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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. 2990/01

Panel: McCutcheon (Vice-Chair), Jago, Jackson

Decision — May 6, 2009

Neutral Citation: 2009 ONWSIAT 1129

Cancer (lung) – Exposure (asbestos) – Medical report (opinion of medical assessor) – Benefit of the doubt.

There is ongoing debate in medical community whether presence of asbestosis is prerequisite to entitlement for lung cancer due to asbestos exposure – In circumstances, applying benefit of doubt, worker had entitlement.

The worker was a miner, starting in 1967. He was diagnosed with lung cancer in 1995 and died in 1996. The worker's estate appealed a decision of the Appeals Resolution Officer denying entitlement. The appeal was allowed.

The worker had significant exposure to asbestos from 1974 to 1977. However, the worker did not have asbestosis. The worker was a non-smoker.

There were conflicting medical opinions in this case on the issue of whether the presence of asbestosis is a prerequisite to entitlement for lung cancer when the primary exposure is asbestos. This has been an ongoing medical debate which has been referred to in Tribunal decisions. The issue is still not resolved in medical literature.

Decision No. 266/93 stated that there are five factors to consider with respect to probability of causation of lung cancer. The two most important factors are latency period and intensity of exposure to asbestos. The three other, more controversial factors of lesser importance are fibrositic changes, location of the cancer and type of cancer.

A Tribunal medical assessor preferred the literature supporting a link between asbestosis and asbestos-related lung cancer. The Board medical consultants were of the view that entitlement should not be granted in the absence of asbestosis. However, the Panel noted that Board policy sets out only two criteria: length of exposure and latency period. The policy also allows entitlement, having regard to the exposure and other factors peculiar to the individual case, in claims that do not meet the guidelines.

Neither Tribunal decisions nor Board policy has definitively adopted one side or the other in the debate regarding asbestosis in asbestos-related lung cancer. The issue is still a subject of debate in the medical community. The Panel found that this was an appropriate case to apply the benefit of doubt. The Panel also noted other factors such as the non-smoking history, lack of family history of cancer, the intense and significant exposure, and the meeting of the latency period.

The Panel noted that the worker was suffering from adenocarcinoma. The assessor did not accept adenocarcinoma as indicative of asbestos-related lung cancer, as it was now the leading cell type in persons suffering from lung cancer in North America. However, the Panel found the evidence to indicate that cell type is not a particularly accurate indicator of causation.

The Panel applied the benefit of doubt in favour of the claim.

Cancer (poumon) – Exposition (amiante) – Rapport médical (opinion d'un assesseur médical) – Bénéfice du doute.

La question de savoir si la présence d'amiantose est un préalable au droit à une indemnité pour cancer du poumon dû à l'exposition à l'amiante fait l'objet d'un débat dans le monde médical – Vu les circonstances, le Tribunal a appliqué la disposition du bénéfice du doute et a conclu que le travailleur avait droit à une indemnité.

Le travailleur avait commencé à travailler comme mineur en 1967. Il avait reçu un diagnostic de cancer du poumon en 1995 et était décédé en 1996. La succession du travailleur a interjeté appel de la décision par laquelle le commissaire aux appels refusait de reconnaître le droit à une indemnité. L'appel a été accueilli.

Le travailleur avait eu une importante exposition à l'amiante de 1974 à 1977; cependant, il ne souffrait pas d'amiantose. Il n'était pas un fumeur.

Il y avait des opinions médicales conflictuelles en l'espèce au sujet de la question de savoir si la présence d'amiantose est un préalable au droit à une indemnité pour cancer du poumon quand l'exposition première est à l'amiante. Cette question fait l'objet d'un débat persistant auquel le Tribunal a fait référence dans ses décisions. La question n'est toujours pas réglée dans les publications médicales.

Dans la *décision n° 266/93*, le Tribunal déclare qu'il y a cinq facteurs à prendre en considération en ce qui concerne la causalité du cancer du poumon. Les deux facteurs les plus importants sont la période de latence et l'intensité de l'exposition à l'amiante. Les trois autres facteurs, plus controversés de moindre d'importance, sont les changements de type fibreux, l'emplacement du cancer et le type de cancer.

Un assesseur médical du Tribunal a préféré les publications appuyant l'existence d'un lien entre l'amiantose et le cancer du poumon lié à l'amiante. Les médecins consultants de la Commission ont exprimé l'opinion que le droit à une indemnité ne devrait pas être reconnu en l'absence d'amiantose. Le comité a toutefois noté que la politique de la Commission impose seulement deux critères : la durée de l'exposition et la durée de la période de latence. Dans les dossiers qui ne cadrent pas avec les lignes directrices, la politique permet aussi de reconnaître le droit à une indemnité en tenant compte de l'exposition et d'autres facteurs particuliers au cas visé.

Le Tribunal, dans ses décisions, et la Commission, dans ses politiques, ne se sont pas rangés catégoriquement d'un côté ou de l'autre du débat relatif à la présence d'amiantose dans les cas de cancer du poumon liés à l'amiante. La question fait encore l'objet de débat dans le monde médical. Le comité a conclu que c'était un cas approprié pour appliquer la disposition relative au bénéfice du doute. Le comité a aussi noté d'autres facteurs tels que l'absence d'antécédent de tabagisme et d'antécédent familial de cancer, l'intensité et l'importance de l'exposition ainsi que la période de latence.

Le comité a noté que le travailleur souffrait d'un adénocarcinome. L'assesseur n'a pas accepté l'adénocarcinome comme signe d'un cancer du poumon lié à l'amiante, car il s'agissait maintenant du type de cellule le plus prévalent chez les personnes souffrant d'un cancer du poumon en Amérique du Nord. Le comité a toutefois conclu que, selon la preuve, le type de cellule cancéreuse n'est pas un signe de causalité particulièrement fiable.

Le comité a appliqué la disposition du bénéfice du doute en faveur du travailleur en l'espèce.

Tribunal Decisions Considered:

Decision No. 375/92 (1993), 28 W.C.A.T.R. 32 consd

Decision No. 266/93 (May 24, 1994) consd

Decision No. 690/99 (August 15, 2000) [2000 ONWSIAT 2282] consd

Decision No. 802/01 (September 11, 2001) [2001 ONWSIAT 2646] consd

Decision No. 600/04 (April 13, 2005) [2005 ONWSIAT 840] distd

Decision No. 1443/04 (2005), 75 W.S.I.A.T.R. (online) consd

Workplace Insurance Legislation Considered:

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

s. 134

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

s. 126

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 04-04-16 (December 1989) (since superseded)

Document No. 23-02-03 (October 12, 2004)

Cross-References:

Decision No. 2990/01E (December 1989) (since superseded)

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DISPOSITION

APPEAL by the worker's estate from a decision of the Appeals Resolution Officer denying the worker entitlement for lung cancer.

May 6, 2009. THE TRIBUNAL: —

BEFORE:

R. McCutcheon, Vice-Chair

W. D. Jago, Member Representative of Employers

F. Jackson, Member Representatives of Workers

HEARING:

May 9, 2005, at Toronto, Oral

Post-hearing activity completed on October 23, 2007

DECISION(S) UNDER APPEAL:

WSIB Appeals Resolution Officer (ARO) L.M. Franchi dated September 9, 1998

APPEARANCES:

For the worker: R. Hamilton, Office of the Worker Adviser

For the employer: Not participating

REASONS

(i) Introduction

[1] The worker's surviving spouse appeals a decision of the ARO, which concluded that the deceased worker's lung cancer did not arise out of his workplace exposures. The appellant was granted an extension of time to file an appeal in *Decision No. 2990/01E* (December 6, 2001).

[2] The Panel heard testimony from the appellant, as well as two additional witnesses. Following the hearing, the Panel obtained additional evidence, including the opinions of two independent health professionals.

(ii) Background

[3] The worker was born in 1943, and began a career in the mining industry in 1967. He obtained certification as a mining technologist in 1967 and a degree in mining engineering from Queen's University in 1973.

[4] In October 1995, the worker was admitted to the Toronto General Hospital with symptoms of right-sided chest pain and shortness of breath. The discharge diagnosis was metastatic adenocarcinoma. The medical reports on file document the worker's symptoms and treatment. On December 4, 1995, Dr. T.R.J. Todd, Head of the Division of Thoracic Surgery at the Toronto Hospital, gave the opinion that the worker had primary bronchogenic carcinoma with pleural metastatic disease. This was considered inoperable. Unfortunately, the worker succumbed to his illness and passed away on July 6, 1996, at the age of 53. Medical reports on file and testimony at the hearing established that the worker was a non-smoker.

[5] Although the death certificate listed mesothelioma as the antecedent cause of death, Dr. Todd stated in a letter dated August 29, 1996 that the most likely diagnosis was adenocarcinoma.¹ The appellant and her representative have accepted that Dr. Todd's opinion is correct.

[6] A claim was filed with the Workplace Safety and Insurance Board in March 1996. Once the diagnosis was clarified, the Board examined the worker's exposure, particularly in relation to asbestos. Dr. Kabir, occupational hygienist, reviewed the worker's work history and concluded that the worker had significant exposure to asbestos during the two years and three months he worked at two particular mines, although the exposure could not be quantified in f/cc (fibres/cubic centimetre) years.

[7] The worker's representative asked Dr. Todd to provide an opinion on the claim. In a report dated August 29, 1996, Dr. Todd stated in part:

[The worker] apparently had significant asbestos exposure and has worked in mines that included gold and copper as well. Although I have no record of an autopsy having been performed at the time of his death to enable us to accurately determine whether he has asbestosis, the exposure in the mines would certainly suggest an occupational predisposition to the development of his tumour. As a result it is certainly my opinion that he is eligible for some type of compensation.

[8] The WSIB denied the claim on the basis of opinions from medical consultants. The Board's adjudication turned on the lack of a finding of asbestosis in the worker. In a report dated July 18, 1996, Dr. A.S. Wardekar, Occupational Medicine Consultant, noted there was no clinical or radiological evidence of asbestosis and stated:

There is recent literature support that to have a cause and effect relationship for causing lung cancer from asbestos there is usually asbestosis present. In absence of asbestosis the cause and effect relationship is not established.

[9] Dr. Roos, respiratory consultant, reviewed the worker's chest x-rays and concluded that, although there was a very obvious atelectasis and effusion on the right, and a nodulation in the left chest that progressed, none of the appearances were consistent with pulmonary parenchymal asbestosis.

[10] Dr. R. Thakur, Medical Co-ordinator in the Board's Complex Case Unit, gave the opinion that, in light of the clinical findings, a causal relationship between the worker's asbestos exposure and the development of the worker's adenocarcinoma of the lung could not be established. In a memorandum dated November 20, 1996, the Board's Manager concluded that the worker's lung cancer was not work-related, reasoning in part as follows:

Clinical evidence of asbestosis is a key marker of excessive asbestos exposure. However, after examining the late [worker's] chest x-rays, our chest disease consultant found no evidence to suggest pulmonary parenchymal asbestosis... Similarly there was no evidence of pleural plaques or calcification, also a marker for asbestos exposure. Therefore, evidence has not been established to support a causal relationship between this worker's asbestos exposure and his lung cancer.

[11] The Appeals Resolution Officer denied the objection and the worker's widow appeals to the Tribunal.

(iii) Issues

[12] The issue is whether the appellant is entitled to dependency benefits on the basis that her late husband's fatal lung cancer was caused by workplace exposure in the various mines where he worked.

[13] Although the Board's adjudication focused on asbestos exposure, Mr. Hamilton presented evidence relating to the worker's other exposures. Mr. Hamilton submitted that the worker's cumulative exposures made a material contribution to the development of his lung cancer.

[14] In this appeal, the worker's exposures during the following periods are of particular significance:

- "the G Mine," May 1967 to October 1974;
- "the CJM Asbestos Mine", October 1974 to February 1975;
- "the CJM Talc Mine", February 1975 to February 1977.

[15] Mr. Hamilton submitted that, in addition to asbestos exposure, the worker was exposed to radiation during his work at the G mine. In this regard, Mr. Hamilton submitted exposure data he was able to obtain through the Ministry of Labour. Mr. Hamilton also obtained reports from OHCOW.

[16] In short, the legal question is whether the worker's workplace exposures made a significant contribution to the development of his lung cancer. It is not necessary to find that the workplace was the sole causal factor.

(iv) The Panel's Findings of Fact

[17] The appellant testified at the hearing. The Panel also heard testimony (via teleconference) from RC, a former co-worker of the worker, who testified regarding the conditions at the CJM Asbestos Mine and the Talc Mine. The Panel also heard from KS, a mining geologist who went to university with the worker and worked with him at the G mine. KS is the appellant's brother.

[18] In making its findings of fact, the Panel carefully considered all of the testimonial and documentary evidence, and Mr. Hamilton's submissions. The following findings of fact were provided to the medical assessor.

(a) The G Mine – May 1967 to October 1974

[19] The worker's résumé indicates that he worked as a shift boss, mine captain and mine technologist in the G mine from May 1967 to October 1974. During this period, the worker also attended Queen's University from 1970 to 1973. He was in school from September to May, but worked at the G mine during the summers, from June to August. Otherwise, he was employed full time at the G mine during the period noted above.

[20] The Panel accepted KS's testimony that the worker worked full-time, five days a week, and sometimes six,

underground in the mine.

[21] At the G Mine, the relevant exposures relate to radiation, diesel fumes, and blasting agents. There has been some reference to oil mists (from mining machinery), but the report of the OHCOW occupational hygienist indicates that oil mists are associated with skin cancer, rather than lung cancer, so the Panel has not placed emphasis on this aspect of the worker's exposure.

1) Radiation

[22] Mr. Hamilton contacted the Ministry of Labour to obtain exposure data about the G Mine during the period that the worker was there. Only sparse information was available regarding radiation levels during this period, as noted in correspondence from J. Vergunst of the Ministry of Labour. The Ministry of Labour did not measure radiation levels at the mine until 1983. Mr. Vergunst noted as follows in his correspondence:

In February 1983, the Ministry of Labour conducted an evaluation of radon daughters at the underground operations of the [G] mine as part of a province wide non-uranium mine evaluation. Higher than expected radiation results were encountered and the mine was required to implement a radon daughter sampling program.

[23] Correspondence in Addendum No. 2 indicates that the G mine's goal was to keep radiation levels at or below 0.10 W.L. However, an Assessment Report from the Ministry of Labour shows that the Ministry of Labour set the acceptable limit lower, at 0.03 W.L.

[24] A "Summary of Radon Daughter Working Levels at [G] Mine" shows that, in 1983, radon daughter levels in the sumps area were above the G mine's acceptable limits, and were also above Ministry of Labour standards in the exhaust airways and the working areas. Workers would have had access to the exhaust airways, sumps and working areas. KS testified that the worker would have been in all of the locations referenced in the radiation survey. The worker also would have been at the 250 level where higher than usual radiation counts were obtained in 1987. It was part of the worker's job to check that all sumps and pumps were in good working order.

[25] Mr. Hamilton submitted that the Panel should infer that the radiation levels during the period that the worker was at the G mine would have been at least as high, if not higher, than levels reflected in the 1983 testing. In the absence of direct evidence about radiation levels from 1967 to 1973, the Panel accepts that the worker would have been exposed to elevated levels of radiation during his employment in the G mine. The Panel notes that Mr. Vergunst stated that elevated radiation levels in the No. 1 Shaft Area were believed to be caused by the local geology and ground water. If this were the case, then it is reasonable to infer that the situation would have been the same when the worker was there. Once the problem was identified, the mine improved and increased ventilation. These improvements are reflected in subsequent testing of radiation levels after 1983, long after the worker's term of employment.

[26] In summary, the Panel accepts that the worker was exposed to elevated radiation levels during his employment at the G mine, although there is insufficient evidence to calculate his "radiation index."

2) Diesel Fumes

[27] The exposure to diesel fumes resulted from the use of diesel-powered equipment. KS testified that when they started at the G mine, the equipment was electric or air-powered, and there were no fumes. Eventually, however, diesel equipment was introduced, but the ventilation in the mine was not increased until several years later. KS testified that the oil bath filters used on the machinery didn't work very well.

[28] Mr. Hamilton obtained an occupational hygiene report and a medical report through OHCOW. L. Wakely, occupational hygienist, prepared an exposure review, based upon information provided about the worker's exposure. The report stated as follows regarding diesel emissions:

Diesel exhaust is a complex mixture which includes polycyclic aromatic hydrocarbons (PAH's), benzene, formaldehyde, etc. To date, there is no single exposure standard or guideline available for diesel exhaust exposure although there are standards for components of the exhaust such as carbon monoxide or nitrogen dioxide. Workers who are likely to be

exposed to diesel emissions include mine workers, railroad workers, truck drivers, forklift drivers, dock workers, farm workers, and auto, truck and bus maintenance garage workers.

...

As reported in the IDSP report on Uranium Mining, it was noted that prior to 1979, the problem of diesel fumes was often severe at mine headings and that this could be accounted for not only by the presence of too many machines in the area, but also by ventilation design problems.

[29] Due to the nature of the worker's duties underground at the G mine, the Panel accepts that he would have been exposed to diesel fumes during his employment.

3) Blasting agents

[30] KS testified that the worker spent a considerable amount of time in the blasting department, experimenting with new explosives. KS testified that blasting was usually done at the end of the shift and most major blasts were done on the weekend.

[31] The OHCOW occupational hygienist reports states as follows regarding blasting agents used in mines:

Until 1955, nitroglycerine-based dynamite was the most widely used explosive in mines. It was gradually replaced by a mixture of ammonium nitrate (94%) and fuel oil (6%) called ANFO. Nitrosamines and PAH's may also be found in ANFO which resembles diesel oil and is a complex mixture of straight chain and aromatic hydrocarbons. Nitrosamines and PAH's from blasting, would add to those from diesel emissions and oil mists to increase the exposure of workers to possible carcinogens.

[32] KS testified that a nitroglycerin-based explosive was still being used at the G mine when he started there. It was later replaced by a mixture of ammonia and diesel. This is consistent with the information provided in the OHCOW report. The Panel accepts that the worker would have had some exposure to blasting agents and their by-products during his employment at the G mine. The worker did often work on weekends, and, as KS testified, he also worked in the blasting department.

(b) CJM Asbestos Mine and the CJM Talc Mine – October 1974 to February 1977

[33] Mr. Hamilton submits that the worker had been exposed to significant levels of asbestos during his employment at the CJM Asbestos Mine and the nearby CJM Talc Mine. The Panel heard testimony from all three witnesses about the dusty conditions at both of these mines.

[34] KS testified that there is chrysotile asbestos in talc. The talc mine was only half a mile away from the old asbestos mine and the talc ore body was the same rock. In the talc production process, accessory minerals, such as asbestos, would be removed. The Panel heard evidence that the worker was directly involved in the talc mill process, experimenting with different types of equipment.

[35] The conditions at the talc mill were described as extremely dusty. This was corroborated in correspondence from a director of the Mines Engineering Branch of the Ministry of Natural Resources, which describes the CMJ Talc mine as follows: "...you could not find the plant, crusher or operator in the dust cloud." KS agreed with this description. An internal memorandum dated August 16, 1973 provides further evidence of the presence of asbestos in the talc mining process.

[36] The Board's Occupational Hygienist, H. Kabir, also supported a finding that the worker would have been exposed to high levels of asbestos during the time he spent at both the CJM Asbestos Mine and the CJM Talc Mine. The report quotes from the Royal Commission Report on Asbestos (1984) regarding the conditions at the CJM Mine, as well as another talc mine in Ontario. The Panel also notes the following comments made by Dr. Kabir:

[CJM Asbestos] Mine was an open pit mine, and, a Pit Superintendent is required to visit throughout the pit and supervise the mining, thus he is expected to be subject to the asbestos fibres generally pervading the area as determined

by monitoring in the Royal Commission Report as having high area sample results throughout the mine. The claimant worked in the pit for 3 to 4 months just before the mine was shutdown in January of 1975. However, he reportedly continued on the site in the Milling and Shipping areas as a Superintendent. This mill has been reported to be on the same site, where talc was being processed.

Usually talc contains asbestiform fibres as an impurity and the milling process actually crushes the rocks to remove the talc and process it for shipping. Thus, even though talc usually contains a small fraction of asbestos in it, the crushing and milling of the ore on the asbestos mine site is expected to generate high levels of asbestos. Even as a Milling and Shipping Superintendent, he could not have escaped the airborne asbestos fibre exposures since loose asbestos fibres will pervade the area that is located on the open pit asbestos mine. It will be difficult to estimate this claimant's personal asbestos exposure levels, as none are available now. However, the fact that the process entailed high levels of airborne asbestos, as indicated by the Royal Commission Report, the possibility is there that this claimant incurred high asbestos exposures for the 28 months he worked on the site. Please note also that asbestos was regarded as relatively innocuous until about the mid to late-1970s and, the presence of airborne asbestos fibres was not a concern in those days.

[37] Dr. Kabir goes on to conclude that, "in all likelihood he has had significant exposure during the two years and three months worked" in those mines. Dr. Kabir stated in part:

The current Board Guidelines for lung cancer suggest that there should be history of asbestos exposure for 10 years with a 10-year latency, without any reference to the intensity of the asbestos exposure. It would appear that this claimant could have the potential for repeated or constant daily risk of asbestos exposure for about 28 months when he served in the ... asbestos mines and talc mill from October/November of 1974 to February of '77. It will be very difficult to quantify his cumulative asbestos exposure in (f/cc) years, but in all likelihood he has had significant exposure during the 2 years and three months he worked ...

When the [CJM Asbestos Mine] was shutdown in January of 1975, he started working in the talc milling and shipping operations on the same site ... as a superintendent up until February of 1977. This has been substantiated by co-worker interviews. Based upon the Royal Commission Report on Asbestos (1984) quoted above, it seems very likely that he has had the potential for repeated and constant daily risk of asbestos exposure for 27 or 28 months between 1974 and 1977. This notion has been based on the understanding that in the open pit mine and in the mill, the asbestos fibres are expected to be airborne pervading the area constantly, thereby causing exposure of all employees regardless of their occupations.

[38] The Board initially accepted that the worker had sufficient asbestos exposure to grant entitlement for lung cancer, even though the policy criteria were not met. However, the Board eventually denied entitlement on the basis that the worker did not have asbestosis, and therefore asbestos could not have been a factor in the development of his lung cancer.

[39] The Panel accepts the opinion of the Board's occupational hygienist that the worker likely experienced significant asbestos exposure during his employment at the two mines where he worked between 1974 and 1977.

(c) Other Exposures

[40] In the summers of 1965 and 1966, the worker was employed in uranium mines. Specifically, from June to September of 1965, the worker was employed at a mine in Elliot Lake; and from May to September of 1966, he was employed at a different uranium mine in Elliott Lake. Specific exposure data is not available regarding these mines. However, it is generally recognized in Board policy that exposure to ionizing radiation in the uranium mining industry is associated with primary cancer of the lung. The Panel accepts that the worker would have been exposed to radiation during the summers working in uranium mines.

(v) Law and Policy

[41] For disablement and occupational disease claims, the date of accident is generally considered to be the date that the worker suffers the impairment. In this case, the worker sought treatment for his symptoms and his diagnosis was made in 1995. Therefore, the pre-1997 *Workers' Compensation Act*, R.S.O. 1990, c. W.11, is applicable to this appeal. All statutory references in this decision are to the pre-1997 Act, unless otherwise stated. The hearing of the appeal commenced after January 1, 1998; therefore, certain provisions of the *Workplace Safety*

and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A, also apply to the appeal.

[42] Section 4 of the pre-1997 Act provides that workers are entitled to benefits for personal injury by accident arising out of and in the course of employment. Section 4 also states that, where it is not practicable to determine an issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the claimant.

[43] Section 134 of the Act provides that, where a worker suffers from a disease that is due to the nature of the work in which the worker was engaged, the worker is entitled to compensation as if the disease were a personal injury by accident, subject to specified modifications.

[44] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision #5, would apply to the subject matter of this appeal:

- #1 – Initial Entitlement;
- #22 – Lung Cancer and Asbestos Exposure;
- #300 – Decision Making/Benefit of Doubt/Merits and Justice.

[45] Policy package #22 included Document No. 04-04-16 of the *Operational Policy Manual* (OPM), “Lung Cancer – Asbestos Exposure.” That policy states that entitlement for lung cancer is accepted as an industrial disease peculiar to and characteristic of occupations involving exposure to asbestos. Generally speaking, the Board grants entitlement where the following two conditions are met:

- there is a clear and adequate history of at least ten years occupational exposure to asbestos; and
- there is a minimum interval of ten years between the first exposure to asbestos and the appearance of lung cancer.

[46] The policy states that claims which do not meet these guidelines will be individually judged on their own merits, having regard to the intensity of exposure and other factors of the case.

(vi) The Assessor’s Report

[47] The post-hearing phase eventually became a multi-stage process. The process began with the Panel’s decision to obtain the opinion of a Tribunal medical assessor. The Panel set out the above-noted findings of fact and questions for the assessor in a post-hearing memorandum. The assessor was provided with the full medical file available. No autopsy had been performed in this case.

[48] Dr. D. Ahmad, a respirologist and emeritus professor of medicine was chosen as the medical assessor. Dr. Ahmad’s curriculum vitae demonstrates his qualifications as an expert and that he has published extensively. Dr. Ahmad responded to the Panel’s questions in a report dated September 12, 2005. Dr. Ahmad’s report was lengthy and detailed. In the interest of being concise, the Panel will focus on the most relevant portions of the report, rather than reproducing the entire report.

[49] In response to the question of whether it could be definitely determined whether the worker had asbestosis, Dr. Ahmad reviewed the available reports from the reporting radiologists and noted that there were no abnormalities reported that would indicate asbestos related lung disease, i.e., asbestosis or pleural disease such as pleural plaques. It is therefore settled that the worker did not have asbestosis or pleural plaques.

[50] The Panel asked whether the lack of a finding of asbestosis precluded a finding that asbestos exposure contributed to the development of the worker’s lung cancer. Dr. Ahmad responded as follows:

2b. Most workers with asbestos exposure will not develop lung cancer, indicating that there are differences between workers and/or their asbestos exposure to cancer link, tobacco smoke is a confounding link. Asbestosis establishes a link between lung cancer and asbestos exposure even when a person is a non-smoker. Since there is no other marker, for example, molecular genetic marker, available to link lung cancer to asbestos exposure, there is no basis in absence of asbestosis to assume that an individual's lung cancer is caused by asbestos exposure (4). A recent study by Hassel (et al) performed meta-analysis of all the studies reported in the English language that examined the cumulative effect of

asbestos exposure and lung cancer. This study concluded that none of the epidemiological studies were perfect and from the data, evidence does not support a clear association between asbestos exposure and lung cancer without evidence of asbestosis (5). In [the worker's] case there is no evidence of asbestosis nor did he have any other x-ray abnormalities as a result of asbestos exposure; therefore, one would have difficulty attributing a significant exposure to asbestos as a cause of his lung cancer.

[51] The Panel posed a question based upon an argument made by the appellant's representative. Mr. Hamilton cited *Decision No. 802/01* (September 11, 2001), in which the Panel quoted at length from an opinion of N. Keller, an OHCOW occupational hygienist. The representative relied in particular upon the following quote from her report:

Generally, lung tumours are more common in the upper lobes than in the lower ones. In asbestos workers, the reverse is usually true. Adenocarcinomas are more common among persons exposed to asbestos than unexposed persons are...

[52] The Panel asked whether the assessor agreed with this statement. Dr. Ahmad replied:

3. Adenocarcinoma of lung has increased incidence and is now the most frequent histological subtype and is a common sub type in non smokers. They usually occur in the periphery of the lung and frequently beyond the reach of bronchoscopic diagnosis. Hence, post-mortem series in which peripheral tumours were identified tend to show an apparent excess of Adenocarcinomas compared to bronchoscopic series (6). Many of the studies that have reported an apparent excess of adenocarcinoma in asbestos workers or those with asbestosis were based on autopsy findings, but higher autopsy rate among asbestos workers than in general population makes the interpretation difficult. While lower lobe predominance was reported in a Finnish study (7), a US study found upper lobe predominance in relation to both smoking and asbestos exposure (8). In this case, there is no evidence of the primary site the statement by Mr. N. Kellers has no significance, as there was no autopsy performed on [the worker].

[53] Dr. Ahmad went on to address the worker's cumulative exposures:

4. A single etiologic agent, cigarette smoking, is by far the leading cause of lung cancer world wide. I will try to address the issue of cumulative effect of exposure to various agents in [the worker's] case.

Lung cancer is attributed to miners being exposed to ionising radiation in the form of radon gas, which is emitted from rock face and, when inhaled the respiratory mucus is subjected to alpha radiation. Increase in lung cancer was seen in the Canadian Uranium and Fluorspar miners who were exposed to radon and its daughter products. The available evidence suggests that radon exposure and smoking are synergistic in producing lung cancer. The increase in lung cancer involves the histological cell type; mainly Oat cell and Squamous cell cancers, particularly the former type. Cigarette smoking was an important cofactor in these miners. The increased risk is 67 times greater in heavy smokers exposed to heavy doses of radiation than non-smokers with comparable radiation exposure (9).

It is difficult to know from the case report if [the worker's] degree of radon gas exposure when he was working in the mine between 1974 and 1979, as Dr. H. Kabir's report states "we were unable to identify any significant exposures to known carcinogens in these operations". In this case the histological cell type was adenocarcinoma and not Oat or Squamous cell carcinoma. It would be difficult to conclude that radiation exposure along with other casual factors were the cause of his cancer.

The International Agency for Research on Cancer (IARC) evaluated exposure to diesel exhaust fumes, they categorised it into Group 2A ("probable carcinogen to humans") based mainly on animal studies by exposing rats to diesel exhaust. These studies concluded that a high dose prolonged exposure to diesel exhaust is required to overwhelm lung defences for it to be a carcinogen. Hence a prolonged exposure to a high level of diesel exhaust increases risk for lung and other cancers. There have been numerous studies on truck drivers as well as heavy equipment drivers that show an increased risk of lung cancers; however when these studies are reanalysed it is evident that most of these persons were heavy smokers and smoking was a confounding factor. The results of numerous case-control and cohort studies show a weak association between exposure to diesel exhaust and development of lung cancer.

The blasting agents cause airway inflammation. Recent studies have shown that the cumulative effect of ammonium nitrate fuel oil (ANFO) on the lung is a temporary reduction in lung function. The blasting agent used in the mines at the

time [the worker] was working had AFNO. This agent more than likely did not contribute to the development of lung cancer.

Dr. T.R. Todd probably based his opinion that occupation was the cause of cancer as he could not identify any known cause. The worker was a non-smoker did not have a pre-existing lung disease and the fact that he had worked in mines.

Adenocarcinoma is now the leading cell type in persons suffering from lung cancer in North America. According to the National Cancer Institute 20% of women suffering from this cell type are non smokers and about 5% of men. There are other factors that can cause cancers in humans. They range from genetic factors (familial risk factors), dietary factors, pre-existing benign lung disease and oncogenic viruses.

[54] Dr. Ahmad concluded:

In summary, this worker had a metastatic adenocarcinoma to the pleura. The primary site of the tumour could have been lung but was not identified. The histopathology reports were not conclusive enough that it was indeed a lung cancer. The physicians looking after him assumed that the cancer originated from the lung. No autopsy was performed and when one reviews the case records it is not difficult to conclude that this man had adenocarcinoma of unknown primary. Based on the review of his work history from the case records and the assessment of exposure documented I am unable to conclude that the lung cancer in this case was occupationally related.

[55] Two key issues emerged as a result of Dr. Ahmad's report: (1) the theory that asbestosis ought to be present to attribute lung cancer to asbestos exposure; and (2) Dr. Ahmad's suggestion that the diagnosis should be adenocarcinoma of unknown primary, rather than lung cancer. There were other issues, particularly in relation to exposure to radiation and the cell type of the cancer, but for the purposes of this decision, these two points are most relevant.

(vii) Reply Evidence Submitted on Behalf of the Appellant

[56] The appellant's representative was given an opportunity to make written submissions and he also filed reply evidence with his submission.² Mr. Hamilton filed a report by Dr. A. Reinhartz of OHCOW and also submitted a report from Dr. M.R. Johnston, who is a thoracic surgeon at Mount Sinai Hospital, a member of the surgical oncology unit at the Princess Margaret Hospital, and an associate professor at the University of Toronto.

[57] Dr. Reinhartz set out in his view of the literature on the issue of asbestosis and causation of lung cancer, stating in part:

2. Radiographic presence of asbestosis is not necessary to link significant asbestos exposure and an increased risk of lung cancer. The debate as to whether exposure to asbestos fibre or the fibrotic response to asbestos (asbestosis) as the cause of excess lung cancer has been ongoing since 1949.

The group supporting asbestosis as necessary for lung cancer to develop, cites the "Browne hypothesis" as the central pathophysiologic mechanism in the development of cancer. This hypothesis proposed by Browne states that asbestos fibres become trapped in areas of fibrosis and disrupt the normal clearance mechanism, and concentrate carcinogens from cigarette smoke to become the focus for carcinogenesis. (Browne) Browne found that there appeared to be a threshold effect, and the threshold level of exposure was approximately that believed to be capable of producing asbestosis.

Churg reviewed the literature which included a prospective autopsy study of South African amosite miners. Sluis-Cremer et al found an increased lung cancer risk only when asbestosis was seen pathologically when the severity of asbestosis paralleled the increase in lung cancer risk. (Churg)

On the other hand, there are a number of studies which look at the role of excess lung cancer risk in workers without asbestosis. Hillerdal reported on a large number of individuals with pleural plaques in a single cohort and found the risk of lung cancer among those with pleural plaques, independent of asbestosis, had a 40% increase in incidence of lung cancer. Those with pleural plaques and radiographic evidence of asbestosis had an even higher incidence. (Hillerdal)

Jones et al obtained occupational and smoking histories from 271 patients with a confirmed diagnosis of primary lung cancer. The extent of radiographic fibrosis was assessed blindly by three radiologists. The incidence of lung cancer in

patients who worked in occupations with definite or probable asbestos exposure, had a 56% increase in the incidence of lung cancer even in the absence of radiographically-apparent pulmonary fibrosis. (Jones)

Abraham questioned why one would need asbestosis of the parenchyma to relate to carcinoma of the large airways if in fact a cancer grows out of fibrotic tissue not present in large airways. He also argues on the biologic plausibility of parenchyma asbestosis as being a precursor to the development of lung cancer in a major airway. He states that, "asbestosis is merely a marker of more severe asbestos exposure and, not surprisingly, therefore more strongly related to increased risk of lung cancer than in those without asbestosis, but it does not follow that there is some causal delineation (other than arbitrary)".

[58] Dr. Reinhartz went on to conclude:

The consensus report from the International Expert Meeting on Asbestos, Asbestosis and Cancer convened in Helsinki in January 1997 states that, "heavy exposure in the absence of radiologically-diagnosed asbestosis is sufficient to increase the risk of lung cancer".

This is the most practical way in understanding this complex issue. Finkelstein studied a group of Ontario asbestos cement workers and found that there is an increased risk of lung cancer (almost five-fold) in asbestos-exposed workers without radiographic evidence of asbestosis. He states that, "radiographic asbestos, as a prerequisite for asbestos-attributed lung cancer, is logically untenable." The reason he cites is that histologic asbestosis may be present when the radiograph is normal and that "slight asbestosis is commonly and moderate asbestosis occasionally undetected radiographically". Since histologic asbestosis is a marker for increased lung cancer risk, and since slight asbestosis is usually undetected radiographically, it follows that lung cancer risk may be increased among asbestos-exposed workers even in the presence of a normal radiograph.

[59] In a follow-up report to the representative, Dr. Reinhartz clarified that pleural effusions themselves are not indicative of asbestos exposure.

[60] Dr. Johnston commented upon the issue of the need for a diagnosis of asbestosis to establish a causal association between asbestos exposure and lung cancer:

...Documentation of [the worker's] workplace exposure history along with the reviews from Dr. Ahmad and Dr. Reinhartz were extensive and of high quality. I especially found Dr. Reinhartz's rebuttal of many of the conclusions that Dr. Ahmad came to be quite persuasive. In particular, I firmly agree with Dr. Reinhartz's conclusions that the absence of asbestosis or pleural plaques on [the worker's] chest x-rays and CT scans in no way precludes asbestos as being a causative factor in this gentleman's cancer. Even in many patients with diagnosed pleural mesothelioma and a long history of asbestos exposure, there may be no radiographic evidence of either asbestosis or pleural plaques noted.

...

In conclusion, I agree with the comments made by Dr. Reinhartz that [the worker's] occupational exposure to asbestos, radon and other potentially carcinogenic substances was a significant contributing factor to him developing lung cancer.

[61] Dr. Johnston remarked as follows regarding Dr. Ahmad's suggestion about the correct diagnosis:

I also agree that most likely this gentleman had a primary adenocarcinoma of the lung that metastasized to his pleural space. The fact that Dr. Todd did not see an endobronchial lesion is common in patients with peripheral adenocarcinomas. Also the fact that a positive cytology was obtained from bronchial washings is in keeping with a lung cancer primary tumour. The instances in which metastatic cancers to the lung may show positive cytologies are either with an endobronchial lesion readily visible with the bronchoscope or in patients with lymphangitic spread of their cancer. This is most common with breast cancer but can occur with some gastrointestinal cancers. The fact that there is no mention of lymphangitic spread seen on the chest x-ray or CT scans would make this a much less likely scenario. Dr. Todd was a very experienced thoracic surgeon whom I worked with personally for a number of years. It was and still is our practice when performing a pleuroscopy to evacuate all of the fluid within the pleural space. The fact that the lower lobe did not inflate following this procedure again strongly suggests that there was mass within the lower lobe responsible for the continued atelectasis. To obtain further confirmation that this tumour was a primary lung cancer, the pathology slides from his pleural tumour could be reviewed and immunohistochemical staining could be performed on them. Many

of these markers were not present in 1995 and one in particular TTF1, if positive, would further strengthen the contention that this was a primary lung cancer.

(viii) Follow-up Report from Dr. Ahmad

[62] In the circumstances, the Panel felt it was appropriate to give Dr. Ahmad an opportunity to respond to the new reports. In a report of March 1, 2007, Dr. Ahmad commented as follows regarding the appropriate diagnosis of the worker's condition:

1. Adenocarcinoma of the lung is generally a peripheral tumour that is beyond the visual segmental bronchi and is not seen during a bronchoscopic examination. The CT scan performed on October 12, 1995 is reported to show compression of bronchus intermedius, middle and lower lobes due to a large pleural effusion. There was as a result massive atelectasis of the middle and lower lobes. No mass or masses were seen, and the left lung was clear. Dr. T. Todd in his report of the bronchoscopic procedure clearly states that the right lower lobe bronchus was compressed due to the pleural effusion. He did not see any mucosal lesions. A repeat CT scan of the chest was performed on December 15, 1995. The reporting radiologist reported improved aeration of the lung. There was a linear atelectasis or fibrosis, and the right lower lobe had cylindrical bronchiectasis. He reported that "the tracheobronchial tree was patent." No mass was seen in the right lung, the improvement in the CT scan most certainly was as a result of drainage of fluid performed by Dr. Todd. There are no reports of any imaging in 1996 and no autopsy was performed hence we do not know if the lesion was a primary lung cancer.

Adenocarcinoma can originate from lung, breast, gastrointestinal tract, kidneys, bladder, testis, prostate, uterus, cervix and ovaries. The ultrasound examination of the abdomen showed that [the worker] had an enlarged prostate. This finding was also reported in the CT scan of the abdomen, in addition diverticular disease of the sigmoid colon was noted. Prostatic cancer is known for its various pattern of dissemination. Pulmonary metastases are common, pleural involvement is rare and when it presents with a pleural effusion there are nodular lesions in the pleura. There are no reports in the medical file that a PSA measurement was performed on blood or the pleural fluid. Adenocarcinoma can originate from the rectosigmoid diverticuli; these patients are usually asymptomatic in early stages of the disease and intestinal obstruction occurs in the advanced stages and during the terminal stages of the disease. [The worker] on June 18, 1996 presented with an abdominal ascites indicating metastatic disease in the abdomen and 5.5 litres of fluid was drained from his abdomen. There is no report to show if this fluid was examined for biochemistry or cytology. The original pathology report clearly shows that the tumour was positive for mucin and CEA on immunopathology, these findings are in keeping with an Adenocarcinoma but do not rule out GI or prostate malignancy. Dr. Chamberlain, the pathologist, performed tests to rule out a malignant mesothelioma of epithelial type since on histological examination it can look like an Adenocarcinoma. Immunohistochemistry stains were in keeping with metastatic Adenocarcinoma to the pleura. I agree with Dr. Johnston that the origin of metastatic Adenocarcinoma lesions can be difficult to diagnose at pathology. There are cytokeratin stains available that can distinguish between primary and metastatic lung or colorectal Adenocarcinoma by using Cytokeratin 7 and 20 staining technique. Hence one has to conclude that metastatic Adenocarcinoma of unknown primary has not been ruled out in this case.

[63] Dr. Ahmad went on to note that there were no pleural plaques noted on the worker's chest x-rays or the CT scans. Dr. Ahmad observed that "asbestos literature has been fraught with conflicting claims of association between pleural plaques and lung cancer risk," but, in his assessment, there was a lack of convincing evidence of a significant risk of lung cancer associated with pleural plaques without asbestosis.

[64] Dr. Ahmad went on to address the issue of asbestosis and lung cancer in response to the reports from Drs. Reinhartz and Johnston:

3. Most asbestos workers will not develop lung cancers; this indicates that there are differences between workers and/or their exposure in regard to lung cancer risk. Millions of workers have been exposed to asbestos and only some of these develop lung cancer. There are other factors that separate those who develop cancer from those who do not. There is an

ongoing debate in the current literature on the subject of asbestos exposure and lung cancer. There are two camps those who link lung cancer to asbestos exposure in presence of asbestosis and others who believe that asbestosis is not necessary to causally link asbestos exposure to lung cancer. This latter group base their conclusions on different portions of the current literature. No one disputes that lung cancer in a person with asbestosis is due to asbestos exposure. The evidence in the literature suggests that the relationship between asbestosis and lung cancer risk has to do with dose and the tissue burden of asbestos. The risk of asbestosis and lung cancer rise in a parallel manner with increasing tissue burden of asbestos. The evidence indicates that the level of asbestos exposure required for the risk of asbestosis is in the same range as that for lung cancer risk. The classic study by Hammond et al demonstrating an increased risk of lung cancer in insulators. When the histologic review was performed of the lung cancer cases with the available lung tissue, the insulators with an increased risk of lung cancer from asbestos exposure above that of their smoking showed asbestosis in 100% of the cases. Asbestosis, thus, is a reliable marker that a person has been exposed to asbestos dose or has a tissue burden necessary to put him at risk for asbestos-related lung cancer. Banks et al state a molecular marker would be a superior tool to link cancers to asbestos. Molecular markers like p53 and k-ras seen in smoking related lung cancers have been reported in lung cancers due to asbestos (13). Thus far no molecular markers are available to link lung cancer with asbestos exposure. Asbestosis is the most consistent marker of asbestos-related lung cancer in the literature to date unless a better marker comes along. There is no evidence that [the worker] had asbestosis, and we do not have autopsy that would have demonstrated an “occult” asbestosis that is not seen on x-rays or CT scans.

[65] Dr. Ahmad further addressed literature regarding increase in lung cancer among uranium miners and in exposure to diesel exhaust fumes. Dr. Ahmad stated that there are reports in the current literature that suggest that two common cell types following radon exposure are small cell and squamous cell lung cancer. On the issue of diesel exhaust, Dr. Ahmad referred to a recent epidemiological study that showed only a weak association between exposure to diesel exhaust and development of lung cancer.

[66] Finally, Dr. Ahmad stated that he agreed with Dr. Johnston that there may not be evidence of asbestosis in patients with malignant mesothelioma. However, he disagreed with Dr. Johnston’s interpretation of the evidence leading to his conclusion that the worker likely had a primary lung cancer, stating in part:

Reviewing the case records [the worker] had Adenocarcinoma metastatic to the right pleura. It is not clear that the primary is lung or a secondary from an unknown primary. Dr. Johnston in his report concludes that it is likely a primary lung. He states also that the lower lobe did not inflate indicating that there was a mass in the lower lobe causing the atelectasis. This mass has to occlude a bronchus. When one reviews the CT scan report of December 15, 1995, there was improvement in aeration of the right lobe. Cylindrical bronchiectasis was present in the right lower lobe and there was linear atelectasis or fibrosis. Linear atelectasis means that a band of lung tissue that has not expanded or it could be a fibrous band as a result of pleural involvement not allowing a small area of lung to expand. I disagree with his assessment.

(ix) Pathology Report Obtained at the Panel’s Request

[67] In his follow-up report, Dr. Ahmad concluded that it was unclear that the worker had a primary lung cancer and that the evidence favoured a diagnosis of adenocarcinoma of unknown primary. Dr. Ahmad noted that adenocarcinoma can originate from the lung, breast, gastrointestinal tract, kidneys, bladder, testis, prostate, uterus, cervix and ovaries. Dr. Ahmad noted that the worker had an enlarged prostate and included some comments that suggested to the Panel that there was a genuine possibility that Dr. Ahmad felt that the worker may have had a primary prostate cancer.

[68] Since the primary location of the cancer could potentially affect the adjudication of the appeal, the Panel decided it was appropriate to have a pathologist review the slides from a biopsy conducted in 1995 to provide a definitive opinion.

[69] Dr. Brendan Mullen, a pathologist and Director of the Andrology Laboratory and Deputy Director of Pathology and Laboratory Medicine at Mount Sinai Hospital, was the selected assessor and provided a report dated August 17, 2007. Dr. Mullen had access to the surgical pathology report and slides from the Princess Margaret Hospital dated October 1995. Dr. Mullen reported:

The pleural biopsy sections demonstrate a moderately differentiated adenocarcinoma composed of well-formed glands

embedded in dense fibroconnective tissue. The individual tumour cells are intermediate in size with a moderate amount of eosinophilic cytoplasm and irregular hyperchromatic nuclei. Many of the tumour cells contain large cytoplasmic mucin vacuoles which are positive with the stain for neutral mucin (PASD), a feature of adenocarcinomas. The immunohistochemical stained slides submitted from Princess Margaret Hospital were unsuitable for review due to fading of the stains. Immunohistochemical stains were performed at Mount Sinai Hospital. The tumour cells reacted with stains for CEA and TTF-1, a pattern diagnostic of adenocarcinomas arising in the lung. The tumour cells did not react with stains characteristic of a malignant mesothelioma (WTI or ca/retinin).

The morphological (well-formed glands lined by malignant cells), immunohistochemical (malignant cells positive for TTF-t and CEA) and histochemical (neutral mucin present in cytoplasm demonstrated with PASD stain) features are those of an adenocarcinoma of pulmonary origin (pulmonary adenocarcinoma, bronchogenic adenocarcinoma).

[70] Dr. Mullen went on to state definitively that the worker had a lung adenocarcinoma and there was “no question” that the primary cancer was of lung origin.

(x) Submissions

[71] The appellant’s representative made submissions at the hearing and filed post-hearing submissions, including written submissions dated May 18, 2006, May 1, 2007, and October 22, 2007. These submissions were lengthy and the Panel will not reproduce the arguments in full, but we note that the representative relied upon the reports of Dr. Reinhartz and Dr. Johnston in support of the appeal. Mr. Hamilton submitted that these reports demonstrated that the literature supports the view that asbestos exposure increases the risk of developing lung cancer, regardless of whether there is radiographic evidence of asbestosis a particular case.

[72] The appellant’s representative also cited *Operational Policy Manual*, Document No. 23-02-03, “Lung Cancer Among Workers in the Uranium Mining Industry,” which states: “A worker’s non-smoking status can provide evidence of work-relatedness in the weighing of evidence on the individual merits and justice of the case.” Although this principle is not contained in the applicable policy on asbestos and lung cancer, it was submitted that the concept should apply in this appeal.

[73] Mr. Hamilton also argued that the opinion of Ms. Keller, occupational hygienist, cited in *Decision No. 802/01*, continued to be valid. She gave the opinion that generally lung tumours are more common in the upper lobe, but the opposite is true for asbestos exposed workers. Mr. Hamilton noted that Dr. Ahmad had originally dismissed the relevance of Ms. Keller’s statement on the basis that he felt the worker’s cancer was of unknown origin, rather than lung cancer.

[74] Mr. Hamilton submitted that the evidence of other physicians ought to be preferred to that of Dr. Ahmad.

[75] Following the receipt of Dr. Mullen’s reports, Mr. Hamilton submitted that it provided further support for the appellant’s position.

(xi) Analysis

[76] The appeal is allowed, for the reasons that follow.

[77] As a starting point, the Panel accepts Dr. Mullen’s unequivocal finding that the worker’s primary cancer originated in the lung. The Panel’s analysis will focus upon the role of asbestos in the development of the worker’s lung cancer, as this was his primary exposure.

[78] In this appeal, the Panel has before it conflicting opinions from qualified experts on the issue of causation.³ In the Panel’s view, Dr. Ahmad’s expertise is clearly established, and his opinion has been relied upon in several Tribunal decisions.⁴ Drs. Wardekar and Thakur also provided opinions to the Board that a causal link between the worker’s exposure and lung cancer could not be established in the absence of a diagnosis of asbestosis. On the other hand, providing a contrary view, Dr. Johnston is also a medical professor and his curriculum vitae illustrates that he has published extensively. Dr. Todd, the worker’s treating specialist and head of the division of thoracic surgery at the time he provided his report, also supported the worker’s claim.

[79] None the less, the Panel's decision in this appeal ultimately does not turn on preferring one expert opinion over another, in the sense of finding that one opinion is more persuasive or one of the individuals has more expertise. The differences of opinion in this case turn on a point that raises an important issue of general concern in establishing causation – namely, whether the presence of asbestosis is a prerequisite for entitlement for lung cancer, where the primary exposure is asbestos. In the specific factual circumstances of this case, the Panel finds it is inappropriate to deny the claim based upon preferring the restrictive view in an unresolved medical debate. The Panel will explain its reasons for this conclusion below.

[80] The Tribunal's decisions have referred to the ongoing medical debate on this issue for a number of years. For example, in *Decision No. 375/92* (1993), 28 W.C.A.T.R. 32, the Panel summarized the conflicting opinions presented [at pp. 45-46]:

There is, as noted, significant controversy concerning the asbestosis factor. Dr. Gray at the Board was of the opinion that, as there was no evidence from Dr. Ritchie's examination of the worker's lung tissue to suggest any asbestos effects on the pleura or lungs, the lung cancer was not related to asbestos exposure. Dr. Carr disagreed with this opinion. Dr. Woolf was of the opinion that, considering the controversy in the literature on the question of whether lung cancer could be caused by asbestos exposure without evidence of asbestosis, the decision was a matter of policy for the Board to review.

Dr. Wills stated that there is evidence in the literature that "asbestos related lung cancer can and does arise in the absence of markers of asbestos effects". Dr. Grossman also states this in his report. Dr. Muir states that there is "no consensus on this issue."

The experts who testified in [*Decision No.*] 134/89 stated that there was increasing evidence that asbestosis tended to precede the onset of lung cancer when it resulted from asbestos exposure. That panel accepted that the absence of asbestosis reduced the probability of finding a causal relationship between lung cancer and exposure to asbestos. There is no question that the finding of asbestosis assists greatly in determining the etiology of lung cancer. However, unlike the Board, we do not find that it is the determinative factor in this case.

[81] Dr. Ahmad also acknowledged that this issue is still not resolved in the medical literature. Dr. Ahmad remarked:

There is an ongoing debate in the current literature on the subject of asbestos exposure and lung cancer. There are two camps – those who link lung cancer to asbestos exposure in the presence of asbestosis and others who believe that asbestosis is not necessary to causally link asbestos exposure to lung cancer. This latter group base their conclusions on different portions of the current literature...

[82] In *Decision No. 266/93* (May 24, 1994), the Panel stated there are five factors to consider with respect to probability of causation of lung cancer. The two most important factors are latency period and intensity of asbestos exposure. Three other more controversial factors of lesser importance are fibrositic changes in the lung, location of the cancer, and type of cancer. In weighing the evidence in that appeal, the Panel in that case found that the lack of fibrositic changes in the lung lowered the probability that the cancer was related to asbestos exposure.

[83] Dr. Ahmad explained his reasons for preferring the literature supporting a link between asbestosis and asbestos-related lung cancer. Certainly, this represents a valid point of view.

[84] Yet, although the Board's medical consultants in this case opined that entitlement for asbestos-related lung cancer should not be granted in the absence of asbestosis, the Board has not endorsed this approach through its policy. Board policy, cited above, sets out two criteria: length of exposure and latency period. Additionally, the policy provides: "Claims which do not meet these guidelines will be judged on their own merits, having regard to the intensity of the exposure and other factors peculiar to the individual case." Were the Board to conclude that the medical literature is sufficiently clear on this point, it would be open to the Board to add a diagnosis of asbestosis as an additional factor to consider in claims for asbestos-related lung cancer. The Board, however, has not done so.

[85] The Panel's review of the medical opinions and some of the literature cited in this case indicates that this is

an issue that remains unresolved. Furthermore, a review of the Tribunal's recent decisions in similar cases indicate that Panels have looked at the totality of the evidence in the individual appeal, rather than endorsing one side in the medical debate.

[86] The Panel has found *Decision No. 1443/04* (2005), 75 W.S.I.A.T.R. (online) to be particularly relevant to the circumstances of this appeal. The decision summary accurately outlines the nature of the case:

The worker's estate appealed a decision of the Appeals Resolution Officer denying the worker entitlement for lung cancer.

...

Under Board policy, claims are considered favourably when there is a clear and adequate history of at least 10 years of occupational exposure to asbestos and a latency period of 10 years. In this case, the worker met the latency period. He had seven years of exposure. The Panel interpreted the exposure requirement in the policy as not requiring that a worker work with asbestos every day but, rather, only that the exposure is clearly established and substantive.

The Panel noted that the Board policy would apply to workers who are smokers and workers with a family history of cancer. The worker in this case was not a smoker and did not have a family history of cancer. There was also evidence of some other workplace exposures to nickel, chromium, arsenic and crystalline silica.

It was not established as a matter of clear probability that the worker's exposure resulted in a level of risk sufficient to identify the workplace as the probable cause of the cancer. However, the worker did have specific risk factors at work, and alternate explanations were even less clearly established. Applying the benefit of doubt in favour of the worker, the Panel concluded that the worker had entitlement for lung cancer.

[87] In *Decision No. 1443/04*, the Panel also obtained an assessor's opinion. Dr. R. House, a specialist in occupational medicine with a Masters of Science degree in clinical epidemiology, was the assessor. The Panel specifically asked whether any inference could be drawn from the fact that the worker's autopsy report contained no reference to silicosis, asbestosis, or pleural plaques. The decision describes Dr. House's response as follows [at para. 19].

Dr. House states that the presence of pleural plaques is not associated with any added risk of lung cancer in excess of the risk conferred by the exposure to asbestos that caused the pleural plaques. There is evidence that the presence of silicosis or asbestosis is associated with increased risk of lung cancer in comparison to workers with comparable exposure but no associated fibrotic lung cancer. However there is still a risk of lung cancer from asbestos exposure in workers without pleural plaques and/or asbestosis and from silica exposure in workers without silicosis.

[88] Dr. House's response further supports the view that the debate is not resolved regarding necessity of a diagnosis of asbestosis for establishing causation for asbestos-related lung cancer.⁵ While it is apparently undisputed that asbestosis is associated with an increased risk of lung cancer, there is still support for the proposition that there is an increased risk of lung cancer from asbestos exposure in workers without pleural plaques and/or asbestosis.

[89] Thus, neither the Tribunal (through its decisions), nor the Board (through policy), has definitively adopted one side or the other in the ongoing asbestosis-lung cancer debate. The theory that there is increased risk of lung cancer associated with asbestos exposure, in the absence of asbestosis, is supported by reputable physicians. This is not a case in which the theory advanced by the claimant is marginal and only espoused by non-mainstream sources. While the presence of asbestosis increases the likelihood that workplace exposure made a significant contribution to a worker's lung cancer, its absence must be weighed with the other evidence in determining causation. It is not, in itself, determinative.

[90] The Panel finds that this case is clearly distinguishable from *Decision No. 600/04* (April 13, 2005), in which entitlement for lung cancer was denied where the worker did not have asbestosis, but the worker had also been a heavy smoker from a young age and his asbestos exposure was considered to be quite low. The lack of a finding of asbestosis merely added to the very substantial evidence weighing against entitlement in that case.

[91] In summary, Dr. Ahmad's opinion of this case turns on his acceptance of a position that is still subject to debate in the medical community. It also has not been formally endorsed by the WSIB through policy, nor has it been universally accepted in the Tribunal's decisions as a determinative factor. Were the Panel to accept the opinion, we would, in effect, be adding another criterion for entitlement that is not set out in Board policy. The Panel is reluctant to take that path in this case, where the worker was a non-smoker, had no family history of cancer, and had a history of asbestos exposure that the Board accepted was significant and intense. In the Panel's view, the lack of a diagnosis of asbestosis ought to be weighed in the context of the evidence as a whole.

[92] Bearing in mind the approach taken in *Decision No. 1443/04*, the Panel concludes that this is the very type of case in which the benefit of the doubt provision was intended to apply, noting in particular the following factors:

- There is no dispute that the worker had intense and significant exposure to asbestos during his employment at the asbestos mine and the talc mine from 1974 to 1977. This is supported by Dr. Kabir's opinion, as well as the testimonial and documentary evidence.
- The worker was a non-smoker.
- The worker had exposure to radiation which potentially contributed to the development of his lung cancer.
The worker had no family history of lung cancer.⁶
- There is no evidence of other factors (dietary factors, pre-existing benign lung disease and oncogenic viruses) mentioned by Dr. Ahmad as causing cancer in humans.
- The 10-year latency period set out in Board policy is met. The worker was first exposed to asbestos in 1974, and was diagnosed with lung cancer in 1995, over 20 years later. Although Board policy requires a latency period of at least 10 years, several Tribunal decisions have referred to evidence of an average latency period of 20 to 30 years.⁷ The longer latency in this case therefore is a factor that supports the claim.
- The medical opinions for and against entitlement are approximately equal in weight. The opinions on both sides have been given by qualified experts. The opinions against entitlement rely upon a particular view in a medical debate that has not been formally accepted by the WSIB through policy and is not universally applied in Tribunal decisions.

[93] Several arguments advanced in this appeal warrant further discussion. The evidence is not clear on whether the location of the tumour weighs clearly one way or the other. The appellant's representative relied upon evidence that tumours in the lower lobe of the lung are more common among asbestos exposed workers, but Dr. Ahmad noted that there were conflicting studies on this issue. Based upon this evidence, the Panel finds that this factor is neutral in assessing entitlement in this case.

[94] There is also some controversy about whether cancer cell type is an indicator that the cancer is asbestos-related. The appellant's representative referred to *Decision No. 802/01*, in which the Panel relied upon the opinion of N. Kellers, occupational hygienist, who stated that adenocarcinomas are more common among persons exposed to asbestos than unexposed persons are. In addition, the Panel notes that *Decision No. 690/99* (August 15, 2000) referred to the evidence from Dr. N. Jones, a specialist in chest diseases, who noted that 35% of asbestos-related cancers were adenocarcinoma.

[95] Dr. Ahmad did not accept that adenocarcinoma is indicative of asbestos-related lung cancer. Dr. Ahmad stated that adenocarcinoma is now the leading cell type in persons suffering from lung cancer in North America.

[96] Of interest, Dr. Ahmad noted that about 5% of men suffering from this cell type are non-smokers, according to the National Cancer Institute. This would suggest that a relatively small proportion of men with adenocarcinoma are non-smokers. Since the worker in this case was a non-smoker, this factor could be seen to weigh in favour of the claim, although it is by no means unequivocal. The evidence before the Panel suggests that cancer cell type is not a particularly accurate indicator of causation. Accordingly, the Panel does not view this as a strongly persuasive factor, but rather, one to be weighed carefully in the particular circumstances of the case. The Panel has not had to rely on this factor in making its findings in this case.

[97] The worker's additional exposures to radiation, diesel fumes and blasting agents must also be weighed. As in *Decision No. 1443/04*, the worker in this case also had additional exposures to other potential cancer causing agents, specifically diesel fumes, blasting agents and radiation. The Panel accepts Dr. Ahmad's opinion that the literature showed only a weak connection between diesel fume exposure and the development of lung cancer. The evidence regarding blasting agents was also limited.

[98] Although the worker's radiation exposure was not extensive, the Panel finds that it adds to the balance of evidence favouring the appeal. Dr. Ahmad commented that it was difficult to know the extent of the worker's radon gas exposure based upon Dr. Kabir's report. The Panel, however, for the reasons set out in its findings of fact, accepted new evidence submitted by the appellant that the worker likely had exposure to radon daughters at the G mine when he worked there from May 1967 to October 1974. From 1970 to 1973, the worker was in school from September to May, but worked at the G mine during the summers, from June to August. Otherwise, he was employed full time at the G mine during the period noted above. The Panel also accepted that the worker would have been exposed to radiation during the summers working in uranium mines in 1965 and 1966.

[99] Dr. Ahmad cited literature that tends to link radiation exposure to oat and squamous cell carcinoma, rather than adenocarcinoma. On the other hand, Dr. Reinhartz gave the opinion that the fact that the worker's cancer was an adenocarcinoma did not rule out that radon played a role in its etiology. As an example, Dr. Reinhartz cited a study of German uranium workers with lung cancer, which found that 43% were squamous cell, 26% were adenocarcinoma and 23% were small cell lung cancer. In his follow-up report, Dr. Ahmad referred to this study, noting that almost all of the subjects in the study were smokers. Dr. Ahmad noted that the authors of the study reached the following conclusion: "All cell types of lung cancer in this study are associated with radon exposure, but high radon exposure tends to increase proportions of Small Cell Lung Cancer and Squamous Cell."

[100] In the Panel's view, this evidence supports a conclusion that radon exposure may be associated with adenocarcinoma,⁸ although there is a stronger association with small cell and squamous cell cancer. Given the evidence of an increased risk associated with radiation exposure, the Panel finds that this factor weighs in favour of entitlement, although it is not a decisive factor in the context of this appeal.

[101] On the other side of the balance, the Panel notes the following factors weigh against entitlement: the absence of asbestosis or pleural plaques⁹; several expert opinions against entitlement (Drs. Ahmad, Thakur and Wardekar); and, the duration of exposure did not meet Board policy requirements – though this is counterbalanced by Dr. Kabir's opinion that the exposure was still significant.

[102] In summary, there is reliable evidence weighing both for and against entitlement. However, as illustrated through the Panel's review of the Tribunal's case law, there are unresolved medical debates surrounding several issues, most notably, on the issue of how to interpret the absence of asbestosis when attributing causation. Since this debate is unresolved in the medical community, the Panel finds that the absence of asbestosis should not be the determinative factor in weighing entitlement, particularly in this case, where there is clear evidence of significant exposure, a lack of other identifiable causal factors, and supportive opinions from recognized medical experts.

[103] For all of the foregoing reasons, the Panel finds that the evidence is approximately equal in weight, and the benefit of the doubt applies in favour of the claim.

DISPOSITION

[104] The appeal is allowed. The worker's workplace exposures significantly contributed to his lung cancer and the appellant is entitled to survivors benefits.

[105] The issue is remitted to the WSIB to determine the nature and extent of benefits flowing from this decision, subject to the usual rights of appeal.

Appeal allowed.

1. This is significant from an adjudicative standpoint, since mesothelioma is a "Schedule 4" disease under the applicable regulation. Pursuant to the Act

and the regulation, entitlement is conclusively deemed where it is shown that a worker diagnosed with mesothelioma was actively engaged in a work process involving the generation of airborne asbestos fibres.

2. In determining that the appellant had a right to file reply evidence, the Panel followed the approach taken in *Decision No. 759/93RI* (1997), 41 W.C.A.T.R. 24.

3. There was also a difference of opinion between Dr. Ahmad and Dr. Johnston on how to interpret the findings following a pleuroscopy. This was a sophisticated medical issue that went to the question of whether the worker's lung cancer was primary. Since the Panel obtained a definitive answer on this issue from Dr. Mullen, it is unnecessary for us to wade into this debate.

4. See, for example, *Decisions No. 2112/99* (September 29, 2000), *582/99* (September 29, 2006), *1005/99* (December 28, 2000).

5. See also *Decision No. 1815/05* (November 16, 2005), in which a doctor testified that asbestosis is not a necessary precursor to asbestos-related lung cancer.

6. The worker's father passed away at age 86 due to lung disease related to silicosis and emphysema caused by his mining work history, for which he received workers' compensation benefits.

7. See, for example, *Decisions No. 134/89* (1993), 26 W.C.A.T.R. 32 and *138/94* (June 9, 1997). A report on file from L. Wakely, occupational hygienist, also refers to the average latency period of 20 to 30 years.

8. *Decision No. 400/08* (2008), 87 W.S.I.A.T.R. (online), is a recent example of a Tribunal decision which granted entitlement for adenocarcinoma of the lung in a worker whose primary exposure was to radiation in uranium mining. The worker also had prior out of province gold mining exposure, and the Panel noted the evidence that the mixture of gold and uranium mining increases an individual's risks for developing lung cancer.

9. The absence of pleural plaques may not be as relevant, as Dr. Ahmad took the position that there was a lack of reliable studies finding an association between the presence of pleural plaques and asbestos-related lung cancer. On the other hand, see *Decision No. 1917/06* (February 23, 2007), in which Dr. Muir, respirology consultant to the WSIB, recommended granting entitlement for lung cancer based upon the presence of pleural plaques. The ARO in that case accepted Dr. Muir's opinion and granted entitlement.

Decision No. 1778/03

Panel: E. Smith (Vice-Chair), Wheeler, Jackson

Decision — June 17, 2009

Neutral Citation: 2009 ONWSIAT 1464

Cancer (breast) – Office worker – Exposure (electromagnetic fields).

Worker did not have entitlement for breast cancer related to exposure to low frequency electromagnetic fields in office environment – Cluster of five workers who developed breast cancer was sufficient to raise question of occupational cause but determination of entitlement must be made with reference to scientific and other evidence as a whole.

The worker's estate appealed a decision of the Appeals Resolution Officer denying the worker entitlement for breast cancer, which the estate claimed was related to workplace exposure in the employer's systems department. The appeal was dismissed.

In *Decision No. 1778/03/1*, the Panel made findings of facts about the physical characteristics of the workplace, in particular the size of the work area, number of persons working on the floor, size of modular units, distance between units, distance between workstations and distance between equipment. In *Decision No. 1778/03/2*, the Panel made findings of fact about the worker's level of exposure to electromagnetic fields (ELFs), including consideration of the number of CAIL VDT units, the crowding of the units and the use of jiffy poles.

There was expert evidence by a doctor on behalf of the worker, by a doctor on behalf of the employer and by a Tribunal medical assessor. The Panel reviewed their evidence and the epidemiological evidence from various studies as well as the assessments of various authoritative and international research bodies.

The Panel found that the level of the worker's exposure to ELFs (1.86 mG) was below any association with cancer. One study found an association at 1.6 mG but that was based on exposure of between 10 and 20 years. The worker in this case had less than 10 years of exposure.

The Panel considered the role of a Tribunal decision-maker and noted that a Tribunal panel should not take upon itself the role of deciding that the opinion of any single expert is more worthy of weight than the opinion of internationally recognized bodies that represent the best experts in the field, when those bodies have considered an issue and expressed what is in essence a consensus view about the current state of epidemiology.

The Panel also expressed concern about the worker's expert witness, who selectively omitted reference to negative studies.

There were five workers in the workplace in question who developed breast cancer. This was sufficient to constitute a cluster. The fact of a cluster is sufficient to raise the question of whether there is an occupational cause. However, it is not sufficient to answer the question. The question must be answered by reference to the scientific and other evidence as a whole.

In this case, the workplace was studied intensively. The ELF exposure was insufficient to suggest a cause. The literature is consistent that much of the cause of breast cancer remains unknown. The Panel concluded that the worker did not have entitlement.

Cancer (sein) – Employé de bureau – Exposition (champs électromagnétiques).

La travailleuse n'avait pas droit à une indemnité pour cancer du sein lié à l'exposition à des champs électromagnétiques de fréquences extrêmement basses dans des bureaux – Le fait qu'un groupe de cinq travailleuses avait contracté un cancer du sein suffisait pour soulever la possibilité d'un lien avec l'emploi, mais il fallait régler la question du droit à une indemnité en fonction de l'ensemble de la preuve scientifique et autre.

La succession de la travailleuse a interjeté appel de la décision par laquelle le commissaire aux appels refusait de reconnaître le droit à une indemnité pour un cancer du sein qui, selon la succession, était attribuable à une exposition dans les locaux des services informatiques de l'employeur. L'appel a été rejeté.

Dans la *décision n^o 1778/03I*, le comité a procédé à des constatations de fait au sujet des caractéristiques physiques des lieux du travail, en particulier : de la taille de l'aire de travail; du nombre de personnes travaillant à l'étage; de la taille des unités modulaires; de la distance entre les unités; de la distance entre les postes de travail; de la distance entre le matériel. Dans la *décision n^o 1778/03I2*, le comité a procédé à des constatations de fait au sujet de l'exposition aux champs électromagnétiques de fréquence extrêmement basse (ELF), en tenant compte du nombre de terminaux à écran CAIL, de l'encombrement des unités et de l'utilisation de colonnes de service.

Le comité a entendu la preuve d'expert d'un médecin pour le compte de la travailleuse, d'un médecin pour le compte de l'employeur et d'un assesseur médical du Tribunal. Le comité a examiné cette preuve et la preuve épidémiologique provenant de diverses études de même que des évaluations provenant de différents organismes de recherche internationaux faisant autorité.

Le comité a conclu que le niveau d'exposition de la travailleuse aux champs électromagnétiques ELF (1,86 mG) était en-deçà de toute association avec le cancer. Une étude indiquait une association à 1,6 mG, mais pour une exposition de 10 à 20 ans, alors que l'exposition de la travailleuse en l'espèce était de moins de 10 ans.

Le comité a examiné le rôle des décideurs du Tribunal, et il a noté qu'un comité du Tribunal ne devrait pas s'arroger le droit de décider que l'opinion d'un expert a plus de valeur que celle d'organismes internationalement reconnus qui représentent les meilleurs experts dans le domaine, quand ces organismes ont examiné la question et sont essentiellement arrivés à un consensus au sujet de l'état actuel de l'épidémiologie.

Le comité a aussi exprimé des inquiétudes au sujet du témoin expert de la travailleuse, qui avait intentionnellement omis les études négatives.

Il y avait cinq travailleuses sur les lieux de travail en question qui avaient contracté un cancer du sein, soit suffisamment pour constituer un groupe. Le fait qu'un groupe de cinq travailleuses avait contracté un cancer du sein suffisait pour soulever la possibilité d'un lien avec l'emploi, mais pas suffisamment pour vérifier cette possibilité. Il fallait régler la question du droit à une indemnité en fonction de l'ensemble de la preuve scientifique et autre.

En l'espèce, une étude approfondie des lieux du travail avait révélé que l'exposition à des champs ELF était insuffisante pour indiquer qu'il s'agissait d'une cause. Les publications sur le sujet concluent uniformément que la cause du cancer du sein demeure inconnue. Le comité a conclu que la travailleuse n'avait pas droit à une indemnité.

Tribunal Decisions Considered:

Decision No. 107/96 (2002), 60 W.S.I.A.T.R.1 refd to

Decision No. 600/97 (2003), 66 W.S.I.A.T.R. 1 refd to

Decision No. 1558/98 (2002), 60 W.S.I.A.T.R. 78 refd to

Decision No. 1779/03I (September 9, 2004) [2004 ONWSIAT 1860] refd to

Decision No. 1779/03I2 (May 24, 2007) [2007 ONWSIAT 1363] refd to

Decision No. 1780/03I (September 9, 2004) [2004 ONWSIAT 1857] refd to

Decision No. 1780/03I2 (May 24, 2007) [2007 ONWSIAT 1364] refd to

Decision No. 574/05 (2006), 79 W.S.I.A.T.R. (online) consd

Cross-References:

Decision No. 1778/03I (September 9, 2004) [2004 ONWSIAT 1856] refd to
Decision No. 1778/03I2 (May 24, 2007) [2007 ONWSIAT 1361] refd to

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DISPOSITION

APPEAL by the worker from a decision of the Appeals Resolution Officer denying entitlement for breast cancer related to exposure to electromagnetic fields.

June 17, 2009 THE TRIBUNAL: —

BEFORE:

E.J. Smith, Vice-Chair
 B. Wheeler, Member Representative of Employers
 F. Jackson, Member Representatives of Workers

HEARING:

September 26, 2003, February 18, 19, 2004, November 18, 19, December 1, 2006, February 13, 2007, December 16, 17 and 18, 2008, and March 24, 25, and 26, 2009, at Toronto , Oral

DECISION(S) UNDER APPEAL:

ARO Decisions dated April 25, 2000 (for PB and LW) and May 31, 2000 (for MS)

APPEARANCES:

For the workers: Mr. G. Newhouse, Lawyer

For the employer: Mr. D. Gilbert, Mr. K. MacNeil, Lawyers

For TCO: Ms. H. Evelyn, Lawyer

REASONS

(i) The Issue

[1] The issue is whether the breast cancer of three workers resulted from workplace exposures.

(ii) Background

[2] These three appeals are being heard together as batch appeals. Two of the three workers are deceased, and the appeal is brought by their survivors and estates. All parties have agreed that the three appeals will be heard together, because all workers, or their survivors, allege that the exposures they suffered on the third floor of the employer's Hamilton office building were a significant contributing factor in their breast cancer.

[3] The Panel has issued two prior decisions for each appellant: *Decisions No. 1778/03I* (September 9, 2004) and *1778/03I2* (May 24, 2007) (for PB); *1780/03I* (September 9, 2004) and *1780/03I2* (May 24, 2007) (for LW); and *1779/03I* (September 9, 2004) and *1779/03I2* (May 24, 2007) (for MS). The first interim decisions made findings of fact about the workers' medical and exposure histories and the physical characteristics of the workplace. The second interim decisions made findings of fact about the level of the workers' exposures to low frequency electromagnetic fields (ELF) in the workplace. (References to research in this area also sometimes refers to electric and magnetic fields, or EMF, which is a reference to a continuum of electrical frequencies which include ELF.)

[4] We found that each of the three workers had a mean exposure to ELF of 1.86 mG. We asked Dr. M. Bitran, the Tribunal assessor who testified for the purposes of the second interim decisions, to calculate an estimate of the individual cumulative exposures based on this finding and the three workers' individual work histories. We received a supplemental report of Dr. Bitran, which found that, based on the Panel's estimate of 1.86 mG mean exposure for each of the three workers, the related cumulative exposures at the employer's work site would have been: 3.08 mG for LW, 1.92 mG for PB, and 2.58 mG for MS.

[5] Those further findings of Dr. Bitran were not disputed at the reconvening of the hearing.

[6] This decision now addresses the medical and epidemiological evidence and makes findings about whether the workers are entitled to benefits for their breast cancer due to their occupational exposure at the employer.

[7] The Panel heard the oral evidence of Dr. Magda Havas, for the workers, and Dr. David Halton, for the employer. Dr. M. Bitran also provided his opinion on the epidemiological evidence in his written report dated

December 2005.

[8] We note that, after the completion of the workers' case, Dr. Havas provided a further unsolicited report which, *inter alia*, we understand from the parties' submissions suggested possible exposures other than EMF that might have contributed to cancer. However, the Panel declined to receive the report because exposure issues had been addressed in the second phase of the hearing and the Panel was not prepared to reopen that phase of the hearing. The Board had also not addressed these other exposures. This decision is only considering exposure to EMF.

