fire brigade within the WSIA, it did so by specific reference. He cited section 40(4.1) which specifically includes members of a municipal fire brigade and the deemed employer with respect to return to work programs and section 41(17) which specifically includes members of a municipal volunteer fire brigade with respect to return to work accommodations at their place of regular employment. He submitted:

...if it was the Legislature’s intention to make these volunteers into regular employees for the purpose of s. 41(2) that that would be spelled out in the legislation.

...

...where the term “regularly employed” appears in s. 41(2) that it does not include members of a volunteer fire brigade because they are not specifically mentioned and there is no specific reference to “members of volunteer fire brigade”, those members are not included in the calculation of the number of regular employees.

[50] Mr. Cassan submitted that under section 41 of the WSIA, the inclusion of volunteer fire brigade applies only to section 41(16) because of the direct mention of those members in section 41(17). He submitted:

It is the Town’s position that if the Legislature intended members of a municipal volunteer fire brigade to fall into subsections of s. 41 other than 41(16), it would have been open to the Legislature to say in subsection 17 that “this section applies with respect to a member of a municipal volunteer fire brigade” or alternatively the Legislature could have said “subsections 2 and 16 apply with respect to a member of a municipal volunteer fire brigade”. The fact that the legislature chose NOT to do so leaves the interpretation that they did not so intend members of a volunteer fire brigade to apply to all of the subsections of s. 41.

[51] The employer’s representative submitted that the WSIA distinguishes between actual employers and deemed employers in the context of volunteer fire fighters and that Ontario Regulation 253/07 pursuant to the WSIA defines a full-time fire fighter as a worker who is a fire fighter defined in section 1 of the *Fire Protection and Prevention Act, 1997*, who is regularly employed on a salaried basis and who is scheduled to work an average of

35 hours or more per week.

[52] Mr. Cassan cited a decision of the “Honourable Mr. Justice James D. Greco (retired)”. The retired Justice Greco reviewed the circumstances surrounding the termination of a Volunteer Fire Chief of another municipality. Mr. Cassan submitted that the by-law governing the termination of a Volunteer Fire Chief considered by the retired Justice Greco “mirrored” the bylaw of the municipality in this appeal. The retired Justice Greco found that an honorarium of \$300 per annum “is not a salary” and that neither the Fire Chief nor any other Fire Fighter for the municipality “can be considered as being regularly employed on a salary basis by the Township”. Retired Justice Greco found the municipality had limited control over the volunteer fire fighters. He noted that volunteer fire fighters could “quit at the drop of a hat”.

[53] Mr. Cassan cited section 41(1) of the *Fire Protection and Prevention Act*, which specifically excludes volunteer fire fighter from the definition of fire fighter for the purpose of employment and labour relations in part IX of that legislation.

[54] The employer’s representative reviewed the provisions of OPM Document No. 12-04-02, “Special Cases (Worker Coverage) – Volunteer Forces” and the guidelines to be considered a full-time or part-time fire fighter. He submitted that fire fighters for the municipality in this case fail each of the four criteria and, therefore, are not regularly employed fire fighters.

(c) The Worker (Reply)

[55] Ms. Keys disputed the employer’s construction of the issue in this case. She wrote:

The employer says that the issue is “whether the volunteers who are members of the [accident employer] Volunteer Fire Department are ‘regular employees’ of the [accident employer]. This is incorrect; the real issue is whether or not the employer “regularly employs” volunteer firefighters as workers within the meaning of the [WSIA].

[56] She noted that section 41(2) of the WSIA states that that section does not apply in respect of employers who “regularly employ” fewer than 20 workers. She noted that section 41(2) does not use the words “regularly employed”. She submitted that there is nothing in the section that requires that worker be “regularly employed” or be “regular employees”.

[57] With respect to the employer’s submission that the Legislature would have expressly stated that volunteer fire fighters are to be counted for the purpose of section 41(2) if that was its intention, Ms. Keys wrote:

It is not the case that volunteer firefighters are only included when specifically referred to. In fact, the opposite is true. The whole of the WSIA applies to volunteer firefighters, except when they are specifically exempted from particular sections, or there are special rules that apply to them, as in ss 41(17) and (16). The whole [WSIA] applies because, at the outset of the WSIA, “workers” is defined to include volunteer firefighters. Volunteer firefighters are entitled to compensation if they sustain a personal injury by accident arising out of and in the course of their employment. Section 13 does not say, “workers, including volunteer firefighters”; it does not have to because “worker” is defined as including volunteer firefighters.

[58] Ms. Keys submitted that volunteer fire fighters are neither independent operators nor volunteers who show up at a fire without the consent or knowledge of the employer. She submitted that they are workers under the WSIA and section 41(2) requires a count of “workers”. Ms. Keys submitted that By-Law #94-35 clearly sets out the terms of service, rules of behaviour, probationary period and the Fire Chief’s responsibility to discipline the members. She stated that the fact that a contract of service does not attract all of the rights of a regular or full-time employee does not mean that there is no contract of service.

[59] Ms. Keys submitted that Regulation 264/07 cited by Mr. Cassan provides a definition of a full-time fire fighter for the purpose of entitlement for a schedule occupational disease, not for the purpose of the applicability of the WSIA as a whole.

[60] Ms. Keys submitted that the decision of retired Justice Greco cited by Mr. Cassan was neither a decision of a court nor a decision of an established administrative Tribunal and is not relevant in this appeal. She stated that the decision does not assist this case because it has nothing to do with the definition of a worker under the WSIA.

[61] Ms. Keys submitted that the accident employer in this case has not shown that a finding in favour of the worker in this appeal would be onerous and expensive for the accident employer.

(d) The Employer (Reply)

[62] On behalf of the accident employer, Mr. Cassan provided submissions under cover letter dated May 14, 2008.

[63] Mr. Cassan wrote:

It is clear that [volunteer firefighters] are not controlled by the Township with respect to hours of work, scheduled shifts, training, attendance, other employment or discipline.

It is further clear that the payment of the honorarium is not a salary. These individuals are volunteers in every sense of the word.

[64] The employer's representative submitted that a finding that volunteer fire fighters are regularly employed for the purpose of section 41 of the WSIA would be inconsistent with the WSIA and applicable policy and would "have a profound impact on all small and rural municipalities throughout Northern Ontario".

(vi) Analysis

[65] We have carefully considered all of the available evidence before us including the testimony of RT (Fire Chief) and ML (CAO). We have also carefully considered the cogent arguments of the representatives.

[66] With considerable cooperation between the parties and representatives, the adjudication of this appeal has been narrowed to the issue of whether or not, for the purposes of section 41(2) of the WSIA, volunteer fire fighters are workers within the meaning of section 41 of the WSIA and Board policy.

[67] Section 41(1) of the WSIA states:

41(1) The employer of a worker who has been unable to work as a result of an injury and who, on the date of the injury, had been employed continuously for at least one year by the employer shall offer to re-employ the worker in accordance with this section.

[68] Section 41(2) provides an exception to section 41(1):

41(2) This section does not apply in respect of employers who regularly employ fewer than 20 workers or such classes of employer as may be prescribed.

[69] Thus, the issue in this appeal is the interpretation of the word "worker" in the context of section 41(2) and, specifically, whether or not the word "worker" includes a volunteer fire fighter for the purpose of that section.

[70] We agree with Ms. Keys, that the *Legislation Act, 2006* provides that remedial legislation shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.² Previous Tribunal decisions have found that the WSIA and its predecessor legislation, the *Workers' Compensation Act*, are remedial legislation to which the *Interpretation Act* (now repealed and replaced by the *Legislation Act, 2006*) applies.³

[71] The purposes of the WSIA are set out in section 1:

1. The purpose of this Act is to accomplish the following in a financially responsible and accountable manner:
 1. To promote health and safety in workplaces and to prevent and reduce the occurrence of workplace injuries and occupational diseases.
 2. To facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease.
 3. To facilitate the re-entry into the labour market of workers and spouses of deceased workers.

4. To provide compensation and other benefits to workers and to the survivors of deceased workers.

[72] In *Gray v. Ontario (Disability Support Program, Director)*,⁴ the Ontario Court of Appeal found that any ambiguity in the interpretation of social welfare legislation should be resolved in the claimant's favour.

[73] The legislation also clearly states, however, that the re-employment obligations set out in section 41 do not apply to small employers. Section 41(6) of the WSIA states:

41(6) The employer shall accommodate the work or the workplace for the worker to the extent that the accommodation does not cause the employer undue hardship.

[74] In this case, there are two important statutory principles under consideration: the worker's right to re-employment and the employer's right to refuse to re-employ due to undue hardship. Under the WSIA a worker's right to re-employment is not available if their employer regularly employs fewer than 20 workers because, it is presumed, doing so would cause the employer undue hardship. We recognise that the accident employer in this case has not adduced evidence to support that accommodating the worker would cause undue hardship. However, such evidence is not required under the WSIA when it is shown that the employer regularly employs fewer than 20 workers.

[75] In this case, the worker was employed as an equipment operator. Her re-employment rights hinge on our determination of whether or not volunteer fire fighters who provide a service to her employer should be considered workers in the application of section 41(2) of the WSIA.

[76] In our view, it is not necessary to assess the status of volunteer fire fighters for the purpose of determining whether or not they are "workers" under either the Board's *Operational Policy Manual* (OPM) Document No. 12-01-03, "Employer Coverage – Workers and Independent Operators" or the Tribunal's widely applied business reality/worker test. We agree with Ms. Keys that section 2(1) of the WSIA clearly states that the definition of "worker" includes "a member of a municipal volunteer fire brigade whose membership has been approved by the chief of the fire department or by a person authorized to do so by the entity responsible for the brigade". Given the clear language of the statute, the authorities cited by Mr. Cassan (decision of retired Justice J. Greco and the *Fire Protection and Prevention Act, 1997*) are not persuasive on the issue of whether or not a volunteer fire fighter is a worker under the WSIA.

[77] We agree that because a member of a municipal volunteer fire brigade is a worker within the general meaning of the WSIA, he or she is subject to the same rights and obligations prescribed in the legislation for all workers.

[78] In our view, it was the intention of the Legislature to include volunteer fire fighters under the statutory definition of "worker" to ensure that they are subject to the same rights and obligations prescribed in the legislation for all workers. Nevertheless, we agree with Mr. Cassan that the Legislature also recognised volunteer fire fighters as a class of workers which is distinct in important respects from other workers who are governed under the same legislation.

[79] Municipalities (large and small) are statute bound under section 2 of the *Fire Protection and Prevention Act, 1997* to provide fire protection services. Accordingly, municipalities enact by-laws that govern the process through which they meet this statutory obligation including recruitment, training, remuneration, discipline and termination of fire fighters. Although volunteer fire fighters are "workers" as defined by WSIA, the unique status of volunteer fire fighters is addressed in section 41 of the WSIA.

[80] Section 41(6) of the WSIA states:

41(6) The employer shall accommodate the work or the workplace for the worker to the extent that the accommodation does not cause the employer undue hardship.

[81] Section 41(16) of the WSIA states:

41(16) If an emergency worker is injured, the worker's deemed employer is not required to comply with this section. The worker's actual employer, if any, is required to do so. However, the deemed employer is required to pay the costs of the actual employer's compliance with subsection (6).

[82] Section 41(17) states that subsection (16) applies with respect to a municipal volunteer fire fighter.

[83] Section 41(16) recognises the unique circumstances of a volunteer fire fighter and his or her relationship with a municipality when he or she is injured in the line of duty as a volunteer fire fighter. Section 41(16) recognizes that the employment relationship between a municipality and a volunteer fire fighter is unique and distinct from a traditional worker/employer relationship because the volunteer fire fighter, although typically paid an honourarium, is not generally dependent upon the municipality for his or her primary income. This section sets out a mechanism whereby a volunteer fire fighter who is injured in the course of his service as a volunteer fire fighter nevertheless retains the same rights and obligations of other workers and, because of their unique status, the cost and responsibility to accommodate an injured volunteer fire fighter is shared between the municipality and actual employer.

[84] In our view, the "deemed employer" referred to in this section is the municipality for which the volunteer fire fighter provides a service. The "actual employer" referred to in this section is the employer, if any, that provides the worker with his or her primary source of income. The actual employer is obliged to comply with the provisions of section 41, while the deemed employer is obliged to pay the costs of compliance.

[85] In our view, despite their unique status as workers as stipulated under section 41(16) of the WSIA, volunteer fire fighters are to be included in the count for the purpose of determining the threshold test under section 41(2) of the WSIA. We are satisfied that there is no qualifying language in the statute that excludes volunteer fire fighters in this section. Section 41(16) is, in our view, essentially a second exclusion to the general obligation to re-employ under section 41(1) and is not a qualifier of who is counted under subsection 41(2).

[86] We note that OPM Document No. 19-04-02 elaborates on the statutory definition of worker. It states that workers who are full-time, part-time, casual (but that serves the purposes of the employer's industry) or seasonal meet the definition of worker. The policy also states:

This definition applies when determining the number of workers regularly employed by an employer.

[87] Put succinctly, volunteer fire fighters are workers under section 2(1) of the WSIA. Although, section 41(16) recognises the unique circumstances of a volunteer fire fighters, it does not provide a basis to exclude volunteer fire fighters from the threshold test under section 41(2). There is no other language in the WSIA that can reasonably be interpreted to exclude volunteer fire fighters from the count under section 41(2).

DISPOSITION

[88] The appeal is allowed.

[89] The accident employer is subject to the re-employment provisions of the WSIA. Any issue respecting the nature and duration of benefits or services that may flow from this decision is remitted to the Board's Operating Branch for determination.

Appeal allowed.

1. F. Sarlo, a lawyer, represented the employer at the hearing on April 3, 2007.

2. A similar provision was previously found in the now repealed *Interpretation Act*, R.S.O. 1990, c. I.11, which has been replaced by the *Legislation Act*.

3. See *Decision No. 1402/03R* (2005), 80 W.S.I.A.T.R. (online), for example.

4. 59 O.R. (3d) 364 (C.A.)

Decision No. 652/09

Vice-Chair: Crystal

Decision — March 30, 2009

Neutral Citation: 2009 ONWSIAT 820

Non-economic loss (calculation) (indexation of benefits) – Retirement benefits – Future economic loss (calculation) (Canada Pension Plan) – Retroactivity (policy change) – Board Directives and Guidelines (retroactivity).

Board correctly calculated NEL benefits using general indexing factor under s. 148 of the pre-1997 Workers' Compensation Act – Board appropriately set aside for retirement pension 10 % of FEL benefits after offset of CPP disability benefits.

The worker suffered a compensable injury in September 1997. He was granted a NEL award and a full FEL award. The worker appealed a decision of the Appeals Resolution Officer regarding indexation of his NEL benefits and the amount set aside for loss of retirement income. The appeal was dismissed.

The Board calculated the worker's NEL benefits using the general indexing factor rather than the alternate indexing factor. Indexing is addressed in s. 148 of the pre-1997 *Workers' Compensation Act*. Portions of s. 148 are repealed and replaced by s. 111 of the *Workplace Safety and Insurance Act, 1997*. Section 111 of the WSIA refers to ss. 49 and 50 of the WSIA. Under s. 50 of the WSIA, the alternate indexing factor applies to workers whose loss of earnings is 100%. The worker claimed use of the alternate indexing factor based on this provision. However, the Vice-Chair noted that the worker's entitlement to benefits is governed by the pre-1997 Act. Indexing of the worker's NEL award is governed by s. 148 of the pre-1997 Act as amended by the WSIA. Section 148 provides for use of the general indexing factor except in circumstances coming within s. 148(1.2). Those exceptions do not include workers whose loss of earnings is 100%. Accordingly, the Board correctly applied the general indexing factor to the worker's NEL award.

Section 44(1) of the pre-1997 Act requires the Board to set aside, as a retirement pension, 10% of every payment made to a worker under s. 43 (FEL benefits). Section 43(7) requires the Board to have regard to CPP benefits. The worker was receiving a full FEL award. He also was in receipt of CPP disability benefits. The Board offset the FEL award by the amount of CPP benefits. The Board set aside for the retirement pension 10% of the FEL payments after deduction of the CPP benefits.

In *Decision No. 1878/04*, a vice-chair concluded that 10% of the full amount of the FEL benefits should be set aside, without deduction of the CPP benefits. On an application for reconsideration of *Decision No. 1878/04*, a different vice-chair denied the application for reconsideration but noted that in an appeal of first instance another vice-chair might come to a different conclusion than *Decision No. 1878/04* and further noted that s. 44(1) could reasonably bear the interpretation in *Decision No. 1878/04* as well as the interpretation advanced by the Board.

In April 2008, the Board published *Operational Policy Manual*, Document No. 18-04-17. Under that policy, 10% of every payment made to the worker under s. 43 should be interpreted as meaning 10% of the FEL benefits after the CPP offset. The policy states that it applies to all decisions made on or after August 1, 2003 for accidents from January 2, 1990 to December 31, 1997.

There is a presumption against retroactivity, which is applied to Board policy changes. However, Document No.

18-04-17 was not a change in policy. Rather, it was a clarification issued by the Board in response to the inconsistency in interpretation of s. 44(1) in *Decisions No. 1878/04* and *1878/04R*.

The Vice-Chair applied the Board policy and concluded that the amount set aside by the Board under s. 44(1) was appropriate and in compliance with applicable Board policy.

Perte non économique (calcul) (indexation des prestations) – Prestations de retraite – Perte économique future (calcul) (Régime de pensions du Canada) – Effet rétroactif (modification de la politique) – Directives et lignes directrices de la Commission (rétroactivité).

La Commission avait calculé l'indemnité pour PNF correctement en utilisant un facteur d'indexation général aux termes de l'article 148 de la Loi d'avant 1997 – La Commission avait correctement mis en réserve 10 % des versements de l'indemnité pour PÉF aux fins de la pension de retraite après déduction des prestations du RPC.

Le travailleur avait subi une lésion indemnisable en septembre 1997. Il avait obtenu une indemnité pour perte non financière (PNF) et une indemnité pour perte économique future (PÉF) intégrale. Le travailleur a interjeté appel de la décision du commissaire aux appels au sujet de l'indexation de son indemnité pour PNF et du montant mis en réserve aux fins de sa pension de retraite. Le Tribunal a rejeté l'appel.

La Commission avait calculé les prestations pour PNF en utilisant un facteur d'indexation général plutôt qu'un deuxième facteur d'indexation. La question de l'indexation est traitée à l'article 148 de la *Loi sur les accidents du travail* d'avant 1997 (Loi d'avant 1997). Des portions de l'article 148 sont abrogées et remplacées par l'article 111 de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997). L'article 111 de la Loi de 1997 renvoie aux articles 49 et 50 de cette même loi. Aux termes de l'article 50 de la Loi de 1997, le deuxième facteur d'indexation s'applique aux travailleurs dont la perte de gains est de 100 %. Le travailleur demandait l'utilisation du deuxième facteur d'indexation en se fondant sur cette disposition. Le vice-président a toutefois noté que le droit du travailleur à une indemnité était régi par la Loi d'avant 1997 et que l'indexation de son indemnité pour PNF était régie par l'article 148 de la Loi d'avant 1997, tel que modifiée par la Loi de 1997. L'article 148 prévoit l'utilisation d'un facteur d'indexation général, sauf dans des circonstances cadrant avec le paragraphe 148 (1.2). Ces exceptions n'incluent pas les travailleurs dont la perte de gains est de 100 %. La Commission avait donc correctement appliqué le facteur d'indexation général lors du calcul de l'indemnité pour PNF du travailleur.

Aux termes du paragraphe 44 (1) de la Loi d'avant 1997, afin de fournir une pension de retraite au travailleur, la Commission doit mettre en réserve des fonds correspondant à 10 % de chaque versement fait en vertu de l'article 43 (indemnité pour PÉF). Le paragraphe 43 (7) exige de la Commission qu'elle tienne compte des prestations du Régime de pensions du Canada (RPC). Le travailleur touchait une indemnité pour PÉF intégrale ainsi que des prestations d'invalidité du RPC. La Commission avait déduit le montant des prestations du RPC de l'indemnité pour PÉF, et elle avait ensuite mis 10 % de l'indemnité pour PÉF restante aux fins du revenu de retraite.

Dans la *décision n^o 1878/04*, un vice-président a conclu qu'il fallait mettre en réserve 10 % du plein montant des versements de l'indemnité pour PÉF, sans déduction des prestations du RPC. Lors de l'examen d'une demande de réexamen visant la *décision n^o 1878/04*, un autre vice-président a rejeté la demande mais il a noté qu'un autre décideur de deuxième instance aurait pu parvenir à une conclusion différente de celle à laquelle le vice-président auteur de la *décision n^o 1878/04* était parvenu. Il a aussi noté que le paragraphe 44 (1) pouvait raisonnablement tout autant s'accommoder de l'interprétation donnée dans la *décision n^o 1878/04* que de celle avancée par la Commission.

En avril 2008, la Commission a publié le document n^o 18-04-17 de son *Manuel des politiques opérationnelles*. Cet énoncé prévoit que 10 % de chaque versement fait au travailleur aux termes de l'article 43 devrait s'entendre de 10 % de l'indemnité pour PÉF après déduction de la pension du RPC. La politique précise qu'elle s'applique à toutes les décisions rendues le 1er août 2003 ou après cette date pour les accidents survenus du 2 janvier 1990 au 31 décembre 1997.

Il y a présomption à l'encontre de la rétroactivité, et cette présomption s'applique aux changements apportés aux politiques de la Commission. Cependant, le document n^o 18-04-17 ne constituait pas un changement de politique.

Il s'agissait plutôt d'un éclaircissement que la Commission avait apporté en réponse à l'interprétation incohérente de l'article 44 (1) dans les *décisions n^{os} 1878/04 et 1878/04R*.

Le vice-président a appliqué la politique de la Commission et il a conclu que le montant mis en réserve par la Commission aux termes du paragraphe 44 (1) était approprié et conforme à la politique applicable.

Tribunal Decisions Considered:

Decision No. 1878/04 (2006), 83 W.S.I.A.T.R. (online) consd
Decision No. 1878/04R (2007), 83 W.S.I.A.T.R. (online) consd
Decision No. 1357/05 (2006), 79 W.S.I.A.T.R. (online) consd

Workplace Insurance Legislation Considered:

Workers' Compensation Act, R.S.O. 1990, c. W.11
s. 43(7)
s. 44(1)
s. 148
Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A
s. 49
s. 50
s. 111

Board Directives and Guidelines Considered:

Operational Policy Manual
Document No. 18-04-17 (April 7, 2008)

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[DISPOSITION](#)

APPEAL by the worker from a decision of the Appeals Resolution Officer regarding indexation of non-economic loss benefits and regarding the amount set aside for loss of retirement income.

March 30, 2009. THE TRIBUNAL: —

BEFORE: M. Crystal, Vice-Chair

HEARING: March 27, 2009, at Toronto, Written case

DECISION(S) UNDER APPEAL: WSIB ARO decision dated March 25, 2008

APPEARANCES:

For the worker: Mr. Eric DePoe, Building Trades Workers' Services

For the employer: Did not participate

REASONS

(i) Introduction

[1] This appeal was considered as a written case on March 27, 2009 in Toronto.

[2] The worker appeals the decision of Appeals Resolution Officer (ARO) G. Sicilia, dated March 25, 2008. That decision concluded that:

1. the indexing of the worker's NEL benefit, as determined by the Board, was appropriate; and
2. the base amount utilized in the worker's loss of retirement income (LRI) benefit calculation was appropriate.

[3] The worker was represented by Mr. Eric DePoe, Building Trades Workers' Services. Written submissions, dated December 16, 2008, were provided by Mr. DePoe.

(ii) The Issues on Appeal

[4] The issues to be determined in this appeal are:

1. whether the indexing of the worker's NEL benefit, as determined by the Board, was appropriate; and
2. whether the base amount utilized in the worker's LRI benefit calculation was appropriate.

(iii) Background

[5] The worker suffered a workplace accident on September 26, 1997. At the time of the accident, the worker was employed by the accident employer as a drywall taper. The accident occurred when the worker fell down stairs and injured his low back. The worker was awarded a non-economic loss (NEL) benefit for the organic injury to his low back, which was subsequently increased when he was awarded further NEL entitlement for psychotraumatic disability. The worker's NEL benefit was subject to indexing (i.e., adjustment by a factor associated with Consumer Price Index for Canada (CPI)) pursuant to the applicable legislation.

[6] The worker was awarded a 100% future economic loss (FEL) benefit. The worker was also awarded a Canada Pension Plan (CPP) disability benefit by Human Resources and Development Canada (HRDC). The CPP disability benefit was offset from his FEL benefit pursuant to the applicable law and Board policy.

[7] Pursuant to section 44(1) of the pre-1997 *Workers' Compensation Act*, R.S.O. 1990, c. W.11, the worker was also entitled to benefits for LRI.

(iv) Applicable Law and Policy

[8] The workplace accident which is the subject of this appeal occurred on September 26, 1997. Accordingly, the worker's entitlement to benefits is governed by the pre-1997 Act. There are also some provisions of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) relating to the transition between the pre-1997 Act and the WSIA which are applicable in the circumstances of this appeal

[9] As noted above, pursuant to section 44(1) of the pre-1997 Act, the worker is entitled to benefits for LRI. Section 44(1) states:

44(1) For the purpose of providing a worker who is receiving compensation under section 43 with a retirement pension, the Board shall set aside for the worker additional funds equal to 10 per cent of every payment made to the worker under section 43.

[10] A FEL benefit is "compensation under section 43" within the meaning of section 44(1).

[11] The Board published *Operational Policy Manual* Document No. 18-04-17 on April 7, 2008. That policy

document, on the subject of “Loss of Retirement Income Benefits (Accidents from January 2, 1990 to December 31, 1997)” states in part:

LAW

s. 44(1), (3)

To provide workers who have a permanent impairment with a retirement income at age 65, the WSIB sets aside additional funds equal to 10% of every future economic loss (FEL) payment. These funds are deposited in a loss of retirement income (LRI) benefit account.