(iii) The Evidence of Dr. Havas

[9] The Panel heard evidence from Dr. Magda Havas about EMF exposure and breast cancer. Dr. Havas is an Associate Professor, Science Education and Environmental Resource Studies, with a cross appointment in the Biology Department, at Trent University. She is a Member, Centre of Health Studies, Trent University. She is member of the International Committee on Electromagnetic Safety (ICEMS). This is a by-invitation membership. She is an advisor to the EMR Policy Institute in Marshfield, Vermont.

[10] Dr. Havas testified generally about her view of the epidemiology that addresses the relationship between breast cancer and exposure to low frequency electromagnetic fields. There have been epidemiological studies that have found relationships between those exposures and childhood leukemia as well as some studies that have found a relationship between breast cancer in males and high levels of electromagnetic exposures. There are also some studies that have found relationships between exposures and female breast cancer. However, studies in all areas have been inconsistent.

[11] Dr. Havas referred in her report only to the positive studies. She explained her reasons for doing this on the basis that there may be many confounders in occupational studies, which can result in mixed findings. In her view it is not correct to simply count the number of studies and find that they weigh to one side of an issue or the other. She endorsed a statement of Dr. Martin Blank of Columbia University:

One cannot prove that EMF is harmless no matter how many negative results one presents. One single reproducible (significant) harmful effect would outweigh all negative results.

[12] Dr. Havas distinguished a substance that promotes the growth of cancer cells from a substance that initiates cancer. This distinction was based on her assessments of *in vivo* studies, as discussed further below.

[13] Dr. Havas agreed that females are genetically different from males and that studies in males cannot necessarily be directly applied to females. Further, she agreed that the men involved in the 2004 Milham study, of male breast cancer, had mean exposures of 92 mG, compared to 1.86 mG mean exposure for the appellants in this appeal. However, Dr. Havas testified that in her view many of the Bradford Hill criteria discussed by Dr. Halton are met in the studies addressing women. Dr. Halton describes the Bradford Hill criteria as helpful in determining whether causation can be inferred when epidemiological studies have identified an association. Dr. Havas testified that the criteria have to be applied in the context that the ELF effect is acting as a promoter rather than as an initiator. She was referred in cross-questioning to the 2005 Forssen study, which took place in Sweden. However, she testified that the fact that women may exercise more and be healthier may have meant that a promoter effect was not found in that group. The dose-response effect may be found inconsistently in the studies because there may not be an incidence of cancer initiated in the group studied. Dr. Havas testified that, in her view, the fact that not all studies show a higher incidence for a particular form of cancer is not an inconsistency because, for a promoter to work, the cancer has to be present.

[14] She testified that the dose-response effect may also be affected by the fact that the impact of ELF may be to reduce tumours at very high exposure levels. This is an effect that occurs with ionizing radiation. She has published a peer-reviewed paper containing an overview of *in vivo* studies that suggested to her that there may be this effect. However, her findings in that paper were called into question during her testimony, and are discussed further below.

[15] She testified that, in her view, there are too many studies showing a level of increased risk for EMF to be discounted as a causal factor in breast cancer.

[16] She was referred to a transcript of her testimony at a public information meeting of the Xeel Power Line EIR Steering Committee, of Mendota Heights City Council, Minnesota, U.S.A., dated March 22, 2001. She was testifying about potential risk from ELF exposures from a proposed power line on school children and childhood leukemia. She testified at that time:

The guidelines used in Sweden are three milligauss for children. They were that children should not play...playgrounds... schools should not have levels beyond three. So these are guidelines that are not enforceable. They are based on voluntary compliance. And I think if we had to do something, if you came up with a recommendation as to what was safe or if you had to make decisions on what was safe, it would certainly not be in the hundreds of milligauss. It would be somewhere between 2 and 12 milligauss.

[17] When asked whether there was a level of ELF below which she would not have any concern about human health, she testified: "I'd say two milligauss."

[18] We note that two milligauss is above the level of exposure of the appellants in this case.

[19] Later in the transcript she was asked:

So if the house is far enough away from the power line that the measure is less than two milligauss, you would not consider that a problem?

[20] She responded: "Correct. Not from that power line."

[21] Dr. Havas responded that she now does not consider 2 mG a safe level of exposure. She referred us to the 2001 Van Wijngaarden study (E. Van Wijngaarden et al., "Population-based case-control study of occupational exposure to magnetic fields and female breast cancer" (2001) *Annals of Epidemiology* 11(5): 297-303) that found an increased risk of breast cancer for premenopausal women with 10 to 20 years of exposure at 1.6 mG. That finding is discussed further below. She provided additional epidemiology about childhood leukemia and ELM exposure on a post hearing basis. It was a matter of dispute at the hearing whether those studies provided a basis for her to have changed her view, as discussed below.

[22] She testified that she also has been working with electrically sensitive persons, who find that electricity affects diabetes and MS. She is doing scientific studies. Those studies are focused on other frequencies, of "dirty" electricity. However, on an anecdotal basis, she hears from people that they react to electricity. There is a study about "screen dermatitis". There are people who can't sit in front of a computer without their skin breaking out. She has talked to enough people to satisfy herself that people have these reactions. However, they do not involve cancer.

[23] Dr. Havas testified that the matrix of peak results might also be relevant or that other forms of electricity might be relevant. However, we were not provided with any evidence on these matters in the exposure phase of this hearing, and the Panel ruled that it would not re-open the exposure issues.

[24] In her report to the Tribunal Dr. Havas concluded:

It is possible that exposure to an average magnetic field of 1.86 mG promoted growth of breast cancer cells and thus made the cancer more "aggressive". I base this on the fact that all three women were younger than 50 years of age and, hence, were most likely pre-menopausal and producing estrogen; that two had estrogen-receptor positive breast cancer (the type of breast cancer for the third is not known); and that their exposure (average of 1.86) mG was within the range shown in epidemiological studies (generally above 1.6 mG) to be associated with increased risk of breast cancer. I also base this on the in vivo studies with rats that showed a promotion effect of magnetic fields from 1 to 500 mG.

[25] She states:

The risk seems to be greater with longer exposure and for premenopausal women, presumably because they are still producing estrogen. It may also be greater for women with [estrogen-receptor positive] breast cancer.

[26] However, she amended or clarified these conclusions at the Tribunal hearing. In her testimony, Dr. Havas revised the last estimate to be a reference to between 3 mG and 500 mG, as discussed further below. She also clarified her conclusion that epidemiological studies show a small increased risk, with a median value for statistically significant association of about 1.5, or 50% increased risk, for women developing breast cancer who are exposed to magnetic fields that range from less than 1.6 mG to greater than 4 mG. That conclusion was based on findings in the 2001 study of Van Wijngaarden, discussed below. However, as discussed below, Dr. Havas accepted in her testimony that she had not made reference to the correct comparable group, given that those results were for persons with ten to twenty years of exposure and the results for workers with less than ten years of exposure were not statistically significant. All the appellants had worked at the employer for less than ten years. Dr. Bitran's report includes a listing of the weeks worked by each appellant at the employer's workplace. The results indicate that LW spent, on a cumulative basis, approximately eight years in the workplace, that MS spent approximately six years, and that PB spent just under four and one-half years.

[27] Therefore significant questions were raised about Dr. Havas' conclusions at hearing. Those questions and our findings about them are set out in more detail below.

[28] We note that we have considered the specific epidemiological studies addressed by Dr. Havas further, below, because Dr. Havas, Dr. Halton and Dr. Bitran all addressed this literature.

(iv) The Evidence of Dr. Halton

[29] Dr. Halton provided a report dated November 2008. He has a PhD in chemistry from the University of Windsor and is a certified Industrial Hygienist. He is a past president and director of the Occupational Hygiene Association of Ontario and a past Project Manager and scientist at the Canadian Centre for Occupational Health and Safety. He was formerly an Assistant Professor, toxicology, in the Department of Environmental Health at Wayne State University. He is the 2004 recipient of the Hugh Nelson Award for Excellence in Occupational Hygiene.

[30] He reviewed the epidemiological studies, referred to below. He testified that it is most likely that the appellants' ELF exposures were not a causative factor in their breast cancer. He testified that the findings of the international committees that review the epidemiological studies are very important because they involve the views of the best minds in the field. The International Agency on Cancer (IARC) is the gold standard. None of these committees have endorsed a relationship between EMF and breast cancer.

[31] In referring to the specific studies, he expressed the opinion that some of the studies are more reliable than others. He considered the studies that looked at reasonably large cohorts, that are controlled for confounders, that are based on actual exposure data, and those that estimate cumulative exposures, the most reliable. These studies do not support a relationship, especially at the levels of exposure of the appellants. He also considered it important to apply the Bradford Hill criteria. In his opinion, the epidemiological studies do not meet a number of those criteria. They do not show a consistent dose-response effect. There are inconsistent studies, and the most reliable studies do not show a relationship. He testified that the Bradford Hill criteria cannot be applied in a rigid way, but they are an important and widely recognized guide for moving from findings of association in epidemiological literature to findings about causation.

[32] He testified that cancer is a disease of life in the sense that it develops as a result of genetic interactions with materials in the environment, including not only chemicals, but also food, sunlight, and everyday exposures. Breast cancer is very common in the population. There may be no clear answer for why a cluster of cases occurs. There may be unidentified causes or they may be due to randomness or chance. The incidence of a frequent occurrence will not be uniform over a population. There will be areas where the incidence will be above average and areas where it will be below average. Chance is not a remote or unreasonable explanation. This is the case despite the one in a thousand probability identified in the Theriault report, discussed below. If there are enough people, and enough time, rare events will happen. Sooner or later a rare event will occur due to chance. Breast cancer is a very common disease and its distribution is random.

[33] He testified that initiation and promotion are both integral to the development of cancer in human beings.

Initiation occurs when a cell mutates. There is likely more than one mutation involved before a cell is primed to become a tumour. Current theory suggests that the cell also likely has to interact with a promoter for tumour cells to grow. The promoter is a substance which changes the pathways which provide messages to the cells and gives the cell a message to grow. The growth at first is often benign. Current theory then suggests that there is a third change called “progression” which involves a huge change in the tumour cells. The cell becomes immortal, and grows uncontrollably. It does not die anymore.

[34] In the case of human beings, there are tumour suppressant genes that can stop tumour growth in its tracks and repair mutated DNA. Human beings have developed protective mechanisms against cancer. However, people have different genetic inheritances and some are better able to fight cancer cells than others. The kidneys have a function in detoxifying abnormal cells.

[35] Therefore, he testified that promotion is always a part of the cause of the disease, and is a red herring in terms of how to analyse the epidemiology. There is no cancer without both initiation and promotion. The studies do not distinguish these factors. In his view, the distinction doesn’t matter. The studies are looking at whether there was an increase in cancer.

[36] In vitro studies are useful but not directly applicable to results in animals or humans because the cancer cells are studied in the absence of the kidney or the body’s other protective mechanisms.

[37] He testified that it is not possible to extrapolate in a definitive way from rats to humans. There are many differences. Rats don’t have a gallbladder. They metabolize differently. They can’t breathe through the mouth. The pineal gland of a rat is on the periphery of the brain right under the skull. In humans, the pineal gland is deep in the brain. If the effect of EMF involves the pineal gland, as has been hypothesized, the effect may be different in rats than in humans. However he agreed in cross-questioning that the pineal gland may respond to effects on the eye, and that those effects would be less impacted by the fact of the pineal gland location.

[38] He testified that he was not aware on what basis EMF might act to suppress tumours at high levels, because its biological effects are not comparable to the effects on cell tissue of ionizing radiation. He agreed in cross-questioning that there is some evidence in some contexts of biological effects on cells from electrical charges. He accepted that there is literature supporting the use of electrical charges for bone healing. However, this impact is not the result of electrical frequencies at 60 hertz, which is the frequency in issue in this appeal. He noted that, in her report, Dr. Havas refers to the July 2005 article by Ivan L. Cameron et al. (“Therapeutic Electromagnetic Field (TEMF) and gamma irradiation on human breast cancer xenograft growth, angiogenesis and metastasis” (2005), 5 C.C.I. 223) as indicating the effectiveness of low frequency magnetic fields to treat cancer. However the effect identified in that paper is at 15 mT which is 15,000 mG, not the 500 to 1,000 mG level that Dr. Havas identifies in her published paper as the possible threshold for this effect.

[39] As noted above, Dr. Havas’ analysis of the *in vivo* results in this respect is discussed further below.

(v) The Evidence of Dr. Bitran

[40] Dr. Bitran is an occupational hygienist who appeared as a witness for the Tribunal in the Phase Two of these appeals, to address the exposure evidence. He is Director of the Innovation and Management Branch, Ontario Ministry of Labour. He is Chair of the Physical Agents Committee, ACGIH Worldwide.

[41] In his report provided for Phase Two of the hearing, Dr. Bitran included a review of the epidemiology. We deferred consideration of that aspect of his report to this stage of hearing. His view is that comprehensive reviews by authoritative organizations have consistently concluded that the scientific evidence does not substantiate a cause-effect link between ELF magnetic fields and breast cancer. IARC considered the evidence inadequate to establish a link to breast cancer. The classification by IARC of ELF as possibly carcinogenic to humans is based on limited epidemiological evidence on childhood leukemia and is not indicative of a significant risk. Other substances also evaluated by IARC as possibly carcinogenic to humans are coffee and gasoline engine exhaust.

[42] Dr. Bitran refers to the 2001 Van Wijngaarden study, the 2003 Labreche study (F. Labrèche et al., “Occupational Exposures to Extremely Low Frequency Magnetic Fields and Postmenopausal Breast Cancer”

(2003), 44 AJIM 643), and the 2005 Forssen study (U.M. Forssen et al., “Occupational Magnetic Fields and Female Breast Cancer: A Case-Control Study using Swedish Population Registers and New Exposure Data” (2005), 161(3) A.J.E. 250), as the most recent epidemiological studies. Those studies are discussed below. He concludes from these studies:

In summary, smaller occupational exposure studies with limited statistical power show some modest increases of breast cancer with exposure to ELF magnetic fields, but these findings are often non-statistically significant and could be explained by chance. The largest occupational study with the most comprehensive exposure assessment and statistical power does not show any increase.

[43] The latter reference is a reference to the 2005 Forssen study. Dr. Bitran also expresses the opinion that the Erron meta-analysis and the Caplan review, discussed below, do not confirm an effect.

[44] He concludes that the most recent studies and data conclude that ELF exposures are most likely not a risk factor for breast cancer.

(vi) The Epidemiological and Other Studies

(a) The Epidemiological Studies; Breast Cancer in Women

[45] The experts also reviewed the epidemiology. We have not referred here to all the studies that were the subject of testimony. We have given most weight to results that refer to the levels of exposure relevant to these workers, i.e., that refer to breast cancer in women, either at measured levels of exposure comparable to the levels identified for these women, or, if not measured, that refer to office workers or telephone workers or job categories that are similar to the job categories of these workers. We have also given weight to the results for premenopausal women and for women with estrogen-receptor positive breast cancer. The three appellants were pre-menopausal and it is established that two had estrogen-receptor positive breast cancer.

[46] We have limited our review of the papers, for the most part, to those with results that are statistically significant.

1. The 1994 D.P. Loomis et al. study, “Breast Cancer Mortality Among Female Electrical Workers in the United States” (1994), 86(12) JNCI 921-925, found that female electrical workers had excess mortality relative to other employed women with an odds ratio of 1.38. However there was no excess found in telephone operators, data-keyers, computer operators and programmers which, in our view, are the occupational categories relevant for the appellants. The authors state that the conclusions that could be drawn from this study were limited but encouraged further investigation.
2. The 1995 K.P. Cantor et al. study, “Occupational Exposures and Female Breast Cancer Mortality in the United States” (1995), 37(3) J.O.E.M. 336-348, found a slight elevated risk in some job categories but stated that neither black nor white women with an elevated probability of using video display terminals experienced elevated breast cancer risk. The authors stated that on the whole their results did not support an association.
3. The 1996 study by P.F. Coogan et al., “Occupational Exposure to 60-Hertz Magnetic Fields and Risk of Breast Cancer in Women” (1996) 7(5) Epidemiology 459-464, of breast cancer in women exposed to 60-hertz fields showed statistically significant results, with a relative risk (RR) of 1.42, for high exposures. However there were no increased risks for exposures comparable to those of these workers. Dr. Halton comments that the study involved relatively few persons.
4. The 1994 study by Dosemeci and Blair, “Occupational Cancer Mortality Among Women Employed in the Telephone Industry” (1994), 36 (11) J.O.E.M. 1204-1209, of women employed in the telephone industry, included in the employer’s book of documents, found that statistically significant excess risks were identified among white women below age 49 with a mortality odds ratio of 1.6. The observed excesses were evident particularly for engineers and technicians, mechanics and repairers, and office workers, but not for telephone operators. The authors stated that possible exposure to technological

advancement in the modern telephone industry may account for the excess risks observed. However, the authors noted that there was a lack of information on confounding factors such as smoking, alcohol and diet, because they had used death certificate information.

5. The 1998 M. Feychting et al. study, "Magnetic Fields and Breast Cancer in Swedish Adults Residing Near High-Voltage Power Lines" (1998), 9(4) *Epidemiology* 392-397, was of breast cancer in Swedish adults residing for at least one year within 300 meters of 220 or 400-kv voltage power lines at any time between 1960 and 1985. It found an RR of 7.4 for estrogen-receptor positive women less than 50 years old. However, the confidence interval, although statistically significant, was 1.0 to 178. Dr. Havas agreed that by picking 300 meters as a parameter the study diluted results and that, given the wide confidence interval, the 7.4 RR may be an anomaly. Further, the exposure levels used were also very broad. The finding of an RR of 7.4 reflected results for all exposures equal or greater than 1 mG, without differentiating between levels of exposure at lower or higher levels.

We note also that there was no clear dose-response effect identified in this study. Other results, for persons who were less than 50 years old with exposures between 1 mG and 1.9 mG, and for persons who were less than 50 years old with cumulative exposures of 5 mG to 29 mG, were not statistically significant.

With reference to cumulative exposures, we note also that an exposure of less than 5 mG was used as the reference category, which we understand means the control group. Therefore the appellants would have fallen within the control group level for cumulative exposures. As already noted, the cumulative exposures of PB, LW and MS were 1.92 mG, 3.08 mG and 2.58 mG respectively.

6. The 1998 Johnsen and Olsen prospective cohort study, "Risk of Cancer Among Danish Utility Workers – A Nationwide Cohort Study" (1998), 147(6) *A.J.E.* 548-555, found no increased risk for breast cancer. The low exposure category used for the assessment of risk was an exposure of less than 2.9 mG. No increased level of risk for breast cancer was identified at this level or for some higher exposures.
7. The 1999 Kliukiene study, "Incidence of breast cancer in a Norwegian cohort of women with potential workplace exposure to 50Hz magnetic fields" (1999), 36(1) *A.J.I.M.* 147-154, found a relative risk of 1.21 for the group of women who were less than 50 years of age with 1000 to 1999 hours of exposure. However, when results were measured in terms of cumulative exposures, there was no excess risk for the group with cumulative exposures between 1 and 8 mG. Again, the cumulative exposures of P.B., LW and MS were 1.92 mG, 3.08 mG and 2.58 mG respectively.
8. The 2000 study of Forssen, Feychting, Ahlbom et al. "Occupational and Residential Magnetic Field Exposure and Breast Cancer in Females" (2000), 11(1) *Epidemiology* 24-29, again addressed the exposures of women living within 300 meters of power lines in Sweden. It showed an RR of 1.5 for workers who were under 50 years of age and of 3.2 for workers under 50 years who were estrogen-receptor positive, at levels of exposure greater than 2.5 mG. However, these results were not statistically significant.

We note that this study concluded that, while the results showed an increased risk in the youngest age groups and for estrogen-receptor positive breast cancer, the results were far from persuasive. The small number of subjects resulted in unstable risk estimates.

9. The 2001 Van Wijngaarden study was relied on specifically by Dr. Havas in her conclusion that increased risk had been identified in the literature at the level of 1.86 mG of exposure. In Table 2 of her report, Dr. Havas indicates that this study shows an RR of 1.6 for pre-menopausal women with exposures between 10 and 20 years at 0 to 1.6 mG of exposure. For pre-menopausal women who are estrogen-receptor positive, at this exposure level, there was a relative risk of 2.0. At the higher exposure levels of 1.6 mG to 4 mG and of 4 mG to 5.2 mG, the relative risks were 1.7 and 1.7, respectively, for premenopausal women with ten to twenty years of exposure and the relative risks

were 2.0 and 2.1 for premenopausal estrogen-receptor positive women with ten to twenty years of exposure.

With respect to measured cumulative exposures, premenopausal estrogen-receptor positive women with greater than 5.2 mG of exposure had a relative risk of 2.1.

However, as was pointed out in cross-questioning at the hearing, the information provided by Dr. Havas in her summary table of this study was selective. She did not include the information that was relevant to the work history of these appellants. As noted above, all had worked at the employer for less than ten years. The findings in the Van Wijngaarden study for women with less than ten years' exposure were not statistically significant at any level of exposure. Further, there was no consistent statistically significant dose-response effect in the findings as a whole. The findings for premenopausal estrogen-receptor positive women with exposures in the ten to twenty year category, at between 4 mG and 5.2 mG, were not statistically significant. The results for this category of women at greater than twenty years of exposure were also not statistically significant at the levels of 0 to 1.9 mG or at the level greater than 7.6 mG. Not only did Dr. Havas not refer us to the category of results that was most relevant to these appellants, she included only the positive findings in her report and excluded the negative findings.

The results for different occupational categories in this study are also relevant. There were no statistically significant results for office workers. While there were some positive results for industrial workers, the authors note that the study was not controlled for confounders that might be present in that work, such as exposure to solvents. In addition, the authors state that the time period of 10 to 20 years between exposure and diagnosis (before a positive relationship was seen) could be considered inconsistent with the hypothesis that exposure to EMF acts as a tumour promoter. That theory would predict that the relevant exposure to EMF would be close in time to diagnosis. The authors conclude that the findings give little support to the hypothesis that ELF causes female breast cancer.

10. The 2001 meta-analysis by T.C. Erren, "A Meta-analysis of Epidemiologic Studies of Electric and Magnetic Fields and Breast Cancer in Women and Men" (2000), 22(s5) Bioelectromagnetics s105-s119, found that, on a pooled basis, the relative risk for the studies in women was 1.12. The studies were consistent with a small increased risk for breast cancer from EMF exposure, but the author commented on the methodological problems in the studies and stated that it was premature to conclude that the observations reflected a real rather than an "artifactual" association.
11. The 2002 Reynolds et al. study, "Cancer incidence in California flight attendants (United States)" (2002), 13(4) C.C.C. 317-324, found an SIR (similar to an RR) of 1.42 for breast cancer for California flight attendants. In her table, Dr. Havas identifies the likely EMF exposures as from 8 to 13 mG. However, a review of the article indicates that the authors were not necessarily associating the findings with EMF. They also refer to the possible effects of disruptions to the circadian rhythm as well as duration, latitude or altitude of flight and cumulative doses of ionizing radiation as possible factors. The authors state that lifestyle differences could contribute, although the authors note that known risk factors for breast cancer are thought to account for only a fraction of cases.
12. The 2002 Gardener study found a statistically significant RR of 4.63 in telephone and telegraph operators in China. However, Dr. Havas testified that this study may not be reliable for our purposes. The authors did not find an increased risk in electrical workers, which suggested that factors other than EMF might be involved in the findings for telephone and telegraph workers. The authors undertook the study because they speculated that the 40% increase in breast cancer between 1972 and 1989 identified in China was due to industrialization. Dr. Halton suggests that the increase may be related to improved detection and record keeping as well as unidentified factors.
13. Dr. Havas notes that the 2003 Kliukiene study found an SIR of 1.3 in radio telegraph operators working on board ships. The authors state that the study gives some support to the hypothesis of an association, and emphasize in their discussion that they found an association for women below 50 who

were estrogen-receptor positive as well as in the older age group for women who were estrogen-receptor negative. However, we note that the only relative risk reported that was statistically significant was the RR of 1.3 reported for all women. The study also refers to the fact that the operators had irregular work hours and that light-at-night might have been a factor.

14. Dr. Havas refers us to the 2003 Labreche study. In this study, for the group with lifetime occupational exposures to EMF at medium or high intensities, Dr. Labreche finds an odds ratio of 1.13. Risks were higher at this level of exposure for first exposures before age 35, with an odds ratio of 1.4. However neither of these findings was statistically significant. The findings were statistically significant for exposures at medium and high intensities with first exposure before age 35 among cases with progesterone-receptor positive tumours, with an odds ratio of 1.56.

However, the exposure levels at which these results were obtained were above 5 mG. Dr. Labreche identifies: "less than 2 mG" as "no exposure"; from 2 mG to 5 mG as "low exposure"; from 5 mG to 10 mG as "medium exposure"; and from 10 mG to 100 mG as "high exposure".

Therefore she includes workers with levels of exposure comparable to the appellants, of 1.86 mG, in the category of "no exposure".

However, we note that Dr. Labreche also describes jobs in the low exposure category as including VDT operators and electric typewriter operators. It appears that Dr. Labreche believes that these jobs may sometimes involve exposures above 2 mG. However, she does not provide a basis for that opinion. In any event, she describes positive results only at medium and high levels of exposure.

15. The 2004 Kliukiene study was based on data obtained for power line exposures in Norway. It found an RR of 1.56 for residential exposure from power lines at 300 meters with a confidence interval of 1.3 to 1.92. This study also included a review of occupational exposures. It reviewed both residential and occupational exposures in three categories: less than 0.5 mG (the control); between 0.5 mG and 2.mG; and equal to or above 2 mG. While the study found an increased incidence of breast cancer in the exposed population, the authors state that no clear dose-response relationship was shown. The magnitude of excess risk was similar for women aged less than 50 years and those aged 50 years or more.

The authors also concluded that occupational exposure was associated with a somewhat lower increase in risk than residential exposure. The authors discuss the melatonin hypothesis and state that since the residential exposure of economically active adults occurs mainly in the evening and at night: "one could speculate that this exposure is of greater importance for risk than daytime exposure at work." The authors also state that their finding of elevated risk for estrogen-negative breast cancer in women of all ages needs further investigation. In conclusion, the authors state that their results show an association between exposure to magnetic fields and the risk of breast cancer but a more important role for residential exposure than for occupational exposure, in particular in the last five years before diagnosis.

16. The 2007 Peplonska et al. study, "Occupation and breast cancer risk in Polish women: A population-based case-control study" (2007) 50(2) A.J.I.M. 97, of Polish women found relative risks of between 0.7 and 2.0 for a variety of jobs, but the jobs are not relevant to these workers.
17. The 2005 Forssen study did not support a relationship between ELF and breast cancer. All risk estimates were close to unity, regardless of exposure cut-off point or choice of exposure parameter. The study failed to find an association with the level of exposure to ELF closest in time to the referent year, or based on occupations with extreme exposure closest in time to the referent year, or based on exposure for at least 10 years. The results did not change when reviewed based on menopausal status or estrogen-receptor positive status. In particular, there was no excess risk identified in the group exposed to up to 3 mG. This was a very large study, of 20,400 cases and 116,227 controls. It used actual exposure data. Dr. Halton testified that this was one of the most reliable studies by his criteria:

the cohort was very large, the exposures were measured, cumulative effects were reviewed, and there were controls for confounders. The study distinguished results based on both age and estrogen-receptor status.

The population studied was in Sweden, and Dr. Havas testified that healthier habits may have affected outcomes because of the distinction that she makes between EMF as a cancer promoter and as a cancer initiator. As noted above, Dr. Halton did not consider that a reasonable basis for distinguishing the study.

18. The 2006 Caplan study involved a review of the previous epidemiology. It found that the studies were inconclusive but that continued research was appropriate because of the unexplained incidence of breast cancer. As discussed below, this study also comments on the melatonin hypothesis.
19. The 2007 McElroy et al. study, "Occupational Exposure to Electromagnetic Field and Breast Cancer Risk in a Large, Population-Based, Case-Control Study in the United States" (2007), 49(3) J.O.E.M. 266-274, found a modest increased risk for women working as data entry clerks or computer equipment operators, with an odds ratio of 1.47, or of 1.51 after adjustment for confounders. Dr. Halton points out that the women with breast cancer were more likely to have had a first full time pregnancy at a later age, or not to have borne children, or to have begun menarche at an early age and to have started menopause later. They also tended to gain weight more after age 18, consume more alcohol, and use hormone replacement therapy. Only 49 patients and 50 controls were used in the odds ratio calculation.

We note also that the exposures ranked as "low" did not show increases for pre-menopausal women and that the increases for telephone operators were only at a relative risk of 1.15 (or 1.23 when adjusted) and were not statistically significant. In any event, in this study, the controls that were exposed to only "background EMF" had no excess risk. While the study did not include individual measurements, Dr. Halton suggested that the 1.86 mG exposure of the appellants is similar to background levels and therefore suggestive of no increased risk.

(b) Breast Cancer in Men

[47] Dr. Havas has also included a number of studies about breast cancer in men. However, we consider these studies distinguishable in many respects from our facts.

[48] Of the ten studies listed in her Table 1, the findings in four studies are not statistically significant. Of the other six studies, the Demers and Fioderus studies consider industrial job categories that are not comparable to these workers, and have mixed findings of statistical significance.

[49] The Pollan study also has mixed findings of statistical significance. Further, no statistically significant association is found in the administrative job categories. Therefore the findings do not apply to our facts. Even at higher levels of exposure, there is no consistent dose-response effect.

[50] The Robinson and Tynes studies found some statistically significant results for carpenter trades, wood machinist trades, electrical occupations, and electrical transport work but, again, these are very different job categories to the appellants.

[51] Mr. Newhouse also referred us to the 2004 Milham study, "A cluster of male cancer in office workers" (2004), 46(1) A.J.I.M. 86-87, which involved an unusual cluster of three cases of male breast cancer over ten years among a group of workers who worked in a basement office near electrical switch gear. Breast cancer is an unusual disease in men, and this incidence reflected an SIR of 100. That means that the incidence was 100 times what was expected. However, this study also addressed very different facts. The exposure was to 92 mG of EMF. The appellants in this case were exposed to 1.87 mG.

[52] We note again also the 2001 meta-analysis by Erren. The pooled results indicated a relative risk of 1.37 for men. However, even with respect to this result, the author commented on the methodological problems in the

studies and concluded it was premature to conclude that the observations reflected a real rather than artifactual association.

[53] We also note the general testimony that results in men cannot be directly extrapolated to women.

(c) *In Vivo Studies (Animal Studies)*

[54] Turning to the *in vivo* studies, Dr. Havas explained that these are studies done on laboratory animals. Unlike epidemiological studies, these studies are able to establish cause-effect relationships, rather than associations, because of the controlled conditions in the laboratory. However, the question remains whether the studies can be extrapolated to humans.

[55] Dr. Havas referred us to a review of the literature dealing with low frequency EMF that she published in 2000, examining the studies in which rats were exposed to electromagnetic fields. The rats used in these studies had been bred to be genetically predisposed to cancer. In all but two studies, the rats were also injected with tumour initiators. The rats were then studied for the number of tumours produced when they were exposed to low frequency electromagnetic fields. The rats were kept in incubators fitted with coils to distribute the EMF uniformly over the rats' entire bodies. We understand that the exposure was continuous.

[56] There were some differences between the studies. Not all the rats were from the same school of genetically predisposed strains. There were also differences in the types of initiators used.

[57] Dr. Havas testified that, in her view, the results showed a pattern. In her 2000 paper, she expressed the opinion that harmful intensities were indicated at between 1 mG and 500 mG. Between 500 mG and 1000 mG she testified that the results were inconsistent. Above 1000 mG there was a negative effect on the growth of tumours. She postulated that this might be because at high intensities magnetic fields may have the same effect that high frequency radiation has on cancer cell growth: namely, inhibition or cell death.

[58] In cross-questioning at the Tribunal hearing, Dr. Havas accepted that the finding of 1 mG in the Mevissen paper was a finding for a control group. The rats were exposed only to the background levels of EMF in the room. The tumours reported at 1 mG were likely due to the fact that a cancer initiator had been used, and could not be attributed to EMF. Therefore she amended her opinion, to state that harmful intensities were indicated at between 3 mG and 500 mG.

[59] However, Dr. Havas continued to postulate that, if these results could be extrapolated to humans, then they suggested that EMF magnetic fields stimulate breast cancer growth at levels between 3 mG and 500 mG. She made a distinction that EMF might promote breast cancer even if it does not initiate it. She expressed the opinion that the evidence of low frequency EMF initiating breast cancer is weak, which we understand in part to be because of the inconsistent epidemiological studies. We also understood that the *in vivo* studies did not provide information about the possible initiation of breast cancer because the rats used in the experiments were bred to be genetically predisposed to cancer and in all but two cases the rats were injected with tumour initiators. Therefore the studies did not address the question of what exposures might initiate breast cancer.

[60] However, Dr. Havas testified that these studies supported the view that low frequency EMF can promote breast cancer at low levels of exposure and provided an explanation for why a dose-response effect might not be consistently found.

[61] In order to understand her testimony, it is important to understand how Dr. Havas has approached the findings of the studies. She has combined the information in the various studies to identify positive and negative effects at each level of exposure according to different criteria: identified as "incidence", "number of tumours", "size of tumours", and "latency". She has then added the findings under each of these criteria to determine a negative or positive total effect. Seven studies have been reviewed, but there are several entries for several of the studies to reflect results at different exposure levels. The lowest level of exposure shown is at 1 mG, which reflects findings for what Dr. Havas accepted in her testimony was the control group used in the Mevissen study. She rated the "harmful" findings in that study at a level of "two." That rating was based on an incidence of tumours which she rated as "two".

[62] However, it was clarified during her testimony that the level of 1 mG was the background level of exposure in the laboratory. These rats were not exposed beyond that level. Therefore we understand that no inference can be drawn from the tumour growth in that situation, because the rats were bred to be vulnerable to cancer and were injected with tumour initiators. As noted, Dr. Havas revised her testimony and indicated that the studies showed negative effects at levels at and above 3 mG.

[63] However, on review of Dr. Havas' Table 3, setting out the findings of these studies, we have considerable difficulty with Dr. Havas' thesis even when considered based on the threshold of 3 mG, rather than 1 mG. In our view, the fact that the findings of the Mevissen study at 1 mG were findings for a control group has greater significance for Dr. Havas' analysis than is reflected by the amendment that Dr. Havas made in her testimony, of changing the threshold for negative effects from 1 mG to 3 mG.

[64] First, on a review of Dr. Havas' Table 3, there are no tumours shown in the rats in the 1994 Loscher study, which is the only study she refers to which addresses exposures at 3 mG. This is despite the fact that there was tumour growth reported in the control group in the Mevissen study at 1 mG. Dr. Havas includes the Loscher study as an example of negative results at 3 mG only on the basis that the study reported a decrease in melatonin levels in the rats at this exposure. However, given that she indicates that there were tumours found in the control group at 1 mG in Mevissen, and she indicates that there were no tumours found even at 3 mG in Loscher, it is unclear how this comparison can be argued to support the theory that a reduction in melatonin affects tumour growth at this level of exposure, or even that EMF exposure promotes tumour growth at 3 mG. The rats in both experiments were injected with the same tumour initiator, DMBA. From Dr. Havas' Table 3, the rats exposed to 3 mG in the Loscher study experienced a lesser degree of cancer than the control group of rats exposed to 1 mG in the Mevissen study.

[65] Further, the criterion indicated for the Loscher study, of a decrease in melatonin, is not a criterion referred to for any of the other studies, presumably because melatonin levels were not recorded in those studies. Therefore, if the findings are limited to the criteria that are found in all the studies, then the results in the Loscher study, at 3 mG, are better than those of the control group in the Mevissen study at 1 mG. There are no negative findings at 3 mG with respect to incidence, number of tumours, tumour size or latency.

[66] We understand that the control group used in the Mevissen study was not the control group used in the Loscher study or in the other studies, and that comparing these studies directly may well constitute comparing apples with oranges. It is possible that no reliable inferences can be drawn from the comparison. However, it is Dr. Havas who has treated these results as comparable. Based on her approach to the data, we find no basis to assume negative results at 3 mG .

[67] Further, on reviewing the results of Dr. Havas' Table 3, many of the findings even at 200 mG and at 500 mG are inconsistent, when compared to the control group in Mevissen, and are not consistently negative in comparison to that group. In our view, this evidence raises a question about Dr. Havas' conclusions that there are negative results at these levels, either. We realize that it may be reasonable to find that the data is too disparate for any inferences to be drawn. Mr. Gilbert pointed out that the authors of the studies did not attempt to draw the inferences that Dr. Havas has drawn. However, even if an attempt is made to compare the findings in this data, we question whether the data is sufficient to support the inferences drawn by Dr. Havas.

[68] We note also, however, the 1997 in vivo study by Mevissen, filed as Exhibit 40, which found moderate acceleration of mammary tumours in rats exposed to 1000 mG. That study is discussed further below, because it addresses the melatonin hypothesis.

(d) In Vitro Studies

1) The Melatonin Hypothesis: The Testimony of Dr. Havas

[69] Dr. Havas also reviewed in vitro studies. These are studies that use cells or sub-cellular components to experimentally examine mechanisms of action. She relies on these studies as evidence that the "melatonin hypothesis" provides a biological explanation for how low frequency EMF affects cancer growth. The theory is

that estrogen promotes tumour growth, and that melatonin, like tomoxifen, inhibits the production of estrogen. The “melatonin hypothesis” is that low frequency EMF inhibits the natural production of melatonin, therefore reducing its effect on estrogen levels and resulting in an increase in tumour growth.

[70] She testified that in 1992 Richard G. Stevens proposed that light-at-night and EMF can suppress the production of melatonin. He postulated that lower melatonin would lead to an increase in circulating estrogen levels and would stimulate the proliferation of estrogen- receptor positive breast tissue. She testified that less is known about progesterone-receptor positive breast tissue.

[71] Dr. Havas testified that a 1993 study by R.P. Liburdy, “ELF magnetic fields, breast cancer, and melatonin: 60 Hz fields block melatonin’s oncostatic action on ER breast cancer cell proliferation” (1993), 14(2) Journal of Pineal Research 89-97, exposed human breast cancer cells to 2 mG and 12 mG of EMF. Two mG was used to represent a background level. The study found that EMF magnetic fields acted at the cellular level to enhance breast cancer cell proliferation by blocking melatonin’s natural oncostatic (cancer fighting) effect. The effect was found at 12 mG but not at 2 mG, and so the authors postulated that there was a dose threshold between 2 and 12 mG.

[72] Dr. Havas testified that in 1997 Harland and Liburdy, “Environmental Magnetic Fields Inhibit the Antiproliferation Action of Tamoxifen and Melatonin in a Human Breast Cancer Cell Line” (1997), 18 Bioelectromagnetics 555-562, then presented experimental evidence that magnetic fields modify drug interactions with human breast cancer cells. They found that 12 mG magnetic field exposure blocked the oncostatic effect of tamoxifen at pharmacological levels on human breast cancer cells in vitro.

[73] She did not know if the women in this case had been taking tamoxifen. However, Mr. Newhouse referred us to medical evidence that PB had been taking tamoxifen during the time period that she returned to work from June 1 to September 1, 1995, after her cancer was diagnosed.

[74] Dr. Havas testified that these findings have been repeated in studies by C. F. Blackman et al. “The Influence of 1.2 μ T, 60 Hz Magnetic Fields on Melatonin and Tamoxifen-Induced Inhibition of MCF-7 Cell Growth” (2001), 22 Bioelectromagnetics 122-128, and Hanf (2004). She testified that the fact that the findings have been replicated means that the gold standard has been met for the reliability of the results. The question remains at what levels the magnetic fields affect melatonin and tamoxifen in women, as distinct from in breast cancer cell cultures.

[75] Dr. Havas testified that the timing of exposure is critical for melatonin production. This distinction is apparent in the literature. She testified that if EMF exposure occurs at night or especially in the evening (at dusk) it can interfere with night time concentrations of melatonin. If it occurs earlier in the day it has no effect on melatonin production. She testified that as it begins to get dark, levels of melatonin increase. Therefore exposures to EMF or electric light may not affect melatonin production during the day. Daytime is not the critical time.

[76] Mr. Newhouse also referred us to several additional studies on this subject. He referred us to a 1994 study by Yellon, “Acute 60Hz magnetic field exposure effects on the melatonin rhythm in the pineal gland and circulation of the adult Djungarian hamster” (1994), 16 J. Pineal Res. 136-144, which exposed adult male and female hamsters to 1000 mG of ELF for 15 minutes, started two hours before lights off, and compared results to those found in “sham-exposed” hamsters. The exposed hamsters had a delayed rise and fall in melatonin levels compared to the sham-exposed hamsters. Results from two replicate studies indicated some changes in melatonin levels, but the results were not entirely consistent. The authors suggested differences might be related to the time of year or the age of the hamsters.

[77] Mr. Newhouse also referred us to the 1995 Rogers study on baboons, which exposed the animals to 1000 mG of magnetic fields, and found night time melatonin depressed. This study is referred to with a number of other studies in the National Research Council’s 1997 report on the Possible Health Effects of Exposure to Residential and Electric and Magnetic Fields. However the study also looked at a number of other outcomes. It concluded that there was no convincing evidence that exposure to low frequency electric and magnetic fields causes cancer in animals. With respect to melatonin, the study states that magnetic fields might inhibit night time melatonin

concentrations at effective field strengths of 100 mG to 520 mG, but there is no conclusive evidence that human melatonin responds similarly. The report does conclude that there is convincing evidence that low-frequency pulsed magnetic fields greater than 5000 mG are associated with bone-healing responses in animals.

[78] Mr. Newhouse also drew to our attention an abstract provided of a 1997 study of human reactions by Wood, which reports marginally significant findings on night time plasma melatonin, with exposure to 200 mG. The results were found in about 20% of the 30 adult males studied.

[79] Mr. Newhouse referred us to the testimony of Dr. Blank of Columbia University to the EIR Steering Committee about the ability of ELF to cause changes in cells. When testifying about impacts on leukemia, Dr. Blank referred to the fact that Dr. Liburdy had identified a threshold somewhere between 2 mG and 12 mG and also to a study by Trasko, published in *Environmental Health Sciences*, that found effects on cells at 40 mG and 20 mG but that at 10 mG there was no change. Dr. Blank testified that somewhere between 10 and 12 milligauss there was an effect that was very much like the effect of a chemical promoter.

[80] There have also been experiments with respect to the effects on melatonin of light-at-night. The original proponent of this hypothesis, that ELF and/or light-at-night may affect melatonin, Richard Stevens, published a 2007 article reporting on a workshop convened by the National Institute of Environmental Health Studies (NIEHS) to consider how to conduct research on the effects of light on the circadian system, including the suppression of melatonin.

[81] An IARC Monograph dated May 12, 2007 states: "Shiftwork that involves circadian disruption is probably carcinogenic to humans." The finding is based on a 2006 study by E.S. Schernhammer et al. "Insulin-like growth factor-1, its binding proteins (IGFBP-1 and IGFBP-3), and growth hormone and breast cancer risk in The Nurses Health Study II" (2006), 13(2) *Endocrine-Related Cancer* 583-592, which found an RR of 1.79 for nurses who had worked on rotating night shifts for 20 years, but not with fewer years of rotating night shifts, and a 2001 study also by Schernhammer that found a statistically significant relative risk of 1.36 for nurses who worked 30 or more years on the night shift. Some increases were observed at lesser time periods but they were not statistically significant. We note also the findings of the 2002 Reynolds study, referred to above, which found an SIR of 1.42 for flight attendants, identified as possibly related to circadian rhythm among other factors.

2) Testimony of Dr. Halton about the Melatonin Hypothesis

[82] Dr. Halton testified about a concern that Dr. Liburdy's studies do not indicate the use of appropriate quality control mechanisms.

[83] He also referred the Panel to several studies that have not been able to confirm the effects of ELF on melatonin, or of melatonin on estrogen levels.

[84] The 1997 *in vivo* study by Mevissin et al., "Complex effects of long-term 50 Hz magnetic field exposure in vivo on immune functions in female Sprague-Dawley rats depend on duration of exposure" (1997), 19(4) *Bioelectromagnetics* 259-270, referred to above exposed rats to electromagnetic fields at 1000 mG. The authors of the study concluded that low frequency EMF promoted the development and growth of mammary tumours in rats although the data suggested the acceleration was only moderate. That study failed to find decreases in melatonin. However, the authors took the view that their findings did not discount the Liburdy theory, because of limitations in the study, although their study failed to confirm his results.

[85] A 1998 paper by Baldwin sought to test the theory that melatonin can attenuate proliferation in the estrogen-responsive MCF-7 breast cancer cell lines. The study found that melatonin at high doses did not inhibit the estradiol-induced changes in the cell cycle.

[86] A 2001 study by Graham exposed 53 healthy young women to electric fields of 283 mG at night under controlled conditions. There was no effect on the blood levels of melatonin.

[87] Dr. Halton also referred us to the 2006 Caplan study, which also comments on the melatonin hypothesis. The study was a review of the previous epidemiology. It found that studies in this field were appropriate because of

the unexplained incidence of breast cancer. However, it found little evidence of melatonin effects on human breast cancer.

[88] Dr. Halton testified that the hypothesis that EMF leads to an increase in cancer in human beings because of a decrease in melatonin remains a hypothesis.

[89] Mr. Gilbert also submitted that the fact that Dr. Stevens has not published further about ELF effects on melatonin, and instead has turned his attention, in his 2007 paper, to the effects of light-at-night, indicates that the theory that ELF affects breast cancer incidence because of effects on melatonin has fallen out of favour in the scientific community.

3) The View of Dr. Bitran on the Melatonin Hypothesis

[90] Dr. Bitran also expresses the opinion that this hypothesis is not proven. He refers to a 2000 review by Boorman which concluded that the totality of the rodent data does not support the hypothesis that power-frequency magnetic-field exposure enhances mammary cancer in rodents. However, he notes that another study, in 2004 by Fedrowitz, presents evidence that some strains of animals may be more susceptible to magnetic fields than others.

4) Evidence of Scientific Misconduct

[91] Dr. Havas was referred to findings about scientific misconduct on the part of Dr. Liburdy, made by the Office of Research Integrity (ORI), Department of Health and Human Services, of the U.S. National Institute of Health in 1995. The ORI made a final finding of scientific misconduct, to the effect that “Dr. Liburdy engaged in scientific misconduct in biomedical research by intentionally falsifying and fabricating data and claims about the purported cellular effects of electric and magnetic fields (EMF) that were reported in two scientific papers”. The statement indicates that Dr. Liburdy entered into a consent agreement with the ORI that neither admitted nor denied the ORI’s findings, and agreed to exclude himself from specified research activities for three years, and to submit letters to journals requesting restriction of certain data.

[92] She testified that she had been aware of this finding. She did not disclose this information in her report, when she relied on Dr. Liburdy’s research as a basis for her opinion, because different research papers were involved, because in her view the results had been replicated, and because she had been told by colleagues that Dr. Liburdy had entered into the consent agreement only due to the fact that he could not afford to defend himself. After the Tribunal hearing, she provided a statement for the record prepared by Dr. Liburdy defending his position.

[93] Mr. Newhouse drew to our attention the fact that IARC and other authoritative bodies continue to refer to the research of Liburdy and the scientists who have found similar results.

[94] Dr. Halton testified that in his view a finding such as the above from this disciplinary body would mean that all of a scientist’s findings are suspect.

(e) The Assessments of Various Authoritative Bodies

[95] The relationship between breast cancer and ELF has been addressed by a number of international and research bodies as follows:

1. The National Research Council (NRC) (1997) found that there was no conclusive or consistent evidence to show that EMF fields produce breast cancer.
2. The report of the National Institute of Environmental Health Studies (NIEHS), U.S. National Institute of Health (1998) concluded that laboratory studies failed to support a causal relationship between EMF at environmental levels and changes in biological function or disease status. The report stated that a lack of consistent findings in animal studies weakened the belief that associations are due to EMF, but the findings cannot be completely discounted.

3. The International Commission for Non-Ionizing Radiation Protection (ICNIRP) (2001) conducted a review of the literature and found that the purported association of EMF to breast cancer remained unresolved.
4. The International Agency on Cancer (IARC) (2002) conducted an authoritative review which found that with the exception of childhood leukemias, there was inadequate evidence in humans for the carcinogenicity of EMF.
5. The Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR) (2007) classified ELF as possibly carcinogenic to humans, based on the increased risks of leukemia in children at average field strengths of 3 mG to 4 mG. Dr. Halton noted that, with respect to ELF and breast cancer, the Committee stated that:

Recent big, well controlled studies had been entirely negative, and the hypothesis of a link between ELF field exposure and breast cancer is essentially written off.

[96] Dr. Havas testified that she did not agree with the findings of these bodies. She testified that in her view the studies (referred to under (vi)(a)(b)(c) and (d) above) provide evidence of an increased risk for breast cancer from ELF.

(f) Studies and Reports Specific to These Workers

1) The Report of Dr. Theriault; The Board Experts

[97] When the incidence of breast cancer among women working at the employer's third floor office facility was identified, the employer asked Dr. Gilles Theriault to provide an opinion. Dr. Theriault was then the Chair of the Joint Departments of Epidemiology and Biostatistics and of Occupational Health at McGill University. He provided a report dated November 4, 1996. He identified five cases of breast cancer, including the three appellants. He identified 165 employees over the three years cited. He calculated an SIR of 10, with a 95% confidence interval of 3.24-23.34 and a probability of less than 0.001. We understand that to mean that this incidence of cancer would be expected to occur in less than one in a thousand cases.

[98] He reviews the exposure levels for EMG in the work environment, and the epidemiology, but describes the epidemiology as not very strong. He states that it is necessary to wait for higher quality studies. He states:

It is my personal view that we are confronted with a classical cluster of cancer cases among a small group of clerical and managerial workers. I don't think that additional search for finding a cause to this cluster will be successful.

[99] The Board experts expressed the view that the fact of the cluster itself was not sufficient for entitlement and that a relationship to ELF was not established.

2) The Opinions of the Expert Witnesses about Dr. Theriault's Findings

[100] Dr. Havas testified that when she saw this report she considered it very significant because of the very high SIR. She felt it indicated that "something was going on". This was a significantly higher SIR than any of the statistically significant reports in her study. She considered it significant even if an SIR of 6 is used, excluding the cases of the two workers who have not appealed and for whom we have little evidence.

[101] On the other hand, Dr. Halton expressed the opinion that the SIR could be explained by chance. Dr. Bitran was also of the view that it was not sufficient to support a relationship between breast cancer and ELF, given the epidemiology as a whole.

(vii) Submissions

(a) Submissions of Mr. Newhouse

[102] Mr. Newhouse submits that the evidence that there was a cluster of breast cancer cases in this workplace

suggests that there was a causative factor in the workplace, and that the evidence of the association between EMF and breast cancer makes it probable that that was the cause. While many alleged clusters turn out not to be clusters when investigated, this was a confirmed cluster. The Theriault study identified an SIR of 10, and indicates a one in one thousand chance of this cluster effect occurring by chance, based on the information that there were five cases of breast cancer in this workplace over three years. Although we have no information about two of the cases, Dr. Havas testified that even based on the case of the three appellants for whom we have information, the SIR is 6.

[103] Mr. Newhouse submits that the numbers are similar to those found in the Milham study for male breast cancer. He submits that the three appellants were all pre-menopausal and there is information that two were estrogen-receptor positive. The studies indicate that the effects of ELF on breast cancer are greater for premenopausal and/or estrogen-receptor positive women.

[104] He submits that, although Dr. Theriault was not willing to conclude that the cancer was work-related, we should conclude that the cluster was unlikely to have been random, and that something in the workplace must have caused it.

[105] He submits that the three appellants did not have any of the known risk factors for breast cancer. Living in Hamilton is not a known risk factor. PB was on tamoxifen and she returned to work from June 1 to September 1995. The ELF exposure may have impacted on the effectiveness of the medication.

[106] He submits that the evidence is increasingly clear that melatonin has an oncostatic effect. We should not consider that to be in dispute. Research has continued into the relationship between light-at-night and melatonin, in the context of shift work. He submits that what is important about this research is that it confirms the oncostatic properties of melatonin.

[107] With respect to animal studies, Mr. Newhouse submits that, when data is not available from human studies, IARC has accepted that it is plausible and prudent to rely on animal studies. That means that extrapolation from animals to humans may be appropriate. That is why animal studies are done. The question is one of degree.

[108] With respect to the in vitro studies, Mr. Newhouse submits that it is not relevant that Dr. Liburdy was subject to a disciplinary finding. The studies involved were not about the melatonin effect and in any event his findings have been replicated in other studies. His findings continue to be referred to by IARC and other authoritative bodies. The Baldwin study has not been noted by IARC.

[109] Mr. Newhouse made submissions about the effect of “scaling”, which is a theory that suggests that lower exposures may be more relevant in some situations than in other situations.

[110] Mr. Newhouse submitted that the Bradford Hill criteria should not be applied in a mechanistic way. It is not possible to lay down hard and fast rules. The Panel should take a robust and pragmatic approach to the issues. In this case, the workers had no other risk factors. He refers us to *Decisions No. 574/05* (2006), 79 W.S.I.A.T.R. (online) and *1558/98* (2002), 60 W.S.I.A.T.R. 78 to support these principles. He also refers us to an article by Kenneth J. Rothman, et al., about causation and causal inference in epidemiology, and how these principles should be applied.

(b) Submissions of Mr. Gilbert

[111] Mr. Gilbert submits that the scientific literature does not establish a causation relationship on the balance of probability.

[112] He submits that the evidence of Dr. Havas is not objective. She is selective in her choice of literature. She has not provided a comprehensive evaluation. She has taken on the tenor of an advocate in presenting her views, for instance by offering an unsolicited further report after she testified.

[113] He submits that of the 10 articles referred to by Dr. Havas to support an association between EMF and male breast cancer, six contain no information about the level of exposures. In three other studies, the results were not

statistically significant. In the tenth study, the Milham study, the exposure levels were 92 mG. These workers had mean exposures of 1.86 mG. They are not comparable. He submitted that none of these studies is relevant to our facts. In any event Dr. Havas agreed that it is not possible to directly correlate results from males to females.

[114] In the 14 studies that Dr. Havas reviewed for an association with female breast cancer, ten did not include any exposure information. In the Feychting study, the RR of 7.4 for estrogen-receptor positive women is not based on known exposure data. The confidence interval is “off the charts”. Dr. Havas testified that she did not have a lot of confidence in that number because of the broad confidence interval.

[115] Positive findings were shown in the 2000 Forssen study and the 2002 Reynolds study but the levels of exposure were in excess of the levels in this appeal. The results in the 2000 Forssen study were also not statistically significant.

[116] Mr. Gilbert also points out that Dr. Havas failed to refer, in her report, to the relevant category in the Van Wijngaarden study. She referred to the category of women with exposures of at least ten years, rather than to the category of women with less than ten years of exposure, as discussed above.

[117] He submits that the selectivity in Dr. Havas’ report is a problem which affects the weight that can be given to the report of an expert witness.

[118] He notes the progression in the findings and reporting of Feychting and Forssen. These scientists were both authors of early studies. In 2005 they expanded on their earlier research by doing actual measurements of exposures and using a larger population. They concluded that there was no evidence of an association. Dr. Havas referred to their earlier works in her report without including the more definitive later study. Mr. Gilbert submits that this is misleading. It is comparable to relying on a Court of Appeal decision when there is a Supreme Court of Canada decision reversing the findings.

[119] He submits that none of the international agencies have confirmed that an association between EMF and breast cancer is possible. He does not dispute Dr. Blank’s opinion that it is not sufficient to simply list and count studies that are for or against an association. However, when there are conflicting studies, it is necessary to look at the quality of the studies and to do an evaluation. It is not possible to do an evaluation if one simply omits consideration of the studies with a contrary view. Dr. Halton reviewed studies both for and against an association.

[120] With respect to the in vivo studies, Mr. Gilbert submits that the studies reviewed by Dr. Havas did not support the conclusions that she draws from them. Her conclusions are not reliable. She is comparing not only apples to oranges but apples to oranges to grapes. The studies involve different rat lines, different initiators, different exposures and different durations of exposure. There are too many variables to make direct comparisons. In any event, she has also made errors in her evaluation. Her analysis is flawed in that the 1 mG level referred to in the study was the control group.

[121] He submits that both Dr. Havas and Dr. Halton testified that they did not have the expertise necessary to extrapolate from animal studies to human studies.

[122] In any event, he submits that none of the studies submitted by Dr. Havas finds any effect on melatonin below 12 mG. A number of the studies are addressed to levels of exposure well above 12 mg. They are not comparable to the exposures of these workers. Dr. Liburdy suggested that there was a threshold level for the melatonin effect that was somewhere between 2 mG and 12 mg. Therefore it is not relevant to these workers.

[123] There is only one study in Dr. Havas’ Table 3 supporting the position that EMF decreases melatonin in animals, as distinct from the in vitro studies on cells. That is the 1994 Loscher study. However, in that case, while the melatonin levels were decreased, there was no increase in the incidence of tumours in the injected mice. The other studies referred to by Dr. Havas deal with in vitro results, and so are less comparable to humans. Therefore the hypothesis that EMF leads to an increase in cancer in human beings because of a decrease in melatonin is not proved. Dr. Halton and Dr. Bitran are agreed on this point. He disputes Dr. Havas’ claim that the effect has been demonstrated in humans. The studies do not provide proof of a relevant impact on humans. Results have been inconsistent.

[124] In addition, Mr. Gilbert notes that Professor Stevens postulated his thesis about the melatonin hypothesis in studies in 1987 and 1992. However, he has not published anything since on the subject of EMF. In 2007, Professor Stevens published in this area again, but only with respect to the effect of light-at-night on melatonin.

[125] The research on light-at night is not relevant. It does not address EMF. None of the appellants was a shift worker.

[126] Mr. Gilbert refers us to the fact that, in her prior testimony in March 2001, Dr. Havas expressed the opinion that 2 mG was a safe level of exposure. In cross-questioning, when presented with her prior opinion, she testified that she had changed her view. However, of the articles provided to support the change in her opinion (in Exhibit 57) a number are dated prior to her earlier opinion. Others do not refer to risks at less than 2 mG, and so would not constitute a basis for a change in view. Eight of the nine studies have no bearing on exposures below 2 mG. The one study that is relevant, that refers to exposures at 2 mG, is the 1993 Feychting study. However, it is referred to in the bibliography of the paper that Dr. Havas' published in 2000, and so would not have been new to her. This is not a credible basis for the Panel to accept that she has changed her thinking.

[127] In any case, the odds ratios identified in the positive studies submitted by Dr. Havas as supporting an association between ELF and breast cancer are weak. Mr. Gilbert submitted that they are below the levels most usually accepted in Tribunal decisions as sufficient for entitlement. It is also necessary to look at all the evidence, and not to focus only on the odds ratio.

[128] Mr. Gilbert submits that Dr. Halton's report is of greater reliability than Dr. Havas' report. Dr. Halton included an overview of the epidemiological literature on both sides of the question. He was not selective. He reviewed studies going back fifty years. He relied most heavily on studies that had large cohorts, specific exposure information, information about cumulative exposures, and that had attempted to deal with confounders. He placed weight on the international consensus. He did not act as an advocate.

[129] Mr. Gilbert submits that the primary study is the 2005 Forssen study, which was carried out by Dr. Forssen in conjunction with Drs. Feychting and Ahibom, the epidemiologists who had been involved in the earlier studies. It covered a huge population. There was an attempt to measure exposures, to quantify results and to account for confounding factors. It looked at exposure levels, cumulative effects, age, and estrogen-receptor status. The results at 3 mG were not statistically significant. All of the associations found were weak.

(viii) Conclusions

(a) Matters Not Addressed

[130] Given our findings below, we have not found it necessary to make findings about a number of matters raised in the expert testimony and submissions.

[131] We have not found it necessary to make findings about Dr. Havas' view that low frequency EMF might inhibit tumour growth at very high levels of exposure. These are not the levels of exposure relevant to workplace exposures, at least based on these epidemiological studies. Even the 2004 Milham study addressed only 92 mG of exposure, and that exposure was extremely high compared to the other studies. Therefore the question of what effects ELF might have at exposures of 500, 1,000 or 5,000 mG is not likely relevant, in our view, to the inconsistencies in the results in the epidemiology about these workplace exposures.

[132] We have not found it necessary to make any findings about the correctness of the melatonin hypothesis, because those studies do not, in our view, establish effects at the levels relevant to these workers. The effects shown in the positive studies were only identified at 12 mG and above. In addition, these workers were not shift workers and so the timing of their exposures would be only marginally relevant to melatonin impacts.

[133] It follows that we do not need to make any findings about the reliability of the studies done by Dr. Liburdy, either because of the disciplinary findings against him or with respect to his use of quality control mechanisms.

[134] It is also not necessary for us to make any findings about whether ELF might act as an initiator or only as a promoter. Dr. Havas suggests that the 2005 Forssen study or other studies might be unreliable because of this effect, and because the Swedish population may have been healthy. However, in the absence of further studies, we find that theory speculative. We were not referred to any published literature which suggests that this is a reason to disregard the Forssen study. That study made considerable effort to control for recognized confounders.

[135] We have not found it necessary to consider Mr. Newhouse's submission about "scaling", because there is no evidence that that effect is relevant to findings at the exposure levels of these appellants. None of the expert witnesses addressed this impact, or testified to expertise in translating in vitro or animal studies to human studies, or considered this a relevant factor in their weighing of the evidence.

[136] We have also not found it necessary to decide if there is a basis in the literature for Dr. Havas to have changed her view of the safe threshold for ELF exposure in the context of childhood leukemia. We are not addressing childhood leukemia.

[137] We have also not found it necessary to decide whether the latest, largest studies, such as the 2005 Forssen study, are sufficient to rule out an association between ELF and breast cancer even at higher levels of exposure than those experienced by the appellants. Several studies indicate that ELF can affect cells. The data remains unclear about the implications of these findings for human cancers, because there are many confounders, and because even the control groups used in the studies are subject to a level of ELF exposure. There may be genetic differences between people that have not been identified. We recognize that it is possible that further studies or new understandings of human genetics will bring greater clarity to the research, one way or another.

[138] However, we do not find it necessary to address that issue, because of our findings, below, about the significance of the exposures of these workers. The Panel must base its decision on the evidence before it.

[139] In any event, most of the studies that did find an association between breast cancer and ELF found only weak positive results, at levels below the level that many Tribunal decisions have found sufficient for entitlement. (See the analyses of *Decisions No. 600/97* (2003), 66 W.S.I.A.T.R. 1 and 574/05).

[140] We are satisfied that additional findings on the above issues would not change the result of our decision, given the circumstances of these three workers.

(b) The Bradford Hill Criteria; Theories about Causation

[141] We accept that the consideration of the Bradford Hill criteria can provide very important information about the inferences to be drawn from epidemiological studies, but also that they cannot be applied in a rigid way. However, in this case, we have found, below, that the epidemiology does not establish even an association between ELF and breast cancer at the level of exposure of these workers. Therefore in this case, it is not necessary to address how to move from association to causation.

[142] Mr. Newhouse also referred us to the analysis of the 2005 article of Professor Rothman entitled "Causation and Causal Inference in Epidemiology" (2005), 95 (s1) A.J.P.H. s144-s150. That article discusses why in some cases an analysis of multiple factors might lead to findings of causative contributions in excess of 100%. Mr. Newhouse referred us to this article as relevant to the discussion in *Decision No. 574/05* of why, in the view of that Panel, an SIR cannot be directly extrapolated to represent a degree of causation in a particular case. *Decision No. 574/05* was of the view that such an attempt would be extrapolating apples to oranges. Among other considerations, that decision pointed out [at paras. 50-53]:

A second proposal, put forward by the OWA, as discussed in *Decision No. 600/97*, appears to suggest that the level of the increased risk identified in the epidemiological studies might be treated as a "proxy" for the degree of medical causation that can be attributed to the workplace factors... However, epidemiological evidence does not give any direct evidence about medical causation. For this reason, in our view, this question is essentially one of policy, and not one of medicine or science.

Further, like the Panel in *Decision No. 600/97*, we do not understand how an SIR or other statistical finding of relative

risk may be an appropriate proxy to measure the contribution of different exposures to medical causation. It is not clear to us that a statistical finding of an SIR lends itself mathematically to direct extrapolation to a percentage calculation of medical causation. There is no concept of the “whole” in an SIR calculation that is comparable to a percentage calculation. Depending on the size of the cohort, or the incidence of the cancer, it is possible to have an SIR of 500, or 700, or higher. If an SIR of 150 or 125 is extrapolated to represent a degree of medical causation of 1/3rd, or 1/5th, then, following the same principles of extrapolation, an SIR of 500 or 700 represents a degree of medical causation of 500% or 700%. However it is not possible to express a percentage of medical causation as 500%. Percentage calculation, when based on a concept of the “whole”, by definition, can be expressed only as percentages of 100%. The extrapolation does not appear mathematically correct. It is extrapolating apples to oranges.

[143] In his article, Professor Rothman states, about multi-causality:

Among those people who are smokers and also alcohol drinkers, what proportion of the cases is attributable to the effect of smoking? We know that the rate for these people is 12 cases per 100,000 person-years. If these same people were not smokers, we can infer that their rate of head and neck cancer would be 3 cases per 100,000 person-years. If this difference reflects the causal role of smoking, we might infer that 9 of every 12 cases or 75% are attributable to smoking among those who both smoke and drink alcohol. If we turn the question around and ask what proportion of disease among these same people is attributable to alcohol drinking, we would be able to attribute 8 of every 12 cases, or 67%, to alcohol drinking.

How can we attribute 75% of the cases to smoking and 67% to alcohol drinking among those who are exposed to both? We can because some cases are counted more than once. Smoking and alcohol interact in some cases of head and neck cancer.

[144] Mr. Newhouse refers to this article to suggest that it may be possible for causal factors to exceed 100%. However, Professor Rothman is not addressing the same question as that addressed in *Decision No. 574/05*. Professor Rothman is addressing the percentage of cases, out of an incidence of cases, for which each identified factor provides a contribution. Because the different factors may each contribute to the same case, there is no logical requirement that the sum of the contributing factors total 100%, even when the contributions are expressed as a percentage. Smoking may be a factor in 75% of the cases of a disease and alcohol may be a factor in 67% of cases because, in some cases, both factors will apply. That analysis makes sense.

[145] That does not mean, however, that it can be said that smoking is responsible for 75% of the disease and alcohol is responsible for 67% of the disease of a particular person. That analysis would not make sense. If one wishes to express the causative factors in the context of degrees of responsibility for the particular disease of one person, in percentage terms, the percentages cannot logically add up to more than 100%. A useful analogy might be to the determination of responsibility for damages in a tort case. Let us assume that there is literature to the effect that alcohol is a causative factor in one third of injuries in motor vehicle accidents; that driving without a seat belt is causative in another third; that using a cell phone is a factor in another third; and that failing to check mirrors is a causative factor in another third. The fact that these causative factors add up to 133⅓% is logically reasonable, because more than one factor might have applied in any one case. However, if a Court were charged with deciding responsibility for damages among tortfeasors for an accident that involved these four tortious factors, the Court would not award 133⅓% of damages. Responsibility would be determined based on all the evidence in the case, and damages would not exceed 100%. If the Court found that each of these factors was equally contributory, it would be necessary to reduce the weight of each factor proportionately to represent fractions of the “whole” of the damages to be awarded for the injury: i.e. each factor would be weighed at 25% for the award of damages. That is because, in addressing the percentage responsibility for the injury in the individual case, the percentages would need to be expressed in terms of the single “whole”, or 100%.

[146] Of course, a Tribunal Panel is not addressing tortious responsibility or damages. However, Panels can be asked to determine degrees of causal contribution to a particular injury. However, when this is the question, we agree with the Panel in *Decision No. 574/05* that the percentages cannot add to more than 100%. Further, it would seem difficult to extrapolate from the type of data Professor Rothman describes, to the individual case, unless all contributing factors are known. In Tribunal appeals such as this one, all possible causal factors may not have been identified or may not be identifiable. The Panel will also find it necessary to take into account many individual

circumstances that are not directly reflected in the epidemiology, such as the worker's smoking history, family history of cancer, and personal work history.

[147] The Panel in *Decision No. 574/05* described the attempt to extrapolate from SIR (or RR) data directly to percentages of causation as extrapolating apples to oranges. To use Mr. Gilbert's analogy, to attempt to apply Professor Rothman's analysis to the question addressed in *Decision No. 574/05* is to add grapes to that analysis. We find the analyses of *Decisions No. 600/97* and *574/05* more helpful in identifying the factors relevant to a Tribunal determination.

[148] In any event, in this case, we have found, below, that the epidemiology does not establish even an association between ELF and breast cancer at the level of exposure of these workers. Therefore it is not necessary to address how to move from association to causation or to consider possible levels of contribution by multiple causative factors, in this case.

(c) Our Findings about the Contribution of EMF to the Workers' Cancers

[149] In our view, the evidence provides an insufficient basis for a finding that the appellants' mean exposures, at 1.86 mG, were a significant contributing factor in their breast cancer. Dr. Havas referred to only two studies to support an association at this level of exposure. First, she relied on her own 2000 literature review of the in-vivo studies to support an effect at 1 mG or, in her amended testimony, at 3 mG. Her initial view was based on an error about the threshold at which effects were established. As explained above, we are not satisfied that even her amended analysis supports the finding of an association at 1.86 mG or at 3 mG or, consistently, even at levels considerably above 3 mG. As discussed above, we do not find her analysis of these studies sufficiently reliable to support her position about the cancers of these workers.

[150] Secondly, Dr. Havas refers to the fact that a study found an association at 1.6 mG. This is a reference to the Van Wijngaarden study. However, the association that she refers to from that study was based on exposures of between ten and twenty years. These workers had less than ten years of exposure. That study did not identify a statistically significant association at that exposure level. Further, the study did not show an association at the cumulative exposure levels of these appellants and did not show a dose-response effect.

[151] There is no other study that establishes a relationship at a level of exposure comparable to these workers. Dr. Liburdy found no effects on melatonin at 2 mG. The 1998 Johnsen study classified low exposure as less than 2.9 mG. Dr. Labreche refers to an exposure of less than 2 mG as "not exposed." The 2005 Forssen study found no association at up to 3 mG, as well as no or minimal association in a number of other contexts. We agree with Dr. Halton that the Forssen study is worthy of considerable weight, because it is the largest and best-controlled study.

[152] Dr. Havas also did not refer us to any epidemiology that suggests an association at the cumulative levels of exposures of these workers, which were 3.08 mG for LW, 1.92 mG for PB and 2.58 mG for MS. We realize that much of the epidemiology does not include data on cumulative exposures because it does not reflect specific exposure data. However, we note that the 1998 Feychting study used a cut off of 5 mG as the reference point (or, as we understand it, the control level) for cumulative exposures. These workers had cumulative exposures below that cut off point.

(d) The Role of a Tribunal Decision-maker

[153] Further, the question of a possible relationship between breast cancer and ELF has been addressed by a number of authoritative bodies, including IARC. None found that even a possible relationship to breast cancer has been established. We accept the opinion of Dr. Halton that these international committees reflect the views of the best minds in the field. Even if we, as individuals, had found Dr. Havas' report more compelling, we would not have found it appropriate to make a finding that it was worthy of more weight than the opinions of these internationally recognized bodies. We have considerable concern about the proposition that a Tribunal Panel should take upon itself the role of deciding that the opinion of any single expert is more worthy of weight than the opinion of the internationally recognized bodies that represent the best experts in a field, when those bodies have

considered an issue and expressed what is in essence a consensus view about the current state of the epidemiology. In this case, the general scientific question of whether ELF is likely a causative factor in breast cancer, at all, or especially at these exposure levels, is a precursor to consideration of any of the other specific facts about each worker's case, and so must be addressed first, before it is appropriate to turn to the other specific facts of the case.

[154] In our view, a Tribunal hearing is not the appropriate forum to resolve disputes about general scientific issues. The Tribunal Panel does not have the expertise to resolve those issues. This concern has been the subject of prior comment by Tribunal Panels: see, for example, *Decision No. 107/96* (2002), 60 W.S.I.A.T.R. 1. The Tribunal relies on expert evidence for the purpose of resolving individual disputes only when, and because, a matter is beyond the expertise of a lay adjudicator. General scientific disputes must be resolved in the scientific community. Assuming that all other factors are equal, it is incumbent on a Tribunal Panel to give weight to the opinion of the most qualified experts. In this case, in our view, that is the opinion of the internationally recognized associations.

(e) The Role of an Expert Witness

[155] We also share Mr. Gilbert's concern about the role of an expert witness, and about the selectivity of the information provided by Dr. Havas as a basis for her opinion. We do not dispute the statement of Dr. Blank that one single reproducible (significant) harmful effect could outweigh all negative results. However, the key word in that statement is "reproducible". The problem with the epidemiological studies in this case is that the results have been inconsistent. The high incidence of breast cancer in the population has made it difficult to control for confounders. A number of the early studies were based on small samples, without exact exposure data. We accept Mr. Gilbert's characterization that the evolution of these studies is that, after several of the early studies, the researchers involved in those studies went on to do later, more controlled studies. In particular, the 2005 Forssen study is an example of a later study conducted by the same researchers as some of the earlier studies, but with better controls. The later study did not find any reliable association between ELF and breast cancer.

[156] We agree with Dr. Halton that when there are inconsistent studies, it is necessary to address why the studies are inconsistent. It is not sufficient to omit reference to the negative studies. We agree with Mr. Gilbert that Dr. Havas' reliance on the early Forssen and Feychting studies in her written report without reference to or analysis of their 2005 study affects the weight that can be placed on her opinion.

[157] We also consider it unfortunate that Dr. Havas relied on Dr. Liburdy's work without informing the Panel of the disciplinary findings against him. She testified she was aware of those findings. This information about Dr. Liburdy came to light only as the result of cross-questioning. While the primary responsibility for the failure to produce relevant evidence, of which a party is aware, lies on that party, the Tribunal is investigative and seeks to produce high quality decisions that reflect all relevant evidence. The Panel would have been embarrassed to have produced a decision without being aware of the Liburdy disciplinary findings. They are relevant because they go to the credibility of all his work. What weight should be put on the disciplinary findings, and whether those findings affect the issues in this case, was a matter for the Panel to decide. The Tribunal relies on the experts that appear before it to address all the relevant information, whether supportive of their client's position or not. Omission of relevant information may lead to reconsideration of the Tribunal's decision and undermine the validity of the hearing process.

(f) The Cluster Argument

[158] Finally, we have considered what weight is to be given to the fact of the cluster of breast cancer cases that arose at the employer's workplace, given our findings, above. We accept Dr. Theriault's opinion that the incidence in this case constituted a genuine cluster. That fact was not disputed.

[159] However, the fact that a cluster of cancer cases occurs in a particular workplace is not sufficient for entitlement. There must be a basis for a finding that something about the workplace exposure caused the cancer. A cluster can occur as the result of chance. Based on an incidence of five cases, Dr. Theriault calculated a one in 1,000 probability. However, we understand that to mean, for instance, that for every 10,000 groupings of people

of comparable size, anywhere in the world, 10 clusters comparable to this cluster are expected to be found, at 10 different locations, merely as a result of the effects of the random distribution of breast cancer cases. That would be the case irrespective of the exposure characteristics of those groupings of people, because the statistical data about the likelihood of such an occurrence is not related to exposure data. It is related only to the statistical frequency of the occurrence in a population. Some clusters might result from workplace exposures or other causes. But a number of such clusters will occur simply by chance. In each of the latter cases, a search would likely be made for an explanation based on occupational or other exposures. However, for those clusters that were merely the result of the random effects of distribution, none would be found.

[160] The fact of the cluster is sufficient to raise the question of whether there was an occupational cause. However, it is not sufficient to answer the question. The question must be answered by reference to the scientific and other evidence as a whole.

[161] In this case, the workplace was studied intensively, to identify a possible cause. Air quality tests were taken. Radiation levels were assessed. ELF levels were assessed. In the case of the air quality and radiation level results, even the appellants appear to have accepted that no cause was identified. We have found above that the level of ELF exposure was also insufficient to suggest a cause.

[162] Therefore the only remaining theories are that the cluster was the result of chance, and/or that the cluster was the result of unidentified other factors, whether occupational, genetic, residential/geographical or otherwise unidentified. We note that the workplace was thoroughly studied for possible causative factors. That was not the case with respect to other possible factors, such as the workers' home environments over the possible latency periods.

[163] The literature is consistent in stating that much of the causation of breast cancer remains unknown. We find the likelihood that the cluster was caused by chance or by other unidentified factors greater than the likelihood that the appellants' cancers were caused or aggravated by exposure to ELF.

DISPOSITION

[164] The appeals of the three appellants are denied.

Appeals dismissed.

Decision No. 565/04

Vice-Chair: Moore (Vice-Chair), Young, Briggs

Decision — May 22, 2009

Neutral Citation: 2009 ONWSIAT 1007

Cancer (larynx) – Mining (nickel) – Exposure (asbestos) – Exposure (oil mist) – Smoking – Alcohol.

Nickel miner had entitlement for cancer of the larynx resulting from exposure to asbestos and oil mists.

The worker was an underground nickel miner from 1952 to 1982. He was diagnosed with cancer of the larynx in 1990. He died in 2000. The worker's estate appealed a decision of the Appeals Resolution Officer denying entitlement. The appeal was allowed.

The worker had exposure to four potential carcinogens: cigarette smoke, alcohol, asbestos and oil mists.

The worker was diagnosed with cancer 38 years after beginning employment as an underground miner. This latency period was supportive of the worker's claim.

According to a study, the SIR for individuals with 25 years or more employment as underground miners is 174. This was suggestive of a link to occupational exposure but not probative. In addition, the Panel found that the worker's exposure was greater than the average worker, considering his exposure to both asbestos and oil mists. The Panel found that the worker's exposure in the course of his 30 years of employment as an underground miner was substantial and significant.

There were also non-occupational factors, specifically smoking and drinking of alcohol. However, the location of the cancer in the lower part of the larynx was more commonly associated with asbestos exposure.

The Panel concluded that occupational exposure was a significant contributing factor to the development of the worker's laryngeal cancer.

Workplace Insurance Legislation Considered:

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

s. 119

s. 124

Tribunal Decisions Considered:

Decision No. 773/88 (1991), 19 W.C.A.T.R. 39 consd

Decision No. 809/88 (November 16, 1988) consd

Decision No. 134/89 (1993), 26 W.C.A.T.R. 32 consd

Decision No. 257/89 (1990), 14 W.C.A.T.R. 87 consd

Decision No. 47/91 (July 7, 1992) consd

Decision No. 645/91 (October 1, 1991) consd

Decision No. 600/97 (2003), 66 W.S.I.A.T.R. 1 consd

Decision No. 787/99 (2005), 75 W.S.I.A.T.R. (online) consd

Other Decisions Considered:

Laferrière v. Lawson (1991), 78 D.L.R. (4th) 609 (S.C.C.) consd
Rothwell v. Raes (1990), 2 O.R. (3d) 332 (Ont. C.A.) consd

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 23-02-02 (October 12, 2004)

Cross-References:

Decision No. 565/04E (2004) [2004 ONWSIAT 788]

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DISPOSITION

APPEAL by the worker from a decision of the Appeals Resolution Officer denying entitlement for cancer of the larynx.

May 22, 2009. THE TRIBUNAL: —

BEFORE:

J.P. Moore, Vice-Chair

B.M. Young, Member Representative of Employers

R.W. Briggs, Member Representative of Workers

HEARING:

December 6, 2007, at Sudbury, Oral

Post-hearing activity completed on February 24, 2009

DECISION(S) UNDER APPEAL:

WSIB ARO decision dated February 12, 2002

APPEARANCES:

For the worker: K. Conley, United Steelworkers of America

For the employer: D. Kirkpatrick, Group Leader for Claims

REASONS

(i) Introduction

[1] The worker in this appeal worked as an underground miner in nickel mines from 1952 to 1982. In 1990, he was diagnosed with cancer of the larynx. At the time of the diagnosis, he was 67 years of age. He died as a result of this condition on February 6, 2000.

[2] The worker's survivors sought entitlement to benefits. The claim was denied. The survivors objected to that decision. The objection was denied by an Appeals Resolution Officer (ARO) in a decision dated February 12, 2002. The worker's survivors have appealed that decision to the Tribunal.

(ii) The Issue

[3] The issue in this appeal is whether the late worker's employment as an underground miner for 30 years made a significant contribution to the development of laryngeal cancer.

(iii) The Decision

[4] On the evidence and submissions presented to us, the Panel is persuaded that the worker likely developed laryngeal cancer as a result of workplace exposure in the course of his employment as a nickel miner.

(iv) Analysis

(a) *The ARO's Decision*

[5] In the decision under appeal, the ARO concluded that the worker likely had exposure to three potential carcinogens related to laryngeal cancer: cigarette smoking, alcohol consumption, and occupational asbestos exposure. The ARO went on to conclude:

In the present case, no evidence was adduced which would demonstrate that the asbestos monitoring results were erroneous or unreliable. There is also no evidence that [the worker] was repeatedly exposed to asbestos, on a daily basis. In the absence of such evidence, I find that a causal relationship has not been established between the development of [the worker's] laryngeal cancer and workplace exposures.

[6] The ARO cited two policy documents from the Workplace Safety and Insurance Board's *Operational Policy Manual* (OPM): Document No. 04-04-14 (Laryngeal Cancer – Asbestos/Nickel Exposure) and Document No. 16-02-03 (Laryngeal Cancer for Asbestos Exposure). Those two policy documents have been re-numbered as Documents No. 16-02-10 and No. 23-02-02, respectively.

[7] Document No. 16-02-10, on laryngeal cancer as a result of asbestos/nickel exposure, stipulates that entitlement for laryngeal cancer as a result of asbestos/nickel exposure requires evidence of either 15 years exposure to nickel aerosols or combined exposure to nickel aerosols and asbestos in the quantum of 7.5 years of exposure to nickel aerosols and five years exposure to asbestos. Given the absence of evidence in the present case of exposure to nickel aerosols, the Panel does not consider this policy document to be pertinent to the worker's claim.

[8] Document No. 23-02-02 addresses the subject of laryngeal cancer and asbestos exposure and stipulates that entitlement can be considered for a diagnosis of cancer of the larynx for a worker who has been employed "in any industrial process which generates airborne asbestos". The document contains the following criteria:

- the worker has been employed in an industrial process which generates airborne asbestos at least 15 years before the diagnosis of the disease, and
- the worker has worked for at least ten years in an environment which has been documented to have

- generated asbestos in respirable form, or
- the worker has been diagnosed with asbestosis...

[9] In the Panel's opinion, it is this policy that pertains to the worker's claim.

(b) Summary of the Panel's Reasoning

[10] The Panel agrees with the ARO, on the evidence, that the worker likely had exposure to four substances that are potential carcinogens to the larynx: cigarette smoke, alcohol, asbestos and oil mists. The epidemiological support for the carcinogenicity of the first two substances is strong. The epidemiological evidence for the carcinogenicity of asbestos and oil mists is not as strong. However, in the Panel's opinion, the epidemiological support regarding the impact of asbestos on laryngeal cancer combined with evidence particular to the nature of the worker's job persuades us that the worker's exposure to asbestos and oil mists likely made a significant contribution to the development of laryngeal cancer.

(c) The Legal Context

[11] In arriving at our conclusion in this appeal, we have applied certain principles that have been discussed in other Tribunal decisions.

[12] The decision under appeal in this case denied entitlement on the basis that the worker's laryngeal cancer did not result from exposure to asbestos in the workplace.

[13] Concerning the standard of proof to be used in addressing the issues raised in this appeal, we note the following excerpt from *Decision No. 809/88* (November 16, 1988) [at p. 7]:

It cannot be stressed too strongly that, in cases of disease, the Tribunal's balance of probabilities test is necessary in determining the outcome. In all but the most extraordinary cases, a panel will have to ask itself, based on the limited evidence available, "is it more probable than not that this condition arose from the worker's workplace, or is it more probable that it was caused by a non-occupational factor"?

[14] In weighing these probabilities, we are cognizant of the principle enunciated in the case *Rothwell v. Raes*, (1990), 2 O.R. (3d) 332 (C.A.), that the onus of proof is not met by demonstrating a possibility of some causal connection. We also note that the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) requires resolution of an issue in favour of the worker where the evidence for and against that issue is approximately equal in weight (sections 119 and 124 of the Act).

[15] Regarding the kinds of factors to be looked at in addressing the question of causation, we note the approach taken in *Decision No. 134/89* (1993), 26 W.C.A.T.R. 32. In that case, the Panel had to weigh the comparative contributions, to a worker's lung cancer, of workplace asbestos and non-compensable cigarette smoking. That Panel weighed the probability that asbestos contributed to the worker's lung cancer by looking at five different factors. We have adapted that approach to the present case and have weighed the probability of a causal relationship between the worker's workplace exposure and his laryngeal cancer by looking at the following factors:

1. the latency period between initial exposure to a potentially harmful substance, and the onset of cancer;
2. the intensity of the worker's exposure to a potentially harmful substance;
3. the involvement in the worker's cancer of non-occupational factors;
4. physiological signs consistent with any proposed causal relationships;
5. the presence of predictive factors consistent with the suggested causal factors.

[16] In addressing those factors, we have weighed the evidence using the standard of reasonable probability (applying the benefit of the doubt where appropriate) rather than reasonable medical certainty. We believe that we have followed Tribunal and judicial authority in applying that standard. We note some statements of principle on that point.

[17] The first is that, as stated by the Panel in *Decision No. 47/91* (July 7, 1992), lack of scientific certainty in the evidence is not determinative of the causation issue. We note the following excerpts at pages 7 and 8 of that decision:

Despite the complexity of the evidence, a decision must be reached on the question of whether the worker's chest condition is compensable. The difficulty in deciding cases like this where the scientific evidence is unclear and debatable was noted by Professor P. Weiler in his report to the Minister of Labour in 1983, *Protecting the Worker from Disability: Challenges for the Eighties*. He emphasised the importance of distinguishing between the scientific and compensation perspectives. Professor Weiler cautioned that in the compensation context "the fact that the scientific evidence is unclear or debatable no more supports the negative than it does the positive conclusion on the issue".

[18] The Courts too have addressed these aspects of the causation question in medical cases. The Supreme Court of Canada and the Ontario Court of Appeal have issued a number of decisions that highlight some of the difficulties in this area. For example, in *Laferrière v. Lawson*, [1991] 1 S.C.R. 541, 78 D.L.R. (4th) 609, Gonthier, J. commented on the use of scientific evidence in determining issues of legal causation [at para. 156]:

Cases in which the evidence is scarce or seemingly inconclusive presents the greatest difficulty. It is perhaps worthwhile to repeat that a judge will be influenced by expert scientific opinions which are expressed in terms of statistical probabilities or test samplings, but he or she is not bound by such evidence. Scientific findings are not identical to legal findings. Recently, in *Snell v. Farrell* (1990), 2 SCR 311, this Court made clear [at p. 328] that: "... [C]ausation need not be determined by scientific precision" and that "... [I]t is not ... essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation" (p. 330). Both this Court and the Quebec Court of Appeal have frequently stated that proof as to the causal link must be established on the balance of probabilities taking into account all the evidence which is before it, factual, statistical and that which the judge is entitled to presume.

[19] We have applied that approach to this case. In so doing, we note also the following excerpt from pages 8 and 9 of *Decision No. 645/91* (October 1, 1991):

The evidence is that the etiology of sarcoidosis is not known. It would appear that there is an immunological component. However, this has not been definitively established in scientific research. In our view, this is not the end of the analysis. The scientific research in question is carried out to determine the cause of the disease process which can ultimately assist in treatment and prevention. The results reached in such research must be definitive for this reason. Treatment and prevention of disease in human beings cannot depend on science which reaches research conclusions based only on a reasonable likelihood.

Our purpose in this inquiry is quite different and we are therefore governed by a different standard of proof. We must decide whether it is more probable than not that the worker's lung condition, sarcoidosis, was caused or aggravated by exposure to a chemical. Our decision does not require the degree of certainty necessary to scientific research, and at times the fact that the etiology of a disease process is not known is only part of the evidence we must weigh in arriving at a conclusion. This fact in itself is not conclusive to the adjudication inquiry.

[20] We note also, with approval, the approach taken by the Panel in *Decision No. 773/88* (1991), 19 W.C.A.T.R. 39, regarding the role of epidemiological evidence in the compensation context. The Panel in that case cited the following excerpt from another Tribunal decision, *Decision No. 257/89* (1990), 14 W.C.A.T.R. 87, at page 93:

Epidemiology is the "discipline ... concerned with the patterns of events affecting the health of human populations and the factors influencing these patterns.... Epidemiologic studies may demonstrate a statistical association between a disease and an exposure or risk factor".

Epidemiological studies analyze statistical associations between "populations" ... rather than cause of disease in an individual case. ...Nonetheless, they can be given weight and they can be used in helping to judge whether an individual worker's disability is likely work-related. The weight epidemiological studies will be given in deciding causation in individual cases will, of course, vary considerably. It will, for example, depend on the extent to which causation can be inferred from the statistical associations found in the epidemiological study, and the extent to which the facts of an individual worker's case are comparable to the population analyzed in the epidemiological study.

[21] We acknowledge that, where epidemiological evidence exists, it is an important piece of evidence. However, entitlement, in our opinion, cannot depend exclusively on such evidence. Conversely, its absence cannot be treated as determining that no causal relationship exists, particularly given how long it takes to develop epidemiological evidence. As we understand epidemiological evidence, it may often be the best evidence of the existence of a causal link between a disease and a substance. However, there will be many circumstances in which the absence of epidemiological evidence cannot conversely be seen as evidence of the absence of a causal link.

[22] Finally, we note the following excerpt from the Tribunal's *Decision No. 787/99* (2005), 75 W.S.I.A.T.R. (online) which stated at paragraph 113:

The issue of whether the worker's employment as a gold miner was a significant contributing factor in the development of his stomach cancer must be decided on the balance of probabilities. It is not sufficient to show that a causal relationship between the worker's employment as a gold miner and his stomach cancer is *possible*. Rather, for the worker's stomach cancer to be compensable, the evidence must establish that it is *probable* that his employment as a gold miner was a significant factor in the development of the condition, or that the evidence for and against work-relatedness is persuasive and approximately equal in weight.

[23] The last clause in that excerpt from *Decision No. 787/99* refers to the application of the "benefit of the doubt" principle contained in the governing legislation.

[24] The policy applicable to this claim, as submitted by the Board, has been noted above in paragraphs 7 and 8.

(d) *The Evidence*

[25] In the present case, the worker worked for 30 years in the nickel industry as an underground miner. He was employed in that capacity from 1952 to 1982.

[26] The worker smoked cigarettes. The evidence presented to us is consistent in suggesting that the worker likely smoked less than half a pack of cigarettes per day for approximately 20 years. The worker stopped smoking in 1962, approximately 28 years before diagnosis. There was some evidence that the worker had an occasional cigarette after 1962 but the Panel does not consider his smoking history after 1962 to be significant.

[27] The worker consumed alcohol. The evidence varies somewhat as to the quantity of that consumption. Just before his death, the worker was interviewed by an occupational health physician, Dr. J. Andersen, a physician with Ontario Health Clinics for Ontario Workers Inc. (OHCOW). The worker apparently told Dr. Andersen that he consumed two glasses of wine daily. The Panel heard testimony from the worker's widow and from a friend and former co-worker of the worker. The worker's widow stated that the worker drank "socially" on weekends and that he was not a heavy drinker, consuming moderate amounts of wine. The worker's friend stated that the worker drank "the occasional glass of wine with a meal". The Panel concludes, regarding the worker's alcohol consumption, that it is likely that he consumed wine on a daily basis but that his consumption was moderate.

[28] Taken together, we conclude that the worker's cigarette consumption was likely light and that his alcohol consumption was likely moderate.

[29] The worker's employment history shows that the worker spent the first 20 years of his employment working in the deepest of the mines operated by the employer. From 1972 to 1982 he continued to work underground but at a different location.

[30] The worker's primary duties involved drilling and "slushing". The Panel heard testimony from a former co-worker who was the worker's partner commencing in the late 1970s. Consequently, his testimony pertained to the worker's immediate work environment during the last 10 years of his employment and not during the first 20 years. However, he also worked in the mine where the worker worked during those first 20 years, but not directly with the worker.

[31] In his testimony he described the work process, which consisted of drilling, blasting, and constructing. He stated that the drills used by the miners used substantial quantities of lubricant: two to ten quarts per day per drill.

According to his testimony, these drills produced oil mist into the mining environment.

[32] Regarding the operation of the slusher, he testified that the blasting process created “muck” which was scooped up by a slusher machine that carried the muck away to a crusher. The slusher machine had brakes, and the pads, during most of the period of the worker’s employment, contained asbestos. The witness was unable to recall how often brake shoes were changed. However, he testified that application of the brakes created dust particles. The brake pads were not enclosed so the dust became airborne.

[33] Finally, the co-worker stated that, during the time the worker was employed, the miners were permitted to smoke cigarettes while they worked.

[34] The witness stated that he was familiar with the mine where the worker was employed from 1952 to 1972. He described the environment as “brutal”, stating that it was very hot and had poor ventilation. He testified that he worked in that mine for approximately 18 months in 1970 and 1971. He called it the “deepest” mine operated by the employer.

[35] The nature and extent of the worker’s occupational exposure was reviewed by the Board’s Senior Occupational Hygienist, Dr. H. Kabir. In a report dated September 26, 2001, Dr. Kabir noted that the worker had exposure to four potential carcinogens: tobacco smoke, alcohol, asbestos, and oil mists. His conclusion, regarding occupational exposure reads as follows:

In this claimant’s case we are unable to confirm the possibility of repeated and daily risk of exposure to asbestos in the type of work he performed. Among other agents, PAHs has long been implicated as the most likely carcinogen in the machining oil, especially those petroleum based oil [sic] that was not well refined prior to the 1970’s. Some concerns were expressed for excess cancer risk among machinists.

(e) Expert Opinion

[36] The material before the Panel included opinions offered by three physicians specializing in occupational medicine. An opinion offered in support of the worker’s claim was prepared by Dr. Andersen (of OHCOW) on March 29, 2001. Dr. Andersen cited the results of a report prepared by an OHCOW Occupational Hygienist, Dr. N. Keller. Dr. Andersen concluded that, in his opinion, the worker’s exposure to potential carcinogens during his 30 years of work as an underground miner was likely significant and was probably “the dominant etiologic factor in the causation of his laryngeal carcinoma”.

[37] A contrary opinion was provided on behalf of the employer by Dr. S. Siu, a private medical consultant. Dr. Siu concluded that the worker had significant exposure to cigarette smoke and alcohol and only limited exposure to asbestos. Dr. Siu did not address the impact of oil mists. It appears, however, that Dr. Siu agreed with Dr. Andersen that exposure to asbestos can, in significant quantities, cause laryngeal cancer.

[38] A third opinion was provided by an independent medical assessor, Dr. J. Beach, a specialist in occupational medicine with the Community and Occupational Medicine Program at the University of Alberta. In a report dated October 21, 2008, Dr. Beach addressed the four most likely sources of carcinogenic exposure the worker experienced in his life – cigarette smoke, alcohol, asbestos, and oil mists – and reviewed the epidemiological evidence pertaining to those exposures. He also reviewed epidemiological evidence that pertains specifically to miners in the nickel industry.

[39] Dr. Beach concluded that each of the substances to which the worker was exposed in his lifetime was a potential carcinogen to the larynx. We also concluded that each of those factors likely increased the risk of the worker in this case by a “small to moderate” amount. Dr. Beach commented on what he described as “considerable evidence” of a synergistic effect between cigarette smoke and alcohol in laryngeal cancer. Finally, he commented on a study cited by Dr. Andersen, regarding nickel miners, including miners who worked for the accident employer. The report of that study by Julian and Muir¹ described a study of a cohort of 65,000 nickel workers employed between 1950 and 1976. Regarding that study, Dr. Beach wrote:

The Julian and Muir study is very important in the context of this case as it utilizes data collected directly from the mine

where [the worker] worked, but it is not the only study to suggest such a relationship. The evidence of such an association is not, however, unequivocal. None of the studies establish that any particular agent is responsible for any excess risk of laryngeal cancer apparent within the nickel mining environment, although nickel mining may entail exposure to a number of carcinogens, as is apparent from this case. As no particular substance can be identified as the sole cause of increased risk of laryngeal cancer in nickel mining, no clear level of exposure at which risk starts to become apparent can be defined.

[40] The Julian and Muir study is particularly significant because, unlike prior studies that looked at *mortality* rates in relation to certain exposures, it looked at *incidence* rates in relation to certain exposures. In the “Executive Summary” of the Study, the authors stated:

The origin of the present investigation was the suggestion that an analysis of causes of death identified on death certificates may fail to recognize those cases of cancer which respond well to treatment and which are not listed as the primary cause of death on a certificate.

An example might be cancer of the larynx.

[41] The significance of this distinction was acknowledged by the Board in a memorandum prepared by the Acting Director of the Board’s Medical and Occupational Disease Policy Branch, Ka Sing Yeung. In a memorandum dated February 1996, Dr. Yeung prepared a “Staff Report” on the Julian and Muir study. At page one of that report, the following comment is made:

Cancer risks based on mortality of this cohort had been reported previously, the latest report was published in 1991. The present study examined incidence, i.e., the occurrence of cancer rather than deaths attributed to it. Incidence studies are more accurate in estimating cancer risks because the number of events available for study is larger and biases caused by factors affecting disease prognosis are eliminated.

[42] The particular significance of this fact with respect to laryngeal cancer was discussed by Ms. Keller in her 2001 report:

In this study [Julian and Muir] the authors stated [that] cancer of the larynx is often detected at a fairly early stage and is more responsive to therapy than other cancers. They stated that in Canada about 85% of persons diagnosed with laryngeal cancer are still alive after five years. They concluded that earlier studies that [had] analyzed causes of death, may fail to recognize those cases of cancer, such as laryngeal cancer, that respond well to treatment and are not listed as the primary cause of death on a certificate.

[43] The findings of the Julian study that are of particular significance in the present case are described at page 6 of the study, under “Main Findings”. The first “Finding” reads:

Cancer of the Larynx (Table 16-20)

A four-fold risk in millers with more than 25 years of exposure was identified and is likely to be work-related. In underground miners, an increased risk was apparent after 25 years of exposure. This risk was significantly associated with duration of exposure when the analysis included those with 15 years or more of underground mining. In other job areas, cancer of the larynx did not appear to be work-related.

[44] In the section devoted to laryngeal cancer (pp. 67-69), the study discussed the results of their findings and concluded:

Using the two “never mining” internal comparison groups, the actual laryngeal cancer risk estimates for the underground production mining sub-cohort are shown in Figure 1(a). There is substantial evidence of the effect of the ascertainment bias in groups defined by less than 20 years of exposure, regardless of the choice of internal comparison group. With the assistance of the “lowess” scatter plot smoother ... as a simple graphical aid, the erratic behaviour of the data in panel (a) is “smoothed” to produce the curves displayed in Figure 1(b). *The increasing risk beyond 25 years DOE in underground mining is clearly identified in two of the three comparisons.* [Emphasis added]

[45] A “Staff Report” prepared by the Board on February 19, 1996 provided the following analysis of the study data on cancer of the larynx:

Compared to the population of Ontario, a large relative excess in the occurrence of [cancer of the larynx] was found in millers with more than 25 years of employment (six cases were observed while 1.5 were expected, SIR = 400). In underground miners, a less dramatic excess was observed after 25 years of employment (24 cases were observed, 13.8 expected, SIR = 174). In other job areas, no excess of cancer of the larynx was observed.

[46] The report also noted an excess of lung cancer for underground miners with more than 25 years of exposure. With respect to that group, an increased incidence ratio of 146 was observed.

[47] Regarding the findings on laryngeal cancer, the 1996 staff report contained the following comment:

Contrary to previous studies, which showed no excess deaths, this study revealed a large excess of laryngeal cancer cases among those who worked for 25 years or longer as millers (SIR = 400), and a moderate excess among those who worked for 25 years or longer as underground miners (SIR = 174). For both millers and miners, a dose-response relationship between duration of employment and laryngeal cancer risk was apparent among those who had been employed for 15 years or more.

[48] The report went on, however, to caution that the results could be skewed because the smoking habits of the individuals assessed were not specified. The report concluded that, because of this fact, no conclusion of causal relationship could be drawn on the basis of the observations alone.

[49] On the other hand, the report stated:

This was a well conducted and properly analyzed study. It constitutes an important source of scientific information for many occupational disease issues related to the nickel producing industry. In particular, the study has a large sample size and hence has the power to detect small excess in disease occurrence. For the same reason, the estimates of excess are relatively reliable (i.e. not subject to random errors).

[50] Regarding the concerns that the Board staff had about a skewing of the results because of failure to take into account the workers' smoking history, the report itself acknowledged that this may not have been a significant error:

There is no information on smoking or drinking habits of the worker as to confirm or rule out such a possibility. The fact that there is no large overall lung cancer excess ... suggests that as a group nickel workers did not smoke more than the Ontario population. However, it is still possible that some groups of workers might have had more smokers and/or heavy drinkers, hence exhibited excess of lung cancer and/or laryngeal cancer.

[51] The Julian and Muir study suggests that the following inferences can reasonably be made:

- Those workers who likely had the greatest exposure to dust – millers and underground miners – had a significantly increased risk of developing laryngeal cancer. In underground miners with more than 25 years of employment, that increase began to approach double the expected rate with a standardized incidence ratio (SIR) of 174.
- Underground miners also had an increased risk of developing lung cancer that, while not as significant, was nonetheless notable (an SIR of 146).
- Each of these types of cancers is related to the respiration of carcinogens. There is, therefore, biological plausibility between each of these cancers and the inhalation of dust, including asbestos dust.
- There did not appear to be any increased risk of any other form of cancer in underground miners, other than that associated with respiration of dust.
- There was no increased risk of the development of cancers involving respiration among any other nickel workers notwithstanding the fact that the rate of cigarette smoking was likely similar across the cohort of 65,000 individuals.

(f) Findings and Conclusions

[52] Determining causation in an individual case requires assessment of the evidence at hand. The body of

evidence will not necessarily be as full as the decision-maker would like. Often a decision has to be based on a limited body of evidence. In the present case, we have evidence regarding the worker's exposure to both work-related and non-work-related substances that are potentially carcinogenic to the larynx. We also have epidemiological evidence regarding nickel miners in general and miners who, in particular, performed the type of work in which the worker in this case engaged.

[53] The weight to be given to incidence (SIR) findings in epidemiological evidence was the subject of instructive discussion in the Tribunal's *Decision No. 600/97* (2003), 66 W.S.I.A.T.R. 1. We note the following comments from that decision, at paragraphs 95-103:

In doing so, it is important to ask whether this worker's cancer would likely have developed even in the absence of work exposure, and the SIR provides some evidence about that question.

From this perspective (and assuming that a causal link can be inferred from the statistical association represented by the SIR of 161), the SIR of 161 suggests that, *regardless of* whether there was some additional occupational risk for miners in the 30-34 year group, 100 of the 161 cases of cancer among the mining group would have been expected to occur at the age they did occur even in the *absence* of occupational exposure. Arguably, for those 100 cases, even if there was some occupational risk, employment was not a "significant contributing factor" to the development of the cancer because the cancer would have developed when it did even in the absence of occupational exposure.

Using this analysis, it would only be the "excess risk" group (i.e. the 61 cases in the 161) for which employment was a significant contributing factor in the development of the cancer because it is this group that would not have developed the cancer "but for" the industrial exposure.

If this type of analysis is used, the concept of "benefit of doubt" or balance of probabilities" applies *not* to the extent of occupational exposure, but rather to the probability that an individual worker would be one (of the 61 "excess" cases) whose cancer would not have developed "but for" the occupational exposure.

Using this analysis, the question becomes "what is the probability that an individual worker is one of those who would not have developed cancer "but for" the occupational exposure (i.e. what is the probability that an individual worker is one of the 61 "excess risk" cases).

Using the SIR of 161, that probability would be $61/161 \times 100 = 38\%$.

Thus, there would be only a 38% probability that any individual miner in this population of underground miners with 30 to 34 years experience would be one of the miners who would not have developed the cancer "but for" the occupational exposure (i.e. one of those in the group of 61). There would be a 62% probability that he would be one of the miners who would have developed the cancer at that age even in the absence of work exposure.

Using this interpretation of the SIR, it would not be until there was an SIR of about 200 that it would be as probable as not that any worker in the group was one of the workers who would not have developed their cancer "but for" occupational exposure.

We recognize that it is impossible to determine with certainty whether a particular worker is one who would have developed cancer even in the absence of work exposure, or whether he was one who would not have developed cancer "but for" the work exposure. From a medical perspective, Dr. Muir suggests that the assumption has to be made that all causative factors are uniformly spread across the whole group so the central problem lies in determining what proportion of causality is required to accept a claim. But the whole group of miners with this work exposure did not develop cancer. And the SIR of 161 suggests that the majority of the workers who did develop cancer would have developed it when they did even in the absence of work exposure.

[54] The Panel went on to state at paragraphs 118 and 122:

Adjudicative decisions about causation do not simply convert statistical probabilities into decisions about causation using the legal standard of balance of probabilities.

...

To decide a claim from an individual worker in the population used in the OWA example, the Tribunal would consider

not only the epidemiological evidence about the group risk, but also any evidence about the individual worker that might indicate whether his risk was greater than, or less than, the group risk. The Tribunal would, for example, consider specific medical evidence about the worker as well as evidence about whether he was exposed to other risks (such as smoking if that is a risk factor for the disease the worker developed). The Tribunal would also consider evidence about the particular worker's work exposure to see whether the worker had a different risk associated with work exposure than did other workers in the group for which the relative risk of 1.5 was calculated.

[55] Applying the approach recommended in that decision regarding the assessment of occupational exposure, the Panel has weighed the evidence on non-occupational and occupational factors, including epidemiological evidence regarding underground miners, and the particular circumstances of this worker. The question to be resolved in the present case is whether the evidence establishes exposure to occupational factors of sufficient magnitude that it must be inferred that occupational exposure likely made a significant contribution to the development of the worker's laryngeal cancer. And, we note again that the Board's policy on laryngeal cancer and asbestos exposure provides that a worker will be granted entitlement to benefits for laryngeal cancer if, among other criteria:

The worker has been employed in an industrial process which generates airborne asbestos at least 15 years before the diagnosis of the disease...

[56] We turn then to an analysis of the individual circumstances of this case applying the five-point test that we have noted earlier in the decision.

1) Latency

[57] The worker was diagnosed with laryngeal cancer in 1990, 38 years after beginning his employment as an underground miner. In our view, such a period of latency between initial exposure and a diagnosis of cancer is supportive of the worker's claim. There is no opinion in the medical evidence to the contrary.

2) The Intensity of the Worker's Exposure to Occupational Substances

[58] The Julian and Muir study provides us with an important piece of information. Of all of the potentially carcinogenic exposures to which nickel miners were subject during the period covered by the study, one of the two findings that the authors considered to be most significant was the association between laryngeal cancer and employment as an underground miner for 25 years or greater. The study found such individuals to have a standardized incidence ratio of 174. In the Panel's view, that finding is evidence that is suggestive, if not probative, of a link between the worker's occupational exposure and his laryngeal cancer.

[59] However, as the Panel noted in *Decision No. 600/97*, in the end it is the facts pertaining to the individual worker that must ultimately determine the causation question. And, in the view of the Panel, the worker in this case likely had greater exposure to carcinogens than did the average underground miner with 25 years of employment or more. We find, in this regard that the worker had exposure to oil mists produced by the lubricants used by drills. We also find that he had exposure to asbestos.

[60] According to the testimony of the worker's co-worker, each drill used between two and ten quarts of lubricant per day. In the Panel's opinion, the use of such quantities of oil in an enclosed and poorly vented environment likely resulted in high ambient levels of oil mist.

[61] The worker's exposure to asbestos came about as a result of the presence of asbestos in brake pads used in the slusher machines. Dr. Kabir felt that the worker's exposure to asbestos from this source was unlikely to be the type of continuous exposure envisioned in the Board's policy. He stated, regarding this exposure:

His exposure to asbestos occurred only briefly and intermittently during installing asbestos brake shoes on slusher bands.

[62] He also cited information provided by the employer regarding "asbestos data" collected from 1979 to 1989. Dr. Kabir felt that this data showed minimal exposure to asbestos during the process of changing the brake pads. However, the Panel notes, first of all, that the data pertained to the years 1979 to 1989. There was some suggestion in the evidence before us that the data collected was invalid. But, more importantly, the data pertained

to a period of time when awareness of the danger of asbestos was greater. During most of the time when the worker was working underground, there was no awareness of the potential impact of asbestos. Consequently, we have no measure of the potential exposure the worker may have had to asbestos prior to 1979, when he performed the bulk of his work and must assume that it was likely greater than the levels detected from 1979 to 1989.

[63] Dr. Kabir also appears to be of the view that the worker would only have had exposure to brake pads when he changed the pads. However, as the testimony of the worker's co-worker established, the brake pads were not enclosed. As the pads wore down, the asbestos became friable and became part of the poorly ventilated ambient air.

[64] An obvious fact to appreciate is that, if the brake pads were deteriorating and required regular change, the material in the brake pad – asbestos – was being worn down and, hence, released into the environment around the slusher. Putting it succinctly, the asbestos had to go somewhere and likely remained in the poorly ventilated environment. A person who operated the slusher machine, as the worker in the present case apparently did, would, therefore, have continuous exposure to the asbestos that was released with each application of the brakes. According to the evidence, brake use was a constant part of the operation and explained why brake pads had to be changed on a regular basis.

[65] There is another element of the worker's exposure that warrants consideration. It is a well accepted fact that there is a carcinogenic relationship between asbestos and cigarette smoking. The primary carcinogenic substance in cigarettes is PAHs. The primary carcinogenic substance in oil mists that are petroleum based is also PAHs. As Dr. Beach noted, the lubricants used by the worker during most of his employment were likely oils with a high level of PAHs. Consequently, the worker, in this case, likely had continuous exposure to asbestos made friable by the disintegration of brake pads combined with the inhalation of oil mists containing carcinogenic PAHs.

[66] In her written submissions on behalf of the employer, Ms. Kirkpatrick noted Dr. Beach's comment, regarding the Julian and Muir study:

... as no particular substance can be identified as the sole cause of increased risk of laryngeal cancer in nickel mining, no clear level of exposure at which risk starts to become apparent can be defined.

[67] However, in the Panel's opinion, it is appropriate for us to draw an inference from the increased risk of underground miners developing laryngeal cancer and the potentially significant exposures the worker in this case had in the course of his employment. Although there is no epidemiological evidence that specifies the manner in which an underground miner's risk of developing laryngeal cancer might have been increased by his workplace exposures, we think it appropriate to draw inferences from the fact that, at least in the present case, the worker likely had significant exposures to asbestos and oil mists which, separately and together, can contribute to laryngeal cancer.

[68] We are persuaded, therefore, that the intensity of the worker's exposure to occupational carcinogens during the course of his 30 years of employment as an underground miner was substantial and significant.

3) Non-occupational Factors

[69] It was agreed by all physicians who commented on this case that the worker had exposure to non-occupational carcinogens for laryngeal cancer. They were cigarette smoke and alcohol. The medical literature indicates that each of these substances is potentially carcinogenic to the larynx. And, as Dr. Beach noted, they can operate synergistically to enhance the risk of developing laryngeal cancer.

[70] On the other hand, as Dr. Beach noted, it does not appear that the extent of the worker's exposure to these substances created any more than a mild to moderate increased risk for the worker, the same risk that Dr. Beach felt the worker had as a result of occupational exposures.

[71] Dr. Siu, the employer's expert, felt on the other hand that the non-occupational factors were paramount in the etiology of the worker's cancer.

[72] The worker was a light to moderate cigarette smoker for 20 years, quitting in 1962, 10 years after he began work as an underground miner. He continued to have exposure to occupational carcinogens for another 20 years. The worker did drink alcohol all of his adult life. It appears that he consumed wine on a light to moderate basis. The Panel concludes, therefore, that the worker did have non-occupational factors that could potentially have contributed to the development of the original cancer. However, in the Panel's opinion, the worker's exposure to these factors was not substantially greater than his exposure to occupational factors. We are persuaded that the impact of these factors does not negate the impact of occupational factors.

4) Physiological Science Consistent With Any Proposed Causal Relationships

[73] In addressing this factor, we ask whether there is evidence that other parts of the worker's physiology may have been affected by the exposures in issue. There is no evidence, for example, of damage to the liver suggestive of excessive alcohol intake. There is no evidence of the type of damage to the lung that would suggest either injury from cigarette smoking or injury from asbestos exposure. There was no evidence of any dermatological problems suggestive of excessive exposure to oil mists.

[74] Hence, we find that there is no evidence of other physiological signs that assist us in determining the causal impact of the exposure factors of this case.

5) The Presence of Predictive Factors Consistent with the Suggested Causal Factors

[75] In the Panel's view, there is in this case a predictive factor consistent with a more likely causal link with asbestos exposure than with alcohol exposure. Specifically, it appears, from the epidemiological evidence, that the location of the tumour found in the worker's larynx may be of some significance in assessing the etiology of that tumour.

[76] Material filed by the employer included an article from a medical journal, *Oral Oncology* (2005) 41, 956-965, entitled "Alcohol Consumption and Risk of Laryngeal Cancer" by Altieri, *et al.* According to that study, the risk of developing laryngeal cancer increases with the amount of alcohol consumed. The study also confirmed the synergistic impact of tobacco and ethanol. The authors went on to address "Alcohol and anatomic subsites of the larynx". The article stated:

The larynx can be divided into the supraglottis ... and epilarynx, which border on the hypopharynx, at the glottis (also called intrinsic larynx) and subglottis, which lie wholly within the respiratory system. These various subsites of the larynx are exposed to potential carcinogens at different levels, the glottis and subglottis being more exposed to inhaled agents, and the supraglottis to the ingested ones, while the junctional area between the larynx and the pharynx is exposed to both inhaled and ingested agents. Thus, they could react different to different etiological factors.

At least seven case-control studies suggested that the risk associated with alcohol consumption was stronger for cancer of the glottis/subglottis.

[77] Dr. Kabir, in his report of September 26, 2001, briefly addressed this phenomenon with respect to asbestos exposure stating:

Risk of cancer of the glottis has been shown to be higher when asbestos exposure is established whereas, cancer risk of the supraglottis has been shown to be higher among heavy alcohol consumers and having a synergistic relationship with concomitant cigarette smoking...

[78] Looking at the medical evidence regarding the nature of the worker's cancer, initial CT investigation showed the following:

On the right, just inferior to the level of the epiglottis, there is the soft tissue mass which extends among the right side of the larynx and is transglottic. There is a significant portion of the mass below the level of the glottis.

[79] It appears, therefore, that the location of the tumour was in the lower part of the larynx, which is more commonly associated with asbestos exposure. There is no indication of any tumour activity in the supraglottis,

which is the area of the larynx more commonly affected by alcohol exposure.

(g) Summary

[80] The Panel finds:

- The worker was employed as an underground miner for 30 years.
- Epidemiological evidence indicates that underground miners with more than 25 years of underground mining work have had a significantly increased risk of developing laryngeal cancer.
- Under Board policy, a worker with 15 years of exposure to asbestos is entitled to benefits for laryngeal cancer.
- The worker in the present case had what was likely significant exposure to asbestos on a daily basis in the course of his employment as an underground miner.
- The worker also likely had daily exposure to oil mists which, throughout much of his employment, contained significant levels of PAHs.
- These two substances likely had a synergistic impact on the worker's larynx.
The nature of the worker's tumour is more consistent with an inhaled cause than an ingested cause.
- Although the worker had exposure to non-occupational carcinogens in the form of cigarette smoke and alcohol, these exposures did not negate the significance of the impact of occupational factors.

[81] On the basis of those findings, we are persuaded that the worker's occupational exposures made a significant contribution to the development of laryngeal cancer. There is entitlement to benefits for this condition. We leave to the Board the determination of the nature, duration and quantum of the entitlement for the worker and his survivors.

DISPOSITION

[82] The appeal is allowed. The worker has initial entitlement to benefits for laryngeal cancer. His survivors are also entitled to benefits on the basis of that finding. We leave to the Board the determination of the nature, duration and quantum of that entitlement subject to the parties' usual rights of appeal.

Appeal allowed.

1. J.A. Julian and D.C.F. Muir, *A Study of Cancer Incidence in Ontario Nickel Workers* (Prepared for the Occupational Diseases Panel, Province of Ontario) (January 15, 1996).



Decision No. 1604/07

Panel: McCutcheon (Vice-Chair), Christie, Jackson

Decision — June 19, 2009

Neutral Citation: 2009 ONWSIAT 1504

Exposure (aluminum) – Occupational disease (preventive removal) – Psychotraumatic disability.

Worker had entitlement to a limited period of benefits for preventive removal from the workplace, even though subsequent investigation revealed that the removal was medically unnecessary.

The worker appealed a decision of the Appeals Resolution Officer denying entitlement for symptoms related to aluminum exposure resulting from her work on a machine that cut aluminum sheets. The appeal was allowed in part.

On the evidence, the worker's exposure was below exposure levels set by the Ministry of Labour. It was noted that the employer did not grind or finish aluminum, so that there was very little aluminum dust. Even if the worker had been exposed to significant levels of aluminum dust, there was still a lack of evidence demonstrating that the exposure was a significant contributing factor to the claimed neurological or other symptoms.

On the evidence, the worker also did not have entitlement for psychotraumatic disability.

The definition of occupational disease includes a medical condition that requires preventive removal from the workplace. In this case, the worker was entitled to a limited period of benefits for preventive removal from the workplace, even though subsequent investigation revealed that the removal was medically unnecessary.

Exposition (aluminium) – Maladie professionnelle (retrait préventif) – Invalidité attribuable à un traumatisme psychique.

La travailleuse avait droit à des prestations pendant une période limitée pour un retrait préventif des lieux du travail, même si l'enquête subséquente avait révélé qu'un tel retrait n'était pas nécessaire du point de vue médical.

La travailleuse a interjeté appel de la décision par laquelle le commissaire aux appels refusait de lui reconnaître le droit à une indemnité pour des symptômes liés à l'exposition à l'aluminium résultant de son travail à une machine servant à couper des feuilles d'aluminium. L'appel a été accueilli en partie.

Au vu de la preuve, l'exposition de la travailleuse était inférieure aux niveaux établis par le ministère du Travail. L'employeur ne broyait pas l'aluminium, et il n'en faisait pas la finition, de sorte qu'il y avait très peu de poussière d'aluminium. Même si la travailleuse avait été fortement exposée à de la poussière d'aluminium, il manquait d'éléments de preuve démontrant que l'exposition était un facteur contributif important de ses symptômes neurologiques et autres.

Compte tenu de la preuve, la travailleuse n'avait pas droit non plus à une indemnité pour des troubles psychotraumatiques invalidants.

« Maladie professionnelle » s'entend entre autres de troubles médicaux qui nécessitent un retrait préventif des lieux du travail. En l'espèce, la travailleuse avait droit à des prestations pendant une période limitée pour un retrait préventif des lieux du travail, même si l'enquête subséquente avait révélé qu'un tel retrait n'était pas

nécessaire du point de vue médical.

Tribunal Decisions Considered:

Decision No. 820/93A (1995), 34 W.C.A.T.R. 132 consd

Decision No. 249/96 (1996), 40 W.C.A.T.R. 110 consd

Decision No. 1420/97 (October 9, 2001) [2001 ONWSIAT 3103] consd

Decision No. 1574/99 (2001), 58 W.S.I.A.T.R. 41 consd

Decision No. 977/05 (October 31, 2007) [2007 ONWSIAT 2726] consd

Workplace Insurance Legislation Considered:

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

s. 1(1) "occupational disease"

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 04-03-13 (November 4, 1997) (since superseded)

Document No. 15-04-02 (October 14, 2009)

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[DISPOSITION](#)

APPEAL by the worker from a decision of the Appeals Resolution Officer denying entitlement for symptoms resulting from aluminum exposure.

June 19, 2009. THE TRIBUNAL: —

BEFORE:

R. McCutcheon, Vice-Chair

M. Christie, Member Representative of Employers

F. Jackson, Member Representatives of Workers

HEARING:

July 10, 2007 at Toronto, Oral

Post-hearing activity completed on August 8, 2008

DECISION(S) UNDER APPEAL:

WSIB Appeals Resolution Officer (ARO) M. E. Ryczko dated September 25, 1999

APPEARANCES:

For the worker: Jan Szmidt, Consultant

For the employer: Not participating

M. Kowalczyk, Polish

REASONS

(i) Introduction

[1] The worker appeals a decision of the ARO, which concluded that she did not have entitlement to further benefits because the evidence did not establish that the worker's disability, including neurological symptoms, were related to exposure to aluminum in the workplace. That decision was rendered following an oral hearing.

[2] The worker testified under oath at the Tribunal hearing and her representative made submissions. Following the hearing, the Panel obtained the opinion of an independent health professional pursuant to section 134 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A. The worker's representative was given an opportunity to file written submissions before and after the assessor's report was received.

(ii) Background Facts

[3] The worker seeks entitlement to benefits for various health problems, which she attributes to aluminum exposure in the workplace. The worker also seeks entitlement for depression.

[4] The worker immigrated to Canada from Poland in 1988 and began employment with the accident employer in September 1988. The employer is in the business of manufacturing aluminum louvres.

[5] In the autumn of 1995, the worker saw her family doctor, Dr. J. Ochocinski, with complaints of chest discomfort, cough and generally not feeling well. These symptoms were attributed to exposure to aluminum dust in the workplace and the diagnosis was "mild lung fibrosis." The worker did not return to work after September 16, 1995.

[6] The worker filed a claim for workers' compensation benefits at that time. In the Worker's Report of Injury (Form 6), the worker stated that her job duties involved cutting aluminum sheets on a machine, and forming the aluminum elements to be mounted on louvres. The worker stated that her working environment was continually contaminated with aluminum dust, which was very noticeable in the area and both on the body and hair.

[7] The Panel had limited objective evidence before it about the potential for exposure at the plant where the worker was employed from 1988 to 1995. There is no evidence that the worker was involved in grinding activities, which would be expected to create the most of the dust.

[8] The Panel did hear testimony from the worker, in which she confirmed the previous descriptions of her job. For the purposes of this appeal, the Panel accepts the worker's written description of the work environment contained in the file:

Most of dust was concentrated on the tables that I used for mounting the louvres. The floor was also covered in aluminum dust and was very rarely cleaned as this depended heavily on our workload and number of orders we had. At the most, the floor was cleaned once every two months. My foreman suggested that I use a broom to sweep the aluminum dust off the floor and as I did I noticed that I was inhaling some aluminum in the process as a result of the windows being left closed by my foreman. As well, my foreman didn't think that this environment was dusty enough to require ventilation and so there was none.

In the production process was where I was first exposed to a large amount of aluminum. It happened often that I had to remove the aluminum dust from the table I was working on to protect the elements I was working with from being

scratched or damaged. When I removed the dust from the aluminum elements I was exposed to it.

[9] There is also evidence that the worker ate lunch at her work table.

[10] As a result of the worker's complaints, the Ministry of Labour undertook an investigation of the employer's premises in 1996. However, the employer had moved to new premises in August/September 1995, and the worker did not attribute her symptoms to work at this location (she worked approximately only one week at the new location).

[11] The Ministry of Labour found that aluminum levels at the new plant were well below the applicable exposure limits. The new location inspected by the Ministry of Labour was noted to have ventilation controls in place, whereas the worker maintains that the old location had no ventilation and the windows were kept closed. However, the Ministry of Labour report indicated that the equipment from the old plant was brought to the new plant, suggesting that the environment would be similar.

[12] When queried about other potential sources of aluminum exposure, the worker advised the WSIB that she did not use aluminum pots and pans and she did not take Tums or Roloids. An endocrine clinic report dated June 2004 indicates that the worker drinks tea and that the worker is a smoker of approximately one pack of cigarettes every two days.

[13] The worker had a prior thyroid condition. The file indicates that she had a thyroidectomy in Poland in 1982. In July 1997, she advised Dr. E. Stone that she had used thyroid medication for approximately three years. An endocrine report dated June 23, 2004 indicates that the worker was diagnosed with diabetes a few years previously. In February 2001, Dr. I. Rosen reported that he recommended that the worker have some form of nodal clearance because of the CT finding of nodularity.

[14] According to the information on file, the "normal" serum level of aluminum is 0.220 UMOL/L. The Ministry of Labour Guidelines on file call for review of work practices and dietary habits (not removal from the workplace) at a level of 0.660 UMOL/L.

[15] On August 23, 1995, the worker was noted to have a serum level of aluminum of 0.420 UMOL/L. In September 1996, approximately one year after the worker had been out of the workplace, her serum level of aluminum was 0.720 UMOL/L.

[16] As noted above, the initial diagnosis of the worker's condition was lung fibrosis. The worker testified that her most significant current problem was her memory. She felt her memory was poor.

[17] A CT scan of the head in January 1997 reportedly showed "moderately severe atrophy." However, a subsequent CT scan report of April 1998 described "mild atrophy in the frontal lobes bilaterally."

[18] In approximately 1998, the worker began having what were described as grand mal seizures. The worker testified that her last seizures occurred in March and May 2007.

[19] The worker also filed a claim for an injury to the lower arms and upper legs due to repetitive movement. In September 1995, Dr. Ochocinski, the worker's family physician, diagnosed tendinitis/osteoarthritis in both hands. Diagnostic imaging in November 1995 showed "fairly advanced osteoarthritis of the DIP joint of the left ring finger." The Board accepted that the nature of the work temporarily aggravated the pre-existing osteoarthritis in her hands and paid temporary disability benefits from September 19, 1995 to October 31, 1995, and paid health care benefits until June 1996. The worker objected to the decision to terminate her temporary disability benefits as of October 31, 1995. In a decision dated June 27, 2000, ARO R. Nestereiczuk concluded that the worker was entitled to temporary total disability benefits from December 6, 1995 to May 1, 1996, while she received physiotherapy treatment. She was not entitled to a permanent impairment award or ongoing benefits under that claim.

(iii) The WSIB's Adjudication and Policy on Workplace Aluminum Exposure

[20] Since the worker's symptoms arose in 1995, the pre-1997 *Workers' Compensation Act*, R.S.O. 1990, c. W.11,

is applicable to this appeal. All statutory references in this decision are to the pre-1997 Act, as amended, unless otherwise stated. The hearing of the appeal commenced after January 1, 1998; therefore, certain provisions of the *Workplace Safety and Insurance Act*, also apply to the appeal.

[21] Dr. P. Carr, a WSIB Occupational Medicine Consultant, provided an opinion in a memorandum dated January 26, 1996. Although Dr. Carr accepted that the worker had the potential for aluminum exposure at work and her aluminum serum level on one occasion was higher than normal, it had not been ascertained that health effects occur at the levels this worker had. At that time, Dr. Carr recommended that further information be gathered about the worker's potential aluminum exposure outside of work, as well as information about the workplace.

[22] In March 1996, Dr. Carr reviewed the worker's claim again after reviewing additional medical reports. Based upon the chest x-ray, Dr. Carr found that there was no evidence of pulmonary fibrosis. There was no basis for removal from the workplace based upon the information available. In April 1996, Dr. Carr reviewed the Ministry of Labour's workplace testing reports, which showed aluminum dust levels to be well below acceptable limits. Dr. Carr concluded that there was little in the way of exposure and there were no exposures that could account for any health effects. However, noting that she used to eat lunch at her workstation, Dr. Carr accepted that the minimally elevated aluminum levels were caused by work.

[23] In a decision dated March 19, 1996, the WSIB Claims Adjudicator accepted that the worker's elevated aluminum levels could be considered related to her occupational exposure; however, the adjudicator did not accept that these levels would warrant her removal from exposure nor was it accepted that there was a permanent impairment. The worker's claim was allowed on a "no lost time" basis to recognize the worker's elevated aluminum levels.

[24] The WSIB concluded that the increase in the worker's aluminum serum level to 0.720 in September 1996 was likely not work related, but rather, related to non-occupational factors such as diet.

[25] Board of Directors Minute #16, August 27, 1993, Page 5687, with attachments, provides background information about the Board's handling of claims for aluminum exposure. Between 1986 and 1988, the then Workers' Compensation Board received claims for "elevated" levels of aluminum in the blood. There were concerns about the possibility of neurological damage, lung disease and death from exposure to aluminum. Due to continued concern about the potential health risk of aluminum exposure, the Chairman of the Board referred the issue to the Industrial Disease Standards Panel (IDSP) in December 1988. The IDSP Progress Report on Aluminum in the Workplace was issued in October 1989. This report included a detailed literature review of the health effects of aluminum. The IDSP Report to the Workers' Compensation Board on Aluminum was published in the Ontario Gazette in July 1992. The Board provided the report to scientific experts for comments and received four submissions.

[26] Pursuant to section 95(15) of the pre-1997 Act, the WCB published its position on the IDSP's findings in a document marked as Board of Directors Minute #16, August 27, 1993, Page 5687. This is a lengthy document which discusses the literature and submissions from the scientific community. The Panel will not reproduce the document in its entirety. To summarize, however, the Panel notes that the Board of Directors accepted the following four findings made by the IDSP:

1. The evidence currently available is inadequate to allow the IDSP to conclude that occupational aluminum exposure causes neurological health effects.
2. Neither blood nor urine aluminum levels are good indicators for predicting occupational health risk, nor for estimating body burden of aluminum. The other methods currently available are far too invasive to be considered for occupational monitoring. There is currently no evidence that body burden of aluminum reflects danger to health.
3. The available evidence is inadequate to allow the IDSP to identify conditions under which a worker should be removed from occupational exposure to aluminum.
4. Since the available evidence is inadequate to identify adverse health effects from occupational aluminum exposure, the IDSP is not able to recommend criteria for the adjudication of claims at this

time.

[27] In 1997, the WSIB approved *Operational Policy Manual*, Document No. 04-03-13, "Occupational Aluminum Exposure, Dementia, Alzheimer's Disease and Other Neurologic Effects," which states in part:

Dementia, Alzheimer's disease, and conditions with neurologic effects are not occupational diseases or injuries by accident under the Act when they are alleged to result from occupational aluminum exposure.

The available medical and scientific evidence does not establish causal associations between occupational aluminum exposure and dementia, Alzheimer's disease or conditions with neurologic effects.

[28] Pursuant to section 126 of the WSIA, the Board has stated that Document No. 04-03-13 is applicable to this appeal. The policy is dated November 4, 1997 and applies to all accidents occurring on or after September 23, 1993.

[29] In its post-hearing memorandum, the Panel stated that we would begin by assessing the merits of the individual claim. Then, if necessary, we would consider whether there were any policy implications to be addressed in the circumstances of this appeal.

(iv) Evidence of the Worker's Medical Condition

[30] The assessor's report provided a detailed summary of the medical reporting and the following overview of the medical evidence is drawn in part from the assessor's report.

[31] In a letter dated June 3, 1997, Dr. Ochocinski indicated that the worker's symptoms started with chest discomfort, cough and she was concerned about aluminum exposure. When her level was checked in August 1995 it was 0.420, above the normal value of 0.220. She was told to stop working on September 18, 1995, because of this and was referred to a chest specialist.

[32] The worker was referred to Dr. H. Levy, internist, who examined the worker and provided a report dated January 3, 1996. Dr. Levy saw the worker for dyspnea and elevated aluminum levels. There were no definite findings except hypertension 200/100 and beta blockers were recommended. On July 9, 1996, Dr. Levy reported that the pulmonary function study in January 1996 was normal. Her symptoms were coughing, hacking, shortness of breath and insomnia. Her chest was clear on examination and spirometry was normal. Chest x-rays revealed healed fractures of the left 8th and 9th rib and Dr. Levy was wondering about the possibility of abuse. The lungs were clear in an x-rays dated August 1995 and April 1, 1996.

[33] A laboratory report dated January 17, 1996 indicates that the worker's blood aluminum level was 0.111 NMOL/L.¹ The report indicates that less than 0.371 NMOL/L is considered normal.

[34] By October 21, 1996, the worker's chief complaint was "I am not able to keep myself from crying," as documented in a Community Mental Health Clinic report. She had been treated with Paxil for a year prior to this. She had panic attacks in the past with unspecified fears. A year before she had stretching of the whole body while asleep which she perceived as jerky movements or seizures.

[35] On February 20, 1997, Dr. Werrett, a neurologist, saw the worker regarding the possibility of an organic basis for depression and insomnia and the possible role of aluminum exposure. Past medical history revealed that she had thyroid surgery in Poland and received thyroid replacement. Over the previous three and a half years, she had what she described as leg problems, characterized by pains in both her legs and hands. She reported pain both in arms and legs, mainly in her joints which kept her awake at night. Her medications were paroxetine 20 mgs a day, Lorazepam 1 to 2 mgs q.h.s p.r.n. and Kernadrin 5 mgs a day. She described her symptoms as difficulty breathing, fatigue at work, and an eye problem with white spots before the right eye and black lines before both eyes, subsequent deterioration of her vision, discomfort in the joints in her arms and legs and difficulty sleeping at night. She became very anxious, readily startled, with some jerky and shaking movements of her hand and head. Dr. Werrett concluded that, in the presence of severe depressive symptoms, it would be difficult to interpret findings on neuropsychological examination. There was nothing in her examination that suggested a major

memory problem or impairment in attention, communication, visual/spatial, executive or other higher cerebral functions.

[36] The worker was referred to Dr. Colin R. Voorneveld, a rheumatologist, who diagnosed fibromyalgia with a secondary pain amplification problem in May 1997.

[37] As noted above, testing in September 1996 indicated an aluminum blood level of 0.720 UMOL/L.

[38] In a memorandum of January 1999, Dr. Chain, Occupational Medicine Consultant, noted that the alert aluminum serum level for work removal is 0.660 UMOL/L. The increase in the worker's blood aluminum levels to 0.720 in September 1996 would suggest the source of aluminum accumulation likely from non-work-related activities, such as diet.

[39] She saw Dr. Wherrett, a neurologist, in February 1997, who noted complaints of depression, insomnia, pain in both arms and legs which kept her awake. She was limping with a cane and neurological examination was negative.

[40] An EEG in September 1997 was normal. Nerve conduction studies in August 1997 showed minimal chronic neurogenic changes in the right tibialis anterior and EDB muscles. An EEG in September 1997 was reported as normal, with no epileptiform or lateralizing abnormality identified.

[41] Subsequently, neurology consultations from Dr. S. H. Pasternak and Dr. Wherrett indicated that only one of the attacks could be considered seizures.

[42] The worker was seen by Dr. M. Kostolowski-Kondysar, psychiatrist, from 1996. She subsequently switched to Dr. P.A. Nynkowski in June 2005. In July 1999, Dr. Kostolowski-Kondysar reported that the original diagnosis was an adjustment disorder with mixed mood and depressive disorder and a brief psychotic disorder of the disorganized type. Initially, she presented with anxiety and depression, distress and frustration and overall hyper-arousal was reflected in her behavioural speech and thought. She had concomitant medical problems of hyperthyroidism, hypertension, recurrent bladder infections, muscular and joint pains. She developed seizures for which she was prescribed Dilantin and then later treated with Epival. She continued to have anxiety, depression, and anger. She had incongruent vague hallucinations. SPECT Scan of the brain done in 1996 was in normal range. She was receiving several medications including Manerix, Trazodone, Doxepin, Nortriptyline, Luvox, Sertraline, Paxil, Olanzapine, Melaril, Noziman, Perphenazine, Clonazepam, Temazepam, Chloral Hydrate, L-Tryptophan, Epival, Procyclidine and Cogentin. At the time of Dr. Kostolowski-Kondysar's report, she was on Serzone 200 mg and 400 mg q.h.s. Clonazepam 0.5 m b.i.d., Temazepam.

[43] Endocrine consultation by Dr. Stone in July 1997 suggested subclinical hypothyroidism for which she was already taking L-Thyroxine daily.

[44] Laboratory testing in 1996 also showed high TSH levels secondary to her previous thyroidectomy. In 2001, the worker was taking Metformin for her diabetes.

[45] Dr. Chepesiuk, a neurologist, noted in May 2007 that her last seizure was at the beginning of March 2007. She was switched from Dilantin to Carbamazepin 200 b.i.d. and Sinemet was added for possible restless leg syndrome and later this was changed to Mirapex q.h.s. She complained of some loss of balance on these medications and she was told to take only one of the Levodopa drugs only. She continued to complain of hand numbness and was wearing carpal tunnel splints with questionable benefit. Her leg numbness continued to be distressing. Her loss of balance was attributed to Carbamazepine side effects.

[46] Dr. P. Nynkowski, psychiatrist, reported in June 2007 that the worker was taking Seroquel 600 mg at bedtime and Amitriptyline 25-50 mg at bedtime. She complained of constant distress, depression, anxiety, difficulty sleeping, difficulty concentrating, memory, attention and concentration difficulties, pain and fatigue. She was having distorted thought with suicidal preoccupation. She complained of waking up in the middle of the night with confusion and imagining herself outside her apartment including transient psychotic episodes. The diagnosis was chronic major depressive disorder.

(v) Issue Agenda

[47] The primary issue arising from the decision under appeal is the question of whether the worker is entitled to lost time benefits on the basis that she suffered ill effects from exposure to aluminum dust in the workplace.

[48] In the alternative, the worker's representative submitted that the Tribunal had jurisdiction to consider entitlement for depression on the basis that it was due to the combined effect of her compensable bilateral hand and wrist injury and her reaction to her removal from work after serum blood work indicated the presence of aluminium of 0.42. At the hearing, the Panel advised the worker's representative that we would consider his arguments in this regard. For the reasons set out below, the Panel concludes that the Tribunal has jurisdiction over the claim for depression related to the removal from work, but not as a result of the bilateral arm injury.

[49] There are two ARO decisions relating to this worker's claims.

[50] The decision of R. Nestereiczuk, dated June 27, 2000, addressed the following issue under the worker's tendinitis claim: "[The worker] objects to the termination of temporary total disability benefits on October 31, 1995 and the termination of health care benefits on June 2, 1996."

[51] The decision of M. E. Ryczko, dated September 25, 1999 defined the issue as follows:

The worker is claiming entitlement to further benefits on the basis that she developed neurological difficulties from her exposure to aluminum dust in the workplace. She is requesting that entitlement be granted and that consideration be given for a future economic loss (FEL) benefit and non-economic loss award.

[52] The issue of entitlement for aluminum exposure was considered at the appeals level in 1999. Subsequently, the worker pursued the closure of benefits for the tendinitis claim. The worker's representative relies upon memoranda on file to argue that the Tribunal has jurisdiction over entitlement for depression under the tendinitis claim and as a reaction to her removal from work at the direction of her doctor. The representative refers to a memorandum to file from R. Nestereiczuk, the ARO who considered the appeal under the tendinitis claim. ARO Nestereiczuk apparently contacted ARO Ryczko to inquire about the issue agenda. ARO Nestereiczuk's memo states in part:

Call to ARO, M. Ryczko

I asked her whether her decision specifically dealt with psych. issue.

She checked her notes and called me back. She said IW rep and IW maintained that her symptoms were all neurological in origin. They never specifically referred to psych. problems.

Mary deliberately worded her decision in the manner that she did to account for both organic and inorganic symptoms. She found none of these symptoms were related to aluminum dust exposure.

April 12/00

To file

I had reviewed both files during week of April 10/00 and had asked Paul Gilkinson, Manager, to review as well...Paul checked with WSIAT and IW had registered an objection in Feb./00 under the aluminum claim.

On April 12, 2000, I had called ARO Mary Ryczko to clarify whether her decision of Sept. 25/99 under ...4052 was a ruling on psych issues. She said she ruled on both organic and non-organic issues. *Therefore, Paul and I agreed psych is a non-issue under tendonitis claim.* Major disability since September 1995 is psych. [Emphasis added]

[53] In the Panel's view, the above memorandum clearly indicates that ARO Nestereiczuk did not consider entitlement for psychotraumatic disability under the tendinitis claim, stating: "...psych is a non-issue under tendonitis claim." The Panel notes that the worker did not request entitlement for psychotraumatic disability under the tendinitis claim and this was not cited as an issue in the 2000 decision of ARO Nestereiczuk.

[54] In a letter dated November 11, 2004, the worker claimed entitlement for depression as a result of aluminum exposure. The worker's representative also relied upon a Memorandum #51, dated January 11, 2006, and correspondence from the WSIB of the same date. In this correspondence, the claims adjudicator stated that the claim for entitlement could not be considered as the ARO's decision of September 25, 1999 denied further entitlement to benefits under the aluminum exposure claim. This supports a conclusion that the 1999 ARO decision implicitly considered and denied entitlement for depression under the aluminum exposure claim, but does not relate to the tendinitis claim.

[55] Accordingly, the Panel finds that the Tribunal does not have jurisdiction to address a claim for depression or psychotraumatic disability under the tendinitis claim.

[56] The representative also asked the Panel to take jurisdiction over the claim that her depression was causally related to the effect of her "reaction to her removal from work after serum blood indicated presence of aluminum of 0.420 UMOL/L, and her subsequent health difficulties that she developed after September 1995." The representative relied upon the memorandum reproduced above in support of the argument that ARO Ryczko addressed this issue in her 1999 decision.

[57] The memorandum of ARO Nestereiczuk states that ARO Ryczko did deny entitlement for both organic and inorganic symptoms, finding that "none of these symptoms were related to aluminum dust exposure." The Panel finds that the alternative argument is closely related to the issue under appeal and the Tribunal has jurisdiction to consider this argument.

[58] The representative's argument also requires the Panel to consider the issue of preventive removal. The statute defines occupational disease as follows:

1(1) In this Act,

...

"occupational disease" includes,

- (a) a disease resulting from exposure to a substance relating to a particular process, a trade or occupation in an industry,
- (b) a disease peculiar to or characteristic of a particular industrial process, trade or occupation,
- (c) a medical condition that in the opinion of the Board requires a worker to be removed either temporarily or permanently from exposure to a substance because the condition may be a precursor to an occupational disease, or
- (d) any of the diseases mentioned in Schedule 3 or 4.

[59] The worker's representative did not specifically argue that the worker had an occupational disease on the basis of clause (c) of the definition, that is, that the worker had "a medical condition that in the opinion of the Board requires a worker to be removed either temporarily or permanently from exposure to a substance because the condition may be a precursor to an occupational disease." The Panel finds it necessary to consider this, however, in relation to the claim for depression. This issue is within the Tribunal's jurisdiction as it was addressed by the WSIB, beginning with the Claims Adjudicator's decision of March 19, 1996.

[60] In summary, the issues in this appeal are as follows:

- a. whether the worker has entitlement for health effects as a condition arising out of and in the course of employment;
- b. whether the worker was entitled to benefits for preventive removal from the workplace;
- c. whether the worker has entitlement for depression as a condition resulting from the health effects of aluminum or removal from the workplace.

(vi) The Assessor's Opinion

[61] Dr. A. Kertesz, Professor of Clinical Neurological Sciences at the University of Western Ontario, was

selected as the medical assessor. In a report dated May 8, 2008, Dr. Kertesz reviewed the medical documents on file. To answer the Panel's questions, Dr. Kertesz reviewed and cited the recent literature on the effects of aluminum exposure. Dr. Kertesz's curriculum vitae demonstrate that he has published extensively and the Panel accepts that he is an expert qualified to answer the questions put to him.

[62] Prefacing his answers to the Panel's questions, Dr. Kertesz noted that current Board policy states that the available medical and scientific evidence does not establish causative associations between occupational exposure and dementia, Alzheimer's disease or conditions with neurological effects. Dr. Kertesz responded to the Panel's questions as follows:

1. Does this worker have epilepsy? Please define terms and explain the reasons for your opinion.

No, the worker appears to have only one seizure observed by her husband. One consultant thought there was only one definite seizure and the other episodes were not. Subsequent neurological notes failed to summarize the seizure disorder satisfactorily. The diagnosis is not well established even though she has seen four neurologists. Some of the descriptions of dubious value. One doesn't usually make a diagnosis of epilepsy on the basis of one seizure alone and no associated EEG abnormality or underlying etiology. The patient doesn't have idiopathic epilepsy by definition.

2. What is the medical significance, if any, of the findings noted on the CT scan in January 1997 and April 1998?

I have reviewed these scans myself and both show a mild to moderate nonspecific atrophy. The significance is unknown.

3. Significance of blood test results.

- a. What is the medical significance, if any, of the results of the worker's blood tests for aluminum in 1995 and 1996?

I don't think the medical significance of blood test results for aluminum is well established and they are not certainly part of the general practitioner or even of the neurologist's expertise. From what I can gather from the literature there is a wide fluctuation in the methodology and interpretation of blood levels and there is no clear agreement about their significance.

- b. Did the worker's level of 0.420 in August 1995 warrant removal from work?

Not, according to [the WSIB] occupational medicine consultant. However, it was a prudent advice by her doctor, who is supposed to be her advocate, in view of the report of being twice normal and the difficult and controversial issues in interpreting blood levels.

- c. Is there any potential explanation for the increase in the worker's serum aluminum levels in 1995, approximately one year after she had stopped working?

No, except aluminum levels are inconsistent in the literature and probably fluctuate depending on dietary exposure, drinking water, amphogel intake, etc...
...

4. Does the worker have any "neurological condition"? If so, what is the relationship, if any, between the worker's aluminum exposure as described by the Panel and any neurological condition present? Is such a relationship medically likely? Please explain the reasons for your opinion.

Yes, she may have a seizure disorder. This is not well established, described or diagnosed in her case. It is not commonly part of the "dialysis dementia" syndrome, the only well established instance of human aluminum neurotoxicity related to dialysis without purified water before 1980.

- a. Are you able to identify any other factors that may be contributing to the worker's condition?

Yes, this patient appears to be significantly depressed. Many of her symptoms are related to it. Her obsession to aluminum exposure contributes to this. I found one article that attributes psychological symptoms to *long term* ² occupational Aluminum exposure...

- b. Is there any other medical information that you feel would be of assistance to the Panel and the parties in understanding the nature or the etiology of this worker's condition?

I have reviewed the last 20 years literature on aluminum neurotoxicity in humans and I have to agree with the [WSIB's] position, although the issue remains complex and controversial. (They can't even agree how to spell the element). The most relevant articles are below:

Letzel S, Lang CJ, Schaller KH, Angerer J, Fuchs S, Neundorfer B, Lehnert G Longitudinal study of neurotoxicity with occupational exposure to aluminum dust. *Neurology* 2000 Feb 22;54(4):997-1000. Two cross-sectional studies were conducted at a German aluminum (A1) powder plant to evaluate possible nervous system effects from occupational A1 exposure. The investigation included biological monitoring, a neuropsychological test battery, and event-related P300 potentials. Neurophysiologic findings in workers chronically exposed to A1 dust did not differ from non-A1 exposed controls from the same plant. The authors suggest that chronic exposure to A1 dust, at the levels documented in this study, does not induct measurable cognitive decline.

Another article from the foremost Canadian advocate of neurotoxicity of aluminum indicates no neurological disease only inferior cognitive performance after aluminum dust exposure:

Rifat SL, Eastwood MR, McLachlan DR, Corey PN. Effect of exposure of miners to aluminum powder. *Lancet* 1990 Nov 10;336(8724): 1162-5. (Department of Psychiatry, University of Toronto, Canada). 'McIntyre Powder' (finely ground aluminum and aluminum oxide) was used as a prophylactic agent against silicotic lung disease between 1944 and 1979 in mines in northern Ontario. To find out whether the practice produced neurotoxic effects a morbidity prevalence study was conducted between 1988 and 1989. There were no significant difference between exposed and non-exposed miners in reported diagnoses of neurological disorder; however, exposed miners performed less well than did unexposed workers on cognitive state examinations; also, the proportion of men with scores in the impaired range was greater in the exposed than non-exposed group. Likelihood of scores in the impaired range increased with duration of exposure. The findings are consistent with putative neurotoxicity of chronic aluminum exposure.

[63] The worker's representative was given an opportunity to file written submissions following receipt of the assessor's report, but chose not to do so.

(vii) Analysis

[64] The worker's claims for entitlement for health effects due to aluminum exposure and depression are denied. The Panel finds that the worker was entitled to a limited period of benefits for removal from the workplace while her claim was being investigated.

(a) Entitlement to Benefits for Aluminum Exposure

[65] In order for this appeal to succeed the evidence must establish that the workplace exposure made a significant contribution to her disability. This requires consideration of whether:

1. the worker was substantially exposed to aluminum in the course of her employment; and
2. such exposure likely caused the variety of symptoms that she subsequently experienced.

[66] The evidence does not establish either of these elements on a balance of probabilities.

1) Extent of Aluminum Exposure

[67] Reporting from the Ministry of Labour indicates that the Regulation Respecting the Control of Exposure to Biological and Chemical Agents sets the exposure level for aluminium dust at 10mg/m³. There is a lack of evidence that the worker had exposure at this level during her employment. Although the Panel accepted the worker's description of the work environment as dusty, there was no objective evidence that there were hazardous levels of aluminum in the workplace.

[68] The Ministry of Labour did not have the opportunity to inspect the original premises where the worker claimed to have received exposure. However, Dr. L. Genesove, Occupational Medicine Consultant for the Ministry of Labour, concluded that it was unlikely that the conditions would have been substantially different at the old plant, stating in part:

The company does not grind or finish aluminium, so very little aluminum dust is expected, as indicated in the air sampling. There was very little dust on the floor around the stamping machine and at the assembly area.

No chemicals are used in the process.

There are no records from the old location...However, all the equipment from the old location was brought to the new building, plus additional equipment. I would expect exposures, therefore, to be similar at both plants.

[69] Given that the equipment from the old plant was moved to the new plant, it was reasonable to infer that the extent of dust created at the new plant would be similar to the former location. That is to say, the equipment would be expected to generate minimal levels of dust. The Panel also notes that the employer did not engage in grinding or finishing aluminum, and therefore little dust would be expected. Therefore, objective evidence about the conditions at the old plant does not establish that aluminum dust levels exceeded the standards set by the Ministry of Labour.

[70] The worker testified that the ventilation at the old plant was much worse than the new plant, but there was no objective evidence confirming that. Nonetheless, even accepting that the ventilation at the old plant was not as good, the processes being performed were not expected to create a large amount of dust, according to the Ministry of Labour's inspection.

[71] The worker's representative relied upon unclear copies of photographs of the original workplace to argue that the conditions were much dustier there. However, the representative was unable to produce the original photographs. This evidence is of limited value. We did have the worker's testimony that the working conditions were much dustier, but this does not necessarily establish that there was exposure to aluminum dust beyond the acceptable levels set by the Ministry of Labour. A Ministry of Labour report of January 1996 noted that conditions at the new plant were about 100 times less than the exposure levels of 10 mg/m³. The Ministry of Labour report stated: "It was never expected that the levels would be high; there simply were no operations being conducted that would even produce aluminum dust." As noted above, the same equipment was used at both the older and new locations.