...

GUIDELINES

Definitions

...

FEL payment – the actual amount of monies paid to the worker (prior to any redirection, see 18-01-06, Redirected Benefit Payments). This amount is equal to 90% of the difference between the worker’s pre-injury net average earnings and the post-injury net average earnings which include any Canada/Quebec Pension Plan disability payments the worker may receive for the injury. ...

...

Application date

This policy applies to all decisions made on or after August 1, 2003, for accidents from January 2, 1990 to December 31, 1997.

[12] The issue of indexing is addressed by section 148 of the pre-1997 Act, which states:

148(1) On January 1 in each year, an indexing factor shall be determined using the formula,

$$\text{Indexing factor} = [3/4 \times A] - 1$$

in which “A” is the amount of the percentage change in the Consumer Price Index for Canada for all items, for the 12-month period ending October 31 of the previous year, as published by Statistics Canada. The indexing factor shall be not less than 0 per cent and not greater than 4 per cent.

(1.1) Subject to subsection (1.2), the indexing factor described in subsection (1) applies with respect to the calculation of all compensation payable under this Act.

(1.2) The indexing factor described in subsection (1.3) applies with respect to the calculation of the following:

1. Compensation under section 35 for survivors and dependants.
2. Compensation for survivors and dependants under section 36 of the pre-1985 Act, as continued under section 145.
3. Compensation for survivors and dependants under section 36 of the pre-1989 Act, as continued under section 146.
4. Permanent disability benefits under subsection 43(1) of the pre-1985 Act, as continued under section 145, but only if the impairment of the earning capacity of the worker is 100 per cent of the worker’s earning capacity.
5. Permanent disability benefits under subsection 45(1) of the pre-1989 Act, as continued under section 146, but only if the impairment of the earning capacity of the worker is 100 per cent of the worker’s earning capacity.
6. All compensation payable to a worker whose permanent partial disability benefits are increased under subsection 147(14).

(1.3) The indexing factor that applies with respect to the benefits described in subsection (1.2) is to be determined on January 1 in each year and is the amount of the percentage change in the Consumer Price Index for Canada for all items, for the 12-month period ending October 31 of the previous year, as published by Statistics Canada. The indexing factor shall be not less than 0 per cent.

(2) On the 1st day of January in each year, the Board shall,

(a) adjust the dollar amounts set out in this Act and in provisions continued by section 144 by applying the indexing factor to the amount as adjusted under this Part on the preceding 1st day of January; and

(b) adjust average earnings by applying the indexing factor to the average earnings as adjusted under this Part on the preceding 1st day of January and the Board shall make consequential changes to the compensation payable under this Act and under provisions continued by section 144.

(3) For the purpose of calculating the adjustment under clause (2)(b) for a person who is receiving compensation under provisions continued by section 144, the average earnings shall be the amount which produces the compensation that the person is receiving as of the day preceding the day on which the adjustment is to be made.

(4) Nothing in this section entitles a person to claim additional compensation for any period before the effective date of an increase as a result of subsection (2) or with respect to any award commuted or paid as a lump sum before the effective date.

[13] Portions of section 148 are repealed by the section 111 of the WSIA, which states:

111(1) Subsections 148(1) and (1.1) of the pre-1997 Act shall be deemed to be repealed and the following substituted:

(1) Subject to subsection (1.2), the general indexing factor determined under subsection 49(1) of the *Workplace Safety and Insurance Act, 1997* applies with respect to the calculation of all compensation payable under this Act.

(2) That portion of subsection 148(1.2) of the pre-1997 Act that precedes paragraph 1 shall be deemed to be repealed and the following substituted:

(1.2) The alternate indexing factor determined under subsection 50(1) of the *Workplace Safety and Insurance Act, 1997* applies with respect to the calculation of the following:

...

(3) Paragraph 6 of subsection 148(1.2) of the pre-1997 Act shall be deemed to be repealed.

(4) Subsection 148(1.3) of the pre-1997 Act shall be deemed to be repealed.

(5) The pre-1997 Act shall be deemed to be amended by striking out “subsection 148(1.3)” in paragraph 1 of subsection 43(4), subparagraph ii of paragraph 2 of subsection 43(4), paragraph 1 of subsection 43(5) and clause 43(6.1)(b) and substituting in each instance “subsection 148(1.2)”.

(6) Subsection 148(2) of the pre-1997 Act shall be deemed to be amended by striking out “the indexing factor” in clause (a) and in clause (b) and substituting in clause (a) “the general indexing factor” and in clause (b) “the general or alternate indexing factor, as the case may be”.

[14] Section 111 of the WSIA refers to sections 49 and 50 of the WSIA. Those provisions state:

49(1) On January 1 every year, a general indexing factor for the year shall be calculated using the formula,

$$(1/2 \times A) - 1$$

in which “A” is the amount of the percentage change in the Consumer Price Index for Canada for all items, for the 12-month period ending on October 31 of the previous year, as published by Statistics Canada. However, the indexing factor shall be not less than 0 per cent and not greater than 4 per cent.

(2) The general indexing factor applies with respect to the calculation of all amounts payable under this Part other than,

(a) payments to workers whose loss of earnings is 100 per cent;

(b) payments under section 48 to survivors; and

(c) payments to the other person referred to in subsection 48(5) and to a parent or other person described in subsection 48(20).

50(1) On January 1 every year, an alternate indexing factor for the year shall be calculated. It is the amount of the percentage change in the Consumer Price Index for Canada for all items, for the 12-month period ending on October 31 of the previous year, as published by Statistics Canada. However, the indexing factor shall not be less than 0 per cent.

(2) The alternate indexing factor applies with respect to the calculation of payments,

(a) to workers whose loss of earnings is 100 per cent;

(b) under section 48 to survivors; and

(c) to the other person referred to in subsection 48(5) and to a parent or other person described in subsection 48(20).

(v) Analysis

(a) Whether the Worker's NEL Benefit Was Appropriately Indexed

[15] It is the worker's representative's submission that the "alternate indexing factor" (i.e., the full CPI) referred to in section 50 of the WSIA should be applied to the worker's NEL benefit, rather than the "general indexing factor" referred to in section 49 of the WSIA. The worker's representative takes this position based on the fact that the worker is entitled to a 100% FEL benefit, and section 49(2) of the WSIA provides that "the general indexing factor applies with respect to the calculation of all amounts payable under this Part other than...payments to workers whose loss of earnings is 100%." Section 50(2) provides that "the alternate indexing factor applies with respect to calculations of payments ...to workers whose loss of earnings is 100%" According to the representative's submission, the worker's 100% FEL award was provided due to the fact that the worker's loss of earnings is 100%. Accordingly, pursuant to the WSIA, the "alternative indexing factor" should be applied to the worker's NEL award.

[16] The Board's explanation for denying the worker's request to apply the "alternative indexing factor", both in correspondence from the Board's Manager, Service Delivery, Construction and Transportation Sectors, dated February 19, 2007, and in the ARO decision, dated March 25, 2008, which is the subject of this appeal, did not appear to directly address the point raised by the representative's submission to this Tribunal. Rather, it merely went through the calculation required to apply the "general indexing factor". The ARO decision dated March 25, 2008, also went through the same calculation. It also indicated that "There is no evidence in the claim file to indicate that [the worker's NEL benefit] falls within the exclusions listed in Section 49(2) (a), (b), or (c) of the Act", but did not explain why that was the case, given that a NEL award is an "amount payable under this part (i.e., Part VI of the WSIA)" and given that the worker had indeed suffered a 100% loss of earnings.

[17] A fact which does not appear to have been addressed by either the worker's representative or the Board, is that the worker's entitlement to benefits is governed by the pre-1997 Act and not the WSIA. Accordingly, neither section 49 nor section 50 of the WSIA are directly applicable in the worker's case. Indexing of the worker's NEL award is governed by section 148 of the pre-1997 Act, as amended by the WSIA.

[18] Section 148 of the pre-1997 Act is similar in structure to sections 49 and 50 of the WSIA, in that, under both legislative schemes, there is a general indexing factor, which applies in the general case, and an alternative factor, which applies in certain circumstances, which are exceptions to the application of the general indexing factor ("the excepted circumstances"). which are specified under the respective schemes. Under both schemes, the factor for the excepted circumstances is the full CPI.

[19] As I have noted, indexing of the worker's NEL award is governed by section 148 of the pre-1997 Act, as amended by the WSIA. In this context, the excepted circumstances in which the general indexing factor does not apply, do not include "payments to workers whose loss of earnings is 100%", as is the case under the WSIA. As a result of the amendments, the numbered paragraphs which are in the latter portion of the original version of section 148(1.2) describe the excepted circumstances, where the full CPI is applied, except that para. 6 is repealed. These do not include the circumstances of a worker who has suffered a 100% loss of earnings. Accordingly, the fact that the worker has suffered a 100% loss of earnings does not affect the application of the "general indexing factor", which applies through the operation of section 148(1) of the Act, as amended by the WSIA.

[20] Accordingly, I find that the application of the “general indexing factor” was appropriately applied to the worker’s NEL award, and that the indexing was calculated appropriately.

(b) Whether the Base Amount Utilized in the Worker’s LRI Benefit Calculation Was Appropriate

[21] The other issue raised by the worker’s appeal relates to the amount that the Board “sets aside” for the worker’s retirement pension. Section 44(1) of the Act provides that, in the case of workers who are in receipt of compensation under section 43 of the Act (i.e., a FEL benefit) “the Board shall set aside for the worker additional funds equal to 10 per cent of every payment made to the worker under section 43.”

[22] The issue arises because section 43(7) of the pre-1997 Act provides:

43(7) For the purposes of subsection (3), in determining the amount that a worker is likely to be able to earn in suitable and available employment, the Board shall have regard to,

...

(b) any disability payments the worker may receive for the injury under the Canada Pension Plan or the Quebec Pension Plan.

[23] This provision has been interpreted by the Board to mean that where a worker in receipt of a FEL award also receives CPP disability benefits for the same injury, the amount of the CPP disability benefits shall be offset from the FEL award, and the amount of the payment by the Board to the worker for the FEL award is the amount of the FEL award which would otherwise be paid, minus the amount of the CPP disability benefit.

[24] In this appeal, it is the contention of the worker’s representative that the base amount used for the worker’s LRI should be 10% of the amount of the FEL award, prior to the deduction of the amount of the CPP disability benefit. The Board has taken the position that since section 44(1) provides that “the Board shall set aside for the worker additional funds equal to 10 per cent of *every payment made to the worker* under section 43” (emphasis added), the base amount used for the worker’s LRI should be 10% of the amount of the FEL award, subsequent to the deduction of the amount of the CPP disability benefit. The Board has taken the position that, since it does not pay the worker the amount deducted as the CPP disability benefit offset, the Act does not require that 10% of the pre-offset amount of the FEL award be set aside, and that the Act only requires that 10% of the amount actually paid to the worker (i.e., the post-offset amount of the FEL award) be set aside for the worker’s retirement pension.

[25] This issue was addressed in *Decision No. 1878/04* (2006), 83 W.S.I.A.T.R. (online). The issue described above, namely, whether section 44(1) requires that the Board set aside, for a retirement pension, 10% of the amount of the FEL award prior to the CPP disability benefit offset, or subsequent to it, was the central issue under appeal in that decision. The Vice-Chair in *Decision No. 1878/04* concluded [at para. 22]:

In my view, the calculation of the worker’s LRI benefit should not take into account the offset of the worker’s CPP benefit from his 100% FEL award. The calculation of the worker’s LRI benefit should be based upon his full 100% FEL.

[26] The rationale for this view is set out in detail in the decision, and recourse should be had to the decision to obtain a complete understanding of the rationale for the decision. Some of the analysis provided by the decision in support of this view included:

- The manner in which the Board “has regard to” the CPP disability benefits is determined by Board policy, and it is unlikely that the Legislature intended that the amount to be contributed to an injured worker’s retirement fund be subject to the Board’s discretion, exercised from time to time, in its capacity to make policy.
- The primary purpose of the CPP disability benefit offset was to avoid overcompensation to injured workers who receive both FEL and CPP disability benefits. Setting aside of 10% of the pre-offset amount would not interfere with achieving this purpose.
- The decision to apply for a CPP disability benefit is at the discretion of the injured worker. By setting

aside 10% of only the post-offset amount of a worker's FEL award, where FEL awards were otherwise equivalent, a worker who is in receipt of a FEL award, but not in receipt of a CPP disability benefit, will receive a greater contribution to the retirement fund than a worker who is in receipt of a FEL award, but also in receipt of a CPP disability benefit, and has the CPP disability benefit offset from the FEL award. This result is arbitrary and inequitable.

- The Act should be given a broad and purposive interpretation.

[27] I interpret *Decision No. 1878/04* to mean that it is likely that by enacting section 44(1) of the Act, the Legislature intended to provide injured workers with a retirement fund that was equal to 10% of amount of the full FEL benefits awarded to them.

[28] The Board requested a reconsideration of *Decision No. 1878/04*, and *Decision No. 1878/04R* (2007), 83 W.S.I.A.T.R. (online) was released on October 9, 2007. In that decision, the Vice-Chair (a different Vice-Chair from the Vice-Chair in *Decision No. 1878/04*) noted [at paras. 26-27]:

The Board's interpretation of section 44(1) is consistent with principles of statutory interpretation. The literal meaning of the phrase "every payment made to the worker under section 43", found in section 44(1), seems reasonably to refer to an actual amount received by the worker. Section 43(7) does appear to suggest that a FEL calculation has a number of facets, including the fact that the worker is receiving CPP disability benefits. It appears that, in accordance with the legislation, the calculation of FEL benefits does not merely involve a determination of future economic disability but requires inclusion of other factors such as future earnings or future disability benefits.

The legislation will bear the Board's interpretation.

[29] Commenting on the Vice-Chair's analysis in *Decision No. 1878/04*, *Decision No. 1878/04R* stated [at paras. 28-31]:

Regarding the analysis contained in *Decision No. 1878/04*, I note that the Vice-Chair invited and received submissions from both the Board and the Tribunal Counsel Office. The Vice-Chair appears to have relied on submissions from the Tribunal Counsel Office which read in part [at para. 15]:

While the Board's application of s. 44(1) may be consistent with the ordinary meaning of the legislation, it has the adverse effect of reducing the retirement income of the most disabled injured workers – those who are also receiving CPP disability benefits.

The Board's submissions in the original hearing referred to Board policy on calculating CPP offsets but seem not to have addressed the interpretation to be given to the phrase "10% of every payment made to the worker under section 43". In *Decision No. 1878/04*, the Vice-Chair reviewed extensively the policy that was provided by the Board, noting the absence of any policy that interpreted the phrase in question from subsection 44(1). The Vice-Chair weighed the broad policy implications of the Board's practice against the purpose of the legislation and interpreted the phrase in subsection 44(1) accordingly. I note that, to some extent, the Vice-Chair's interpretation is informed by a view that what the Board does in implementing section 43 is to determine a worker's likely future loss of earnings and then to look to an alternative source to share the cost of that future loss. The Vice-Chair's reasoning seems to rest on an acceptance that there is an objective degree of future loss as a result of a worker's injury and, while it is reasonable to reduce the Board's liability for that loss to reflect an alternative source of income, it is not reasonable to do so with respect to retirement benefits when there is, in fact, no alternative source of retirement benefits. The Vice-Chair appears to have been concerned about the fact that the Board's policy with respect to CPP offset had the effect of reaching into the future to reduce retirement income to which the worker was otherwise entitled.

And while the Board does take the position that a FEL determination is the product of consideration of a number of different factors, including CPP entitlement, the fact is that, in practice, the Board determines a worker's likely future loss of earnings based on evidence of personal and vocational characteristics and, having done so, makes a mathematical determination that reflects other sources of payment for that future loss of earnings. This practice seems to reflect the Vice-Chair's understanding of the FEL process, which in turn informs her interpretation of subsection 44(1).

In my view, the legislation and policy currently in effect can bear the interpretation put forward by the Vice-Chair in *Decision No. 1878/04*.

[30] The decision noted that "if this were an appeal in the first instance, another Vice-Chair might come to a different conclusion" but that, "the reconsideration process that the Tribunal has developed is not intended to allow a party or the Board a second level of appeal at the Tribunal." The Vice-Chair in *Decision No. 1878/04R*

concluded that the Tribunal's threshold test for re-opening a decision had not been met. In this regard, the decision stated [at para. 32]:

The Tribunal's case law on reconsideration makes it clear that a decision will only be reopened where there is evidence of a significant error. A difference of opinion on the interpretation of legislation, in my view, does not in and of itself constitute evidence of a significant error.

[31] I agree with the Vice-Chair in *Decision No. 1878/04R* that section 44(1) of the Act can reasonably bear the interpretation advanced in *Decision No. 1878/04*, as well as the interpretation advanced by the Board. In my view, the Vice-Chair in *Decision No. 1878/04* provided cogent reasons for the outcome determined in that decision. Nevertheless, given that in the absence of policy addressing the underlying question, contradictory outcomes in relation to the interpretation of section 44(1) were possible, clarification of the matter was appropriate.

[32] Both *Decision No. 1878/04* and *Decision No. 1878/04R* referred to the fact that Board policy in place at the time did not address the question under review. On April 7, 2008, the Board published *Operational Policy Manual* Document No. 18-04-17. That policy document, on the subject of "Loss of Retirement Income Benefits (Accidents from January 2, 1990 to December 31, 1997)", is excerpted above. The policy document, which is set out above, provides a definition of the term "FEL payment" in the context of section 44(1). I interpret the definition to have determined the issue that was under appeal in *Decision No. 1878/04* and in this portion of these reasons. I interpret the policy document to mean that the phrase "10 per cent of every payment made to the worker under section 43" should be interpreted to mean 10% of the amount of a FEL payment, subsequent to the CPP disability benefit offset, where such an offset is made.

[33] I note that section 126(1) of the WSIA provides:

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.

[34] Accordingly, I am satisfied that *Operational Policy Manual* Document No. 18-04-17 should be applied to decisions after April 7, 2008, the date of the publication of the policy document. The policy document stated, however, that it "applies to all decisions made on or after August 1, 2003, for accidents from January 2, 1990 to December 31, 1997." The ARO decision which is the subject of this appeal is dated March 25, 2008. A question that arises, therefore, is whether the Board has power to make policy which shall have a retroactive effect.

[35] In *Decision No. 1357/05* (2006), 79 W.S.I.A.T.R. (online), the distinction was made between a change in a Board policy which effects substantive change, as opposed to one which merely effects a clarification. *Decision No. 1357/05* provided that the presumption against retroactivity applied to Board policy changes. The Vice-Chair found, however, that the presumption did not apply to the Board's revised policy on how the Combined Values Chart should be applied to NEL awards. The initial Board policy was not clear and had not been interpreted consistently in Tribunal decisions. The Board's revised policy only clarified the Board's original intent. As such, it could properly apply to cases which predated the policy clarification. *Decision No. 1357/05* states [at paras. 46-47]:

While I generally agree with the presumption against retroactivity of Board policy, I do not interpret OPM Document No. 18-05-05 as retroactively setting out a different method of calculating NEL awards in the case of post Bill 162 impairments. In my view, the situation in this appeal is to be contrasted with the situation found in *Decision No. 2828/01* (2003), 67 W.S.I.A.T.R. 81, dated December 9, 2003, which considered two versions of OPM Document No. 05-02-02 on the issue of whether insurance benefits were to be excluded from earnings. The Board argued in that case that the old policy always excluded employment insurance benefits from earnings and that the new policy did so explicitly. As found in *Decision No. 2828/01* [at para. 55], however, there was a "significant and increasingly unanimous body of Tribunal decisions" that allowed for the inclusion of employment insurance benefits in the earnings basis of seasonal workers. Accordingly, the Panel of *Decision No. 2828/01* held [at para. 55] that "[i]f the new policy changes the way the Tribunal is to determine the earnings basis of seasonal workers, that is a change in policy, not merely a clarification of policy".

In my view, Document No. 18-05-05 does not change the way the Tribunal unanimously decided NEL awards arising from different claims...Furthermore, there is no significant and unanimous body of Tribunal decisions that interpreted Document No. 05-06-07. On the contrary, there were only a handful of Tribunal decisions that arrived at different results. In my view therefore, OPM Document No. 18-05-05 is the only policy to address the combination of NEL awards when there are pre and post 1998 accidents. It is therefore the policy applicable to the worker's right arm and left knee NEL

awards.

[36] Similar to the circumstances that existed in *Decision No. 1357/05*, I conclude that when, on April 7, 2008, the Board published OPM Document No. 18-04-17, it was clarifying the application of section 44(1) of the Act, and was not effecting a substantive change. The Tribunal did not have a “unanimous “ approach to the issue prior to the release of *Decision No. 1878/04* and *Decision No. 1878/04R*. It does not appear that the issue had been the subject of adjudication at the Tribunal prior to that time. It also appears that, prior to *Decision No. 1878/04* and *Decision No. 1878/04R*, the Board’s approach to the application of section 44(1), for workers in receipt of CPP disability benefits, was to set aside 10% of the amount of the FEL benefit paid to workers after the CPP disability benefit offset was made. Following the release of *Decision No. 1878/04* and *Decision No. 1878/04R*, there was inconsistency in the interpretation of section 44(1), and in publishing OPM Document No. 18-04-17, it was the Board’s intention to provide a clarification. On that basis, I conclude that Document No. 18-04-17, which was published by the Board on April 7, 2008, should be applied in the appeal of the ARO decision, dated March 25, 2008, which is the subject of this appeal.

[37] As I have indicated above, I conclude that Document No. 18-04-17 makes it clear that in applying section 44(1) of the Act, the phrase “10 per cent of every payment made to the worker under section 43”, as it appears in the section, should be interpreted to mean 10% of the amount of a FEL payment subsequent to the CPP disability benefit offset, where such an offset is made. As I have also indicated, the policy document has application to the ARO decision dated March 25, 2008, and that, through the operation of section 126(1), I am required to apply the policy in the instant case.

[38] Accordingly, I conclude that the base amount utilized in the worker’s LRI benefit calculation was appropriate and in compliance with the applicable Board policy. For these reasons, the worker’s appeal is denied.

DISPOSITION

[39] The appeal is denied:

1. the indexing of the worker’s NEL benefit, as determined by the Board, was appropriate.
2. the base amount utilized by the Board in the worker’s LRI benefit calculation, was appropriate.

Appeal dismissed.

Decision No. 2699/08

Panel: Baker (Vice-Chair), Trudeau, Grande

Decision — March 9, 2009

Neutral Citation: 2009 ONWSIAT 566

Loss of earnings (review) (after seventy-two months) – Loss of earnings (calculation) (Canada Pension Plan).

CPP disability benefits were granted after final LOE review and after NEL and LOE redeterminations – In circumstances, LOE benefits should not be offset by amount of CPP benefits.

The worker suffered a compensable injury in 1999. She was granted a NEL award and partial LOE benefits. The final LOE review was in August 2005. In December 2005, the Board increased the NEL award to 24%. In February 2006, the Board granted full LOE benefits, based on the deterioration in the worker's condition, retroactive to November 2004. In June 2006, the worker was granted CPP disability benefits retroactive to July 2004. The Board then offset the LOE benefits by 50% of the CPP benefits. The worker appealed a decision of the Appeals Resolution Officer confirming the offset of the LOE benefits by the CPP benefits. The appeal was allowed.

Board *Operational Policy Manual*, Document No. 18-01-13, provides that, for CPP benefits granted prior to the final LOE review, the LOE benefits are offset by the CPP benefits from the date of the notification of entitlement to the CPP benefits. If a worker is granted retroactive CPP benefits, the retroactive benefits are not offset from any past or future WSIB benefits. If the date of notification to CPP benefits occurs after the final LOE review, the Board may offset the CPP benefits in exceptional circumstances. The exceptional circumstances are that, if the Board reviews LOE benefits after a significant deterioration, the CPP benefits are considered when reviewing LOE benefits. However, the policy also states that the date of notification of entitlement to CPP benefits is considered when reviewing LOE benefits.

In this case, there was a significant deterioration, a NEL redetermination and an LOE redetermination, but all of these events occurred before the date of notification of entitlement to CPP benefits. This case would have come within the exception but for the dates of the determinations and reviews. The CPP benefits were granted after the final LOE review and after the NEL and LOE redeterminations. The policy states regarding exceptional circumstances that CPP benefits are considered when reviewing LOE benefits and that the date of notification of entitlement to CPP benefits must be considered. In this case, there was no further review of LOE benefits.

The Panel concluded that in the unique circumstances of this case, the LOE benefits should not have been offset by the CPP benefits.

Perte de gains (réexamen) (après soixante-douze mois) – Perte de gains (calcul) (Régime de pensions du Canada).

La travailleuse avait obtenu des prestations du RPC après le dernier réexamen de ses prestations pour PG et après de nouvelles déterminations de son indemnité pour PNF et de ses prestations pour PG – Vu les circonstances, il ne fallait pas déduire les prestations du RPC des prestations pour PG.

La travailleuse avait subi une lésion indemnisable en 1999. Elle avait obtenu une indemnité pour perte non financière (PNF) et une indemnité pour perte de gains (PG) partielle. Le dernier réexamen des prestations pour PG avait eu lieu en août 2005. En décembre 2005, la Commission avait porté l'indemnité pour PNF de la travailleuse à

24 %. En février 2006, la Commission lui avait reconnu le droit à des prestations pour PG totale par suite de la détérioration de son état de santé, rétroactivement à novembre 2004. En juin 2006, la travailleuse a obtenu des prestations d'invalidité du Régime de pensions du Canada (RPC) rétroactivement à juillet 2004. La Commission a alors déduit 50 % des prestations du RPC de la travailleuse de ses prestations pour PG. La travailleuse a interjeté appel de la décision par laquelle le commissaire aux appels confirmait la déduction de ses prestations du RPC de ses prestations pour PG. Le Tribunal a accueilli l'appel.