[72] Thus, the only potential indicator in this regard was the fact that her serum aluminum levels were considered to be "elevated" at 0.420 in August 1995. The Panel sought information from the medical assessor as to whether it was reasonable to draw a causal link between the worker's serum aluminum levels and workplace exposure. Dr. Kertesz undertook a review of the literature and found that it supported the IDSP's original position that there is a lack of consensus about the medical significance of blood tests for aluminum.

[73] The WSIB accepted that the worker's aluminum serum level of 0.420 in August 1995 was caused by exposure at work, but medical consultants concluded that this level is not associated with adverse health effects. The MOL guidelines stipulate that there should be a review of work practices and dietary habits at 0.660. Basing decision-making on blood aluminum levels would appear to be somewhat at odds with the prevailing medical evidence which suggests that aluminum blood serum levels are not good indicators for predicting occupational health risk, nor for estimating body burden of aluminum. Nonetheless, it appears that blood aluminum levels are used as a rough guideline for determining aluminum exposure.

[74] Assuming that the worker's aluminum blood level of 0.420 was related to exposure to aluminum dust at work, this still does not establish that the worker had exposure beyond acceptable limits. As noted above, Ministry of Labour guidelines only recommend a review of work practices and dietary habits at a level of 0.660, not a work removal.

[75] The worker's representative argued that the increase in the worker's blood aluminum levels to 0.720 was also related to workplace exposure. As noted above, this spike in the worker's blood aluminum level occurred a year

after she had left the workplace. In the interim, test results showed blood aluminum levels of 111 NMOL/L (normal: less than 371 NMOL/L) in January 1996. There is no evidence or opinion to support a conclusion that workplace exposure could have caused an increase in the worker's blood aluminum levels after she had been out of the workplace for a year. Dr. Chain noted that this would suggest that the source of aluminum accumulation was likely due to non-occupational factors such as diet. Similarly, Dr. Kertesz noted that the increase in aluminum blood levels in September 1996 could have been related to a variety of non-workplace factors, including diet and drinking water. There is no evidence to support a conclusion that the increase in blood aluminum levels in September 1996 was work-related.

[76] In summary, based upon the objective evidence of the workplace conditions, as well as Dr. Kertesz's opinion on the dubious significance of serum aluminum levels, the Panel is not persuaded that the worker had exposure to hazardous levels of aluminum in the course of her employment.

2) Lack of Evidence of a Causal Link Between Aluminum Exposure and Neurological Symptoms

[77] Even if the Panel were to accept that the worker had significant exposure to aluminum dust in the course of her employment, there is still a lack of evidence demonstrating that such exposure was likely a significant contributing factor in the development of her claimed neurological symptoms.

[78] The worker's claim was initially established as a claim for pulmonary fibrosis due to aluminum exposure. Subsequent objective testing, however, did not confirm this diagnosis. The worker went on to develop a variety of symptoms. In January 1996, Dr. Levy noted that she had complaints of dyspnea and weakness and aching in her hands and her legs. She denied any headaches or dizziness or periods of confusion. By October 1996, she was diagnosed with adjustment disorder with mixed mood, chronic and brief reactive psychosis, disorganized type. She reported a stretching of the whole body while asleep, which she perceived as jerky movements or seizures. The Panel accepts Dr. Kertesz's opinion that a diagnosis of epilepsy does not apply, although she may have a seizure disorder.

[79] As described earlier in this decision, the Board accepted the following four findings of the IDSP in 1992:

1. The evidence currently available is inadequate to allow the IDSP to conclude that occupational aluminum exposure causes neurological health effects.
2. Neither blood nor urine aluminum levels are good indicators for predicting occupational health risk, nor for estimating body burden of aluminum. The other methods currently available are far too invasive to be considered for occupational monitoring. There is currently no evidence that body burden of aluminum reflects danger to health.
3. The available evidence is inadequate to allow the IDSP to identify conditions under which a worker should be removed from occupational exposure to aluminum.
4. Since the available evidence is inadequate to identify adverse health effects from occupational aluminum exposure, the IDSP is not able to recommend criteria for the adjudication of claims at this time.

[80] Dr. Kertesz's opinion supports the conclusion that these findings continue to be valid, based upon the current literature. There is no basis for the Panel to disregard Dr. Kertesz's opinion in favour of the various articles previously cited by the worker's representative. Dr. Kertesz's interpretation of the literature is supported by other opinions on file. For example, the worker was referred to Dr. J. R. Wherrett, neurologist, who authored a report dated February 20, 1997. The worker was referred to Dr. Wherrett regarding the possibility of an organic basis for depression and insomnia and the possible role of aluminum exposure. Dr. Wherrett commented in part:

I note the report of some atrophy on the CT brain scan.

I cannot make much comment about the significance of the elevated serum aluminum levels. Unfortunately, the authority on aluminum associated with the Memory Clinic has retired. I will review some literature, but it is my understanding that the only firm evidence for aluminum toxicity comes from studies of patients on dialysis who had received excess aluminum in some soluble form as part of fluid replacement.

In the presence of severe depressive symptoms, it would be difficult to interpret findings on neuropsychological examination which I suspect if present, would be subtle. The other issue is whether there is any epidemiological information to support the possibility that the kind of exposure that she experienced was associated with encephalopathy.

[81] In 1997, the Board codified its approach to aluminum exposure in OPM Document No. 04-03-13. That policy provides that dementia, Alzheimer's disease and conditions with neurologic effects are not occupational diseases or injuries by accident when they are alleged to result from occupational aluminum exposure. The evidence available in this appeal does not suggest that the policy approach is incorrect or that it should not apply on the individual merits and justice of this appeal.

[82] The Panel accepts Dr. Kertesz's opinion that a seizure disorder is not commonly part of the "dialysis dementia" syndrome, which is the only well-established instance of human aluminum neurotoxicity related to dialysis without purified water before 1980.

[83] The worker's representative referred to *Decision No. 249/96* (1996), 40 W.C.A.T.R. 110, in which the Panel granted entitlement for neurological impairment to an electrician who had occupational exposure to aluminum. This decision, however, was rendered prior to the enactment of the specific Board policy on occupational aluminum exposure in 1997. Furthermore, in that case, the worker's job required him to drill and grind aluminum and there was evidence that the worker's uptake of aluminum could have been facilitated by the fact that much of the worker's interaction with aluminum dust would have been in conjunction with various solvents.

[84] In *Decision No. 1574/99* (2001), 58 W.S.I.A.T.R. 41³, Dr. Wherrett provided an opinion to the Tribunal as a medical assessor. Dr. Wherrett stated: "my understanding of the neurological literature pertaining to aluminium and industrial solvent is that the concept is controversial and the *preponderance* of evidence weighs against it."

[85] Dr. Kertesz referred to two studies that indicated potential effects from long-term exposure to aluminum, for example, the studies by Guo, Ma, and Wang (10 years of aluminum exposure) and Rifat et al. The Panel notes that the worker in this case had no more than seven years of potential exposure and there is no basis for concluding that she had the same intensity of exposure as the subjects of those two studies. Furthermore, it appears that these studies are not necessarily consistent with the preponderance of the literature, since Dr. Kertesz agreed with the Board's policy position that the available medical and scientific evidence does not establish causal associations between occupational aluminum exposure and conditions with neurologic effects.

[86] The worker's representative relied upon the supportive opinions from the worker's family physician, but the Panel finds that these are outweighed by the expert report from Dr. Kertesz. The worker's family physician does not have any expertise in aluminum neurotoxicity, and, as Dr. Kertesz pointed out, he had recommended removal from the workplace in his role as advocate for the worker.

[87] In summary, there is no reliable, credible evidence upon which to draw a causal link between the worker's level of aluminum exposure and the symptoms she developed. The family physician's recommendation to remove the worker from the workplace was made without any reference to Ministry of Labour guidelines or the prevailing epidemiological evidence on the effects of aluminum exposure. Dr. Levy also recommended removal from the workplace on the basis that a blood aluminum level of 0.420 was considered "toxic," but this is not supported by the guidelines set by the Ministry of Labour or any other credible evidence.

(b) Preventive Removal

[88] As noted above, the worker's representative did not specifically claim that the worker was entitled to benefits from preventive removal from the workplace, but argued that the worker had entitlement for depression as a consequence of the removal. In the context of this argument, the Panel finds it necessary to consider the issue of preventive removal.

[89] The statute defines occupational disease as follows:

1(1) In this Act

...

“occupational disease” includes,

- (a) a disease resulting from exposure to a substance relating to a particular process, a trade or occupation in an industry,
- (b) a disease peculiar to or characteristic of a particular industrial process, trade or occupation,
- (c) a medical condition that in the opinion of the Board requires a worker to be removed either temporarily or permanently from exposure to a substance because the condition may be a precursor to an occupational disease, or
- (d) any of the diseases mentioned in Schedule 3 or 4.

[90] The Panel must consider whether the worker was entitled to benefits on the basis of clause (c) of the definition, that is, that the worker had “a medical condition that in the opinion of the Board requires a worker to be removed either temporarily or permanently from exposure to a substance because the condition may be a precursor to an occupational disease.”

[91] Examining the evidence as a whole, as well as the Tribunal’s jurisprudence, the Panel concludes that the worker was entitled to a limited period of benefits for preventive removal, although subsequent investigation revealed that removal from the workplace was medically unnecessary.

[92] The worker’s family physician instructed to change her area of work in approximately September 1995. At that time, the diagnosis was “mild lung fibrosis.” There was no objective evidence to support the diagnosis of lung fibrosis, given that a chest x-ray August 1995 was negative. In retrospect, the removal from the workplace was not justified on the basis of the medical findings or the exposure evidence. Nonetheless, the Tribunal’s jurisprudence indicates that a temporary period of removal from the workplace may be accepted to allow for investigations to take place.

[93] For example, in *Decision No. 1420/97* (October 9, 2001), the worker began to experience symptoms at work in 1987 and they became more significant in 1989. In 1990, a respirologist was concerned that the worker might have mild occupational asthma and he recommended that the worker find a job where he was not exposed to TDI or isocyanate. The worker stopped working in February 1991. The Panel concluded that the worker did not have occupational asthma. The Panel concluded that the worker’s ongoing symptoms were not work-related. The worker was not entitled to benefits for occupational asthma, or to benefits for his ongoing symptoms. However, from February to May 1991, the worker was off work on his doctor’s advice for investigation of the possibility that he was developing occupational asthma. The Panel found that the worker was entitled to benefits for this period.

[94] This approach is consistent with the Tribunal’s jurisprudence on preventive removal from the workplace. However, as noted in *Decision No. 820/93A* (1995), 34 W.C.A.T.R. 132, once the original diagnosis is shown to be incorrect, entitlement would be considered appropriate thereafter.

[95] In this appeal, the WSIB granted limited entitlement for aluminum exposure on the basis of several opinions from Dr. Carr, Occupational Medicine Consultant. In January 1996, Dr. Carr discussed the worker’s case as follows:

BACKGROUND INFORMATION:

This now 44 year old worker has been with the accident employer since September 1988. The worker states that her duties involved cutting aluminum sheets on a machine and forming the aluminum elements to be mounted on louvers. She states that most of the aluminum dust was on the tables and also the floor was covered with aluminum dust and rarely cleaned.

Over a period of time she was not feeling well with difficulty in breathing and very weak and also noticed high blood pressure.

A serum aluminum level which was performed on 22 August 1995 was 0.420 umol/l (normal values are up to 0.220 umol/l)...The Plant moved to a new location in August 1995. Her respiratory problems began approximately 1-2 years

ago. There is no prior history of respiratory problems nor family history of any. She has smoked for approximately five years.

COMMENTS:

Although there is no doubt that this worker has had the potential of exposure to aluminum, and her aluminum levels on one occasion are higher than the normal range, it has not been ascertained that health effects from aluminum occur at the levels that the worker has. *In fact, the Ministry of Labour guidelines for aluminum in serum just say that at a level of 0.660 umol/l there should be a review of work practices and dietary habits. There is no indication for any removal from exposure at these levels.*

...

OPINION:

1. It is very unlikely that this worker's mild lung fibrosis would be as a result of workplace exposures, but as above, on very rare occasions, lung fibrosis has been shown to be associated with very high levels of aluminum exposure.
2. Yes, this worker's elevated aluminum levels would likely be in keeping with her workplace exposures, especially noting that she used to eat her lunch at the work station, etc.
3. No, as above, these levels would not require removal from exposure. It is not considered that there would be health effects at these levels.
4. No, this worker's high blood pressure would not be in keeping with exposures, with current information.
5. No, it is unlikely that this worker would be left with any permanent impairment. To await the medical reports and results of recommendations, however. [Emphasis added]

[96] In January 1996, the worker's family physician stated that he advised the worker to ask for a place at work where she would not be exposed to any aluminium dust, and the employer was not able to accommodate. Dr. Carr reviewed the claim again when new medical information was received in the file. In March 1996, Dr. Carr gave the following opinion:

There is no evidence, currently, that worker has pulmonary fibrosis, noting Dr. Levy's report and chest x-ray reports. However, we do not have Dr. Levy's f/u report although I doubt that pulmonary fibrosis would be diagnosed.

With current information on file:

1. Increased aluminum levels compatible with workplace exposures. No indication for removal with current information.
2. No evidence of pulmonary fibrosis.
3. No evidence of a P.I. related to aluminum exposure.

[97] The Claims Adjudicator issued a decision in March 1996, advising the worker that her elevated aluminum levels could be related to occupational exposure, but these levels did not warrant removal from employment. There was also no evidence of pulmonary fibrosis and no evidence that respiratory problems were related to aluminum exposure.

[98] After reviewing the Ministry of Labour reports, Dr. Carr gave the following assessment to the claims adjudicator in April 1996:

I agree that not too much in the way of exposures were noted and certainly there were no exposures that could account for any health effects, i.e., pulmonary fibrosis.

However, noting that she used to eat lunch at the work station and as it appears unlikely that she has had exposure out of work, would still accept that the minimally elevated aluminum levels were caused by work. These levels are not of concern, medically, as it requires many, many times that level to produce health effects. ("Normal" levels refer to a normal population which likely would have had very little or no contact with aluminum, i.e., less contact than the worker.)

[99] The Panel noted above that the family physician's recommendation to remove the worker from the workplace was made without any reference to Ministry of Labour guidelines or the prevailing epidemiological evidence on

the effects of aluminum exposure. Dr. Levy also recommended removal from the workplace on the basis that a blood aluminum level of 0.420 was considered “toxic,” but this is not supported by the guidelines set by the Ministry of Labour or any other objective evidence. The Ministry of Labour found that the employer’s new premises had very low levels of aluminum dust and there was no compensable reason for the worker not to return to that employment. The worker agreed with the Ministry of Labour’s findings that the employer’s new premises were not dusty.

[100] Taking all of the evidence into account, the Panel finds that the worker’s preventive removal from the workplace was justified from September 1995 until March 19, 1996, the date of the Claims Adjudicator’s decision. At that time, the Claims Adjudicator communicated to the worker that there was no medical basis for removal from the workplace. Subsequent information from the Ministry of Labour testing further reinforced this conclusion.

[101] By this time, the family physician’s recommendation to remove the worker from the workplace was no longer reasonable, taking into account the objective medical and exposure evidence. The worker’s symptoms began with shortness of breath and coughing, but a diagnosis of pulmonary fibrosis was never confirmed and there was no basis for finding that these symptoms were related to workplace exposure. A chest x-ray in August 1995 was negative. Subsequently, these initial symptoms were overtaken by a wide variety of non-specific pain symptoms and reported seizure-like episodes.

[102] In summary, the worker is entitled to temporary benefits for preventive removal from September 1995 until March 19, 1996. However, the worker also received benefits for her bilateral arm injury during this time. The WSIB shall take this into account in calculating the worker’s entitlement to benefits for preventive removal.

(c) Claims for Depression

[103] There are two aspects to the representative’s alternative argument: First, entitlement for depression as a reaction to her health difficulties, and second, as related to her removal from work.

[104] Board policy No. 15-04-02, “Psychotraumatic Disability,” states:

Entitlement for psychotraumatic disability may be established when the following circumstances exist or develop

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

[105] In order to establish entitlement for a reaction to the worker’s “subsequent health difficulties,” it would be necessary for the Panel to conclude that those subsequent health difficulties were causally related to occupational aluminum exposure. For the reasons set out earlier in this decision, the Panel does not accept that the worker’s various health problems after September 1995 were related to aluminium exposure. Accordingly, she does not have entitlement for depression related to health difficulties she experienced.

[106] The other aspect of the argument is that the worker’s depression was related to her removal from work. As set out in the preceding section of this decision, the Panel has accepted, based upon the Tribunal’s jurisprudence,

that the worker's removal from work was justified for a limited period.

[107] However, an irrational belief that a worker has suffered a work-related harm is not compensable. This principle is illustrated in the Tribunal's decisions on claims for multiple chemical sensitivity. For example, in *Decision No. 977/05* (October 31, 2007), the Panel reviewed the Tribunal's jurisprudence and concluded [at para. 166]:

In our view, allowance of entitlement in a case such as this requires that there be objective evidence of an identifiable injuring process and evidence that the worker's symptoms resulted from that injuring process and not from factors unrelated to work exposures. *Entitlement cannot be granted solely on the basis of the worker's subjective belief of harm.*
[Emphasis added]

[108] In this case, the worker reported a number of symptoms that cannot be causally connected to aluminum exposure. These ongoing symptoms likely were a major factor in her psychiatric difficulties, but there was no evidence to support a conclusion that the worker suffered any medical condition as a result of the aluminum exposure. The psychiatric reports indicate that the worker's psychiatric condition was related to her belief that she was harmed by aluminum exposure, but the worker's representative has not brought to the Panel's attention any case law that has allowed psychotraumatic disability entitlement in analogous circumstances.

[109] The Panel does not accept that the temporary removal from the workplace was a significant contributing factor in her subsequent mental health difficulties. In reaching this conclusion, the Panel notes in particular the following evidence:

- The evidence indicates that the worker was started on Paxil in November 1995, within two months of her removal from work. This is a relatively short period of time, and is not consistent with Board policy, which allows for psychotraumatic disability entitlement for symptoms related to *extended* disablement.
- This worker's claim for aluminum exposure was initially filed on the basis of lung fibrosis, which was subsequently not established. By January 1996, Dr. Levy reported that she was seen for dyspnea (shortness of breath) and the worker was complaining of weakness and aching in her hands and legs, but denied headaches or dizziness and had had no periods of confusion. She had no cough or sputum production.
- In February 1996, the worker's family physician noted that she was in a state of "acute anxiety." In this appeal, it was submitted that the worker developed a "severe depression caused predominantly by her fear resulting from high aluminum level in her blood and her reaction to information obtained from her treating physicians that her condition will worsen in the future."
- However, in the meantime, in January 1996, repeat testing indicated that the worker's blood aluminum level was 111 NMOL/L, well below the normal level of 371 NMOL/L. This should have provided some level of comfort to the worker and her doctor. Instead, the worker's psychological condition apparently deteriorated. Given the available information, the Panel finds that this deterioration in the worker's condition was not a reaction to her work removal, but rather, due to unfounded beliefs about the nature of her condition, which had no rational connection to workplace exposure.
- The basis for the Board's decision-making was set out in the decision in March 1996 and was explained to the worker's family physician in a letter dated August 23, 1996. The letter to the worker's physician explained that the Ministry of Labour testing revealed that aluminum dust levels in the workplace were 100 times less than acceptable levels; that, even at a blood aluminum level of 0.660, all that is required is a review of work practices and dietary habits; and, that there was no evidence to support the diagnosis of lung fibrosis.
- In July 1996, Dr. Levy reported that the only abnormality he could find upon investigation was a high TSH level and a slightly low parathyroid level. These findings would be related to the worker's pre-existing thyroid condition, for which she had undergone surgery in Poland.
- In October 1996, the worker was referred to Dr. Kostolowski-Kondysar. By that time, the worker was diagnosed with adjustment disorder with mixed mood, chronic and brief reactive psychosis, disorganized type. The worker had been on Paxil since November 1995, within two months of the date that she stopped working. She reported transient symptoms of bizarre experiences in the form of not clearly defined hallucinations. The Panel is unable to find that the rapid deterioration in the worker's condition

and psychotic features were related to the workplace removal. The presence of psychotic features indicates that other, non-work-related factors were involved in causing her mental health condition.

- In July 1999, Dr. Kostolowski-Kondysar reported that the Axis I diagnosis was “Mood Disorder due to multiple medical problems,” listed as: chronic pain related to joint disease; Hyperthyroidism, Hypertension, and Seizure Disorder Not Otherwise Specified. On Axis II, the worker was said to have “Passive Aggressive Personality Disorder Traits.” The history of exposure to aluminum was cited on Axis III, but it is notable that it was not cited as a causal factor on Axis I. This report does not support a conclusion that the preventive removal from the workplace was a significant contributing factor in her psychiatric illness. To the contrary, this report implicates several other non-compensable conditions.
- In 2007, Dr. Nynkowski diagnosed chronic major depressive disorder and stated that “she has been dysfunctional for a number of years following a toxic reaction to aluminum where she worked...” However, this opinion is presupposes that the worker did have aluminum toxicity, which, as the Panel has discussed, is not borne out by the objective medical evidence. Elsewhere in the report, Dr. Nynkowski refers to “alleged aluminum toxicity,” which suggests that he is not giving a medical opinion that the worker in fact suffered from aluminum toxicity, but rather, that is accepting her description of perceived harm from aluminum exposure. Furthermore, Dr. Nynkowski did not begin seeing the worker until several years after the events at issue, making any opinion on causation less persuasive.
- Dr. Kertesz observed that the worker’s “obsession with aluminum exposure” contributes to the worker’s depression and many of her symptoms are related to depression. The Panel finds that the removal from work did not make a significant contribution to the worker’s psychiatric condition, but rather, it was her subjective reaction – the “obsession with aluminum exposure” – that was the primary cause of her symptoms.
- Finally, the Panel notes that the worker does have other unrelated health issues that could contribute to her ongoing symptoms, including thyroidectomy, fibromyalgia, and diabetes.

[110] For all of the foregoing reasons, the Panel finds that the worker does not have entitlement for psychotraumatic disability under the claim established for aluminum exposure.

DISPOSITION

[111] The appeal is allowed in part as follows:

- The worker does not have entitlement for a neurological condition or any other health conditions as a result of workplace exposure.
- The worker is entitled to temporary benefits for preventive removal from the workplace for the period from September 1995 until March 19, 1996. However, the worker also received benefits for her bilateral arm injury during this time. The WSIB shall take this into account in calculating the worker’s entitlement to benefits for preventive removal.
- The worker does not have entitlement for depression under this claim, either as a reaction to perceived health effects of exposure or as a reaction to the preventive removal.

Appeal allowed in part.

1. The Panel notes that this laboratory test uses a different unit of measurement (NMOL/L rather than UMOL/L) from the other testing, but the report provides a reference point by expressing the normal level in NMOL/L.

2. On this point, Dr. Kertesz cited one study that found changes in psychological status, neuromotor speed and accuracy in workers exposed to aluminum for more than ten years. Guo, G. Ma H, Wang X. Psychological and neurobehavioural effects of aluminum on exposed workers; 1998 Sep; 32(5): 292-4. (Article in Chinese with English abstract).

3. In *Decision No. 1574/99R* (2007), 84 W.S.I.A.T.R. (online), a request for reconsideration was granted on the denial of entitlement related to solvent exposure. However, the decision was not reopened on the issue of denial of entitlement related to aluminum exposure.



Decision No. 1172/08

Vice-Chair: Patterson

Decision — June 18, 2009

Neutral Citation: 2009 ONWSIAT 1476

Non-economic loss (medical assessments) – Permanent impairment (degree of impairment) (back).

Assessment by Board NEL assessor should be given greater weight than determination by Board NEL clinical specialist.

The worker appealed a decision of the Appeals Resolution Officer confirming a 12% NEL award for low back impairment. The appeal was allowed.

The Appeals Resolution Officer confirmed the calculation of the NEL clinical specialist. The clinical specialist did not rely on the range of motion measurements taken by the NEL assessors during two NEL assessments, because the clinical specialist found that the assessors' measurements were not consistent with the medical information on file.

The Vice-Chair noted that the assessors are selected and trained by the Board as qualified to rate permanent impairment by applying the AMA Guides. The NEL assessments should be given greater weight. The range of motion reported by the assessors was consistent with each other. The Vice-Chair concluded that the NEL award should be calculated using the most recent NEL assessment.

Perte non économique (évaluations médicales) – Déficience permanente (degré de déficience) (dos).

Il fallait accorder plus de poids à l'évaluation de l'évaluateur pour PNF de la Commission qu'à la détermination du spécialiste clinique pour PNF de la Commission.

Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels confirmait le taux de 12 % de son indemnité pour perte non financière (PNF) pour des troubles lombaires. L'appel a été accueilli.

Le commissaire aux appels avait confirmé le calcul du spécialiste clinique pour PNF. Ce dernier ne s'était pas fondé sur les mesures d'amplitude articulaire prises lors des évaluations aux fins de la détermination de l'indemnité pour PNF parce qu'il avait estimé qu'elles ne correspondaient pas aux renseignements médicaux au dossier.

Le vice-président a noté que les évaluateurs sont choisis et formés par la Commission en tant que spécialistes qualifiés pour évaluer la déficience permanente en fonction des *AMA Guides*. Il fallait donner plus de poids aux évaluations effectuées aux fins de la détermination de l'indemnité pour PNF. Les amplitudes articulaires notées par les évaluateurs concordaient entre elles. Le vice-président a conclu qu'il fallait calculer l'indemnité pour PNF à partir de la plus récente évaluation pour PNF.

Workplace Insurance Legislation Considered:

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

s. 42

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

s. 46

Cross-References:

Decision No. 1172/08E (August 28, 2008) [2008 ONWSIAT 2306]

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[DISPOSITION](#)

APPEAL by the worker from a decision of the Appeals Resolution Officer regarding the amount of the worker's award for non-economic loss.

June 18, 2009. THE TRIBUNAL: —

BEFORE: A.T. Patterson, Vice-Chair

HEARING: June 11, 2009 at Toronto, Written

DECISION(S) UNDER APPEAL: WSIB ARO decision dated August 13, 2007

APPEARANCES:

For the worker: Sam Cirillo, Paralegal

For the employer: Did not participate

REASONS

(i) Introduction

[1] The worker appeals the decision of Appeals Resolution Officer M. Fragomeni, dated August 13, 2007. That decision concluded that the worker was not entitled to an increase in the quantum of his non-economic loss (NEL) award of 12% for a low-back impairment.

[2] The issue is whether the worker's non-economic loss award was correctly assessed at 12% and whether the worker is entitled to a redetermination of his Non-economic loss award.

[3] The worker, a labourer, was injured on September 13, 2001. Initial entitlement was granted and the worker was granted a 12% NEL award for a permanent impairment to his low back. In October 2004 he was granted a further NEL award for a permanent psychotraumatic disability. The combined whole person impairment was 34%. The worker objected to the quantum of the low back NEL. This objection was denied by the ARO decision cited above.

[4] The worker appealed the ARO decision to the Tribunal, but his notice of appeal was seven days late. Tribunal *Decision No. 1172/08E* (August 28, 2008) granted an extension of time to file the appeal and it has been referred to my attention for adjudication.

[5] The issues for my consideration in this appeal are therefore whether the NEL quantum is appropriate.

(ii) Law and Policy

[6] Section 46 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, and section 42 of the pre-1997 *Workers' Compensation Act* [R.S.O. 1990, c. W.11] provide that if a worker's injury results in permanent impairment, the worker is entitled to compensation for non-economic loss.

[7] "Impairment" means a physical or functional abnormality or loss (including disfigurement) which results from an injury and any psychological damage arising from the abnormality or loss.

[8] "Permanent impairment" means impairment that continues to exist after a worker reaches maximum medical recovery (formerly referred to as maximum medical rehabilitation under the pre-1997 Act).

[9] Legislation and Board policy provide that the degree of a worker's permanent impairment is determined in accordance with the prescribed rating schedule or criteria, any medical assessments, and having regard to the health information on file. The prescribed rating schedule for most impairments is the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 3rd ed. rev. (Chicago: American Medical Association, 1990) [the AMA Guides].

(iii) Submissions

[10] The worker argues, in submissions provided by his representative's office dated March 11, 2009, that the ARO erred in confirming the NEL clinical specialist's calculation of percentage of NEL benefits which was not consistent with the assessments of Dr. Prior in 2002, or of those of Dr. Paitich in 2003, NEL assessors. The NEL clinical specialist did not rely upon those measurements because the range of motion (ROM) measurements taken during the NEL assessments were not consistent, in her view and confirmed by the ARO, with the medical information on file.

(iv) Medical Evidence Relating to the Worker's Low Back Impairment

[11] The first medical record relating to clinical findings with respect to the worker's low-back ROM is Dr. Krystyna Prutis' report dated October 31, 2001. Dr. Prutis is a consultant in physical medicine; her report reads in part as follows:

On examination, he was walking with an antalgic gait. Examination of the back revealed decreased lumbar lordosis. There was increased tone in the lumbar paraspinal muscles. Range of motion of the lumbosacral spine was decreased in forward flexion by 75%. Extension was virtually nil. Movements were painful.

...

Straight leg raising was achievable to 75° bilaterally. Laseque test was negative.

[12] The worker was referred to the Regional Evaluation Centre and seen by Dr. Malcolm and a physical therapist, L. Mayer. Those medical professionals produced an interim report dated January 8, 2002 in which they noted the following:

His standing alignment showed flexion through the hips. With some difficulty, he was able to extend upright. There was an appearance of left calf wasting. From his stance or neutral position, he could flex forward to bring his fingertips to the mid-thigh level. This extreme increased his low back pain and leg pain. He extended to neutral and had barely a quarter extension beyond with an increase of both low back and lower extremity pain. Right/left side bending were significantly restricted such that his fingertips barely came to the mid-thigh level, again because of low back pain. Spinal rhythm was abnormal.

...

On straight leg raising in the sitting position with distraction, he permitted 80 degrees on the right and 70 to 80 degrees on the left. This was only possible on one occasion and thereafter in the sitting position he resisted because of low back and

left leg pain. In the supine position, he permitted 50 degrees on the right and this extreme was associated with left low back pain and on the left, he permitted 45 to 50 degrees with an increase in his low back pain. With help, he was able to get into the long sitting position, but complained of significant left low back pain. In this position, his fingertips came to the mid-shin level and he had no pain while resting in this position.

...

By way of summary, his inappropriate responses to the physical examination included positive axial compression and simulated rotation (which was actively resisted), straight leg raising discrepancy and marked pain behaviors consisting of sighing, grimacing and verbalization.

[13] On April 9, 2002 Dr. Schacter, a neurosurgeon, prepared a report of an examination which took place the day before. That report includes the following:

On examination the patient appears somewhat older than his stated years. He moved about very slowly and cautiously and had definite difficulty in getting on and off the examining table. As far as his lower back is concerned there was tenderness in the left paralumbar musculature although there was not a great deal of demonstrable spasm. He had very little forward flexion of the trunk with finger tips reaching about mid thigh before significant pain prevented him from proceeding further. With the patient lying on his back straight leg raising was carried out to 60 degrees on the right with the left cross over pain and about 45 degrees elevation was all that he could accomplish on the left.

There was some atrophy of the left calf.

[14] On August 15, 2002 the worker was assessed by Dr. Prior for a NEL assessment of his low back. Dr. Prior recorded the worker's flexion as between 0-14°, his extension from neutral position as 10°, and right and left lateral flexion as 0°. Sensory and motor deficits were recorded as was an unoperated vertebral condition. Dr. Prior commented: "motor testing was associated with pain, but good effort put forth."

[15] The worker was re-assessed on February 26, 2003 by Dr. Paitich. Dr. Paitich's findings with respect to ROM were similar to those of Dr. Prior, though he specified that the flexion was recorded as 8°, and extension was assigned a 0° value. Dr. Paitich commented: "+ + functional overlay + exaggerated pain behaviour. + SLR @30° L + R + Laseque sign". Dr. Paitich did not record any motor deficit, but rated the sensory deficit at the S1 level as "decreased sensation with severe pain, which may cause outcries as well as prevent activity (major causalgia)".

[16] Both Dr. Prior and Dr. Paitich checked off a box on the NEL Assessment forms confirming that they were "satisfied that [the] medical assessment of the area(s) of permanent impairment accurately reflects and is consistent with the WSIB medical section sent".

[17] On June 25, 2003, the worker was seen by Dr. Massicotte, a neurosurgeon. The medical report associated with that visit includes the following statements:

Motor examination was somewhat limited by pain, but no gross weakness was identified in any of the muscle groups in the lower limbs. Straight leg raise was positive on the right at 30 degrees on the left. Range of the motion of the lumbar spine was limited in all planes.

[18] A report from Dr. Prutis dated December 16, 2003 indicates:

Lumbar lordosis was decreased. Range of movement of the lumbosacral spine was decreased in forward flexion by more than 85%. Extension was virtually nil.

There was no wasting in the lower extremity muscles. Muscle strength was normal in the lower right extremity. It was difficult to be objectively effectively in the left lower extremity due to extreme pain inhibition. Sensation was decreased in the left lower extremity in a non-dermatomal distribution. Deep tendon reflexes were symmetrical.

Straight leg raising was achievable to 75° on the right and about 40° on the left in supine position. Laseque test was negative.

[19] A report dated January 13, 2004 prepared by a physiotherapist, Dr. Ankur Desai, indicates:

Lumbar flexion 30° limited due to pain in back, lumbar extension 10° limited with low back pain. Right and left hip flexion 90°, extension 15°. Right hip abduction, external and internal rotation could not be assessed. [The worker] reported that moving his right limb would produce severe pain in his lower back. SLR on the right side is 30° giving pain on lower left leg. Left side SLR could not be assessed.

[20] Dr. Prutis provided a report dated February 26, 2009. That report notes:

Examination of the lumbar spine revealed decreased lumbar lordosis. Range of movement of the lumbosacral spine was achievable in forward flexion to merely 5°. Extension was virtually nil. Movements were painful.

...

Straight leg raising was achievable to about 30° bilaterally in the supine position and 80 in sitting position. Laseque test was negative.

(v) Analysis

[21] Having reviewed all the information on file, and the medical evidence outlined above in particular, it is my view that the worker's appeal should be granted.

[22] Notwithstanding the comments contained within the REC interim report of January 8, 2002, I find that the NEL assessments should be granted greater weight in the determination of this matter.

[23] The NEL assessors, Drs. Prior and Paitich, are trained and selected by the Board as qualified to rate permanent impairments by applying the AMA guides. The recorded range of motion measurements and conclusions of the two NEL assessors reports are consistent with each other.

[24] In my view the worker's NEL award should be calculated using the most recent of the two reports, that of Dr. Paitich.

DISPOSITION

[25] The appeal is allowed. The worker's NEL award for his permanent impairment to the low-back is to be calculated using the ranges of motion recorded by Dr. Paitich.

Appeal allowed.



Decision No. 1211/08R

Vice-Chair: E. Smith

Decision — April 30, 2009

Neutral Citation: 2009 ONWSIAT 1084

Reconsideration (error of law) – Loss of earnings (review) (after seventy-two months) – Permanent impairment (rating schedule) (whole person concept) – Words and phrases (condition) – Permanent impairment (redetermination) (significant deterioration).

Section 44 of the WSIA allows review of LOE benefits when there is a significant deterioration in a condition that results in redetermination of the degree of permanent impairment – The relevant condition is the condition under consideration of purposes of LOE benefits, and not necessarily the overall condition.

The worker suffered knee injuries in 1999. The Board granted a 10% NEL award for the right knee and a 13% award for the left knee. When combined, the worker received a 22% NEL award. After right knee replacement surgery, the Board redetermined the NEL award, resulting in a 12% rating for the right knee and a 10% rating for the left knee, which combined for a 21% award, but the Board maintained the 22% award.

In *Decision No. 1211/08*, the vice-chair concluded that there was a significant deterioration in the right knee condition, which allowed the Board to review the worker's LOE benefits after final review, under s. 44(2.1)(c) of the *Workplace Safety and Insurance Act, 1997*. The employer applied for reconsideration of *Decision No. 1211/08*.

The 2% deterioration in the right knee condition reflected a 20% change. There was no error by the vice-chair in finding that this represented a significant deterioration.

The employer submitted that ss. 44(2.1)(c) and 47 should apply on a whole person basis and that there was no deterioration of the worker's overall condition in this case. The Vice-Chair found that the reference to permanent impairment was not intended to refer only to the sum of multiple impairments. A permanent impairment is always rated on a whole person basis. Ratings are generally first specified based on the degree of impairment of the body part and then recalculated on a whole person basis. When s. 47 refers to the rating for a permanent impairment as expressed as a percentage of the total impairment, it is referring to the method of calculation applicable to a specific impairment. A reference to whole person rating does not necessarily imply a reference to multiple injuries on a global basis.

Section 47 addresses calculation of NEL ratings. Section 44 addresses loss of earnings benefits, allowing review of LOE benefits when there is a significant deterioration in a condition that results in redetermination of the degree of permanent impairment under s. 47. The word "condition" is a general term. The Vice-Chair agreed with *Decision No. 1211/08* that the condition that is relevant is the condition which is under consideration for the purposes of LOE benefits. A review addressing only the cumulative whole person NEL rating would be inadequate in cases where the deterioration in a specific impairment impacts on the loss of earnings.

The Vice-Chair stated that this analysis does not necessarily preclude entitlement to a review of LOE benefits when the relevant condition is the cumulative level of impairment for multiple injuries on a whole person basis, as in *Decision No. 595/08*. The word "condition" is broad enough to apply in both contexts.

The application to reconsider was denied.

Réexamen (erreur de droit) – Perte de gains (réexamen) (après soixante-douze mois) – Déficience permanente (barème des taux) (concept de l'intégralité de la personne) – Libellé (condition) – Déficience permanente (nouvelle détermination) (détérioration importante).

L'article 44 de la Loi de 1997 permet un réexamen des prestations pour PG quand il se produit une détérioration importante dans l'état du travailleur qui donne lieu à une nouvelle détermination de son degré de déficience permanente – L'état pertinent est l'état visé aux fins des prestations pour PG, et non pas nécessairement l'état global du travailleur.

La travailleuse a subi des lésions aux genoux en 1999. La Commission lui a reconnu le droit à une indemnité pour perte non financière (PNF) de 10 % pour le genou droit et de 13 % pour le genou gauche. Une fois ces deux taux combinés, la travailleuse avait droit à une indemnité pour PNF de 22 %. Après une arthroplastie totale du genou droit, la Commission a procédé à une nouvelle détermination de l'indemnité pour PNF, et elle est parvenue à un taux de 12 % pour le genou droit et de 10 % pour le genou gauche. Une fois combinés, ces taux donnaient une indemnité pour PNF de 21 %, mais la Commission a maintenu le taux de 22 %.

Dans la *décision n° 1211/08*, la vice-présidente a conclu que la Commission était autorisée à réexaminer les prestations pour PG après le dernier réexamen, en application de l'alinéa 44 (2.1) c) de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997), étant donné qu'il y avait eu une détérioration importante de l'état du genou droit. L'employeur a demandé un réexamen de la *décision n° 1211/08*.

La détérioration de 2 % de l'état du genou droit reflétait un changement de 20 %. La vice-présidente n'avait pas erré en concluant que cela représentait une détérioration importante.

L'employeur soutenait qu'il fallait appliquer l'alinéa 44 (2.1) c) et l'article 47 de façon holistique et qu'il n'y avait pas eu de détérioration de l'état général de la travailleuse en l'espèce. La vice-présidente a conclu que « déficience permanente » ne s'entend pas seulement de la somme de déficiences multiples. Une déficience permanente est toujours évaluée de façon holistique. Les taux sont généralement spécifiés en premier lieu selon le degré de déficience de la partie du corps concernée pour ensuite être calculés de nouveau en fonction de la personne globale. Quand il fait référence à l'établissement du taux de déficience permanente exprimé en pourcentage de déficience permanente totale à l'article 47, le législateur fait référence à la méthode de calcul applicable à une déficience particulière. La référence à la détermination d'un pourcentage de déficience globale ne suppose pas nécessairement une référence à des lésions multiples sur une base globale.

L'article 47 traite du calcul des taux d'indemnité pour PNF. L'article 44 traite des prestations pour perte de gains (PG), autorisant un réexamen des prestations pour PG dans les cas où une détérioration importante entraîne une nouvelle détermination du degré de déficience permanente en application de l'article 47. Le mot « état » est un terme général. La vice-présidente s'est dite d'accord avec la *décision n° 1211/08* pour dire que l'état pertinent est l'état faisant l'objet d'un réexamen aux fins des prestations pour PG. Un réexamen portant seulement sur le taux cumulatif global de l'indemnité pour PNF serait inadéquat dans les cas où la détérioration de troubles invalidants particuliers a une incidence sur la perte de gains.

La vice-présidente a déclaré que cette analyse n'empêche pas nécessairement le droit à un réexamen des prestations pour PG quand l'état pertinent est le degré de déficience totale pour des lésions multiples dans une perspective holistique, comme dans la *décision n° 595/08*. Le mot « état » est assez large pour s'appliquer dans les deux contextes.

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

Decision No. 1119/04R (2005), 75 W.S.I.A.T.R. (online) reld to
Decision No. 396/08R (2009), 88 W.S.I.A.T.R. (online) reld to
Decision No. 595/08 (2008), 86 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(1)

s. 43(1)

s. 44(1)

s. 44(2)

s. 44(2.1)

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Cross-References:

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[DISPOSITION](#)

APPLICATION by the employer for reconsideration of *Decision No. 1211/08*.

April 30, 2009. THE TRIBUNAL: —

BEFORE: E.J. Smith, Vice-Chair

HEARING: March 10, 2009, at Toronto, Written

DECISION(S) UNDER APPEAL: Employer request for reconsideration of *Decision No. 1211/08* dated June 23, 2008

APPEARANCES:

For the worker: D. McCormick, consultant

For the employer: E. Kosmidis, Lawyer

REASONS**(i) Introduction**

[1] The employer requests reconsideration of *Decision No. 1211/08* (2008), 86 W.S.I.A.T.R. (online). That case considered the application of section 44(2.1) of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA), respecting NEL deteriorations, to the case of a worker who had injuries to two different body areas as a result of a single accident. The question is whether the exception set out in section 44(2.1), allowing for a redetermination of FEL benefits, applies to a significant deterioration in one body area when the worker's overall NEL rating for all body areas is not increased on a whole person basis.

[2] In this case, the employer also submits that the Vice-Chair erred in finding that there was a significant deterioration even in that one body area.

(ii) The Reconsideration Test

[3] 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.

[4] 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.

[5] 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.

[6] 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.

[7] 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 reopened.

[8] 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) The Facts of Decision No. 1211/08

[9] The facts of this case are as follows. Fuller details are set out in *Decision No. 1211/08*.

[10] The worker was hurt at work on January 27, 1999, when she slipped on ice, twisting and injuring her right knee. In December 2000, the Board accepted entitlement for a left knee condition also.

[11] The worker was initially granted a 7% NEL award for the right knee, which was increased on appeal to 10% in January 2001.

[12] The worker received a NEL award of 13% for the left knee in April 2003. The left knee award was then "combined" with the right knee award under the Board's Combined Values Chart and reduced to an incremental award of 12%. The combined whole person award for the right and left knees was determined at 22%.

[13] The worker had left knee replacement surgery on May 26, 2004. The worker was paid LOE benefits for her time off work following the left knee surgery. It was within the 72-month "lock-in" period discussed below.

[14] Relatively soon after her first surgery, replacing the left knee joint, she was put on the waiting list for a right knee replacement.

[15] The 72-month lock-in date for loss of earnings benefits then occurred, on January 27, 2005.

[16] On March 21, 2005, the worker had the right knee replacement surgery. She was off work following that surgery until September 2005. The issue in this appeal was whether she was entitled to LOE benefits for that time period, given that the surgery took place after the 72-month lock-in date for the accident.

[17] In December 2005, there was a NEL redetermination of the worker's bilateral knee impairment. The Board's NEL clinical specialist calculated the impairment based on 12% for the right leg and 10% for the left leg. The 12% and 10% awards were combined under the Combined Values Chart, resulting in a whole person impairment

of 21%. Therefore the 2005 NEL redetermination determined that (1) the right knee had worsened (an increase from 10% to 12%), (2) the left knee had improved (from 13% to 10%) and (3) the combined value under the Chart was 21%, slightly lower than the pre-redetermination impairment of 22%. The Board did not reduce the worker's NEL award but continued it at 22%.

[18] Because the NEL redetermination was after the lock-in date and did not, in the Board's view, demonstrate a significant deterioration, the Board declined to reconsider LOE benefits. Therefore the worker was denied LOE benefits for the period in issue.

(iv) The Law and Board Policy

[19] The relevant sections of the WSIA and of Board policy are as follows.

[20] Section 13(1) of the WSIA states:

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.

[21] Section 43(1) 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.

[22] Section 44 states:

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,

...

(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.

[23] The Vice-Chair noted in a footnote that section 44 of the Act was subsequently amended to expand the circumstances in which LOE benefits may be reviewed after 72-months. However, as the Vice-Chair noted, these amendments were not applicable to the facts of this decision.

[24] The employer also refers me to section 47 of the Act, which states:

(47)(1) If a worker suffers permanent impairment as a result of the injury, the Board shall determine the degree of his or her impairment expressed as a percentage of total permanent impairment.

(2) The determination must be made in accordance with the prescribed rating schedule (or, if the schedule does not provide for the impairment, the prescribed criteria) and,

(a) having regard to medical assessments, if any, conducted under this section, and;

(b) having regard to the health information about the worker on file with the Board.

(3) The Board may require a worker to undergo a medical assessment after he or she reaches maximum medical recovery.

(v) The Analysis of the Prior Vice-Chair

[25] The prior Vice-Chair addressed the issue, in key respect, as follows. The full analysis is set out in *Decision No. 1211/08* [at paras. 44-57].

The basis of the claim for LOE benefits is the right knee surgery, and there was deterioration in the right knee with the redetermination in 2005. The whole person impairment increased from 10% to 12%. No issue was raised either by the Board or by the employer's representative regarding the significance of this deterioration, and I am prepared to find that this is significant.

...

I have considered the interpretation of the term "condition" in s. 44(2.1)(c) of the Act in the context of the facts here.

The term is not defined in the Act or in Board policy, and, to my knowledge, there have not been any Tribunal cases that have interpreted it.

I agree with the submission of the worker's representative that the Act is remedial legislation and the term should be given a broad and liberal interpretation...

The term should be interpreted in harmony with what the legislation is attempting to achieve. In my view, what the legislation is attempting to achieve is that, at a certain point in time, the gate closes for the review of LOE benefits; those benefits are not going to be reviewed open-endedly. That general rule is however subject to a number of exceptions: if the worker comes within one of the exceptions, he or she gets through the gate. The subject-matter is earnings loss and the exceptions, in general terms, reflect cases where it is fair to either reopen (significant deterioration) or leave open (labour market re-entry plan not yet complete) the gate.

In my view, one should interpret the term "condition" in the context of whether it is fair to reopen LOE benefits.

Reopening of LOE benefits is permitted where the worker has had a significant deterioration in his or her compensable condition as confirmed by a NEL redetermination, that is, permanent deterioration. That is fair because a significant deterioration in the compensable condition may well impact the worker's ability to earn.

The Board's approach to the interpretation of the word "condition" in s. 44(2.1)(c) here was to look at the "whole person." Even if the individual components of the composite picture had changed, but the combined whole person impairment remained (approximately) the same, it was the Board's position that there had been no significant deterioration in the worker's condition that would entitle the worker to have her LOE benefits reviewed.

However, the individual components (impairments) may affect earning ability in a way that is not reflected in the combined whole person impairment. An example would be a secretary with two permanent impairments, one affecting her dominant wrist, with a 5% NEL award, and one affecting her knee, with a 15% NEL award. If the wrist condition deteriorates such that the NEL award is reassessed to 15% and knee surgery results in an improvement such that the NEL award is reassessed at 5%, the combined NEL is still the same, but there may well have been a significant impact on her ability to earn income as a secretary.

The interpretation of the term "condition" should accord with the purposes the Act sets [out] to achieve. In this case, there is a direct relationship between the compensable condition, the right knee, and the claim for LOE benefits: it was the right knee surgery that gives rise to the claim for LOE benefits and it is the right knee that has deteriorated. I interpret the term "condition" in section 44(2.1) (c) to mean the condition giving rise to the claim for review of LOE benefits. There was accordingly a significant deterioration in the worker's compensable condition entitling her to a review of LOE benefits.

My analysis, concluding that "the significant deterioration . . . that results in a redetermination" of permanent impairment takes into account the component impairments, does not turn on whether there is any specific effect on earnings in any individual case. There may or may not be an impact. However, interpreting the term "condition" to apply on a whole body basis as the Board has done would exclude the case in which the deterioration in one body area did affect the worker's earnings.

[26] The Vice-Chair concluded [at para. 58]:

I have concluded that there was a significant deterioration in the worker's compensable condition entitling her to a review and reopening of LOE benefits. The worker is entitled to LOE benefits for her loss of earnings resulting from surgery for her compensable knee condition, from March 21, 2005 to September 6, 2005.

(vi) The Submissions of the Employer

[27] The employer submits that the decision should be reconsidered because:

- a. The Vice-Chair erred in finding that the change in the NEL award from 10% to 12% for the right knee reflected a significant deterioration within section 44(2.1)(c).
- b. The Vice-Chair erred in applying section 44(2.1)(c) and section 47 of the WSIAT. The employer submits that these sections should apply on a whole person basis. Section 44 requires the deterioration of a worker's condition to result in a redetermination of the degree of permanent impairment under section 47. Section 47 requires the determination of permanent impairment to be expressed as a percentage of total permanent impairment.

[28] The employer submits that, instead, the Tribunal rejected this requirement and made its decision to reopen benefit entitlement after the 72-month period had expired even though the worker's total permanent impairment assessment found that there was no deterioration of the worker's total overall condition.

(vii) Conclusions

(a) Whether the Vice-Chair Erred in Finding that the Deterioration in the Right Knee Was Significant

[29] I find no error in the Vice-Chair's determination that the change in the NEL award from 10% to 12% for the right knee reflected a significant deterioration in the level of that impairment. The change was a 20% change. The question of whether a 2% change may be significant was a question of fact or of mixed fact and law to be determined by the Vice-Chair. The determination is not in error simply because the employer does not agree with the Vice-Chair's assessment.

(b) Whether the Vice-Chair Erred in Finding that Section 44 Applied to a Deterioration of the Right Knee Condition Irrespective of the Worker's Rating on a Whole Person Basis

[30] I do not agree with the employer's interpretation of section 47, as necessarily referring to the worker's global whole person impairment for all NEL rated injuries. In my view, it may be read as referring to a specific NEL-rated impairment.

[31] The provision states that, if a worker suffers permanent impairment as a result of the injury, the Board shall determine the degree of his or her impairment expressed as a percentage of total permanent impairment, and that the determination must be made in accordance with the prescribed rating schedule or, "if the schedule does not provide for the impairment, the prescribed criteria".

[32] If the reference in this provision to "permanent impairment" had been intended to be only to the sum of a worker's multiple impairments, it would have been necessary for the language to contemplate that different rating schedules might be applicable to that impairment: i.e. a person with ratings for both a low back injury and a sequential psychotraumatic injury would have ratings under both the AMA Guides (American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 3rd ed. (revised) (Chicago: AMA, 1990)) and under the Board's prescribed criteria for psychotraumatic injuries. If the section were intended to refer to the sum of both ratings, it would have referred to ratings made in accordance with the prescribed rating schedule, "and/or", if the schedule did not provide for one or more of the rated impairments, in accordance with the prescribed criteria. The fact that the language of the section contemplates an either/or situation for the rating schedule indicates that it is referring to a specific NEL rating, and not to the sum of all the NEL ratings that a worker might have. The provision provides that a worker is entitled to a NEL rating for each area of permanent impairment. It is not inconsistent with the interpretation of the prior Vice-Chair.

[33] In my view, the employer is misinterpreting the requirement that the worker's impairment be "expressed as a percentage of total permanent impairment". It is necessary to consider how permanent impairment is rated under the Act. Under the Act, a permanent impairment rating is always done on a whole person basis. With respect to a worker's permanent impairment rating under the AMA Guides, the Forward to the Third Edition of the Guides

(Revised) states [at viii]:

The *Guides* continues to espouse the principles that all impairments affect the individual as a whole and that all impairments should be expressed as impairments of the “whole person”. This is done with the aid of the “Combined Values Chart”...

[34] Under the AMA Guides, ratings are generally first specified based on the degree of impairment of specific body areas, and then recalculated on a whole person basis. Therefore an impairment involving a worker’s hand, for instance, may first be rated as a percentage of impairment of the upper extremity and then re-rated as a percentage of impairment on a whole person basis. Under the Guides, even a single injury will be given a whole person rating. The whole person concept is also applied when there are ratings to more than one body area. In that case, each body area is separately rated, on a whole person basis, and then the ratings are combined under the Combined Values Chart to obtain a whole person rating for the combined multiple injuries.

[35] However, a reference to a whole person rating does not necessary imply a reference to multiple injuries on a global basis. Single injures also receive whole person ratings. Even in the case of multiple injuries, a reference to a whole person rating is merely a reference to the method of calculation used for each of the ratings. The language may still be read as referring to a specific rating.

[36] When section 47 refers to the fact that the rating for a permanent impairment is expressed as a percentage of total permanent impairment, I understand it to be referring to the method of calculation applicable to a specific impairment.

[37] In any event, in my view, section 47 does not directly address the question that the prior Vice-Chair addressed under section 44. Section 47 addresses how a NEL rating is calculated for a permanent impairment. Section 44 addresses loss of earnings benefits. The exception in section 44(2.1) refers to a significant deterioration in a “condition” that results in a redetermination of the degree of the permanent impairment under section 47.

[38] The word “condition” is a general term. It is not a defined term in the Act or in the AMA Guides. I find it likely that the use of the more general term in section 44 was intentional. If the legislature had intended a more specific reference, for instance to the worker’s NEL ratings on a global basis, it could have said so. I agree with the prior Vice-Chair that the condition that is relevant is the condition which is under consideration for the purposes of the loss of earnings benefits. I agree with the prior Vice-Chair that a review that is addressed only to a worker’s cumulative whole person NEL rating would be inadequate in some cases to address whether the deterioration in a specific impairment impacts on loss of earnings. As the Vice-Chair describes, the NEL ratings, when assessed on a global basis, may not properly reflect real and important impacts on earnings. The impacts on employability might be different depending on what area of injury improves and what area of injury worsens. I agree with the prior Vice-Chair that the term “condition” in section 44(2.1) (c) means the condition giving rise to the claim for review of LOE benefits. In this case, the relevant deterioration was the deterioration in the right knee. There was a deterioration in that condition and it led to a redetermination of the NEL awards.

[39] I note further that, in my view, the Vice-Chair’s analysis does not necessarily preclude entitlement to a loss of earnings review when the relevant condition is the worker’s cumulative level of impairment for multiple injuries, as expressed in his NEL rating on a whole person basis. I have considered the analysis of *Decision No. 595/08* (2008), 86 W.S.I.A.T.R. (online), which considered the case of a worker who suffered back and neck injuries and was granted a partial FEL award at the final review (R2) date of January 2004. In July 2004 he began receiving CPP disability benefits. In November 2005, the Board granted a 30% rating for psychotraumatic disability, which was combined with the worker’s organic rating for a total 65% NEL award. The Board then reviewed the worker’s FEL award under section 44(2.1) based on a significant deterioration in the worker’s condition after the R2 date. It granted a full FEL award but offset the FEL award by the amount of the CPP benefits. The worker appealed on the basis that the psychotraumatic rating was a new rating and not a redetermination and that section 44(2.1) did not apply. He submitted that the Board was not entitled to offset the CPP award.

[40] The Panel considered the meaning of the word “condition” in section 44(2.1) as follows [at paras. 23-25]:

In our assessment, it is the deterioration of the worker's overall work related condition after the final FEL review (and after the legislated date of November 26, 2002) which is the key factor to consider. The fact that the deterioration of that work related condition resulted in a combination of organic and non organic NEL benefits is important in recognizing the relative weight of those factors for NEL purposes but does not alter the fact that both the organic and non organic components stem from and together reflect the overall deterioration of the worker's work related condition.

We also note that if we were to apply the policy as the worker claims there would be dissimilar and, in our view, unfair results in the calculation of FEL or LOE benefits among workers whose work related condition deteriorated after the final FEL review and resulted in a NEL redetermination. Workers whose work related condition worsened solely on an organic basis would see their full FEL benefits offset by the Canada Pension Plan disability benefits while those whose work related condition worsened through a combination of organic and non organic factors, like the worker in this case, would escape that offsetting. We see no logic or justification in such a situation. In our assessment, the legislation does not contemplate such a differentiated treatment of workers. The Board policy should not be read or applied in a manner that inserts such a result.

We note that in Tribunal *Decision No. 1211/08* (2008), 86 W.S.I.A.T.R. (online), the Vice-Chair interpreted the term "condition" to apply to only one of two organic permanent impairments which worsened after the final LOE review. In that case, the worker had entitlement to benefits for a permanent impairment in the right knee as well as for a permanent impairment in the left knee as a secondary condition. The Vice-Chair allowed the worker entitlement to LOE benefits for a period after the final LOE review based on what she found to be significant deterioration of the organic permanent impairment in the right knee and an increase in the NEL benefits for that knee even though the organic permanent impairment in the left knee improved resulting in reduced NEL benefits for that knee and for the overall combined NEL benefits. It is possible to interpret the Vice-Chair's approach in *Decision No. 1211/08* as not being inconsistent with our reasoning. In *Decision No. 1211/08* the Vice-Chair interpreted the term "condition" in section 44(2.1)(c) to mean "the condition giving rise to the claim for review of LOE benefits". The Vice-Chair based her conclusion on the reasoning [at para. 54] that "the individual components (impairments) may affect earning ability in a way that is not reflected in the combined whole person impairment" and noted [at para. 57] that accepting the Board's whole person approach to determining deterioration might exclude "the case in which the deterioration in one body area did affect the worker's earnings". In the appeal before us it is the combined organic and non organic components of the worker's overall permanent impairment which give rise to the claim for review of FEL benefits. In our assessment they are not separable for the purposes of the determination of the worker's FEL benefits as they arguably are in *Decision No. 1211/08*. In the present appeal it was the combined effect of the organic and non organic impairments which resulted in the significant deterioration of the worker's condition and rendered him unemployable. However, to the extent that the interpretations of the term "condition" in this decision and in *Decision No. 1211/08* are incompatible, in our view the dominant determinant which is most consistent with the wording and overall intent of the legislation is the worsening of the worker's overall work related condition.

[41] In my view, *Decisions 1211/08* and *595/08* are not inconsistent. In my view, the word "condition" is broad enough to apply in both contexts. I read section 47 to mean that a worker is entitled to a rating for each body area that is impaired as a result of the injury. Therefore, on these facts, the deterioration in his or her "condition", whether on a whole person basis, or in respect of a particular impairment, would result in a redetermination of the degree of permanent impairment from the injury. I consider the word "condition" to be broad enough to apply to these different fact situations.

[42] In any event, *Decision No. 1211/08* was the first Tribunal decision to address this issue. The fact that there may be more than one way to interpret a statutory provision is not sufficient to meet the threshold test for reconsideration. (See *Decisions No. 1119/04R* (2005), 75 W.S.I.A.T.R. (online) and *396/08R* (2009), 88 W.S.I.A.T.R. (online).) The question of the correct interpretation of this provision may be considered further in subsequent decisions.

[43] Accordingly, I find that the Tribunal's threshold test for granting a reconsideration request has not been met.

DISPOSITION

[44] The request for reconsideration is denied.

Application denied.

Decision No. 2157/08

Vice-Chair: Martel

Decision — April 7, 2009

Neutral Citation: 2009 ONWSIAT 912

Interest (rehabilitation) – Merits and justice.

According to Board policy, interest is not payable for delayed payment of LMR expenses but, in circumstances, on the merits and justice of the case, worker was entitled to payment of interest.

In February 2000, the worker made a claim for symptoms related to exposure to fumes. The claim was denied by the Board. In *Decision No. 2080/03*, released in March 2005, the Tribunal granted the worker entitlement for the workplace exposure. The Board then granted benefits to the worker including reimbursement for costs of a training program that the worker undertook from June 2000 to June 2001. The worker now appealed a decision of the Appeals Resolution Officer denying interest on the delayed payment for the training program. The appeal was allowed.

Board *Operational Policy Manual*, Document No. 18-01-08, contains a list of delayed benefit payments for which interest is paid. It provides that interest is not paid on other delayed benefits or expenses. Labour market re-entry or vocational rehabilitation is not on the list. The Vice-Chair found that Document No. 18-01-08 was a closed list. Therefore, interest is not payable on LMR expenses according to Document No. 18-01-08. As a result, interest on LMR expenses may only be paid under the merits and justice provisions of the Act and Board policy. There must be exceptional circumstances for the merits and justice provisions to apply.

In this case, there were exceptional circumstances. Until release of *Decision No. 2080/03*, the worker had been denied all entitlement under the claim. He was on his own to retrain and find alternative employment while not receiving any assistance or benefits from the Board. The worker was diligent in pursuing his claim and was not responsible for delays in adjudication.

On the merits and justice, the worker was entitled to interest.

Intérêts (réadaptation) – Bien-fondé et équité.

Selon la politique de la Commission, le paiement tardif de frais de RMT ne donne pas lieu au versement d'intérêts, mais le travailleur avait droit à des intérêts compte tenu de la justice et du bien-fondé du cas en l'espèce.

En février 2000, le travailleur a demandé une indemnité pour des symptômes liés à l'exposition à des fumées. La Commission a rejeté sa demande. Dans la *décision n° 2080/03* émise en mars 2005, le Tribunal lui a reconnu le droit à une indemnité pour une exposition professionnelle. Le travailleur a alors obtenu des prestations, y compris le remboursement des frais engagés aux fins d'un programme de formation qu'il avait pris de juin 2000 à juin 2001. Le travailleur en appelle maintenant de la décision par laquelle le commissaire aux appels refusait de lui verser des intérêts sur le remboursement tardif des frais engagés pour prendre le programme de formation. L'appel a été accueilli.

Le document n° 18-01-08 du *Manuel des politiques opérationnelles* de la Commission contient une liste des paiements tardifs donnant lieu au versement d'intérêts. Ce document prévoit que les autres paiements tardifs de

frais et de prestations ne donnent pas lieu au versement d'intérêts. La réintégration sur le marché du travail (RMT) et la réadaptation professionnelle ne sont inclus dans la liste. La vice-présidente a conclu que la liste dans le document n^o 18-01-08 est une liste fermée; par conséquent, les frais engagés aux fins de la RMT ne donnent pas lieu au versement d'intérêts selon le document n^o 18-01-08. Des intérêts sur les frais engagés aux fins de la RMT peuvent donc être versés seulement en vertu des dispositions de la Loi et de la politique de la Commission relatives au bien-fondé et à la justice. Il faut des circonstances exceptionnelles pour appliquer ces dispositions.

Il y avait des circonstances exceptionnelles en l'espèce. Jusqu'à ce que le Tribunal rende la *décision n^o 2080/03*, le travailleur s'était vu refuser toute indemnité dans ce dossier. Il avait dû se débrouiller pour se recycler et trouver un autre emploi sans aide de la Commission. Le travailleur avait fait preuve de diligence dans son dossier et il n'était pas responsable des retards décisionnels.

Compte tenu du bien-fondé du cas et de la justice, le travailleur avait droit à des intérêts.

Tribunal Decisions Considered:

Decision No. 700/03 (May 6, 2003) [2003 ONWSIAT 1056] refd to
Decision No. 649/05 (May 17, 2005) [2005 ONWSIAT 1137] refd to
Decision No. 230/06 (June 14, 2007) [2007 ONWSIAT 1567] consd
Decision No. 230/06R2 (2008), 87 W.S.I.A.T.R. (online) distd

Board Directives and Guidelines Considered:

Operational Policy Manual
Document No. 18-01-08 (since superseded)

Cross-References:

Decision No. 2080/03 (March 2, 2005) [2005 ONWSIAT 482]

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APPEAL by the worker from a decision of the Appeals Resolution Officer denying interest on delayed payment of labour market re-entry expenses.

April 7, 2009. THE TRIBUNAL: —

BEFORE: S. Martel, Vice-Chair

HEARING: October 6, 2008 at Toronto, Written
Post-hearing activity completed on February 11, 2009

DECISION(S) UNDER APPEAL: WSIB ARO decision dated September 13, 2007

APPEARANCES:

For the worker: Mr. D. Lavoie, Union representative

For the employer: WSIB account closed

REASONS

(i) Introduction

[1] The worker seeks interest on the amount he was reimbursed for a self-directed labour market re-entry (LMR) program.

[2] The appeal proceeded in writing. I considered a two-volume Case Record, Addendum 1, Addendum 2 and Post-Hearing Addendum 1. This last Addendum included *Decision No. 230/06R2* (2008), 87 W.S.I.A.T.R. (online) as well as Mr. Lavoie's submissions in respect of this decision.

(ii) Background

[3] The worker worked as an automotive technician. He stopped working around February 2000 due to various symptoms he associated with fume exposure in the workplace. His claim with the Workplace Safety and Insurance Board has an accident date of February 10, 2000. The Board did not accept entitlement for the worker's symptoms and the worker appealed this denial all the way to the Tribunal. A Tribunal hearing was held on November 5, 2003. In *Decision No. 2080/03*, released on March 2, 2005, the Panel allowed entitlement for workplace exposure. They granted loss of earnings (LOE) benefits from February 10 to February 24, 2000 and from March 28, 2000 to June 7, 2000. The Panel remitted the issue of benefits after June 7, 2000 to the Board, as held in paragraphs 50 and 51 of their decision:

The Panel notes, however, that the reports from Dr. Bishop and Dr. Molot confirm that, apart from an ongoing mild cacosmia, the worker's symptoms had largely resolved by August 9, 2000. Indeed, while we agree that his ongoing cacosmia supports that the worker would not be able to return to the work environment of a garage, it is clear that by the time of the evaluation by Dr. Bishop on June 7, 2000, the worker was capable of returning to other suitable employment.

We acknowledge that in August 2000 the worker did undertake efforts to retrain in another occupation and that he commenced a training program to become an airline pilot. We acknowledge that the worker indicated that this retraining was arranged through the Employment Insurance program. This would tend to support that it was an appropriate labour market re-entry program for the worker. This information alone, however, is not sufficient to determine the potential suitable employment or business for the worker, particularly in light of the inability of the worker to find employment in his chosen field. Unfortunately, the Panel did not have before it sufficient employment information to determine whether the retraining as an airline pilot was appropriate or necessary or whether other less extensive labour market re-entry services would have been sufficient to restore the worker's pre-injury earnings. As a result, we refer to the Board the determination of the worker's LMR program and the worker's entitlement to LOE benefits beyond June 7, 2000.

[4] Subsequent to the release of *Decision No. 2080/03*, the Board allowed entitlement for the worker's pilot retraining program and granted LOE benefits from June 7, 2000 to June 15, 2001 while the worker participated in the pilot training program. The worker obtained his pilot's license on June 15, 2001. The worker and Human Resources Development Canada (HRDC) bore the costs of this program at the time that the costs were incurred. The Board reimbursed HRDC for its portion of the program (\$6,722) and the worker for his portion (\$22,855.22).

[5] While the Board paid the worker interest on the delayed LOE benefits, it did not pay interest on the \$22,855.22 amount that the worker paid for the pilot training program. The Board relied on *Operational Policy Manual* (OPM) Document No. 18-01-08 entitled "Interest Payments", which does not provide for interest on the delayed payment of a self-directed LMR program. The worker now appeals this denial and submits that there are exceptional circumstances that warrant the payment of interest.

(iii) Policy

[6] OPM Document No. 18-01-08 entitled “Interest Payments”, which applies to all decisions made on or after August 1, 2004, states:

POLICY

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

Two groups of workers are entitled to interest on delayed benefit payments

- workers whose claims are registered **before** January 1, 1990, only if the delayed benefit payment is the result of an Appeals Resolution Officer (ARO) or the Workplace Safety and Insurance Appeals Tribunal (WSIAT) overturning a decision and now granting entitlement to compensation benefits
- workers whose claims are registered **on or after** January 1, 1990.

Interest is also payable if an adjudication decision is overturned because a policy is revised, after having been found to be contrary to the law by the Board of Directors.

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.

GUIDELINES

Delayed benefit payments

Interest is paid on the following delayed benefit payments only. Interest is not paid on other delayed benefits or expenses (e.g., health care benefits).

- loss of earnings benefits (LOE)
- non-economic loss (NEL) periodic and lump sum benefits
- loss of retirement (LRI) periodic and lump sum benefits
- re-employment payments
- survivor pension and lump sum benefits
- temporary total/partial disability benefits
- future loss of earnings (FEL) benefits and supplements
- permanent partial disability supplements
- permanent disability pension and lump sum benefits, and
- disfigurement benefits.

[7] As noted above, LMR-related expenses (and their predecessor, vocational rehabilitation expenses) are not included in the list of delayed benefit payments that may attract interest. The policy clearly states that interest is paid on the following delayed benefit payments *only* and that *interested is not paid on other delayed benefits or expenses*. As noted in *Decision No. 230/06R2*, the type of delayed payments that may attract interest payments is presented as a closed list. While I recognize that at least two other Tribunal decisions have allowed interest on tuition-related expenses under the Board’s interest policy (*Decisions No. 649/05* (May 17, 2005) and *700/03* (May 6, 2003)), such decisions were decided using a prior version of the Board’s interest policy: *Operational Policy Manual*, Document No. 05-01-08, which simply stated that interest was to be paid on the delayed payment of a list of items. That policy did not include a preamble that specifically stated that interest was to be paid *only* on the following benefits and no other, which is what the current policy provides. In any event both of the decisions were of the view that there were compelling reasons under the merits and justice of the case to award interest in those cases. As will be seen later in this decision, I have arrived at a similar conclusion in this case.

(iv) Decision No. 230/06R2

[8] *Decision No. 230/06R2* is a recently released Tribunal decision dated December 3, 2008, which considered OPM Document No. 18-01-08 in the context of interest on the reimbursement of home modifications, a health care expense. A previous Tribunal decision, *Decision No. 230/06* (June 14, 2007) had granted entitlement for

home modifications in the amount of almost \$41,000 with full interest. The Board requested a reconsideration of this decision because OPM Document No. 18-01-08 excludes the payment of interest for health care expenses. The Vice-Chair of *Decision No. 230/06R2* considered the reconsideration and ultimately allowed the Board's application for reconsideration. She held that interest was not payable on the health care benefits awarded in *Decision No. 230/06*. In considering OPM Document No. 18-01-08, the Vice-Chair held that the policy did not provide for the payment of interest on health care, except under the merits and justice provisions of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, and Board policy. She further held that Board policy and Tribunal decisions require that for the merits and justice provisions to apply, the facts must be exceptional.

[9] The Vice-Chair then considered whether there were exceptional circumstances present in order to pay interest on the health care benefits. She noted that if health care benefits are deferred, a worker may risk a negative impact on his physical recovery and that the medical outcome may not be the same if health care is delayed. She also considered important to review the extent to which the worker was responsible for the delay in obtaining entitlement for the health care costs. The Vice-Chair found that the worker was responsible for considerable delay in filing his appeals at the Board and at the Tribunal. She found that a considerable portion of the long delay in the adjudication of the appeal, which took from 1994 to 2007, was due to the fact that the worker did not actively pursue the appeal for periods of time. The fact that the worker was contributory in causing the delay was not consistent with the requirements for exceptional circumstances.

[10] Given that *Decision No. 230/06R2* was released after written submissions were made in the present case, I asked that the worker's representative be given an opportunity to make additional submissions in respect of this decision.

(v) Submissions

[11] The worker's representative, Mr. Lavoie, provided written submissions dated June 16, 2008 and January 30, 2009. In his initial submissions, Mr. Lavoie noted that the delayed benefits payment list in OPM Document No. 18-01-08 did not include or exclude LMR programs although it included re-employment payments. I note, however, that *Decision No. 230/06R2* found that the delayed benefits payment list of OPM Document No. 18-01-08 is a closed list.

[12] Mr. Lavoie also submitted that there had been a significant lapse of time (five to six years) between the time that the worker incurred the training expenses and when he was subsequently reimbursed for the expenses. This situation evolved as a result of the Tribunal overturning the Board's decision on initial entitlement. Mr. Lavoie submitted that the worker had suffered financial hardship because he had to spend over \$22,000 through various means such as credit cards, line of credit and personal loans to improve the likelihood of ever returning to work. I note that it would have been easier to consider this submission if documentary evidence had been submitted in respect of the exact interest expenses incurred by the worker for the \$22,000 loan.

[13] Mr. Lavoie also made submissions in respect of *Decision No. 230/06R2* and submitted that exceptional circumstances existed in this case. He submitted that the expenses incurred by the worker could not have been deferred five years because the worker's physical, psychological and economic condition did not permit such a delay. The employer could not accommodate the worker's restrictions thereby restricting the worker from receiving wages from the accident employer. The worker therefore had to limit his financial hardship and engage in a program that might eventually provide him with the ability to work again and to receive wages. Mr. Lavoie submitted that "it should be considered as exceptional circumstances that a worker will be kept in limbo without an LMR program for a number of years when the employer is unable to offer a re-employment program".

(vi) Conclusion

[14] I am of the view that the delayed benefits payment list of OPM Document No. 18-01-08 is a closed list. The policy specifically states that interest is not paid on other delayed benefits or expenses. LMR is not mentioned as one of the items that may attract interest. As a result, the payment of interest on LMR-related expenses may only be allowed under the merits and justice provisions of the WSIA and Board policy. Board policy and Tribunal

decisions require that exceptional circumstances must exist for the merits and justice provisions to apply.

[15] I find that exceptional circumstances are present in this case. Until the release of *Decision No. 2080/03* on March 2, 2005, the worker had been denied all entitlement in this claim. He neither received LOE benefits, health care benefits nor access to LMR services. He was on his own to retrain and find alternative employment while not receiving any loss of earnings benefits from the Board.

[16] The worker was diligent in pursuing his claim for benefits at the Board and at the Tribunal. There was a significant delay (16 months) in this case from the time of the Tribunal hearing to the release of the Tribunal decision. It does not appear that the worker was responsible for any of the delays occasioned in the adjudication of his claim. This situation is therefore different from the facts of *Decision No. 230/06R2*, in which the Vice-Chair found that the worker was responsible for considerable delay in filing his appeals at the Board and at the Tribunal.

[17] As a result of having been denied initial entitlement in his claim, the worker was left completely on his own to fund a self-directed LMR program while not being in receipt of LOE benefits. The worker was not responsible for any delay in pursuing his claim. I therefore conclude that exceptional circumstances are present in this case and that the worker is entitled to interest on the amount he paid for his self-directed LMR program.

DISPOSITION

[18] The worker's appeal is allowed. The worker is entitled to interest on the amount he paid for his self-directed LMR program.

Appeal allowed.

Decision No. 2268/081

Vice-Chair: Morris

Decision — April 16, 2009

Neutral Citation: 2009 ONWSIAT 970

Parties (representation) (paralegal) (exceptions) (relative, friend or neighbour) – Jurisdiction, Tribunal (parties) (representation) – Tribunal counsel (role of).

Unlicensed paralegal did not meet all requirements for exemption for person acting for a friend – Paralegal was not allowed to represent the worker.

The worker appealed a decision of the Appeals Resolution Officer denying entitlement for chronic pain disability. In this decision, the Vice-Chair dealt with the preliminary issue of the status of the worker's representative.

The representative was not a licensed paralegal. The representative claimed exemption from licensing under the exception for representation by relatives, friends or neighbours.

The representative objected to participation of Tribunal counsel on this matter. The Vice-Chair reviewed Tribunal decisions about the role of Tribunal counsel and found that this was an appropriate case for participation because of the relative novelty of the issue.

The Tribunal has the power to control its own process. In *R. v. Romanowicz*, which was decided before the passage of the licensing requirements for paralegals, the Ontario Court of Appeal found that the court had a duty to ensure that an accused's choice to be represented by an agent was an informed choice, but the court did not have a duty to enquire into the competence of the agent. Since passing of the paralegal licensing requirements, the Ontario Court of Justice found in *R. v. Toutissani* that the legislation was constitutional and did not conflict with *Criminal Code* provisions permitting agents to appear in summary conviction proceedings, and refused to permit an unlicensed representative to appear for the accused in that matter.

The representative has had various occupations over the years, including translator, insurance agent, real estate agent, mortgage broker and workers' compensation representative. Since 1994, he had acted for 50 people in at least 50 claims at the Tribunal. This does not include services he may have provided regarding claims at the Board or claims in relation to CPP benefits. The representative stated that he was not receiving money for his services in this case and that he was acting as a friend.

Under s. 1(8) of the *Law Society Act*, certain persons are deemed not to be providing legal services, including persons listed in the by-laws. Under s. 30(1) of By-law 4, there is an exemption for persons acting for family members, friends or neighbours. To come within that exemption, a person must meet four requirements: 1) the person's profession or occupation does not include provision of legal services or the practice of law; 2) the person provides legal services only occasionally; 3) the person provides the legal services for a relative, friend or neighbour; and 4) the person does not receive any compensation, including a fee, gain or reward, direct or indirect, for the provision of the legal services.

The Vice-Chair found that the representative did not meet at least the first two of the four requirements. Considering the number of appeals in which the representative was involved, the Vice-Chair found that one of the representative's occupations appeared to be the provision of legal services. Furthermore, it did not appear that he provided those services only occasionally. The Vice-Chair also had concerns about the friendship with the worker,

since the representative had represented him previously at the Tribunal as well as when he was an insurance agent and real estate agent. In addition, the Vice-Chair had concerns about possible indirect compensation. In any event, it was not necessary to make findings on those areas of concern since the exemption was only applicable if all four requirements were met.

The representative was not allowed to represent the worker. The hearing was adjourned to allow the worker to obtain new representation.

Parties (représentation) (parajuriste) (exceptions) (parent, ami ou voisin) – Compétence du Tribunal (parties) (représentation) – Conseiller juridique du Tribunal (rôle du).

Le parajuriste non titulaire d'un permis ne remplissait pas toutes les exigences pour être exempt des exigences relatives au permis de parajuriste aux termes de l'exemption prévue pour les personnes offrant des services à un ami – Le parajuriste n'a pas été autorisé à représenter le travailleur.

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 invalidité attribuable à la douleur chronique. Dans cette décision, la vice-présidente examine une question préliminaire au sujet de la situation professionnelle du représentant du travailleur.

Le représentant n'était pas titulaire d'un permis de parajuriste. Le représentant soutenait qu'il n'avait pas besoin d'un permis de parajuriste aux termes de l'exemption prévue pour les personnes offrant de l'aide à un ami, à un parent ou à un voisin.

Le représentant s'est opposé à la participation de la conseillère juridique du Tribunal dans ce dossier. La vice-présidente a examiné la jurisprudence du Tribunal au sujet du rôle du conseiller juridique du Tribunal et elle a conclu que ce cas se prêtait à la participation du conseiller juridique en raison de la relative nouveauté de la question.

Le Tribunal a le pouvoir d'établir sa propre procédure. Dans *R. v. Romanowicz*, un arrêt rendu avant l'adoption des exigences relatives au permis de parajuriste, la Cour d'appel de l'Ontario a conclu qu'un tribunal doit veiller à ce qu'un accusé qui choisit de se faire représenter par un agent fasse ce choix en toute connaissance de cause, sans toutefois être tenu de faire enquête sur la compétence de l'agent. Depuis l'adoption des exigences relatives au permis de parajuriste, la Cour de justice de l'Ontario a conclu, dans l'arrêt *R. v. Toutissani*, que la législation était constitutionnelle et qu'elle n'entraînait pas en conflit avec les dispositions du *Code criminel* autorisant la comparution d'agents dans les procédures sommaires, et elle a refusé de permettre à un représentant non titulaire d'un permis de comparaître pour l'accusé dans cette affaire.

Le représentant avait eu différentes occupations au cours des années, y compris traducteur, agent d'assurance, courtier en immeubles, courtier en hypothèques et représentant de travailleurs en matière d'assurance contre les accidents du travail. Depuis 1994, il avait agi pour 50 personnes dans au moins 50 dossiers au Tribunal, sans compter les services qu'il avait pu fournir dans des dossiers à la Commission ou dans des dossiers du Régime de pensions du Canada. Le représentant soutenait qu'il ne se faisait pas payer pour ses services dans ce dossier et qu'il agissait à titre d'ami.

Aux termes du paragraphe 1 (8) de la *Loi sur le Barreau*, certaines personnes sont considérées comme ne pratiquant pas le droit ou ne fournissant pas des services juridiques, y compris les personnes nommées dans les règlements administratifs. Le paragraphe 30 (1) du Règlement administratif no 4 prévoit une exemption pour les personnes agissant pour des parents, des amis ou des voisins. Pour se prévaloir de cette exemption, une personne doit remplir quatre exigences : 1) sa profession ou son occupation ne consiste pas à fournir des services juridiques ou à exercer le droit et ne comporte pas la prestation de services juridiques ou l'exercice du droit; 2) elle fournit des services juridiques à titre occasionnel seulement; 3) elle fournit des services juridiques uniquement au nom d'un parent, d'un ami ou d'un voisin ; 4) elle ne reçoit ni n'attend aucune rétribution, par ex., honoraires, paiement ou récompense, directs ou indirects, pour la prestation des services juridiques.

La vice-présidente a conclu que le représentant ne remplissait pas deux des quatre exigences au moins. Compte tenu du nombre d'appels auquel le représentant participait, la vice-présidente a conclu que la prestation de services juridiques semblait être une de ses occupations. Qui plus est, il ne semblait pas qu'il fournissait de tels

services à titre occasionnel seulement. La vice-présidente s'inquiétait aussi de la relation du représentant avec le travailleur étant donné qu'il l'avait déjà représenté au Tribunal et qu'il l'avait aussi représenté à titre d'agent d'assurance et de courtier en immeubles. Enfin, la vice-présidente s'inquiétait aussi de la possibilité d'une rétribution. Il n'était toutefois pas nécessaire de procéder à des constatations à ces sujets puisque l'exemption s'appliquait seulement si les quatre exigences étaient remplies.

Le représentant n'a pas été autorisé à représenter le travailleur. La vice-présidente a ajourné l'audience pour permettre au travailleur d'obtenir d'autres services de représentation.

Tribunal Decisions Considered:

Decision No. 4 (1986), 1 W.C.A.T.R. 17 consd
Decision No. 393/88I (October 31, 1988) consd
Decision No. 145/95 (1995), 35 W.C.A.T.R. 195 consd
Decision No. 1161/03I (2003), 65 W.S.I.A.T.R. 201 consd
Decision No. 1678/03 (September 23, 2003) [2003 ONWSIAT 2090] refd to
Decision No. 2508/07I (2008), 86 W.S.I.A.T.R. (online) consd
Decision No. 598/08 (2008), 86 W.S.I.A.T.R. (online) consd
Decision No. 1565/08I (2008), 86 W.S.I.A.T.R. (online) consd
Decision No. 1694/08I (March 3, 2009) [2009 ONWSIAT 513] refd to
Decision No. 2365/08 (November 20, 2008) [2008 ONWSIAT 3028] consd

Other Decisions Considered:

Codina v. Law Society of Upper Canada, [1996] O.J. No. 3348 (Ont. Div. Ct.) consd
R. v. Romanowicz (1999), 45 O.R. (3d) 506 (Ont. C.A.) consd
R. v. Toutissani, 2008 ONCJ 139 consd
Tranchemontagne v. Ontario (Director, Disability Support Program), 2006 SCC 14, [2006] 1 S.C.R. 513 consd

Workplace Insurance Legislation Considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A
s. 131

Other Statutes and Regulations Considered:

Law Society Act, R.S.O. 1990, c. L.8
s. 1(1)
s. 1(5)
s. 1(6)
s. 1(8)
s. 26.1(1)
s. 26.1(5)
Law Society By-law 4
s. 30(1)

Tribunal Practice Directions Considered:

Representatives (2007), 81 W.S.I.A.T.R. (online)
WSIAT Code of Conduct for Representatives (2007), 81 W.S.I.A.T.R. (online)

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DISPOSITION

DETERMINATION by the Vice-Chair whether to allow an unlicensed paralegal to represent the worker.

April 16, 2009. THE TRIBUNAL: —

BEFORE: A. Morris, Vice-Chair

HEARING: October 28, 2008, at London, Oral

DECISION(S) UNDER APPEAL: WSIB ARO decision dated September 9, 2005

APPEARANCES:

For the worker: Marcel Santos

Interpreter: Helena DiBerardins, Portugese

Tribunal Counsel Office: Joanna Smith

REASONS

(i) Introduction

[1] The worker has appealed the decision of Appeals Resolution Officer (ARO), V. Rubino, dated September 9, 2005. That decision concluded that the worker was not entitled to benefits for chronic pain disability (CPD). The worker is represented by Marcel Santos.

[2] Prior to the hearing of this matter, Tribunal counsel, Joanna Smith, advised that Mr. Santos is not a licensed paralegal. His position is that he falls under the licensing exemption provided in the Law Society of Upper Canada's By-Law 4, which allows legal services to be provided by those who are unlicensed, where the representative is acting for a friend or family member. I subsequently requested the assistance of Ms. Smith at the hearing, both to ask questions and to make submissions with respect to the status of Mr. Santos. Ms. Smith attended the hearing by way of teleconference.

[3] Mr. Santos was advised of the issue of his status as a representative in advance of the hearing. At the outset of the hearing, he indicated that if Ms. Smith proceeded to ask questions and to make submissions with respect to his status, he would withdraw as representative. He indicated that Ms. Smith had played a similar role in a recent hearing in which his status as a representative was at issue, and he submitted that Ms. Smith's questions and legal submissions were time consuming, and delaying.

[4] As discussed further below, I have the jurisdiction to enquire into the status of a representative in circumstances where the representative is not licensed and where it is not clear that he falls within the claimed licensing exemption. I advised Mr. Santos therefore that I would proceed to make enquiries with respect to his status.

[5] As regards the participation of Ms. Smith, the role of Tribunal counsel is, as the name suggests, to provide legal assistance to the Tribunal. The authority for that assistance stems from the Tribunal's power to determine its own practice and procedure pursuant to section 131 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A .

[6] The role of Tribunal counsel was discussed at Technical Note 3, in an appendix to *Decision No. 4* (1986), 1

W.C.A.T.R. 17, a 1986 decision which dealt with the objection by the Office of the Worker Adviser to the participation of Tribunal counsel at the hearing. The Panel in that hearing considered that Tribunal counsel played an appropriate role in ensuring that the Tribunal was sufficiently informed and had sufficient quality evidence upon which to make a decision, regardless of what the parties chose to present to the Tribunal. The Panel stated as follows [at p. 22]:

The Tribunal considers that it has a responsibility to ensure that its panels are sufficiently informed and have evidence of sufficient quality to allow them to make, with confidence, sensible and appropriate decisions, regardless of the nature or quality of the case made by the worker or employer or their representatives. The Tribunal does not accept the proposition that it must make decisions solely on the basis of what the parties to an appeal may choose to present.

There are many reasons for this policy, not least of which is the fact that in compensation cases it is commonplace to find parties not represented – as in this case with respect to the employer – or not represented by experienced representatives, or not participating at all. It is a routine matter for appeals to this Tribunal not to be opposed by any party.

Accordingly, it is part of the Tribunal's counsel's essential role at hearings to ask witnesses any pertinent questions not asked by parties or their representatives.

[7] More recently, the Panel in *Decision No. 1161/03I* (2003), 65 W.S.I.A.T.R. 201, commented with respect to the role of Tribunal counsel in ensuring that the panel was provided with all relevant material and submissions. The objection was to the participation of TCO at the pre-hearing stage. The Panel stated as follows [at para. 39]:

It is the role of TCO to assist panels by ensuring that they are provided with all relevant material and submissions prior to the hearing. This includes generic material, such as, in this case, the generic submissions of Mr. Revington on the *amicus curiae* issue, and the Classification and Retroactivity Casebook. It is helpful to panels for this information to be provided. Where generic material may be available, it would be wasteful and time-consuming for panels to be required to obtain post-hearing, on a case-by-case basis, or to research individually, the evidence, policy material or law that might be required to address each issue in each separate case. Pre-hearing preparation and disclosure is also more efficient in terms of time and resources for the parties.

[8] I consider the assistance of TCO to be appropriate in this case because of the relative novelty of the preliminary issue before me. The issue of a representative's status to appear before the Tribunal is the result of recent licensing requirements for anyone who provides legal services in Ontario. An unlicensed representative must fall within one of the exemptions set out in the *Law Society Act*, R.S.O. 1990, c. L.8 (LSA) and related by-laws. There is no issue that Mr. Santos is not licensed. The question is his exemption status. I consider the assistance of TCO in providing legal research and submissions, and in asking pertinent questions, to be beneficial in helping me to make a decision in this regard.

[9] Mr. Santos suggested that Ms. Smith was pursuing her own agenda in appearing at the hearing. The only basis for this appeared to be the fact that Ms. Smith assisted an earlier panel which enquired into Mr. Santos' exemption status as an unlicensed representative. I do not consider this to be evidence that Ms. Smith is pursuing any agenda other than to fulfill her role as Tribunal counsel by providing valuable assistance to the Tribunal with respect to new legislation and emerging law.

[10] Mr. Santos also submitted that taking up hearing time to enquire into his status caused unnecessary delay which was unfair to the appellant. For reasons which are further elaborated on below, the issue of Mr. Santos' status is important as to how this matter is to proceed. While this enquiry did ultimately involve a delay in the hearing, I nevertheless was satisfied that an important issue had been identified which required resolution, and I advised Mr. Santos that I intended to proceed to consider the issue, and that I would do so with the assistance of Ms. Smith.

[11] Mr. Santos then requested an adjournment when I asked if he still intended to withdraw. The purpose of the adjournment was to await a pending decision with respect to his status in another proceeding before the Tribunal. The only exemption under which Mr. Santos claims to fall, however, is that of acting for a family member, friend or neighbour. A finding therefore that Mr. Santos is or is not acting as a family member, friend or neighbour for someone in one proceeding, is not a finding that Mr. Santos is or is not acting as a family member, friend or

neighbour for someone different in another proceeding. An enquiry as to the relationship between Mr. Santos and the worker in this hearing would still be necessary regardless of the outcome of the decision on the preliminary issue in the other proceeding. I therefore declined an adjournment for that particular purpose.

[12] Mr. Santos did not withdraw and the enquiry into the preliminary issue of Mr. Santos' status proceeded. Unfortunately, that enquiry, as well as the preliminary discussions with respect to the enquiry, took up the half day scheduled for the hearing, as Mr. Santos predicted. I therefore adjourned the hearing to consider the issue of Mr. Santos' status and to make a preliminary decision with respect to that issue.

[13] As events have transpired, the decision in the other proceeding, *Decision No. 1694/08I* (March 3, 2009), issued shortly before this decision. The Vice-Chair was satisfied that there was stronger evidence of Mr. Santos' friendship with the worker in that case. While the Vice-Chair had serious concerns about Mr. Santos' status, she decided that these should be referred to the Tribunal Chair and that Mr. Santos could continue to act for the worker in that appeal as it was unlikely that the administration of justice would be brought into dispute due to their friendship. Based on the evidence in this case, including the various business dealings between Mr. Santos and the worker over the years, I have come to a different conclusion for the reasons set out below.

(ii) Requirement to be Licensed or Exempt

[14] The family, friend or neighbour exemption was considered by the Panel in *Decision No. 598/08* (2008), 86 W.S.I.A.T.R. (online). Tribunal counsel, Dan Revington, assisted the Panel at the hearing of that matter, and Mr. Revington's submissions are set out in some detail in that decision. They are similar to the submissions made by Ms. Smith in this case where Mr. Santos claims the same exemption. The submissions in essence are as follows:

[15] Section 1(5) of the LSA generally describes what constitutes the provision of legal services and section 1(6) specifically states that a person provides legal services if he does certain things including representing a person in a proceeding before an adjudicative body. An "adjudicative body" is defined in section 1(1) as including a tribunal established under an Act of the Legislature of Ontario to conduct an inquiry or inquest.

[16] Section 26.1(1) of the LSA, subject to section 26.1(5), prohibits persons other than licensees whose licence is not suspended from providing legal services.

[17] Section 26.1(5) provides an exception for a non licensee to provide legal services "if and to the extent permitted by the by-laws". This subsection operates in conjunction with section 1(8) which enumerates certain persons deemed to be not providing legal services including "a person or a member of a class of persons prescribed by the by-laws, in the circumstances prescribed by the by-laws."

[18] Section 30(1) of By-Law 4 (Licensing) exempts certain persons and classes of persons who provide legal services from the requirement to obtain a licence including persons acting for family members, friends or neighbours:

- 5. An individual,
 - i. whose profession or occupation is not and does not include the provision of legal services or the practice of law,
 - ii. who provides the legal services only occasionally,
 - iii. who provides the legal services only for and on behalf of a related person, within the meaning of the *Income Tax Act* (Canada), a friend or a neighbour, and
 - iv. who does not expect and does not receive any compensation, including a fee, gain or reward, direct or indirect, for the provision of the legal services.

[19] I am satisfied that the Tribunal is an adjudicative body within the meaning of the *Law Society Act*, and that in representing a party before the Tribunal, Mr. Santos would be providing legal services within the meaning of the *Law Society Act*. There is no issue that Mr. Santos is not licensed. The issue is whether or not he is exempt from the licensing provisions. The only exemption which he claims is that of acting for a friend.

[20] Mr. Revington submitted to the Panel in *Decision No. 598/08* that it was a proper exercise of the Tribunal's jurisdiction to consider the status of a representative pursuant to the provisions of the *Law Society Act*, and to make a decision about whether or not to proceed to hear from that representative based on the result of that consideration. Ms. Smith made similar submissions in this matter and I accept those submissions for the reasons which follow.

(iii) Tribunal's Powers to Control Its Own Processes

[21] The Tribunal's powers to control its own process in the context of the new licensing provisions for paralegals were first discussed by the Vice-Chair in *Decision No. 2508/07I* (2008), 86 W.S.I.A.T.R. (online). The Vice-Chair noted that the Tribunal has the power to determine its own practice and procedure under section 131 of the WSIA. This section gives the Tribunal the authority to develop its Practice Directions including the Practice Direction on *Representatives* (2007), 81 W.S.I.A.T.R. (online), which states that "[r]epresentatives at the Tribunal must possess a licence required and issued by the Law Society of Upper Canada, unless excluded from this requirement by the *Law Society Act*, or by a bylaw passed under the *Law Society Act*."

[22] The Practice Directions also include the Practice Direction on *WSIAT Code of Conduct for Representatives* (2007), 81 W.S.I.A.T.R. (online). As the Vice-Chair in *Decision No. 2508/07I* noted [at para. 36], the remedy "in the event that a representative contravenes the Code of Conduct, including the requirement that the representative is either registered with the Law Society or exempt, is the possibility that the representative will be suspended from appearing before the Tribunal, either temporarily or permanently. The Tribunal may also refer the matter to the Law Society. If the Law Society determines that the representative has provided legal services without being registered or exempt, the person is liable to a criminal conviction and a significant fine."

[23] The Vice-Chair went on to note that Panels and Vice-Chairs have the authority in the context of a particular hearing to control abusive or inappropriate behaviour including the authority to determine that the hearing cannot proceed. This authority, although rarely used, exists independently of any authority to refuse to allow an unlicensed paralegal to appear.

[24] Tribunal counsel, Ms. Smith, drew my attention to the Court of Appeal decision in *R. v. Romanowicz*, (1999), 45 O.R. (3d) 506. That decision, in discussing the power of the court to control its own process in the context of *Criminal Code* provisions permitting agents to appear in summary conviction proceedings, and in the context of the right of an accused to choose his own representation, nevertheless noted [at para. 84] that the "trial court cannot be powerless to prevent representation by an agent where that representation would destroy the fairness of the trial or otherwise bring the administration of justice into disrepute. Surely, an accused's right to choose to be represented by an agent does not compel trial judges to preside over travesties and leave them helpless to prevent a miscarriage of justice." The Court of Appeal states earlier [at para. 73] that the "power to refuse audience to an agent must be invoked whenever it is necessary to do so to protect the proper administration of justice."

[25] *R. v. Romanowicz* was decided prior to the passage of the new licensing provisions for paralegals. The Court of Appeal concluded that while a court had a duty to ensure that the accused's choice to be represented by an agent was an informed one, the court did not have a duty to enquire into the competence of the agent, given the practical difficulties and delay inherent in such an enquiry. The Court of Appeal lamented the legislative inaction to date with respect to the status of agents in summary conviction proceedings. Since that time, licensing provisions for paralegals have been enacted in Ontario, as discussed above, and the Court in *R. v. Toutissani*, 2008 ONCJ 139, having found that legislation to be constitutional in that it did not conflict with the *Criminal Code* provisions permitting agents to appear in summary conviction proceedings, refused to permit an unlicensed representative to appear for the accused in that matter.

[26] The Divisional Court in *Codina v. Law Society of Upper Canada*, [1996] O.J. No. 3348, upheld the right of the discipline committee of the Law Society to refuse to permit a disbarred lawyer from representing Ms. Codina, where the committee held that the lawyer's recent disbarment for acts of "pervasive dishonesty" rendered him incompetent in that he could not be relied on to conduct Ms. Codina's representation in an honest and ethical manner.

[27] The Vice-Chair in *Decision No. 2508/07I* discussed the Tribunal's jurisdiction to consider and apply legislation, such as the *Law Society Act*, in addition to its enabling legislation. He noted *Tranchemontagne v. Ontario (Director, Disability Support Program)* [2006], 1 S.C.R. 513, as authority for the proposition that a Tribunal may go beyond its enabling statute in order to determine the issues in an appeal. He also noted *Decision No. 145/95* (1995), 35 W.C.A.T.R. 195, where the Panel found that in some circumstances, the Tribunal must interpret a statute which is involved in the issues before it. In that case, the Panel had referred to *McLeod v. Egan* [1975] 1 S.C.R. 517 where the Court had confirmed the right and duty of, in that case, an arbitrator to construe and apply legislation, in the exercise of the arbitrator's jurisdiction.

[28] The Vice-Chair determined that the Tribunal has the jurisdiction to consider other statutes and provisions in determining issues that the Tribunal has the jurisdiction to determine under *Workplace Safety and Insurance Act*. It was not clear to him, however, that the Tribunal has the jurisdiction to consider other statutes and provisions in regard to issues over which the Tribunal did not have jurisdiction. In that case the issue was entitlement to benefits for a recurrence. It did not appear necessary to determine the status of the worker's representative in order to determine the worker's entitlement to benefits, and the Vice-Chair noted that there was nothing regarding the status of representatives in the Tribunal's enabling statute. He contrasted this with the *Law Society Act* which set out the procedures to be followed in the event that a complaint was received that an individual who was neither licensed nor exempt was providing legal services.

[29] The Vice-Chair stated that there might therefore be a question as to whether or not the Tribunal has the jurisdiction to make an adjudicative determination as to the status of a representative based on the analysis in *Tranchemontagne*. He determined, however, that he did not have to decide that question. He noted that the Tribunal had the power pursuant to section 131 of the *Workplace Safety and Insurance Act* to establish its own practice directions including the Practice Direction on *Representatives* which provides that representatives before the Tribunal must either be licensed or exempt from the licensing requirement. The Vice-Chair reasoned that if the Tribunal had the authority to promulgate the Practice Directions, it must also have the authority to interpret them, and apply them in a particular case.

[30] The Vice-Chair then went on to discuss the remedies available for a breach of the Code of Conduct, including the referral to the Tribunal Chair and the referral possibly to the Law Society. The Vice-Chair also discussed a Panel or Vice-Chair's independent authority to not permit a hearing to proceed in the face of a breach of the Code of Conduct which the Panel or Vice-Chair considered to be egregious. The Vice-Chair stated as follows [at para. 62]:

In a case where a question arises as to the status of the representative, it would appear that the Panel or Vice-Chair has discretion as to whether to permit the hearing to proceed. If there is no doubt about the status of the representative and it is clear that the representative is not registered and not exempt, the Panel or Vice-Chair may decide that it is not proper to allow the hearing to proceed with that representative, on the grounds that the *Law Society Act* makes such representation illegal. However, if the status of the individual is not clear and an adjudicative decision is required as to whether, in the circumstances of the hearing, the individual is exempt, the Panel or Vice-Chair may decide that it is appropriate for the hearing to proceed on the understanding that the matter will be referred to the Tribunal Chair. In making the determination of whether to proceed, the potential for bringing the administration of justice into disrepute that could arise if it turns out that the individual is not exempt, needs to be balanced against the right of the parties to a hearing without undue and unnecessary delay.

[31] I am satisfied that the Tribunal has the authority pursuant to section 131 of the Act to control its own process. I am also satisfied that the Tribunal, in pursuit of its jurisdiction to control its own process, has the authority to determine that an appeal cannot proceed in appropriate circumstances, including circumstances where a representative is not a licensed paralegal. This is so even where a party to an appeal consents to the representation. The Panel in *Decision No. 393/88I* (October 31, 1988) refused to permit an appeal to proceed in circumstances where two employers had consented to be represented by the same representative. The Panel was concerned that there was a perception of conflict of interest. The Panel felt that to permit the hearing to proceed in the face of the apparent conflict would compromise the process of the Tribunal.

[32] I am satisfied that I have the authority to consider the status of Mr. Santos as a representative prior to hearing

from him. Tribunal counsel emphasized that I am not being asked whether or not Mr. Santos in fact does fit within the claimed exemption, but only whether he *appears* to fall within the exemption in the circumstances of this case and in the context of his representation of this worker in this appeal. This leaves the final determination of the representative's actual status appropriately in the hands of the Law Society.

(iv) Information with Respect to Claimed Exemption

[33] Tribunal counsel put some questions to Mr. Santos, the worker's representative. She did not think it necessary that such questions be given under oath, and I agree. Mr. Santos stated that he is very involved in the Portuguese community in London, and has been for a long time. He is very active in his church and is involved in a number of community clubs. He is the president of a club which supports soccer teams.

[34] Mr. Santos indicated with respect to his various occupations over the years that at one time he provided paid translation services to the WSIB, and to the courts. He was an insurance agent at one time from about 1971 to 1986, and he was also a real estate agent at one time. He owned a restaurant for more than 15 years from 1989. He stated that he invests in mortgages through a broker and that this is a source of income for him. He stated that his wife owns a travel agency. He indicated in response to a question regarding insurance that he is covered through the travel agency. He stated, however, that he does not work for the travel agency. He is just "there". He indicated that the travel agency operates out of his home. The travel agency has a secretary whom Mr. Santos referred to as "my secretary". He stated on questioning, however, that the secretary was the secretary for the travel agency and not his secretary. Mr. Santos indicated that this secretary was in the process of becoming a paralegal. She prepared a typed summary for use by Mr. Santos in his representation of the worker in this case, as she has done in the past for other cases.

[35] Mr. Santos indicated that he had a motor vehicle accident in 1993, as a result of which he became disabled. He stopped providing translation services at that time. He stated that he has a disability allowance of some sort. As noted, he receives money from mortgage investments. He also receives money from the WSIB in relation to a workplace accident. He could not recall the year of the workplace accident.

[36] Ms. Smith asked Mr. Santos questions with respect to his involvement in other appeals before the Tribunal. She asked Mr. Santos if 74 to 76 appeals since 1994 sounded correct. Mr. Santos acknowledged that he assisted in a lot of appeals. In the beginning he assisted in translating. Ms. Smith suggested that a list which she had shown Mr. Santos at the previous hearing showed Mr. Santos as representative on the 74 to 76 appeals before the Tribunal. Mr. Santos acknowledged having seen the list. He acknowledged that he would have been shown as the representative on those appeals. Mr. Santos did not dispute the number of 74 to 76 appeals. He indicated, however, that the list showed some people twice and that it was more accurate to say that he had acted for 50 people since 1994, rather than that he had acted on 74 to 76 appeals. Ms. Smith suggested to Mr. Santos that 14 files remained open. Mr. Santos indicated that about five or six, such as the one involving this worker, remained active. The rest were inactive and Mr. Santos had sent letters to the Tribunal to close them. The secretary for the travel agent sent those letters. He knew that they have been sent because people had started coming to him to ask about those letters. This was in response to Ms. Smith's suggestion that the inactive files still remained open as of October 20, 2008.

[37] It appears from the case record that Mr. Santos first began acting for this worker with respect to workplace safety and insurance matters in February, 1996, when the worker signed an authorization and consent which permitted the Board to disclose information and documentation to Mr. Santos. This authorization and consent which was signed by the worker on February 26, 1996, described Mr. Santos as the worker's "representative". The worker signed a more comprehensive authorization and consent on March 1, 1996. Again, Mr. Santos was described as the worker's representative. There is nothing in this documentation or in ensuing documentation and letters to both the Board and Tribunal over the years to suggest that Mr. Santos was a friend of the worker.

[38] When the worker appealed to the Tribunal with respect to a different issue in dispute in 2003, the Vice-Chair in that case, *Decision No. 1678/03* (September 23, 2003), stated that the worker attended that appeal and that he was represented by Mr. Santos, a consultant. The Vice-Chair also noted that the worker was assisted by an interpreter in the Portuguese language. When the worker objected to a subsequent decision of the Claims

Adjudicator (CA), the objection form dated May 31, 2004, stated that the representative's name was Marcel Santos of the organization "M S Consultants". When writing to the Tribunal with respect to this worker, Mr. Santos, sometimes, but not always, used letterhead describing himself as "Marcel Santos M&S Consultants". A letter to the Tribunal dated December 2, 2005, is an example of this. Mr. Santos indicated at the hearing with respect to this issue that M&S Consultants was closed. Ms. Smith asked if this was because of the changes with respect to regulating paralegals but Mr. Santos was quite adamant that he had not said that. Mr. Santos acknowledged that WSIB cases and Canada Pension Plan cases, on which he also sometimes acted as representative, went through M&S Consultants.

[39] Mr. Santos indicated that he did not apply for a licence pursuant to the new paralegal licensing requirements because he did not have the education to do that. He indicated that the law had only changed last year. He did not feel that cases from 10 or 15 years ago are related to this case. With respect to cases that he is getting now, if they are not friends, he sends them away. He is giving cases away to other paralegals. He now only represents close friends.

[40] Mr. Santos indicated that he has known the worker since before he was married, and since before a real estate transaction in 1980, in which Mr. Santos acted as real estate agent when the worker purchased a house. That was in 1980. He knows the worker through the church and clubs in which he is and was involved, and from "Dundas Street", a reference apparently to socializing on that street as young men. The worker indicated that he had known Mr. Santos since 1978 or 1979. When asked how they had met, he responded that it was because Mr. Santos had a travel agency. He bought tickets through the travel agency. He also knows Mr. Santos from the church and from clubs. He indicated that Mr. Santos provided help when he needed documents translated. He indicated that he mostly sees Mr. Santos at Mr. Santos' house. They have coffee together sometimes. They play billiards sometimes. They have a glass of wine together sometimes.

[41] Mr. Santos referred to the worker as "my client" at the hearing. Mr. Santos, when asked about this, responded that he could do so because he had acted for the worker in the real estate transaction. He denied that the worker paid him for the real estate transaction because the vendor pays the commission in a real estate transaction. Mr. Santos had also indicated earlier that the worker had been a client when Mr. Santos was an insurance agent.

[42] Mr. Santos asserted that the worker has not paid him for his services in acting as his representative. The worker gave evidence under oath that the only way in which he paid Mr. Santos was with a "glass of wine" and "shells", by which he meant apparently that he did not pay Mr. Santos for his help.

[43] The worker indicated in response to questions by Ms. Smith, that he understood that Mr. Santos was not a licensed paralegal, that Mr. Santos was not accountable to the Law Society, and that if Mr. Santos mishandled his appeal, the worker would have no recourse. The worker indicated that he understood that the Tribunal was the final level of appeal, although what this meant had to be explained to him.

(v) Conclusions with Respect to Claimed Exemption

[44] Ms. Smith submitted with respect to the family, friend and neighbour exemption that all four aspects of that exemption have to be met, and I agree. The exemption applies to an individual:

- i. whose profession or occupation is not and does not include the provision of legal services or the practice of law,
- ii. who provides the legal services only occasionally,
- iii. who provides the legal services only for and on behalf of a related person, within the meaning of the *Income Tax Act* (Canada), a friend or a neighbour, **and**
- iv. who does not expect and does not receive any compensation, including a fee, gain or reward, direct or indirect, for the provision of the legal services. [Emphasis added]

[45] With respect to occupation, Mr. Santos indicated that he has been disabled since 1993. He owned a restaurant for 15 years from 1986. He invests in mortgages. He acknowledged, however, that since 1994, he has represented about 50 people before the Tribunal. He acted for the worker on one earlier appeal before the Tribunal, so that at

least in the case of this worker he has acted on more than one appeal before the Tribunal. In addition to acting for the worker before the Tribunal, the case record shows that Mr. Santos also acted for the worker before the Board by writing and receiving letters on behalf of the worker, by assisting in obtaining medical reports, by making submissions, and by representing the worker in two appeals before two AROs. It is a reasonable inference in my view that Mr. Santos also appeared before the Board for at least some of the appeals before the Tribunal in which he has been involved since 1994. Mr. Santos also acknowledged that he has represented people in CPP proceedings.

[46] As Tribunal counsel has pointed out, it is not my role to make a final determination of Mr. Santos' status under the *Law Society Act*. Such a determination must be made by the Law Society. The issue before me is whether Mr. Santos appears to fit within the claimed exemption in the context of these proceedings, based on the information and submissions before me. If it appears that Mr. Santos fits within the claimed exemption, the hearing may then proceed. If it appears clear on the evidence of this case that Mr. Santos does not fit within an exemption, *Decision No. 2508/07I* indicates that the Tribunal would likely not permit the person to appear as a representative. If the individual's status is less clear, *Decision No. 2508/07I* indicates that the Panel or Vice-Chair may decide that the hearing may continue with the representative, on the understanding that the matter will be referred to the Tribunal Chair. In deciding whether to proceed, the potential for bringing the administration of justice into disrepute that could arise if the individual is not exempt, must be balanced against the right of the parties to a hearing with undue or unnecessary delay.

[47] In engaging himself in the matters referred to above, Mr. Santos was in my view providing legal services, within the meaning of the *Law Society Act*. He has acknowledged acting for 50 people in at least 50 appeals before the Tribunal since 1994. This is an average of three or four appeals per year. This does not include services which he has provided to people in relation to CPP benefits, or any services provided at the Board. I find that Mr. Santos has been providing these legal services often enough and for enough people, that being a provider of legal services is one of his occupations. He does not have any particular education or training to qualify himself as a provider of such services, but prior to the recent changes in the *Law Society Act*, he did not require any.

[48] Mr. Santos has used letterhead showing "M&S Consultants" when providing the legal services referred to. He indicated that M&S Consultants was created to do different things than those things which the travel agency did. He indicated that WSIB matters and CPP matters were carried on through M&S Consultants. The fact that Mr. Santos used a separate entity with its own letterhead through which to engage in the activity of representing people in WSIA and CPP proceedings reinforces my view that he appears to have been engaged in this activity as an occupation. The word "consultant" as it is increasingly used in everyday life implies a knowledge of the subject matter consulted upon. The Merriam-Webster's Online Dictionary defines "consultant" as "one who gives professional advice or services". The use of the word "consultant" by Mr. Santos also supports my view that Mr. Santos appears to have been engaged in the occupation of providing legal services since 1994. Mr. Santos did indicate that M&S Consultants started when he was a real estate agent but the fact is that he continued using that name in the context of providing legal services long after he had stopped being a real estate agent.

[49] Mr. Santos indicated that he is very involved in the Portuguese community. He does a lot of volunteer work. In his view he assists people with poor English language skills and poor education, who are unable to afford lawyers. The evidence in this case suggests, however, that Mr. Santos has used his community contacts to further various business enterprises. The worker was a client of Mr. Santos when Mr. Santos was an insurance agent and also when he was a real estate agent. The travel agency which Mr. Santos' wife operates out of their home services the Portuguese community. The worker has used the travel agency. I do not doubt that Mr. Santos can claim a certain level of friendship with many if not most of the people he has acted for, whether as a real estate agent, insurance agent, or provider of legal services. As Ms. Smith suggested, however, there is a difference between acting as a representative for someone as a friend and acting as a representative for a friend. Even if I accept that Mr. Santos has not been paid for legal services in this case, this does not alter my view that he has been engaged in the occupation of providing legal services.

[50] In my view of the information presented to me in this case, it does not appear to me that Mr. Santos meets the first aspect of the family, friend or neighbour exemption in that one of his occupations appears to be the provision of legal services. Furthermore, it does not appear to me that those services were provided only

occasionally. Mr. Santos acknowledged acting for 50 people over 14 years in at least fifty appeals before the Tribunal. He has also acknowledged acting for people before the Board and in CPP proceedings during the same time frame. Mr. Santos, it appears, is apparently still active in six appeals currently before the Tribunal. It therefore does not appear to me that Mr. Santos meets the second aspect of the family, friend, and neighbour exemption in the case before me.

[51] Mr. Santos stated that the worker was his friend, and the worker testified that Mr. Santos was his friend. Simple friendship does not appear to me to be the sole basis of their relationship, however, since the worker has been an acknowledged client of Mr. Santos when he was an insurance agent and when he was a real estate agent. He also uses the services of Mr. Santos' wife's travel agency. Nevertheless, there is no evidence that they are not in fact friends. Mr. Santos and the worker both indicated that Mr. Santos has not and will not be paid for the services of Mr. Santos before the Tribunal. Again there is no evidence of direct payment. I note, however, that the fourth aspect of the exemption prohibits any compensation, including a fee, gain or reward, direct or indirect. It is unclear whether there may have been some indirect benefit to Mr. Santos.

[52] Mr Santos must, however, meet all four aspects of the family friend or neighbour exemption and I have found that he does not appear to meet the first two aspects of the exemption. It is therefore not necessary to decide whether he has received indirect compensation. I therefore find that Mr. Santos does not appear to me to fall within the exemption for individuals acting for family, friends or neighbours.

[53] The question then is how this matter is to proceed in light of the fact that Mr. Santos is not a licensed paralegal and appears to me not to fall within the claimed family, friend or neighbour exemption.

(vi) How to Proceed

[54] Mr. Santos submitted that he is just trying to help people in his community who have poor English language skills, poor education, and a lack of resources to pay a lawyer. The recent licensing provisions however, do not prevent representation by paralegals and agents, other than lawyers. Rather, they generally require that paralegals or agents be accountable to the Law Society, carry liability insurance, and possess a certain amount of competence. They are not held to the same educational standards as lawyers. The legislation also contains "grandfathering" provisions, available prior to October 31, 2007, for those who had already been providing legal services on a full time basis for a specified period of time.

[55] I have found that Mr. Santos, an unlicensed paralegal, does not appear in this case to meet the family, friends and neighbour exemption primarily on the basis that the information before me tends to show that he is engaged in the occupation of providing legal services and that he provides legal services on more than an occasional basis.

[56] In *Decision No. 598/08*, the Panel noted that Tribunal counsel, Mr. Revington, had "referred to the Government of Ontario Report (2000) entitled *A Framework for Regulating Paralegal Practice in Ontario*, authored by the Honourable Peter Cory where, at page 33, Mr. Revington submitted, it is made evident that the mischief that the LSA amendments were intended to address, was, in part, the potential that parties before the Tribunal might be represented by unqualified persons. The purpose of the LSA amendments was, he argued, to provide new and needed protection for the public in this regard."

[57] There may be circumstances where even though a representative does not appear to fall within any of the exemptions provided for in the *Law Society Act*, that the matter is nevertheless not so serious that the matter cannot proceed. Mr. Revington had submitted, for example, that the Panel in *Decision No. 598/08* might wish to proceed in that case even if they found that the representative did not fall within any of the exemptions provided for by the *Law Society Act*.

[58] In *Decision No. 598/08*, the representative, Mr. Puddicombe, stated that his profession did not involve or include the practice of law or the provision of legal services, and that to the extent that he did provide such services, he did so as a volunteer and on an only occasional basis. He stated that the worker was a close and long-term family friend and that he would not receive a fee for representing the worker. He had not applied to the Law Society for a licence, and he intended to cease providing any representation services to workers, even on a volunteer basis within the near future. He had a maximum of three outstanding cases before the Tribunal, and he

was acting for the workers as a friend, and without fee in those cases. When those cases were complete, he did not intend to take on any other cases. The previous Saturday night, the worker had been at the home of a relative of Mr. Puddicombe, which was attended by both their families. The Panel found that the unlicensed representative in that case did in fact fall within the claimed exemption. The Panel appears to have accepted that Mr. Puddicombe and the worker in that case, and their families, were close friends. There appears not to have been evidence that Mr. Puddicombe provided legal services so extensively that it called into question his assertion that his profession did not include the practice of law or the provision of legal services. In my view, the facts in that case are different to those in the case before me.

[59] In the case at hand, however, where I have found that the representative does not appear to fall within the claimed exemption, largely on the basis of the volume of cases in which the representative has acted, and continues to act, I do not find that I can proceed to hear from him. I should note that in arriving at my decision with respect to whether or not Mr. Santos fits the claimed exemption, I looked at the number of other cases in which Mr. Santos is and was involved since I considered the volume of cases (both in workers' compensation and in CPP matters) to be relevant to the issue of the nature of Mr. Santos' occupation and to the issue of the frequency with which he provides legal services. These issues are essential components of the family, friend and neighbour exemption.

[60] In *Decision No.1565/08I* (2008), 86 W.S.I.A.T.R. (online), the issue was whether the representative in that case, Ms. Champagne, could act as a "facilitator". She was a member of a group called the "Advocacy and Facilitation Group, a volunteer organization. She advised the Panel that she had acted in two other cases before the Tribunal as a facilitator. The Vice-Chair noted with respect to one of them that Ms. Champagne had been described as a consultant and as the worker's representative and that her role in that hearing appeared to have been consistent with the role usually assumed by a representative. Ms. Champagne had also appeared as a facilitator at the Financial Services Commission of Ontario in motor vehicle accident insurance claims, and in various courts. She indicated, however, that in most of those cases, the individual was formally represented by someone else. Ms. Champagne worked directly for a lawyer as a law clerk in a law firm, but she made it clear that her appearance before the Panel was completely independent of her work as a law clerk, and that she would not be paid.

[61] Ms. Champagne eventually advised the Panel that she wished to proceed as the worker's representative and that she was exempt from the licensing requirement because the worker was her friend. The Panel found no reason on the basis of the information provided by Ms. Champagne and by the worker to doubt that they were in fact friends. The Panel decided for the purposes of that appeal to permit the worker to appear as the worker's representative. They did not find it necessary or appropriate to investigate whether she might be providing legal services in contravention of the *Law Society Act*. They were satisfied that allowing her to appear as the worker's representative was not likely to bring the administration of justice into disrepute.

[62] The Panel, however, noted [at para. 27] that the Panel's concerns about the role of facilitator had prompted Ms. Champagne to change to the category of "acting as a friend" and were concerned "about the potential for abuse of process in future cases, where the exempt category of 'friend' may be used to circumvent the paralegal regulation system". The Panel indicated therefore that it was bringing the circumstances of the case to the attention of the Tribunal Chair. If Ms. Champagne or other members of her group sought to represent other workers in the future, the *bona fides* of a claim to be acting as a friend might be further investigated by the Tribunal and /or the Law Society.

[63] In my view of the facts of this case, where Mr. Santos appears to have gone from acting for the worker in real estate and insurance matters and from acting as a consultant to acting as a friend, while at the same time having the worker as an ongoing client of his wife's travel agency, there is an appearance that Mr. Santos is using the "friend" exemption to circumvent the paralegal regulations. While there is evidence of friendship in this case, there is also evidence of ongoing business dealings. In my view, the friend exemption was not intended to cover the facts in this appeal. As suggested earlier, the licensing provisions for paralegals was enacted to protect the public. Mr. Santos indicated his view that his representation in various appeals has been effective. That is not the point. A Tribunal cannot be expected to know the level of competency of any particular representative or to accept at face value assertions by a particular representative that he considers himself competent. The Law Society

has set the standard for competency and accountability through the licensing requirements for paralegals. To permit Mr. Santos to proceed to act as a representative in the circumstances of this case, and in the face of the requirements for paralegals, enacted to protect the public, would in my view be to bring the administration of justice into disrepute.

[64] I am aware of *Decision No. 2365/08* (November 20, 2008) which also dealt with a representative who claimed to be acting as a friend. In the notice of appeal in that case, the worker's representative, Mr. Batten, was listed as a union representative. He had retired from the union in 1983, and had then continued acting for the worker as a friend. The Vice-Chair noted that union representatives are exempt from the licensing requirement. He also noted that the exemption with respect to friend suggested that it should be used only occasionally. In that regard, there was information that Mr. Batten had five active appeals before the Tribunal. He also had three inactive appeals and 28 appeals which had been closed. Of the 28 closed appeals, Mr. Batten was listed as a union representative in 17 of those cases.

[65] The Vice-Chair reviewed the information with respect to the relationship between Mr. Batten and the worker and was satisfied that for the purposes of that appeal that Mr. Batten fit within the "friend" exemption. Mr. Batten agreed to review the other active appeals in which he was listed as a representative in the category of friend. He appeared to recognize that continuing to act in those appeals might jeopardize the interests of those appellants and the status of his exempt status as a friend providing legal assistance on an occasional basis. Each case is decided on its own facts and the Vice-Chair in *Decision No. 2365/08* was satisfied that Mr. Batten fit within the friend exemption.

[66] For the reasons already stated, it appears to me that Mr. Santos does not fit within the exemption of acting for a friend. In my view, there is an appearance that Mr. Santos is attempting to use the exemption of acting as a friend to circumvent the paralegal regulation. This has the appearance of an abuse of process. In my view, it would bring the administration of justice into disrepute if Mr. Santos were to continue to act in this case. I therefore adjourn this matter to permit the worker an opportunity to obtain another representative or to prepare his case if he wishes to proceed unrepresented.

DISPOSITION

[67] The appeal is adjourned to permit the worker to obtain other representation or to prepare his case if he wishes to proceed unrepresented. This matter is not to proceed with Mr. Santos as representative.

Unlicensed paralegal not allowed to represent worker.



Decision No. 2341/08I

Vice-Chair: Moore

Decision — April 21, 2009

Neutral Citation: 2009 ONWSIAT 1003

Accident (date) (disablement) – Parties (accident employer) – Notice of hearing (previous employer) (disablement).

Disablement injury began before worker started working for current employer but worker claimed that current employment made significant contribution to impairment – Current employer is correctly considered to be the accident employer – Notice to previous employers not required at this time.

The worker started working for his current employer in 2004. He filed a claim for a disablement in 2006. The worker appealed a decision of the Appeals Resolution Officer denying entitlement.

In this decision, the Vice-Chair considered the preliminary issue raised by the current employer regarding the finding by the Board that the current employer was the accident employer.

The worker acknowledged that his injury started prior to 2004, while in the course of employment with other employers.

Board policy provides that the date of injury in the case of disablement is the date on which the worker experiences the disabling physical or functional abnormality or loss.

The Vice-Chair agreed with reasoning in *Decision No. 841/08* which concluded that the inability to work is not a necessary requirement for establishing a date of accident in a disablement claim. This is a view supported in the preponderance of Tribunal decisions in this area.

The date of accident in a disablement claim is not necessarily the date on which the worker is no longer able to work because of the injury. The date of injury in a disablement claim is a question of fact that turns on the particular circumstances in the claim.

In this case, the worker acknowledged that his injury began before he started working for the current employer. However, he was, in essence, claiming that his current employment made a significant contribution to the impairment that caused him to stop work. The Vice-Chair was of the view that this significant contribution, if proven, would constitute a new work-related accident with the current employer. Thus, at this point, based on the claim by the worker, the current employer is the accident employer.

Also at this time, there was no reason to give notice of the hearing to previous employers. Evidence may ultimately establish that pre-2004 employment was the only significant cause of the worker's condition. However, at this point, the worker has no claim regarding that earlier employment. Therefore, there are no other accident employers at this time and, accordingly, no need to provide notice to previous employers.

The hearing will proceed with the current employer as the accident employer.

Accident (date) (incapacité) – Parties (employeur au moment de l'accident) – Avis d'audience (ancien employeur) (incapacité).

L'incapacité s'était manifestée avant qu'il commence à travailler pour son employeur courant, mais le travailleur soutenait que son emploi courant avait beaucoup contribué à son incapacité – L'employeur courant était correctement considéré comme l'employeur au moment de l'accident – Il n'était pas nécessaire d'aviser les anciens employeurs pour le moment.

Le travailleur avait commencé à travailler pour son employeur courant en 2004. Il avait fait une demande d'indemnité pour une incapacité en 2006. Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de lui reconnaître le droit à une indemnité.

Dans cette décision, le vice-président examine une question préliminaire soulevée par l'employeur courant du travailleur au sujet de la conclusion de la Commission selon laquelle il était l'employeur au moment de l'accident.

Le travailleur a reconnu que son incapacité s'était manifestée avant 2004, au cours de son emploi pour d'autres employeurs.

La politique de la Commission prévoit que, dans les cas d'incapacité, la date de la lésion est la date à laquelle le travailleur subit l'anomalie ou la perte physique ou fonctionnelle.

Le vice-président a indiqué qu'il était d'accord avec la *décision n^o 841/08* pour dire que l'inaptitude au travail n'est pas nécessaire pour établir une date d'accident dans un dossier d'incapacité. La jurisprudence du Tribunal appuie cette opinion de façon prépondérante.

La date d'accident dans un dossier d'incapacité n'est pas nécessairement la date à partir de laquelle le travailleur ne peut plus travailler en raison de la lésion. La date de la lésion dans un cas d'incapacité est une question de fait qui dépend des circonstances particulières dans le dossier.

En l'espèce, le travailleur a reconnu que sa lésion s'était manifestée avant qu'il commence à travailler pour son employeur courant. Cependant, il soutenait essentiellement que son emploi courant avait beaucoup contribué à la déficience à l'origine de son arrêt de travail. Le vice-président était d'avis que cette contribution importante, si elle était prouvée, constituerait un nouvel accident du travail pendant qu'il était au service de son employeur courant. Par conséquent, à partir de là, compte tenu de la demande d'indemnité du travailleur, l'employeur courant était l'employeur au moment de l'accident.

Pour le moment, il n'y avait aucune raison d'aviser les anciens employeurs de l'audience. La preuve pourrait finir par établir que seuls les emplois d'avant 2004 étaient une importante cause des problèmes du travailleur. Cependant, pour le moment, le travailleur n'avait aucune demande d'indemnité concernant ses anciens emplois. Par conséquent, il n'y avait aucun autre employeur au moment de l'accident et il n'y avait donc aucune raison d'aviser les employeurs précédents.

Le cas sera entendu avec l'employeur courant à titre d'employeur au moment de l'accident.

Tribunal Decisions Considered:

- Decision No. 1386/02* (December 13, 2002) [2002 ONWSIAT 2632] refd to
- Decision No. 1073/05* (2005), 74 W.S.I.A.T.R. 271 refd to
- Decision No. 2014/05* (March 2, 2006) [2006 ONWSIAT 465] refd to
- Decision No. 1053/07* (November 2, 2007) [2007 ONWSIAT 2750] refd to
- Decision No. 2371/07* (February 14, 2008) [2008 ONWSIAT 467] refd to
- Decision No. 841/08* (May 20, 2008) [2008 ONWSIAT 1375] consd
- Decision No. 1540/08* (July 21, 2008) [2008 ONWSIAT 2010] consd

Board Directives and Guidelines Considered:

Operational Policy Manual

- Document No. 11-01-04 (October 12, 2004) (since superseded)
- Document No. 15-03-01 (October 12, 2004) (since superseded)

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DETERMINATION by the Vice-Chair of a preliminary matter who is the accident employer.

April 21, 2009. THE TRIBUNAL: —

BEFORE: J.P. Moore, Vice-Chair

HEARING: October 30, 2008 at Thunder Bay, Oral
 Post-hearing activity completed on April 16, 2009

DECISION(S) UNDER APPEAL: WSIB ARO decision dated December 14, 2009

APPEARANCES:

For the worker: E. DePoe, Paralegal

For the employer: C. Nichols, Office of the Employer Adviser

REASONS

(i) Introduction

[1] This decision addresses a point of law raised by the employer. The worker is seeking entitlement to benefits for a low back condition that he attributes to his years of employment as an electrician. The worker is claiming entitlement to benefits for a “disablement” accident under the legislation. The claim was filed in April 2006 while the worker was in the course of his employment with the employer who is considered by the Workplace Safety and Insurance Board to be the accident employer. The worker began his employment with this employer in November 2004. However, the worker claims that the injury began prior to that date, in the course of his employment with other employers. The worker also acknowledged that he experienced symptoms of back pain prior to commencing his employment with the accident employer of record.

[2] After hearing testimony at the hearing date of October 30, 2008, Ms. Nichols submitted that the worker’s employer at the time he filed his claim in 2006 was not the correct accident employer in this case since the claimed injury began prior to the commencement of the worker’s employment with the 2006 employer. The parties agreed that they would provide me with written submissions on this issue, following which I would issue an interim decision on Ms. Nichols’ submissions. What follows is that interim decision.

(ii) The Issues

[3] The issue in this appeal, is whether worker has entitlement to benefits for a disablement injury in the form of a lower back disability. The issue addressed in this decision is whether the 2006 employer should be the accident employer in the worker’s 2006 claim.

(iii) The Decision

[4] On the evidence and submissions presented to me, I am persuaded on a balance of probabilities that the 2006

employer has been properly identified by the Board as the accident employer for the purposes of the claim in issue in this appeal.

(iv) Analysis

[5] For the purposes of my analysis on this issue, I find as a fact that the worker had symptoms of lower back pain prior to commencing his employment with the 2006 claim employer. I also find as a fact that the worker experienced symptoms of lower back pain shortly after beginning his employment with the 2006 claim employer, but did not stop work because of those symptoms until April 2006, at which time he filed the claim in issue in this appeal.

[6] The worker's claim is that the lower back pain that compelled him to stop working in April 2006 was a result of the cumulative effect of his years of work as an electrician, including work he did with the 2006 claim employer.

[7] In her submissions on this issue, Ms. Nichols argued that the 2006 claim employer was not the accident employer for the purposes of the worker's claim since, under Board policy (as interpreted by Tribunal decisions), the date of the injury giving rise to the claim was before the worker began his employment with the accident employer in 2004.

[8] The policy in question is found in Document No. 11-01-04 of the Board's *Operational Policy Manual* (OPM). That document states:

The date of injury is the date that the worker experiences a disabling physical or functional abnormality or loss due to a disablement, occupational disease, or trauma.

...

For a disablement or an occupational disease, the date of injury is the date the worker suffers the impairment (i.e., the date on which the worker experiences the disabling physical or functional abnormality or loss).

[9] Ms. Nichols submitted that several Tribunal decisions have concluded that, in determining the date of injury in a disablement case, the date of injury is the date on which the worker suffers a physical or functional abnormality or loss. Ms. Nichols submitted that these decisions concluded that the word "disabling" in the policy document did not mean that the worker must actually be prevented from working to meet the policy requirement. I note, in this regard, the following excerpt from the Tribunal's *Decision No. 841/08* (May 20, 2008). Paragraphs 66-68 of that decision read as follows:

The Board's position in this case appears to be that there is no date of injury for hearing loss until there is evidence of "disabling" physical or functional abnormality or loss: that is, until the worker meets a disability threshold (i.e. entitlement to a permanent pension).

However, the Act appears to recognize the existence of impairment where there is physical or functional abnormality or loss that is not disabling. In the pre-1989 Act, impairment is defined as "any physical or functional abnormality or loss..." (ss. 1(1)). The definition does not require that the impairment be disabling. Disability is a different concept. A "disability" is defined in the pre-1989 Act as "loss of earning capacity" as a result of the injury (ss. 1(1)). It may, therefore, be necessary for a worker to have a "disability" before he/she can be eligible for a pension, which requires a loss of earning capacity under the pre-1989 Act. But disability is not part of the definition of impairment; an injury can exist without disability. As I interpret the legislation, it is not necessary for the worker to have a loss of earning capacity in order to have an impairment. A worker who suffers an impairment without any loss of earning capacity could be entitled to health care benefits.

I am persuaded, therefore, that, under the applicable legislation, a worker sustains an injury by accident where he/she experiences a physical or functional abnormality or loss. The date of injury is the date on which that physical or functional abnormality or loss becomes apparent. In my view, the Act does not require that a physical or functional abnormality or loss be disabling to establish the presence of an injury. In my view, the word "disabling" in the Board's policy is not a modifier for the type of physical or functional abnormality or loss that would be considered an injury. Rather, I interpret

the word “disabling” as a reference back to the word disablement in the policy. It cannot, in my view, be interpreted as a threshold requirement for the existence of an injury.

[10] Although that excerpt addresses the pre-1989 version of the legislation, “impairment” has the same definition in the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, the legislation applicable to the present claim.

[11] Mr. DePoe submitted, in his written arguments on this issue, that the better interpretation of the policy is one that gives to the policy its literal meaning. In support of that position, he cited the Tribunal’s *Decision No. 1540/08* (July 21, 2008). In that decision, a worker had an onset of symptoms of an elbow impairment while working for an employer who was not registered with the Board. The employer registered with the Board on January 28, 2005. In April 2005, the worker stopped work because of her elbow condition and filed a claim. The Board’s operating level determined that the date of accident was April 22, 2005. The employer appealed; an Appeals Resolution Officer determined that the correct accident date was February 3, 2004. The worker then appealed to the Tribunal. In *Decision No. 1540/08*, a Vice-Chair concluded that, under the Board’s policy, the date of accident was the date on which the worker was disabled from working. The Vice-Chair reversed the ARO’s decision and reinstated the operating level decision.

[12] Mr. DePoe argued that I should follow that decision and conclude that the date of injury in the present case was the date when the worker stopped work in April 2006.

[13] While I agree with the result in *Decision No. 1540/08*, I do not agree with the interpretation of the Board policy found in that decision. I prefer the reasoning in *Decision No. 841/08* which concluded that the inability to work is not a necessary requirement for establishing a date of accident in a disablement claim. Having said that, however, I do not accept Ms. Nichols’ position that a worker for whom there is evidence of earlier impairment is precluded from filing a claim for benefits at some point after the worker first experiences a physical or functional abnormality or loss associated with the condition in issue.

[14] The basis for so concluding involves an analysis of law and policy, which I will commence below. Prior to doing so, however, I wish to comment further on the decision cited and relied on by Mr. DePoe, *Decision No. 1540/08*. In that decision, the Vice-Chair cited four other Tribunal decisions. Those decisions are described in paragraph 24 of *Decision No. 1540/08*. The Vice-Chair noted that two of those decisions concluded that the date of accident in a disablement claim was the date of the onset of symptoms (*Decisions No. 2371/07* (February 14, 2008) and *2014/05* (March 2, 2006)). According to the Vice-Chair, two other previous decisions concluded that the date of accident in a disablement claim should be the date of evidence of disability (*Decisions No. 1053/07* (November 2, 2007) and *1386/02* (December 13, 2002)).

[15] I note, however, regarding those latter two decisions, that the first considered the issue of whether a worker’s claim had been filed in a timely manner. In that decision, the Vice-Chair cited other policy that permitted the filing of the worker’s claim within the time it was filed. The Vice-Chair, therefore, considered the policy in Document No. 11-01-04 as a tangential factor. Regarding the other decision cited, which apparently concluded that Board policy required evidence of disability to establish a date of accident for a disablement claim, *Decision No. 1386/02*, I note that that decision did not, in fact, come to that conclusion. At paragraph 41 of that decision, the Panel stated:

We note, in this regard, that a claim for benefits is not triggered by a disability but by an “injury by accident”. Hence, in our opinion, the date of a worker’s accident is not the date upon which he is unable to work because of an injury but the date on which it appears, from a medical point of view, that the injury may have occurred.

[16] Consequently, I cannot agree with Mr. DePoe’s submissions that there are a number of Tribunal decisions that support his position. In my view, the preponderance of the decisions in this area support the conclusion that, under the Board’s policy and the applicable legislation, the date of accident in a disablement claim is not necessarily the date on which the worker is no longer able to work because of that injury (see e.g. *Decisions No. 1386/02, 1073/05* (2005), 74 W.S.I.A.T.R. 271, *2014/05, 1053/07* and *841/08*).

[17] But, as I noted above, that is not the end of the analysis. In my view, the date of injury for a disablement

claim is a question of fact that turns on the particular circumstances in each claim.

[18] In the present case, Ms. Nichols submits that the date of injury was the date the worker first experienced impairment as defined under the legislation. The worker concedes and even argues that his injury began before he started working for the 2006 claim employer. However, he is also claiming that his employment with that employer furthered the injury resulting in disability. He is, in essence claiming that his last employment made a significant contribution to the impairment that caused him to stop work. In my view, this constitutes a claim for a new injury that supports, *if proven*, a claim for benefits for the 2006 loss of earnings.

[19] The Board's policy on "Recurrences" is helpful in analysing the arguments presented to me on this issue. That policy is found in OPM Document No. 15-03-01. It stipulates:

A recurrence may result from an insignificant new accident, or may arise when there is no new accident. To identify a recurrence, the WSIB must confirm that there is clinical compatibility between the original injury or disease and the current condition, or a combination of clinical compatibility and continuity.

If a significant new work-related accident occurs, the WSIB establishes a new claim. [Emphasis added]

[20] Since there was no prior claim for a similar injury, the Recurrence policy is not technically applicable. But I cite the policy because it helps in showing what kind of injury can give rise to a new claim, i.e., where a "significant new work-related accident occurs".

[21] In my opinion, the issue before me is whether the worker's employment with the 2006 claim employer made a significant contribution to his later disability. That is a matter for the evidence to resolve. In the meantime, the worker in this case has clearly asserted that, as a result of his employment with the 2006 claim employer, he suffered a "new work-related accident". Whether that is a correct interpretation of the evidence is a matter for me to determine. But, at this point, there is no basis for concluding that the 2006 claim employer is not the accident employer for the purposes of this appeal. On the face of the claim as presented, it clearly is the accident employer.

[22] In presenting her submissions, Ms. Nichols stated that one of the reasons for making her submission at this point was to be able to enable the Tribunal to notify earlier employers if that was deemed to be appropriate. It may well be that the evidence will ultimately establish that the worker's pre-2004 employment was the only significant cause of the later disability. At this point, the worker has no claims regarding that earlier employment. There are, therefore, no other accident employers at this time and there is therefore no need to provide notice to such employers. The worker's appeal will proceed on the basis that the worker has a claim against his 2004 employer.

[23] The worker's appeal will proceed with the 2006 claim employer as the accident employer in this claim. I have separately issued instructions regarding obtaining additional evidence. Once that evidence has been obtained, the parties will have an opportunity to file submissions on the merits of the worker's claim in their respective capacities as worker and accident employer.

DISPOSITION

[24] The worker's appeal is adjourned to obtain further evidence.

[25] The worker's employer at the time he filed his claim in 2006 is the accident employer in this claim. Notice will not be provided to earlier employers.

[26] By separate correspondence, I have directed the Tribunal's Medical Liaison Office to obtain additional medical evidence. Once that evidence has been received, the parties are to file final submissions on the merits of the worker's appeal in accordance with instructions set out in separate correspondence.

Accident employer determined.



Decision No. 2356/08

Panel: Kenny (Vice-Chair), Séguin, Broadbent

Decision — July 29, 2009

Neutral Citation: 2009 ONWSIAT 1794

Post-traumatic stress disorder – Psychotraumatic disability – Stress, mental – Consequences of injury (altered gait) (cane) – Drug abuse – Alcohol – Medical treatment (special) – Labour market re-entry (co-operation) (disabled by non-compensable condition).

Worker did not have entitlement for drug and alcohol dependency related to compensable accident but, in circumstances, had entitlement for addiction treatment program, which was needed before other compensable conditions could be identified and treated

In 1999, while working at a fishing lodge, a 22-year-old worker fell from a boat. The propeller struck and injured his knee. Three years before the accident, the worker had been treated for drug dependency. After the accident, the worker started drinking excessively and taking illegal drugs. Three years after the accident, he again sought treatment for alcohol and drug dependency. From 2002 to 2004, he entered treatment centres on several occasions. In 2005, he was diagnosed with post-traumatic stress disorder. The worker appealed a decision of the Appeals Resolution Officer denying entitlement for psychotraumatic disability or traumatic mental stress, denying entitlement for carpal tunnel syndrome and denying further LOE benefits and LMR services. The appeal was allowed in part.

The substance abuse did not result from medications used to treat the worker's knee. The worker was not prescribed the type or dosage of medications that would cause a dependency on the alcohol and illegal drugs that the worker took. After the accident, the employer gave the worker about \$1,300 in wages. At the time, the worker was alone in his parents' home. He chose to drink \$1,300 worth of alcohol, and then to follow that with ongoing use of illegal drugs. In doing so, he chose to disregard the steps he knew he had to take in order to keep his substance dependency in remission. The use of alcohol and drugs was not related to the compensable injury. He did not have entitlement for the drug and alcohol dependency.

The worker had entitlement for post-traumatic stress disability. The accident was sudden, unexpected and horrific, as he was thrown into the water near the rotating propeller. He saw bone, muscle and blood that became visible due to the open laceration caused by the propeller. There was a delay in diagnosis of the PTSD but there was a reasonable explanation related to the seriousness of the substance abuse and the need for treatment of the substance abuse before other conditions could be identified.

The worker did not have entitlement for carpal tunnel syndrome. Evidence did not relate the condition to use of a cane.

The worker held a number of jobs from 1999 to 2002. Evidence did not establish a wage loss during that period. The Panel noted that the worker needed post-injury earnings that exceeded his pre-injury earnings in order to sustain his expensive substance abuse.

After completion of the substance abuse treatment in 2004, the worker experienced a wage loss resulting from the knee injury and the PTSD. The compensable conditions prevented him from returning to his pre-accident employment and reduced his chances of re-entering the labour market.

In determining entitlement to an LMR plan, the Board must consider non-work-related conditions. The worker's substance dependency was such a condition. Because it was necessary to treat the substance abuse before the PTSD could be identified and treated, and before the Board could provide an effective LMR program, the Panel was satisfied that the addiction treatment program was an important first step in the treatment of his PTSD and the LMR plan. Therefore, the treatment programs should be considered to be a necessary part of the LMR plan to which the worker was entitled. The time the worker spent in the programs should be considered to be time during which the worker was co-operating in LMR. Thus, the worker was entitled to full LOE benefits during that time.

Tension post-traumatique – Invalidité attribuable à un traumatisme psychique – Tension mentale – Conséquences de la lésion (altération de la démarche) (canne) – Abus de drogues – Alcool – Traitement médical (spécial) – Réintégration sur le marché du travail (collaboration) (handicapé par des problèmes non indemnissables).

Le travailleur n'avait pas droit à une indemnité pour toxicomanie et alcoolodépendance liées à l'accident indemnissable, mais, vu les circonstances, il avait droit à un programme de traitement des dépendances, lequel était nécessaire avant de pouvoir identifier et traiter ses problèmes indemnissables.

En 1999, pendant qu'il travaillait à un camp de pêche, le travailleur, qui était âgé de 22 ans, est tombé d'un bateau. L'hélice a frappé et blessé son genou. Trois ans avant l'accident, le travailleur avait été traité pour toxicomanie. Après l'accident, le travailleur a commencé à boire excessivement et à consommer des drogues illicites. Trois ans après l'accident, il s'est fait traiter de nouveau pour alcoolodépendance et toxicomanie. De 2002 à 2004, il a été admis à des centres de traitement à plusieurs occasions. En 2005, il a reçu un diagnostic de syndrome de stress post-traumatique. 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 invalidité psychotraumatique ou stress traumatique et pour un syndrome du canal carpien ainsi qu'à d'autres prestations pour perte de gains (PG) et à des services de réintégration sur le marché du travail (RMT). L'appel a été accueilli en partie.

L'abus d'alcool et de drogues du travailleur ne résultait pas de la médication utilisée pour traiter son genou. Les médicaments prescrits n'étaient pas d'un type ou d'un dosage pouvant causer l'alcoolodépendance et la toxicomanie du travailleur. Après l'accident, l'employeur avait donné environ 1 300 \$ en salaire au travailleur. À ce moment-là, le travailleur était seul au domicile de ses parents. Il avait choisi de consommer la valeur de 1 300 \$ en alcool pour ensuite continuer à user de drogues illicites. En ce faisant, il avait choisi de passer outre aux mesures qu'il connaissait pour maintenir sa dépendance en rémission. La consommation d'alcool et de drogues n'était pas liée à sa lésion indemnissable. Il n'avait pas droit à une indemnité pour sa toxicomanie et son alcoolodépendance.

Le travailleur avait droit à une indemnité pour stress psychotraumatique. L'accident avait été soudain, imprévu et horrible : le travailleur avait été projeté dans l'eau près des hélices qui tournaient et il avait vu ses os, ses muscles et son sang en raison de la lacération ouverte causée par les hélices. Le diagnostic de stress psychotraumatique avait tardé, ce qui s'expliquait par la gravité de l'abus d'alcool et de drogues du travailleur et par le fait qu'il fallait traiter ces abus avant de pouvoir identifier les autres problèmes.

Le travailleur n'avait pas droit à une indemnité pour un syndrome du canal carpien, car la preuve n'indiquait pas qu'il était lié à l'utilisation d'une canne.

Le travailleur avait occupé différents emplois de 1999 à 2002. La preuve n'indiquait pas qu'il avait eu une perte de gains pendant cette période. Le comité a noté que les gains d'après l'accident du travailleur devaient excéder ses gains d'avant la lésion pour financer son dispendieux abus d'alcool et de drogues.

Après avoir terminé un traitement pour l'abus d'alcool et de drogues en 2004, le travailleur avait subi une perte de gains par suite de sa lésion au genou et du stress psychotraumatique. Ses problèmes indemnissables l'empêchaient de retourner à son emploi d'avant l'accident et réduisaient ses chances de réintégration sur le marché du travail.

Quand elle examine la question du droit à un plan de RMT, la Commission doit tenir compte des problèmes non reliés au travail, et le problème de toxicomanie du travailleur était un problème de ce genre. Étant donné qu'il

fallait traiter le problème d'abus de drogues et d'alcool avant de pouvoir identifier et traiter le problème de stress psychotraumatique et avant que la Commission puisse fournir un programme de RMT efficace, le comité était convaincu que le programme de traitement des dépendances était un important premier pas dans le traitement du problème de stress psychotraumatique et du programme de RMT. Par conséquent, il fallait considérer les programmes de traitement comme une partie nécessaire du plan de RMT auquel le travailleur avait droit. Le temps passé dans des programmes devait être considéré comme du temps pendant lequel le travailleur collaborait à son programme de RMT. Le travailleur avait donc droit à des prestations pour PG totale pendant cette période.

Workplace Insurance Legislation Considered:

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

- s. 13(4)
- s. 13(5)
- s. 42
- s. 43

Board Directives and Guidelines Considered:

Operational Policy Manual

- Document No. 15-03-02 (October 12, 2004) (since superseded)
- Document No. 15-04-02 (November 3, 2008)
- Document No. 19-03-04 (June 15, 1999) (since superseded)

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DISPOSITION

APPEAL by the worker from a decision of the Appeals Resolution Officer denying entitlement for a number of conditions.

July 29, 2009. THE TRIBUNAL: —

BEFORE:

M. Kenny, Vice-Chair
J. Séguin, Member Representative of Employers
D. Broadbent, Member Representative of Workers

HEARING:

November 4, 2008, at Ottawa, Oral
Post-hearing activity completed on February 24, 2009

DECISION(S) UNDER APPEAL:

WSIB ARO decision dated October 4, 2007, and April 16, 2007

APPEARANCES:

For the worker: P. King, Paralegal

For the employer: Not participating

REASONS

(i) Introduction

[1] On July 24, 1999, the worker was working as a guide/maintenance labourer at a fishing lodge. He was thrown from a boat. The boat motor propeller struck and injured his right knee. He had knee surgery. He returned to work about one month after the accident. He was, however, unable to do his pre-injury job at the fishing lodge so the employer drove the worker home in September 1999 (about two weeks after he attempted to return to work). The worker was 22 years old at the time of his work accident.

[2] About 3½ years before his work accident, the worker had been treated for alcohol and drug dependency. When

the worker returned to his parents' home after his unsuccessful attempt to return to his pre-injury work at the fishing lodge, he began drinking excessively and taking illegal drugs (including cocaine). The worker did a number of other jobs (including a hotel front desk clerk job) over the course of the next three years. He testified that he was "high all the time" during that period and he did not pursue plans he previously made for attending college. About three years after his work accident, he again sought treatment for alcohol and drug dependency. From September 2002 until April 2004, the worker entered centres for the treatment of addiction on several occasions. Except for a relatively brief period in early 2004, the worker remained clean and sober after September 2002. He was actively working to recover from his addictions during that period of time.

[3] About six months after the worker was discharged from his final residential treatment program, the worker contacted the Board about problems he was having with his right knee. The Board decided that degenerative changes identified in a 2004 MRI were compatible with the 1999 work injury. It rated the worker's permanent right knee impairment at 8%.

[4] In 2005, the worker's representative referred the worker to a psychologist for a psychological assessment. Among other things, the psychologist diagnosed "Post-Traumatic Stress Disorder [PTSD] – Chronic" and related this to the worker's 1999 work accident. However, Board psychologists and adjudicators noted that the worker had been examined by other psychologists and a psychiatrist during the period from 2001 to 2004 and these psychologists/psychiatrist had not diagnosed PTSD.

[5] In 2005, the worker decided to return to school. He subsequently successfully completed a college program in the addictions and community service field. Since graduating from that program, he has found rewarding work in that field.

(ii) The Issues

[6] The issues to be decided in this appeal are:

1. whether the worker is entitled to benefits for psychotraumatic disability;
2. whether the worker is entitled to benefits for traumatic mental stress;
3. whether the worker is entitled to benefits for carpal tunnel syndrome (CTS);
4. whether the worker is entitled to further loss of earnings (LOE) benefits and labour market re-entry (LMR) services.