Le document n^o 18-01-13 du *Manuel des politiques opérationnelles* de la Commission prévoit que, dans le cas où elles sont allouées avant le dernier réexamen des prestations pour PG, les prestations d'invalidité du RPC sont déduites des prestations pour PG à partir de la date de l'avis du droit à ces prestations du RPC. Si le travailleur obtient des prestations d'invalidité rétroactives du RPC, ces prestations ne sont déduites d'aucune prestation passée ou future de la Commission. Si la date de l'avis du droit à des prestations d'invalidité du RPC tombe après le dernier réexamen des prestations pour PG, la Commission peut déduire les prestations d'invalidité du RPC dans des circonstances exceptionnelles. Par « circonstances exceptionnelles », on entend que, si la Commission réexamine les prestations pour PG après une détérioration importante, les prestations du RPC sont prises en compte lors du réexamen. La politique indique toutefois aussi que la date de l'avis du droit à des prestations du RPC est prise en compte au moment du réexamen des prestations pour PG.

En l'espèce, il y avait eu une détérioration importante, une nouvelle détermination de l'indemnité pour PNF et une nouvelle détermination des prestations pour PG mais tous ces événements étaient survenus avant la date de l'avis du droit à des prestations du RPC. Ce cas aurait cadré avec l'exception n'eut été des dates des déterminations et des réexamens. Les prestations du RPC avaient été allouées après le dernier réexamen des prestations pour PG et après les nouvelles déterminations de l'indemnité pour PNF et des prestations pour PG. Au sujet des circonstances exceptionnelles, la politique stipule que les prestations du RPC sont prises en compte au moment du réexamen des prestations pour PG et que la date d'avis du droit à des prestations du RPC doit être prise en compte. En l'espèce, il n'y avait pas eu d'autres réexamens des prestations pour PG.

Le comité a conclu que les prestations du RPC ne devaient pas être déduites des prestations pour PG vu les circonstances exceptionnelles existant en l'espèce.

Tribunal Decisions Considered:

Decision No. 35/02 (December 4, 2002) [2002 ONWSIAT 2562] refd to
Decision No. 1306/02 (2004), 68 W.S.I.A.T.R. 89 refd to
Decision No. 1334/03 (January 28, 2004) [2004 ONWSIAT 223] refd to
Decision No. 1874/05 (2006), 77 W.S.I.A.T.R. (online) refd to
Decision No. 19/08 (March 31, 2008) [2008 ONWSIAT 855] consd
Decision No. 595/08 (2008), 86 W.S.I.A.T.R. (online) consd

Workplace Insurance Legislation Considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A
s. 43
s. 44
s. 126(4)

Board Directives and Guidelines Considered:

Operational Policy Manual
Document No. 18-01-13 (June 1, 2005) (since superseded)

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APPEAL by the worker from a decision of the Appeals Resolution Officer to offset loss of earnings benefits by

the amount of Canada Pension Plan disability benefits.

March 9, 2009. THE TRIBUNAL: —

BEFORE: A.G. Baker, Vice-Chair
M.P. Trudeau, Member Representative of Employers
A. Grande, Member Representatives of Workers

HEARING: December 17, 2008, at Toronto, Oral

DECISION(S) UNDER APPEAL: WSIB ARO decision dated June 13, 2007

APPEARANCES:

For the worker: Mr. A. Bomé, Lawyer

For the employer: Did not participate

REASONS

(i) Introduction

[1] The worker appeals the decision of Appeals Resolution Officer (ARO) N. Norvack, dated June 13, 2007. In that decision, it was concluded that the Canada Pension Plan (CPP) offset for the worker was correctly deducted from the loss of earnings (LOE) benefits paid.

(ii) Background

[2] There was no oral testimony in this case, only submissions from the worker's counsel on the application of Workplace Safety and Insurance Board policy and whether such application was illegal or improper given the background to this matter. As noted, the background was not largely in dispute as stated by the ARO as follows:

On August 25, 1999, [the worker] suffered a bilateral injury to her arms.

She is presently in receipt of a 24% Non-Economic Loss (NEL) award and full LOE benefits from November 15, 2004. Noting the worker received her CPP benefit backdated to 2004, the Adjudicator determined that half of the CPP award was granted for her work-related arm impairment and half for a non-work related condition. Therefore, half of the CPP benefit was offset against her full LOE benefit from November 2004.

In a letter of March 30, 2007, Mr. Bome [the worker's counsel] challenged the Workplace Safety and Insurance Board's (WSIB) legal authority to calculate such an offset.

AUTHORITY

As per the WSIB Operational Policy Manual (OPM)
Calculating CPP/QPP Offsets from FEL/LOE Benefits
Reviewing LOE Benefits

...

ANALYSIS

As indicated in the Adjudicator's letter of March 8, 2007, the worker completed her Labour Market Re-Entry plan on June 17, 2004 and was able to find employment. Although the worker was experiencing a wage loss due to reduced hours, the WSIB deemed the worker capable of performing full-time employment.

[The worker] was able to continue working on and off until November 15, 2004, when she stopped. It was not until

almost two years later that the WSIB determined the worker was in fact entitled to the payment of partial LOE benefits during her employment for the periods between June 17, 2004, and November 15, 2004, in which she was working and full LOE benefits for any period not worked. In addition, she was entitled to full LOE benefits thereafter, due to the recurrence she had suffered prevented her from being employed. The final LOE benefit rate was eventually locked-in at the final review date of August 2005 (six years post-accident).

In summary, [the worker] has been paid the following for the past several years:

100% LOE from 14Aug2001 to 17Jun2004 (full rate, no CPP offset)

Partial LOE from 17Jun2004 to 24June2004

100% LOE from 24Jun2004 to 21Oct2004 (full rate, no CPP offset)

Partial LOE 21Oct2004 to 14Nov2004

100% LOE from 15Nov2004 and continuing with CPP offset

As per the Service Canada letter of June 7, 2006, [the worker] was granted CPP disability benefits, which were retroactively paid back to July 2004.

In conjunction with section 43(5) of the Act, and as per OPM Document 18-01-13, "Calculating CPP/QPP Offsets from FEL/LOE Benefits",

"When calculating LOE benefits, the amount of the net average earnings the worker is able to earn in suitable employment or business after the injury must reflect any disability payments paid to the worker under the Canada Pension Plan (CPP) or the Quebec Pension Plan (QPP) in respect of the injury."

Therefore, noting this section, when the worker was retroactively paid LOE benefits, the Adjudicator determined that since half of the CPP benefit was for the work-related impairment, only half of the CPP amount would be offset against the full LOE benefit. Also, since the worker was being paid retroactively for a period prior to the six-year (or 72 month) lock-in date, the Adjudicator took into account the CPP benefits which were paid retroactively in the calculation of the LOE benefit rate for the period.

In effect, the Adjudicator paid the claim as though all of the information, including confirmation of CPP, was present at the time of the reinstatement of LOE benefits. This resulted in the worker receiving what she should have received as if there were no reversals in adjudicative decisions. In effect, she was paid as though the correct benefits had been determined all along.

[3] As noted, the ARO agreed and found that the adjustment predated the lock-in date, as such the worker was paid exactly the benefits payable that she would have been paid if all information was originally available. The ARO did not accept the argument that the WSIB paid the LOE benefits, with a CPP offset, in a manner contrary to the intent of the Act and/or as further developed in the WSIB policy. Again, the worker has appealed that finding and the appeal is now before the Tribunal.

(iii) Issues

[4] The issue is whether 50% of the worker's CPP benefits should be offset against her 100% LOE benefits, which offset was submitted to be illegal by the worker's representative.

(iv) Decision

[5] In this case, the date of injury was August 25, 1999, therefore, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, (WSIA) applies.

[6] In this case, the worker suffered a bilateral arm injury on August 25, 1999, and the Board initially did not award full LOE benefits. In December 2005, the Board increased the worker's NEL to 24%. The worker asked for a redetermination of the LOE benefits so that she would receive full LOE benefits. In February 2006, a Board Adjudicator determined that the worker was competitively unemployable due to a permanent worsening of her compensable disability. The worker was awarded 100% LOE benefits with arrears to November 2004. The final LOE benefit date was August 2005. In June 2006, the worker was awarded CPP disability benefits retroactive to July 2004. The Board then offset the worker's LOE benefits by 50% CPP from November 2004 as this was the portion of the CPP due to the compensable condition.

[7] The Panel also reviewed the submissions from the worker's representative. As we understand it, the worker is only appealing the CPP offset and not her LOE awards, and she was awarded CPP after her final LOE award. Because of this, it was argued that section 43 of the WSIA does not apply, and any changes to her LOE benefits can only be made in the limited circumstances described in section 44. Since those circumstances do not exist, her LOE benefits cannot be changed to offset CPP. It was also submitted that there are Tribunal cases which allowed final FEL awards to be offset by later CPP awards on the basis that the CPP award sheds light on the circumstances at the time of the final FEL award. It was submitted these do not apply for the same reasons. Further, it was submitted that the policy concerning CPP offsets is inconsistent with or not authorized by the Act and there should be a section 126(4) review.

[8] In this case, the Board indicated that *Operational Policy Manual* Document No. 18-01-13 is applicable, entitled "Calculating CPP/QPP Offsets from FEL/LOE benefits", and published June 1, 2005. The policy says that it applies "to all LOE benefits payable for entitlement periods on or after January 1, 2004, for all accidents on or after January 1, 1998". Under "When to offset CPP disability benefits" on page 2, the policy states:

If the worker is granted retroactive CPP disability benefits (i.e. benefits payable prior to the date of notification of entitlement by the federal government), the retroactive CPP disability benefits are not offset from any past or future WSIB benefits.

If the date of notification of entitlement to CPP disability benefits occurs after the final review, the WSIB may only offset the CPP disability benefits from FEL/LOE benefits in exceptional cases.

[9] The exceptional circumstances are described in the policy as follows:

Exception

The WSIB may review the FEL/LOE benefits after the final review if the worker suffers a significant deterioration in his/her work related condition, which is confirmed by a NEL redetermination occurring on or after November 26, 2002, see 18-03-03, Reviewing LOE Benefits or 18-04-14, Reviewing FEL Benefits. In these cases, the receipt of CPP disability benefits is considered when reviewing the FEL/LOE benefits.

The date of notification of entitlement to CPP disability benefits must be considered when offsetting these benefits from FEL/LOE benefits reviewed as the result of a significant deterioration.

[10] The policy states on page 7:

Appeals or Workplace Safety and Insurance Appeals Tribunal (WSIAT) decisions

If FEL/LOE benefits are granted as a result of an Appeals Resolution Office or WSIAT decision, CPP disability benefits may be offset.

...

When LOE benefits are granted

- CPP disability benefits are offset from the date of notification of entitlement to CPP disability benefits, as long as the notification occurred prior to the final review....

In all cases, the retroactive portion of the CPP disability benefits, if any, is not offset. This means that the worker's benefits are the same as if they had been granted with the facts available at the time of the original decision.

[11] In this case, notification of entitlement to CPP occurred after the final review, and retroactive CPP benefits were paid. The policy states that retroactive benefits are not offset. It also states that if the notification was received after the final review, the Board may only offset CPP in exceptional cases. The example of exceptional circumstances in the policy is when the worker suffers a significant deterioration confirmed by a NEL redetermination. The policy states that the date of notification must be considered when offsetting in these circumstances.

[12] In the case at hand, there was a deterioration, a NEL redetermination, and a LOE redetermination. However, these events occurred before the date of notification of the entitlement to CPP, and according to the previously noted submission, CPP should not be considered.

[13] The policy also states that when FEL/LOE benefits are granted as a result of an ARO decision, as long as the notification occurred prior to the final review, CPP disability benefits are offset from the date of notification of entitlement to CPP. The ARO seems to have held that the Adjudicator's reconsideration is equivalent to an ARO decision. Even if this is correct, the policy still says that the notification must have occurred prior to the final review. As this did not occur here, it is evident that the CPP could not be offset under the policy on this basis.

[14] As seen above, the policy indicates that CPP benefits may be considered after the final LOE or FEL review when there is a deterioration and NEL redetermination. There are two fairly recent Tribunal decisions which reflect this view.

[15] In *Decision No. 19/08* (March 31, 2008) the Board awarded a final FEL in 1998 and offset the worker's CPP. In 1999, the worker's CPP was terminated. In 2003 the Board redetermined the worker's NEL award due to a significant deterioration in November 2001. The Board adjusted the FEL award effective November 2001 to reflect the deterioration of his condition and the fact that he was no longer receiving CPP. The worker appealed the Board's refusal to remove the CPP offset from his FEL from 1999 until 2001. The Tribunal denied the appeal. It was only as of November 26, 2002, that there were changes to section 44 of the WSIA that permitted the adjustment of FEL awards due to significant deterioration that resulted in a redetermination of a NEL award. The Board correctly applied

section 44(2.1) to adjust the FEL, and remove the CPP offset, from the date of worsening of the condition in 2001. Prior to the introduction of the changes to the WSIA in November 2002, the legislation permitted reviews of final FEL reviews in limited circumstances only, which did not exist to permit a review from 1999 to 2001.

[16] In *Decision No. 595/08* (2008), 86 W.S.I.A.T.R. (online) the worker was injured in 1996, and received a partial FEL at the final FEL review effective January 1, 2004. The worker had an organic neck and back condition. The Board also accepted that the worker had a permanent psychological condition which had not reached maximum medical recovery (MMR). The Board found the non-organic impairment did not prevent the worker from working in his SEB. The worker was granted CPP in July 2004. The worker was assessed a 50% NEL for organic disability in June 2004 and later underwent further back surgery. In May 2005, the Board decided the psychological condition had reached MMR. He was assessed a 30% NEL for psychotraumatic disability, which resulted in a 65% NEL when combined with the 50% organic NEL. The Board reconsidered his FEL and awarded a full FEL as of April 1, 2006, with a CPP offset. The worker appealed, claiming a full FEL prior to this date and that there should not be a CPP offset. The decision notes the amendment to section 44 the WSIA introduced in November 2002 allowing reviews after the final FEL review when there is a significant deterioration leading to a NEL redetermination. The Vice-Chair quoted OPM Document No. 18-01-13 which states that when a worker is notified of entitlement to CPP after the final review, the WSIB may offset CPP in exceptional circumstances only, which consist of a FEL review following a significant deterioration resulting in a NEL redetermination. The Vice-Chair found that the worker's overall work-related condition deteriorated after the final FEL review, resulting in a combination of organic and non-organic NEL benefits. The facts of the case fell within the policy. The Vice-Chair rejected the worker's argument that the FEL was reviewed due to a new NEL assessment due to psychotraumatic disability, rather than because of deterioration in the organic NEL. The decision found the dates selected for the FEL award and CPP offset were correct and denied the appeal.

[17] The worker has referred to *Decisions No. 35/02* (December 4, 2002), *1334/03* (January 28, 2005), *1874/05* (2006), 77 W.S.I.A.T.R. (online), and *1306/02* (2004), 68 W.S.I.A.T.R. 89, FEL decisions which refer to the "sheds light on" analysis. This developed in FEL cases concerning what evidence could be considered at the time of FEL reviews. Tribunal cases have generally held that appeals are to be based upon circumstances as they exist at the time of the FEL determination, but subsequently available evidence which sheds light on the circumstances at the time of the determination can be considered. This is different from evidence of changes after the time of the determination, which cannot be considered.

[18] The cases which the worker refers to are FEL decisions. The worker seems to argue that these cases are primarily distinguishable because they involve appeals of final FEL awards, and the worker's case does not. As the worker indicates, *Decision No. 1306/02* does not involve an appeal of a final FEL. Nor does *Decision No. 1874/05*. While the statutory language relating to FEL reviews is similar to the language relating to LOE reviews,

these cases do not discuss OPM Document No. 18-01-13 and its treatment of CPP. As such, the Panel did not consider them directly relevant to this matter.

[19] It is evident that this case presents facts that are unique. The Panel found that the application of Document No. 18-01-13, which references its legislative authority in part as flowing from section 43 of the WSIA, was correct. Further, upon review of the policy language and case law discussed, it was evident that the circumstances of the case may well have fallen within the exception but for the dates of the determinations and reviews. In this case, it was evident that the worker's CPP award granted in June of 2006, occurred after her final LOE review and after the further deterioration, NEL redetermination, and LOE redetermination, which were all completed by August 2005.

[20] As discussed above, the policy states that if the notification to entitlement to CPP disability benefits occurs after the final review, the WSIB may only offset the CPP from the LOE in exceptional cases. The exception is "if the worker suffers a significant deterioration in his/her work-related condition, which is confirmed by a NEL redetermination occurring on or after November 26, 2002." The policy states in these cases the CPP is considered "when reviewing" the LOE, and that the date of notification of entitlement to CPP must be considered. We are not aware that the wording of this policy has been considered in other cases, and the wording is arguably unclear. However, in this case, the worker's representative made persuasive submissions that the CPP can only be considered at the time of the review of the LOE. This occurred here before the CPP notification, and because 100% LOE was awarded, no further review to increase the LOE was possible.

[21] As such, the final review of the worker's LOE benefits occurred before the date of notification of her entitlement to CPP, and accordingly the CPP benefits should not have been offset from the worker's LOE benefits. Therefore, the worker's appeal is allowed and CPP benefits are not to be offset. The Board is to reimburse the worker for the benefits that have been offset to date.

DISPOSITION

[22] The worker's appeal is allowed.

[23] The worker's CPP benefits are not to be offset from her LOE benefits. The Board will calculate the amount of benefits offset and reimburse the worker for the offsetting of CPP benefits to date, subject to the usual rights of appeal.

Appeal allowed.

Decision No. 495/06R2

Vice-Chair: Nairn

Decision — January 26, 2009

Neutral Citation: 2009 ONWSIAT 212

Reconsideration – Loss of earnings (level of benefits) (hours of work).

Worker should not be expected to increase number of hours worked post-injury from hours worked pre-injury in order to mitigate wage loss.

In *Decision No. 495/06*, the hearing panel dismissed the worker's appeal, finding that the worker was entitled to LOE benefits using the worker's pre-injury earnings based on a 36-hour work week and post-injury earnings in the SEB based on a 40-hour work week. The worker applied for reconsideration of *Decision No. 495/06*.

After receiving *Decision No. 495/06*, the worker contacted the Board concerning what the worker referred to as inconsistent decisions at the operating level regarding post-accident SEB hours. A Board policy analyst replied that a SEB should meet, as closely as possible, the number of hours worked prior to the injury and that a worker should not be expected to increase the number of hours worked post-injury in the identified SEB in order to mitigate a wage loss.

In *Decision No. 495/06R*, the Vice-Chair decided that, in the circumstances, it was appropriate to reopen the original decision in order to have the benefit of the guidance of Board practice.

In this decision, the Vice-Chair noted that a 36-hour work week was not unusual in the worker's industry. Given that one of the goals of the legislation is to attempt to restore injured workers to their pre-accident position, and considering the Board practice, the Vice-Chair concluded that the worker's LOE benefits should be based on deemed post-injury earnings using a 36-hour week.

Réexamen – Perte de gains (niveau des prestations) (heures de travail).

Un travailleur n'est pas censé faire plus d'heures de travail après la lésion pour atténuer sa perte de gains.

Dans la *décision n^o 495/06*, le comité d'audience a rejeté l'appel du travailleur en concluant que ce dernier avait droit à des prestations pour perte de gains (PG) calculées en fonction de ses gains d'avant la lésion à raison de 36 heures par semaine et de gains d'après la lésion dans un emploi ou entreprise approprié (EEA) à raison de 40 heures par semaine. Le travailleur a demandé un réexamen de la *décision n^o 495/06*.

Après avoir reçu la *décision n^o 495/06*, le travailleur a communiqué avec la Commission au sujet de ce qu'il a qualifié de décisions administratives incohérentes au sujet de ses heures de travail dans l'EEA d'après l'accident. Un analyste des politiques de la Commission lui a répondu que l'EEA doit correspondre aussi étroitement que possible à l'emploi d'avant l'accident en ce qui concerne le nombre d'heures de travail et qu'un travailleur n'est pas censé faire plus d'heures de travail après la lésion pour atténuer sa perte de gains.

Dans la *décision n^o 495/06R*, le vice-président a conclu qu'il était approprié de rouvrir la décision initiale afin de tenir compte de cet avis au sujet de la pratique de la Commission.

Dans cette décision, le vice-président a noté qu'une semaine de travail de 36 heures était chose courante dans

l'industrie du travailleur. Comme un des objectifs de la législation est de permettre aux travailleurs blessés de rétablir leur position d'avant l'accident et vu la pratique de la Commission, le vice-président a conclu que les prestations pour PG du travailleur devaient être calculées à partir de gains assimilés d'après la lésion pour une semaine de travail de 36 heures.

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 18-03-02 (October 12, 2004)

Document No. 19-03-03 (July 3, 2007)

Cross-References:

Decision No. 495/06I (April 25, 2006) [2006 ONWSIAT 906]

Decision No. 495/06 (November 26, 2006) [2006 ONWSIAT 2703]

Decision No. 495/06R (2008), 85 W.S.I.A.T.R. (online)

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REHEARING of worker's appeal pursuant to *Decision No. 495/06R*.

January 26, 2009. THE TRIBUNAL: —

BEFORE: R. Nairn, Vice-Chair

HEARING: October 1, 2008, at Sudbury, Oral

DECISION(S) UNDER APPEAL: WSIB ARO decision dated April 22, 2004

APPEARANCES:

For the worker: Ms. S. Hart, Office of the Worker Adviser

For the employer: Did not participate

REASONS

(i) Introduction

[1] The following background information is provided in order to place this matter into its proper context:

- The worker permanently injured his back and right leg on May 4, 2000, while employed as a commercial painter earning \$15.50 an hour. The WSIB subsequently provided the worker with various periods of loss of earnings (LOE) benefits and a 17% non-economic loss (NEL) award.
- The Board also provided the worker with labour market re-entry (LMR) assistance. As a result of an LMR assessment, it was determined that the worker's suitable employment or business (SEB) objective would be that of an information clerk or a service adviser in an automotive setting.

- In May 2002, the worker's LOE benefits were adjusted to reflect 85% of the difference between his pre-accident wage of \$15.50 an hour and the amount he was capable of earning as an information clerk, calculated to be \$8.96 an hour. As a result, the Board determined that the worker's weekly LOE benefits would be \$138.98. The worker objected to the quantum of his benefits and the matter was referred to an Appeals Resolution Officer (ARO). In a decision dated April 22, 2004, the ARO confirmed that the worker's LOE benefits had been correctly set at \$138.78 and noted:

The use of \$6.54 an hour in the LMR [plan] document to calculate the post LMR [plan] LOE rate is in my opinion an error. It is unclear why the \$6.54 figure would be used and I note that this amount would be below even the Provincial minimum wage. It appears that [the worker] may have been mislead [sic] at the time he signed the LMR [plan]. He states in his letter he was told at that his weekly rate would be around \$240.00 a week. A review of the LMR [plan] as outlined above would appear to support this statement. It is truly unfortunate that [the worker] was mislead [sic] at the time and I apologize to [the worker] for this administrative error. However the fact remains that [the worker] has been retrained and does have an earnings capacity post-training of \$8.96 an hour. The law requires that [the worker] be paid the difference between his pre-accident wage and his post-accident, post LMR [plan] earnings capacity. I am satisfied that \$8.96 an hour is reflective of the entry wage and is what [the worker] would likely earn within the SEB if employed.

While it is truly unfortunate that he was inadvertently mislead [sic] and believed his weekly benefit would be higher, the LOE calculation must be based on the wage projection of \$8.96 an hour as supported by the Ontario Wage Guide (1999) and not on the unsupported wage of \$6.54 an hour.

- The worker appealed this decision to the Tribunal. At the hearing, the worker's representative advised that there was no objection to the deemed wage of \$8.96 per hour. Instead, Ms. Melville submitted that the issue under appeal was "whether the calculation of the worker's loss of earnings was incorrect".
- The Panel which considered the worker's appeal noted a letter from a Claims Adjudicator dated March 11, 2003, which attempted to explain the calculations surrounding the worker's ongoing benefits. The Claims Adjudicator had indicated:

...I explained that in Bill 99 claims, it is based on 85 percent of the Net Average Earnings (NAE).

I then explained how the NAE was determined. The NAE is the amount after - CPP, Tax and UIC is deducted from the gross.

In this case, [the worker's] gross weekly (long-term) earnings were \$580.32 per week (or \$15.50 per hour). From this we deducted \$20.00 CPP; \$94.32 Tax and \$13.92 UIC which would equal NAE of \$452.08. This is then multiplied by 85 percent to arrive at the WSIB weekly payable rate of \$384.27 – effective July 31, 2000. This would be indexed accordingly.

The WSIB payable rate commencing March 2002 (when [the worker] completed the LMR program) was calculated using the *projected* earnings of the SEB (identified on the LMR plan, which [the worker] signed). The SEB rate was \$8.96 per hour. The same method is used for determining the NAE of the SEB rate (i.e. less CPP, Tax and EI). These are then compared to the long-term rate and *the difference is paid*.

...

The calculation of the ongoing LOE rate is therefore correct and remains at \$138.78.

- After considering the material before them, the Panel issued *Decision No. 495/06I* (April 25, 2006) in which it concluded [at paras. 7-10]:

In our view, the Claims Adjudicator (CA) in a letter dated March 11, 2003, provides part of the explanation of the worker's LOE rate. We note, however, the following: The CPP, tax and EI deduction figures used by the CA do not correspond with the figures from the worker's pay stubs which included the following deductions: \$20.01 for CPP, \$86.20 for tax and \$13.93 for EI for a total amount of \$120.14. The CA has accepted that the worker's post-injury net average earnings (NAE) is the worker's SEB rate of \$8.96. The CA did not multiply that figure by 36 hours. It is unclear what the rationale for doing so is. It is not clear whether the SEB rate of \$8.96 per hour is the gross post-injury deemed earnings or the NAE. In our view of the foregoing, we have decided to seek clarification from the Board about the calculation of the worker's LOE benefit, prior to reaching a conclusion on the issue.