(iii) The Board Decisions

[7] In April 2007, a Board ARO rejected the worker's representative's arguments that the worker's work accident was "a significant contributing factor to [the worker's] aggravated drug abuse problem, depression and PTSD." The ARO noted the worker's pre-existing substance abuse problem and concluded that the evidence did not support a finding that the worker's ongoing abuse was causally related to the work injury. The ARO also noted the absence of medical treatment from 1999 to 2004 for either knee problems or stress-related psychological problems. He concluded that the evidence did not establish that the worker had an "emotional reaction to the accident or injury" within the meaning of Board *Operational Policy Manual* Document No. 15-04-02 (the Board's psychotraumatic disability policy) because the reaction did not occur for many years following the accident. With respect to the worker's claim for benefits for CTS, the ARO accepted a Board Medical Consultant's opinion that there was no compatibility between the worker's use of a cane and the development of CTS. The ARO concluded that the worker was not entitled to LMR services or further LOE benefits because his compensable knee injury did not preclude him from attending the college program which he could have attended in September 1999 (i.e., a two-year "Drug and Alcohol Counsellor program" at Fleming College).

[8] In October 2007, a Board ARO decided the worker was not entitled to benefits for PTSD under Board *Operational Policy Manual* Document No. 15-03-02 (the Board's traumatic mental stress policy). He noted the gap in seeking medical attention for any PTSD symptoms from 1999 to 2004 with no reasonable explanation. He concluded that there was insufficient evidence to link the worker's PTSD symptoms to the work accident.

(iv) The Worker's July 24, 1999 Work Accident

(a) The Worker's Testimony

[9] The worker testified that, in the spring of 1999, he began working at a fishing lodge cutting grass, guiding guests (in boats), and cleaning guests' fish. When circumstances at that lodge changed, he started working for the accident employer – another fishing lodge. His duties were about the same as they were with the previous lodge. He started working for the accident employer on July 21, 1999. The worker's accident occurred three days later.

[10] The worker testified that the owner of the fishing lodge asked him to fix the motor of a used boat that the owner had just purchased. The worker understood that it was missing a shifting pin. The worker repaired it, put the motor on the boat, and took the boat out on the lake to test the shifter (about ½ to one kilometre from the camp). He invited a young teenager to accompany him. After testing the shifter, the worker was ready to head back into camp. When he pulled the handle with his left arm to turn the boat, he suddenly found that there was nothing supporting him – he “was flying” and he hit the water. He later found out that the wood under the boat carpet was rotten so, when he shifted his weight, the seat he was sitting on to drive the boat came out. He said he also learned that there was a faulty “stop” cord. Because he was holding the throttle in his hand, as he fell, the boat jerked forward and he was thrown over the side of the boat.

[11] The worker testified that he remembers hearing the motor and thinking that it was on when it should have shut off. He testified that he remembered thinking he had to move away from the motor, so he dove for the bottom – but he felt a “bump.” He testified that he thought it had bumped him out of the way, and he did not feel any pain. When the motor did stop, the worker swam to the boat.

[12] The worker testified that, when he got to the boat, his knee was sore and he expected there to be a bruise there. But when he kicked himself up into the boat, his jeans were cut away on his right side, and his leg was covered with blood.

[13] The worker testified that his ski patrol experience meant that he knew what to do, so he used his shirt to make a pressure bandage. They started the boat and the worker's young companion screamed for help so everyone at the camp went to the dock to meet the boat.

[14] The worker testified that he remembers that a girl from the camp brought him the wrong First Aid kit (he wanted his ski patrol kit). The worker described how the camp used 2x4 wooden walkways. He testified that the most terrifying part of the day of the accident was when he was being helped up the walkway to get his First Aid kit and he saw his blood running down the ramp over the space between the 2x4s.

[15] The worker recalled being “in and out” of consciousness during a long boat ride from the camp to a landing where the owner was loading guests. From that landing, the owner drove the worker to meet the ambulance and the ambulance took him to Red Lake. He was taken from Red Lake to Thunder Bay by air ambulance. The worker testified that most of the ride in the ambulance was a “blur.”

[16] The worker recalled a doctor in the town to which he was taken calling his parents and telling them there was a pretty good chance he would not make it to Thunder Bay because he had lost a lot of blood. The worker's mother's testimony did not, however, support the worker's testimony about such a conversation. She recalled that she and her husband were first notified about the accident by an OPP officer who said the worker had been hurt in a boating accident. The mother recalled that her husband spoke with a nurse before the worker arrived at a town hospital, but she did not recall the nurse giving them any information about loss of blood or any other indication about the severity of the accident, and neither she nor her husband spoke directly with any doctor before they arrived at the hospital in Thunder Bay.

(b) The Written Evidence about the Injury

[17] The worker's accident occurred at about 4 or 5 p.m. on July 24, 1999.

[18] In Red Lake, the worker was examined by Dr. Miller Williams, and then transferred to Thunder Bay.

[19] According to the hospital records, the worker arrived at the Thunder Bay Hospital at 23:07 on July 24, 1999.

When he arrived, morphine was ordered – but, according to the available records, this was the only time morphine was prescribed for the worker. The Emergency Department record described the worker’s accident history as follows:

Fell out of boat at 4-5 p.m. this evening = laceration to right knee – Large evulsion noted with muscle seen – no bleeding at present – patient awake and alert...

[20] According to notes dictated by the orthopaedic surgeon at the Thunder Bay Hospital (Dr. H. Hamilton) at 00:26 on July 25, 1999, his examination of the worker’s right knee revealed a ragged laceration of the side of the worker’s right knee, and x-rays showed the bone had been “nicked.” Dr. Hamilton arranged for the worker to have emergency surgery to explore and repair the knee wound.

[21] At 01:59 July 25, 1999 (about 1½ hours after the pre-surgery examination, and 2½ hours after the worker arrived at the Thunder Bay Hospital), the worker’s surgery was finished, and Dr. Hamilton dictated notes about the worker’s surgery. He wrote:

...there was a small chunk of the lateral femoral condyle that [was] gouged out by the propeller blade and probably part of the lateral ligament complex was damaged, but the knee did not feel grossly unstable on examining it with varus stressing and certainly the anterior cruciates appear to be absolutely solid, so I don’t think there is going to be too much instability in this knee. It was noted on palpation that he has a fair amount of chondromalacia patella, but this may not be symptomatic...

[22] The worker was discharged from the Thunder Bay Hospital the next day. Dr. Hamilton’s Discharge Summary described the worker’s injury as follows:

...This patient was admitted just before midnight last night having suffered power boat propeller injuries to the lateral aspect of his right knee. These entered the joint and caused a fair amount of soft tissue damage and just nicked the bone...

[23] Dr. Hamilton’s Discharge Summary stated that the worker had been placed in a light fibreglass cast and that he was returning with his parents to the city where his parents lived (the same day as the surgery). Dr. Hamilton recommended a five-day course of Ancef (an antibiotic) with a continuation of antibiotics if necessary. He wrote:

...The knee felt reasonably stable but as soon as he has recovered from the initial insult and is comfortable the cast can be removed and he could be started on some physiotherapy to strengthen his quadriceps and get him going as fast as possible...

[24] Thus, the surgeon who performed the worker’s knee surgery wrote that the propeller had “nicked” the side of the worker’s right knee bone as well as damaging soft tissue at the side of his knee – but that the worker’s cruciate ligaments appeared to be “absolutely solid.” The surgeon anticipated that the worker’s knee would heal relatively well and the worker would not experience much instability in this knee.

[25] The worker was examined at the Dryden Hospital later on July 25, and he was discharged from the Dryden Hospital at about 9:20 p.m. on July 25, 1999 (the day after the worker’s accident). According to the record from the Dryden Hospital, the worker was discharged with Tylenol #3, Ancef (an antibiotic), a home care referral, and a recommendation that he follow up with his family doctor (Dr. Cortens). The Dryden Hospital noted that the worker was also taking Naproxen – but, according to the Thunder Bay Hospital records, the worker had been taking Naproxen for back pain.

[26] Dr. Cortens submitted a report to the Board on July 26, 1999. He indicated that Dr. Hamilton had performed the worker’s knee surgery. In answer to a question about whether complete recovery was expected, Dr. Cortens responded “yes” but he did not provide an approximate time for that recovery. Likewise, when Dr. Miller Williams reported to the Board, he indicated that the prospects for the worker’s “complete recovery” were “favourable.”

[27] On July 30, 1999, the worker filled a prescription for 50 Tylenol #3 (as well as Naprosyn). The pharmacy

receipt indicates that the worker was to “take 1-2 tablets by mouth four times daily when needed for pain.” There is no record of the worker filling any additional prescriptions for Tylenol #3 or any other pain medication after July 30.

[28] The worker saw Dr. Cortens on August 11 and August 25, 1999. According to Dr. Cortens’ notes of those visits, by August 11, the worker’s right knee had “almost full” extension and flexion was approximately 100 degrees. On August 25, Dr. Cortens wrote that the worker’s laceration continued to heal and he concluded that the worker could return to light duties as of August 28, 1999 (full hours). There is no indication in Dr. Cortens’ notes that he prescribed any additional pain medication when he saw the worker in August 1999.

[29] Dr. Cortens’ August 25, 1999 report to the Board, described the worker’s restrictions as: “unable to use right leg effectively” but it also indicated that Dr. Cortens expected that the worker would completely recover.

[30] Thus, the medical reports from the surgeon and the other doctors who examined the worker at the time of the work accident indicate that the worker’s right knee injury was certainly not as serious as it could have been given the mechanics of the accident. They anticipated that the worker would likely completely recover from the injury.

[31] As can be seen from the above records, any references in later medical histories to the worker having a right knee replacement, or a “plastic” knee, or surgery lasting 10 hours or 18 hours, are wrong.

(c) Other Evidence about the Worker’s Injury

[32] The worker’s mother testified that she thought the worker had been prescribed morphine and Tylenol #3 when he was discharged, and she thought that she or her husband may have picked up Tylenol #3 for the worker and put it on her husband’s benefit plan. However, she could not recall whether this was in fact, the case, or any details about how often this might have occurred.

[33] In our view, the worker’s mother’s recollection about what medication the worker took after his 1999 work accident does not establish that he took more than the 50 Tylenol #3 for which a receipt was submitted to the Board. The mother’s recollection was vague and, with the passage of time, it was clearly difficult for her to distinguish between events around the time of the worker’s earlier back injury/surgery when the worker did get medications on her husband’s benefit plan (because he was a dependant who was living with his parents), and later time periods (after he was no longer living with his parents, and no longer a dependant).

[34] The worker’s mother did, however, remember that her son talked about the accident when he was at home recuperating. She testified that he discussed how the accident happened, and he showed he had been upset by it – that it was “scary” for him – but he was glad that he was not worse than he was. She recalled that, after the accident, he stayed up with the TV on at night.

(d) The Worker’s Contact with the Board

[35] The worker had several contacts with the Board before he returned to work on August 28, 1999.

[36] On August 16, 1999, the worker spoke with a Claims Adjudicator at the Board. According to the Claims Adjudicator’s notes, the worker said that his condition was improving and he would be off work for at least another two weeks. He advised the adjudicator that he was “quite sure” that he would be back to work within 12 weeks (the period during which the Board calculates benefits on a short-term earnings basis). He indicated that “they” were hoping that if his knee was good enough, he could just return to work and not have to go to physiotherapy.

[37] On August 16, 1999, the worker also spoke with a Board Nurse Case Manager (NCM). Her notes of that conversation indicate that the worker described the accident (and being able to see bone, muscle and bone chips in the wound). She indicated that he was discharged from hospital with oral antibiotics as well as Tylenol #3. She wrote:

...On August 10, his cast was removed, and he was able to ambulate with assistance. Presently he does not experience

much pain, just a dull ache. He does experience flashbacks of the accident, and sometimes feels a bit of depression...

He has been a guide, and boat maintenance man for the past 2 years, however had only been working for 3 days with his present employer. He is comfortable with boats and motors, and cannot offer any prevention ideas.

He intends to return to work as soon as possible, and states the accident employer has light work available for him as soon as he is able to return...

[38] On August 17, 1999, the worker sent the Board his Report of Injury form.

[39] The worker phoned his Claims Adjudicator on August 27, 1999, to advise the adjudicator that he had seen the doctor and he could return to work light duties the next day. The worker also signed a letter dated August 27, 1999, enclosing certain receipts (and describing how he was just coming out of surgery when his parents arrived in Thunder Bay at about 1:30 a.m. on July 25, 1999).

[40] There is nothing in these notes of the worker's conversations with the Board that suggests that the worker intended to go to College in September 1999. To the contrary, the discussions dealt with his pre-injury job as a seasonal employee (guide/maintenance man – with E.I. in the winter), and his eagerness to return to his pre-injury job at the fishing lodge in late August 1999. However, the worker testified that, in the spring of 1999, he had applied to two programs at the Sir Sandford Fleming College – one of which was a paramedic course, and one of which was a two-year "Drug and Alcohol Counsellor" program. He said that his first choice was the paramedic course and the College had advised him that he would be eligible for the paramedic course even though he had prior back surgery.

[41] The worker testified that, when he was recovering at home following his work accident, his father phoned the College to see whether the worker would still be eligible for the paramedic program with his knee injury and the College told his father "no" – that it could not take the chance with the combination of his back and his knee problems.

[42] The worker testified that he was not sure at this point that this information had an impact on him because he knew he could still take the college addiction counsellor course. He said he could have started the addiction counsellor course in January 2000, but he needed to return to work to make money for his tuition.

(v) The Worker's August 28, 1999 Return to Work

[43] Although a later Record of Employment from a Winnipeg hotel indicates that the worker started working as a front desk clerk on August 11, 1999, this is unlikely in view of the fact that the worker saw his doctor (Dr. Cortens) in Dryden on that date – and both Dr. Cortens' and the Board's information suggest that the worker returned to work with the pre-injury employer on August 28, 1999.

[44] It is not clear exactly how long the worker worked with the accident employer after his injury. In November 1999, the worker's Board Claims Adjudicator spoke with the worker. According to the adjudicator's notes, the worker described his knee condition and his attempt to return to work as follows:

...He's doing OK – swelling hasn't gone down – still no feeling. He's finding now with the cold weather he's being affected – he's very stiff in the morning – limp is much more pronounced.

When weather steady, it's not too bad – but when weather changing it's very bad...

I asked what work he's doing. Night audit at a hotel.

When he'd gone back to work with employer it went quite well – he pretty well stayed on light duty until season end...

[45] Thus, the adjudicator's notes suggest that the worker's return to work went well and he worked until almost the end of the fishing season. However, the worker later estimated that he returned to his pre-injury job at the fishing lodge for no more than two weeks.

[46] The worker testified that, when he returned to work for the pre-injury employer, there was really no "light

duty” work, so he essentially performed his regular job with a cane and a cast. He described one day when a storm was coming up so he and the other guides were taking boats from a beach (where they could get banged up in a storm) across the lake to a sheltered bay. The worker testified that, when they were about half way across the lake, the boat started to get hit hard with waves and he “froze” in the middle of the lake with the boat being thrown around. He testified that he was curled up in a ball at the bottom of the boat and the accident employer/owner had to come and get him. He testified that the owner said that he could not have this happen when the worker was responsible for guests in the boat, and the owner drove the worker home to his parents’ house the next day.

[47] There is, however, no record of the worker describing the above event before 2005 (when his representative recorded his description of the event).

[48] In 2005, when the Board contacted the fishing lodge accident employer/owner about the worker’s attempt to return to work in August/September, 1999, the owner advised the Board that they had not had light duty for the worker and he recalled that the worker did not continue in the job due to too much pain in the knee. The accident employer/owner said that he had no recollection of the worker’s departure being related to a “mental thing.”

(vi) The Worker’s Substance Abuse After the Work Accident

[49] When the accident employer drove the worker to his parents’ home (in mid-September 1999), he gave the worker about \$1,100 to \$1,300 in cash for his wages.

[50] The worker testified that his parents were away and he broke into their home. He testified that, when he was alone in their house, he thought about his future – the fact that a lot of his identity was tied up in hunting, fishing, and ski patrol work – and being a paramedic was no longer possible. The worker testified that he is an addict. He said that, when he “lost his perspective,” he drove to the liquor store and he began drinking. He testified that he has no recollection of anything until eight days later. By the time he sobered up, he was in Winnipeg working and sleeping at a hotel. He later learned that he had stolen his parents’ car and it had been impounded in Winnipeg when he was charged with a criminal offence.

[51] The worker testified that, for the next three years, he made a lot of mistakes and did not do certain things because he was “high” using illegal drugs – including marijuana, cocaine, and hallucinogens. He said that he used marijuana for pain and cocaine to “quiet down” what went on in his head (for some things that he now attributes to Attention Deficit Disorder (ADD)). The worker testified that, from September 1999 to 2002, his primary focus was getting high. During this time, he did a number of jobs, including jobs at the hotel, a telemarketing job, jobs at resorts in the summer, and jobs in Montreal.

[52] The worker did return to work that was similar to his pre-injury job after his accident. He testified that he worked as a dockhand at a resort in the summer of 2000 – but he did not do guiding or work with the boats. He later gave up the fishing resort work and went to a bear hunting camp. According to his mother’s testimony, the worker was working at a fishing camp near Winnipeg in June 2002 when the owner of that camp phoned her to say that the worker had gone and left his dog behind. The worker testified that he moved to Montreal after a drug deal “went south” around the end of June. After being in Montreal for several months (with a drug habit that, according to his testimony at the ARO’s hearing, cost him about \$1,000 a day), the worker said he had a moment when he realized he was a “far cry from who I am” and he decided to seek treatment for his addictions.

[53] The worker entered a residential treatment program for addiction and substance abuse in September 2002 (for 28 days). He then continued his treatment at a different facility (from October 2002 to January 2003) after which time he lived in what he described as a “halfway house.” The worker testified that he did take a job or two after that treatment, but he felt he could not do physical work and he lacked the education to do other types of work. After he had a relapse in about February 2004, he again entered a treatment program. This program was run by the Royal Ottawa Hospital. The worker continued in that program for about 48 days, and then received follow-up treatment at a Centre in Elliot Lake until April 30, 2004.

[54] The worker testified that he has been clean and sober since March 2, 2004.

(vii) The Worker's Right Knee Condition After the Work Accident

[55] The worker received very little in the way of medical treatment for his right knee from August 1999 until November 2004.

[56] According to the Board's records, the worker contacted the Board about two years after his work accident (i.e., in August 2001) to see whether the Board was going to rate him for a permanent impairment award. Dr. Cortens provided a report in July 2001 stating that the worker continued to suffer pain related to his WSIB-related right knee injury – but Dr. Cortens did not provide physical findings or any information about the frequency with which he had seen the worker since August 1999.

[57] A Winnipeg doctor who described the worker as being a “new patient” sent the Board a report in August 2001. That doctor recorded the worker's description of pain with weather changes – but the doctor noted that the worker's right knee had full range of knee movement and no crepitus.

[58] In December 2001, Board Medical Consultant Dr. Brian Kelly reviewed the medical evidence on file and concluded that the worker did not have an assessable permanent impairment from his injury. Dr. Kelly wrote:

Despite the fact that this seemed to be a rather horrific injury and the fact that there was a significant soft tissue injury, it does not appear that the knee was structurally damaged in any way. Dr. Cortens in July noted the patient was still having pain and Dr. Williams in August noted that there was pain as well. He did describe however a knee with a full range of movement and no crepitus. I presume the knee is structurally sound as there is no reason from this claim that it would not be.

I think that a full recovery is expected from such an injury and that there should not be any assessable permanent impairment.

[59] In December 2001, the worker's Claims Adjudicator advised the worker that he was not entitled to a permanent impairment award. According to the adjudicator's notes, he discussed this with the worker in June 2002, but the worker did not contact the Board again until November 2004 – more than five years after his work accident.

[60] In November 2004, the worker advised the Board NCM that he had been in treatment for drug addiction (cocaine and other unidentified substances) and had been incapacitated until several months before his contact with the Board.

[61] The worker saw a doctor (Dr. Lang) at a walk-in clinic in Ottawa in November 2004. It appears from Dr. Lang's clinical notes that the worker may have described having had 18-hour surgery for his right knee (which, as can be seen from the medical records described above is not correct). Dr. Lang referred the worker to orthopaedic surgeon Dr. R. Forget for an assessment.

[62] In December 2004, after reviewing the results of an MRI of the worker's knee, Dr. Forget wrote a report to the worker's representative. In his report, Dr. Forget noted that the July 25, 1999 surgery had debrided the worker's knee and repaired lacerations, but the examination of the inside of the knee indicated that the anterior and posterior cruciate ligaments, and the right lateral collateral ligaments were intact, and there were no other pathological findings. With respect to his findings on examination of the worker in 2004, Dr. Forget wrote that the worker's knee ligaments were stable, and the worker had full range of knee motion in extension and flexion (and no other physical findings) – but that the worker complained of pain and discomfort and weakness of his right knee.

[63] The December 2004 MRI had reported “early chondropathy, either from early degeneration or post-traumatic changes in the tibiofemoral joint...” Dr. Forget concluded that the December 2004 MRI of the worker's right knee demonstrated the following:

...an MRI on the 17th of December 2004...demonstrates an early degeneration of the right tibiofemoral joint, both at the medial and lateral compartments. There is also a slight degeneration of the anterior compartment. A large dystrophic calcification was shown at the right lateral/collateral ligament, and this is probably due to an old ski injury...

[64] After reviewing the medical reports and the MRI, Board Medical Consultant Dr. Hignell concluded that the degenerative changes identified were compatible with the July 1999 work injury. Dr. Hignell noted that, although the worker had subjective complaints (of pain, swelling, instability, and difficulty standing or walking for long periods or kneeling), Dr. Forget had reported a full range of motion and stable ligaments – so it was not clear there was any assessable knee impairment.

[65] In June 2006, the worker was examined for the purpose of rating his permanent right knee impairment. The examiner noted that the worker described pain in the knee joint area and numbness in the scarred area of his knee and that the worker took Advil for pain relief as necessary. The Board rated the worker's permanent impairment at 8% (part of which was for disfigurement from scarring and part of which was for abnormal motion/impairment from arthritis).

(viii) The Worker's Condition Before His July 24, 1999 Work Accident

[66] The worker testified that he had been very active in sports and outdoor activities until 1991 when he suffered a back injury in a football game. Because he was only 14 or 15 years old at the time, his doctor wanted him to finish growing before he had back surgery. Thus, from 1991 to 1993 when he had the surgery, the worker managed his pain with medication. In 1993, he had a 2-level fusion. The worker testified that, after the surgery, he had Demerol in hospital and later, Tylenol #3. He testified that he took about 12 Tylenol #3 a day. By the time his doctors stopped giving it to him, the worker had access to it from other sources. The worker testified that his doctors stopped prescribing Tylenol #3 for him in the fall of 1994, and he began to take other drugs shortly after that. He recalled smoking marijuana and then progressing fairly quickly from that to cocaine. Once he started using cocaine, his school attendance suffered and he completed only his Grade 11. He left school and got a job, but he then stole cash from his employer. Criminal charges were laid and arrangements were made for the worker to receive treatment for his drug addiction. Shortly after his 18th birthday, the worker was charged and convicted of another criminal offence (of "theft under") and he received 18 months probation with community service.

[67] The worker entered a residential chemical dependency program on November 12, 1995. By the time he entered the program, he was using a variety of substances, including "cocaine, pot, acid, mushrooms, pain killers." According to a report from the psychometrist and supervising psychologist who assessed the worker when he was admitted to the centre, the worker's profile at that time showed "a degree of depression" and the worker said that he had been diagnosed in the past with clinical depression "because of pervasive feelings of sadness and listlessness, and sleep disturbance." He described experiencing dramatic mood swings throughout his life, and the psychologists concluded that this emotional lability predated his drug use. As part of the program, the worker agreed to abstain from alcohol and other drugs unless the drugs were prescribed. When he was discharged from the centre on December 20, 1995, his continuing care commitment included a commitment to attend a minimum of three Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings per week, to obtain an AA home group and two sponsors and contact them as required, and to complete 12 sessions with a care group.

[68] After he was discharged from the centre in 1995, he returned home. His mother testified that, when he was living at home after he returned from the rehabilitation centre, he came back to church and helped with activities such as Sunday school and scouts. The worker testified that he realized that it was difficult for him to "stay clean" in his home town, so he moved into a halfway house in another city – and then from the halfway house to a trailer that he shared with a friend who was in recovery and working at a treatment centre. The worker testified that he got a few more high school credits and he started doing seasonal work during the summer season at tourist resorts. He described the physical work and guiding he did with guests at a remote resort from June to October 1996. He testified that he did ski patrol work in the winter as well as some school work. He said he also ran a hot dog stand and drove taxi for a period of time. The worker provided a copy of his ski patrol registration card (expiring in January 1998). He testified that it took him until he was almost 21 years old to finish high school.

[69] The worker testified that he could not stay "clean" if he did not go to meetings – but he continued to go to one NA and two AA meetings a week.

[70] The worker testified that, in the spring of 1999, he applied for the two college programs (referred to above).

One program was a paramedics course, and the other was a substance abuse counsellor program.

[71] There is, on file, a letter from the College confirming that the worker applied for and was accepted to the September 1999 intake for a two-year Drug and Alcohol Counsellor program at the College, but that he did not register or attend the College. There is no such confirmatory letter regarding a paramedics course.

[72] The worker testified that addicts who applied to attend the College Drug and Alcohol Counsellor program had to be “clean” for two years in order to be eligible to attend the program.

[73] The worker described himself as “an anomaly” – a young person who managed (before his work accident) to stay clean after his 1995 treatment. He testified that, because he stayed clean, he was invited to speak to groups about drug abuse. He testified that, although relapse is “just going to happen” for a large number of people with addictions, it also does not happen for a large number of people who are (as he says he was) clean and sober for almost four years.

[74] There was evidence that the worker was having back problems shortly before his July 1999 work accident. When the worker was admitted to the Thunder Bay Hospital following his work accident, it was noted that he was taking Naprosyn for back pain. Also, when he saw his family doctor shortly after the work accident, his doctor noted: “Saw Dr. Hoffman recently with regards to his lower back problems, told that he had a crack in the sacral area, nothing to worry about and no problems related to previous surgery.”

[75] The worker recalled seeing Dr. Hoffman shortly before the work accident. He testified that he had slipped in the tub in about June 1999 and it hurt a lot. He thought he damaged his tailbone but he was advised that the back fusion was “fine.”

ISSUES 1 AND 2: IS THE WORKER ENTITLED TO BENEFITS FOR PSYCHOTRAUMATIC DISABILITY? IS THE WORKER ENTITLED TO BENEFITS FOR TRAUMATIC MENTAL STRESS?

(i) The Law and Board Policy

[76] The worker’s work accident occurred in July 1999. Thus, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) applies in deciding his appeal.

[77] Section 13 of the WSIA states that a worker “who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits” under the WSIA. The general entitlement provision of the WSIA does not distinguish between physical personal injuries and psychological personal injuries. However, section 13(4) and (5) limits entitlement to benefits for mental stress as follows:

13(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.

[78] In this case, the Board paid the worker benefits for the physical right knee injury he sustained at the time of his July 24, 1999 work accident. The worker’s representative argues that the worker suffered a psychological reaction to a very traumatic event (i.e., a psychological injury from the event itself) or a psychological impairment resulting from the compensable right knee injury. She asks the Tribunal to find that the worker is entitled to additional benefits under either the Board *Operational Policy Manual* Document No. 15-04-02 or Document No. 15-03-02.

[79] The psychotraumatic disability policy applies when a psychological disability results from a work accident or injury. It states:

POLICY

A worker is entitled to benefits when disability/impairment results from a work-related personal injury by accident.

Disability/impairment includes both physical and emotional disability/impairment.

GUIDELINES

General rule

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

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

...

Psychotraumatic disability entitlement

Entitlement for psychotraumatic disability may be established when the following circumstances exist or develop

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

[80] Thus, the Board’s psychotraumatic disability policy grants entitlement to benefits when an emotional impairment results from a work injury. The guidelines grant entitlement providing that the impairment became manifest within five years of the injury. If the evidence establishes that a worker has a psychological impairment as an emotional reaction to the accident or injury, or as a reaction to the treatment process, it comes within the circumstances for which the Board’s psychotraumatic disability policy grants entitlement.

[81] The Board’s Traumatic Mental Stress policy describes the circumstances in which impairment from employment-related mental stress can be compensated (as an exception to the section 13(4) provision that denies entitlement to benefits for mental stress). The policy distinguishes circumstances where workers develop mental stress gradually over time due to general workplace conditions from those circumstances which meet the requirements of the section 13(5) of the WSIA. It describes when a worker will be 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 employment” (as described in section 13(5)).

[82] The traumatic mental stress policy describes what is meant by the words “sudden and unexpected traumatic event,” and “acute reaction.” It states:

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...
- is generally accepted as being traumatic.

...

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.

...

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.

(ii) Reports about the Psychological Condition Within Five Years of the Accident

(a) From September 1999 to September 2001

[83] In spite of the fact that the worker was examined by psychologists and a psychiatrist during the five years after his work accident, it was not until the worker saw psychologist Dr. Seatter more than five years after his work accident that the worker was diagnosed with “Post-Traumatic Stress Disorder – Chronic.” There are, however, reports on file from individuals who had contact with the worker during that more than five-year period.

[84] As noted above, when the worker was speaking with the Board NCM on August 16, 1999, he described how he was no longer experiencing much pain (just a “dull ache”) but he did also mention that he experienced flashbacks of the accident and sometimes felt “a bit of depression.” He was, however, anticipating returning to work with the accident employer and he did so after seeing his family doctor on August 25, 1999. There is nothing in the family doctor’s August 25, 1999 report to the Board that suggests the worker was suffering any psychological reaction to the accident. To the contrary, in response to a question about whether there were “any significant factors delaying recovery,” Dr. Cortens responded “no” and indicated that complete recovery from the knee injury was expected.

[85] The next medical report is dated almost two years later. It is a report in which Dr. Cortens advised the Board that the worker reported ongoing right knee pain. Neither it, nor an August 2001 report from a doctor in Winnipeg for whom the worker was a “new patient” describes any psychological problems.

(b) The September 2001 Psychological Assessment

[86] In September 2001, the worker underwent a four-day assessment by clinical psychologist Dr. J. Henderson, and Dr. N. Anderson, a psychologist candidate. According to their report, because the worker had difficulties in several areas (academic, occupational, interpersonal and intra-personal), and after reading a magazine article about Attention Deficit Hyperactivity Disorder (ADHD), the worker requested a psychological evaluation. The psychologists understood that the assessment “was to determine whether he might be struggling with a learning disorder such as ADHD, another psychological disorder, or some combination thereof, and to make recommendations to follow-up planning and support.”

[87] The 2001 psychological assessment included an interview, as well as the administration of a number of tests – including the MMPI and Beck Depression Inventory – as well as a review of some background written documentation that the worker provided. It included a review of the worker’s past drug use, his in-patient treatment for drug abuse, and the following information about the worker’s drug use since that 1995 in-patient treatment:

...There have been relapses since that time [1995], including binges with alcohol and use of soft drugs, apparently after stressful events had occurred. There appears to have been some substance-induced dissociation in the past. Apart from two such incidents [the worker] appears to have remained mostly sober. He does not attend AA or NA meetings currently...

He said he currently drank one beer at most although he had had more to drink on two occasions in the past year - on both his birthday prior to the evaluation period, and before Christmas 2000, he had been drunk he said. He said he currently smokes marijuana approximately twice weekly and that using it relieved chronic pain from his knee injury. He denied any use of cocaine since his treatment at the [1995 Clinic]...

[88] Thus, the worker’s description of his alcohol/drug use in 2001 contradicts his later description of his alcohol/drug use. At the 2001 psychological assessment, he denied any use of cocaine since his 1995 treatment; he did not describe “being high all the time”; and he did not describe a change in his alcohol/drug consumption after (and linked to) his work accident.

[89] The 2001 report does describe the worker as having “suffered an unusual number of physical injuries” and it related the various injuries he suffered – including breaking his fingers, left leg bone, wrist and ribs, and injuring his back injury while playing sports as well as his “partial knee replacement (sic) in July 1999.” The report indicated that the worker reported experiencing chronic back and knee pain, as well as a history of using more than the prescribed amount of pain medication in order to get high, but it quoted the worker as stating that he was currently not abusing prescription medications. At the time of his 2001 assessment, the worker described the following as his work pattern:

[The worker] presented to the assessment describing “pattern of getting nowhere.” He said he wanted to know why he was in the rut he was in and how to get out of it. He described a pattern of having “unbelievable energy” when interested in a task, and able to “go and go,” working extremely hard at entry level jobs, being “unstoppable” and reaching the ceiling of opportunity in these, but becoming frustrated, irritable, and then leaving the job. Both starting a new job and working through a summer at a fishing lodge were examples of times when he was energised, although his energy did not flag while working in the fishing lodge and he described this as work he loved. He said he had not been interested in school and that school had been very frustrating for him. He said he had recently read an article in *Men’s Health* magazine about ADHD and he felt that the descriptions of ADHD there were much like his own situation.

He described himself as an excellent salesman, and easily able “to manipulate people.” He had recently sold natural gas contracts with [a gas company] and had held other sales positions including – at the beginning of the assessment period but not, we believe, at its end – a position with a call centre from which he set up in-home appointments for vacuum cleaner sales people...

[90] Thus, the worker appears to have described being “energised” when working at a fishing lodge doing work “he loves.” In view of the evidence that he worked at fishing lodges after his work accident, this description of that type of work does not suggest that he had psychological difficulties doing that work.

[91] After administering various tests, the assessors noted that the worker had presented for the assessment with the strong idea in mind that he was dealing with undiagnosed ADHD, so there was likely some over-focus on some symptoms through the testing because of this. But the assessors concluded that “it does seem clear...that [the worker] has been chronically depressed.” After noting the worker’s description of his symptoms and mood, and after observing that the worker’s depression had been noted in 1995 during previous treatment, the assessors concluded that it “appears clear now...why” – and concluded that his “longstanding dysthymia” likely resulted from his feelings of uncertainty about himself due to having an undiagnosed learning disorder and of difficulties in meeting the challenges this presented. With respect to other symptoms, or other possible psychological conditions, the assessors wrote:

... [The worker] reported that he did not know what his mood would be like when he awoke in the morning. He said he would wake up at times feeling great, but would “crash” into a very dark mood after minor triggers, and he described several of these. He said he could work his way out of these bad moods by distracting himself with such things as video games. [The worker] showed no evidence of any psychotic process, but noted some unusual experiences, such as generally knowing who was telephoning him after two rings of the phone and finding his dreams to be premonitory...

He denied any history of panic attacks or of significant social anxiety, although he found approaching or engaging in small talk with women he didn’t know to be difficult. [The worker’s] reality testing appears intact, he does not appear to have difficulties with obsessions or compulsions normally...

[92] Thus – it appears that the worker not only failed to describe the boat in the storm incident that he described in 2005, he also denied having any history of panic attacks. With respect to any problems sleeping, the assessors noted that the worker said that his doctor had recently prescribed Zyban to help him stop smoking, but Zyban had been a stimulating medication for the worker – that “he had begun to sleep less, so that whereas he had formerly slept ten to twelve hours a night he now slept only three to four.” The worker’s description of his normal sleep pattern does not suggest that he was experiencing difficulties sleeping before he started taking Zyban to help him stop smoking.

[93] The assessors concluded that the worker met “general psychometric, behavioural, and historical criteria for a diagnosis of Attention Deficit/Hyperactivity Disorder – Combined Type”. After concluding that the worker had been “chronically depressed” and that this most likely related to his undiagnosed learning disorder, the assessors addressed the question of whether the worker’s drug and alcohol abuse could account for his ongoing problems. On the basis of the information the worker provided (that he had curtailed his ongoing substance use since 1995) the assessor concluded it did not (because he had not done well since curtailing his substance use).

[94] The assessors provided the following diagnostic impressions:

Axis I: ADHD Combined Type

Dysthymia

Substance abuse (historical)

Occupational stress

Difficulties with life transition

Dyscalculia (math disability).

[95] Thus, at the time of the worker’s 2001 psychological assessment, the worker did refer to his right knee injury (but did so inaccurately, in that the assessors reported that he had “a partial knee replacement” in July 1999) – but there is no indication in the assessors’ report that the worker described the accident itself, or that he was unable to do things because they had any association with that accident, or that he was having any difficulties with sleeping

or flashbacks. And, although depression was diagnosed, the assessors considered it to be longstanding depression – depression that had been in evidence in the 1995 treatment notes.

[96] In answer to questions about why he concentrated on getting an assessment for attention deficit disorder if he was “high all the time” in 2001, the worker testified that he had read a magazine article about the type of behaviour he thought he had, so he wanted to know whether he had undiagnosed ADD. He acknowledged that he did not tell the psychologists who did the testing the truth about his alcohol/drug intake. He testified that he did not do so because his parents were paying for the assessment, and he did not want them to know he was high all the time. He testified that he did not describe the 1999 accident when he underwent the 2001 assessment because he felt that the purpose of that assessment was to test for ADD. He also testified that, when he was getting high, he did not have flashbacks – that the dreams about the accident recurred after he began his period of sobriety (i.e., some time after September 2002).

(c) Treatment Centre Records

[97] There are notes and reports on file from the centres that treated the worker for chemical dependency in and after September 2002.

[98] Records from the centre that the worker entered in September 2002 include a questionnaire in which the worker described his heavy alcohol/drug use. It states that the worker “had previously experienced a treatment program and was successful in his recovery until recently” – and that “a doctor had recommended using marijuana to relieve chronic pain that he was experiencing. This use escalated until [the worker] was using heavily. His lifestyle disintegrated and contributed to his habit...” The admission information indicates that the worker lost his job in 2001 due to drug use, and that he “can’t handle money while he’s involved with drugs.”

[99] A two-page discharge summary from a centre where the worker stayed for about 2½ months (from October 29, 2002 until January 17, 2003) makes reference to the fact that the worker “disclosed that his right knee is plastic” (among other physical problems) but it makes no mention of the worker describing a traumatic boat accident or flashbacks.

[100] When the worker was at this centre, staff wrote weekly reports that included their observations of the worker. Their notes do indicate that the worker provided (inaccurate) information that he had a “knee replacement as a result of a boat accident” (as well as other injuries) – but there is no suggestion in the notes that the worker was having difficulty sleeping or experiencing flashbacks or other reactions to the work injury. At this centre, the worker was diagnosed with “severe depression,” (and a doctor prescribed an anti-depressant for this) and test results classified him as “chemically dependent.” Treatment was focused on treatment for his chemical dependency and depression – and he was given an anti-inflammatory for the pain he described as being associated with his previous injuries. The notes also indicate that the worker was aware (at least by December 2002) that his father was dying of cancer.

(d) Psychiatrist Dr. Lougheed’s 2004 Assessment

[101] The worker testified that he has been clean and sober since March 2, 2004.

[102] In March 2004, the worker was assessed on two occasions by a psychiatrist who was part of the Royal Ottawa Hospital’s psychiatric outreach team (Dr. D. Lougheed). In her report about a March 10, 2004 assessment, Dr. Lougheed reported that the worker said he was still having difficulty sleeping “due to uncomfortable dreams” – but there is no description of the dreams being about the work injury. Instead, the report deals with the worker’s description of long-term depression (diagnosed at age 16), his drug abuse (at times associated with pain), his concern about the hurt he caused his family “because he lies to them about whether or not he is working... [and] his parents have sent him money because of his lies.” He also advised Dr. Lougheed that he felt his spinal fusion was “wearing out” and causing him pain – and that he also had pain from his 1999 work injury (which he described as a “right partial knee replacement”). Dr. Lougheed also noted that the worker reported being disappointed “since he is ineligible for the paramedic job he wished to have because he believes his back and knee injuries will not let him pass the physical.” Dr. Lougheed noted that the worker had “worked as a hunting

and fishing guide in the summer since he was 15 and last did this last summer. He has worked in warehouses in the winter.”

[103] Dr. Loughheed’s description of the worker’s medical history included a reference to the back injury and fusion that the worker felt “kept him from doing the things he had always wanted to do and enjoyed doing,” as well as to the knee injury at work. Her “mental status examination reported that the worker was taking several hours to fall asleep but there was “no evidence of any psychotic thought process or content.” Dr. Loughheed prescribed Celexa (an anti-depressant) and described the “target symptoms” as including “feelings of hopelessness, poor sleep, and negative ruminations.” She diagnosed:

- Axis I: Major depression
Substance abuse
Chronic pain secondary to knee and back injuries.
- Axis II: Cluster B traits.
- Axis III: History spinal fusion age 15.
Right knee replacement secondary to work-related injury 1999
- Axis IV: Social difficulties associated with using drugs, few life goals, query conflict with girlfriend, financial issues
- Axis V: GAF 50.

[104] When Dr. Loughheed assessed the worker again later in March 2004, she reported that he said he reported that he slept deeply and napped during the day, but he said his back and knee constantly ached, and “his knee is worse if he goes for a run.” He was continuing his treatment at another centre with a “recovery enhancement program.”

[105] The April 30, 2004 discharge summary from the other centre makes no reference to problems other than those associated with treating the worker’s addictions. However, the worker testified that it was when he was at this centre (in April 2004) that he first talked with a counsellor about the psychological trauma of the work accident. He testified that the counsellor suggested that he seek psychological treatment for this after his discharge from the addiction recovery enhancement program (on April 30, 2004).

(iii) Reports More than Five Years after the Worker’s Work Injury

(a) Psychologist Dr. Seatter’s October 2005 Report

[106] In June 2005, the worker’s representative contacted psychologist Dr. R. Seatter and asked him to examine the worker. Her July 25, 2005 letter described for Dr. Seatter what additional benefits the worker was seeking and it enclosed a memorandum (which does not appear to be on file) in which she described the worker’s “incident history.” She also sent Dr. Seatter “the worker’s WSIB file.”

[107] Dr. Seatter wrote his psychological assessment report in October 2005 – the same month that the worker was treated with Medrol for “severe pain in his low back.”

[108] In his report, Dr. Seater outlined a number of psychological tests that the worker completed, as well as the worker’s description of his current symptoms. The worker described symptoms that included depressed and anxious mood, significant sleep disturbance, lowered concentration, frequent nightmares, a heightened startle response in any type of vehicle, and flashback “where it feels like he is reliving the incident.” According to Dr. Seatter’s report, when the worker was asked about specific avoidance behaviour, he stated, “not anymore but I did avoid thoughts and feelings of the accident, particularly immediately following the accident.” The worker also

reported significant back and right knee pain.

[109] According to Dr. Seatter, the psychological tests that the worker completed reported results “within the mild range of anxious symptomatology,” within the “moderate range of depressive symptomatology,” a pain picture consistent with numbness and aching pain in the lower back as well as “aching and stabbing pain in [the worker’s] right leg”; a pain disability index indicating a fairly significant level of disability that the worker attributed to pain; a trauma scale indicating that the trauma that the worker found most disturbing to him was the work accident of July 24, 1999 – with distressing dreams of the event continuing to occur, and responses (occurring at a frequency of every day) to reminders of the event, and “hyper-arousal symptomatology as he has trouble falling asleep and staying asleep, irritability and outbursts of anger, difficulty concentrating, feeling easily distracted and “on guard” as well as being jumpy or easily startled. He estimated that he slept about four hours a night (taking 60 to 90 minutes to fall asleep), that he had pain at night three or more times in the week, and bad dreams three or four times a week. The “Detailed Assessment of Post-Traumatic States (DAPS) indicated that he had an elevated profile – but some aspects of the test suggested that the test results may be invalid (i.e., certain of the scores “could indicate either a cry for help or propensity for secondary gains,” or the influence of chronic substance abuse). The Minnesota Multiphasic Personality Inventory 2 (MMPI) reported results consistent with significant bodily concerns, some depressive symptomatology, and indications of a “tremendous amount of psychological turmoil.”

[110] Dr. Seatter concluded that the worker appeared to be “suffering deleteriously from [the ‘significant workplace accident in 1999’] up to the present time” and that “his reported trauma symptomatology appears to have been treated by himself in a self-medicating fashion with substance abuse, which is not uncommon for individuals suffering from Post-Traumatic Stress Disorder (PTSD) type symptomatology.” Dr. Seatter provided the following diagnoses for the worker’s condition:

- Axis I: 309.81 Post-Traumatic Stress Disorder – Chronic
307.89 Pain disorder associated with both psychological factors in a general medical condition
304.80 PolySubstance Dependence in *early complete remission*
Bipolar II features (include mood swings and particularly hypomanic symptomatology)
- Axis II: 799.9 diagnoses deferred
- Axis III: Deferred to medical assessors
- Axis IV: Financial concerns – job uncertainty.
- Axis V: GAF 55 current.

[111] Dr. Seatter recommended that the worker have psychotherapy on a weekly or biweekly basis over the next four to six months to address his trauma and depressive symptomatology. He also noted that the worker’s continued involvement with his NA group was crucial for the worker’s overall rehabilitation.

(b) Psychologist Dr. Szekely’s Opinion

[112] After the Board received Dr. Seatter’s report, the worker’s Board Claims Adjudicator asked for a medical opinion about whether the worker had PTSD and, if so, whether it related to the 1999 work accident. He also asked whether the worker’s drug dependence was causally related to the work accident.

[113] In responding to that request for an opinion, Board psychologist Dr. Szekely noted Dr. Seatter’s report (including the fact that the DAPS test resulted in an invalid profile). He noted that no other psychological or medical report on file included the diagnosis of PTSD. He also noted the pre-injury report from the treatment centre the worker attended in 1995 (before his work accident) noting pervasive depression, emotional lability, and

prescription as well as non-prescription drug abuse. In addition, Dr. Szekely noted Dr. Henderson's 2001 psychological report did not include a diagnosis of pain disorder, but it did note the worker's description of self-medicating for pain (with alcohol and other substances). Dr. Szekely also referred to psychiatrist Dr. Loughheed's subsequent reports diagnosing major depression, substance abuse, and chronic pain as well as "Cluster B" traits (associated with some personality disorders). Dr. Szekely concluded:

Based on the above reporting, I cannot determine whether [the worker] meets the diagnostic criteria of PTSD. He has serious psychological issues, many of these clearly predate the work injury. Some of them, however, such as coping with the knee/leg pain and adjusting to a life that restricts this young man's activities can be attributed to the injury under the present claim.

In my opinion, it is necessary to obtain an independent assessment to clarify [the worker's] diagnosis. A file review allows me to conclude only that he has serious psychological problems, which may or may not include PTSD and be attributable to the injury in this claim.

Regarding the issue of recurrent drug dependence, I could not relate it causally to the work injury. This issue clearly predates the injury, as several reports on file document it...

[114] Thus, although Dr. Szekely concluded that the worker's recurrent drug dependence was not causally related to the work injury, he suggested that some of the worker's psychological issues might relate to his work injury. Dr. Szekely therefore suggested that the Board obtain an independent assessment to clarify the diagnosis.

(c) Psychologist Dr. Hebert's Assessment

[115] After receiving Dr. Szekely's opinion, the Board referred the worker to psychologist Dr. G. Hebert for an independent psychological evaluation. Dr. Hebert met with the worker in April 2006. In his report to the Board, Dr. Hebert set out a summary of documents he reviewed – including a May 2005 letter from the worker's representative to the Board. That letter set out certain facts that were not accurate (such as stating that the worker "underwent emergency surgery for 18 hours") as well as statements made in the form of argument, such as "Even though he had informed the doctors about his previous drug dependency, he was still provided with this medication [Tylenol #3 and "other medications" the worker was not sure about] which caused him to suffer a full-blown relapse." The other documents reviewed by Dr. Hebert included the 2001 assessment by Drs. Anderson and Henderson, as well as Dr. Loughheed's reports.

[116] According to Dr. Hebert's report, when he interviewed the worker, the worker described undergoing about 10 hours of knee surgery (which, as indicated in the paragraph above is incorrect) – but otherwise his description of events (including his description of "his first panic attack" while boating in a storm when he returned to work with the accident employer) is fairly consistent with that given by the worker when he testified at the Tribunal hearing.

[117] According to Dr. Hebert's report, the worker described returning to his parents' home after his attempt to return to work – and how "he started giving his addiction the power, and pride got in the way of his calling his NA sponsor" to the point that "he drank \$1,300 worth of alcohol and blanked out – ending up working behind a hotel desk (with no recollection of the previous eight days' events). He told Dr. Hebert that he then " 'stayed high' for two years, taking daily marijuana and was in a "permastoned state" from morning until night using cocaine, ecstasy, mushrooms, marijuana, etc." Dr. Hebert's report describes the worker's subsequent treatment at detox and rehabilitation centres – as well as the worker's description of his back and knee pain in 2006. He also noted that the worker's father (with whom the worker had a very close relationship) died in December 2005. Dr. Hebert noted that the worker reported that he felt depressed, irritable and impatient, as well as low self-esteem and self-confidence.

[118] Dr. Hebert wrote that the worker also reported "anxiety and panic attacks, especially when swimming." He said he had been unable to get into a boat for two years after his accident, and that he had a great deal of difficulty having his head under water (so he generally bathed instead of showering). The worker also said that he used to swim constantly prior to his injury, but he was now not able to swim in a lake. He was, however, swimming twice a week in a pool, but he advised that he had to exit the pool after 15 minutes due to extreme

levels of anxiety that he experienced. Dr. Hebert described the symptoms of PTSD that the worker reported as follows:

...Symptoms of PTSD including recurrent thoughts of the incident, hypervigilance such as startle response, avoidance, memory and concentration difficulties, lack of strong emotions, and flashbacks were reported...

[119] The worker completed a number of psychological tests as part of his assessment by Dr. Hebert. This included a Beck Depression Inventory (with findings suggestive of a moderate degree of depressive symptomatology); a pain disability index (“PDI”) pain inventory with findings suggesting that he perceived his life to be significantly disrupted by his pain experienced (with greatest impact on recreation activities); a Davidson Trauma Scale (“DTS”) in which the worker identified the frequency and severity of symptoms typically associated with PTSD – with his most elevated scores being associated with hypervigilance and re-experiencing clusters; the Conners Adult ADHD Rating scale (with findings consistent with a diagnosis of ADHD, Inattentive subtype – such that the worker would likely experience difficulties with organizing or planning his work, completing tasks, and concentration on tasks that require sustained mental effort); and the MMPI-2 (with overall findings that were considered to be an accurate reflection of the worker’s current psychological functioning). Certain findings were reported to be consistent with the profiles of individuals diagnosed with Anxiety Disorder and/or Schizoid Personality Features. Also, Dr. Hebert reported that, on two supplementary scales designed to discriminate between individuals who experience post-traumatic stress symptoms, the worker’s findings were reported to be “extremely elevated” and consistent with ongoing symptoms of PTSD or, “at the very least, they are reflective of an individual who is in a great deal of emotional turmoil and distress.”

[120] In summarizing his impressions, Dr. Hebert accepted as fact certain facts that are at issue. For example, Dr. Hebert accepted that the worker was, at the time of his 1999 work-related injury, “again placed on narcotics and relapsed,” that he “sustained severe knee damage” as a result of his injury, and that he was unable to attend a paramedics course scheduled to begin in September 1999 as a result of his work-related knee injury.

[121] With respect to the worker’s psychological condition before his work-injury, Dr. Hebert noted that, although the worker had not used drugs or alcohol since March 2004, his past history “certainly warrants a diagnosis of Polysubstance Abuse, in remission.” He wrote:

Longstanding psychological issues are present and include symptoms of depression, ADHD, and Schizoid Personality Traits [although the findings may not meet the full diagnostic criteria for a personality disorder pre se].

[122] Dr. Hebert provided the following diagnoses:

- Axis I: 309.81 Post-Traumatic Stress Disorder, chronic, severe
307.89 Pain disorder associated with both psychological factors and a general medical condition
292.9 Caffeine related disorder, NOS
314.00 ADHD, Predominantly Inattentive Type
304.80 Polysubstance Abuse, Sustained Full Remission since March 2004
- Axis II: 301.20 Schizoid Personality Traits
- Axis III: Deferred to medical specialists (back injury in 1992, lumbar fusion in 1993)
- Axis IV: V62.82 Bereavement
Financial difficulties, uncertainty about WSIB, recent death of father
- Axis V: GAF = 51-55 [this rating of the worker’s psychological, social and occupational functioning is consistent with “moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers.)”]¹

[123] Dr. Hebert concluded:

...In my view, [the worker] is presently in a considerable degree of emotional turmoil and continues to experience symptoms and sequelae that stem directly from his work-related injury on July 24th, 1999. Despite the history of narcotic abuse in this gentleman's past from 1992 – 1995, there is overwhelming evidence to support the notion that this young man had gotten his life back on track, and been dry and sober for 4 years, and was in the process of going back to school to study paramedics when he sustained his work-related injury in July 1999, and his life began to unravel.

After losing a battle with his drug and alcohol addiction from 1999-2002, [the worker] has shown that he is trying very hard to get on with his life, is actively engaged in the community and has continued to move forward despite numerous setbacks including financial difficulties and, more recently, the death of his father.

[The worker] came across as a young man who is very determined and strong, not someone who is abusing a system for monetary or other gain.

[124] Dr. Hebert recommended that the worker be provided with immediate and intensive psychological/emotional support and clinical intervention to treat his chronic PTSD as well as adaptive skills and resources needed to deal with his ongoing pain problem. He also supported the worker's ongoing participation in NA.

(d) The Subsequent Board Review

[125] Board psychologist Dr. R. Woods reviewed Dr. Hebert's report. Dr. Woods concluded that, in light of the worker's "history of some variant of major mood disorder – probably influenced by and influencing – substance abuse," the reports were not sufficient to clearly ascertain the precise diagnosis. He recommended that the Board obtain copies of all psychiatric and psychological reports for the worker and refer him for a comprehensive psychodiagnostic assessment.

[126] However, in July 2006, a Board adjudicator recommended that there be no further exploration of psychological entitlement in this case. He noted that the worker had psychological intervention for non-compensable psychological problems before his 1999 work injury; the work accident did not present as a factor in the worker's ongoing psychological problems for five or six years after the accident; and "information being relayed more recently via the rep and the worker's attending health care practitioners is inconsistent with direct evidence provided by the worker at the time of the accident." The adjudicator also noted that there was no proof that the worker had ever been accepted to the paramedic program "and, besides, with a prior non-compensable back fusion, this occupation would not likely be suitable for this worker..." He also noted that, "with only a minor degree of functional impairment evidenced under this claim, it's unlikely that the injury sustained under this claim would, of itself, have resulted in the worker having to change programmes."

[127] The adjudicator also noted that there was no reason why the worker's claim meant he could not have pursued the "drug and alcohol" counselling program in the fall of 1999 when he had been accepted for that program. He therefore found no basis for the Board to consider paying the worker LOE benefits or providing LMR.

(e) Psychologist Dr. Seatter's October 2006 Opinion

[128] In October 2006, Dr. Seatter wrote a follow-up report (presumably to the worker's representative) addressing the issues "in order for you to proceed to appeals for [the worker]." Dr. Seatter stated his opinion that the worker continued to meet the criteria for PTSD (with delayed onset). He wrote:

...There is an abundance of literature conflating trauma diagnoses such as these with substance abuse with the obvious explanation being a method for self-medicating or soothing the trauma induced emotional pain and physical manifestations. Thus, it does not matter if there were pre-existing issues given that the accident wreaked a novel diagnosis (PTSD) and an exacerbation of previous issues (i.e., substance abuse).

It is my understanding that his workers claim has been stalled by a type of statute of limitations. This is inappropriate

given that PTSD can obviously be affecting a person without them being able to receive the official diagnosis. It appears that [the worker] was coping as best he could with a severe and serious mental disorder that arose directly from the workplace accident and to cavil over the timeframe of the actual diagnosis is likely exacerbating a mental and physical condition deleteriously...

[129] Although Dr. Seatter described the worker's substance abuse as a form of "self-medication," his opinion does not suggest that the worker lacked the mental capacity to make the choices he made in mid-September 1999 and subsequently.

(iv) The Worker's Testimony

[130] The worker testified that, after he woke up from the July 25, 1999 surgery and pretty much whenever he woke up for that period, he went through the accident again. He testified that even now, almost a decade later, he recalls every piece of the motion that he went through at the time of the accident, although it is not as bad today.

[131] The worker recalled being discharged from the hospital with Tylenol #3s, and he thought he had repeats on the medication. He strongly disagreed with the opinion expressed by the Board NCM that no opiate medications had been prescribed for him. He testified that he understands that, for him (as an addict), the codeine in Tylenol #3 is addictive – especially because it was his original "drug of choice."

[132] Although the prescription for Tylenol #3 that was filled on July 30, 1999 (after the worker left the hospital) would have been finished by August 28, 1999 (when the worker returned to work) if the worker had pain and took it as prescribed, the worker testified that he thought he took some with him when he returned to work. He agreed that there was no abuse of medication at that point – that he was taking the Tylenol #3 only as prescribed.

[133] The worker testified that, at that time, a lot of his identity was tied up with hunting and fishing and ski patrol activities, and the paramedic program was no longer possible. He testified that he recalled being alone in the house and asking himself what he could be – then losing his perspective and going into town to buy alcohol (with the \$1,100 to \$1,300 the employer had given him as wages). The worker described the subsequent events that led to him sobering up in Winnipeg eight days later with a criminal charge outstanding and his parents' car impounded.

[134] The worker also testified that, when he started drinking/taking drugs again in September 1999, he became ineligible for the "Drug and Alcohol Counsellor program" at College because that course required addicts to be clean for two years before taking the program.

[135] When questioned about why there is no evidence of the worker describing "flashbacks" or problems associated with water from September 1999 until 2005, the worker testified that he was "high all the time" until after he began treatment in September 2002 and, when he was getting high, he did not have flashbacks. He testified, however, that after he started treatment for his alcohol/drug dependency, his dreams of the accident recurred – that his problems became "full blown" during the 17 months after that treatment began as he tried to "get through" his recovery, and find money for his next meal and rent. When asked why he chose to pursue the issue of an assessment for ADD in 2001 (during a period when he said his primary focus was "getting high"), the worker testified that this became an "all-encompassing focus" for a time because he had read an article that problems paying bills can result from ADD – and he wanted to learn the skills needed to pay his bills.

[136] The worker described how, from 2002 to 2004, his addiction counsellors concentrated on getting his addictions under control – and how one counsellor advised him it was necessary to do this first before dealing with any matters related to the work accident.

[137] The worker testified that, after he was discharged from the last treatment centre on April 30, 2004, he remained sober. He felt he could not do physical work and he had no education to do other work, so he decided to return to school. He testified that he did a photography course and started a business but then realized this was not what he wanted. In 2006, the worker started a course at CDI in the addictions and community service field. He graduated from that program with honours. He testified that, as part of that program, he became involved in a youth justice program. He continued working with this program until he and his wife decided to take personal

long-term responsibility for youth in their own home. He described his satisfaction at presently being fully engaged in important work with youth and counselling.

[138] The worker testified that he continues to experience flashbacks of the accident, although both the frequency and intensity of the flashbacks are significantly less than they were in the past. He testified that, the busier he is, the more it helps his PTSD – and his life is now full with his wife, kids, and pets. He also noted that, although he goes fishing now, he becomes anxious when the water is rough, or whenever the boat shakes or rocks – and he is not comfortable in boats with outboard motors. He did not think he had driven his father’s boat since before his 1999 work accident. He also described other uncomfortable experiences with water – including problems with activities that require his head to be under water (such as swimming or showering), or with unexpected exposure to water (such as a relatively recent incident when he reacted to a hairdresser splashing water in his face). He refrains from activities such as washing the dog.

(v) The Worker’s Representative’s Arguments

[139] The worker’s representative argued that the worker is entitled to benefits for impairment from PTSD or psychotraumatic disability even if it was not diagnosed until more than five years after the work accident. She noted Tribunal decisions that granted entitlement to benefits for psychological disability in circumstances where a worker described a psychological reaction within the five-year period (even though the diagnosis was not made until more than five years after the accident).² She argued that the worker suffered a psychological reaction to a very traumatic event, and this brought him within the wording of the Board’s psychotraumatic disability policy. She argued that, even though he was not diagnosed with PTSD until more than five years after the accident, there is evidence (such as the Board NCM’s reference to the worker describing flashbacks in her August 1999 notes of her conversation with the worker) that shows he did suffer an immediate psychological reaction to the injury. Furthermore, the representative argued that all the PTSD symptoms the worker was suffering from were being repressed as a result of “self-medication.”

[140] The worker’s representative also noted that, although the worker was diagnosed with depression before his work accident, the worker was not diagnosed with major depression until after the accident. In addition, the worker’s representative argued that the worker’s work accident was a significant contributing factor in the development of the worker’s substance abuse relapse and that, even though the worker had a pre-existing substance abuse disability, this was aggravated by the work accident. She disagreed with the NCM’s opinion that the medical document did not indicate that any opiate medication was prescribed for the worker’s knee injury (she argued that opioid medication includes codeine and Tylenol #3 contains codeine). The worker’s representative referred to Tribunal decisions that granted benefits for impairment from drug dependency that was found to have resulted from a work accident.³

(vi) The Findings

[141] We accept the evidence that the psychological condition that was the primary source of the worker’s impairment from mid-September 1999 to April 30, 2004 (when he was last discharged from a treatment centre) was Polysubstance Dependence/Abuse (DSM IV 304.80) and we do not accept the worker’s representative’s argument that this was a compensable consequence of the worker’s work injury.

[142] We find that the evidence does not establish that the worker’s polysubstance abuse resulted from medications used to treat the worker’s knee injury. For the reasons given above, we find that the only time the worker was given morphine was on the day of the accident (almost two months before the worker’s “relapse”). The only other medication that he was prescribed for the injury was Tylenol #3. He filled a prescription for 50 Tylenol #3 on July 30 – and there was no medical evidence that he was prescribed any more Tylenol #3 after that date. If he had knee pain and took the prescribed dose (of one to two tablets four times daily when needed for pain), he would have finished this prescription in one or two weeks. He would have finished it by the time he saw Dr. Cortens in August – but there is no indication in Dr. Cortens’ clinical notes that he prescribed more Tylenol #3 for the worker (or that there was sufficient ongoing pain for him to do so). If the worker did not need the recommended dosage for pain, he may have had some Tylenol #3 left at the end of August when he returned to work for the accident employer. According to the worker, he took only prescribed medication before the accident

employer drove him to his parents' home in mid-September (almost two months after the accident). Thus, in view of the limited number of Tylenol #3 the worker was prescribed, we find it likely that the worker had taken no, or very little, Tylenol #3 for several weeks before his "relapse" in mid-September 1999.

[143] After his substance abuse began in mid-September, the worker did not abuse Tylenol #3. Instead, he abused alcohol, cocaine, and other illegal drugs.

[144] There was no medical evidence that such a short-term moderate dose of prescribed Tylenol #3 would be sufficient to cause a physical dependence on alcohol and illegal drugs.

[145] In our view, the circumstances that led to the worker choosing to drink when he returned to his parents' home in mid-September 1999 are best described in Dr. Hebert's account of how the worker explained his decision to drink \$1,300 worth of alcohol. The worker was alone in his parents' home with \$1,100 to \$1,300 in wages and he "started giving his addiction the power, and pride got in the way of his calling his NA sponsor."

[146] We appreciate that the worker still had some right knee pain (that he had described as a "dull ache" several weeks before), and that he was likely experiencing some stress and disappointment. But, at this time, the nature of his physical injury was such that his doctors expected a full recovery. According to his mother, the worker himself was glad that he was not worse than he was. And he still qualified to go to College in the Drug and Addictions Counselling program – *until* he made his way to the liquor store and started to drink.

[147] In deciding whether the recurrence of the worker's alcohol/drug abuse resulted from his compensable injury, it is necessary to decide whether that alcohol/drug abuse was a reasonable consequence of the compensable injury, or whether the worker's own intentional conduct was an intervening cause that broke the chain of causation between the compensable injury and the recurrence of the worker's alcohol/drug abuse.

[148] The Tribunal does have decisions (including the decisions cited by the worker's representative) in which a worker's addiction to drugs prescribed for a compensable injury has been found to be a compensable consequence of the injury. However, for the reasons given above, the evidence did not establish that the type and dosage of the medication prescribed for this worker's compensable injury caused a physical dependence on the alcohol and illegal drugs he chose to take. Instead, as the worker explained to Dr. Hebert, he started giving his (pre-existing non-compensable) addiction "the power," he chose not to call his NA sponsor, and he chose to buy and consume close to \$1,300 of liquor – and to then follow that with the ongoing use of illegal drugs.

[149] In our view, the absence for many years of any description by the worker of experiencing any symptoms of PTSD at the time of his September 1999 "relapse," even though there were a number of occasions when he provided histories to psychologists, a psychiatrist, and staff at alcohol/drug dependency treatment centres, suggests that the worker himself did not associate his "relapse" with memories of his work accident in mid-September 1999.

[150] In our view, the worker's pre-existing addiction, his decision to buy liquor and to disregard the steps he knew he had to take to keep his polysubstance dependency in remission, and his ongoing decisions to purchase alcohol/illegal drugs, were the overwhelming causes of the recurrence of the worker's alcohol and illegal drug dependency/abuse. We accept Dr. Szekely's opinion that the worker's recurrent drug dependence was not related causally to the work injury. Any role played by the worker's compensable injury in that dependency/abuse in and after September 1999 was, in our view, insignificant. The worker was therefore not entitled to benefits for a recurrence of his polysubstance abuse, or to any loss of earnings arising from his alcohol and drug dependency/abuse.

[151] Although we find that the worker's recurrent drug abuse was not caused by his work accident, we do accept that the worker suffered PTSD as a result of his 1999 work accident. We accept that the PTSD was a co-morbid condition (existing with depression and polysubstance abuse/dependency), even though there was a delayed onset of symptoms of PTSD (emerging some time after the worker started treatment for substance abuse in September 2002).

[152] We accept the opinions of psychologists Dr. Seatter and Dr. Hebert that, when they examined the worker in

2005/2006, he was suffering from PTSD “chronic” or PTSD “with delayed onset” and that this resulted from the worker’s 1999 work accident.

[153] Our Panel was concerned that some aspects of the history upon which Drs. Seatter and Hebert relied were inaccurate (such as Dr. Hebert’s description of the worker undergoing 10 hours of surgery for his right knee injury and sustaining “severe knee damage” and being unable to attend the College program). For the reasons given above, we find that the worker’s surgery was completed within 1½ hours of the surgeon first examining the worker and the injury to the worker’s right knee was not severe. In fact, the worker’s doctors expected him to fully recover from the knee injury, and he appeared to be doing so immediately after his accident (to the point that, within three weeks of the accident, he reported that he was not experiencing much pain, “just a dull ache”). Until 2004, when the Board accepted that post-traumatic degenerative changes were compatible with the accident, it was debatable whether the worker would have any permanent assessable right knee impairment. Also, as indicated by the worker, even after his work accident, he was able to attend the College Addiction Counsellor course for which he had applied (and been accepted). It was his alcohol/drug dependency relapse, rather than his right knee injury, that meant he was unable to attend that program (in January 2000 when he felt he would have made enough money to do so).

[154] None the less, we are satisfied that the work accident itself was a “sudden and unexpected traumatic event” that arose out of the worker’s employment. It was a horrific accident. The worker was suddenly thrown from a boat; he realized the proximity and danger of a propellor that did not shut off when he landed near it; he witnessed the bone, muscle and blood that became visible due to the open skin laceration caused by the propellor; and he then had six or seven hours in transit with this wound before he arrived at the Thunder Bay Hospital. Even though it did not do so, this accident had the potential to cause a very serious (potentially life-threatening) injury. The worker was very fortunate that it did not do so – but we accept that the event itself was a “sudden and unexpected traumatic event” within the meaning of section 13(5) of the WSIA and the Board’s traumatic mental stress policy.

[155] We also accept the evidence that the worker had an “acute reaction” to the event – even though that reaction was delayed. The worker did mention “flashbacks” to the NCM within one month of the accident – but he nonetheless returned to his pre-injury job and worked with boats following the accident. There is some uncertainty about the incident that the worker described with the storm and the boat upon his return to work – in part, because the worker denied having experienced panic attacks when he had the 2001 psychological assessment (and there is no apparent reason why he would deny this if he recalled the boat storm event at the time); there was no record of the worker describing this reaction until 2005 (almost six years after the accident); and the accident employer/owner did not recall the circumstances the worker described (even though the worker said the owner had to come out to get him, and he told the worker this is why he could not guide guests). But we do accept the worker’s evidence that, until after he began treatment in September 2002 for his alcohol/drug dependency, he was not experiencing the flashbacks that were described in Dr. Seatter’s and Dr. Hebert’s later reports.

[156] In our view, the seriousness of the worker’s substance dependency/abuse, and the paramountcy of treating that condition before other symptoms/conditions could be identified, provided a reasonable explanation for why the PTSD symptoms that he later described to Drs. Seatter and Hebert were not described in other reports within a five-year period after the accident. We do, however, note that both the worker’s testimony about the PTSD symptoms that emerged during the period when he was being treated for substance dependency/abuse (to the point that he discussed this with a counsellor at the last treatment centre in April 2004) as well as Dr. Loughheed’s March 2004 report in which she describes the worker’s “difficulty sleeping due to uncomfortable dreams,” provide evidence that the worker’s psychotraumatic disability/impairment became manifest within five years of his injury – even though the PTSD was not diagnosed until later.

[157] By diagnosing PTSD “chronic” and PTSD “with delayed onset,”⁴ both Dr. Seatter’s and Dr. Hebert’s diagnoses recognize that the worker was experiencing PTSD symptoms in 2005 and 2006. They both diagnosed PTSD and related it to the worker’s 1999 work accident.

[158] We accept their opinions that, when they examined the worker in 2005/2006, he was suffering some impairment from PTSD “chronic” or PTSD “with delayed onset,” and that the worker’s July 24, 1999 work

accident significantly contributed to the development of that condition. They are both qualified psychologists and they provided an Axis I diagnosis in accordance with the DSM-IV. We note, in particular, that the Board itself requested the opinion from Dr. Hebert in order to have an “independent assessment.”

[159] We therefore find that this is a situation that comes within the section 13(5) exception to the section 13(4) provision that states that a worker is not entitled to benefits for mental stress. The worker is entitled to benefits for impairment from PTSD.

ISSUE 3: IS THE WORKER ENTITLED TO BENEFITS FOR CARPAL TUNNEL SYNDROME?

[160] In July 2006, the worker advised his Board Claims Adjudicator that he had started using a cane in about 2002 and that, about one year later, he awoke with hand pain. He advised that his then-family doctor (Dr. Nichols) had diagnosed carpal tunnel syndrome and had indicated that he felt the CTS was from the cane use. The worker said that he had used the cane in his right hand and that he did not use it all the time (only when he really needed it). Although a report had indicated that the worker played video games, the worker advised his adjudicator that he did not use his computer excessively. By the time the worker spoke with the Board adjudicator, he stated that he was “doing fine” – that his right hand was no longer a significant concern.

[161] Dr. Nichols wrote the Board a letter in which he indicated that the worker consulted him in October 2005 for pain, weakness, and paresthesia affecting his right hand. The doctor diagnosed “carpal tunnel syndrome.” The doctor later sent the Board a report in which he expressed the opinion that the worker’s wrist condition “could be related to use of his cane” because “use of [a] cane related to injury right knee could result in carpal tunnel syndrome by reason of prolonged frequent pressure.”

[162] Board Medical Consultant Dr. O’Connor said the following with respect to the CTS diagnosis and its relationship to the worker’s use of a cane:

Some information has linked prolonged continued use of a cane as a risk factor for the development of wrist conditions including CTS. The medical does not suggest that the worker needed a cane or used it continuously. Also he started to use the cane in about 2002 but did not experience any problems in the wrist requiring medical attention until Oct 2005. The worker stated that the onset of right hand symptoms was sudden after a night’s sleep and continued afterwards as an ongoing problem.

In summary the medical does not appear to confirm a compatibility between the use of a cane as described in the file, and a sudden onset of right wrist symptoms later dx as CTS. Present medical suggests that an acute noncomp event at night resulted in a sudden onset of symptoms later dx as relating to the dx of right CTS.

[163] At the Tribunal hearing, the worker testified that his wrist pain improved after he wore a brace for about six months, and it is now better – it is not a problem anymore. He said he no longer uses his cane as much – that whether he uses it or not depends on the weather.

(i) The Findings

[164] In our view, the evidence does not establish, on a balance of probabilities, that the worker’s right wrist condition that was diagnosed as CTS resulted from using a cane for his compensable right knee injury.

[165] The onset of the right wrist pain occurred at night when the worker was not using a cane. The opinion from the worker’s family doctor suggested only a possibility (not a probability) that the worker’s CTS resulted from his cane use. And the Board Medical Consultant concluded that it was unlikely that the worker’s CTS resulted from his cane use – that a more probable explanation was an acute non-compensable event that took place at night when the pain began.

[166] We find that the worker is not entitled to benefits for CTS.

ISSUE 4: IS THE WORKER ENTITLED TO FURTHER LOE BENEFITS AND/OR

AN LMR PLAN?

(i) The Law and Board Policy

[167] Section 43 of the WSIA provides for the payment of loss of earnings benefits if a worker has a loss of earnings “as a result of the [compensable] injury.” The amount of LOE payments is calculated on the basis of the difference between a worker’s pre-injury earnings and the amount he/she earns or is able to earn in suitable employment or business after the injury. If a worker is co-operating in an early and safe return to work program or an LMR assessment/plan, he/she is entitled to full LOE benefits.

[168] In certain circumstances described in section 42 of the WSIA, a worker will be entitled to a labour market re-entry assessment to decide whether he/she requires an LMR plan “in order to enable the worker to re-enter the labour market and reduce or eliminate the loss of earnings that may result from the injury.” If a worker’s employer has been unable to arrange work for the worker that is consistent with the worker’s functional abilities and that restores the worker’s pre-injury earnings, the worker is entitled to an LMR assessment.

[169] Board *Operational Policy Manual* Document No. 19-03-04 (the Board’s policy on entitlement to LMR plans) provides the following guidelines with respect to when the Board will provide an LMR plan:

When does the WSIB provide an LMR plan?

The WSIB provides an LMR plan when it is the most [appropriate] and cost-effective way to enable a worker to re-enter the labour market and reduce or eliminate any loss of earnings resulting from the injury. Generally, workers are provided with only one LMR plan...

The WSIB must have regard for a worker’s rights under the Ontario *Human Rights Code*. Workers are entitled to equal treatment, without discrimination, with respect to services, goods, and facilities. Therefore, when determining entitlement to LMR, the WSIB considers any non-work-related disability, handicap, or condition a worker may have.

[170] Thus, for both LOE and LMR purposes, it is important to decide whether the worker has a loss of earnings that “results from” the compensable injury. To do that, the Board calculates the amount the worker was earning before the compensable injury. It then decides whether the worker’s post-injury earnings are less than his pre-injury earnings and, if so, whether that difference in earnings “results from” the compensable injury.

(ii) The Worker’s Pre-injury Earnings

[171] In this case, the Board calculated the worker’s pre-injury earnings on the basis of what he was earning at the time of his accident because his claim was for fewer than 12 weeks of benefits (i.e., the period for payment of short-term benefits). Had his claim been for a longer period than 12 weeks, the Board would likely have obtained additional information about the worker’s employment pattern because the benefits of workers in non-permanent employment (including seasonal workers) are generally recalculated to reflect a worker’s long-term employment pattern before the injury.⁵

[172] When it was determining the amount of the worker’s short-term benefits, the Board obtained information that the worker was a seasonal employee earning \$75 per day for a seven-day work week plus free room and board (that the Board valued at \$105 per week) while he worked at the fishing lodge. The worker testified that tips were an important part of his earnings at lodges and he earned tips when he guided guests.

[173] The Board did not obtain additional information about the worker’s previous earnings. According to the adjudicator’s notes, the worker indicated that “winter is E.I.” However, the worker testified that, in addition to the seasonal type of work he did with resorts, he had worked at a hot dog stand and driven taxi. He described certain lucrative taxi runs he did before the work accident. There was no documentary evidence to establish the amount of his pre-injury earnings but there were some indications that his earnings were not substantial. For example, he testified that, before his July 24th work accident, he did not yet have enough money to attend the College program in September – and that was why he was eager to return to work at the end of August 1999 (to earn enough money to attend College in January 2000).