We request Tribunal Counsel Office (TCO) obtain the following information from the Board:

1. the actual calculation of the worker's LOE benefit; and
2. an explanation and/or clarification as to which figures are used and the rationale for any deductions made, with specific reference to WSIA provisions;

We request TCO forward the Board's reply to the worker for his information and to the Panel for further instructions.

The worker's appeal regarding his LOE benefit is hereby adjourned, pending receipt of the information requested by the Board.

- As requested by the Panel, Ms. Suzanne Hewitt (a Board Legal Policy Analyst) provided a letter dated May 12, 2006, in which she advised:

The date of accident in the above claim is May 4, 2000. The pre-injury earnings have been established as \$ 15.50 per hour, for 36 hours per week, plus an addition 22.32, for a total of \$580.32 gross per week.

Section 55(1) of the WSI Act directs that the Board shall determine the amount of the net average earnings (NAE) by deducting:

- (a) the probable income tax payable
- (b) the probable Canada Pension Plan (CPP) premiums
- (c) the probable employment insurance (EI) premiums

Section 55(3) states:

"On January 1 every year, the Board shall establish a schedule setting out a table of net average earnings determined in accordance with this section. The schedule is conclusive and final."

The Claims Adjudicator's letter of March 11, 2003 provided the breakdown of the calculation of the benefits as of July 31, 2000, when the worker began receiving 100% LOE benefits. The amount of the net average earnings (NAE) was determined by subtracting the following probable amounts:

94.00 (for income tax)

20.00 (for CPP)

13.92 (for EI)

This issue in dispute appears to be the amount of the benefits as of March 1, 2002, when the amount of the LOE benefits were reduced, taking into account the potential post-injury earnings.

First the weekly gross earnings of \$580.32 were indexed as follows: January 1, 2001 $580.32 + 0.4\% = 582.64$ January 1, 2002 no change as the indexing factor was zero.

From 582.64 the following probable amounts were subtracted, to determine the NAE of 457.62:

87.95 (for income tax)

24.24 (for CPP)

12.83 (for EI)

As noted in the WSIAT Decision the post-injury earnings have been determined to be \$8.96 per hour for 40 hours or 358.40 per week, and the NAE amount 294.35.

Section 43(2) directs that the amount of LOE benefits is 85% of the difference between the NAE before the injury and the NAE from suitable employment or business after the injury.

As noted in the WSIAT Decision, policy 18-03-02 provides the formula:

$$\begin{aligned}\text{LOE benefit} &= 85\% \times (\text{pre-injury NAE} - \text{post-injury NAE}) \\ &= 85\% \times (457.62 - 294.35) \\ &= 138.78 \text{ per week}\end{aligned}$$

Every January there is the possibility of indexing and changes to the amounts of the probable deductions. As a result, as

of January 1, 2003, the LOE benefit increased to 140.41 per week.

As of August 22, 2003 the amount of the post-injury earnings was changed to \$318.00, The LOE benefit was then 165.04 per week. As of January 1, 2004 the LOE benefit was 165.27 per week. As of January 1, 2005 the LOE benefit was 165.94 per week, and as of January 1, 2006 the LOE benefit was 167.17.

- The worker's representative was provided with a copy of Ms. Hewitt's letter and given a chance to make further submissions. In a letter dated July 4, 2006, Ms. Melville submitted that the Board's letter confirmed the need for a recalculation of the worker's benefits and advised:

This clarification letter confirms that the WSIB calculated the pre-injury earnings based on a 36 hour work week, while the post-injury SEB earnings were calculated based on a 40 hour work week. Nevertheless, it does not appear that the WSIB provided any rationale to the Panel to explain why the pre-injury earnings were based on a 36 hour work week, and the post-injury SEB earnings were based on a 40 hour work week.

We submit that the WSIB should have utilized a work week in both the pre-injury NAE and the post-injury SEB (NAE). To do other wise, simply leads to an absurd result, which, in effect, negatively affects the true level of LOE benefits payable by the WSIB to [the worker].

Conclusion

On the basis of the foregoing, we ask that this appeal be allowed. Further, we are requesting that the Panel direct the WSIB to recalculate the post-injury SEB earnings (NAE) based on a 36 hour work week.

- The Panel considered Ms. Melville's submissions and then issued *Decision No. 495/06* (November 20, 2006). The Panel denied the worker's appeal and concluded [at paras. 4-7]:

With respect, we find that the worker's LOE benefits were appropriately calculated. While the Board's initial explanations to the worker regarding his LOE benefit were somewhat confusing, we find that ultimately, it provided the worker an appropriate benefit that was based on the most accurate figures available.

Ms. Melville submits that the worker's post-injury SEB earnings be based on a 36-hour workweek to reflect the worker's pre-accident workweek, otherwise it would be an absurd result. We, however, disagree with Ms. Melville's submission.

The Board endeavours to re-train workers in suitable employment or business in order to maximize the worker's earning potential and thus minimize the Board's liability. A SEB is determined against the worker's physical restrictions and vocational aptitudes. As such, unless otherwise noted, the SEB is based on a full workweek or 40 hours per week. Moreover, it does not seem reasonable to limit the worker's post-injury SEB earnings to pre-injury hours because the two figures are based on entirely different circumstances. If the Board finds a SEB for a worker, unless specifically mentioned, the implication is that the worker is expected to work a full workweek, since the SEB is assumed to be within the worker's physical restrictions and vocational aptitudes.

At the hearing, the worker confirmed that the issue in dispute was the calculation of his LOE benefit and not the suitability of his SEB or whether the worker was capable of working part-time hours in his SEB.

- Subsequently, the worker's former representative requested that the Tribunal reconsider *Decision No. 495/06*. In support of her position that the Board and Tribunal had erred in determining the quantum of the worker's benefits, the former representative provided documentation from Statistics Canada and the OPSEU Collective Agreement as well as a February 27, 2007, letter from Ms. Karen Lynch, a Policy Analyst with the Board's Benefits & Revenue Policy Branch which indicated in part:

It is the position of the Benefits & Revenue Branch that a SEB should not only meet any restrictions caused by the work injury, but should also meet, as closely as possible, the number of hours the worker worked prior to the injury. The worker should not be expected to increase the number of hours worked post-injury (or in the case of a part-time worker, obtain full-time employment post-injury) in the identified SEB in order to mitigate a wage loss.

- After considering the material before me, I issued *Decision No. 495/06R* (2008), 85 W.S.I.A.T.R. (online), in which I granted the worker's request for a reconsideration and concluded [at paras. 21-25]:

That being said however, I note that in its decisions, the Tribunal usually considers Board "practice" when it provides guidance in addressing the issues before it. It is apparent that the practice explained in the letter from Ms. Lynch, if applied, would likely have led to a substantially different result in this case.

A similar conclusion was reached by the Vice-Chair in *Decision No. 605/04R* (2005), 73 W.S.I.A.T.R. 94. In *Decision*

No. 605/04 (July 16, 2004), the Vice-Chair was faced with a worker who had been granted a 0% FEL award. The worker wished to dispute that quantum after the 60 month period. The Vice-Chair concluded that the legislation provided no legal basis upon which a FEL review could be conducted after 60 months in circumstances where the worker was awarded a 0% FEL. The worker's representative had taken the position that the *Government Efficiency Act, 2002* S.O. 2002, c. 18, did not apply to 0% FEL awards and therefore did not bar or prevent the subsequent review of the worker's entitlement to FEL benefits.

In support of the request for a reconsideration of *Decision No. 605/04*, the worker's representative provided a memorandum from the Director of the Board's Benefits Policy Branch which "confirmed the position of the Policy Branch that a zero FEL award is tantamount to a decision that the worker is not entitled to a FEL benefit". The representative argued therefore, that the Tribunal had jurisdiction to consider the worker's entitlement to FEL benefits. The Vice-Chair in *Decision No. 605/04R* granted the request for reconsideration after reviewing Board policy, relevant legislation and "the position of the Director, Benefits Policy Branch of the Workplace Safety and Insurance Board".

In the case before me, the evidence from Ms. Lynch about Board practice was "that the worker should not be expected to increase the number of hours worked post-injury in the identified SEB in order to mitigate a wage loss".

While it is apparent that the worker's representative did not obtain this information about the Board's practice in a timely fashion and that it likely could have been made available at the time of the original hearing, I, like the Vice-Chair in *Decision No. 605/04R*, am satisfied that it would be appropriate to grant the reconsideration request and re-open the merits of this appeal, in order that I might have the benefit of the guidance of Board practice.

- In light of the conclusions in *Decision No. 495/06R*, a hearing was convened to consider the merits of the worker's appeal.

(ii) Issue on Appeal

[2] The issue on appeal in this case involves the worker's objection to the manner in which his post-May 2002 LOE benefits were calculated. More specifically, the worker maintains that those benefits ought to have been calculated using a 36-hour, rather than a 40-hour work week.

(iii) The Worker's Testimony

[3] In his testimony, the worker confirmed that at the time of his accident, he was employed as a commercial painter. He was employed full-time and worked a 36-hour week which consisted of eight hours on Monday to Thursday and four hours on Friday. This was not an unusual arrangement for the painting industry.

(iv) Analysis

[4] As noted earlier, in May 2002, the worker's LOE benefits were adjusted to reflect 85% of the difference between his pre-accident wage of \$15.50 an hour and the amount he was deemed capable of earning as an information clerk, calculated at \$8.96 an hour. As a result of this recalculation, the Board determined that the worker's weekly LOE benefits amounted to \$138.98.

[5] Board *Operational Policy Manual* (OPM) Document No. 18-03-02 entitled "Payment of LOE Benefits" provides in part:

Payment of partial LOE

Post-injury employment earnings

If a worker has returned to work or is participating in ESRTW activities, the WSIB calculates the LOE benefit by taking 85% of the difference between the worker's pre-injury NAE and post-injury NAE.

$85\% \times (\text{pre-injury NAE} - \text{post-injury NAE}) = \text{LOE benefit.}$

Determining Post-injury deemed earnings

For the purposes of LOE benefits, earnings may be deemed when it is determined that a worker is not entitled to an LMR plan, or a worker completes an LMR plan.

To deem earnings, the WSIB identifies a suitable employment or business (SEB) for the worker using information gathered in an LMR assessment and the National Occupational Classification (NOC). The deemed earnings for the

identified SEB are determined using current wage guide and labour market information. The LOE benefit is based on 85% of the difference between the worker's pre-injury NAE and the deemed post-injury NAE.

If the worker obtains a job with higher earnings than were identified for the SEB, the WSIB uses the actual employment earnings to calculate the partial LOE benefit.

[6] As the above-noted policy indicates, the worker's post-injury LOE benefits are based upon the difference between what he was earning before his accident and what he was deemed capable of earning after his accident.

[7] In a letter dated May 10, 2006, Ms. Suzanne Hewitt, a Legal Policy Analyst with the Board's Legal Services Division, confirmed that the worker's pre-injury earnings were established as "\$15.50 per hour" *for 36 hours per week*, plus an additional 22.32, for a total of \$580.32 gross per week". Similarly, Ms. Hewitt confirmed that the worker's post-injury earnings "had been determined to be \$8.96 per hour for 40 hours or 358.40 per week, and the NAE amount 294.35". While there appears to be no dispute that the worker was employed on a full-time basis, there is no explanation in Ms. Hewitt's letter as to why the worker's post-injury benefits were calculated using 40 hours a week rather than 36 hours a week. Clearly, by using a post-injury work week of 40 hours, his deemed post-injury earnings are increased, thereby reducing the LOE benefits payable.

[8] Unfortunately, both the legislation and Board policy are silent on the question of how one determines the number of hours of work to be used for deemed earnings. As noted earlier, after the release of *Decision No. 495/06*, the worker representative contacted Mr. Paul Gilkinson, then the Acting Vice-President of the WSIB Specialized Claim Services, to obtain some further clarification. Mr. Gilkinson referred the inquiry to the Benefits & Revenue Policy Branch. In her letter of February 27, 2007, Ms. Lynch replied:

This issue is not specifically addressed in current policy. However, the issue of determining hours of work for the SEB is being addressed as part of a comprehensive review of FEL/LOE benefit policies that is currently under way. The overall intent of the policy review is to ensure consistency of approach in determining how benefits are to be paid.

It is the position of the Benefits & Revenue Policy Branch that a SEB should not only meet any restrictions caused by the work injury, but should also meet, as closely as possible, the number of hours the worker worked prior to the injury. The worker should not be expected to increase the number of hours worked post-injury (or in the case of a part-time worker, obtain full-time employment post-injury) in the identified SEB in order to mitigate a wage loss.

[9] As Ms. Lynch indicated, this particular issue was part of an ongoing policy review and on July 3, 2007, OPM Document No. 19-03-03 entitled "Determining Suitable Employment or Business and Earnings" was published which provided in part:

Determining hours of work for the SEB

A SEB should not only meet any restrictions that are caused by the injury but should also meet, as closely as possible, the number of hours the worker worked prior to the injury.

[10] As noted earlier, no explanation has ever been provided as to why the Board selected a 40-hour work week for calculating the worker's deemed post-injury earnings. As Ms. Lynch noted (and current policy mandates), the Board's practice at the time was that the hours deemed suitable for a SEB should reflect, as closely as possible, the number of hours the worker worked prior to the injury. As Ms. Lynch noted, a worker would not be expected to increase his or her number of hours worked post-injury in order to avoid a possible wage loss.

[11] In this case, the evidence (including the worker's testimony) confirms that he was employed on a full-time basis, prior to his accident, working 36 hours a week. The Board appears to have decided that a "full-time" job consists of 40 hours a week. While the reason for insisting on a 40-hour work week is not clear, I note Ms. Hart's submissions that workers employed less than 40 hours a week may still be considered "full-time". In that regard, Ms. Hart referred to a 2007 Statistics Canada report which noted that "a person is considered to be full-time if his/her usual hours at the main job are 30 or more hours per week". Similarly, Ms. Hart referred to Article UN2 of the current OPSEU Collective Agreement which referred to the "normal hours of work" for certain employees being 36.25 per week.

[12] In this case, prior to his accident, the worker was employed on a full-time basis, working 36 hours a week. These hours were not unusual for his industry. Given that one of the goals of the legislation is to attempt to

restore an injured worker, as closely as possible, to his or her pre-accident position, I am satisfied that in calculating the worker's post-injury LOE earnings, the Board ought to have used a 36-hour, rather than a 40--hour, work week. In my view, the worker should not have had to work an additional four hours a week (or 10% of his work week) in order to avoid a wage loss.

DISPOSITION

[13] The worker's appeal is allowed.

[14] The worker's post-May 2002 LOE benefits will be calculated on the basis of a 36-hour work week.

Appeal allowed.



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Workplace Safety and Insurance Appeals Tribunal

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Decision No. 884/08

Vice-Chair: Ryan

Decision — December 24, 2008

Neutral Citation: 2008 ONWSIAT 3375

Loss of earnings (retirement).

Retired worker with no intention of returning to work force was not entitled to LOE benefits.

The worker was a firefighter from 1959 until his retirement at age 60 in 1990. In 2001, at age 71, he was diagnosed with bladder cancer. The Board allowed entitlement and granted a NEL award. The Board also granted LOE benefits from September 2001 to November 2002, while the worker was under active treatment. The employer appealed a decision of the Appeals Resolution Officer granting LOE benefits. The appeal was allowed.

Under s. 43(1) of the *Workplace Safety and Insurance Act, 1997*, a worker who has a loss of earnings as a result of an injury is entitled to payments. In this case, the worker had retired with no intention of returning to the work force. Accordingly, he did not have a loss of earnings as a result of the injury. Section 53 sets out a method for calculating the amount of a worker's average earnings. However, s. 53 does not apply when there is no loss of earnings.

Perte de gains (retraite).

Un travailleur retraité qui n'avait pas l'intention de retourner sur le marché du travail n'avait pas droit à des prestations pour PG.

Le travailleur avait été pompier de 1959 à 1990, quand il a pris sa retraite à l'âge de 60 ans. Il avait reçu un diagnostic de cancer de la vessie en 2001, à l'âge de 71 ans. La Commission lui avait reconnu le droit à une indemnité pour perte non financière (PNF) et à des prestations pour perte de gains (PG) pour la période de septembre 2001 à novembre 2002, pendant qu'il était en traitement. L'employeur a interjeté appel de la décision par laquelle le commissaire aux appels reconnaissait le droit à des prestations pour PG. Le Tribunal a accueilli l'appel.

Aux termes du paragraphe 43 (1) de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail*, le travailleur qui subit une perte de gains par suite de la lésion a droit à des versements. En l'espèce, le travailleur avait pris sa retraite sans avoir l'intention de retourner sur le marché du travail. Il n'avait donc pas droit à des prestations pour PG. L'article 53 présente une méthode de calcul des gains moyens; cependant, cet article ne s'applique pas en l'absence de perte de gains.

Tribunal Decisions Considered:

Decision No. 1581/06I (January 12, 2007) [2007 ONWSIAT 94] refd to

Decision No. 1581/06 (2008), 85 W.S.I.A.T.R. (online) consd

Other Decisions Considered:

Gray v. Ontario (Director, Disability Support Program) (2002), 59 O.R. (3d) 364 (Ont. C.A.) refd to

Laronde v. New Brunswick (Workplace Health, Safety and Compensation Commission), 2007 NBCA 10, 280 D.L.R. (4th) 97 consd

Workplace Insurance Legislation Considered:

Workers' Compensation Act, R.S.O. 1990, c. W.11

s. 37

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A

s. 43(1)

s. 53(1)

s. 53(5)

s. 53(6)

s. 127(1)

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 15-06-06 (August 1, 2007)

Document No. 19-03-03 (July 3, 2007)

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

December 24, 2008. THE TRIBUNAL: —

BEFORE: S. Ryan, Vice-Chair

HEARING: April 9, 2008, Written
Post-hearing activity completed on June 2, 2008

DECISION(S) UNDER APPEAL: D. McParland, Appeals Resolution Officer, November 16, 2006

APPEARANCES:

For the worker: P. Atkinson, International Association of Fire Fighters (IAFF), Local 3888

For the employer: S. Clark, Lawyer

REASONS

(i) Introduction

[1] In the decision of November 16, 2006, the Appeals Resolution Officer (ARO) confirmed the Operating Branch decision to grant the worker 100% loss of earnings (LOE) benefits from September 2, 2001 (when he was diagnosed with bladder cancer) to November 30, 2002, even though he had retired from the work force in 1990. The employer appealed.

[2] In this decision, the Tribunal has been asked to decide whether or not the worker has entitlement to LOE benefits from September 2, 2001 to November 30, 2002.

(ii) Background

[3] The factual background in this case is not contested.

[4] The worker was employed as a Frontline Fire Fighter from 1959 to his retirement in 1990 at age 60. In September 2001, at age 71, he was diagnosed with bladder cancer.

[5] In a decision dated March 8, 2005, the ARO granted initial entitlement for the bladder cancer. On July 19, 2005, the worker was granted a 20% non-economic loss (NEL) award for that condition.

[6] In implementing the ARO's decision, the Board's Operating Branch also granted the worker entitlement to 100% LOE benefits from September 2, 2001 to November 30, 2002, on the grounds that during that period "he was under active treatment for his bladder cancer". It is not contested that the worker was undergoing active medical treatment during that period for his compensable condition.

[7] The employer appealed the Board's decision to grant LOE benefits and in the decision of November 16, 2006, the ARO denied the appeal. In so doing, she cited correspondence dated April 20, 2005, from S. Todorovic, Director of the Board's Policy Branch addressed to the accident employer. In that correspondence, Ms. Todorovic acknowledged the accident employer's concern with respect to the payment of LOE benefits to the worker in this case who developed an occupational disease after retirement. She discussed the application of section 37 of the pre-1997 *Workers' Compensation Act*, R.S.O. 1990, c. W.11:

The word "disability" is defined under s. 1(1) of the *Workers' Compensation Act* (WC Act) as the "loss of earning capacity of the worker that results from an injury". So, under s. 37 of the WC Act, if a worker is totally disabled and completely unable to work due to the injury, the worker is entitled to TT disability benefits. The WSIB relies on medical information to confirm the worker is completely unable to work, and then, if established is legislatively required to pay TT benefits.

In traumatic cases, a worker is generally employed at the time of the injury and if the worker lays off work, he/she/ will, therefore, lose wages. However, as it is often the case with occupational diseases, the latency period between the occupational exposure and development of the work-related condition/disease can take several years. So in essence, a worker's work-related disease can develop long after a worker has stopped work. As long as the medical information supports that the worker is completely unable to work, his/her employment status is not at issue in terms of entitlement to wage loss benefits.

With respect to the WSIA, Ms. Todorovic advised:

With the introduction of the *Workplace Safety and Insurance Act* (WSIA), the words "temporary total disability" benefits were eliminated and replaced with "loss of earnings" benefits. In order to effectively determine LOE benefits and the need for lost time, the WSIB still has to evaluate the medical information. It is important to ensure the individual is completely unable to work in order to be eligible for full LOE benefits (i.e. 85% of the net average earnings). Despite the changed wording in the legislation, the WSIB believes the intent remains the same, (i.e. focus on the worker's medical status rather than whether the worker is in the workforce or not).

For recurrences, it appears the aforementioned view is supported in the phrasing of s. 53(6) of the WSIA. Section 53(6) sets out that, "When a worker becomes entitled to payments for a loss of earnings arising out of an accident in respect of which he or she previously received benefits under the insurance plan, the worker's average earnings (for the purpose of calculating the amount payable for the loss of earnings) are the greater of his or her average earnings at the date of the accident or his or her average earnings when he or she was most recently employed".

So effectively, s. 53(6) of the WSIA operates in conjunction with s. 43. That is, as long as the further problems can be linked to or arise from the original injury, further LOE benefits can be paid based on the worker's inability to work. There is no requirement that the worker be employed at the time the further problems arise since the LOE benefits can be based on most recent earnings or pre-injury earnings. In other words, the lack of current earnings, suggesting the worker is between jobs or may not be currently in the workforce, should not be a bar to receiving LOE benefits.

Once a worker is partially impaired and able to resume some form of suitable work, the WSIB considers whether the worker is available for suitable employment or willing to co-operate in a Labour Market Re-Entry Plan, as this will have an effect on his/her ongoing entitlement to LOE benefits. As a final point of interest, s. 43 of the WSIA states that LOE

benefits for workers age 63 to 65 or younger on the date of injury, are entitled to benefits up to 65 years of age.

In summary, the WSIB has accepted that full LOE benefits are payable despite the worker's employment status as long as the worker is completely unable to work because of the work-related injury/disease and this is medically supported.

[8] The ARO accepted the analysis of Ms. Todorovic and granted the worker full LOE benefits from September 2, 2001 to November 27, 2002, because during that period the worker was "unable to perform any type of work" and undergoing medical treatment for a serious occupational disease.

(iii) Post-hearing Activity

[9] With the consent of the parties, this appeal was processed by way of written submissions. In a Memorandum dated April 16, 2008, sent to the Tribunal Counsel Office (TCO) and copied to the representatives, I noted that neither representative in this appeal had cited *Decision No. 1581/06I* (January 12, 2007) or *Decision No. 1581/06* (2008), 85 W.S.I.A.T.R. (online). I noted that these recent decisions address the provision of LOE benefits in light of the legislation, Board policy and Board practice in circumstances where a worker is diagnosed with an occupational disease after retirement. Given that these decisions may have relevance to the issues in this appeal, I asked the TCO to send copies to the representatives and invite their submissions on them.

(iv) The Submissions

(a) The Employer

[10] In correspondence dated May 14, 2008, Ms. Clark emphasized the fact that the worker had been retired from the accident employer for a period of 11 years before being diagnosed with bladder cancer. She noted that there was no evidence before the Tribunal that the worker had any earnings from employment or any intention to become employed during this period.

[11] Ms. Clark acknowledged the correspondence of Ms. Todorovic dated April 20, 2005. She emphasized, however, that in *Decision No. 1581/06*, Senior Legal Counsel of the Board advised that the WSIB did not have a formal policy on entitlement to LOE benefits for workers who develop occupational disease after they have retired. Ms. Clark noted that, according to the Senior Legal Counsel of the Board, the Board had a practice to pay LOE benefits in such circumstances, but that the practice was under review.

[12] The employer's representative cited *Laronde v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2007 NBCA 10, 280 D.L.R. (4th) 97, which considered the purpose of workers' compensation benefits in the context of a Charter challenge to the provinces' *Workers' Compensation Act* and specifically the issue terminating benefits when the loss ends or when the worker turns 65. The Court commented on the purpose of workers' compensation benefits [at para. 27]:

Once you accept that the primary object or purpose of the *Workers' Compensation Act* is to compensate workers for lost wages, due to a work-related injury, it necessarily follows that compensation payments must terminate at some point.

[13] Ms. Clark reviewed the reasoning provided in *Decision No. 1581/06* and submitted that there was no evidence to indicate that the worker had any intention to return to the work force following his retirement such that he may be entitled to LOE benefits. Accordingly, she submitted, the worker in the present case "cannot reasonably be considered to have any loss of earnings as a result of the injury or disease".

(b) The Worker

[14] On behalf of the worker, Mr. Atkinson offered submissions under a cover page dated May 15, 2008.

[15] Mr. Atkinson emphasised the correspondence of April 20, 2005, from Ms. Todorovic which indicated that the Board interprets "loss of earnings" as a concept pertaining to a medical status, rather than a concept pertaining to employment status.

[16] The worker's representative submitted that LOE benefits were granted to the worker because he was totally disabled from September 2001 to November 2002 under sections 43(1) and 53 of the WSIA. Under section 43(1),

Mr. Atkinson emphasized clauses (c) and (d) which state that LOE benefits continue until the earliest of two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury and the day on which the worker is no longer impaired as a result of the injury.

[17] Mr. Atkinson cited section 53(1) and (6) of the WSIA, which sets out how the Board calculates average earnings. Section 53(1) and (6) 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.

...

(6) When a worker becomes entitled to payments for a loss of earnings arising out of an accident in respect of which he or she previously received benefits under the insurance plan, the worker's average earnings (for the purpose of calculating the amount payable for the loss of earnings) are the greater of,

(a) his or her average earnings at the date of the accident; or

(b) his or her average earnings when he or she was most recently employed.

[18] Mr. Atkinson submitted that section 43 clearly permits the payment of LOE benefits for workers that are age 63 or older and that there is "no provision that limits the upper limit of age in this section". He submitted that section 53(1) indicates that the Board has the authority to set the wage loss using the criteria in clauses (a) and (b), but may also use other information that the Board Adjudicator considers appropriate to the situation. He wrote:

I would submit that the wage basis as set was appropriate by using the accident date and the current earnings as set forth in the prevailing collective agreement.

[19] He further submitted:

Section 53(6) directs that when a...loss of earnings [is recognized] that the earnings are determined by either the earnings on the date of accident or when most recently employed. This implies that a worker need not be employed to be entitled to receive loss of earnings.

[20] Mr. Atkinson emphasised that the worker in this case was a fire fighter (i.e., an emergency worker) to which section 53(5) applies:

53(5) The earnings of an emergency worker are the worker's earnings in his or her actual employment. If the worker has no such earnings, the Board shall fix the amount of the worker's earnings for the purposes of the insurance plan.

[21] The worker's representative submitted that this section permits the Board to set earnings based on other similar work forces and that there is no stipulation in this section that the worker be under the age 65.

[22] Mr. Atkinson reviewed the analyses provided in *Decisions No. 1581/06I* and *1581/06* and acknowledged that the latter concluded that LOE benefits are not payable when there is no wage loss. He submitted, however, that an exact opposite situation is found within the WSIA and Board policies that provide the Board with broad discretion to make decisions on LOE benefits. He noted that the Board has the authority to "deem the earnings that are to be achieved at the completion of [an] LMR plan when determining any permanent loss of earnings". He cited *Operational Policy Manual* Document No. 19-03-03, "Labour Market Re-entry (LMR) – Determining Suitable and Available Employment or Business, and Earnings" which states that following the completion of a LMR plan:

If the worker has a wage loss upon completion of a LMR plan, the LOE/FEL benefit is based on

- actual earnings of the worker if working, see 18-03-03, Reviewing LOE Benefits (Prior to Final Review) or 18-

04-14, Reviewing FEL Benefits (Prior to Final Review), or

- most recent wage information for the SEB earnings identified in the LMR assessment, if the worker is not working or is working in the SEB but is under-employed.

[23] Mr. Atkinson submitted that there are many situations where a worker is unable to find employment upon completion of a LMR plan and that the Board has the discretionary power to deem a worker capable of a specific wage regardless of whether or not the worker is actually employed in the SEB objective. He submitted:

It is our position that if the WSIB has the powers to determine or deem a wage that can be earned even when there is no wage being earned, then the WSIB ought to retain the power to determine or deem if a worker is entitled to LOE benefits even when there is not a specific wage loss at the time of the disease.

Due to the unique situation that retired workers find themselves in, in essence becoming ill as a result of chemical exposure in an occupation many years earlier, there should be an exception that compensation benefits should still be forthcoming. The situation for this worker, a firefighter, is no different than an injury that occurred during the employment becomes problematic later in life. The WSIB in this circumstance would still look at NEL benefits and other health care benefits as the injury arose out of and in the course of employment.

The long latency periods that occur often delay the illness onset until late in life after the working career has concluded. There must be accountability in the system that holds those employers that, by accident or by intentional acts, make workers ill as a result of the work activities. The only redress that workers have is through the WSIB as the worker does not have the right to sue. It does not seem fair that on one hand the WSIB can deem a worker capable of earnings that do not exist in a LMR plan and on the other hand find that the older worker is not entitled to LOE benefits based on the wage of those currently employed in the industry. By disentitling older workers to LOE benefits and concurrently denying the right to sue a negligent employer seems patently unfair.

[24] Mr. Atkinson cited OPM Document No. 15-06-06, “Special Circumstances – Incarcerated Workers” which, he submitted, permits the payment of LOE benefits to incarcerated workers. He added:

It seems absurd that a convicted criminal can draw WSIB benefits, including LOE [benefits], yet a law abiding citizen whose cancer is presumed to be caused by workplace exposures cannot.

To disallow entitlement to LOE benefits to retired Ontarians who have been poisoned at work makes killing Ontarians at work much more affordable.

[25] Mr. Atkinson concluded by stating that the accident employer would not be subject to undue financial hardship in this case. He stated that, despite an inconsistency that has been revealed in *Decision No. 1581/06*, the Board has the authority to pay LOE benefits to retired workers. He asked that until the inconsistency is clarified one way or another by Board policy, a decision in this appeal should be delayed.

(c) The Employer (Reply)

[26] In correspondence dated May 28, 2008, Ms. Clark replied to the submissions of Mr. Atkinson. She submitted that there is no inconsistency within the WSIA and no ambiguity in the language of the statute. She submitted that the Board does not have a formal policy on entitlement to LOE benefits for workers who develop an occupational disease after they have retired and, therefore, each case must be determined on its own particular facts.

[27] Ms. Clark submitted that the Board’s authority to “deem” a worker’s earnings in the context of an LMR plan is not analogous to the circumstances of this case. She stated:

The very nature of a Labour Market Re-entry plan is to enable the worker to re-enter the labour market and reduce or eliminate the loss of earnings that may result from the injury...the common element is the intention to return to the workforce. This is not the situation in our case...

(v) Analysis

[28] I have carefully considered all of the available evidence in this case and submissions of the representatives.

[29] The worker was diagnosed with bladder cancer in September 2001. Thus, the applicable legislation is the WSIA and the applicable section in this case is section 43. It states:

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.

[30] The issue of a worker's entitlement to LOE benefits when diagnosed with an occupational disease long after retirement was addressed in *Decisions No. 1581/06I* and *1581/06*. That decision was informed by the submissions of not only the parties' counsel, but also of counsel for the Board and the Tribunal. *Decision No. 1581/06* concluded [at paras. 52-54]:

[S]ection 43 of the WSIA does not generally provide a basis to compensate injured workers after they have retired. There is no language in section 43 that can be reasonably interpreted to suggest that LOE benefits can be paid for any reason other than a loss of earnings. By definition, entitlement to LOE benefits is only available to workers who suffer a loss of earnings as a result of an injury or disease. Workers who are completely retired from the workforce and have no intention to return to the workforce for reasons unrelated to the injury or disease cannot reasonably be considered to have any loss of earnings as a result of the injury or disease

...

...although the practice of the Board to grant LOE benefits to workers who are diagnosed with an occupational disease after retirement is understandable, it is not authorised under the WSIA...

[31] The only circumstance where there may be a basis to grant entitlement to LOE benefits to a worker who has retired from the work force is where there is evidence that it is more likely than not the worker would have had future earnings if it were not for the occupational disease (i.e., where there is evidence the worker had an intention to return to the labour market).

[32] In this case, there is no evidence that the worker had any intention of returning to the work force after his retirement.

[33] Mr. Atkinson cited sections 43 and 53 of the WSIA. With respect to section 43, he submitted that there is no provision that "limits the upper limit of age in this section".

[34] With respect, I disagree with Mr. Atkinson's interpretation of the limits set out in clauses (a) to (d) of section 43(1). The opening words of section 43(1) expressly state that "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" (emphasis added). These words modify the application of clauses (a) to (d). The central question is one of interpretation of the phrase "loss of earnings as a result of the injury" in section 43(1). The *Legislation Act, 2006*, provides that remedial legislation shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.¹ A similar provision was previously found in the now repealed *Interpretation Act*, R.S.O. 1990, c. I.11, which has been replaced by the *Legislation Act*. Tribunal decisions have found that the WSIA and its predecessor legislation, the pre-1997 *Workers' Compensation Act*, are remedial legislation to which the *Interpretation Act* (now repealed and replaced by the *Legislation Act, 2006*) applies.²

[35] I also note that the Ontario Court of Appeal held in *Gray v. Ontario (Disability Support Program, Director)*³ that any ambiguity in the interpretation of social welfare legislation should be resolved in favour of the claimant.

[36] In this case, there is no dispute that the worker suffered an injury as a result of his employment. However, as a result of that injury, he did not experience a "loss of earnings" because he was retired and had no intention of returning to the work force. Thus, although the WSIA is remedial legislation which shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects and any ambiguity in the interpretation of its provisions should be resolved in favour of the claimant, I find that the provision of LOE benefits is unambiguous and is clearly linked to a loss of earnings. Thus, there are no grounds to pay LOE benefits on the facts of this case

and the discussion of section 43, clauses (a) to (d) is moot.

[37] Section 53 of the WSIA sets out a method for calculating a worker's average earnings for the purpose of the insurance plan. Before section 53 can apply to a worker's claim, the worker must qualify for entitlement under section 43(1). Where an injury does not result in loss of earnings, there is no entitlement to LOE benefits.

[38] Section 53(5) states that the earnings of an emergency worker are the worker's earnings in his or her actual employment. If the worker has no such earnings, the Board shall fix the amount of the worker's earnings for the purposes of the insurance plan. Again, I find that one of the purposes of the insurance plan is to compensate injured workers for loss of earnings. Where an injury does not result in loss of earnings, there is no entitlement to LOE benefits. In my view, section 53(5) was intended to address specific circumstances that may apply to an emergency worker such as a volunteer fire fighter who is injured in the line of duty and may have little or no earnings from the municipality that they serve on a volunteer basis, but who has other earnings.

[39] In short, section 53 sets out a method for calculating the amount of a worker's average earnings for the purposes of the insurance plan. There is no loss of earnings as a result of the worker's injury because he was retired and had no intention of returning to the work force. Thus, section 53 does not apply. Section 53(1)(c) cannot reasonably be interpreted in the manner proffered by Mr. Atkinson because section 43(1) requires that there be a loss of earnings as a result of the injury for a worker to be entitled to claim loss of earnings benefits.

[40] The overall purpose of the WSIA is set out in section 1. It states generally that in addition to promoting health and safety in the workplace, facilitating return to work and recovery of injured workers, facilitating re-entry into the labour market of workers and spouses of deceased workers, it provides "compensation and other benefits to workers and to the survivors of deceased workers". Interpreting the words "compensation and other benefits" requires consideration of other sections of the WSIA. In this case, the other relevant section is section 43 which requires that there be a loss of earnings as a result of an injury in order for a worker to be entitled to LOE benefits.

[41] I note that prior to 1990, the pension schemes under the pre-1985 and pre-1989 *Workers' Compensation Acts* did pay benefits after retirement even though there was no loss of earnings. However, beginning in 1990 with the enactment of the WCA, wage loss benefits (i.e., temporary disability benefits and future economic loss (FEL) benefits) were not generally available to workers over age 65. However, in certain circumstances, workers may be entitled to wage loss benefits under the WCA because wage loss benefits remained linked to the concept of disability. Under the WSIA, wage loss benefits are linked to the concept of "loss of earnings" resulting from the disability.

[42] In *Laronde*, cited above, Justice Robertson on behalf of the New Brunswick Court of Appeal, reviewed the legislative scheme surrounding the termination of compensation benefits at age 65 in that province's workers' compensation system which, in my view, is analogous to the circumstances in this case [at para. 21]:

Prior to 1982, long term disability benefits paid to an injured worker were based on the lost earning capacity. The monthly benefit was calculated according to the degree of impairment suffered by a fictitious average worker with the same injury as the claimant. Prior to 1982, compensation benefits were paid for life. In 1982, the *Workers' Compensation Act* was amended. Henceforth, long-term disability benefits were paid based on a percentage of the worker's actual wage loss (80% to 90% depending on the year the injury was incurred). In order to integrate the compensation system into existing social programs also available to injured workers, and to avoid double indemnity or indemnity greater than actual wage loss, other disability benefits such as those available under the Canada Pension Plan were deducted. The 1980 Report, upon which the 1982 amendments were expressly based, recognized that benefits paid under the *Workers' Compensation Act* should be paid as an indemnity against lost wages. That being so, the legislature had to address when benefits would cease. Otherwise, the legislative scheme would remain a life-time pension plan. The 1980 Report states that the justification for choosing age 65 as the termination date for receipt of long-term disability benefits is that it is the age at which "pension benefits would normally become available".

[43] Mr. Atkinson emphasized the correspondence of April 20, 2005, from S. Torodovic, Director of the Board's Policy Branch. Ms. Torodovic reviewed the concept of "disability" as it was defined under the WCA and noted the words "temporary total disability" were eliminated under the WSIA and replaced with the words "loss of earnings". She stated that despite the changed wording in the legislation, the WSIB believes the intent remains the

same. That is, to provide compensation benefits based upon an evaluation of the worker's medical status rather than an evaluation of the worker's employment status.

[44] Ms. Torodovic's interpretation of the intent of the WSIA was provided before the release of *Decision No. 1581/06* and is at odds with its interpretation of the intent of the WSIA. In that decision, a distinction was drawn between the payment of LOE benefits under section 43 of the WSIA and the payment of temporary disability benefits under section 37 of the WCA. *Decision No. 1581/06* found that LOE benefits under s. 43 of the WSIA are "tied to loss of earnings as a result of the injury" while temporary disability benefits under section 37 of the WCA are "tied to disability". At paragraph 44, *Decision No. 1581/06* states:

It is important to emphasise that, for analytical purposes, there are references in this decision to the WCA. However, the legislation that applies to this case is the WSIA. I point this out because Ms. Shaw noted, correctly in my view, a distinction between LOE benefits under section 43 of the WSIA and the temporary disability benefits under section 37 of the WCA. While LOE benefits under section 43 of the WSIA are "tied to loss of earnings as a result of the injury", temporary disability benefits under section 37 of the WCA are "tied to disability". In certain circumstances, Tribunal decisions have granted entitlement to temporary disability benefits under section 37 of the WCA even though a worker had retired from the workforce and was neither earning nor anticipating any earnings after retirement. An example that comes to mind is that of a worker who undergoes surgery for a compensable injury after retirement. Under the WCA, section 37 benefits have been granted for the duration of a worker's "temporary disability" while recuperating from surgery. A worker in identical circumstances whose case is governed under the WSIA may not be entitled to LOE benefits because while there was a period of post-surgical disability, there were no loss of earnings.

[45] In finding no legislative basis to grant LOE benefits in the circumstances of that case, the Board was invited to provide information with respect to any policy that might authorise such payments. *Decision No. 1581/06* cited correspondence dated February 7, 2007, from E. Brown, Senior Legal Counsel of the Board, who advised [at para. 7]:

1. LOE benefits for workers who retire and subsequently develop an occupational disease.

The WSIB does not have a formal policy on entitlement to LOE benefits for workers who develop an occupational disease after they have retired. Each case must be decided on its own particular facts.
I am advised that, as a matter of practice, the WSIB does generally pay LOE benefits in these cases. I understand that this practice is currently under review.

2. Determination of a worker's average earnings for the purpose of calculating periodic payments for survivors under s.48

Document No. 18-02-02 in the Operational Policy manual ("OPM"), entitled Determining Short-term Average Earnings, considers the calculation of earnings in long-latency occupational disease claims. The issue of how average earnings are determined in cases where a worker is retired at the time that the long-latency occupational disease is diagnosed is not addressed in the policy. It is, therefore, up to the adjudicator to determine this on a case-by-case basis.

[46] With respect to Mr. Atkinson's argument that the Board has the authority and discretion to "deem" earnings following the completion of a LMR plan, I am in agreement with the submissions of Ms. Clark. The purpose of LMR services is to restore a worker's loss of earnings that result from the compensable injury. A worker who has no earnings at the time of an injury, is not entitled to LOE benefits or LMR services. The authority to deem earnings after the completion of a LMR plan is inextricably connected to a finding that there is a loss of earnings as a result of the injury. The opening words of section 43(1) specifically provide that a worker who has a loss of earnings as a result of an injury is entitled to benefits "when the loss of earnings begins". While there are provisions in the WSIA that permit the Board and Tribunal to address unusual fact situations, such as the section 53(5) provision on emergency workers, this does not mean that the Board can "deem" earnings when no loss of earnings has occurred.

[47] Mr. Atkinson submitted that incarcerated workers are entitled to LOE benefits under Board policy. I note that OPM Document No. 15-06-06, "Special Circumstances – Incarcerated Workers" places important restrictions on an incarcerated worker's entitlement to LOE benefits which are consistent with the foregoing analysis. The policy states:

POLICY

The terms of their sentences, however, may affect the amount of some compensation benefits to the extent that the terms

of sentences affect workers' earning abilities. Sentences for an offence may also affect entitlement to those benefits/services that hinge upon workers' participation in early and safe return to work (ESRTW) or labour market re-entry (LMR) programs.

GUIDELINES

No effect

The entitlement requirements of the Act listed below are such that incarceration or sentences for an offence do not affect injured workers' entitlement

- temporary total disability/full loss of earning*
- non-economic loss
- health care
- obligation to re-employ**, and
- loss of retirement income.

The policy expressly states:

[I]ncarceration or a sentence for an offence may affect the amount of benefits to which workers are entitled. Incarceration or a sentence for an offence affects the amount of benefits to the degree that it affects a worker's ability to earn.

...

[I]f the terms of the sentence prevent the worker from participating in ESRTW or the LMR program or from returning to work immediately thereafter, the worker does not qualify for benefits under the Act for the duration of the sentence.

[48] Thus, a worker whose incarceration prevents participation in the early and safe return-to-work process or LMR program or *from returning to work* does not qualify for LOE benefits under the WSIA because there is no loss of earnings as a result of the injury.

[49] Mr. Atkinson requested that this decision be held in abeyance pending a resolution of an apparent inconsistency between the findings of *Decision No. 1581/06* and Board practice. He asked that this decision be delayed until "such time as the WSIB has created the clarity with policy". I note that *Decision No. 1581/06* indicated that this was an issue that would seem to require an amendment to the legislation. It is not clear that this matter could be addressed by Board policy. Mr. Atkinson also has not identified any Board policy consultation process. Further, section 127(1) of the WSIA states that the Tribunal shall decide an appeal within 120 days after the hearing of the appeal ends or within such longer period as the Tribunal may permit. In my view, the absence of Board policy on a specific legal issue is not a basis to hold a Tribunal decision in abeyance. While there may be very exceptional circumstances where this possibility might be considered, there is no basis for deferring the Tribunal's decision in this case.

[50] In summary, I find that the intent of the WSIA is to compensate workers who experience a loss of earnings as a result of an injury. The statute does not provide a basis to compensate workers with LOE benefits for medical conditions that do not result in a loss of earnings. Additionally, there is no Board policy that permits payment of LOE benefits to workers who do not incur a loss of earnings as a result of an injury. Remedies sought by parties that exceed the ambit of the law, regardless of how appropriate or worthy they may be, cannot be awarded by the Tribunal without authority to do so under the law. Where the remedy sought exceeds the law, such as the remedy sought by the worker in this appeal, the appropriate venue for redress is the Legislature.

DISPOSITION

[51] The employer's appeal is allowed.

[52] The worker is not entitled to LOE benefits for the period of September 2, 2001 to November 30, 2002.

Appeal allowed.

1. *Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, s. 64(1).
2. See *Decision No. 1402/03R* (2005), 80 W.S.I.A.T.R. (online), for example.
3. 59 O.R. (3d) 364 (C.A.).

Decision No. 1523/07R

Vice-Chair: Mitchinson

Decision — January 16, 2009

Neutral Citation: 2009 ONWSIAT 149

Reconsideration (jurisdictional error) – Permanent impairment (rating schedule) (whole person concept).

After new area of entitlement is accepted, adjudicator should take a whole person approach to assessing the worker's condition and ability to perform suitable modified work.

The worker suffered a compensable back and shoulder injury in 1993, for which he was granted a 24% NEL award. In *Decision No. 103/98*, the Tribunal confirmed a Board decision regarding temporary disability and FEL benefits. Later, the Board granted entitlement for psychotraumatic disability and reassessed the worker for a 40% NEL award. The worker then claimed that he was unemployable from 1994 as a result of his organic and non-organic disabilities. In *Decision No. 1523/07*, the Tribunal found that the worker was entitled to a full FEL award as of 2003 but was not entitled to full benefits from 1993 to 2003. The decision also denied reimbursement for travel expenses to medical appointments.

The worker applied for reconsideration of *Decision No. 1523/07*.

The vice-chair in *Decision No. 1523/07* incorrectly considered himself bound to adopt the findings of *Decision No. 103/98* regarding the impact of the worker's organic injuries on his ability to resume full-time employment and then considered whether there was sufficient evidence that the subsequently recognized psychological impairment was itself sufficient to alter the outcome. The Appeals Resolution Officer had taken a whole person approach to the issue and the vice-chair should also have taken a whole person approach. After entitlement for psychotraumatic disability had been accepted, the vice-chair should have taken a whole person approach to assessing the worker's condition and his ability to perform suitable modified work. The failure to do so constituted a fundamental error, the correction of which would likely produce a different result. The application to reconsider on this issue was granted.

There was no basis to reconsider the decision regarding travel expenses.

Réexamen (excès de compétence) – Déficience permanente (barème des taux) (concept de l'intégralité de la personne).

Une fois le droit à une indemnité pour une nouvelle région reconnu, le décideur doit considérer le travailleur dans son intégralité lors de l'évaluation de son état de santé et de sa capacité à effectuer du travail modifié approprié.

Le travailleur a subi une lésion indemnisable au dos et à l'épaule en 1993. Il a obtenu une indemnité pour perte non financière (PNF) de 24 %. Dans la *décision n^o 103/98*, le Tribunal a confirmé la décision de la Commission au sujet des prestations d'invalidité temporaire et d'une indemnité pour perte économique future (PÉF). La Commission a ensuite reconnu le droit à une indemnité pour invalidité psychotraumatique et elle a porté l'indemnité pour PNF à 40 %. Le travailleur a alors déclaré qu'il avait été inemployable à partir de 1994 par suite de troubles invalidants organiques et non organiques. Dans la *décision n^o 1523/07*, le Tribunal a conclu que le travailleur avait droit à une indemnité pour PÉF intégrale à partir de 2003 mais qu'il n'avait pas droit à des

prestations intégrales de 1993 à 2003. Le Tribunal a aussi refusé de lui accorder le remboursement de frais de déplacement pour se rendre à des rendez-vous médicaux.

Le travailleur a demandé un réexamen de la *décision n^o 1523/07*.

Le vice-président auteur de la *décision n^o 1523/07* a erré en se considérant lié par les constatations faites dans la *décision n^o 103/98* au sujet des conséquences des lésions organiques du travailleur sur son aptitude à recommencer à travailler à plein temps. Il a alors examiné s'il y avait assez d'éléments de preuve indiquant que la déficience psychologique reconnue subséquemment suffisait à elle seule pour altérer l'issue. Le commissaire aux appels avait considéré le travailleur dans son intégralité à l'égard de la question, ce que le vice-président aurait dû faire lui aussi. Une fois le droit à une indemnité pour invalidité psychotraumatique reconnu, le vice-président aurait dû considérer le travailleur dans son intégralité pour évaluer son état de santé et sa capacité à effectuer du travail modifié approprié. Le défaut de le faire constituait une erreur fondamentale dont la rectification pourrait entraîner une issue différente. Le Tribunal a accueilli la demande de réexamen à ce sujet.

Il n'y avait aucun motif ouvrant droit au réexamen de la décision relativement au remboursement des frais de déplacement.

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. 871/02R (2006), 81 W.S.I.A.T.R. (online) consd

Workplace Insurance Legislation Considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A
s. 123(1)(a)

Board Directives and Guidelines Considered:

Operational Policy Manual
Document No. 17-01-09 (November 3, 2008)

Cross-References:

Decision No. 103/98 (March 13, 1998)
Decision No. 1523/07 (October 26, 2007) [2007 ONWSIAT 148]

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APPLICATION by the worker for reconsideration of *Decision No. 1523/07*.

January 16, 2009. THE TRIBUNAL: —

BEFORE: T. Mitchinson, Vice-Chair

HEARING: November 26, 2008, at Toronto, Written

DECISION(S) UNDER APPEAL:

Worker request for reconsideration of *Decision No. 1523/07* dated October 26, 2007

APPEARANCES:

For the worker: Robert Govaert, Paralegal

For the employer: Not participating

REASONS

(i) Background

[1] The worker sustained a compensable low back and right shoulder injury on February 4, 1993 while performing regular duties as a shear operator. The Board eventually accepted that these injuries resulted in a permanent impairment, and he was granted an 18% non-economic loss (NEL) award. The NEL award was subsequently increased incrementally to 24% by 2004.

[2] The worker returned to part-time modified duties with the accident employer on December 13, 1993, but stopped working by January 10, 1994, claiming that he could not progress to full-time modified duties as expected of him. The Board determined that he was fit to perform the modified duties on a full-time basis. Temporary partial disability benefits were extended to September 26, 1994 and then terminated by the Board on the basis of non-co-operation.

[3] The Board advised the worker that his initial D1 future economic loss (FEL) benefits would be based on deemed earnings in the modified job, effective December 1, 1994, and on December 1, 1996 the worker's R1 FEL was set on the same basis.

[4] The worker appealed the Board's decision to the Tribunal. On March 13, 1998 a Vice-Chair, issued *Decision No. 103/98* denying the worker's appeal and upholding the Board's decisions regarding total partial disability and FEL benefit entitlements.

[5] The worker was awarded Canada Pension Plan (CPP) disability benefits in 1999, prior to receiving his final R2 FEL decision from the Board. The Board again used deemed earnings from the worker's modified job as the basis for setting R2 FEL benefit entitlements and applied an offset for CPP benefits in accordance with established policy.