(iii) The Panel's Findings about LOE Entitlement Before April 30, 2004

[174] In our view, the evidence did not establish that the worker suffered a loss of earnings after his work accident – at least before September 2002 when he began treatment for substance abuse.

[175] Throughout the three-year period after the worker's 1999 attempt to return to work with the accident employer, the worker held a number of jobs – including a fairly long-term job at a Winnipeg hotel, summer jobs at resorts, and other jobs described in the records (such as sales jobs, warehouse jobs, and a job in Montreal as a stripper). The evidence did not establish that the worker's pre-injury earnings exceeded his post-injury earnings during this period.

[176] Also, we note that during this three-year period, the worker had a very expensive alcohol/drug habit. According to the worker, by September 2002, his cocaine habit was costing him about \$1,000 per day. To sustain that habit, his post-injury earnings had to exceed his pre-injury earnings.

[177] In any event, even if the worker did have a loss of earnings before September 2002, we find that loss of earnings did not result from his compensable injury. For the reasons given by Dr. Kelly and the doctors who saw the worker before 2004, it was unclear whether the worker had any functional impairment of his right knee. The lack of medical treatment for right knee problems, as well as the nature of the problem that the Board later recognized (i.e., post-traumatic degenerative changes) suggest that the worker likely initially had very few if any physical restrictions due to his right knee injury – although he did, with time, experience more right knee pain and some resulting impairment.

[178] In our view, before the worker completed his treatment for substance abuse (on April 30, 2004) and that problem was in remission, any loss of earnings was far more likely to arise from the worker's substance dependency/abuse than from his compensable injury. The magnitude of the worker's impairment from substance dependency/abuse rendered any contribution from the compensable injuries insignificant in comparison. For the reasons given above, we have found that substance dependency/abuse condition to be non-work related.

(iv) The Panel's Findings about an LMR Plan and LOE After April 30, 2004

[179] We are satisfied that, after April 30, 2004, when he was discharged from the addiction treatment centre, the worker's compensable impairments (from PTSD and his right knee injury) likely did reduce his chances of re-entering the labour market and likely did result in some loss of earnings. He was entitled to an LMR Plan.

[180] In coming to this conclusion, we note the worker's complaints of increasing (compensable) right knee pain – to the point that he sought medical treatment for his right knee in November 2004. Although there is a gap in the medical reporting about the worker's right knee condition, the reports from late 2004 and the later NEL examination suggest that the worker was experiencing more right knee pain (from early degenerative changes) and probably some resulting impairment by April 2004 when he completed the residential treatment program for substance dependency/abuse.

[181] We also accept the evidence that the worker was experiencing symptoms of PTSD by April 30, 2004, when he was discharged from the addiction treatment centre. We accept the evidence that, at some time after the worker started treatment for his substance abuse in September 2002, he began to experience symptoms from PTSD (such as recurring dreams, flashbacks, and reactions to exposures to water). In our view, the absence of any references to these symptoms in the treatment centre records from September 2002 to April 2004 suggests that these symptoms likely became manifest later in the treatment process – possibly closer in time to March 2004, when Dr. Lougheed reported that the worker was having difficulty sleeping due to uncomfortable dreams, or April 2004, when (according to the worker's testimony) he first discussed the psychological trauma of the accident with a counsellor at a treatment centre.

[182] We are satisfied that, by April 30, 2004, when he was discharged from the last addiction treatment centre, some of the PTSD symptoms he was then experiencing would have had an impact on his ability to do his pre-injury job as a fishing lodge worker who guided lodge guests in boats. By October 2005, the worker was (according to Dr. Seatter's report) experiencing relatively serious symptoms associated with PTSD that had not

yet been diagnosed or treated. We accept the worker's testimony that he had loved his pre-injury work as a fishing lodge maintenance worker and guide, and that it was the guest-guiding component of the job that gave him the potential to earn more money (from tips). In our view, by April 30, 2004, symptoms from the worker's PTSD probably prevented him from doing this type of pre-injury work – particularly the part of the job that involved guiding guests in boats. The worker's increased right knee pain may also have restricted his ability to do some of the physical lodge maintenance work he did before his work accident.

[183] In our view, after April 30, 2004, when he was discharged from the last addiction treatment centre, the worker's compensable impairments likely not only prevented the worker from doing his pre-injury job, they also likely reduced his chances of re-entering the labour market and resulted in some loss of earnings. He was entitled to an LMR program.

[184] As indicated in the Board's policy on entitlement to an LMR Plan, the Board must consider any non-work related condition a worker may have in making decisions about a worker's entitlement to an LMR Plan. In our view, the worker's substance dependency was such a condition. Even though the onset of the symptoms of the worker's compensable PTSD condition was delayed, the evidence from psychologists Drs. Seatter and Hebert suggests that this condition was "masked" by the worker's substance dependency/abuse before March/April 2004, when the PTSD symptoms became manifest.

[185] Because it was necessary to treat the worker's substance dependency/abuse before the worker's PTSD condition could be identified and treated, and before the Board could provide an effective LMR program for the worker's loss of earnings from his compensable impairments, we are satisfied that the addiction treatment program which the worker began in September 2002 was an important first step in the treatment of the worker's PTSD and in his LMR plan.

[186] We are therefore satisfied that the treatment program the worker began in September 2002 and continued at other centres (from October 2002 to January 2003, and in March and April 2004) was a necessary part of the LMR plan to which the worker was entitled pursuant to the Board's policy on entitlement to LMR plans. The time the worker spent in these programs should therefore be considered to be time during which the worker was cooperating in an LMR plan, and the worker is entitled to receive full LOE benefits for those periods.

[187] We also find that the addiction counselling and community service courses that the worker began in 2006 were an appropriate continuation of the LMR plan that began with the substance abuse treatment. In our view, these courses provided the worker with the skills, knowledge, and abilities to enable him to re-enter the labour market in suitable employment. They allowed him to work in the youth justice system and to obtain employment at a youth group home – and to then make an important long-term commitment to providing services to youth in his own home (with funding). In our view, this self-directed rehabilitation program was an appropriate LMR plan, and the worker should therefore be reimbursed for appropriate expenses he incurred to take these courses. He should also be paid full LOE benefits for the periods he was attending the courses.

[188] We leave it to the Board to decide whether the worker was entitled to LOE benefits for any other periods after April 30, 2004.

DISPOSITION

[189] The worker's appeal is allowed in part. We find:

1. The worker is not entitled to benefits for substance dependency/abuse, or to loss of earnings associated with that condition.
2. The worker is entitled to benefits for impairment from PTSD. The Board will now decide whether the worker has a permanent impairment from PTSD and, if so, it will determine the amount of NEL compensation to which the worker is entitled.
3. The worker is not entitled to benefits for carpal tunnel syndrome.

4. The worker is entitled to full LOE benefits for periods during which he was in centres for treatment of his substance dependency/abuse from September 2002 to January 2003, and March/April 2004. He is also entitled to reimbursement for expenses associated with the addiction counselling and community service courses he began in 2006 and to full LOE benefits during the period that he was attending those courses. The Board will decide whether LOE benefits are payable to the worker for any other periods of time after April 30, 2004.

Appeal allowed in part.

1. American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders*. DSM-IV Global Assessment of Functioning Scale.

2. Tribunal Decisions No. 2545/06 (May 13, 2008), 1939/05 (November 14, 2005), 198/07 (February 6, 2007), and 172/03R2 (November 24, 2005).

3. Tribunal Decisions No. 239/00 (May 31, 2000), 70/91 (1992), 23 W.C.A.T.R. 164.

4. For a discussion of PTSD subtypes, see the Tribunal's Discussion Paper on "Post Traumatic Stress Disorder" by Dr. Diane Whitney, May 2002.

5. Board Operational Policy Manual Document No. 18-02-04 (October 12, 2004).



Decision No. 21/09

Vice-Chair: Noble

Decision — April 21, 2009

Neutral Citation: 2009 ONWSIAT 1007

Dependency benefits (one hundred per cent pension).

Pre-1985 Workers' Compensation Act provides for dependency benefits to dependant of worker who was in receipt of 100 % pension at time of death – One hundred per cent pension need not result from one claim.

The worker suffered a head and neck injury in 1957 and a back and hip injury in 1970. In 2001, his pensions were reassessed and increased to total 100%. The worker died in 2005. The worker's estate appealed a decision of the Appeals Resolution Officer denying dependency benefits. The appeal was allowed.

Section 43(1) of the pre-1985 *Workers' Compensation Act*, provides for a pension where permanent disability results from the injury. Section 43(7) provides for dependency benefits for the dependant of a worker who, at the time of death, was in receipt of an award of permanent disability which the Board has rated at 100%. The Vice-Chair found that the language of this section did not require that the 100% pension result from one claim.

The ARO denied the dependency benefits based on Board *Operational Policy Manual*, Document No. 18-07-08, which provides that the 100% pension must result from one claim. However, that policy has an application date of accidents after April 1, 1985. In this case, both accidents occurred before that date. The Board confirmed to the Tribunal that Document No. 18-07-08 did not apply in this appeal. The Board also did not advise of any other applicable policy pertaining to the issue of dependency benefits.

Decision No. 2074/001 involved similar circumstances. That case denied dependency benefits because the 100% pension did not result from one claim. However, the Vice-Chair distinguished that decision on the basis that the Board advised that Document No. 05-03-10, a predecessor policy to Document No. 18-07-08, applied, whereas in this case, the Board did not advise of any applicable policy.

The Vice-Chair also disagreed with *Decision No. 2074/001* in its finding that s. 43(7) required a 100% pension from one claim.

Since the Board did not advise of any applicable policy, the Vice-Chair based her conclusion on s. 43(7), and found no requirement that the 100% pension result from one claim. The estate was entitled to dependency benefits.

Indemnités de personnes à charge (pension de cent pour cent).

La Loi d'avant 1985 prévoit le versement de prestations pour personne à charge à la personne à charge du travailleur qui, au moment de son décès, touchait une pension de 100 % – Il n'est pas nécessaire que la pension de 100 % soit le résultat d'une seule demande.

Le travailleur a subi une lésion à la tête et au cou en 1957 et une lésion au dos et à la hanche en 1970. En 2001, il a été réévalué aux fins de pension et ses pensions ont été portées à un total de 100 %. Le travailleur est décédé en 2005. La succession du travailleur a interjeté appel de la décision par laquelle le commissaire aux

appels refusait de reconnaître le droit à des prestations pour personne à charge. L'appel a été accueilli.

Le paragraphe 43 (1) de la *Loi sur les accidents du travail* d'avant 1985 prévoit le versement d'une pension quand une invalidité permanente résulte de la lésion. Le paragraphe 43 (7) prévoit le versement de prestations pour personne à charge à la personne à charge du travailleur qui touchait, au moment de son décès, une pension de 100 %. La vice-présidente a conclu que le libellé de cette disposition n'exigeait pas que la pension de 100 % soit le résultat d'une seule demande.

Le commissaire aux appels avait refusé de reconnaître le droit à des prestations pour personne à charge en se fondant sur le document n^o 18-07-08 du *Manuel des politiques opérationnelles*, selon lequel la pension de 100 % doit résulter d'une seule demande. Cette politique est toutefois applicable après le 1^{er} avril 1985. En l'espèce, les deux accidents étaient survenus avant cette date. La Commission a confirmé au Tribunal que le document n^o 18-07-08 ne s'appliquait pas à cet appel, mais elle ne l'a pas informé d'une autre politique applicable à la question des prestations pour personne à charge.

Des circonstances similaires existaient dans le cas examiné dans la *décision n^o 2074/001*. Dans ce cas, le Tribunal a refusé de reconnaître le droit à des prestations pour personne à charge parce que la pension de 100 % ne résultait pas d'une seule demande. La vice-présidente a toutefois distingué cet ancien cas en indiquant que la Commission avait informé le Tribunal que le document n^o 05-03-10, une politique antérieure à celle exposée dans le document n^o 18-07-08, s'appliquait, alors que, dans le cas en l'espèce, la Commission ne l'avait informé d'aucune autre politique applicable.

La vice-présidente a aussi indiqué qu'elle n'était pas d'accord avec la *décision n^o 2074/001* que le paragraphe 43 (7) exige une pension de 100 % provenant d'une seule demande.

Comme la Commission ne l'avait informée d'aucune politique applicable, la vice-présidente s'est fondée sur le paragraphe 43 (7), et elle a conclu qu'il n'était pas nécessaire que la pension de 100 % soit le résultat d'une seule demande. La succession avait droit à des prestations pour personne à charge.

Tribunal Decisions Considered:

Decision No. 2074/001 (2002), 60 W.S.I.A.T.R. 119 not folld

Workplace Insurance Legislation Considered:

Workers' Compensation Act, R.S.O. 1980, c. 539

s. 43(1)

s. 43(7)

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 05-03-10 (December 22, 1993) (since superseded)

Document No. 18-07-08 (January 5, 2005) (since revised)

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APPEAL by the worker's estate from a decision of the Appeals Resolution Officer denying dependency benefits.

April 21, 2009. THE TRIBUNAL: —

BEFORE: J. Noble, Vice-Chair

HEARING: December 29, 2008, at Toronto, Written

DECISION(S) UNDER APPEAL: WSIB ARO decision dated September 25, 2007

APPEARANCES:

For the worker: Ms. M. Zare, Paralegal

For the employer: Not participating

REASONS

(i) Issue

[1] The issue to be decided in this appeal is whether there should be entitlement to survivor benefits under Claim A and Claim B.

(ii) Background

[2] The worker sustained a head injury and a fracture at C2-3 in 1957, and entitlement was granted by the Board under Claim A. The worker returned to work following this injury.

[3] The worker sustained a low back injury and an aggravation of the worker's non-compensable right hip condition on June 19, 1970, and entitlement was granted by the Board under Claim B. The worker was 51 years of age at that time.

[4] The worker received permanent disability (PD) awards under Claim A and under Claim B. A redetermination of the PD award quantum was performed by the Board in 2001, which provided the worker with a combined 100% PD award in both claims.

[5] The worker passed away on February 28, 2005 due to causes unrelated to his compensable injuries. The estate requested entitlement for survivor benefits for the late worker's spouse.

[6] In a decision dated August 4, 2005 the Claims Adjudicator denied entitlement for survivor benefits and stated as follows:

This letter will outline my decision concerning entitlement to Survivors' Benefits in your late husband's file.

If a worker suffers a severe injury such that the worker is entitled in one total (100%) Permanent Disability Benefits [sic], and then subsequently dies, a survivor is entitled to the same compensation (death) benefits as if the worker had died at the time of the accident.

As discussed with your son this policy is specific and to be entitled to Survivors Benefits the above criteria must be met. Therefore, as your late husband was not in receipt of a 100% Permanent Disability award in one claim I must deny your request for entitlement.

[7] The worker appealed this decision to the ARO.

[8] In the ARO decision under appeal dated September 25, 2007, the ARO stated that the estate's objection to the denial of survivor's benefits was denied. The ARO decision stated that Board *Operational Policy Manual* (OPM) Document No. 18-07-08 – Payments to Dependents – was applicable to this appeal and that OPM Document No. 18-07-08 required that the 100% PD entitlement be under one claim for entitlement to be granted. The ARO stated:

There is no entitlement to survivor's benefits in this claim. I summarize the following key facts leading to this decision:

The worker's death was not due to the compensable conditions.

The worker did not have a 100% permanent disability award in one claim as required under policy 18-07-08. The subsequent acceptance of the 100% permanent disability combined in two claims would not allow for the payment of survivor's benefits.

The 100% indisputable rating allowance in 2001 did not date the award prior to 2001.

The worker was indicated to have done well until the July 2001 non compensable deterioration in the worker's medical condition.

Conclusion:

The estate's request for survivor's benefit entitlement for the late worker's spouse is denied.

[9] The worker appeals this decision.

(iii) Medical Evidence

[10] In a memo to the file dated August 14, 2001, Dr. A. Karr, Board Medical Consultant stated as follows:

Subject: Indisputable Permanent Disability Rating

Both of these files were referred for indisputable rating, since the worker is now house confined, and cannot even get to his doctor's office. His family physician, Dr. Ricci, has provided a comprehensive report dated March 1, 2001, and so it is felt that an indisputable rating is possible.

Present Complaints and Physical Examination:

Reference is made to paragraphs 4, 5 and 6, and 7 of Dr. Ricci's report.

Conclusions:

1. Under claim Number [Claim A], it is recommended that the P.D. rating for the worker's injured neck be increased to 20%.

Under claim number [Claim B], it is recommended that the P.D. rating for the worker's low back be increased to 40% and that the rating for his right hip be also raised to 40%, for a total of 80% under this claim.

The total rating under the two claims is thus increased to 100%.

2. The issue of SIEF in both claims has previously been addressed.

3. Arrears under both claims are recommended from the date of Dr. Ricci's report, which is March 1, 2001.

4. Further deterioration in all areas of injury is possible.

5. The worker will have to keep his activities very largely sedentary.

(iv) Other Information in the Case Record

[11] In a letter to the Board dated August 13, 2008, the Tribunal's Office of the Vice-Chair Registrar stated:

Upon reviewing this file, I noticed that policy document 18-07-08 which is mentioned in the ARO decision on appeal was not included with the policy letter dated May 9, 2008. Could you please clarify as to whether or not this policy is applicable to the current appeal? Thank you.

[12] In a reply letter to the Tribunal dated August 13, 2008, Mr. V. Radicevic of the Board's Legal Services Division stated:

This is in reply to your letter of today's date.

The dates of accident under [Claim B and Claim A] are June 19, 1970 and September 10, 1957, respectively. Policy document 18-07-08 titled "Payments to Dependents" applies to accidents from April 1, 1985 to December 31, 1997. As such, it would not apply to the subject matter on appeal and Ms. Hewitt [from the Board] was correct not to include it in her May 9, 2008 "policy" letter.

(v) Submissions

[13] The worker's representative submits that the late worker's spouse should be entitled to survivor benefits.

[14] The worker's representative submits that the worker passed away for reasons unrelated to his compensable disabilities.

[15] The worker's representative submits that it was not the intention of the legislation to require the 100% PD award to be attributable solely to one claim, and that is not what the legislation states. The worker's representative submits that Document No. 18-07-08 on which the ARO had relied to deny entitlement, does not apply to this appeal, and accordingly the Tribunal is not bound by that policy.

[16] The worker's representative submits that if the Tribunal concurs with the Board policy which stipulates that the 100% PD must be under one claim, then it is submitted that the evidence demonstrates that there was marked deterioration in the worker's compensable disability under Claim B, which would have likely resulted in 100% disability had it not been for the worker's death.

(vi) Law and Policy

[17] Since the accidents occurred in 1957 and 1970 respectively, the pre-1985 *Workers' Compensation Act*, R.S.O. 1980, c. 539, applies to this appeal. Section 43 of the pre-1985 Act is applicable, and it provides in part as follows:

43(1) Where permanent disability results from the injury, the impairment of earning capacity of the worker shall be estimated from the nature and degree of the injury, and the compensation shall be a weekly or other periodical payment during the lifetime of the worker, or such other period as the Board may fix, of a sum proportionate to such impairment not exceeding in any case the like proportion of 75 per cent of his average weekly earnings during the twelve months immediately preceding the accident or such lesser period as he has been employed.

...

43(7) A dependant of a worker who was, at the time of his or her death, in receipt of an award for permanent disability which the Board has rated at 100 per cent or, but for his or her death, would have been in receipt of an award for permanent disability at the rate of 100 per cent is entitled to compensation as if the death of the worker had resulted from the compensable disability for which he or she received or would have received the permanent disability award.

[18] Pursuant to section 126 of the *Workplace Safety and Insurance Act* (WSIA) the Board advised that the following Policy Packages were applicable to this appeal: #300 – Decision Making/Benefit of Doubt/Merits and Justice.

(vii) Conclusions

[19] On the issue of whether there should be entitlement to survivors' benefits under Claim A and Claim B, I find for the worker/estate.

[20] I find that the applicable legislation, which is section 43 of the pre-1985 Act, provides that the worker's dependant should have entitlement to compensation as if the death of the worker had resulted from the compensable disability, since the worker was in receipt of a 100% permanent disability award at the time of the worker's death. I find that there is no applicable Board policy with respect to this appeal. I find that the plain language of section 43(7) of the pre-1985 Act indicates that the worker's spouse should have entitlement under section 43(7) in the circumstances of this appeal.

[21] As I have stated, I find that the applicable legislation, which is section 43 of the pre-1985 Act, provides that the worker's dependant should have entitlement to compensation as if the death of the worker had resulted from the compensable disability, since the worker was in receipt of a 100% PD award at the time of the worker's death.

[22] I observe that the evidence on file indicates that the worker's PD award was rated at 100% with arrears effective from March 1, 2001, pursuant to an Indisputable Permanent Disability Rating that was performed by Dr. Karr, a Board Medical Consultant, as set out in Dr. Karr's memo to the file dated August 14, 2001. This memo confirms that the worker's PD award was increased, in 2001, to 20% under Claim A and to 80% under Claim B, for a total rating of 100%.

[23] In the ARO decision under appeal, the ARO applied the Board Policy OPM Document No. 18-07-08 to the facts of the appeal and concluded that the worker's spouse was not entitled to survivor benefits since that policy required that the worker had been entitled *in one claim* to total 100% PD benefits. I note that Document No. 18-07-08 provides in part as follows:

POLICY

If a worker dies as a result of a work-related accident, the worker's survivors are entitled to ongoing periodic benefits based on their dependency status and the number of dependants involved.

...

Workers entitled to 100% permanent disability benefits

If a worker suffers a severe injury such that the worker is entitled in one claim to total (100%) permanent disability benefits, and then subsequently dies, a survivor is entitled to the same compensation (death) benefits as if the worker had died at the time of the accident.

...

Application date

This policy applies to all decisions affecting benefit periods on or after August 1, 2003, for accidents from April 1, 1985 to December 31, 1997.

[24] We see that pursuant to this Board policy document, a worker must specifically be entitled *in one claim* to 100% PD benefits for entitlement for survivor benefits to be granted.

[25] I note that in this case, however, the Board has confirmed to the Tribunal, in the Board's correspondence dated August 13, 2008, that Document No. 18-07-08 does not apply to this appeal, since the worker's accidents pre-date April 1, 1985. I further note that the Board has not advised the Tribunal that there are any other Policy Packages that are applicable to this appeal, apart from Policy Package No. #300 – Decision Making/Benefit of Doubt/Merits and Justice – which contains general policies pertaining to decision making, and which does not contain a policy which directly pertains to the issue of survivor benefits or payments to dependants upon the death of a worker. My own review satisfies me that there are no other Board policies which pertain to this appeal, apart from the policies contained in Policy Package No. #300 – Decision Making/Benefit of Doubt/Merits and Justice.

[26] I find, accordingly, that I must apply the applicable legislation in the adjudication of this appeal, and in particular I must apply section 43 of the pre-1985 Act.

[27] Section 43(7) of the pre-1985 Act is set out above in this decision. I observe that section 43(7) does not stipulate that a worker must be in receipt of an award for permanent disability *under one claim* in the amount of 100%. Section 43(7) provides, rather, that when a worker is in receipt of a PD award which the Board has rated at 100% at the time of the worker's death, the dependant of the worker is entitled to compensation as if the death of the worker had resulted from the compensable disability for which he or she received the permanent disability award.

[28] In my view, the worker's spouse is entitled to compensation under this section since the worker was, at the time of the worker's death, in receipt of a 100% PD award. I find that a plain language reading of section 43(7) does not reveal that any aspect of that provision operates to bar entitlement for the worker's spouse. I further find that there is no applicable Board policy that applies to this appeal.

[29] I observe that a similar issue was considered by the Tribunal in *Decision No. 2074/00I* (2002), 60 W.S.I.A.T.R. 119. In that decision, the Vice-Chair considered an application from the late worker's spouse for dependency benefits. In *Decision No. 2074/00I* the worker had two workplace accidents, the first in 1979, pursuant to which the Board granted a 25% PD award, and the second in 1983, pursuant to which the Board granted a 75% PD award. The worker, then, had a total PD award of 100% under two separate claims. *Decision No. 2074/00I* concluded that there was no entitlement for dependency benefits since the worker did not have the 100% PD award for one claim.

[30] I have considered *Decision No. 2074/00I* and I note that the fact situation and the issue addressed in that decision are similar to the instant appeal. I find, however, that there is a significant difference, in the following respect. As I have discussed above, in the instant appeal the Board advised the Tribunal that Document No. 18-07-08 does not apply to this appeal, since the worker's accidents pre-date April 1, 1985. As I have also discussed above, my own review satisfies me that there are no other Board policies that pertain to this appeal, apart from the policies contained in Policy Package #300 – Decision Making/Benefit of Doubt/Merits and Justice – which Policy Package does not contain a policy which directly pertains to the issue of survivor benefits or payments to dependants upon the death of a worker.

[31] In *Decision No. 2074/00I*, on the other hand, the Board advised the Tribunal, pursuant to section 126 of WSIA, that Board Policy OPM Document No. 05-03-10 – Payment to Dependents – was applicable to that appeal. Document No. 05-03-10 – Payment to Dependents – was in the nature of a predecessor policy to Document No. 18-07-08 and it provided that survivors' benefits would be granted to a survivor only when the deceased worker was entitled to 100% PD benefits in one claim. As the Vice-Chair stated in *Decision No. 2074/00I* at paragraph 35:

Board Operational Policy, Document No. 05-03-10, which is applicable to all decisions affecting benefit periods on or after November 1, 1991, states that, if a worker suffers a severe injury such that the worker is entitled in *one claim* to total (100%) permanent disability benefits and then subsequently dies, a survivor is entitled to survivors' benefits. This policy was minuted on September 1[5], 1993.

[32] Whereas in *Decision No. 2074/00I* the Vice-Chair was bound to apply this policy to the fact situation in that appeal, in the instant appeal the Board has advised that there is no similar policy that is applicable. I find that *Decision No. 2074/00I* can be distinguished from the circumstances of the instant appeal on this basis.

[33] I am aware that *Decision No. 2074/00I* considered whether Document No. 05-03-10 was consistent with the Act and concluded that it was consistent with section 43(7) of the pre-1985 Act. I find that this conclusion has limited application to the appeal before me since in the instant appeal the Board has specifically advised that this policy (and the similar successor policy) does not apply. There is arguably a question as to whether the Board was correct to advise the Tribunal that Document No. 05-03-10 applied to the appeal in *Decision No. 2074/00I*.

[34] I also find that a plain language reading of section 43(7) does not reveal that any aspect of that provision operates to bar entitlement for the worker's spouse, and I respectfully disagree with the conclusion reached in

Decision No. 2074/00I in that regard. *Decision No. 2074/00I* concluded that the language in section 43(7) referred to an individual injury. I find that section 43(7) clearly provides that a dependant of a worker who was, at the time of his or her death, in receipt of an award for permanent disability which the Board has rated at 100%, is entitled to compensation as if the death of the worker had resulted from the compensable disability for which he or she received the permanent disability award. I am aware that section 43(7) states: "... as if the death of the worker had resulted from the compensable disability..."

[35] I do not conclude that this reference should be interpreted as stipulating that the worker must have had a 100% PD award for *one disability*, since it is common that a worker will have suffered more than one disability under one accident claim especially in a case of an accident that leads to multiple injuries. In the instant appeal, for instance, the worker has entitlement for a low back disability and a right hip disability under Claim B. I do not find that it would be reasonable, therefore, to read the reference in section 43(7) to "the compensable disability" as a stipulation that the 100% PD award must be for one disability, or by inference, one claim only.

[36] Similarly, I do not conclude that the reference in section 43(7) to "*an award* for permanent disability" [emphasis added] should be interpreted as stipulating that the worker must have one award only for a 100% PD, since it is also common that a worker will have more than one PD award under one accident claim. In the instant appeal, for instance, the worker has a 40% PD award for the low back and a 40% PD award for the right hip, both under Claim B. I do not find that it would be reasonable, therefore, to read the reference in section 43(7) to "*an award* for permanent disability" [emphasis added] as a stipulation that the 100% PD award must be for one PD award, or by inference, one claim only.

[37] The worker in this appeal was in receipt of an award for permanent disability which the Board had rated at 100%, and pursuant to section 43(7) of the pre-1985 Act the worker's spouse is therefore entitled to compensation as if the death of the worker had resulted from the compensable disability for which he received the permanent disability award.

[38] Based on all of the foregoing, the appeal is allowed.

DISPOSITION

[39] The appeal is allowed.

[40] The worker's spouse has entitlement to survivor benefits pursuant to section 43(7) of the pre-1985 *Workers' Compensation Act*, under Claim A and Claim B.

Appeal allowed.

Decision No. 141/09

Panel: Baker (Vice-Chair), Tracey, Grande

Decision — July 8, 2009

Neutral Citation: 2009 ONWSIAT 1624

Earnings basis (dependent contractor).

Motor vehicle of dependent contractor was registered to worker personally but used almost exclusively for business purposes – In determining earnings basis of worker, motor vehicle expenses should not be added back to net income reported on income tax return.

The worker was a courier who was determined by the Board to be a dependent contractor. The worker appealed a decision of the Appeals Resolution Officer regarding the earnings basis for calculation of benefits resulting from an accident in 2003. The appeal was dismissed.

The worker reported to Canada Revenue Agency gross earnings of \$48,900 and net earnings of \$11,700. In accordance with Board policy, the Board started with net income and then added back certain amounts. It added back amounts for RRSP contributions, capital cost allowance and business use of the worker's home. This raised the worker's earnings to \$14,500, and was the amount used to calculate the worker's earnings basis.

The worker reported to CRA \$22,000 of motor vehicle expense. The Board did not add this amount back to the worker's income. The vehicle was registered to the worker personally and was used for some very minor personal use, but it was used almost 100% of the time for business use. It was not a personal vehicle that was being used occasionally for business purposes.

Because the vehicle was being used almost exclusively for business purposes, the vehicle expenses were a cost of doing business and were correctly not added back to the worker's income.

Base salariale (entrepreneur dépendant).

Le véhicule à moteur de l'entrepreneur dépendant était immatriculé en son nom personnel, mais il servait presque exclusivement à des fins commerciales – Lors de la détermination de la base salariale du travailleur, les frais du véhicule à moteur ne devaient pas être rajoutés au revenu net déclaré dans la déclaration de revenu.

Le travailleur était un messenger que la Commission avait classé dans la catégorie des entrepreneurs dépendants. Le travailleur a interjeté appel de la décision du commissaire aux appels au sujet de la base salariale devant servir au calcul de ses prestations pour un accident survenu en 2003. L'appel a été accueilli.

Le travailleur avait déclaré un revenu brut de 48 900 \$ à l'Agence du revenu du Canada et un revenu net de 11 700 \$. Conformément à la politique de la Commission, la Commission avait commencé avec le revenu net et elle avait rajouté certains montants. Elle avait rajouté des montants pour les contributions à un régime enregistré d'épargne retraite, la déduction pour amortissement et l'utilisation commerciale du domicile. Le revenu du travailleur était alors passé à 14 500 \$, montant qui avait servi au calcul de la base salariale.

Le travailleur avait déclaré 22 000 \$ en frais de véhicule à moteur. La Commission n'avait pas rajouté ce montant au revenu du travailleur. Le véhicule était immatriculé au nom personnel du travailleur, et ce dernier l'utilisait

seulement à quelques fins personnelles très mineures, mais il servait presque 100 % du temps à des fins commerciales. Il ne s'agissait pas d'un véhicule personnel utilisé occasionnellement à des fins commerciales.

Comme le véhicule servait presque exclusivement à des fins commerciales, les frais engagés à cette fin représentaient des frais d'exploitation commerciale et il était correct de ne pas les rajouter au revenu du travailleur.

Workplace Insurance Legislation Considered:

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

s. 53(1)

s. 53(3)

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 12-03-02 (October 12, 2004) (since superseded)

Document No. 18-02-08 (January 3, 2007)

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[DISPOSITION](#)

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

July 8, 2009. THE TRIBUNAL: —

BEFORE:

A. G. Baker, Vice-Chair

E. Tracey, Member Representative of Employers

A. Grande, Member Representatives of Workers

HEARING:

January 19, 2009 at Toronto, Oral

DECISION(S) UNDER APPEAL:

WSIB ARO decision dated February 23, 2006

APPEARANCES:

For the worker:

Mr. M. Blythe, Paralegal

For the employer:

Did not participate

REASONS

(i) Issue

[1] The worker appeals the decision of Appeals Resolution Officer (ARO) K. Gowans, dated February 23, 2006. In that decision, the ARO concluded that the worker was a dependent contractor at the time of his accident, and that the basis for calculating his earnings using the Workplace Safety and Insurance Board *Operational Policy*

Manual (OPM) Document No. 18-02-08 and the resulting figure reached was correct. The worker has appealed those findings to the Tribunal.

(ii) Background

[2] The worker was a courier when he suffered a right eye and left cheek injury on March 31, 2003, when he was walking through an auto service shop to deliver parts to a store. He remained off work for one day and the claim was accepted. However, the worker's employment status was concluded to be that of a dependent contractor and the worker's earnings basis was calculated using OPM Document No. 18-02-08. That policy refers directly to determining the average earnings for workers employed in non-traditional work relationships, including workers employed as dependent contractors.

[3] The worker testified that 100% of his income comes from the employer and that he remains with the employer under the same conditions. He supplies a vehicle and pays related costs including insurance, maintenance, fuel and licensing. The worker stated he owned his van and that he did not own another vehicle. He stated that his vehicle is used from 95-96% of the time for business purposes, which he stated was appropriately claimed as 100% in his 2002 income tax return. There were also a range of items that he reported as business expenses, including home office expenses.

[4] The worker also stated he does not receive a T4 from the employer and is supplied a T4A, and claims he is self-employed with commission income. He stated he has no business number and does not own a corporation or limited liability company. He stated he has a G.S.T. number, although he does not charge G.S.T. to the employer and uses it to claim tax credits on expenses.

[5] The worker also stated that he operated under a collective agreement, but charged a flat rate on a daily basis that ranged from \$250-\$290 per day, plus an additional 6% for vacation pay. He stated the employer keeps track of his time and provides for an annual leave allowance. He stated he generally works offsite out of a warehouse and that jobs vary. He stated there was a bidding system for particular jobs in what was basically a piece work system, which also included consideration of seniority.

[6] The worker's representative provided extensive written submissions. While they are not reproduced in this decision, the Panel has reviewed those very thorough submissions.

(iii) Law and Policy and Tribunal Case Law

[7] The *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) applies to this appeal. The Panel also noted section 53 of the WSIA which applies to the determination of the worker's pre-accident average earnings and states, in part, as follows:

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.

...

(3) The Board shall recalculate the amount of a worker's average earnings if the Board determines that it would not be fair to continue to make payments under the insurance plan on the basis of the determination made under subsection (1). The Board shall take into account such information as it considers appropriate when recalculating the amount.

[8] OPM Document No. 18-02-08, *Determining Average Earnings – Exceptional Cases*, provides as follows with respect to dependent contractors:

POLICY

The guidelines for calculating short-term and long-term average earnings are not applicable for those workers classified by the WSIB as dependent contractors

...

In these exceptional cases, the WSIB recognizes the specific requirements of the *Workplace Safety and Insurance Act* (the Act) and the unique nature of some industries regarding employment relationships and method of payment.

In these exceptional cases, the WSIB does not use some of the rules normally followed to determine a worker's average earnings.

GUIDELINES

Dependent contractor

The *Labour Relations Act* defines a **dependent contractor** as a person whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

In general, dependent contractors are remunerated based on the gross earnings received for performing a certain contract of work, sometimes referred to as piecework for a contractor. The contractor does not issue a T-4 statement since payroll taxes are not deducted at the source. A dependent contractor may report as a self-employed individual for income tax purposes with the Canada Revenue Agency (CRA).

To be considered a dependent contractor, the worker must be covered under the contractor's WSIB account at the time of injury.

When the injury occurs, the gross earnings may include payment amounts not related to wages, such as materials, tool rentals, or gas. The reported gross earnings of a dependent contractor are similar to the earnings of a self-employed individual. In these cases, the average earnings are calculated in accordance with the guidelines found in document 12-03-02, *Optional Insurance*.

Criteria for dependent contractors

Prior to calculating the worker's average earnings, the decision-maker considers

- if the dependent contractor would be more properly considered an independent operator
- if the principal contractor insured the dependent contractor and paid premiums accordingly, and
- if the dependent contractor hired workers. If the dependent contractor hired workers, this would suggest an employer status.

Period of calculation

The period of calculation is the 12-months prior to the date of accident, or a lesser period. The calculation period may be shortened by a break in the employment pattern.

Break in the employment pattern

A break in the employment pattern is a change in the dependent contractor's employment significant enough to make the period before the break irrelevant to the determination of the dependent contractor's average earnings. This may include a change in status from

- employer to dependent contractor
- worker with optional insurance to dependent contractor, or
- worker to dependent contractor.

A break in the dependent contractor's employment pattern shortens the calculation period.

Earnings information

The decision-maker uses the **net** business income during the calculation period based on the income reported to CRA or an audited financial statement of earnings prepared by a chartered accountant. The decision-maker then overestimates the net business income by including such items as

- pension plan and RRSP contributions
- depreciation and amortization
- charitable donations
- expenses arising out of the individual's use of personal home or vehicle for business purposes
- dividends from the business, and/or
- other items as appropriate.

[9] The above noted policy applies to all decisions for all accidents occurring on or after December 1, 2002. In this case, and according to the above noted policy, the Panel viewed the worker as being a dependent contractor and that the basis for his earnings calculation was correct. In coming to that finding, we noted the following information.

[10] The employer in this case identified the worker as a dependent contractor in their Form 7. The worker was reported as being paid a gross wage without deductions. Further, despite the worker owning and supplying key equipment, particularly his vehicle, there is no evidence of the worker working for any other employer. The worker testified 100% of his income comes from the employer, where he performs his duties under the terms of a collective agreement. As such, there is no evidence of another employer or source of income on which the worker depends. Therefore, we found the worker to have clearly been in a position of economic dependence, and under an obligation to perform duties for the employer, on what more closely resembled an employee/employer relationship.

[11] The worker also received gross earnings reported in a T4A from the employer for what was essentially piece work and had no payroll tax deductions. The worker considered himself, and reported as being, self-employed for tax purposes. However, the employer pays premiums to the WSIB and the worker was covered under the employer's account at the time of his injury. In considering the above noted information, the Panel found that, after reviewing the policy, the worker was a dependent contractor.

[12] Given that the worker has been determined to be a dependent contractor, the Panel now turns to his earnings calculation. Our review of the documentation included Board policy, as well as the worker's tax information. The Panel noted first that this worker was a dependent contractor under the WSIA and Board policy, and not a commissioned employee, despite the worker having indicated on his 2002 tax return that he earned commission income. As such, OPM Document No. 18-02-08 is applicable to the worker's earnings calculation.

[13] In the return, he indicated gross income from the Statement of Self-Employed Commission Activities of \$48,921.38. However, the worker's net income was reported as \$11,697.68. The calculation method outlined in OPM Document No. 18-02-08 requires that certain items be added back to the worker's income. As such, \$1,400 was added back for RRSP contributions, \$180.30 for capital cost allowance, and \$1,177.86 for business use of the worker's home. No add backs were made for items such as charitable donations, the business use of a personal vehicle or dividends from the business. The result was a determination that the worker's total earnings were found to be \$14,455.84, which was used to calculate the worker's earnings basis.

[14] Of particular concern to the worker regarding the calculation of his earnings was that a large part of his gross income was not recognized in his earnings calculation. Specifically, \$21,940.94 for motor vehicle expenses was not added back to the worker's earnings.

[15] As noted, this worker has been determined to be a dependent contractor, and given the worker's date of accident, OPM Document No. 18-02-08 is applicable. Under that policy, gross earnings may include payment amounts not related to wages, such as materials, tool rentals or gas. Earnings calculations must be made in

accordance with that policy, as well as Board OPM Document No. 12-03-02, *Optional Insurance*, which provides, in part, as follows:

GUIDELINES

...

Definitions

...

Approved amount of insurance

This amount is based on an individual's average earnings, as determined and approved by the WSIB, taking into account the period of insurance requested. The amount is used to calculate optional insurance premiums for the upcoming year.

Average earnings

An individual's average earnings are calculated from the most recent Canada Revenue Agency [CRA] income tax return or audited financial statement, and are subject to the maximum annual insurable earnings ceiling (see 18-01-02, Benefit Dollar Amounts). Average earnings are used to calculate loss of earnings benefits.

...

Average earnings for sole proprietors, independent operators, partners

If an individual has operated a business for one year or more at the time of application, the WSIB determines the average earnings from

- net business income for the previous year as reported to Canada Revenue Agency, subject to audit by the WSIB. The WSIB overestimates the net business income by including such items as
 - pension plan and RRSP contributions
 - depreciation and amortization
 - charitable donations
 - expenses arising out of the individual's use of personal home or vehicle for business purposes
 - dividends from the business
 - other items as appropriate, or
- an audited financial statement of earnings prepared by a chartered accountant.

In operation less than a year

If an individual has operated a business for less than a year at the time of application and requests optional insurance, the WSIB sets the approved amount of insurance at one-third of the maximum annual insurable earnings ceiling. The individual pays premiums based on this amount (see "Payment in advance", below).

[16] The Panel noted the submissions from the worker's representative indicating the worker's costs associated with his vehicle. They included gasoline, licensing, maintenance and repairs. It was noted the vehicle is registered personally and not in a business name. It was also noted that the worker testified he does use the van very minimally for personal use, indicating some 3-5% of the time, despite claiming a 100% business use on his tax information.

[17] In our view, and despite the vehicle being registered personally with some very minor personal use, the vehicle is a business vehicle occasionally used personally, and not a personal vehicle that has been used occasionally for business purposes. The worker purchased a van and couriers items in accordance with the employer's requirements. The vehicle is used almost 100% of the time for business purposes, and as such, is a cost of doing business for the worker, and is a business vehicle.

[18] The worker's representative argued that the policy distinction between business and personal use vehicles is arbitrary and that no real explanation was provided as to why the vehicle expenses were not added back to the

worker's earnings. In our view, there is a distinction between personal and business vehicles. A personal vehicle, similar to a personal home expense, is paid for from the worker's net business income, and of course after taxes have been paid. That is the common criteria under the policy items listed, that they have been drawn from the worker's net business income, and not from gross earnings. Even under the category entitled "other items appropriate", that category is not a catch all for all deductions made from the worker's overall business income. While the list may not be restrictive in relation to appropriate items deducted from net business income, it does not include direct business expenses for items such as supplies, equipment or business vehicles. The determination of average earnings is made using the worker's earnings after business related expenses, as reported in the worker's T1 general tax return, have been paid and deducted from the gross business income. In other words, the net business income.

[19] It was evident that the gross income paid to the worker in this case contemplated amounts and compensation for "materials, tool rentals or gas". The worker was required to supply the vehicle to perform the work offered by the employer. Further, the worker is paid a gross amount by the employer as a dependent contractor for the performance of those services, which again includes supplying the necessary equipment (a vehicle in this case), in order to complete his work for the employer. As such, there were amounts deducted from the worker's gross earnings, and not from his net business income, for the worker's essential tool, his business vehicle. Therefore, as per the above noted policies, those amounts were correctly not included in the calculation of the worker's average earnings.

[20] The representative also argued that vehicle costs continue to occur even if the worker is not at work. Of course, while there may be ongoing costs to the worker even when he is not actually at work, it has been clearly noted that the worker uses his vehicle almost 100% of the time for business purposes, and has reported it as such in his tax return. In doing so, the worker has in our view identified his vehicle expenses for a van that is used again almost 100% of the time for business purposes. As such, given the above noted findings, the vehicle and related expenses would not have been added back to the worker's income for the purposes of calculating his earnings basis.

[21] In conclusion, the Panel was persuaded that this worker was a dependent contractor. We were also persuaded that the earnings calculation was performed correctly and in accordance with the WSIA and Board policy. In that regard, we found that the worker's earnings basis was correctly calculated. Therefore, the worker's appeal is denied.

DISPOSITION

[22] The appeal is denied.

Appeal dismissed.

Decision No. 206/09

Panel: Martel (Vice-Chair), Christie, Grande

Decision — June 5, 2009

Neutral Citation: 2009 ONWSIAT 1368

Assessment of employers (retroactivity) – Detrimental reliance – Assessment of employers (assessable payroll) (profit sharing plan).

There was no negligent misrepresentation by Board auditors regarding law and policy of including contributions to registered deferred profit sharing plan in insurable earnings – Documents at the time indicated that such contributions should be included in insurable earnings, and matter was still far from settled.

In 2005, the Board agreed that contributions paid to employees of the employer from a registered deferred profit sharing plan (DPSP) should not be treated as insurable earnings. The Board allowed a retroactive adjustment of the employer's premiums for the year 2003, 2004 and 2005. The employer submitted that it had relied on negligent misrepresentations of Board personnel directing the employer to pay premiums on the DPSP from 1995 onwards. The employer appealed a decision of the Appeals Resolution Officer denying further retroactivity of the adjustment. The appeal was dismissed.

For income tax purposes a registered DPSP forms part of a deferred retirement arrangement. Employer contributions are not taxable, and appear as a pension adjustment on T4 slips. In contrast, contributions to employee profit sharing plans are treated as taxable income at the time of contribution.

A claim for negligent misrepresentation typically involves a claim for economic loss flowing from detrimental reliance on a statement of fact made in circumstances where the person who made the statement ought reasonably to have foreseen that it would be relied upon and where the reliance was reasonable.

The Panel found that the Board auditors did not negligently misrepresent the law and policy in existence at the time. All documents in existence at the time of the audits indicated that profit sharing plans were to be included in insurable earnings. The documents did not generally distinguish between registered and non-registered plans. Even more recent documents were capable of being interpreted in different manners.

The matter of inclusion of DPSPs in insurable earnings was far from settled. The issue in this case was not whether DPSPs should be included in insurable earnings. The only issue was whether a longer period of retroactivity should be allowed. There was no negligent misrepresentation in this case. The interpretation of the auditors was not unreasonable. There were no exceptional circumstances that would warrant a greater period of retroactivity.

Cotisation des employeurs (effet rétroactif) – Confiance préjudiciable – Cotisation des employeurs (masse salariale assurable) (programme de participation aux bénéfices).

Il n'y avait eu aucune assertion négligente et inexacte de la part des vérificateurs de la Commission au sujet de la Loi et de la politique en ce qui concerne l'inclusion des contributions au programme de participation différée aux bénéfices dans les gains assurables – Les documents d'alors indiquaient que de telles contributions devaient être incluses dans les gains assurables et l'affaire était encore loin d'être réglée.

En 2005, la Commission avait convenu que les contributions payées aux employés de l'employeur à partir d'un programme de participation différée aux bénéfices (PPDB) ne devaient pas être traitées comme des gains assurables. La Commission avait autorisé un rajustement rétroactif des primes de l'employeur pour les années 2003, 2004 et 2005. L'employeur a soutenu qu'il s'était fondé sur des assertions négligentes et inexactes par lesquels le personnel de la Commission lui avait dit de payer des primes sur le PPDB à partir de 1995. L'employeur a interjeté appel de la décision dans laquelle le commissaire aux appels a refusé de pousser davantage la date de rétroactivité. L'appel a été rejeté.

Aux fins de l'impôt sur le revenu, un PPDB fait partie d'un arrangement de pension différée. Les contributions de l'employeur ne sont pas imposables et elles sont présentées comme un redressement au titre des régimes de retraite sur les feuillets T4. Par contraste, les contributions aux PPDB des employés sont traitées comme imposables au moment de leur versement.

Une demande pour assertion négligente et inexacte comporte typiquement une prétention de perte financière découlant de la confiance préjudiciable placée dans une déclaration faite quand la personne à son origine aurait raisonnablement dû être en mesure de prévoir que quelqu'un s'appuierait dessus et quand cette confiance était raisonnable.

Le comité a conclu que les vérificateurs de la Commission n'avaient fait aucune assertion négligente et inexacte au sujet de la Loi et de la politique alors en existence. Tous les documents en existence au moment de la vérification indiquaient que les programmes de participation aux bénéfices devaient être inclus dans les gains assurables. Les documents ne faisaient généralement pas de distinction entre les programmes enregistrés et les programmes non enregistrés. Même des documents plus récents pouvaient être interprétés de différentes manières.

La question de l'inclusion des PPDB dans les gains assurables était loin d'être réglée. La question en l'espèce n'était pas de savoir si les PPDB devaient être inclus dans les gains assurables. La seule question était de savoir s'il convenait d'accorder une période de rétroactivité plus longue. Il n'y avait pas eu d'assertion négligente et inexacte en l'espèce. L'interprétation des vérificateurs n'était pas déraisonnable. Il n'y avait pas de circonstances exceptionnelles pouvant justifier une période de rétroactivité plus longue.

Other Decisions Considered:

Hercules Management Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165 (S.C.C.) consd

Workplace Insurance Legislation Considered:

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

s. 2(1) "earnings"

s. 25

s. 126(1)

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 14-02-06 (August 18, 2000) (since revised)

Document No. 14-02-08 (October 12, 2004) (since revised)

Cross-References:

Decision No. 207/09 (June 5, 2009) [2009 ONWSIAT 1369]

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DISPOSITION

APPEAL by the employer from a decision of the Appeals Resolution Officer denying further retroactivity of an adjustment to the employer's premiums.

June 5, 2009. THE TRIBUNAL: —

BEFORE: S. Martel, Vice-Chair
M. Christie, Member Representative of Employers
A. Grande, Member Representatives of Workers

HEARING: January 29, 2009 at Toronto, Oral
Post-hearing activity completed on April 17, 2009

DECISION(S) UNDER APPEAL: WSIB ARO decision dated October 5, 2006

APPEARANCES:

For the worker: Not applicable

For the employer: Ms. E. Kosmidis, Lawyer

REASONS

(i) Introduction

[1] The employer seeks a retroactive adjustment to the contributions paid to employees from a registered deferred profit sharing plan (DPSP) for the years 1995 to 2002. The employer submits that it included these amounts as insurable earnings at the direction of various Board personnel. In 2005, the Board agreed that such amounts should not be treated as insurable earnings and allowed the employer a retroactive adjustment for the years 2003, 2004 and 2005 in accordance with its retroactive policy. The employer seeks a longer period of retroactivity based on exceptional circumstances because it submits that it relied on the negligent representations of Board personnel from 1995 onwards.

[2] Ms. Kosmidis represented the employer and made submissions. We heard testimony from the employer's Chief Financial Officer (CFO) and from an employee of PAL Benefits, who acted as a resource to the employer in respect of its group benefits.

[3] After the oral hearing, we obtained additional information from the Board, which was forwarded to the employer's representative for final written submissions.

[4] We considered 6 documents entered as exhibits at the January 29, 2009 hearing and an additional two post-hearing Addenda, entered as Exhibits 7 and 8. This appeal was heard together with the appeal resulting in *Decision No. 207/09* (June 5, 2009).

(ii) How the Issue Arises

[5] Revenue Canada's Income Tax Information Circular on DPSPs defines a DPSP as an arrangement where an employer may share with either all or a designated group of its employees the profits from the employer's business, or from the business of the employer and one or more corporations with which the employer does not deal at arm's length. A registered DPSP is one which has been registered with Revenue Canada in accordance with the *Income Tax Act*.

[6] The PAL Benefits employee explained that the employer's contributions to the plan are not taxable and appear as a pension adjustment on T4 slips. A registered DPSP forms part of a deferred retirement arrangement. In contrast, the contributions made to an employee profit sharing plan (EPSP) are treated as taxable income at the time of contribution. The investment earnings in an EPSP are also taxable.

[7] The employer has been in operation and reporting to the Board since 1971. The employer's CFO testified that he believes that the employer has had a registered DPSP since approximately 1975.

[8] The Board has audited, visited and contacted this employer on various occasions during which the profit sharing issue has arisen.

[9] A 1989 audit report for the years 1987 and 1988 stated:

Audit differences were noted for the years 1987 and 1988 as assessable earnings (T4A's) were included for profit sharing paid in one lump sum at end of the year to individual workers. These workers were paid bonuses for meeting their production quotas/volume for the year. Assessable earnings have been added subject to maximum ceiling per workers. Firm's controller does not agree and plans to appeal.

[10] Despite the auditor's statement that the employer intended to appeal, the employer did not appeal this issue at that time. Even though it did not appeal the issue, it appears that the employer continued to not report profit sharing amounts as insurable earnings because a similar audit adjustment was made in a 1993 audit report for the years 1991 and 1992:

Audit difference were noted for the years 1991 and 1992 as assessable earnings (T4A's) were added for profit sharing paid to individual workers in addition to regular wages. Workers were paid additional bonuses for meeting/exceeding the company production quotas/level for the year. Assessable earnings have been added as other earnings ... subject to maximum ceiling per worker.

[11] The employer was sent an audit letter on August 12, 1993 notifying it of the T4A adjustments for profit sharing according to the following reasoning:

Under Section 1(1) of the Act, the definition of "earnings" and "wages" include any remuneration capable of being estimated in terms of money. This would include pay by hourly rate, piecework, salary, commission, vacation pay, board, bonus, profit sharing and any other allowance, remuneration or taxable benefit.

[12] It appears that this issue continued to be contentious as evidenced by a letter sent to the employer's CFO by a Board Revenue Service Representative on April 23, 1996:

This letter will serve to confirm our conversation of Tuesday, April 23, 1996, regarding the reporting of deferred profit sharing for your employees.

In our discussion, you indicated that there are two ways in which an employee can make a deduction from their save [sic], deposited by your company. They are:

- 1) They can withdraw 50% of their total, every three years.
- 2) When an employee leaves the company, they can withdraw their accumulated deferred profit.

In both of the above scenarios the deferred profit from shares, becomes assessable, and must be reported to the Workers' Compensation Board the year the amount is withdrawn.

[13] It appears that the employer was reporting the amounts disbursed to employees out of the DPSP by the next Board audit in 1999 since a December 24, 1999 audit memo states:

To determine excess earnings, the company uses a payroll printout of T4's for all provinces excluding Quebec. In effect, this leaves only Ontario residents except for the two or three persons in other provinces. The controller then reviews T4A's that have been issued to Ontario employees for deferred profit sharing payouts to determine if part or all of the

profit sharing amount is excess.

[14] Another audit was conducted in 2003 but does not address any issues or adjustments relating to profit sharing.

[15] Around 2004, the employer's CFO testified that the employer retained the services of PAL Benefits to analyze their benefits and to make recommendations. PAL Benefits advised that it did not think that the employer should be paying premiums on the amounts paid out of the DPSP. As a result of this advice, the employer contacted the Board for further information. On March 21, 2005, the employer's accountant wrote to the Board:

The above-mentioned partnership contributes to a registered Deferred Profit Sharing Plan ("plan") registered with the Canada Revenue Agency with the account number [number]. Each year, a number of employees request a distribution or have given notice to the company and request a distribution from the plan resulting in taxable income under the Income Tax Act. The partnerships have been issuing T-4As to the employees for the distributions. We request confirmation whether these distributions are subject to WSIB premiums.

[16] The Board Account Manager replied on April 11, 2005:

Regarding your query of monies paid to the benefactors of a Deferred Profit Sharing Plan, contributed to on their behalf by a third party, such as an employer, the following is the status regarding assessable earnings on behalf of those benefactors.

The value of the benefit under a deferred profit-sharing plan (DPSP) is not insurable prior to the time the benefit is actually paid. This amount becomes taxable, therefore, insurable *in the year the benefit is actually paid to the worker*.

[17] The employer then retained legal representation to pursue this issue. It appears that a representative of Hicks Morley had a telephone conversation with the Board's Manager of Benefits & Revenue Policy Branch resulting in the following letter dated November 7, 2005 from Mr. G. Smith, the Manager of the Board's Benefits & Revenue Policy Branch:

The purpose of this letter is to confirm that amounts contributed by an employer to a worker *and realized by the worker* under the terms of a CRA registered DPSP are not insurable. The amount of money allocated on behalf of the worker is not subject to deductions for CPP, EI, and income tax. Single or instalment payments made out of a DPSP are reported on a T4A.

I should note that employer contributions to profit sharing plans not registered with CRA where the profit-sharing payments are reported in box 14 of the T-4, are insurable in the year the employer contribution is made. The WSIB considers these particular employer profit-sharing contributions to be part of the worker's remuneration package from employment. [Emphasis added]

[18] The above letter does not specify an effective date for this treatment of DPSPs.

[19] In a letter dated December 16, 2005, Hicks Morley requested a retroactive adjustment of premium payments the employer made to the Board based on withdrawals made to its current and former employees from its DPSP for the years 1995 to 2003, which totalled \$438,143.89. The employer did not report the DPSP payments in its 2004 Reconciliation Form. The letter submitted:

The [employer's] DPSP is registered under section 147 of the Income Tax Act (Canada). Confirmation of registration of the [employer] DPSP is enclosed for your reference. In any given year, [the employer] makes contributions relating to its profits to the DPSP trustee in respect of qualifying employees. These contributions do not generate any tax implications for the employee at the time that contributions are made. Investment earnings in the DPSP trust accumulate on a tax-deferred basis. Once an employee is eligible to withdraw funds from the DPSP, the DPSP trustee authorizes the withdrawal and the funds are paid out. The DPSP withdrawal is subject to income tax under s.147 of the Income Tax Act. The DPSP trustee is required to issue a T4A in respect to the withdrawal.

A DPSP operates in a similar manner to a money purchase registered pension plan. Under this type of registered pension plan, amounts are allocated to individual employees on a tax-neutral basis, investment return accumulates on a tax-

deferred basis, and payouts are taxable and reported on a T4A. Both a money purchase registered pension plan and a DPSP generate a pension adjustment for the employee in the year that contributions are made to the plan.

A registered DPSP is distinct from an employee profit sharing plan (“EPSP”) which is not a registered plan under the Income Tax Act and generates immediate tax consequences for employees both on contributions made to the plan and on investment returns earned on such contributions.

Since DPSP withdrawals made by employees/former employees are not WSIA insurable earnings, [the employer] should not have remitted WSIB premiums on the DPSP withdrawals made to employees/former employees. Therefore, the WSIB premiums paid by [the employer] on these withdrawals were incorrectly made and should be refunded to [the employer]. Attached please find a letter from Graham Smith, Manager Benefit & Revenue Policy Branch at the WSIB... Mr. Smith’s letter confirms that registered DPSP contributions and withdrawals are not WSIA insurable earnings.

[20] On January 3, 2006, the Board Account Manager replied:

In your submissions, you have indicated that you are requesting retroactive adjustments to periods of reported payroll information for [the employer] from 2004 going back to 1995, (10 years in total)... These adjustments are due to the employer reporting earnings to Workplace Safety and Insurance Board, (WSIB) inclusive of contributions paid by the workers to a DPSP. I would like to respond to your appeal and to confirm that the payroll information reported by the employer should not have included these DPSPS contributed amounts, unless they were paid out to the contributor in the year that the amounts were reported to WSIB. If in fact these contributions have been included in the assessable calculations, those calculations should be adjusted to remove those amounts.

[21] Our reading of the above suggests that despite referencing Mr. Smith’s letter, the Account Manager was still of the view that DPSPS *payments* were required to be reported as insurable earnings but not *contributions* to the DPSP. Nevertheless, the letter agreed to a retroactive adjustment but only for the years 2003 to 2005 in accordance with the Board’s policy regarding retroactive adjustments: *Operational Policy Manual (OPM)*, Document No. 14-02-06.

[22] The employer appealed the period of retroactivity to the Appeals Resolution Officer, who also seems to have had a different view than that of Mr. Smith:

Subsection 2(1) of the Workplace Safety and Insurance Act states that:

“earnings” or “wages” include any remuneration capable of being estimated in terms of money but do not include contributions made under section 25 for employment benefits.

Prior to 2004, there was no approved WSIB policy on what specific types of remuneration were and were not insurable. Rather, employees of the WSIB and its predecessor the WCB relied on internal guidelines and provisions in the annual guides that were sent out to employers to assist them in completing their payroll forms.

The internal guidelines I have referred to extend back through an internal WCB memo from the Manager of Assessment Services, dated December 21, 1984, which indicated that, among the various types of things that had to be included as earnings, were “production bonuses – usually a cash payment based on production quotas” and “profit sharing – profits of the employers’ business shared with his workers.” As well, there were Consolidated Board Orders from 1964 that included, in the list of assessable earnings, “bonuses” and “profits of the employer’s business shared with his workman.”

In addition, the annual Reconciliation guides, for at least all of the years in dispute and up to and including the current one, list “bonuses” and “profit sharing” as insurable.

The first time WSIB policy made any explicit mention of DPSPs was in OPM Document 14-02-08, which applies to earnings earned as of January 1, 2004, and therefore post-dates the period in dispute in this objection. That document states that “profit sharing money paid to workers by the employer from a non-registered plan” is insurable. It goes on to state that all earnings except those that are explicitly stated to be uninsurable are insurable. Therefore, since there is no statement that profit sharing paid from a registered plan is uninsurable, a reading of the plain language of document 14-02-08 would indicate that profit sharing paid from a registered plan is in fact insurable.

Given the history of how the WCB treated profit sharing, what the WSIB’s approved policy says, and the information that

has been given to employers for years in Reconciliation guides, it is not clear when and on what basis some within the WCB/WSIB began to regard profit sharing amounts paid out of a registered plan as being uninsurable. In my view, since decision-makers – including people within the operating levels of the WSIB, the WSIB’s Appeals Branch and the Workplace Safety and Insurance Appeals Tribunal – are required to have regard to written policies that appear in the OPM and can make exceptions only within the parameters of the merits and justice policy, there is no authorization to make something uninsurable when it is listed as insurable, which is what a Manager in the WSIB’s Benefits & Revenue Policy Branch seems to have done in a November 7, 2005 letter to Ms. Kosmidis’ firm. OPM document 14-02-08 explicitly calls for the insurability of unregistered DPSPs and implicitly calls for the same regard to registered DPSPs (since the policy says that anything that is not listed as uninsurable is insurable, and the policy says only that unregistered plans are insurable but is silent on registered plans). If the WSIB intended otherwise, it should not have worded its policy (in OPM Document 14-02-06) the way it did.

In light of the above, it seems that WSIB policy (which applies for earnings as of January 1, 2004 and not before) on its face states that DPSP monies are insurable. For the period prior to the approval of that policy, there was a history of WCB/WSIB guidelines and practices treating profit sharing as insurable, without qualification as to whether the plan was registered or not. It is not clear when that history started to be departed from and why.

Since I have not been called on to make a ruling with regard to the insurability of payments under a registered DPSP, my comments about its insurability are in the nature of *obiter dicta*. However, they are relevant in making the point that it was not necessarily an error for previous auditors and the WCB Senior Revenue Service Representative to have advised the employer that amounts of the type in question were in fact insurable. It might be equally erroneous for the operating area to have accepted these types of remuneration as uninsurable for the years during which Ms. Kosmidis’ colleagues’ request was allowed.

In any case, the fact is, there was no clear policy on the insurability of payments from DPSPs (registered or otherwise) during years prior to 2004. There were only internal guidelines of the WCB/WSIB and annual Reconciliation guides that were issued to registered employers including [the employer]. Therefore, the situation was governed by the understanding of the decision-makers who had contact with the company. Whether the understanding of those people was erroneous or not (and as I have said, in my opinion they were not necessarily erroneous), there is no evidence that those WCB/WSIB employees were negligent. There is nothing to demonstrate, or to even lead to any fair inference, that those people did not call upon the information they had been given and/or research the matter themselves (including looking at the Reconciliation guides, the Consolidated Board Orders and the Manager of Assessment Services, all of which indicated that the amounts in question were assessable). Therefore, I find no basis for regarding the advice of the Senior Revenue Service Representative, the various WCB/WSIB auditors or any other WCB/WSIB employees who might have provided advice to the company, as being misrepresentative or negligent.

(iii) Other Board Information and Policy Documents

[23] OPM Document No. 14-02-08, the policy referred to by the ARO, which has been in existence since 2004 for earnings earned as of January 1, 2004 includes an appendix of insurable earnings for premium calculations and states:

1. With the exception of those items listed as non-insurable in APPENDIX II, all other earnings are considered to be insurable for WSIB purposes.
2. Examples of insurable earnings are listed in APPENDIX I, which is a general list and is not exhaustive.

[24] Appendix I includes a list of insurable earnings including:

Profit sharing money paid to workers by the employer from a non-registered plan
 ...
 RRSP contribution by an employer.

[25] Appendix II entitled “non-insurable earnings for premium calculations” lists several items among them:

Pension plan benefits accrued and then paid by the employer upon termination and/or retirement.

[26] Neither Appendix I nor II specifically mentions DPSPs although Appendix I states that insurable earnings include “profit sharing money paid to workers by an employer from a *non-registered plan*”.

[27] The document referenced by the ARO is an “Information Sheet” that sets out a list of items to be included as “earnings” and includes “production bonuses” and “profit sharing”. It also sets out a list of items not included as earnings, which includes “payments by the employer to the worker for accrued pension plan benefits paid upon termination and/or retirement”.

[28] Post-hearing, the Panel requested additional information from the Board including its reconciliation guides and a description of the Board’s practice as to how it treated monies paid to workers from registered DPSPs prior to and after the publication of its policy on insurable earnings.

[29] The Board responded via its Legal Policy Analyst and stated:

I have contacted staff in Revenue Policy, Employer Audits and Operations. As a result it appears that the Board does not have an established practice as to whether or not payments to workers from a DPSP are considered to [sic] insurable earnings, for both before and after 2004.

DPSP were introduced in 1991. The payments out of a DPSP made to a worker would be reported in box 18 of their T4A slip.

You have also requested copies of any internal guidelines, information sheets, memos or Board orders, in effect during the years 1995 to 2002.

It appears that the Board has almost no such documents that reference the payments made to worker’s from a DPSP. I have attached an advice document entitled Deferred Profit-Sharing Plans. I have also attached a copy of a part of an advice document Understanding CRA and Financial Documents Reference Guide which provides information about the T4A Slip, which might be helpful to the Panel.

[30] The “Deferred Profit-Sharing Plan Advice Document”, last revised May 14, 1999, states:

The value of a benefit under a registered pension plan or a deferred profit-sharing plan which is not paid in the current year (same as book or ledger credits – deferred) is not insurable

The benefit is insurable in the year the benefit is actually paid to the worker.

[31] Ms. Kosmidis submits that this document states that the value or a benefit under a registered pension plan or a DPSP is not insurable. She therefore submits that the Board was well aware of the fact that money paid out pursuant to a registered DPSP was not part of insurable earnings and should not have been reported to the Board.

[32] We interpret this document differently than Ms. Kosmidis since Ms. Kosmidis has omitted to reference part of the sentence she relies upon – that the value of a benefit under a DPSP *which is not paid in the current year* is not insurable. The document then clarifies that “the benefit is insurable in the year the benefit is actually paid to the worker”. In our view, this suggests that that the contributions made on a worker’s behalf are not insurable at the time the contribution is made by the employer into the plan but are insurable when the DPSP disburses the money out of the plan to a worker.

[33] The other document provided by the Board entitled “Understanding CRA & Financial Documents Reference Guide” discusses the T4A slip and seems to suggest that earnings reported in box 18 “lump sum payment” are insurable earnings. As noted by the Board’s legal policy analyst, payments made out of a DPSP are reported in Box 18 of a T4A.

(iv) Retroactivity Policy

[34] Section 126(1) of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA), states that if there is an applicable Board policy with respect to the subject-matter of an appeal, the Appeals Tribunal shall apply it when making its decision.

[35] Pursuant to section 126, the Board has stated that *Operational Policy Manual* (OPM), Document No. 14-02-06 entitled “Employer Premium Adjustments” applies to this appeal. The policy states:

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

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

The four exceptions to this general two-year rule are:

- classification changes,
- provisional premiums,
- lack of full disclosure,
- offences or fraud.

[36] Ms. Kosmidis submits that there are exceptional circumstances in this case to award the employer a retroactive adjustment going back to 1995. She submits that the Board was never entitled to the premiums received and should not be able to rely on its negligent misrepresentations to preclude a refund of the premiums wrongly paid. She notes that the employer was audited several times over the years and that the Board auditor should have known what is insurable and what is not insurable. She submits that the Board auditor was guilty of negligent misrepresentation when he advised the employer that it had to include income paid out under a registered DPSP.

(v) Conclusion

[37] As noted by the ARO, the issue before us is not whether DPSP payments are to be included as insurable earnings. The issue is whether there are exceptional circumstances to award a retroactive adjustment beyond the two-year general policy. The employer submits that the Board’s negligent misrepresentation constitutes an exceptional circumstance.

[38] A claim for negligent misrepresentation typically involves a claim for economic loss flowing from detrimental reliance on a statement of fact made in circumstances where the person who made the statement ought reasonably to have foreseen that it would be relied upon and where the reliance was reasonable: *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165.

[39] After considering the evidence and submissions, the Panel is unable to conclude that the Board auditors negligently misinterpreted the law and policy in existence at the time of the audits. All of the documents in existence at the time of the audits and which were relied upon by the Board auditors stated that profit sharing plans were to be included as insurable earnings. The Information Sheet referenced by the ARO and discussed above did not distinguish between registered and non registered profit sharing plans. Since there was no distinction, it was reasonable for the auditor to include all profit sharing plans as insurable earnings. The sole document that specifically referenced DPSPs, the “Deferred Profit-Sharing Plan Advice Document”, according to our interpretation, also indicated that the DPSP benefit is insurable in the year the benefit is actually paid to the worker.

[40] The Board’s Reconciliation Guides and its predecessors for the years 1995 to 2002 all indicated that profit sharing was to be included as insurable gross earnings.

[41] All of the information published by the Board for external and internal purposes suggested that profit-sharing plans were to be treated as insurable earnings. Even the 2004 policy, OPM Document No. 14-02-06 entitled “Employer Premium Adjustments” can be interpreted in two different manners. On the one hand, the fact that it specifically lists “Profit sharing money paid to workers by the employer from a *non-registered plan*” as insurable earnings suggests that profit sharing money paid to worker from a *registered plan* are not insurable earnings. On the other hand, profit sharing money paid to a worker from a registered plan is not listed in Appendix II – the non

insurable earnings list. Since the policy states that with the exception of those items found in Appendix II all other earnings are considered insurable, profit sharing money paid from a registered play must also be considered insurable earnings.

[42] Section 2 of the WSIA defines earnings as including “any remuneration capable of being estimated in terms of money but does not include contributions made under section 25 for employment benefits”. Section 25 sets out an employer’s obligation to make contributions for employment benefits throughout the first year after a worker is injured. Under this section, contributions for employment benefits means amounts paid in whole or in part by an employer on behalf of a worker for healthcare, life insurance and pension benefits. It is unclear whether this section applies to DPSPs. No submissions were made on the meaning of sections 2 and 25.

[43] In any event, we reiterate that the issue before us is not whether DPSP benefits must be included as insurable earnings. The employer in this case has assumed, rightly or wrongly, that DPSPs are excluded from insurable earnings and relies on Mr. Graham’s letter to this effect. Other adjudicators, such as the ARO, have cast doubt on this opinion. We are of the view that the issue is far from settled and would benefit from formal clarification from the Board in the nature of a policy or policy amendment. If the DPSP issue was before us, it could potentially involve a downside risk to the employer if we were to disagree with Mr. Graham.

[44] In this appeal, therefore, the Panel can only consider whether a different period of retroactivity should be granted. OPM Document No. 14-02-06 provides for two years of retroactivity as a general rule. The employer seeks a longer period of retroactivity based on negligent misrepresentation. The Panel does not find that the evidence establishes negligent misrepresentation. Rather, the auditors relied on the information in existence at the time. The auditors’ interpretation was not an unreasonable one, for reasons set out above. It was open to the employer to challenge this interpretation through the appeal process at any time. While the employer disagreed with the Board, it did not appeal the issue nor retain expert external advice for some time. We find that the employer did not exercise reasonable diligence but rather delayed in bringing this matter for adjudication. This is not the type of exceptional circumstances that warrants a variation in the Board’s two-year retroactivity policy.

[45] We therefore deny the appeal.

DISPOSITION

[46] The appeal is denied.

Appeal dismissed.

Decision No. 362/09

Vice-Chair: Moore

Decision — April 29, 2009

Neutral Citation: 2009 ONWSIAT 1071

Class of employer (social club) – Schedule 1 employer (business or trade).

Employer was non-institutional social service organization that operated a conference centre – Significant portion of workers performed activities that were essentially the same as those performed by workers of hotels and food service businesses – Board correctly classified employer in multiple rate groups.

The Board classified the employer in three rate groups: Rate Group 861 for other non-institutional social services; Rate Group 921 for hotels and cabins; and Rate Group 919 for caterers. Rate Group 861 is a voluntary coverage rate group. However, the Board assessed the employer for all its workers at the rate of the group with the highest premium. The employer appealed a decision of the Appeals Resolution Officer confirming the assessment. The appeal was dismissed.

The employer submitted that its predominant business activity was that of a non-institutional social service, and that the other activities were incidental and were not done as a business or trade or for profit or gain, so that, under s. 5 of O. Reg. 175/98, the other activities should be seen as an aspect of the non-institutional social service and, thus, classified solely in the non-compulsory Rate Group 861.

The employer operated a conference centre. The centre is made available to organizations that want to take advantage of the conference and recreational facilities. The employer provides administrative support to such organizations. The employer charges for accommodation and food services. The employer markets its facility to organizations whose goals are consistent with the goals of the employer but the facility is available to any organization.

While the principal business activity of the employer is that of a non-institutional social service, a significant portion of its workers perform activities that are essentially the same as those performed by workers of hotels and food service businesses. The employer did not provide its own social service programs at the conference centre. Rather, the organizations that used the facility provided their own conferences in accordance with their own agendas.

Certain workers of the employer were engaged in activities that are properly considered to be a business or trade even though that business or trade is an element of a non-profit organization and is not intended to accrue profit or gain.

The Vice-Chair confirmed the decision of the Board.

Classification de l'employeur (club social) – Employeur de l'annexe 1 (entreprise ou commerce).

L'employeur était un organisme de service social hors établissement qui exploitait un centre de conférence – Les activités d'une part importante des travailleurs de l'employeur étaient essentiellement les mêmes que celles des travailleurs de l'industrie hôtelière et de l'industrie de la restauration – La Commission avait correctement classé l'employeur dans des groupes de taux

multiples.

La Commission avait classé l'employeur dans trois groupes de taux : le groupe 861 – autres soins de santé hors établissement; le groupe 921 – hôtels/motels/camping; le groupe 919 – restaurant/services de traiteurs. Le groupe 861 est un groupe à protection volontaire; cependant, la Commission avait imposé le taux de prime le plus élevé de ce groupe pour tous les travailleurs de l'employeur. L'employeur a interjeté appel de la décision par laquelle le commissaire aux appels a confirmé cette cotisation. L'appel a été rejeté.

L'employeur soutenait que son activité commerciale prédominante était celle du service social hors établissement et que ses autres activités étaient des activités connexes sans but commercial ou lucratif de sorte que, conformément au Règlement 175/98 de l'Ontario, ces autres activités devaient être un aspect des services sociaux hors établissement et qu'elles devaient donc être classées uniquement dans le groupe 861, qui est à protection facultative.

L'employeur exploitait un centre de conférence. Il offrait ce centre à des organismes désirant profiter de ses installations de réunion et de loisir. L'employeur fournissait le soutien administratif à ces organismes. L'employeur facturait les services d'hébergement et de restauration. L'employeur annonçait ses installations auprès d'organismes ayant des buts compatibles avec les siens, mais elles étaient disponibles à tout organisme.