[6] In November 1996, prior to the R1 FEL decision, the Board denied the worker's request for entitlement for chronic pain disability (CPD) or psychotraumatic disability arising from his compensable 1993 accident. Initially the worker did not pursue these entitlements, but by early 1999 he reactivated his claims. In late 2003, the Board granted the worker entitlement for psychotraumatic disability, and in 2005 his request for CPD was denied.

[7] Following an assessment, the worker was granted a 25% NEL award for psychotraumatic disability, later revised to 40%. When combined with the 24% NEL for low back and right shoulder (as well as a 5% hearing loss award under a different claim), the worker's total NEL benefits were 51%.

[8] The worker then wrote to the Board in February 2005, claiming that the combined impact of his various entitlements rendered him unemployable from January 1994.

[9] In an April 29, 2005 decision, Appeals Resolution Officer (ARO) D. McParland disagreed with the worker, maintaining that despite any recognized organic and inorganic disabilities stemming from the December 1993 injury, the worker would still have been able to perform the full-time modified duties on offer by the accident employer in 1993-94. The worker appealed this decision to the Tribunal.

[10] The worker also appealed the Board's decision not to reimburse him for travel expenses to attend appointments with his family doctor as a health care expense.

[11] The appeal was heard by a Tribunal Vice-Chair on June 29, 2007, and his findings are outlined in *Decision No. 1523/07*, issued on October 26, 2007.

(ii) Introduction

[12] The worker is seeking a reconsideration of the findings in *Decision No. 1523/07*. In that decision, the Vice-Chair granted the worker entitlement to full FEL benefits from January 15, 2003 until his 65th birthday. He denied the worker's request for entitlement to full temporary partial disability benefits from the date of his compensable workplace accident on December 13, 1993 to December 1, 1994; entitlement to full FEL benefits from December 1, 1994 to January 15, 2003; and entitlement to reimbursement of travel expenses for physician appointments as a health care expense.

[13] The worker completed a Request for Reconsideration/Clarification form and his representative, Mr. Govaert, provided written submissions in support of the worker's request.

[14] Mr. Govaert submits that the Vice-Chair erred by dividing the assessment of the worker's claim into organic and inorganic disabilities and only considering the inorganic impairments in determining entitlement for temporary partial disability and FEL benefits. In Mr. Govaert's view, the Vice-Chair's failure to consider the worker's claim on a "whole person" basis constitutes a significant jurisdictional error that must be corrected.

(iii) The Reconsideration Test

[15] Legislation governing workplace safety and insurance compensation in Ontario provides that decisions of the Tribunal are final. However, the Tribunal also has the power and authority to reconsider a decision at any time if it considers it advisable to do so.

[16] 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.

[17] 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.

[18] The threshold test is outlined in *Decision No. 871/02R* (2006), 81 W.S.I.A.T.R. (online), as follows [at paras. 12-13]:

... 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 re-opened.

(iv) The Worker's Position

[19] The worker's representative takes the position that the April 29, 2005 decision of ARO McParland constituted a reconsideration of the findings in previous decisions stemming from the December 1993 workplace accident that had only considered the worker's physical impairments, including the findings in *Decision No.*

103/98. He goes on:

Regarding the worker's level of impairment and suitability of the modified work, we submit the 2005 ARO decision reconsidered previous decisions, including Decision No. 103/98, which only considered the physical impairments alone. The ARO decision indicated, "[The worker] was not totally disabled as a result of his physical and psychological condition from December 1, 1994" (ARO addendum corrects the from date to December 13, 1993). The ARO decision indicated, page three "In reviewing the issues before me, I have considered all of the information in the claim file record, the medical reports and opinions, the previous decisions regarding [the worker's] level of impairment, the relevant policies, and Mr. Govaert's position." The ARO decision (addendum December 9, 2005) indicated, "As previously noted in my decision, the work provided by the employer was considered suitable for [the worker] on a full time basis, and the graduated return to work plan was appropriate. This conclusion was also confirmed in the WSIAT decision dated March 13, 1998".

The Vice-Chair in Decision No. 1523/07 indicated in paragraph 39:

"From a physical perspective in relation to the suitability of the worker's modified job, I have no jurisdiction to overturn the findings made in Decision No. 103/98. The worker's representative seemed to inextricably link the worker's pain complaints and the worker's depression. There is support that the worker's pain contributed to his depression, however, the worker's pain complaints are organic and as such were reviewed by Decision No. 103/98. Instead, my jurisdiction, during the period assessed by Decision No. 103/98, is tied to whether the worker's psychological condition (subsequently recognized by the Board) prevented the worker from working full-time hours in a suitable modified job or rendered him unemployable."

The hearing of June 29, 2007 was an appeal of the ARO decision of April 29, 2005 (addendum December 9, 2005) and was essentially a reconsideration of the findings of Decision No. 103/98, which had only considered the physical impairments alone, since the issues were reconsidered by the ARO decision. We submit the Vice-Chair in Decision No. 1523/07 had the jurisdiction to reconsider Decision No. 103/98, since the issues and time period were so connected, that the Vice-Chair could not reasonably decide the appeal without reconsidering Decision No. 103/98 (the "whole person" concept applies). We submit by failing to reconsider Decision No. 103/98, the Vice-Chair in Decision No. 1523/07 erred and divided the assessment of the worker's appeal. The Vice-Chair in Decision No. 1523/07 accepted the findings of Decision No. 103/98, which only considered the physical impairments alone, that the modified work was suitable on a full time basis. We submit Decision No. 1523/07 did not properly consider and adjudicate the evidence on a whole person basis, taking into account the worker's combined mental and physical impairments. We submit this was a significant error in the adjudication of the worker's appeal, and correcting this error would likely result in a different decision.

[20] As far as travel expenses are concerned, the worker's representative submits that the Vice-Chair did not properly consider the report from Dr. Sokol, one of the worker's treating physicians, that the out-of-town treatment sessions at his office were necessary and related to his compensable injury. The representative goes on:

At that time, Dr. Sokol was a Pain Specialist and the worker had his own family doctor, Dr. Patel, for any medical treatments that were not related to his workplace injury, as Dr. Sokol clearly indicated. We submit this was a significant error, which if corrected, would likely result in a different decision.

(v) Analysis and findings

[21] On November 13, 2003, the Claims Adjudicator assigned to the worker's file sent a letter to his representative advising that the worker had been granted entitlement for psychotraumatic disability under the claim stemming from his December 13, 1993 workplace accident. The Adjudicator went on to state:

However, the psychologist consultant stated that dysthymic disorder is typically a minor form of depression and there is no conclusive evidence in [the report from the worker's treating psychiatrist] to support that the worker is totally disabled in relation to his psychological condition.

[22] The worker's representative disagreed, and wrote to the Adjudicator on December 5, 2003 stating: "The decision is wrong because it does not consider all of the evidence".

[23] The representative elaborated in a December 16, 2004 letter to the Adjudicator as follows:

As you may be aware, due to his organic injury and his Psychotraumatic condition currently rated at 51% NEL award, [the worker] was unable to return to any gainful employment and is in receipt of Canada Pension Plan disability benefits from 1995. We submit that he had a full loss of earnings from the time temporary benefits were reduced on or about January 17, 1994.

The November 13, 2003 decision indicates there is no conclusive evidence to support the worker is total disabled in relation to his psychological condition. We suggest you consider the combined effect of both the medical reports of organic findings and the worker's subjective experience of pain and depression. Although the worker may have been considered partially impaired based on his 23% organic NEL award, we suggest the combined effect of organic findings and his Psychotraumatic disability (depression) and degree of pain experienced may have rendered him totally disabled (Canada Pension Plan accepted he was unable to return to any gainful employment).

When considering the organic and non-organic conditions together, we submit no employer in the real world would realistically be interested in the services of the worker and therefore he should be considered competitively unemployable with a full loss of earnings.

[24] The representative made similar arguments to ARO McParland in this context of her review of the Adjudicator's decision:

We ask that the Appeals Resolution Officer consider if the worker could realistically return to any gainful employment in the real world, by considering the combined effects of the worker's organic and non-organic impairments, the pain and his limitations. We submit that no employer in the real world would realistically consider the services of the worker. The worker's entitlement and impairment rating has changed and increased from 24% to 51%, to warrant a change in the SEB or support that the worker should now be considered unemployable.

[25] In her April 29, 2005 decision, ARO McParland makes it clear that she considered "all of the information in the claims file record, the medical reports and opinions, the previous decisions regarding [the worker's] level of impairment, the relevant policies, and Mr. Govaert's position". She also makes specific reference to the testimony provided by the worker at the prior Tribunal hearing (*Decision No. 103/98*), and then goes on to discuss the medical evidence relating to the worker's psychological treatment that was not within the scope of the 1998 appeal. Before outlining her decision, the ARO summarizes the issue before her as "[the worker's] level of impairment from December 1994, and the impact the granting of psychotraumatic entitlement has on this issue", after which she goes on to find that the evidence does not support a finding of total disability.

[26] The ARO's conclusion makes it clear that she has taken into account both the organic and the psychotraumatic impairments: "[The worker] was not totally disabled as a result of his physical and psychological condition from December 1, 1994 [later amended to December 13, 1993]." There is no mention of being bound by the findings in *Decision No. 103/98*, and no suggestion that the scope of the appeal as set out clearly and repeatedly by Mr. Dovaert was incorrect. The worker was expecting a review of his ability to perform full-time modified work in light of his additional newly recognized psychological impairment and, in my view, without using the word "reconsideration", that is in effect what ARO McParland provided in her April 29, 2005 ruling.

[27] Had the worker's organic and psychological impairments both been accepted by the Board prior to *Decision 103/98*, there is little doubt that the Tribunal would have considered entitlement on the basis of a "whole person" assessment of the worker's condition and his capabilities to perform full-time modified work. In my view, there was no policy rationale or legal impediment to taking this "whole person" approach in *Decision No. 1523/07* when the totality of the worker's impairment had clarified.

[28] The Tribunal's jurisdiction to hear and dispose of appeals of this nature is derived from section 123(1)(a) of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, which provides:

123(1) The Appeals Tribunal has exclusive jurisdiction to hear and decide,

(a) all appeals from final decisions of the Board with respect to entitlement to health care, return to work, labour market re-entry and entitlement to other benefits under the insurance plan.

[29] ARO McParland's April 29, 2005 ruling is a final Board decision on the issue of whether the worker's compensable physical and psychological impairments rendered him totally disabled as of December 13, 1993. She considered the combined effect of the worker's organic and non-organic disabilities in making her decision, and quite understandably and appropriately did not consider herself bound by the prior Tribunal *Decision No. 103/98* which had assessed the worker's organic condition only.

[30] The Vice-Chair took a different approach in *Decision No. 1532/07*. He considered himself bound to adopt the findings from *Decision No. 103/98* regarding the impact of the worker's organic injuries on his ability to resume

full-time modified work, and then considered whether the evidence in support of the subsequently recognized psychological impairments was itself sufficient to alter the outcome. In my view, this was not the correct approach in the circumstances.

[31] The Vice-Chair's jurisdiction on appeal was determined by the content of ARO McParland's final Board decision, in accordance with section 123(1)(a) of the WSIA. She found that the worker was not totally disabled and unable to resume full-time modified duties after considering the combined impact of the worker's physical and psychological impairments. In my view, the Vice-Chair's decision not to take a corresponding "whole person" approach in assessing the issue on appeal represents a fundamental error in the adjudicative process that, if corrected would likely produce a different result.

[32] Accordingly, the threshold test for reconsideration on the issue of entitlement to temporary disability and/or FEL benefits from December 13, 1993 has been met.

[33] I have reached a different conclusion on the issue of travel expenses.

[34] The Adjudicator advised the worker on July 13, 2004 that "reimbursement for travel to attend medical appointment to see your family doctor for routine check up is not an allowable expense". The worker's representative objected on the basis that the worker's visits to his family doctor, Dr. Sokol, were related to his workplace injury and should qualify for reimbursement.

[35] The representative's written submissions to ARO McParland just request that the worker be reimbursed and that the July 13, 2004 be overturned. And in her April 29, 2005 ruling, the ARO simply denies reimbursement on the basis that the worker's "bimonthly trips to his doctor for pain medication do not qualify as a health care expense".

[36] The Vice-Chair considered the issue in *Decision No. 1523/07*. He found [at paras. 64-66]:

In his testimony, the worker noted that he made bi-monthly trips to Dr. Sokol in order to obtain prescriptions for pain medications. If he did not attend Dr. Sokol's office, he did not obtain his prescriptions. In a Board memorandum dated July 8, 2004, the worker indicated that he used to receive prescriptions over the phone but the worker's physician wanted him to personally obtain them.

In his report dated September 24, 2004, Dr. Sokol wrote the following in part regarding the worker's travel expenses:

[The worker] was emphatic that his previous appointments, as well as any drop-in visits, were all medically necessary because of his symptoms related to his work accident and this WSIB claim. He noted that when he has a medical issue not related to this WSIB claim, he visits his Family Physician and not my office. As such it would seem reasonable that he should be reimbursed for travelling expenses to my office.

I do not find that the worker is entitled to reimbursement for travel expenses associated with visits to his physicians. In my view, Dr. Sokol's opinion does not establish that the worker's visits were a necessity. On the contrary, his report seems to support that it was the worker's view that his visits were a necessity. Moreover, Dr. Sokol did not support the necessity that the worker's visits were related to his prescriptions. In my review of the medical evidence, I did not find persuasive evidence which linked the worker's travel expenses with a clinical necessity. Therefore, I deny the worker's entitlement to be reimbursed for travel expenses related to his visits to Dr. Sokol.

[37] The worker's representative makes relatively brief reference to this aspect of the Vice-Chair's decision in his submissions supporting the reconsideration request:

Regarding the worker's request for reimbursement for travel expenses, we submit the Vice-Chair did not properly consider the September 24, 2004 medical report of Dr. Sokol. We submit the only reasonable interpretation of Dr. Sokol's September 24, 2004 report was that Dr. Sokol supported the worker's visits were necessary and related to his compensable injury. At that time, Dr. Sokol was a Pain Specialist and the worker had his own family doctor, Dr. Patel, for any medical treatments that were not related to his workplace injury, as Dr. Sokol clearly indicated. We submit this was a significant error, which if corrected, would likely result in a different decision.

[38] I find that the representative's submissions do not satisfy the threshold test for reconsideration.

[39] The Vice-Chair reached a factual conclusion based on his interpretation of the contents of Dr. Sokol's

September 24, 2004 report. Mr. Dovaert would prefer a different interpretation of the same facts, but that is not a ground for reconsideration.

[40] The Vice-Chair considered the issue based on the evidence and found that the requirements of Board *Operational Policy Manual* Document No. 17-01-09 were not present. This is the correct policy, and I find no error in either law or process in the circumstances which, if corrected, would probably change the result of the original decision.

[41] Accordingly, I find that the threshold test for reconsideration has not been established for the issue of reimbursement for travel expenses.

(vi) Next Steps

[42] The reconsideration request regarding temporary disability and FEL benefits from December 13, 1993 will now proceed to a decision on the merits.

[43] The worker's representative will be asked to provide submissions on the question of whether an oral hearing on the merits is warranted or whether the reconsideration should proceed by way of written submissions. If the representative considers written submissions to be appropriate, then they should be submitted to my attention.

[44] I remain seized of this matter in order to decide the merits of the reconsideration request.

DISPOSITION

[45] The request for reconsideration is allowed, in part.

[46] The worker's request for reconsideration on the issue of entitlement to temporary disability and/or FEL benefits from December 13, 1993 is allowed.

[47] The worker's request for reconsideration on the issue of entitlement for travel expenses is denied.

Application granted in part.

Decision No. 1760/04R

Vice-Chair: Kalvin

Decision — March 31, 2009

Neutral Citation: 2009 ONWSIAT 846

Reconsideration (delay).

Application to reconsider was denied where application was not initiated until one and one-half years after release of original decision.

The worker applied for reconsideration of *Decision No. 1760/04*.

The Vice-Chair noted that the reconsideration application was not initiated by the worker until one and one-half years after release of the original decision, which substantially exceeds the guideline in the Tribunal Practice Direction on *Reconsiderations*, which states that the Tribunal has determined that generally it is not advisable to reconsider a decision after more than six months has passed since the date of the original decision.

The Vice-Chair also noted that new material submitted by the worker did not constitute new evidence since it existed or could have been generated before the original hearing. Further, the worker was raising an argument very similar to what he argued at the original hearing.

The application to reconsider was denied.

Réexamen (retard).

Le Tribunal rejette la demande de réexamen introduite un an et demi après la date de la décision initiale.

Le travailleur a demandé le réexamen de la *décision n^o 1760/04*.

Le vice-président a noté que le travailleur avait fait sa demande de réexamen un an et demi après la date de la décision initiale, soit longtemps après la directive contenue dans la *Directive de procédure : Réexamens*. Selon cette directive de procédure, le Tribunal a déterminé qu'il n'est généralement pas souhaitable de réexaminer une décision plus de six mois après qu'elle a été émise.

Le vice-président a aussi noté que les nouveaux documents soumis par le travailleur ne constituaient pas de nouveaux éléments de preuve puisqu'ils existaient ou auraient pu être produits avant l'audition initiale de l'appel. Qui plus est, le travailleur soulevait un argument très similaire à celui qu'il avait présenté lors de l'audition initiale de son appel.

Le Tribunal a rejeté la demande de réexamen.

Tribunal Decisions Considered:

Decision No. 72R (1986), 18 W.C.A.T.R. 1 refd to

Decision No. 72R2 (1986), 18 W.C.A.T.R. 26 refd to

Decision No. 95R (1989), 11 W.C.A.T.R. 1 refd to

Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 refd to

Decision No. 1674/00R (2006), 80 W.S.I.A.T.R. (online) refd to

Decision No. 871/02R2 (2006), 81 W.S.I.A.T.R. (online) consd

Workplace Insurance Legislation Considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A
s. 129

Other Decisions Considered:

Gowling v. Ontario Workplace Insurance and Appeals Tribunal, [2004], O.J. No. 919 (Div. Ct.) consd
R. v Palmer, [1980] 1 S.C.R. 759 reld to

Practice Directions Considered:

Reconsiderations (2007), 81 W.S.I.A.T.R. (online)

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 18-02-02 (October 12, 2004)

Document No. 18-02-08 (January 3, 2007)

Cross-References:

Decision No. 1760/04 (April 26, 2007) [2007 ONWSIAT 1136]

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APPLICATION by the worker for reconsideration of *Decision No. 1760/04*.

March 31, 2009. THE TRIBUNAL: —

BEFORE: B. Kalvin, Vice-Chair

HEARING: March 11, 2009, at Toronto, Written

DECISION(S) UNDER APPEAL: Worker request for reconsideration of *Decision No. 1760/04* dated April 26, 2007

APPEARANCES:

For the worker: M.S. Green, Lawyer

For the employer: The employer did not participate in the appeal

REASONS

(i) Background

[1] These are the reasons for the decision of the Workplace Safety and Insurance Appeals Tribunal with respect to a request by a worker that the Tribunal reconsider its *Decision No. 1760/04*, dated April 26, 2007.

[2] The background to this matter is as follows. On March 16, 2007, this Tribunal heard an appeal by the worker from three decisions rendered by the Workplace Safety and Insurance Board. Those decisions dealt with the worker's entitlement to benefits following a workplace accident in which he was injured. The appeal gave rise to six issues. In *Decision No. 1760/04*, the Tribunal allowed the worker's appeal in part. One issue which was

decided against the worker pertained to whether loss of earnings (LOE) benefits which the Board paid the worker were appropriately calculated by reference to the Board's long-term LOE policy for irregular employment. This issue was dealt with in *Decision No. 1760/04* as follows [at paras. 25-29]:

1. Should the worker's LOE benefits have been calculated by reference to the long-term LOE policy?

The ARO ruled that the worker should properly be regarded as a worker who was engaged in "irregular employment" and that the worker's LOE benefit should be calculated by reference to the long-term LOE policy for irregular employment contained in *Operational Policy Manual*, Document #18-02-04. That policy was amended in December 2002, but the older version remains effective for accidents occurring before that date. The appropriate provisions read as follows:

The earnings of workers in non-permanent or irregular employment typically fluctuate as they move from job to job, have periods of unemployment, or experience periods of higher or lower earnings. Therefore, it is likely that their long-term average earnings will be different than their short term average earnings. Since, it would be unfair to continue to pay a worker's loss of earnings (LOE) benefits on their short-term average earnings, the WSIB automatically recalculates the average earnings to long-term average earnings.

LOE benefits are paid based on the worker's long-term average earnings for the beginning of the 13th week of LOE benefits

...

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 the irregular hours or the method of payment.

The policy goes on to state that the long-term average earnings for these workers is "based on employment in the 24 months before the injury."

The ARO determined that this policy applied to the worker and ruled:

At the outset of the hearing, the worker's representative indicated that he had no additional information to provide on this matter, and no reference was made to this issue during the course of the hearing. Based on the information contained in the file, the worker's employer [sic] pattern can quite reasonably be considered to be irregular in nature, and as such the Act and policy dictate that the long-term earnings rate the [sic] recalculated after 12 weeks of continuous LOE benefits.

Having considered the evidence and submissions put forward at the hearing of this appeal, I agree with the conclusion reached by the ARO. In this case, the worker began working for the accident employer on January 15, 2001, that is, about a week before his accident. The evidence reveals that in the previous years, the worker worked in construction and that his employment was irregular. He worked from October 15, 1999 to April 7, 2000. After April 7, 2000, the worker did not work again until September 11, 2000, that is, a gap of approximately five months. The job which the worker began on September 11, 2000, lasted for approximately three months, before ending on December 21, 2000. After that, the worker did not work again for approximately one month, and was then hired by the accident employer. In my view, the ARO correctly characterized the worker as being engaged in "irregular employment" as defined by the long-term LOE policy.

At the hearing of this appeal, the worker's representative submitted that even if the worker's previous employment was irregular, the job he undertook with the accident employer in January 2001 was different, and that it was a regular full-time year round job. In my view, the evidence does not support such a conclusion. I note that no such claim was made when the worker appeared and testified before the ARO on June 13, 2002. A review of the file indicates that the original objection to the calculation of the worker's LOE benefit was based on a claim that certain sums of previously earned income were left out of the LOE calculation. No claim was ever made that the worker was not in irregular employment, but rather that in determining amounts which he earned in prior irregular employment certain earnings were left out. At the hearing of this appeal, however, the nature of the objection changed. As noted, now the worker claims that as of January 2001, he was no longer in irregular employment. I do not accept that the worker was hired into a regular full-time year round employment position when he began working for the accident employer in 2001. If that was the case, then, in my view, this claim would have been made much earlier than the hearing of this appeal. Further, there is nothing by way of written documentation to establish this claim. Finally, based on the worker's previous employment pattern, namely working for defined periods of time on particular construction jobs with different employers, it is more likely than not, in my view, that the job which the worker was hired to do by the accident employer in January 2001 was similar. I find that the worker was engaged in "irregular employment" within the meaning of the Board's policy on long-term LOE and that

his LOE benefits were appropriately calculated by reference to the method prescribed in that policy.

[3] The worker now requests reconsideration of this issue. The worker's representative submits that evidence establishes that in September 2000, the worker's status changed from an apprentice to regular worker and therefore the worker's LOE benefits should not be calculated by reference to the Board's long-term LOE policy. In support of his position, the worker's representative refers to the Board's policy on average earnings set out in *Operational Policy Manual* Document No. 18-0-08 which states that for a prescribed list of workers "the guidelines for calculating short-term and long-term average earnings are not applicable." Included in the list is "apprentices."

(ii) The Reconsideration Test

[4] The *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, provides that the Appeals Tribunal's decisions shall be final. However, section 129 of the *Workplace Safety and Insurance Act* provides 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.

[5] 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.

[6] As discussed in *Decision No. 871/02R2* (2006), 81 W.S.I.A.T.R. (online), one of the fundamental concepts which guides the entire Tribunal process is a duty of fairness. The Tribunal has gone to considerable lengths, in spite of limited resources, to promote a fair process. The threshold test and the role of the reconsideration process must be understood in the context of the Tribunal's processes generally. Most parties have the option of an oral hearing, which is a hearing *de novo* at the Tribunal. This is very unusual at the final level of appeal within any adjudicative system. The Tribunal invests considerable resources in preparing cases for hearing and assisting parties to identify the issues in dispute so that parties can in turn be fully prepared for the hearing. The reconsideration process should not be so generally available that it undermines the important role of the original hearing or the finality of decisions which are reached after a fair hearing process.

[7] Because of limited resources, the Tribunal must also carefully balance its processes to ensure that parties awaiting their first hearing are not penalized because of the expenditure of scarce resources on reconsideration requests.

[8] It is instructive to refer to *Decision No. 871/02R2*'s analysis of the threshold test that a reconsideration request must meet and the reasons for this [at paras. 11-13]:

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 re-opened.

[9] The Divisional Court has reviewed and upheld the Tribunal's reconsideration process in *Gowling v. Ontario Workplace Safety and Insurance Appeals Tribunal*, [2004] O.J. No. 919 (Div. Ct.) In particular, the Court found that [at para. 23]:

- 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.

[10] With respect to the substantial new evidence test, the Panel in *Decision No. 871/02R2* provided the following very useful explanation of what must be demonstrated to satisfy this ground [at para. 24]:

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...*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... [Emphasis added]

[11] Where the evidence submitted at the reconsideration was available prior to the completion of the hearing, the diligence of the parties in presenting this evidence may be considered. For example, in *Decision No. 1674/00R* (2006), 80 W.S.I.A.T.R. (online), the worker did not indicate that he had a copy of the evidence that was specifically requested post-hearing. He did not present the evidence until the time of his reconsideration request. The Vice-Chair reviewed the due diligence test as set out in *R. v. Palmer* [1980] 1. S.C.R. 759, and denied the reconsideration on the basis that [at paras. 61-63]:

The Tribunal is not bound by the rules of a Court, and the rules of procedure referred to above are not relevant. An application for reconsideration is not an appeal. However, the Tribunal's threshold test for reconsideration reflects the importance of the principle of finality in Tribunal decision making. In the case of the Tribunal, also, it would not be in the interests of justice to permit a party to reopen appeals at will to the general detriment of the administration of justice.

In this case, the late filed clinical notes are directly relevant to the issue determined by the Panel. I also do not doubt that these are the clinical notes...which the Panel was seeking in its post-hearing request.

However, with respect to the worker's due diligence, I consider this a particularly egregious case. The evidence was in the worker's possession, as opposed to that of the doctor or hospital. The worker failed to produce it in the face of extensive post-hearing efforts by the Panel to obtain it, which highlighted the need for this information.

[12] Applying the principle set out above to the present case, I find that the threshold for granting a reconsideration request has not been met. My reasons for this conclusion are as follows.

[13] First, this reconsideration was initiated by a letter from the worker's current representative dated December 18, 2008, that is, more than one and one-half years after *Decision No. 1760/04* was released. No compelling reason for this delay has been articulated. The Tribunal's Practice Direction on *Reconsiderations* (2007), 81 W.S.I.A.T.R. (online) states [at para. 3.2]:

Therefore the Tribunal has determined that as a general practice, it is not advisable to reconsider a decision after more than six months has passed since the date of the decision.

[14] In this case, the delay in bringing the reconsideration application substantially exceeds the six month guide identified in the Practice Direction, and is a factor which counts against reconsidering *Decision No. 1760/04*.

[15] Secondly, the evidence tendered in support of the application is not new evidence. The worker's representative has submitted a portion of the collective agreement covering the worker's employment as well as what appear to be time sheets for hours worked. Neither of these documents is new evidence: both are documents which existed or could have been generated several years before the Tribunal hearing on March 16, 2007. Further, although these documents were accompanied by two covering letters from the worker's union, dated June 24, 2008 and December 16, 2008, I do not regard these letters as significant new evidence. The letters are an attempt to explain the worker's status in 2000 and are an interpretation of the information contained in the collective agreement and the time sheets. They are documents which could have been solicited from the worker's union prior to the hearing date of March 16, 2007.

[16] Thirdly, at the hearing of the appeal, the worker's representative at the time specifically argued that the worker's LOE benefit should not be calculated by reference to the long-term LOE policy because his work status changed when he began working with the accident employer. That argument was considered and rejected in *Decision No. 1760/04*. The request for reconsideration is now premised on a very similar argument to that raised at the hearing of the appeal, namely, there was a change in the worker's status such that the long-term LOE policy should not have been applied. While the precise change in status now being claimed is different from that precise change in status raised at the original hearing, it is a very similar point to that raised at the hearing of the appeal. There was nothing preventing the worker's representative at the hearing of this appeal from putting forward the precise point now being made in the reconsideration request. I note that the worker was represented by experienced counsel at the original appeal hearing.

[17] Finally, the request for reconsideration is predicated on a distinction drawn between different types of workers set out in *Operational Policy Manual* Document No. 18-02-02. That policy is not applicable to the worker's case. The policy states that it applies to "all decision, for all accidents occurring on or after December 1, 2002." In this case, the worker's accident occurred on January 22, 2001.

[18] For the reasons set out above, I find that the Tribunal's threshold test for granting a reconsideration request has not been met.

DISPOSITION

[19] The request for reconsideration is denied.

Application denied.

Decision No. 464/09

Vice-Chair: Josefo

Decision — March 10, 2009

Neutral Citation: 2009 ONWSIAT 590

Second Injury and Enhancement Fund (pre-existing condition) – Smoking.

Smoking may have contributed to worker's slow recovery from a back injury, but was not a prior disability or condition within Board policy so as to warrant SIEF relief to the employer.

The worker suffered a back injury in 2003. The employer appealed a decision of the Appeals Resolution Officer denying the employer SIEF relief. The appeal was dismissed.

The worker had pre-existing degenerative disc disease, but it did not cause or contribute to the accident, nor did it prolong or enhance the worker's recovery from the accident.

The worker was a smoker. Smoking can and often does lead to disease or death. However, smoking is not, itself, a prior disability or condition. Rather, the act of smoking may cause or contribute to a disability or condition. While the worker's smoking habit may have contributed to her slow recovery from compensable surgery, the smoking was not a prior disability or condition under the applicable Board policy.

The employer was not entitled to SIEF relief.

Fonds de garantie pour travailleurs réintégrés (état pathologique préexistant) – Usage du tabac.

L'usage du tabac pouvait avoir contribué à la lenteur du rétablissement de la travailleuse à la suite d'une lésion au dos mais cela ne constituait pas une invalidité préexistante ou un état pathologique préexistant ouvrant droit à une exonération du FGTR au sens de la politique de la Commission.

La travailleuse avait subi une lésion au dos en 2003. L'employeur a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de lui reconnaître le droit à une exonération du Fonds de garantie pour travailleurs réintégrés (FGTR). Le Tribunal a rejeté l'appel.

La travailleuse souffrait d'une discopathie dégénérative préexistante mais cette affection n'avait ni causé ni contribué à l'accident, pas plus qu'elle n'avait ralenti ou compliqué son rétablissement après l'accident.

La travailleuse était une fumeuse. L'usage du tabac peut être, et est souvent, une cause de maladie ou de décès. Cependant, en soi, l'usage du tabac ne constitue pas une invalidité préexistante ou un état pathologique préexistant. L'usage du tabac peut plutôt causer ou contribuer à une invalidité ou à un état pathologique. Bien que l'usage du tabac de la travailleuse ait pu contribuer à la lenteur de son rétablissement à la suite d'une chirurgie indemnisable, il ne constituait pas une invalidité préexistante ou un état pathologique préexistant au sens de la politique applicable.

L'employeur n'avait pas droit à une exonération du FGTR.

Tribunal Decisions Considered:

Decision No. 1528/05 (September 15, 2005) [2005 ONWSIAT 2044] consd

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 14-05-03 (February 20, 2006)

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APPEAL by the employer from a decision of the Appeals Resolution Officer denying the employer Second Injury and Enhancement Fund relief.

March 10, 2009. THE TRIBUNAL: —

BEFORE: J. Josefo, Vice-Chair

HEARING: March 4, 2009 at Toronto, Written

DECISION(S) UNDER APPEAL: WSIB Decision of ARO Mr. L.J. Vaccarello, dated March 31, 2008

APPEARANCES:

For the worker: Not applicable

For the employer: Mr. A. Southworth, Consultant

REASONS

(i) The Appeal – Issues and Background

[1] The employer appeals the March 31, 2008 decision of Board Appeals Resolution Officer (ARO) Mr. L.J. Vaccarello. In that decision, ARO Vaccarello denied the employer's claim for Second Injury and Enhancement Fund (SIEF) cost relief under a particular claim number. The employer seeks entitlement for cost relief and also, if such is granted, a retroactive cost adjustment to the employer's NEER account for the accident year 2003.

[2] The background facts in this matter were well summarized in the ARO decision. In essence, on April 10, 2003 the worker injured her lower back yet again when performing heavy lifting in the course of her employment. While the worker returned to accommodated work in May 2003, she ultimately laid off on July 18, 2005 as she had ongoing difficulty performing even modified work duties. The worker underwent a spinal decompression and fusions in August 2006. She returned to accommodated work duties at reduced hours in February 2007 following post-operative care and treatment.

[3] The worker had prior low back difficulties. Her first work accident occurred on October 5, 1995 when she strained her lower back. She had a recurrence on June 20, 1996, a new lumbar strain on July 28, 1997, problems that reportedly arose at home on November 21, 1999, another workplace accident on March 6, 2001, and a problem with her neck and right shoulder arising on November 26, 2002, from which also was subsequently noted some pain in her lower back. The next incident was the April 10, 2003 accident.

[4] The ARO concluded that while the worker experienced intermittent lower back pain with sciatica, the worker was able to continue with her regular work duties until the injury of April 10, 2003. The ARO concluded that the

worker's identified central annular tear at the L4-5 level "most likely arose from the workplace accident of April 10, 2003" and there was no evidence of pre-existing degenerative disc disease in the lower back.

[5] The ARO also concluded that the worker's smoking habit did not impact on her post-surgical recovery from spinal fusion and that the worker's recovery was not prolonged or enhanced by any pre-existing condition. As such, the employer's claim for SIEF relief was denied.

[6] The employer appeals from these conclusions.

(ii) Discussion and Conclusions

[7] Despite the detailed written submissions of Mr. Southworth, dated December 9, 2008, I am unable to grant the employer SIEF cost relief. These reasons will hopefully demonstrate why I came to this conclusion.

[8] The worker's history of back problems, well summarized by Mr. Southworth, reveals that the worker did have occasional flare-ups of low back pain that waxed and waned over the years. The worker was not, however, prevented from performing her regular work duties for much of that time. Indeed, following the October 1995 incident, it was expected that the worker would make a complete recovery even though she did occasionally suffer what was described as acute exacerbations of her lumbar pain.

[9] While it is submitted that a July 7, 1998 x-ray that revealed "slight osteophyte formation" could be interpreted "from a lay perspective" to be indicative of an underlying condition, I disagree. I similarly disagree when Mr. Southworth makes the same argument based upon a June 23, 2003 CT scan report that indicated "mild degenerative disc disease with some small anterior marginal osteophyte formation."

[10] It is well known that degenerative disc disease, often referred to as ageing changes of the lumbar spine, is commonplace amongst the populous as a whole. The below comment from Tribunal *Decision No. 1528/05* (September 15, 2005) addresses the significance of DDD revealed by radiological examination and also discusses the evaluation of medical and other evidence for cost relief purposes as follows [at paras. 16-18]:

That the worker, at age 52, had multiple level degenerative disc disease is hardly surprising. Indeed, it would have been far more surprising if a worker of that age and stage in his life on radiological examination would show not to have any degenerative disc disease.

The question that needs to be asked according to *Operational Policy Manual* Document No. 08-01-05 in determining the medical significance of a condition is whether the worker is liable to develop a disability of greater severity than a normal person.

I agree with *Decision Nos. 1596/98, 701/01 and 186/91* that some degree of degenerative change would be considered "normal" according to medical understanding of the natural process of aging and degenerative disc disease. I also agree with the suggestion found in *Decision Nos. 280/05, 1596/98, 404/94 and 524/97* that the evidence concerning the level of the worker's disability both before and after the accident should be compared to determine the medical significance of the pre-existing condition.

[11] Mr. Southworth well notes in his submissions that, per Document No. 14-05-03 of the *Operational Policy Manual*, SIEF, *there must be a prior disability that causes or contributes to the compensable accident, or if a period resulting from an accident becomes prolonged or enhanced due to a pre-existing condition*, in order for there to be cost relief. In this case it would not appear that the worker's pre-existing aging changes in the lumbar spine were a disability that contributed to the stand-alone work accident of April 10, 2003, when the worker unfortunately lifted a box that weighed 20 to 30 pounds. That, in my view, was likely the cause of the worker's tear and resulting treatment and time off work. I further do not conclude that the ageing changes in the worker's lumbar spine prolonged her recovery from the 2003 accident, or enhanced her condition as arising from that accident.

[12] It must be noted that while the worker had a problem in 1995 and a recurrence in June 1996, the next problem occurred 13 months later in July 1997 when again, the worker lifted a 30-pound box. That, too, was a stand-alone incident which caused the worker's problem at that time.

[13] The worker had no more problems for more than two years, until November 1999, when she apparently had

some problems at home, but neither workplace party pursued this issue. The next incident was in March 2001, some 18 months later, again caused by the worker lifting approximately 35 pounds.

[14] But the worker did not perform light work after she recovered from the March 6, 2001 incident, given that on April 10, 2003 the worker was again lifting a 30-pound box. Clearly, the worker was performing her usual duties and had recovered in order to be permitted to do so at the time of the April 2003 work accident. There is no evidence, accordingly, of a pre-existing condition or disability contributing to that accident, or delaying the worker's recovery from that accident.

[15] The April 10, 2003 incident led the worker to a CT scan that identified mild DDD and disc bulging. Subsequently, it was concluded that the worker had central disc herniations at L4-5 and L5-S1, and because of this, the worker underwent an MRI. While Mr. Southworth attempts to put more weight on the CT scan, the more sophisticated imagery of the MRI was required by the worker's treating physicians to better identify her problems. While the worker in any event had mild DDD at certain levels before 2003 again, that is hardly surprising given the above comments excerpted from *Decision No. 1528/05*.

[16] Mr. Southworth references comments from the worker's treating physicians who were concerned with the worker's smoking habit and held this might interfere with the worker obtaining good results from spinal fusion surgery. Dr. B. Rerri noted this fact and suggested that the worker receive a particular treatment that would help speed the fusion process. Dr. Rerri in his report of January 29, 2006, states in part as follows:

Typical recovery from this type of surgery would take six to 12 months but can be significantly shortened by use of BMP to achieve much earlier fusion which in my hands has been achieved within six to eight weeks.

[17] I will return to Mr. Southworth's interesting argument that the worker's smoking habit prolonged her recovery and, as such, would entitle the employer to SIEF cost relief. First, I will observe that Dr. Rerri indicates that typical recovery from fusion surgery is six to 12 months but a new process can reduce that length of time. The ARO noted that the worker had a solid fusion "just over one year from surgery" and opined that the normal range of recovery from spinal fusion is 12 to 18 months. Dr. Steinnaagel, the Board's medical consultant who reviewed on two occasions the employer SIEF relief claim did not opine in either the April 19, 2006 or in the March 1, 2007 medical note that the spinal fusion recovery was prolonged or excessive.

[18] In my view, the worker's recovery from spinal fusion was more likely at about the normal level given the normal variances implicit in the human condition.

[19] I now turn to the argument that smoking is a "disability" which, in this case, caused or contributed to the accident or prolonged the healing time. OPM Document No. 14-05-03, the SIEF policy states in part as follows:

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

Both physical and psychological disabilities are included.

[20] Can it be said that smoking tobacco is a "prior disability" or a "condition"?

[21] It is not disputed that tobacco smoking can and often does lead to disease and death. But in my view, tobacco smoking is not, itself, a "prior disability" or a "condition." While tobacco smoking indeed has been shown to be contributory to many forms of illness, the act and fact of smoking itself is not a disability, nor a condition. Rather, the act or fact of smoking may well cause or contribute to a disability or to a condition.

[22] As such, I find that while the worker's smoking habit may have contributed to her slow recovery from fusion surgery, if indeed her recovery was beyond the normal healing time which is at best a questionable assumption, smoking is not something that would be considered as a prior disability or condition under the applicable Board policy. As such, the employer is not entitled to SIEF relief because of the worker's smoking habit.

[23] Finally, it is helpful to review Dr. Steinnaagel's reports, and in particular, the March 1, 2007 report. Dr. Steinnaagel in this report makes it clear that the worker's file was reviewed "in its entirety" on more than one

occasion. While the worker has interstitial cystitis, Dr. Steinnagel makes it clear that neither this condition, nor the worker's short leg syndrome, were components of the worker's back pain. Dr. Steinnagel notes, correctly, that the worker's pain is "specifically attributed to the disc" that became problematic following the April 10, 2003 accident.

[24] Mr. Southworth speculates that if the Board's physician had access to the 1995 claim file, the physician may have reached a different conclusion. In my view, this is highly doubtful because it is clear that the worker recovered after the prior accidents as described above, such that she was able to perform her regular and physically demanding duties. In any event, other than speculation as to what might have been done by this physician, the employer offers no evidence upon which I can rely to ground the submission that the worker's problems after the discreet and stand-alone accident of April 10, 2003 were contributed by her previous intermittent low back problems.

[25] Accordingly, for these reasons and for the reasons well described by ARO Vaccarello in the decision under appeal, the employer's claim for SIEF relief is denied.

[26] As I have denied the employer's claim for SIEF relief, I need not address the employer's request that any cost relief granted be applied retroactively to the 2003 accident year.

DISPOSITION

[27] The employer's claim for cost relief is denied.

Appeal dismissed.

Decision No. 570/09

Panel: Noble (Vice-Chair), Young, Jackson

Decision — March 30, 2009

Neutral Citation: 2009 ONWSIAT 829

Stress, mental (effect of employment decisions).

Worker did not have entitlement for stress related to employer's investigation and discipline of worker.

The worker was a health care aide. The worker's supervisor telephoned her at home on her day off to tell her that she was being suspended with pay for three days while the employer investigated allegations pertaining to the care provided by the worker to residents in her care. The worker then laid off, claiming entitlement for traumatic mental stress. The worker appealed a decision of the Appeals Resolution Officer denying entitlement. The appeal was dismissed.

The worker was claiming benefits for stress in relation to events that were caused by her employer's decisions or actions related to the employment function, in particular the employer's investigation and discipline of the worker. Benefits for stress are specifically prohibited in these circumstances under s. 13 of the *Workplace Safety and Insurance Act, 1997*, and Board policy.

Tension mentale (effet de décisions en matière d'emploi).

La travailleuse n'avait pas droit à une indemnité pour le stress lié à une enquête de l'employeur et à des mesures disciplinaires.

La travailleuse était une aide-soignante. Son superviseur lui avait téléphoné à la maison pendant sa journée de congé pour lui dire qu'elle était suspendue avec salaire pendant que l'employeur enquêtait par suite d'allégations faites au sujet des soins qu'elle dispensait aux personnes à sa charge. La travailleuse a alors pris congé et elle a demandé une indemnité pour stress traumatique. La travailleuse a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de lui reconnaître le droit à l'indemnité demandée. Le Tribunal a rejeté l'appel.

La travailleuse avait demandé des prestations pour un état de stress attribuable aux décisions ou mesures de l'employeur dans le cadre de l'exécution de la fonction d'emploi, en particulier à l'enquête et aux mesures disciplinaires de l'employeur. L'article 13 de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* et la politique prohibent le versement de prestations dans de telles circonstances.

Workplace Insurance Legislation Considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A

s. 13

s. 13(4)

s. 13(5)

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 15-03-02 (October 12, 2004)

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[DISPOSITION](#)

APPEAL by the worker from a decision of the Appeals Resolution Officer denying entitlement for traumatic mental stress.

March 30, 2009. THE TRIBUNAL: —

BEFORE:

J. Noble, Vice-Chair
B.M. Young, Member Representative of Employers
F. Jackson, Member Representatives of Workers

HEARING:

March 19, 2009, at Toronto, Oral

DECISION(S) UNDER APPEAL:

WSIB ARO decision dated January 8, 2007

APPEARANCES:

For the worker:

Self represented

For the employer:

Not participating

REASONS

(i) Issues

[1] The issue to be decided in this appeal is whether the worker should have entitlement for traumatic mental stress.

(ii) Background

[2] The worker, who was employed as a health care aide, was suspended with pay by her employer in October 2004 as a result of allegations of concerns pertaining to the care provided by the worker to residents in her care. The worker laid off work due to reported stress.

[3] On October 28, 2004 the employer notified the worker that medical information that the worker had provided had been reviewed, and the employer stated that the worker was entitled to short-term disability benefits effective October 8, 2004.

[4] The worker did not return to work with the accident employer subsequent to October 2004.

[5] On January 30, 2006, the worker filed a Worker's Report of Injury (Form 6) with the Board claiming entitlement for chronic depression and stress, and chronic pain syndrome. The Form 6 report stated that the accident/illness happened in a phone call to the worker on her day off at home dated October 5, 2004, in which she was advised that she was suspended for three days. The Form 6 report stated that the employer would not explain why the worker was suspended other than the employer had a written letter regarding the worker's provision of care to the residents of the employer's facility.

[6] In a letter to the Board dated February 1, 2006, the employer's Occupational Health and Safety Officer stated:

We wish to object to initial and ongoing entitlement for this claim and do not believe [the worker] should be entitled to WSIB benefits for traumatic and mental stress. Further to our conversation, it would appear according to [the worker's] Form 6, she is claiming that she should be eligible for WSIB benefits because she has been absent from work due to traumatic mental stress as a result of the employer's employment decision or action and not because she is suffering from an acute reaction to a sudden and unexpected traumatic event.

On October 5, 2004 our Director of Resident Care, [KL] received a concern respecting [the worker's] provision of care relating primarily to Resident abuse and neglect. As per our... policy regarding Resident Abuse, [the worker] was notified that she was immediately suspended with pay from active duty pending further investigation. [The worker] is aware of this policy and the Resident's Bill of Rights, they have been enclosed for your information. As discussed, [the worker] was not the object of physical violence.

On October 8, 2004 [the worker] attended a non-disciplinary meeting to investigate the concern reported to [KL] on October 5, 2004. At the conclusion of the meeting [the worker] produced a medical note also dated October 8, 2004 stating that she would be off work for several weeks due to medical reasons.

I have also enclosed a letter dated October 28, 2004 to [the worker] indicating that we will be unable to conclude the investigation until she is medically capable of returning to work. She is currently on Long Term Disability.

[7] In a decision dated February 1, 2006 the Board Claims Adjudicator denied entitlement for a psychotraumatic disability resulting from the effects of work-related mental stress on the grounds that the claim did not meet the criteria in Board policy. The Claims Adjudicator stated:

The information you have sent to this claim file indicates you were suspended for three days with pay in October, 2004. You have been off work since that date on short-term and then long term benefits with your employer's insurance carrier. Your employer advised me that following an allegation of resident abuse involving an employee of the [employer], it is employer policy to suspend the employee with pay while an investigation is conducted. You have confirmed there was no sudden, objectively traumatic, life-threatening event which occurred in the worksite which may have contributed to your present condition but rather your return to work status remains unresolved following the initial suspension.

While I do not question your opinion that your condition was a result of the events you described, I am not able to allow your claim as these circumstances do not meet the criteria of the policy.

[8] In a letter dated May 13, 2006 the worker stated that she applied for WSIB benefits for various reasons including stress, chronic pain syndrome, and depression which had a cumulative effect. The worker stated:

I have chronic pain syndrome, asthma, arthritis, depression and COPD. The reasons for objecting are reasons enclosed. These reasons are not due to my suspension with pay, but the [employer] is trying to say that is why I am not a candidate for WSIB... All my physical and mental problems are due to my work injuries and various situations have been sudden and unexpected and has had a cumulative effect on me, these situations all stem from my employment, now if I filed under the appropriate policy I do not know and maybe you could advice [sic] me ...

[9] The worker appealed this decision to the ARO.

[10] In a letter dated August 17, 2006 the Board Adjudicator stated that entitlement for CPD was denied.

[11] The ARO decision under appeal dated January 8, 2007 considered the worker's objection to the denial of entitlement under the traumatic mental stress policy. The ARO decision stated that it appeared that the worker's symptoms commenced after being told she was suspended for three days after allegations of abuse of a resident. The ARO stated that the employer's actions were company policy and the employer had a zero-tolerance policy, and as such the worker's case would not be covered under Board policy. The ARO stated that the worker confirmed that there was no sudden, objectively traumatic of life-threatening event that could have caused the worker's breakdown. The ARO stated:

It is noted that she has stated she has had repetitive injuries and strains which have caused stress and psychiatric problems. However, again, this would not fall under the purview of the Traumatic Mental Stress policy.

Furthermore, while she also states she is constantly exposed to violence and conflicts with co-workers, there is no evidence of the worker being in a life-threatening situation or one that can be identified as being objectively traumatic, as defined by policy.

[12] The worker appeals this decision.

(iii) Medical Evidence

[13] Dr. F.J. Jarrett, psychiatry, performed an independent medical assessment of the worker on April 1, 2005 at the request of the employer's insurance carrier. Dr. Jarrett stated that the worker saw her family doctor, Dr. D. Koval, for regular counselling. Dr. Jarrett stated:

October 5, 2004 was her day off. A supervisor called her by telephone and told her that she was "suspended with pay" for three days. The supervisor further said that allegations of "neglect of residents" had been made, but the supervisor did not elaborate and did not tell her the nature of the complaints about her. [The worker] said that she was shocked when she heard this and began crying and shaking. She went to see her family doctor, who immediately suggested that she should be on sick leave and she has not worked since...

[The worker] feels that she had been treated unfairly and she had no indication that anything was wrong with the way she worked...

Since her last day at work, [the worker] has been complaining of depression and chronic pain...

[The worker's] current state of function must be viewed in the context of a very difficult life involving the break up of two marriages with the breakup of the second marriage being particularly traumatic. Throughout this, she brought up five children, and except for her pregnancies, she has worked full time at jobs involving a considerable amount of physical effort. Over the past few years, she seems to have developed osteoarthritis in a number of joints, both large and small. Problems with her spine may have been exacerbated by an MVA eight years ago. This is her third period of time off work in the past four years, and throughout, her main complaint has been of chronic pain and difficulty moving. [The worker's] assessment is that her depressed mood is secondary to her physical complaints and I consider that there is some merit in this assessment. There is no family history of depression, and no episodes of depression prior to five years ago, even though she has been through some harrowing times.

It has not helped that she feels that she has been treated unfairly and that her hard work and care for residents of the nursing home has apparently not been appreciated, although up until the fall of 2004, she was under the impression that she was a highly thought of employee. It has been devastating for her to feel that all of her efforts are now not appreciated...

[14] Dr. Jarrett stated that the worker's diagnosis was Major depressive episode, and that she was not at that time fit for work.

(iv) Other Information in the Case Record

[15] In a letter dated April 12, 2007 addressed to the worker, the employer stated:

In accordance with the terms of Article 15.04 (h) of the C.A.W. Local 830 collective agreement, your absence from employment has exceeded beyond the 24 month term. As a result, this will confirm that your employment at the [employer's workplace] is hereby terminated, effective immediately.

(v) Testimony

[16] The worker testifies that her co-workers said things about her to her employer in 2004, a month after the incidents that were alleged to have occurred. The worker testifies that she feels that certain co-workers ganged up against her and made unfounded allegations about her treatment of residents and her conduct, and she has no idea why.

[17] The worker states that she received a telephone call at home on a Tuesday in October 2004 from her employer and was told that there would be a meeting on Friday. The worker states that she was crying all the time as a result, and she could not sleep and could not accept that this was happening. The worker testifies that she

went to the doctor as soon as she could get an appointment following the Tuesday phone call from the employer, and she got an appointment for Friday prior to the meeting with the employer. The worker states that she gave the employer a doctor's note at the Friday meeting that stated she was going off sick.

[18] The worker states that the employer at first stated that the worker was suspended with pay until the investigation into the allegations was resolved, but then because of her doctor's note they put her on sick benefits. The worker confirmed that she received sick benefits from the Sun Life insurance company. The worker states that eventually she received long-term disability (LTD) benefits and she continued to receive these benefits although she was terminated by the employer in April of 2007 for not attending work for over two years. The worker states that to date she continues to receive LTD benefits from the employer's insurance carrier.

[19] The worker states that the LTD benefits replaced two-thirds of her income. The worker states that she also won her Canada Pension Plan (CPP) Disability appeal and now she also receives CPP disability benefits, however the Sun Life LTD payments are reduced to take into account the CPP disability benefit payments the worker receives. The worker states that she gets CPP disability benefits because of the following conditions: chronic obstructive pulmonary disease (COPD); fibromyalgia; chronic pain syndrome; and irritable bowel syndrome, and the worker states she also suffers from depression.

[20] The worker states that she was in a union but she did not file a grievance about the suspension and she did not file a grievance about the termination of her employment. The worker testifies that she does not feel she received adequate assistance from her union.

[21] The worker states that she has never had an opportunity to clear her name and address the allegations against her, because she went off work on sick leave when she was first suspended with pay and the employer did not therefore complete the investigation. The worker states that she always received very good performance appraisals prior to October 2004.

(vi) Submissions

[22] The worker submits that she should have entitlement for traumatic mental stress because she feels that what happened to her in October 2004 was a sudden and unexpected trauma. The worker submits that what happened was work-related.

[23] The worker submits that what has happened has been life threatening, physically, emotionally, and financially. The worker states that she cannot walk around her town and hold her head up because the accusations were not cleared, and it still bothers her.

(vii) Law and Policy

[24] Section 13 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) is applicable to this appeal and provides as follows:

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.

(3) Except as provided in sections 18 to 20, the worker is not entitled to benefits under the insurance plan if the accident occurs while the worker is employed outside of Ontario.

(4) Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.

(5) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.

[25] Pursuant to section 126 of WSIA, the Board advised that the following Policy Packages are relevant to this appeal: #1 (Revision #7) – Initial Entitlement; #7 – Traumatic Mental Stress; and #300 – Decision Making/Benefit of Doubt/Merits and Justice.

[26] Included in these Policy Packages is Board *Operational Policy Manual* (OPM) Document No. 15-03-02 – Traumatic Mental Stress – which provides in part as follows:

POLICY

A worker is entitled to benefits for traumatic mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment.

A worker is not entitled to benefits for traumatic mental stress that is a result of the employer's employment decisions or actions.

GUIDELINES

Sudden and unexpected traumatic event

In order to consider entitlement for traumatic mental stress, a decision-maker must identify that a sudden and unexpected traumatic event occurred. A traumatic event may be a result of a criminal act, harassment, or a horrific accident, and may involve actual or threatened death or serious harm against the worker, a co-worker, a worker's family member, or others.

In all cases, the event must arise out of and occur in the course of the employment, and be

- clearly and precisely identifiable
- objectively traumatic, and
- unexpected in the normal or daily course of the worker's employment or work environment.

This means that the event

- can be established by the WSIB through information or knowledge of the event provided by co-workers, supervisory staff, or others, and
- is generally accepted as being traumatic.

Sudden and unexpected traumatic events include

- witnessing a fatality or a horrific accident
- witnessing or being the object of an armed robbery
- witnessing or being the object of a hostage-taking
- being the object of physical violence
- being the object of death threats
- being the object of threats of physical violence where the worker believes the threats are serious and harmful to self or others (e.g., bomb threats or confronted with a weapon)
- being the object of harassment that includes physical violence or threats of physical violence (e.g., the escalation of verbal abuse into traumatic physical abuse)
- being the object of harassment that includes being placed in a life-threatening or potentially life-threatening situation (e.g., tampering with safety equipment; causing the worker to do something dangerous).

The worker must have suffered or witnessed the traumatic event first hand, or heard the traumatic event first hand through

direct contact with the traumatized individual(s) (e.g., speaking with the victim(s) on the radio or telephone as the traumatic event is occurring).

Acute reaction

An acute reaction is a significant or severe reaction by the worker to the work-related traumatic event that results in a psychiatric/psychological response. Such a response is generally identifiable and must result in an Axis I Diagnosis in accordance with the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

An acute reaction is said to be immediate if it occurs within four weeks of the traumatic event.

An acute reaction is said to be delayed if it occurs more than four weeks after the traumatic event. In the case of a delayed onset, the evidence must be clear and convincing that the onset is due to a sudden and unexpected traumatic event, which arose out of and in the course of the employment.

Workers who develop mental stress gradually over time due to general workplace conditions are not entitled to benefits.

Cumulative effect

Due to the nature of their occupation, some workers, over a period of time, may be exposed to multiple, sudden and unexpected traumatic events resulting from criminal acts, harassment, or horrific accidents. If a worker has an acute reaction to the most recent unexpected traumatic event, entitlement may be in order even if the worker may experience these traumatic events as part of the employment and was able to tolerate the past traumatic events. A final reaction to a series of sudden and traumatic events is considered to be the cumulative effect.

The WSIB recognizes that each traumatic event in a series of events may affect a worker psychologically. This is true even if the worker does not show the effects until the most recent event. As a result, entitlement may be accepted because of the cumulative effect, even if the last event is not the most traumatic (significant).

In considering entitlement for the cumulative effect, decision-makers will rely on clinical and other information supporting that multiple traumatic events led to the worker's current psychological state. Also, there may be evidence showing that each event had some effect or life disruption on the worker, even if the worker was not functionally impaired by the effect or life disruption.

An employer's work-related decisions or actions

There is no entitlement for traumatic mental stress due to an employer's decisions or actions that are part of the employment function, such as

- terminations
- demotions
- transfers
- discipline
- changes in working hours, and
- changes in productivity expectations.

However, workers are entitled to benefits for traumatic mental stress due to an employer's actions or decisions that are not part of the employment function, such as violence or threats of violence.

Diagnostic requirements

Immediate acute reaction

Where the acute reaction is immediate, the WSIB will accept the claim if an appropriately regulated health care professional confirms the worker is suffering from an Axis I diagnosis which may include but is not limited to

- acute stress disorder

- post-traumatic stress disorder
- adjustment disorder, or
- an anxiety or depressive disorder,

in accordance with the DSM-IV. The decision-maker may, at a later point, require an assessment by a psychiatrist or psychologist to confirm ongoing entitlement.

Delayed onset or onset due to cumulative effect

Where the acute reaction is delayed, or where the claim is based on the cumulative effect of multiple traumatic events, there must be an Axis I diagnosis in accordance with the DSM-IV by a psychiatrist or psychologist before the claim is adjudicated.

Application date

This policy applies to any single traumatic event, or in the case of the cumulative effect the most recent traumatic event, occurring on or after January 1, 1989.

(viii) The Panel's Conclusions

[27] On the issue of whether the worker should have entitlement for traumatic mental stress, the Panel does not find for the worker.

[28] The Panel finds that the worker's claim for entitlement for traumatic mental stress does not meet the criteria for entitlement set out in the applicable legislation and policy. The Panel finds that the evidence indicates that the worker is claiming benefits for mental stress in relation to events that were caused by the employer's decisions or actions related to the employment function and in particular the employer's investigation and discipline of the worker. The Panel concludes that there can be no entitlement for traumatic mental stress due to such employer decisions or actions, pursuant to the application of the relevant legislation and policy, and accordingly entitlement is therefore denied.

[29] As we have stated above, the Panel finds that the evidence indicates that the worker is claiming benefits for mental stress in relation to events that were caused by the employer's decisions or actions related to the employment function and in particular the employer's investigation and discipline of the worker. The Panel observes in this regard that the worker testified at the hearing that the precipitating factor in the worker's emotional problems or stress was the telephone call that she received at home on a Tuesday in October 2004 from the employer, and the resulting suspension and non-disciplinary investigation meeting. The worker testified that these events occurred because allegations were made to the employer about the worker's treatment of residents and the worker's conduct in the workplace, and she testified that the suspension and the investigation meeting pertained to these allegations. The Panel concludes from this evidence that the traumatic mental stress that the worker claims entitlement for is related to the employer's decision to suspend the worker and investigate allegations concerning her conduct in the workplace. The Panel finds that section 13 of WSIA and the applicable Board policy specifically prohibit entitlement for benefit for mental stress in these circumstances.

[30] The Panel notes in this regard that OPM Document No. 15-03-02, which is referred to above in this decision, specifically states:

An employer's work-related decisions or actions

There is no entitlement for traumatic mental stress due to an employer's decisions or actions that are part of the employment function, such as

- terminations
- demotions
- transfers

- discipline
- changes in working hours, and
- changes in productivity expectations.

However, workers are entitled to benefits for traumatic mental stress due to an employer's actions or decisions that are not part of the employment function, such as violence or threats of violence.

[31] We see that OPM Document No. 15-03-02 provides that there is no entitlement for traumatic mental stress due to an employer's decisions or actions that are part of the employment function, such as discipline. In this case the employer notified the worker that she was suspended with pay on October 5, 2004. We note in this regard that the letter on file from the employer dated February 1, 2006 confirms that the employer notified the worker on October 5, 2004 that she was immediately suspended with pay from active duty pending further investigation of allegations relating to resident care. This evidence corresponds with the worker's testimony concerning the telephone call that she received at home on or about October 5, 2004.

[32] The Panel finds that in taking action to suspend the worker from active duty pending the investigation of allegations relating to resident care, the employer was acting in accordance with the employment function; in other words, the employer would have been required to investigate the allegations that were made concerning the worker as part of its managerial function, and in accordance with prudent managerial principles. The Panel has reviewed the information on file pertaining to the allegations concerning the worker's conduct. While we make no findings or conclusions in this decision concerning the veracity of the allegations, we do conclude that the allegations were sufficiently serious in nature that it would have been reasonable, prudent, and possibly a requirement for the employer to take steps to investigate the allegations, and to remove the worker from the workplace pending the outcome of the investigations. We cannot conclude that the employer's actions in this regard fell outside of the employment function in the circumstances of this case.

[33] The Panel finds that there is other evidence before us which indicates that the worker is claiming benefits for mental stress in relation to events that were caused by the employer's decisions or actions related to the employment function and in particular the employer's investigation and discipline of the worker. In this regard we note that the worker underwent a psychiatric examination by the psychiatrist Dr. Jarrett on April 1, 2005. In his report dated April 1, 2005, Dr. Jarrett stated that the worker received a telephone call from her supervisor on October 5, 2004 and was told she was suspended with pay further to allegations that had been made about neglect of residents. Dr. Jarrett stated that the worker said she was shocked and began crying and shaking, and that she went off on sick leave and has not worked since. The Panel finds that this evidence indicates that the employer's actions relating to the investigation and discipline of the worker were the events that gave rise to the worker's stress condition or emotional problems.

[34] Through the enactment of section 13 of WSIA, the legislature has determined that there can be no entitlement for traumatic mental stress due to employer decisions or actions that are part of the employment function, such as discipline. The related Board policy OPM, Document No. 15-03-02, gives expression to these limitations on entitlement provided in section 13. The Panel finds that the worker's case falls squarely within the provision that denies entitlement for traumatic mental stress due to an employer's decisions or actions that are part of the employment function such as discipline. Pursuant to the application of the relevant legislation and policy, entitlement for traumatic mental stress must therefore be denied.

[35] The Panel is aware that the worker stated at the hearing that she felt that the employer did not follow proper procedure with respect to the investigation of the allegations made against the worker, and that the allegations against her were unfounded. The Panel is of the view that these matters are issues for another forum, and are not issues properly before this Panel in the instant appeal. If the employer did not follow proper procedures with respect to the investigation, it is possible that could potentially have been a matter to be raised in a grievance arbitration context. The Panel cannot conclude, however, that the employer was not acting within its employment function by investigating allegations of patient neglect by an employee, even if there are questions about the

procedure followed during the investigation process. There is no suggestion that the employer's actions in this regard took it outside of its *bona fide* employment function, and we find that there is no evidence before us to support such a suggestion at any rate.

[36] With respect to the worker's claim that the allegations against her are unfounded, the Panel notes the following. The worker testified that she did not file a grievance concerning her suspension or the allegations against her, although she was a member of the union. The reasons for this are not entirely clear to the Panel. It is possible that the grievance procedure was the appropriate forum in which to challenge the allegations, but this is also not clear to the Panel. At any rate, the Panel has no doubt that the instant Tribunal appeal is not the appropriate form in which to challenge the allegations. The issue before the Panel in the instant appeal is whether the worker's objection to the ARO decision dated January 8, 2007 that concluded that the worker did not have entitlement for traumatic mental stress should be allowed or denied, and we have concluded in this decision that the objection should be denied for the reasons outlined above.

[37] With respect to the worker's assertion that she has not had an opportunity to clear up the accusations, the Panel notes the following. The worker testified that before the employer's investigation was completed, she provided to the employer a doctor's note that stated she would be off on sick leave, and she did not return to work thereafter. The employer confirmed in the letter dated February 1, 2006 that it advised that it would be unable to complete the investigation until the worker was medically capable of returning to work. The facts indicate that the worker did not return to work, and therefore the investigation was not concluded. We note that although the worker was subsequently terminated by the employer in April of 2007 pursuant to a clause in the collective agreement that required employees not to be absent in excess of 24 months, the worker continues to receive long-term disability benefits. Based on the information before the Panel, it appears that the worker did not have an opportunity to address the accusations against her in the investigation process due to her absence from the workplace on sick leave. This is an unfortunate aspect of the worker's situation; however it does not give rise to entitlement for traumatic mental stress benefits under WSIA. It is, conversely, a fortunate aspect of the worker's situation that she continues to receive disability benefits through the employer's insurance carrier.

[38] We are aware that the worker submits that what has happened has been life threatening, physically, emotionally, and financially. The Panel is unable to accept this submission. The evidence indicates that the worker was placed on suspension with pay pending an investigation into her conduct. There is no cogent evidence before the Panel to indicate that these events were life threatening.

[39] Based on all of the foregoing the appeal is denied.

DISPOSITION

[40] The appeal is denied.

[41] The worker does not have entitlement for traumatic mental stress.

Appeal dismissed.

Decision No. 528/09

Vice-Chair: E. Smith

Decision — March 20, 2009

Neutral Citation: 2009 ONWSIAT 718

Time limits (appeal) (diligence of applicant).

Worker had sufficient information to decide whether to appeal but did not do so for three years – Discoverability principle was not applicable to delay start of time limit to appeal.

The worker appealed a decision of the Appeals Resolution Officer denying an extension of the time to appeal a Board decision. The appeal was dismissed.

The worker referred to the decision of the Supreme Court of Canada in *Peixeiro v. Haberman*. That decision stands for the proposition that a statutory time limit cannot run against a person until the facts that underlie the person's right to bring the cause of action (or in this case, the appeal) are discoverable. However, the case also notes that ignorance or mistake as to the extent of damages does not delay a limitation period.

The relevant question in this case was whether the worker had sufficient information to know that the relationship between his pre-existing underlying condition and the role of workplace activities was in issue. The Vice-Chair found that the Board decision put that matter fully in question. He had sufficient information to decide whether to appeal but did not do so for three years.

The worker was not entitled to an extension of the time to appeal.

Délai (appel) (diligence du requérant).

Le travailleur avait suffisamment de renseignements pour décider d'interjeter appel mais il ne l'avait fait que trois ans plus tard – Le principe de la possibilité de découvrir la preuve ne s'appliquait pas pour retarder le moment où le délai pour interjeter appel commençait à courir.

Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de proroger le délai pour interjeter appel d'une décision de la Commission. L'appel a été rejeté.

Le travailleur a invoqué l'arrêt *Peixeiro c. Haberman* de la Cour suprême du Canada. Cet arrêt appuie la proposition selon laquelle un délai imposé par la loi ne peut commencer à courir tant que la personne visée ne connaît pas les faits sous-tendant sa cause d'action. L'arrêt note toutefois aussi qu'une erreur ou l'ignorance de l'ampleur des dommages ne retardent pas un délai de prescription.

La question pertinente en l'espèce était de savoir si le travailleur avait suffisamment de renseignements pour réaliser qu'il existait un lien entre son état sous-jacent préexistant et ses activités professionnelles. La vice-présidente a conclu que la Commission remettait parfaitement l'affaire en question. Il en savait assez pour décider d'interjeter appel mais il ne l'avait fait que trois ans plus tard.

Le travailleur n'avait pas droit à la prorogation du délai d'appel.

Tribunal Decisions Considered:

Decision No. 2199/04 (2005), 72 W.S.I.A.T.R. 277 consd

Decision No. 673/06E (2006), 79 W.S.I.A.T.R. (online) refd to

Workplace Insurance Legislation Considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A
s. 112(3)
s. 120(1)

Other Decisions Considered:

Peixeiro v. Haberman, [1997] 3 S.C.R. 549 (S.C.C.) consd

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APPEAL by the worker from a decision of the Appeals Resolution Officer denying an extension of the time to appeal.

March 20, 2009. THE TRIBUNAL: —

BEFORE: E.J. Smith, Vice-Chair

HEARING: March 13, 2009, at Toronto, Written

APPEAL BY THE WORKER OF ARO DECISION DATED MAY 15, 2008, FOR ORDER EXTENDING THE TIME TO APPEAL UNDER SECTION 120 OF THE WSIA

APPEARANCES:

For the worker: Mr. K. Beauclerc, Consultant

For the employer: Not participating

REASONS

(i) The Issue

[1] In a decision dated May 15, 2008, a Board Appeals Resolution Officer (ARO) denied the worker's request for an extension of time to appeal.

[2] The issue is whether the time limits imposed by section 120 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, should be extended to enable the worker to pursue his appeal.

(ii) Relevant Law and Policy

[3] On January 1, 1998 the *Workplace Safety and Insurance Act, 1997*, took effect. That Act amends the *Workers' Compensation Act*, R.S.O. 1990, c. W.11, which continues to apply, as amended, to accidents that occurred prior to January 1, 1998.

[4] Section 120(1) of the WSIA provides that a worker or employer who objects to a decision of the Board shall file a notice of objection with the Board:

(a) in the case of a decision concerning return to work or a labour market re-entry plan, within 30 days after the decision is made or within such longer period as the Board may permit; and

(b) in any other case, within six months after the decision is made or within such longer period as the Board may permit.

[5] Section 112(3) of the WSIA states:

112(3) Sections 120 [and other sections] apply, with necessary modifications, to pre-1998 injuries and to decisions of the Board rendered before January 1, 1998, but the time limits in section 120...apply only from January 1, 1998.

[6] In September 2004 the Board introduced a Guideline entitled: Guidelines for Dealing With Appeal Time Limits: Criteria to be Applied in Determining Time Limit Extensions. That Guideline states that one criterion to be considered is the length of the delay, and provides:

Broad discretion to extend the time will be applied where appeals are brought within one year of the date of the decision.

[7] Stricter criteria are described applicable to longer delays. Those criteria include serious health problems, whether the party had actual notice of the time limit, the length of the delay, whether there are interrelated issues for which the time limit has been met, the significance of the issue in dispute, and whether the party was able to understand the time limit requirements. The Guideline concludes that all decisions to extend the time limits will be based on the “merits and justice of the case”.

[8] In the notification process under section 126 of the Act, the Board has written the Tribunal and has attached a copy of its Guideline. However the Board letter confirms that the Guideline does not have the status of Board policy under section 126 of the Act. The Board informed the Tribunal that there is no Board policy applicable under section 126 of the Act.

(iii) The Facts of This Case

[9] In this case the worker made a claim for eye irritation based on exposure to fumes at work in December 2003. That claim was denied in a letter dated May 12, 2004. The Board determined that his ongoing symptoms were due to the underlying condition of Sjogren’s syndrome and not to the effect of the worker’s work duties. The letter of September 4, 2007 states:

The present information would indicate you have sjogren’s syndrome and this can not be related to your employment or have been caused by the employment...Your employment may have caused some irritation of the non-compensable problem but it was not the cause of the problem. Thus I will be unable to accept any entitlement at this time.

[10] The worker did not appeal this decision within the six-month statutory deadline. On August 20, 2007, a prior representative wrote the Board asking to appeal the letter of May 12, 2004. The ARO denied the worker an extension of time to appeal. The worker now appeals that denial to the Tribunal.

(iv) Submissions

[11] Mr. Beauclerc submits that when the Board found on May 12, 2004 that the worker’s impairment was not work-related, the worker had no reason to argue. However, he submits a report of Dr. Davidson dated March 27, 2008 indicates that the worker has recovered since leaving his employer but not to his pre-injury state.

[12] The report of Dr. Davidson states that the worker’s Sjogren’s syndrome can cause the eyes to be severely dry. She states that the worker’s work at the employer seemed to exacerbate the condition. A specialist recommended that he avoid dry, dusty, dirty environments where his symptoms of dry eye irritation, redness etc. would be exacerbated. She states that the worker is now in an apprenticeship program to become a refrigeration mechanic and the level of dryness has been reduced.

[13] Mr. Beauclerc relies on *Decision No. 2199/04* (2005), 72 W.S.I.A.T.R. 277, which states, with respect to a decision about labour market re-entry (LMR) services, and the 30-day statutory deadline to appeal an LMR plan,

that a worker cannot be held to that deadline before decisions have been made about deemed earnings and LOE quantum. The decision states [at para. 34]:

Without the information necessary to make an informed judgement about an LMR plan, the injured worker was not in the position to know whether or not to object to the LMR Plan decision.

[14] He refers me to *Decision No. 673/06E* (2006), 79 W.S.I.A.T.R. (online), which refers to *Peixerio v. Haberman*, [1997] 3 S.C.R. 549 at 563, and the discoverability rule.

(v) Conclusions

[15] In the Supreme Court of Canada decision of *Peixeiro v. Haberman* the Supreme Court found:

While at common law ignorance of or mistake as to the extent of damages does not delay time under a limitation period, under Ontario's no-fault insurance scheme at the time of the accident the starting point is when the damages are known to comprise "permanent serious impairment" within the meaning of s. 266(1) of the *Insurance Act*. Section 266 effectively bars actions for recovery in tort unless a certain level of physical injury, permanent in nature and entailing serious impairment of an important bodily function, is met. The right of action referred to in s. 206(1) of the *Highway Traffic Act* must mean an action that is not excluded by s. 266(1) of the *Insurance Act*. This view is strengthened by s. 266(3), which allows for a pre-trial motion on the issue of the existence of a cause of action. Under s. 206(1) of the *Highway Traffic Act*, there is no cause of action until the injury meets the statutory exceptions to liability immunity. The discoverability principle applies to avoid the injustice of precluding an action before the person is able to sue. Time under s. 206(1) does not begin to run until it is reasonably discoverable that the injury meets the threshold of s. 266(1). While the respondents knew of some injury, they did not know prior to June 1993 that the damage MP sustained as a result of the first accident was a herniated disc, and it cannot be said that they ought to have discovered the serious nature of the damage earlier. As the action was started within two years of the time when they first learned that they had a cause of action, it is not statute-barred.

[16] This decision stands for the proposition that a statutory time limit cannot run against a person until the facts that underlie the person's right to bring the cause of action, or, in this case, to file the appeal, are "discoverable". However, the case also notes the common law position that ignorance or mistake as to the extent of damages does not delay a limitation period.

[17] Care must be taken in applying the dicta of this decision to the time limit stipulated by section 120. The Court was addressing a case in which the plaintiff's right to bring a cause of action was limited, by statute, to cases of serious injury, defined under section 266 of the *Insurance Act*, R.S.O. 1990, c. I.8, section 266, as permanent serious disfigurement or permanent serious impairment of an important bodily function. Therefore the plaintiff was not entitled to bring a Court action until it was discoverable that the injury was serious to this degree.

[18] With respect to the time limit under section 120, there is no requirement that the worker be aware that the injury is serious to any degree. There is no requirement that the worker necessarily understand the full extent of his injury in order for the time limit to run. The statutory provisions are different.

[19] I consider the relevant question to be whether the worker had sufficient information to know that the relationship between his underlying condition of Sjogren's syndrome, which had been diagnosed prior to his work activities, and the role of his workplace activities, was in question. I find that the Board's letter of May 12, 2004 put that matter fully in question. The position of the Board was that, while the work activities might have irritated the worker's eyes, in particular because of his underlying condition, it was his underlying condition that affected his ability to do the work. The Board's analysis of the facts might be compared to the facts that might apply to a worker who had a pre-existing non-compensable back injury, perhaps as a result of a car accident, and took a job doing heavy work. The worker might immediately experience symptoms while working if he tried to do heavy work after the car accident. However, the fact that the worker might not be able to continue doing a job that required heavy work would not be caused by that work. It would be the result of the non-compensable back injury.

[20] If the worker wanted to appeal the Board's denial of the claim on the basis that the work caused more than a temporary or transitional manifestation of the effects of the underlying non-compensable condition, he was in a position to do so in 2004. He knew he had the pre-existing condition of Sjogren's syndrome and he knew he was

suffering irritation of that condition at work. He had sufficient information to decide whether to appeal. He did not do so.

DISPOSITION

[21] The appeal is denied.

[22] The worker is not granted an extension of time to appeal the Board's decision letter of May 12, 2004.

Appeal dismissed.