Bien que la principale activité de l'employeur ait été celle des services sociaux hors établissement, les activités d'une part importante des travailleurs de l'employeur étaient essentiellement les mêmes que celles des travailleurs de l'industrie hôtelière et de l'industrie de la restauration. L'employeur ne fournissait pas ses propres programmes de services sociaux au centre de conférence. Les organismes qui utilisaient les installations tenaient leurs conférences conformément à leurs propres programmes.

Certains travailleurs de l'employeur effectuaient des activités qui étaient correctement considérées comme commerciales ou occupationnelles, même si ce commerce ou cette occupation était un élément d'un organisme sans but lucratif et ne visaient pas à engendrer un profit ou des gains.

Le vice-président a confirmé la décision de la Commission.

Tribunal Decisions Considered:

Decision No. 499/001 (2001), 58 W.S.I.A.T.R. 54 refd to

Regulations Under the Workplace Insurance Legislation Considered:

O. Reg. 175/98

s. 5

Board Directives and Guidelines Considered:

Employer Classification Manual

Document No. H-861-09 (January 3, 2005)

Document No. I-919-03 (January 3, 2005)

Document No. I-921-02 (August 15, 2001) (since superseded)

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Appeal by the employer from a decision of the Appeals Resolution Officer regarding classification of the employer.

April 29, 2009. THE TRIBUNAL: —

BEFORE: J.P. Moore, Vice-Chair

HEARING: February 19, 2009, at Toronto, Oral

DECISION(S) UNDER APPEAL: WSIB ARO decision dated March 31, 2005

APPEARANCES:

For the worker: Not applicable

For the employer: K. MacNeill, Lawyer

REASONS

(i) Introduction

[1] The employer in this appeal is appealing a final decision of the Workplace Safety and Insurance Board regarding the employer's classification under the Insurance Plan.

[2] On January 6, 2004, the employer's business was purchased by another employer, which purports to be a non-profit organization. The appellant employer (GP) had been registered with the Board prior to the purchase. After the purchase, the Board continued to assess the operations of GP. On July 15, 2004, the Board confirmed the inclusion of GP in the following three rate groups:

- 861 (Other Non-institutional Social Services);
- 921 (Hotels and Cabins);
- 919 (Caterers).

[3] I note that Rate Group 861 is a "by application" rate group which means that participation is optional. However, in accordance with the Board's practice, GP's assessments for all its workers were set at the rate of the rate group with the highest premiums.

[4] The employer objected to this decision. The objection was denied by an Appeals Resolution Officer in a decision dated March 31, 2005. The employer now appeals to the Tribunal.

(ii) The Issue

[5] The issue in this appeal is whether the Board has correctly classified the employer.

(iii) The Decision

[6] On the evidence and submissions presented to me, I am persuaded on a balance of probabilities that the Board has correctly classified the appellant employer.

(iv) Analysis

[7] The test generally applied by Tribunal Panels in cases of this nature has been described in the Tribunal's *Decision No. 499/001* (2001), 58 W.S.I.A.T.R. 54 [at para. 17]:

In assessing the merits of this appeal, the Panel has applied the following two tests:

- with regards to the merits of the Board’s decision, we conclude that the test of that decision is its correctness rather than its reasonableness;
- regarding the standard to be applied in determining the correctness of the employer’s classification, we have applied the “best fit” test adopted by a number of Tribunal panels.

[8] As I noted above, the Board has assigned GP to three rate groups. The portions of the applicable rate group descriptions read as follows:

Rate Group 861 (Other Non-institutional Social Services)

By application...

...

Included are government and related agencies engaged in providing services, not elsewhere classified, to help individuals in society. These agencies provide a variety of social service programs including cultural, social, recreational, educational, and community service activities.

Services provided by these agencies include:

...

- day and overnight vacation and recreational camps....
- If any of the above activities is carried on at a separate workplace by an employer classified in this CU, the business activity is considered distinct and separately classifiable.

Rate Group 921 (Hotels and Motor Hotels)

...

Business activities include providing short-term accommodation to the public, with or without food, beverage and other services. A hotel-type room has access only from the interior of the building. Included are hotels, apartment hotels, and motor hotels.

...

Rate Group 919 (Take-out Food Services)

Business activities include the preparation or selling of packaged or wrapped food, such as pizza and Chinese food, to the public for consumption away from the premises.

[9] The appellant employer’s counsel, Mr. MacNeill, did not challenge the correctness of these descriptions, or their applicability to the employer. However, he submitted that the predominant business activity of GP was that of non-institutional social service, under Rate Group 861. He submitted that the other so-called business activities engaged in by GP were done by the employer as incidental activities that were not done as a business or trade or for profit or gain. He cited Ontario Regulation 175/98 and submitted that, under section 5 of that regulation, GP’s food service and accommodation activities should not be seen as separate activities but as an aspect of the non-institutional social service activities. He argued that, on the basis of that analysis, GP was properly classified solely in Rate Group 861, a non-compulsory rate group.

[10] Section 5 of Ontario Regulation 175/98, reads as follows:

5 Subject to section 13 [which applies only to construction activity], anything not itself done by the employer as a business or trade or for profit or gain if, but for this section, it would be an industry included in Schedule 1, is excluded from Schedules 1 and 2, except where it is done as a part of or process in or incidentally to or for the purpose of an industry included in Schedule 1.

[11] In the decision under appeal, the ARO considered this argument and concluded that GP did carry on business activities that included the provision of accommodation for a fee and the provision of food services for a fee. The

ARO concluded that the provision of these services was not an incidental part of the provision of social services but was done as a distinct element in GP's business, an element that involved some of GP's workers in what was effectively a business or a trade.

[12] Having considered the evidence and submissions presented by Mr. MacNeill, I am persuaded that the ARO was correct in his determination. I agree with the Board's characterization of the employer's business activities and the manner in which the Board has assigned GP's workers to various rate groups.

[13] The evidence regarding GP's activities consisted primarily of testimony provided by the Vice-President of Finances for the organization that purchased GP in 2004. The purchaser is itself a non-institutional social service. The purchaser has, as its institutional goal, the object of advancing:

... the physical, social, intellectual and spiritual development of men, boys, women and girls as individuals committed to the Christian way of life and the responsibility of good citizenship;

[14] To that end, the purchasing organization offers a number of recreational and social services. A number of those social services are provided at the facilities operated by GP.

[15] The essence of GP's activity is to function as a conference centre. The conference centre is made available to organizations who wish to take advantage of GP's conference and recreational facilities. GP provides administrative support services to such organizations. In addition, GP provides food service to conference participants. GP receives remuneration for both accommodation and food services from organizations that use the Centre. Any organization may access these facilities but GP markets its facility to organizations whose goals are consistent with the corporate goals of the purchasing agency. The proceeds received from GP's "customers" are used for the cost of running and maintaining the facility. According to the witness, the operation is effectively revenue neutral, and sometimes revenue negative.

[16] According to the witness, approximately two-thirds of GP's workers provide services that fall within the ambit of rate group 861 while the remaining one-third provide services that fall within the ambit of the other two rate groups.

[17] While I fully appreciate that GP's principal business activity is that of a non-institutional social service, I am also persuaded that a significant portion of GP's workers perform activities that are essentially the same as those performed by the workers of hotels and/or food service businesses. They are, therefore, subject to the same risks as the workers of hotels and/or food service businesses.

[18] G.P.'s principal activity is providing accommodation and food services to organizations that wish to hold conferences for their own purposes. Access to the conference centre is not limited to members or associates of the purchasing non-profit agency. The facilities are effectively open to the public, albeit as organizations rather than as individuals. But the facility provides accommodation and food services to the individuals who are members of the participating organizations.

[19] Mr. MacNeill noted that the description of Rate Group 861 indicated that the provision of day and overnight vacation and recreational camps constituted an activity that fell within that rate group. He submitted that this was, in fact, what GP was doing. However, as I understand that element of the description, it pertains to the operation of vacation and recreational camps within the context of the provision of social service programs. In my opinion, GP is not offering accommodation and food service as an element of the provision of social services programs. As I understand the testimony provided to me, the organizations that use the facilities provided by GP receive some administrative support from GP's staff but operate their own conferences in accordance with their own agenda. As I understand it, such organizations are not attending GP for the purpose of receiving the various social and community services provided by GP's parent organization. They are there for the accommodation and the food service that accompany that accommodation.

[20] Consequently, while I accept that GP is properly classified in Rate Group 861 as a non-institutional social service, I am also persuaded that certain of their employees engage in activities that are properly considered a business or trade, notwithstanding the fact that the business or trade is an element of a non-profit organization and

is not intended to accrue profit or gain. The regulatory provision cited by Mr. MacNeill, section 5 of Regulation 175/98, stipulates that anything not done by an employer “as a business or trade or for profit or gain” (emphasis added) is excluded from Schedule 1. Mr. MacNeill submitted that, if a business activity was done not for profit or gain then it was exempted from Schedule 1. However, the stipulation actually states the activity must be both non-profit and not a business or trade. In my view, the provision of accommodation and food services by GP is effectively a business, i.e., operating a conference centre. These activities result in the receipt of significant revenues and, as such, constitute a business, albeit one that in the end is a not-for-profit business.

[21] Mr. MacNeill also relied on section 5 of Regulation 175/98 to argue that the section excluded such activities where they were “a part of or process in or incidentally to or for the purpose of an industry included in Schedule 1”. He submitted that the accommodation and food services activities of GP workers were part of or incidental to the social service activities of GP. However, as I have found above, the accommodation and food service activities are not intended to advance, or are not part of, the provision of social service activities. The services are offered to organizations that have no formal relationship with GP’s parent organization and who use GP’s facilities to advance their own interests and not the interests or purposes of GP’s parent organization.

[22] I conclude, therefore, that the ARO was correct in confirming the classification decisions made by the Board with respect to GP’s business activities. The employer’s appeal is denied.

DISPOSITION

[23] The employer’s appeal is denied.

Appeal dismissed.

Decision No. 364/09

Vice-Chair: Moore

Decision — April 29, 2009

Neutral Citation: 2009 ONWSIAT 1072

Class of employer (social club) – Schedule 1 employer (business or trade).

Employer was non-institutional social service organization that offered a number of recreational and social services including day care and an unattended snack bar in leased premises – Activities were not done as a business or trade or for profit or gain – Employer should be classified in Rate Group for non-institutional social services.

The Board reclassified the employer from non-compulsory Rate Group 861 for other non-institutional social services to Rate Group 919 for take-out food services and Rate Group 908 for operation of non-residential buildings. The employer appealed the final decision of the Board. The appeal was allowed.

The employer submitted that its only activity was that of a non-institutional social service, and that the other activities were an incidental part of its operation.

The overall operation of the employer is the provision of non-institutional social services. To that end, the employer offered a number of recreational and social services, including day-care. The take-out food services provided by the employer consisted on an unattended self-serve snack bar. The operation of a non-residential building consisted of providing day-care and English as a Second Language program in leased premises. These services were not operated for profit or gain or as a business or trade in and of themselves.

Section 5 of O. Reg. 175/98 provides that an activity that would normally be considered a Schedule 1 activity will be excluded from Schedule 1 if the activity is not done as a business or trade or for profit or gain.

The food service aspect of the employer's operation was nothing more than a non-profit, non-incidental activity.

Rate Group 908 was not intended to apply to leasing of rooms within non-residential buildings, such as in this case. Rather, it was intended to apply to operation of most or all of a building for profit. In any event, the employer was exempt from inclusion in Rate Group 908 by virtue of s. 5 of the Regulation. The leasing of space was incidental to, or part of, the purpose of the employer, albeit as a non-profit activity. Under s. 5, activity that is not done as a business or trade or for profit or gain is excluded from Schedule 1 unless it is incidental to a Schedule 1 industry. The leasing of space in this case was a non-business, non-profit, incidental activity to the non-mandatory activity of the provision of social services. Therefore, they were incidental to an industry that was not itself within Schedule 1.

Classification de l'employeur (club social) – Employeur de l'annexe 1 (entreprise ou commerce).

L'employeur était un organisme de services sociaux hors établissement offrant plusieurs services récréatifs et sociaux, y compris des services de garderie et un casse-croûte sans personnel dans des locaux loués – Les activités de l'employeur étaient à titre non commercial et sans but lucratif –

L'employeur aurait dû être classé dans le groupe de taux des autres soins de santé hors établissement.

La Commission avait fait passer l'employeur du groupe de taux 861 à protection facultative, autres soins de santé hors établissement, aux groupes de taux 919, mets à emporter, et 908, exploitants de bâtiments non résidentiels. L'employeur a interjeté appel de la décision définitive de la Commission à ce sujet. L'appel a été accueilli.

L'employeur soutenait que sa seule activité consistait à assurer la prestation de services sociaux hors établissement et que ses autres activités étaient connexes à son exploitation.

L'exploitation générale de l'employeur visait la prestation de services sociaux hors établissement. À cette fin, l'employeur offrait un certain nombre de services récréatifs et sociaux, y compris des services de garderie. Le service de mets à emporter consistait en un casse-croûte sans personnel. L'exploitation d'un édifice non résidentiel concernait la prestation de services de garderie et d'un programme d'anglais langue seconde dans des locaux loués. Ces services n'étaient pas en soi à but lucratif ou à titre commercial.

L'article 5 du Règlement 175/98 de l'Ontario prévoit qu'une activité normalement considérée comme une activité de l'annexe 1 est exclue de cette annexe si elle n'est pas effectuée à titre commercial ou à but lucratif.

La composante restauration des activités de l'employeur n'était rien de plus qu'une activité connexe sans but lucratif.

Le groupe de taux 908 n'avait pas été conçu aux fins de la location à bail de locaux dans des édifices non résidentiels comme dans ce cas. Ce groupe était plutôt destiné à la plupart des édifices exploités à des fins lucratives. De toute manière, l'employeur était exempt de l'inclusion dans le groupe de taux 908 en vertu de l'article 5 du Règlement. La location de locaux était connexe aux fins de l'employeur, ou en faisait partie, bien que pour une activité sans but lucratif. En vertu de l'article 5, une activité sans but lucratif ou à titre non commercial est exclue de l'annexe 1 à moins qu'elle soit connexe à une industrie de l'annexe 1. La location de locaux en l'espèce était une activité à titre non commercial ou sans but lucratif connexe à l'activité facultative de prestation de services sociaux. Ces activités étaient donc connexes à une industrie qui n'appartenait pas en soi à l'annexe 1.

Tribunal Decisions Considered:

Decision No. 362/09 (2009), 89 W.S.I.A.T.R. (online) refd to

Decision No. 499/00I (2001), 58 W.S.I.A.T.R. 54 consd

Regulations Under the Workplace Insurance Legislation Considered:

O. Reg. 175/98

s. 5

Board Directives and Guidelines Considered:

Employer Classification Manual

Document No. H-861-09 (January 3, 2005)

Document No. I-919-03 (January 3, 2005)

Document No. I-908-01 (January 3, 2005)

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APPEAL by the employer from a decision of the Board regarding the classification of the employer.

April 29, 2009. THE TRIBUNAL: —

BEFORE: J.P. Moore, Vice-Chair

HEARING: February 19, 2009, at Toronto, Oral hearing

DECISION(S) UNDER APPEAL: Account Manager, Services Sector decision dated January 17, 2005, declared to be a final decision of the Board in a decision of the WSIB Appeals Branch dated July 6, 2007

APPEARANCES:

For the worker: Not applicable

For the employer: K. MacNeill, Lawyer

REASONS

(i) Introduction

[1] The employer in this appeal is appealing a final decision of the Workplace Safety and Insurance Board regarding the employer's classification under the Insurance Plan.

[2] In a decision dated January 17, 2005, the Account Manager of the Board's Services Sector informed the appellant employer that it had been reclassified under the Board's employer classification system. The reclassification was made retroactive to January 1, 2004. Prior to that date, the employer had been classified as an "Other Non-Institutional Social Service" in Rate Group H-861-09. The reclassification placed the employer into other rate groups: 919-03 (Take-out Food Services) and 908-01 (Operators of Non-Residential Buildings). The employer objected to that decision. The decision of the Account Manager was confirmed by the Board's Appeals Branch in a decision dated July 6, 2007. The employer has appealed to the Tribunal.

(ii) The Issues

[3] The issue in this appeal is whether the Board has correctly classified the employer.

(iii) The Decision

[4] On the evidence and submissions presented to me, I am persuaded on a balance of probabilities that the Board has incorrectly reclassified the appellant employer. I reinstate the employer's previous classification, effective January 1, 2004.

(iv) Analysis

[5] The test generally applied by Tribunal panels in cases of this nature has been described in the Tribunal's *Decision No. 499/001* (2001), 58 W.S.I.A.T.R. 54 [at para. 17]:

In assessing the merits of this appeal, the Panel has applied the following two tests:

- with regards to the merits in the Board's decision, we conclude that the test of that decision is its correctness rather than its reasonableness;
- regarding the standard to be applied in determining the correctness of the employer's classification, we have applied the "best fit" test adopted by a number of Tribunal panels.

[6] As I noted above, the Board has assigned the employer to three rate groups. The portions of the applicable rate group descriptions read as follows:

Rate Group 861 (Other Non-institutional Social Services)

By application...

...

Included are government and related agencies engaged in providing services, not elsewhere classified, to help individuals in society. These agencies provide a variety of social service programs including cultural, social, recreational, educational, and community service activities.

Services provided by these agencies include:

- accredited training and educational programs
- adult day-care centres.

...

If any of the above activities is carried on at a separate workplace by an employer classified in this CU, the business activity is considered distinct and separately classifiable.

...

Rate Group 919 (Take-out Food Services)

...

Business activities include the preparation or selling of packaged or wrapped food, such as pizza and Chinese food, to the public for consumption away from the premises.

...

Rate Group 908-01 (Operators of Non-residential Buildings)

...

Business activities include operating, or owning and operating, non-residential buildings, not elsewhere classified, including

- conference, convention centres
- industrial parks
- meeting halls
- office buildings
- shopping centres
- theatres.

This includes activities such as the leasing of non-residential buildings and dwellings but only as an incidental activity to the main operating business activity.

[7] The classification decision of January 17, 2005 appears not to question that the appellant employer is properly classified in Rate Group 861, a rate group that has non-compulsory coverage. However, the decision goes on to find that the employer engaged in certain business activities as part of their operation that brought them within Rate Groups 919-03 and 908-01.

[8] In his submissions on behalf of the employer, Mr. MacNeill argued that the only activity in which the appellant employer engaged was that of a non-institutional social service. He submitted that the activities the Board considered to be activities related to take-out food services or operation of non-residential buildings were, in fact, a minor element of the employer's operations. He cited section 5 of Ontario Regulation 175/98, passed under the *Workplace Safety and Insurance Act, 1997*. That section stipulates:

5 Subject to section 13, anything not itself done by the employer as a business or trade or for profit or gain if, but for this section, it would be an industry included in Schedule 1, is excluded from Schedules 1 and 2, except where it is done as a part of or process in or incidentally to or for the purpose of an industry included in Schedule 1.

[9] The Account Manager's decision implies a finding that, in the course of providing non-institutional social services, the accident employer also operated take-out food services and non-residential buildings as an incidental part of its operation.

[10] In his submissions, Mr. MacNeill argued that the activities to which those descriptions might apply were:

1. not done as a business or trade or for profit or gain;
2. not part of or incidental to the overall purpose of the employer.

[11] By way of background, prior to the reclassification of the appellant employer, the appellant employer purchased another organization which provided overnight accommodation and food services. The Account Manager's decision letter referred to the activities of this subsidiary organization. However, that organization has been separately classified by the Board and its operations are, therefore, not relevant to the issue of the activities of the appellant employer. I note, in this regard, that the description of one of the classifications to which the Account Manager assigned the employer: 908-01 (Operators of Non-Residential Buildings), stipulates that the business activities described in that rate group include the operation of non-residential buildings "not elsewhere classified."

[12] Consequently, in my opinion, the Account Manager erred in referring to the activities of the subsidiary organization since they have been classified in another rate group and placed under a separate account. The only activities, therefore, that are of relevance in determining the appellant employer's classification are the activities actually carried on by the appellant employer.

[13] The overall operation of the appellant employer is, as I noted above, the provision of non-institutional social services. The appellant employer's mission statement is described in corporate documents as:

The physical, social, intellectual and spiritual development of men, boys, women and girls as individuals committed to the Christian way of life, and the responsibility of good citizenship.

[14] To that end, the employer offers a number of recreational and social services including day-care.

[15] According to evidence presented to me, the "take-out food services" provided by the employer consist of an unattended, self-serve snack bar. Nothing is cooked or served at the snack bar. Individuals simply select a light snack from the snack bar and pay for it at a reception desk. The snack bar is not carried on as a business or trade nor is it intended to make a profit.

[16] The "non-residential building" operated by the organization consists of non-profit programs operated by the employer in leased spaces. The employer uses non-residential buildings for two purposes: the operation of child care centres in school buildings, and the leasing of space in malls to provide English as a Second Language programs. Neither of these services operates for profit or gain nor are they conducted as a business or trade in and of themselves. Their sole function is to foster the non-institutional social services activity of the appellant employer.

[17] Section 5 of Regulation 175/98 stipulates that an activity that would normally be considered a Schedule 1 activity will be excluded from Schedule 1 if the activity is not done itself as a business or trade or for profit or gain. I am persuaded that this is the situation in the present case. Section 5 goes on to stipulate that such an activity may be considered to be a Schedule 1 activity if it is part of or for the purpose of a Schedule 1 industry.

[18] I am not persuaded that the food service aspect of the employer's operation is anything more than a non-profit, non-incidental activity.

[19] Regarding the employer's alleged activities as "operators of non-residential buildings," I am, first of all, not

persuaded that Rate Group 908-01 is intended to apply to the leasing of rooms within non-residential buildings. It appears to me that the purpose of that description is to describe an activity where a company operates most or all of an entire building for profit. The list of activities included in the rate group consists of the following:

- conference convention centres
- industrial parks
- meeting halls
- office buildings
- shopping centres
- theatres.

[20] It does not appear to me that the rate group was intended to apply to operations that lease rooms within structures such as those listed in the rate group.

[21] However, if I am wrong in my understanding of the scope of that rate group, I am persuaded that the appellant employer is exempted from inclusion in that rate group by virtue of section 5 of Regulation 175/98. Unlike the employer's food service activity, which seems to be a non-incidental, non-profit activity, the leasing of space by the appellant employer does appear to be incidental to or part of the purpose of the appellant employer, albeit as a non-profit activity. However, section 5 stipulates that a Schedule 1 activity done not as a business or trade or for profit or gain is excluded from Schedule 1 unless it is incidental to a Schedule 1 industry. But, in my opinion, the primary activity of the appellant employer is not a Schedule 1 industry. Its business activity is the provision of non-institutional social services. It is, therefore, part of a non-mandatory rate group, and, according to the evidence, the appellant employer had opted out of coverage since January 1994.

[22] Hence, the leasing of space by the appellant employer in schools and malls to conduct its social service operations constitutes, in my view, a non-business, non-profit activity that is incidental to the non-mandatory activity of the provision of social services. Since 1994, the employer has not been a Schedule 1 employer. I am persuaded that those of its activities that are not conducted for profit or gain but which are incidental to the social services activities are exempted from Schedule 1 by operation of section 5 of Regulation 175/98 because they are incidental to an industry that is not itself within Schedule 1.

[23] I conclude, therefore, that the activities engaged in by the appellant employer, which the Board placed in Rate Groups 908-01 and 919-03, are each activities that are:

1. not in and of themselves a business or trade or conducted for profit or loss; and
2. incidental to the activities of an industry that is not itself within Schedule 1.

[24] That being the case, any of the appellant employer's workers engaged in those activities are exempted from Schedule 1 and not mandatorily covered. This ruling does not apply to the activities of the subsidiary organizations to which the Account Manager referred. The subsidiary industry has a separate account and has been separately rated.

DISPOSITION

[25] The appeal is allowed.

[26] Workers employed by the appellant employer who are not engaged in the activities of the operation purchased by the employer in 2004 are all workers of a non-institutional social service. As such, they fall within Rate Group 861-09 which is a non-mandatory rate group with participation in Schedule 1 by application only.

The employer has not had coverage by application since 1993 and, at the time of the decision in issue, had not applied for coverage. As such, the workers of the appellant employer who are not part of the subsidiary operation purchased by the employer in 2004 are not covered by compensation legislation.

[27] The status of the workers of the subsidiary organization is the subject of a separate appeal before the Tribunal. Their status has been determined in *Decision No. 362/09* (2009), 89 W.S.I.A.T.R. (online).

Appeal allowed.

Decision No. 443/09

Vice-Chair: Keil

Decision — July 8, 2009

Neutral Citation: 2006 ONWSIAT 2557

Stress, mental – Board Directives and Guidelines (stress, mental) (traumatic event) – Police – Telephone operator.

In considering entitlement for traumatic mental stress, what is unexpected in normal course of a worker's employment will depend in part on the worker's particular environment – Average worker test should be considered contextually within parameters of the particular job – In circumstances, civilian dispatcher for a police department had entitlement for stress resulting from inability to locate officer who had radioed need for assistance.

The worker was a civilian dispatcher for a police department for over 25 years. The employer appealed a decision of the Appeals Resolution Officer granting the worker entitlement for traumatic mental stress in 1999 and for a subsequent recurrence. The appeal was dismissed.

In March 1999, a police officer pushed a button on his radio indicating that he needed assistance. For a few minutes, the worker was unable to locate the officer. It then became apparent that there was a faulty radio and there was no officer in distress.

The worker's job was stressful in nature. However, that alone is not sufficient for entitlement under the Board's traumatic mental stress policy. Workers who develop mental stress gradually over time due to general workplace conditions are not entitled to benefits. For entitlement, there must be a clearly and precisely identifiable event that is objectively traumatic and unexpected in the normal or daily course of the worker's employment or work environment.

The incident in March 1999 was a clearly and precisely identifiable event. In determining whether the event was objectively traumatic and unexpected in the normal course of the worker's employment, the Vice-Chair considered these two elements in concert. What is unexpected in the normal course of a worker's employment will depend in part on the worker's particular environment. The average worker test should be considered contextually within the parameters of the particular job. For example, an office worker would not be expected to encounter quantities of blood on a daily basis whereas a nurse in an emergency department would. This does not mean that there would not be objectively traumatic events involving blood for a nurse; it merely signifies that Board policy requires consideration of the parameters of a worker's job duties when determining the situation.

The Vice-Chair reviewed *Decisions No. 1837/07* and *509/07*. To the extent that there is difficulty in resolving the approaches in those decisions, the Vice-Chair preferred the analysis in *Decision No. 509/07*. However, all the analyses rely on the particular fact situation and surrounding circumstances in determining the significance of an event on any given worker.

In this case, a civilian dispatcher would be accustomed to dealing with difficult situations. However, in this case, the worker received a call about an officer needing assistance but was unable to perform his function of providing aid to the officer. This was an event that was objectively traumatic and unexpected. The fact that the situation ended well does not undermine the seriousness of the moment.

The Vice-Chair confirmed entitlement for acute mental stress resulting from the incident in March 1999.

The worker recovered quite well, but there were indications from increased sick leave after 1999 that the worker did not totally recover. There were two other events after 1999 that can also be characterized as objectively traumatic and unexpected. The worker took a call from an elderly female as her schizophrenic son was stabbing her, and he took a call from a man who had come home to find that his son had shot himself. The worker did not immediately lay off after those incidents but the Vice-Chair accepted that there does not have to be an immediate reaction to an event in order to have entitlement for post-traumatic stress disorder.

Tension mentale – Directives et lignes directrices de la Commission (tension mentale) (événement traumatique) – Police – Standardiste.

Lors de l'examen du droit à une indemnité pour stress traumatique, ce qui est imprévu dans le cours normal de l'emploi dépend en partie de l'environnement de travail particulier du travailleur – Le critère du travailleur moyen doit être pris en contexte en tenant compte des paramètres particuliers à l'emploi – Vu les circonstances, le répartiteur civil d'un service de police avait droit à une indemnité pour le stress résultant de ne pas avoir pu localiser un agent qui avait appelé au secours par radio.

Le travailleur était un répartiteur de service de police depuis plus de 25 ans. L'employeur a interjeté appel de la décision par laquelle le commissaire aux appels reconnaissait le droit à une indemnité pour stress en 1999 et pour une récidive subséquente. L'appel a été rejeté.

En mars 1999, un agent de police a appuyé sur un bouton de sa radio indiquant qu'il avait besoin d'aide. Pendant quelques minutes, le travailleur a été incapable de localiser l'agent. Il est ensuite devenu évident qu'une radio était défectueuse et qu'il n'y avait pas d'agent en détresse.

L'emploi du travailleur était de nature stressante. Cela ne suffisait toutefois pas pour ouvrir droit à une indemnité en application de la politique de la Commission sur le stress traumatique. Les travailleurs qui commencent à souffrir de stress graduellement avec le temps en raison de leurs conditions générales de travail n'ont pas droit à des prestations. Pour qu'il y ait droit à une indemnité, il faut un événement clairement et distinctement identifiable qui est objectivement traumatique, soudain et imprévu dans le cours normal ou quotidien de l'emploi ou dans l'environnement de travail du travailleur.

L'incident de mars 1999 était un événement clairement et distinctement identifiable. Pour déterminer si l'incident était un événement objectivement traumatisant et inattendu dans le cours de l'emploi du travailleur, la vice-présidente a examiné ces deux éléments de concert. Un événement inattendu dans le cours normal de l'emploi d'un travailleur dépend en partie de l'environnement particulier du travailleur. Le critère du travailleur moyen doit être considéré en contexte en tenant compte des paramètres particulier à l'emploi. Par exemple, on ne s'attend pas à ce qu'un travailleur de bureau voit chaque jour beaucoup de sang alors qu'on s'y attend de la part d'une infirmière de service des urgences. Cela ne veut toutefois pas dire qu'une infirmière ne pourrait pas objectivement être exposée à des événements traumatisants comportant du sang, mais plutôt que la politique de la Commission exige de tenir compte des paramètres des fonctions du travailleur quand elle examine la situation.

La vice-présidente a examiné les *décisions* n^{os} 1839/07 et 509/07. Dans la mesure où il est difficile de choisir entre les motifs de l'une ou l'autre de ces décisions, la vice-présidente a préféré l'analyse de la *décision* n^o 509/07. Cependant, toutes les analyses reposent sur une situation factuelle particulière et sur les circonstances entourant la détermination de l'importance d'un événement pour tout travailleur donné.

Un répartiteur civil est normalement habitué à composer avec des situations difficiles. Cependant, en l'espèce, le travailleur avait reçu un appel indiquant qu'un agent était en détresse, mais il avait été incapable de remplir sa fonction en lui venant en aide. Il s'agissait d'un événement objectivement traumatisant et imprévu. Le fait que l'événement s'était bien soldé n'amoinçait pas la gravité du moment.

La vice-présidente a confirmé le droit à une indemnité pour réaction aiguë à l'incident de mars 1999.

Le travailleur s'était assez bien rétabli, mais il ne semblait pas s'être totalement rétabli compte tenu de ses congés de maladie plus nombreux après 1999. Deux autres événements après 1999 pouvaient aussi être qualifiés

d'objectivement traumatisants et inattendus. Le travailleur avait pris un appel d'une dame âgée qui se faisait poignarder par son fils schizophrène, et il avait pris un appel d'un homme qui était rentré chez lui pour constater que son fils s'était tiré. Le travailleur n'avait pas pris congé immédiatement après ces incidents, mais la vice-présidente a accepté que la réaction ne doit pas nécessairement être immédiate pour qu'il y ait droit à une indemnité pour syndrome de stress post-traumatique.

Tribunal Decisions Considered:

Decision No. 1839/07 (2008), 84 W.S.I.A.T.R. (online) consd

Decision No. 509/07 (March 27, 2007) [2007 ONWSIAT 807] consd

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 15-03-02 (October 12, 2004) (since superseded)

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[DISPOSITION](#)

APPEAL by the employer from a decision of the Appeals Resolution Officer granting a worker entitlement for traumatic mental stress.

July 8, 2009. THE TRIBUNAL: —

BEFORE: M.F. Keil: Vice-Chair

HEARING: February 26, 2009 at Hamilton, Oral
Post-hearing activity completed on April 20, 2009

DECISION(S) UNDER APPEAL: WSIB ARO decision dated September 21, 2006 (and Addendum dated October 5, 2006)

APPEARANCES:

For the worker: A. Emmink, Paralegal

For the employer: M. Zare, Lawyer

REASONS

(i) Introduction to the Issues

[1] The now 55-year-old worker began employment as a police dispatcher in 1975. The worker reported a stress disability in February of 2004, resulting from “years of taking and dispatching life and death calls.” The claim was investigated and the Claims Adjudicator denied the appeal. By decision dated September 21, 2006 (with an Addendum dated October 5, 2006), the Appeals Resolution Officer (ARO) determined, for purposes of acute mental stress, the accident date was March 1, 1999. The ARO found the worker did have initial entitlement for acute mental stress, as well as for a recurrence in 2003-2004 and subsequent loss of earnings (LOE) benefits.

[2] The employer appeals the worker’s initial entitlement for acute mental stress in 1999, recurrent disability and subsequent LOE benefits. In the alternative, the employer argues that, if there is initial entitlement for metal stress, there is no basis for a recurrent disability in 2004 and LOE benefits resulting from same.

(ii) Background

[3] In this case, the pertinent events themselves are not in dispute so much as the manner in which they should be interpreted. I find the following to factually represent the worker's employment background and medical treatment:

- The now 55-year-old worker worked for over 25 years as a police dispatcher. This involved calls where suspects were killed, where there were serious injuries and/or death to people and where police officers themselves were in danger.
- In March of 1999, an officer pushed his 1078 button (officer needs assistance) and for a few minutes the worker was unable to locate the officer before it became apparent it was a faulty radio and there was no officer in distress.
- The worker sought medical treatment from his family physician, Dr. A. Gunning, that same month with complaints of disrupted sleep, poor appetite and sadness. The physician diagnosed the worker as having a major depression. The worker then began to see psychiatrist Dr. Dawson and was put of Effexor. During this same period, Dr. Gunning noted the worker was having “stress with mother” and “fight with brother.” He returned to work in August of 1999 and, in November of that year, Dr. Gunning recorded that the worker had told him he “was doing extremely well and coping well at work.”
- The file documentation lacks any indication of medical treatment for any psychological problems between the fall of 1999 and October of 2003.
- The worker returned to Dr. Gunning on October 20, 2003 with a “relapse of what appeared to be his depression.” The doctor’s notes indicated the worker had taken himself off work as he felt unable to cope with the stressful environment. “He reported having to deal with stressful calls in the workplace including suicides, which had upset him.” The family physician increased the worker's Effexor and referred to him to Adult Mental Health where he saw psychiatrist Dr. Gort. Apparently, Dr. Gort did not think the worker was suffering from depression. Dr. Gunning noted the worker returned to work later in 2003 “with difficulty.” Dr. Gunning subsequently filed a Form 8 on February 24, 2004 indicating the worker was unable to work owing to PTSD and depression.
- In the spring of 2004, the worker saw psychologist Dr. J. Gouws and, a month later, psychiatrist Dr. G. Bartolucci. Both physicians thought the worker was having a major depressive episode. Dr. Gouws’ report from April 30 referenced a family crisis with the worker's son as causing the worker ‘additional and extreme distress.’ Dr. Gouws concluded that “from a psychological treatment perspective, I believe this is a valid WSIB claim for a work-related stress condition.”
- The worker was off work for some months in early 2004, returning in May of 2004. He continued to see Dr. Gouws and, in January of 2006, again stopped working feeling unable to cope with the workplace stressors. In a report dated April 12, 2005, and addressed to the worker's representative, Dr. Gouws gave his opinion that the worker presented with a “typical delayed onset Posttraumatic Stress Disorder.” In his report of November 22, 2006, Dr. Gouws indicated the worker was “severely depressed, this to a point of almost complete inactivity.”
- After the ARO granted the worker initial and ongoing entitlement for acute mental stress, Board physician Dr. J. Dudley, Co-ordinator Psycho-Social team, reviewed the file. In his memorandum of August 13, 2007, he advised the worker had achieved maximum medical rehabilitation in 2004 with a permanent impairment. The physician also noted the worker appeared to worsen in 2005 and had remained a “low level of functioning.”

- Dr. Gouws submitted another report in March 2007 indicating that the worker's condition continued to deteriorate and, for at least the last year, the psychologist had been “very concerned about [the worker's] worsening mental health status and in particular his risk of self-harm.”
- From the file documentation, it appears the worker has not worked since 2006.

(iii) Medical Discussion Paper on PTSD

[4] In May 2002 psychiatrist Dr. D. Whitney prepared a discussion paper on Post-Traumatic Stress Disorder (PTSD) for the Tribunal. Following are relevant excerpts from that paper:

Trauma: For PTSD to develop, the person must have suffered or witnessed an event that involved actual or threatened death or serious injury to self or others. According to Diagnostic Statistical Manual IV (DSM IV) the person's response must have included intense fear, helplessness or horror. Thus, there is now a subjective aspect to the trauma with the emphasis being shifted from the severity of the trauma to the person's reaction to the trauma in this version of the DSM.

Symptom Clusters: There are 3 symptom clusters according to DSM IV, which define Post-Traumatic Stress Disorder. The clusters are re-experience traumatic event, avoidance & emotional numbing and increased arousal. The symptoms must be present for at least one month and cause significant distress and/or impair functioning.

The traumatic event is **re-experienced** in 1 or more of the following ways:

- Recurrent & intrusive distressing recollections and dreams of the event
- Acting or feeling as if the trauma were reoccurring
- Psychological distress and/or physiological reactivity when exposed to cues that resemble an aspect of the traumatic event

Avoidance of stimuli associated with trauma and a general numbing of responsiveness indicated by 3 or more of the following:

- Avoidance of thoughts, feelings or conversation associated with the trauma
- Avoidance of activities that will arouse recollection of the trauma (places or people)
- Inability to recall an important aspect of event
- Markedly diminished interest in significant activities
- Feelings of detachment
- Restricted range of mood
- Sense of foreshortened future

Symptoms of arousal as indicated by 2 or more of the following:

- Difficulty falling or staying asleep
- Irritability or outbursts of anger
- Difficulty concentrating
- Hyper-vigilance
- Exaggerated startle response

[5] According to the discussion paper, the probability of PTSD developing in males who witness violence is 23.9%. Dr. Whitney goes on to note that a history of previous trauma significantly increases the risk of developing PTSD: “Multiple traumas are common and the risk of PTSD increases exponentially with multiple traumas or lifetime adversities.” A significant number of patients suffering from PTSD fail to recover for years. Dr. Whitney also discusses co-morbid conditions. These include alcohol abuse/dependence (39.9%); panic (9.69%); major depression (48.2%); agoraphobia (19.25%); and social phobia (29.6%).

(iv) Testimony

[6] The worker testified that his general health had been good prior to 1999 (save for two brief, compensable, back injuries). He did not believe he had had any depression prior to 1999. The worker described the 1078 call in March of 1999 as being very stressful in that he didn't know where the officer was or how serious the problem

was. He said he had to be relieved as he was sick to his stomach and felt a tightening in his chest. The worker did not remember how soon after this incident he had gone off work, but it was shortly thereafter. He could no longer cope and needed to avoid any stressful situations. He went on long walks and spent time by himself. The worker explained that it was only after “1078 call” that he started getting the nightmares which had persisted for the last 10 years (and worse for the last four).

[7] The worker explained that he was off work for a time, received some counselling, and had then returned to regular work. He described himself as managing to get through it by taking a day off here and there and continuing with his medication. The worker described himself as “going through the motions.” In 2000 he was talking to an elderly woman who had just dropped off her schizophrenic son at hospital but was worried he would leave again. The worker confirmed with the hospital that the son had left, called the mother back and, while he was on the phone with her, the son came through the door and started to stab her. The worker could hear her screaming with the son ranting in the background; he stayed on the line until the police arrived. The worker felt physically ill after this call and had recurring nightmares afterwards.

[8] In early 2002, a man called to say he had just arrived home to find that his son “had blown his brains out” with a shotgun. The worker kept the father on the telephone until the police arrived with the man asking “why” over and over, all the time blaming himself.

[9] The worker stated he had to leave his post for a while to calm down; he felt bleak. He felt things were just getting worse and worse.

[10] The worker went off in 2003 and again in early 2004. He felt overwhelmed and unable to cope. He even contemplated suicide.

[11] When asked about the family crisis with his son in mid-2004, the worker replied that his 18 year old son had been caught with marijuana at school. He was subsequently charged. The worker explained that he was “pissed off and disappointed” because he had lectured his son so many times. In the end he was glad his son had gotten a lesson early on and there had been no trouble ever since. The worker did not feel this had been a significant stressor. In response to questioning, the worker also explained that he was the one who took care of his mother, without much assistance from any other family members. He did not regard this as overly burdensome as he was very fond of his mother and she was quite capable in most respects.

[12] The worker agreed that alternate employment had been discussed with the employer in 2004 and following, but there were not many options for civilians such as himself. The worker had been on long term disability for a while but was now on full loss of earnings (LOE) benefits.

[13] The worker could not remember anything particular in 2004; he just woke up and thought “I can’t go back.” When asked about an incident in late 2004 where the ER physician thought the worker's son might have cancer (not the case as was shortly thereafter made clear), the worker stated he did not recall much about that. He would probably have been upset at the time, but it was his wife who was at the hospital with the son and was most upset.

[14] The worker stressed that the nightmares he had were solely about the job and he often had ones specifically about the mother and her schizophrenic son. He stated he had different nightmares and some of them were variations about events that happened. He still has nightmares about the 1078 call.

[15] When asked, the worker thought he was fine from 1974 to March of 1999. Soon after the 1078 call there was a significant spike in emotional distress which resolved somewhat by October/ November of 1999. He agreed he was managing “okay” between late 1999 and late 2003. The worker couldn’t say whether he was truly all right or was just going through the motions for this period. He thought the medication he was taking helped. From 2003 onwards his emotional situation just got worse and worse until he could no longer cope at work.

(v) Relevant Law and Policy

[16] Board *Operational Policy Manual*, Document No. 15-03-02, entitled “Traumatic Mental Stress,” sets out the

following:

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.

...

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 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)...

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 employment.

(vi) Tribunal Case Law on Acute Mental Stress

[17] The question of measuring whether an event (or events) can be described as traumatic has been discussed in previous Tribunal decisions. A good summary is provided in Tribunal *Decision No. 1839/07* (2008), 84 W.S.I.A.T.R. (online) as follows [at paras. 21-27]:

We turn now to the second criterion, namely, whether the worker's reaction relates to an event or events which were traumatic. The first question to be addressed here is by what standard "traumatic" is to be measured. Must the event in question be "traumatic" by some objective standard, or is it sufficient that the individual worker subjectively found an event to be traumatic? A number of approaches to this question have been developed in the Tribunal's jurisprudence. Under the first approach, an objective test for standard of "traumatic" was established. This test is known as the "average worker" test. Another approach, however, adopts a more subjective approach to the question of what is "traumatic" which incorporates the "thin skull rule." These two approaches with respect to the test for "traumatic" in mental stress cases are outlined in *Decision No. 2391/06* (December 15, 2006) as follows [at paras. 44-45]:

In *Decision No. 422/96*, the Panel set out the applicable legal test in mental stress cases which has been followed by other Tribunal decisions:

The basic questions could then become:

1. Is it reasonable that workers of average mental stability would perceive the workplace events to be mentally stressful?
2. If so, would such average workers be at risk of suffering a disabling mental reaction to such perceptions?

If the answer to either question is "no", the psychological damage would not be compensable.

We note that there are varying interpretations in Tribunal case law of the "average worker" approach in mental stress cases. In *Decision No. 871/99* (September 16, 2003), the Panel discussed the average worker test set out above, and concluded as follows:

But these questions do not create a new legal requirement for entitlement. The "thin-skull rule" continues to apply. If it is found that there was an employment-related injuring process, the disability from the resulting psychological injury is compensable, even if that disability is, because of some pre-existing vulnerability, greater than it would be for the average worker.

In *Decision No. 2391/06*, the Panel did not resolve the question of which test to apply. In that case, the Panel held that even if the higher standard set out in the average worker test was appropriate, the events in that case met that higher standard. The Panel stated [at para. 48]:

Even if mental stress cases should be subject to a higher standard of causation through the "average worker" test, we find, for the reasons set out below, that the worker has entitlement for mental stress.

In our view, the appropriate test to be applied in mental stress cases is the "average worker" test. Under this test, in order for entitlement to be established, a worker must have suffered an acute reaction to events which would be traumatic to a worker of average mental stability. In this regard, we note that the Board's Traumatic Mental Stress policy, which we are bound by statute to apply, indicates that the trigger events must be "objectively traumatic."

We note that in some cases, the "average worker test" has taken on an added complexity. This is so because in applying that test, there has not always been consistency with respect to which "average worker" should be used. Should it be an "average worker" generally, or should it be an average worker *doing the same kind of work* as the claimant? This is particularly important in cases involving emergency workers. Should the test for "traumatic" look at whether the events in question would be traumatic for an average worker in the general labour market, or rather, whether they would be traumatic for an average emergency worker? In *Decision No. 1595/97* (August 12, 1998), the Panel adopted the latter approach. The Panel regarded the "average" worker as one doing the same kind of

work as the claimant, rather than an “average” worker in the general population [at para. 69]:

According to this first test, it is not necessary to ask ourselves if the worker was of average mental stability but simply whether a worker of average mental stability would have perceived the workplace circumstances or events as mentally stressful as the injured worker perceived them to be. We would like to begin by acknowledging that a police officer’s routine existence might well seem to involve situations that the rest of us would find stressful. It is the lot of the police officer to deal with crime, some of it horrendous, part depressing, a percentage dangerous and the rest routine. That is their daily workload and may seem unbearable to civilians just as the work of a brain surgeon might appear incomprehensible to those of us who do not, as a matter of daily activity, delicately explore the interior workings of another person’s skull. This is simply by way of saying that “average” must reasonably be understood within the context of the particular job. A police officer expects to encounter situations that many of us would not expect to confront and would not be trained to handle.

With respect, we are of the view that the proper application of the average worker test should be by reference to an average worker in the general labour pool rather than an average worker doing the same kind of work as a claimant. In our view, emergency workers should not be penalized in mental stress cases by having to establish trauma on a higher scale. It should be remembered that the average worker test already establishes a higher standard of causation than is generally adopted in compensation cases by measuring the triggering event not against the subjective “thin skull” of the claimant, but rather against the objective “thicker skull” of the average worker.” In our view, it is not appropriate to raise the bar even higher for emergency workers by requiring those workers to meet a higher standard of “traumatic event.”

We recognize that emergency workers encounter traumatic events more frequently than workers in other occupations. That fact may be relevant to the question of whether the events in question are “unexpected,” but it does not lessen or diminish the traumatic nature of the incidents which the workers are exposed to. Exposure to emergency situations on a regular basis may mean that these types of situations are not unexpected. It may mean that emergency workers develop coping strategies which make them more able to cope with traumatic events than other kinds of workers. But it does not change the nature of the events that they are required to deal with. We agree with the approach taken in *Decision No. 933/07* (August 15, 2007). The facts in that case are similar to those in the instant appeal. *Decision No. 933/07* involved a claim for benefits for mental stress made by a communications operator, or 911 operator, who worked for the police. In that case, the Panel indicated that the appropriate test was whether the calls which the worker dealt with would be traumatic for an “average person.” The fact that the worker dealt with such calls regularly did not detract from the fact that they were objectively traumatic. The Panel stated [at paras. 12-13]:

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 ...

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.

We conclude that the appropriate test with respect to whether an incident constitutes a “traumatic event” for the purposes of section 13(5) is the average worker test. Under that test, the event in question must be one that would be traumatic for an average worker in the general labour pool, rather than an average worker who does the same kind of work as the claimant in a particular case. In essence, the test

is whether the event in question would be traumatic for an “average person.”

[18] Tribunal *Decision No. 509/07* offers a somewhat different analysis than that above in that it dealt with whether the event was unexpected. That Panel provided the following analysis [at paras. 38-45]:

As noted above, the OPM Document No. 15-03-02. states that “in order to consider entitlement for traumatic mental stress, a decision-maker must identify that a sudden and unexpected traumatic event occurred.” We also note that section 13(5) of the Act provides that “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.” Accordingly, in order for the worker to be entitled to benefits for traumatic mental stress, it must be demonstrated that the incident on February 26, 2004 was “unexpected” within the meaning of the Act and the policy document. In our view, the incident was not unexpected, within the context and meaning of the Act and the policy.

We note that the worker testified that it was part of his job to respond to emergency calls, on an “overflow” basis. We heard evidence at the appeal hearing that the employer had an “emergency department” whose members responded exclusively to emergency calls from subscribers, and that the worker was not a member of that department. We also heard evidence that he was required to respond to emergency calls infrequently. Further, we heard evidence that his training in relation to responding to emergency calls from subscribers was very abbreviated, and that, it was his understanding that the members of the “emergency department” received additional training for responding to such calls, beyond the training that the worker received in that regard. We did not hear any evidence on the nature of such additional training that may have been received by the emergency department.

Notwithstanding all of that evidence, which we accept, we must nevertheless conclude that the worker expected to receive, and was required to respond to emergency calls in the regular course of his employment. He testified that this was a requirement of his job. He also stated that although his training in relation to responding to emergency calls was brief, he did receive some training in that regard. He also indicated in the Worker’s Report of Injury, dated May 24, 2004, which he completed and signed, that he had taken “a variety of calls each day”, that “some can be very stressful” and that “they can include emergency situations requiring emergency services.” On the basis of this evidence, we must conclude that the worker expected that, from time to time, he would be required to respond to emergency calls.

The worker testified that, in the portion of his training relating to responding to emergency calls, he was told that it might be necessary to contact and provide routing directions for an ambulance or a fire department. On that basis, we conclude that the worker was aware that when he would be required to respond to an emergency call, it might involve a situation where the caller, or someone nearby to the caller, had suffered serious injury, including a possible fatality, or might be in a situation of impending grave peril.

It appears to be the worker’s contention in this appeal, that although he might have expected to respond to emergencies as described immediately above, he did not expect that he would have to respond to a situation involving a suicide, and in that sense, the incident on February 26, 2004, was unexpected. We are not able to agree that the incident on February 26, 2004 was “unexpected” within the meaning of the Act and the policy on that basis.

As noted above, it is our view, that the worker expected that he would, at times, be required to address situations where callers were seeking assistance because they had suffered serious injury or were facing grave danger. Such situations might include calls from individuals who were seeking assistance because they or someone nearby was experiencing a serious or dangerous event, such as a heart attack, a stroke, a fire, an assault, or any number of other distressing events including a potential suicide.

Having found that the worker expected that he would be required, at times, to respond to emergency situations, we are not able to find that the incident on February 26, 2006 was “unexpected” within the meaning of the Act and the policy, notwithstanding that it may be true that the worker was not able to anticipate every type of emergency to which he would be required to respond. Given that an almost infinite variety of emergencies might arise, it would be very difficult to anticipate every type of emergency that could arise, to which the worker would be called upon to respond. The very nature of an emergency event, is that it is unpredictable, as to the timing of the event, but also as to its nature. The fact that the type of emergency that arose on February 26, 2004 was not specifically anticipated by the worker, does not cause us to find that it was unexpected, within the meaning of the Act and the policy.

We note that the worker had a personal and subjective psychological vulnerability that arose when he was called upon to

address a situation involving a suicide. That fact, however, does not cause us to change our conclusion that the incident on February 26, 2004 was not unexpected within the meaning of the Act and the policy.

[19] The Panel in *Decision No. 509/07* then went on to set out its understanding of “objectively traumatic” in the context of the case’s particular facts [at paras. 46-51]:

We note that the policy document requires that in order for a worker to have entitlement to benefits for traumatic mental stress “in all cases, the event must...be...objectively traumatic.” We have considered the definition of the “objective” that appears in the *Canadian Oxford Dictionary*, edited by Katherine Barber, Oxford University Press, 1998, which states:

objective adj. **1** (of a person, an opinion, etc.) not influenced by feelings or personal bias (*compare* SUBJECTIVE **1**) **2 a** (of writing, art, etc.) concerned with outward things or events; dealing with or laying stress on what is external to the mind **b** external to or independent of the mind ...**4** (of symptoms) observed by another and not only felt by the patient... **objectively** adv. ...

From this definition, which we consider to be the plain and literal meaning of the word, we interpret the requirement of the policy document that the subject event be “objectively traumatic” to mean that, for a worker to obtain entitlement to benefits for traumatic mental stress, the subject event must be traumatic, when considered, not from the unique perspective of the worker, but when considered from a perspective which is independent of the worker’s personal feelings and experiences.

In the circumstances, the subject event was the reception of a request from a subscriber to determine the location of the subscriber’s sister, because the subscriber feared that her sister might be in the process of attempting to commit suicide. We note that the event was not a call from a person who was attempting or contemplating suicide. We also note that the worker did not receive direct information informing him that a person was actually attempting or contemplating suicide. Rather, the worker had information that the subscriber to whom he was speaking was concerned about that possibility.

In our view, this event that was experienced by the worker on February 26, 2004 was not objectively traumatic. The event was a very serious one, and in our view, the appropriate response was to treat the situation as a very serious matter, as was done in the case. We have compared the event to the types of events that are listed in the policy. The events listed in the policy all involve either witnessing the actual injurious or dangerous event, or being the object of threats or harassment. The policy also indicates that being in radio or telephone contact with the person who is central to the event (i.e., “the victim”) may also attract entitlement. In our view, receiving a report from an individual that a member of her family might potentially be in danger at a unidentified location, is qualitatively different from the events listed in the policy, and is not an event which is objectively traumatic, within the meaning of the policy.

We have no doubt that the worker found the event traumatic, but, in our view, his traumatic reaction was due to his own personal history, and his unresolved feelings about the suicide of his close friend that had occurred a few years earlier. In our view, had the worker not had that history and those feelings, the worker would not, on a balance of probabilities, perceived the event as traumatic or suffered any disability as a result of the event. We find that, although the event was subjectively traumatic, i.e., traumatic when considered from the worker’s subjective point of view, it was not “objectively traumatic”. We find that the event was not traumatic when considered from a point of view that is independent of the worker’s perspective.

Given that the Board’s policy requires that the event in question be “objectively traumatic” we are not able to allow the worker entitlement to benefits for traumatic mental stress, because the event does not meet that criterion.

(vii) Submissions

[20] Ms. Zare submitted the worker’s situation did not meet the Board policy criteria for entitlement for traumatic mental stress. She submitted there was no objectively traumatic event in March of 1999 (the 1078 call) in that the stress was only in the worker’s mind; there was in fact no actual threat to an officer or a life-threatening situation. While Ms. Zare acknowledged the worker was off with depression in 1999, she argued there was no medical documentation confirming an acute stress type reaction.

[21] In the event that initial entitlement for 1999 was upheld, Ms. Zare submitted there was no entitlement for a recurrent disability in 2004 and subsequent LOE benefits. She noted that the worker’s diagnosis of depression in

1999 appeared to have resolved by November of 2003. There was no medical documentation for a three year period. It was not until early 2004 that PTSD emerged as a diagnosis.

[22] Ms. Zare submitted that the events cited by the worker as cumulatively traumatic still did not meet the threshold of objectively traumatic within Board policy criteria: there was never any actual threat to the worker. Lastly, Ms. Zare pointed out that there were non-compensable stressors involving the worker's son in 2004 that were the triggering event for the PTSD.

[23] Mr. Emmink submitted that the worker was exposed to a series of sudden, unexpected traumatic events at work that culminated in the "1078 call" in March of 1999. He further argued that although the worker's condition improved with the use of anti-depressants, further traumatic events in 2000 and 2002 caused a relapse and subsequent loss of earnings in 2003 and beyond.

[24] Mr. Emmink acknowledged that contemporaneous medical documentation for 1999 was sparse but referenced Dr. Gouws's 2005 report suggesting that the worker had PTSD that dated back to March, 1999. The worker's representative accordingly urged the Tribunal to accept that this was when the worker had developed and become disabled from PTSD.

[25] In contradistinction to Ms. Zare, Mr. Emmink argued the worker was exposed to a number of objectively traumatic events over the years, such as would have been experienced as such by the "average worker" (and in this regard he referred to Tribunal *Decision No. 1839/07*).

[26] Mr. Emmink acknowledged that the worker was exposed to non-occupational stressors, but they did not trigger or precipitate the onset of the worker's PTSD. He argued that the workplace stressors were the predominant cause of the worker's ongoing problems. Lastly, Mr. Emmink submitted that the worker's condition in 2003 and beyond was reasonably related to his condition in 1999 and ongoing entitlement on a recurrence basis was in order. The worker's condition was medically compatible as set out in Board policy and there were no intervening factors sufficient to break the chain of causation.

[27] In response to the employer's submissions concerning the fact that there was no actual emergency situation in respect to the "1078 call", Mr. Emmink pointed out that it was a reasonable perception on the worker's part, notwithstanding that there was no adverse result.

(viii) The Vice-Chair's Findings

[28] It is undisputed that the worker was a long serving and competent civilian dispatcher for the police department (from 1974 onwards). As a dispatcher he would field calls of a stressful nature and that, in part, was an expected component of his duties. I do not dispute that his job was stressful in nature. That alone is not sufficient for entitlement under the Board's traumatic mental stress policy. The policy states that "workers who develop mental stress gradually over time due to a general workplace conditions are not entitled to benefits." Entitlement for acute mental stress depends on three factors being satisfied: there must be a clearly and precisely identifiable event, one that is objectively traumatic and, finally, one that is unexpected in the normal or daily course of the worker's employment or work environment.

[29] In other words, for compensation purposes, it is not sufficient for the job to be stressful in general or for a worker to be overwhelmed by the ongoing impact of the daily demands.

[30] In this case, the worker has testified that the work was stressful in general but has also identified specific instances he felt met policy criteria. The employer has taken the position that the identified events do not meet the policy criteria and entitlement should be denied.

[31] As a threshold issue, I must determine whether the incident in March 1999 can accurately be described as an event that comes within Board policy.

[32] I find, and there has been no significant dispute on this aspect, that the "1078 call" was a clear and identifiable event. The worker's version has not varied since the outset and no one has disputed that the call took

place.

[33] What is in dispute is whether the event was objectively traumatic and unexpected in the normal or daily course of the worker's employment. In my view, these two elements need to be considered in concert. This is so because what is unexpected in the normal course of a worker's employment will depend in part on a worker's particular environment. For instance, an office worker would not expect to encounter quantities of blood on a daily basis, whereas a nurse working in the emergency department or a surgeon could reasonably be expected to come into contact with this substance as a matter of course. This does not signify that there would not be objectively traumatic events involving blood for those in the medical profession; it merely signifies that Board policy demands we consider the parameters of a worker's job duties when determining the situation. In my view, there would be a "sliding scale" involved in such matters. In other words, I consider the "average worker" test should be considered contextually within the parameters of the particular job. To the extent that this analysis may diverge from that set out in *Tribunal Decision No. 1837/07*, I think that average worker must be considered within the context of that worker's employment. Otherwise, what is expected or unexpected in a particular workplace would lose its significance. In this respect, my analysis conforms more exactly to the one set out in *Decision No. 509/07*. Again, to the extent that there is difficulty resolving approaches, I prefer the analysis as articulated in *Decision No. 509/07* over that in *Decision No. 1837/07*.

[34] What I think all the analyses (including my own) have in common is their reliance on the particular fact situation and surrounding circumstances in determining the significance of an event or events and the effect on any given worker.

[35] In my view, a civilian dispatcher would be accustomed to deal with difficult calls as a matter of his/her employment duties. That is part of the job. It is still reasonable to acknowledge that there could be situations that would be unexpected and objectively traumatic within this context. It is essential then to consider the specific event and the specific reaction (and symptoms) evoked by that event.

[36] As a dispatcher, the worker is connected with his work situations only by radio. There is little control over events that unfold. In respect to the "1078 call," the worker did not have even that control as he could not locate the officer who corresponded to the number. In such a situation the worker could not fulfill his mandate: to determine which officer needed assistance and what that assistance was. In other words, the worker would reasonably and objectively have felt helpless to perform his function of providing aid to a police officer who he logically assumed to be in difficulty. In my view, this does constitute an identifiable event that was objectively traumatic and unexpected. In general the worker would expect to be able to provide assistance of some sort, no matter how grave the situation. In this case, for a number of minutes, he was able neither to gauge the gravity of the situation nor to identify the caller. This meant the worker could do nothing. The fact that it turned out well does not, in my view, undermine the seriousness of the moment. It seems to me that any similarly situated worker – an average worker in that kind of workplace – could reasonably be expected to have experienced this event as objectively traumatic and unexpected.

[37] I also accept that the worker's reaction after the event, corresponds to the symptom clusters set out in Dr. Whitney's paper on PTSD. That is, the worker experienced psychological distress and a physiological reactivity. He kept replaying the event, had nightmares and displayed avoidance features. The fact that Dr. Gunning diagnosed the worker's condition as one of depression is not, in my view, fatal to the claim. As noted by Mr. Emmink, depression often co-exists with PTSD.

[38] Accordingly, I confirm the worker's entitlement for acute mental stress in March of 1999 and the payment of LOE benefits for the period of time he was off work during that year.

[39] This brings us to the worker's condition in 2003 and following. I accept that the worker recovered quite well from his initial bout in 1999. I note, however, that he continued with his Effexor and took more sick days than had been his practice in the years prior to 1999. I note that some of the sick days (five days in 2001 and 14½ days in 2002) were for other compensation claims. Nonetheless, this leaves over two weeks of sick days for each year from 2000 to 2003. I accept the worker's testimony in this regard that he handled events during this period by taking time off here and there.

[40] In my mind, the above does not suggest a total recovery from the effects of his psychological problems. I also note the worker experienced at least two other events in the intervening time frame that can be characterized as objectively traumatic and unexpected. The first concerned listening to the elderly female as her schizophrenic son was stabbing her; in the other instance, he was on the telephone with a man who had come home and found his son had shot himself. While the worker did not directly witness the events himself, he was the “witness” for the callers, linked by radio to their direct and horrific experiences.

[41] I note the worker did not immediately lay off work after either of the above but I accept his testimony that he re-experienced the situations and had nightmares about them. I also note that in the fall of 2003 his symptoms, as described by Dr. Gunnning, again conform to those expected in someone suffering from PTSD.

[42] I accept that a worker does not have to suffer an immediate reaction to an event in order to have entitlement for PTSD (or for a recurrence of same). In consideration of the above factors, I accept Dr. Gouws’s assessment that the worker suffered from delayed onset of PTSD and that this lacuna between the events and the disabling reaction does not argue against a diagnosis of PTSD. Again, I find the worker’s symptoms and experiences to be inline with the criteria outlined in Dr Whitney’s paper.

[43] It remains to discuss the impact and import of non-compensable stressors in the worker’s life. I accept the worker’s testimony, and find corroboration for it in the file documentation, that he was angry and frustrated over his son’s arrest. I also accept that, while the worker was disappointed in his son, it was neither traumatic nor completely unexpected that his adolescent son might be experimenting with marijuana. It was also a short term situation that resolved with no further repercussions. There is nothing in the medical documentation to suggest that this event triggered the kind of symptoms reflective of PTSD. I do not doubt that it added to the worker’s general stress level but the documentation substantiates he had already gone off work before this event occurred. That his son’s problems may have contributed after the fact does not alter the causative impact of the work events.

[44] I confirm the worker’s initial entitlement for PTSD with an accident date of March 1999. I also confirm entitlement for a recurrence and subsequent periods of LOE benefits in 2003 and following.

DISPOSITION

[45] The employer’s appeal is denied. I confirm the September 21, 2006 decision (and October 5, 2006 Addendum) of the ARO.

Appeal dismissed.



Decision No. 633/09

Panel: Patterson (Vice-Chair), Christie, Grande

Decision — May 5, 2009

Neutral Citation: 2009 ONWSIAT 1118

Class of employer (freight forwarding) – Class of employer (trucking) – Parties (representation) (paralegal) (legal services).

Unlicensed paralegal was not allowed to represent employer in classification appeal – Employer was engaged in freight forwarding only as a broker and did not perform any transport of freight – Employer should be classified in rate group for brokers.

The employer appealed a decision of the Appeals Resolution Officer classifying the employer in Rate Group 570 for general freight trucking rather than Rate Group 958 for freight forwarders (brokers). The appeal was allowed.

In a preliminary matter, the Panel considered the status of the employer's representative. The representative was not a licensed paralegal.

The representative had been retained by the employer prior to the coming into force of the legislation regarding paralegals. However, there was no grandfathering of representation based upon prior representation in the same matter.

The representative was an applicant to become a member of the Board of Canadian Registered Safety Professionals. A member of that Board is one of the exemptions to licensing. However, the representative was only an applicant to become a member and had not yet taken her examinations.

Representation with respect to employer classification constitutes the provision of legal services within s. 1(5) and (6) of the *Law Society Act*.

The representative was not allowed to represent the employer. The employer decided to proceed with the appeal without representation.

The employer did not own or operate trucks or trucking equipment, and also did not own a terminal or storage facility. The employer arranged transportation of goods for its customers. It contacted carriers to perform the carriage. The employer paid for the transportation and billed its customers. The employer's revenue was a fee that it charged its customers.

There is an exclusion from Rate Group 958 for activities carried on in conjunction with or under the same contract as a contract to provide or arrange for trucking services in Rate Group 570. Considering the illustrative examples that have been added to the rate group description, the Panel found that the existence of a contract is not determinative of the application of the exclusion but, rather, the mixing of brokering and performance of transport. In this case, the employer was a pure brokerage which did not perform any transport of freight.

The employer should be classified in Rate Group 958.

Classification de l'employeur (transport du fret) – Classification de l'employeur (camionnage) – Parties (représentation) (parajuriste) (services juridiques).

La parajuriste non titulaire d'un permis n'a pas été autorisée à représenter l'employeur dans cet appel relatif à la classification – L'employeur s'occupait du transport du fret seulement à titre de courtier, et il ne faisait pas le transport du fret – L'employeur devait être classé dans le groupe de taux des courtiers.

L'employeur a interjeté appel de la décision par laquelle le commissaire aux appels l'avait classé dans le groupe de taux 570 pour le camionnage de marchandises ordinaires au lieu du groupe de taux 958 pour les courtiers de fret/transitaires (terrestre). L'appel a été accueilli.

Le comité a commencé par examiner la question de la situation professionnelle de la représentante de l'employeur. La représentante n'était pas titulaire d'un permis de parajuriste.

L'employeur avait retenu les services de la représentante avant l'entrée en vigueur de la réglementation sur les parajuristes. Il n'y avait toutefois pas de disposition d'exception fondée sur la représentation antérieure dans une même affaire.

La représentante avait posé sa candidature pour devenir membre de la Canadian Registered Safety Professionals. Bien qu'un membre de cet organisme soit exempt, la représentante n'était qu'une candidate et elle n'avait pas encore passé les examens.

La représentation dans une instance relative à la classification d'un employeur constitue la prestation de services juridiques au sens des paragraphes 1 (5) et 1 (6) de la *Loi sur le Barreau*.

La représentante n'a pas été autorisée à représenter l'employeur. L'employeur a décidé de poursuivre l'appel sans service de représentation.

L'employeur ne possédait pas de matériel de camionnage et n'exploitait pas de camion. Il ne possédait pas de terminal ni d'installation d'entreposage. L'employeur organisait le transport de marchandises pour ses clients. Il communiquait avec les transporteurs pour qu'ils fassent le transport. L'employeur payait le transport et facturait ses clients. Les revenus de l'employeur étaient les frais qu'il imposait à ses clients.

Les activités effectuées conjointement avec le même contrat ou en application avec le même contrat à titre de contrat de prestation ou d'organisation de services de camionnage dans le groupe de taux 570 sont exclues du groupe de taux 958. Après examen des exemples illustratifs ajoutés à la description du groupe de taux, le comité a conclu que l'existence d'un contrat n'a pas un effet déterminant sur l'application de la disposition d'exclusion, mais que c'est plutôt la combinaison du courtage et de l'exécution du transport. L'employeur en l'espèce était purement et simplement un courtier qui ne faisait aucun transport de fret.

L'employeur devait être classé dans le groupe de taux 958.

Board Directives and Guidelines Considered:

Employer Classification Manual

Document No. E-570-09

Other Statutes and Regulations Considered:

Law Society Act, R.S.O. 1990, c. L.8

s. 1(5)

s. 1(6)

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DISPOSITION

APPEAL by the employer from a decision of the Appeals Resolution Officer classifying the employer in the rate group for general freight trucking.

May 5, 2009. THE TRIBUNAL: —

BEFORE: A.T. Patterson, Vice-Chair
M. Christie, Member Representative of Employers
A. Grande, Member Representatives of Workers

HEARING: March 25, 2009, at Toronto, Oral

DECISION(S) UNDER APPEAL: WSIB ARO decision dated April 26, 2007

APPEARANCES:

For the worker: Self-represented

REASONS

(i) Introduction

[1] The employer is appealing the decision of Appeals Resolution Officer (ARO) P. Hall, dated April 26, 2007, which concluded that the employer was excluded from being classified in Rate Group 958, Classification Unit 4592 Freight Forwarders (brokers) (RG 958) prior to January 1, 2005, and that it had been correctly classified in Rate Group 570, Classification Unit 4561 General Freight Trucking (RG 570).

[2] The employer has appealed the ARO's decision to the Tribunal. The issue for the Hearing Panel's consideration is which rate group the employer should be classified in for the period of January 4, 1999 and December 31, 2004.

[3] Prior to the hearing Tribunal Counsel Office (TCO) notified the Hearing Panel that there was a preliminary issue with regard to the status of the representative of record, Ms. Megan Adams. Mr. Marc Delorme, a lawyer from TCO, attended the hearing to assist the Hearing Panel in this regard.

(ii) The Status of the Representative of Record

[4] The following facts are not in dispute:

- Ms. M. A was retained by the appellant employer to represent her in this classification appeal;
- Ms. A is not licensed as a paralegal in Ontario, as required by the *Law Society Act*, R.S.O. 1990, c. L.8 (LSA);
- Ms. A is an applicant to become a member of the Board of Canadian Registered Safety Professionals and intends to take the examination to become a member in October 2009.

[5] The representative of record submitted three arguments to be permitted to continue to represent the appellant in this matter:

- the appeal was submitted by the representative of record prior to the change in legislation.
- she was qualified to represent the employer as a result of the exemption under section 30(1) 7. iv. C. of By-Law 4 made pursuant to section 62 of the LSA:

30(1) Subject to subsections (2) and (3), the following may, without a licence, provide legal services in Ontario that a licensee who holds a Class P1 licence is authorized to provide:

...

7. An individual,

...

iv. who is a member of,

...

C. the Board of Canadian Registered Safety Professionals,

...

- the representative was not engaged in the provision of “legal services” as it was concerned with the application of Board Employer Classification Manual policies.

[6] The Hearing Panel does not find those arguments persuasive.

[7] Neither the LSA nor By-Law 4 provide for a “grandfathering” of representation in a matter based upon representation in the same matter prior to the entry into force of the changes in legislation.

[8] In the Panel’s view it is obvious that the exemption of By-Law 4, s. 30(1) 7. iv. is afforded to members of the listed organisations. In the present instance it is clear to the Panel that the representative of record is merely an applicant to become a member the Board of Canadian Registered Safety Professionals, and not a member. On this basis the argument must fail.

[9] The Panel finds it patently obvious that advice and representation provided with respect to the application of WSIB *Employer Classification Manual* (ECM) policies constitute the provision of “legal services” as defined by the LSA. Section 1(5) and (6) of the LSA clearly states:

1(5) For the purposes of this Act, a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person.

(6) Without limiting the generality of subsection (5), a person provides legal services if the person does any of the following:

1. Gives a person advice with respect to the legal interests, rights or responsibilities of the person or of another person.

...

3. Represents a person in a proceeding before an adjudicative body.

[10] Upon issuing its ruling verbally at the hearing, the Hearing Panel suggested that the appellant employer had three possible options:

- continue with the hearing without the assistance of the representative of record,
- adjourn the hearing and return after the representative had become a member of the Board of Canadian Registered Safety Professionals and could then represent it under the exemption,
- adjourn the hearing and return with a duly licensed or exempt representative.

[11] The appellant employer enquired as to whether the representative could remain and assist as a “resource person”. The Hearing Panel expressed the view that this amounted to “doing through the back-door what one couldn’t do through the front-door”, circumventing the intent of the law, and declined the request. The Hearing Panel recessed to allow the appellant employer time to consider the options set out.

[12] After due consideration the appellant employer expressed the view that the matter had already been subjected

to delays and that she wished to proceed with the hearing. The representative of record left the proceedings.

[13] The Hearing Panel proceeded to consider the issue of appellant employer's classification for the period from January 4, 1999 to December 31, 2004.

(a) Factual Background

[14] The following facts are not in dispute and the Hearing Panel finds them to be true:

- The accident employer started business and registered with the WSIB at the beginning of January 1999.
- The employer does not own or operate any trucks or trucking equipment, nor does it own a terminal or storage facility.
- The employer's customers contact the employer to arrange for the transport of goods between locations, in turn the employer contacts carriers to perform the carriage of the goods. The employer arranges for pick-up location and time, and directs the carrier with respect to border crossings and customs brokers.
- The employer pays for the transportation and bills its customers. The employer's revenue is the fee charged to its customers.
- The carrier trucking companies, not the employer, take possession and title of the freight carried.
- The employer's business has not changed at any time from 1999 until the present day.
- In 2005 the WSIB changed the employer's classification to RG 958 Freight Brokers/Forwarders (Ground Freight).

(b) ECM Rate Group Descriptions

[15] For the period of January 4, 1999 until December 31, 2001 the WSIB has classified the employer in Rate Group 570 Classification Unit 4561 General Freight Trucking. The description of CU 4561 is as follows:

General freight trucking includes local and long-distance trucking and the transfer of general freight.

If the contract between the employer and the customer involves

- providing for trucking services using the principal's directly employed drivers; or
- arranging for trucking services to be provided by owner-operators or other trucking subcontractors

then the operation is classified in this CU unless it is listed in another CU in RG 570.

This classification includes general freight services such as

- cartage
- livestock transport
- local trucking
- long distance trucking
- transfer (trucking)
- truck transport
- trucking contractors.

Also included is the operation of a terminal in conjunction with a trucking service. This includes a cross-dock terminal or similar facility that handles in-transit freight. Although the goods may be temporarily held in the terminal pending shipment, the goods are not held for storage, but rather for distraction within the shortest time frame possible.

Excluded is the operation of a warehouse as described under E-560-02 and E-560-03. A firm that engages in warehousing under E-560-02 or E-560-03, and trucking, may separately classify its warehousing activity and any incidental support functions directly related to warehousing, subject to the WSIB's policies on segregated payrolls.

[16] Further to an audit by the Board, the employer was reclassified to CU 4592 Freight Forwarders (trucking) within the same RG 570, effective January 1, 2002. The description of CU 4592 is as follows:

Business activities include the provision of a trucking service when a freight forwarder or associated firm owns, leases, or operates equipment such as cargo containers, trucks, truck tractors, or trailers. Freight forwarders under this category

provide trucking services using their own drivers or those of an associated firm, or by contracting with owner-operators who transport freight on the forwarder's behalf.

Included as well is the operation of a terminal in conjunction with a trucking service. This includes a cross-dock terminal or similar facility that handles in-transit freight. Although the goods may be temporarily held in the terminal pending shipment, the goods are not held for storage, but rather for distribution within the shortest time frame possible.

If an employer under this CU operates a warehouse facility to store customers' goods for a fee, the insurable earnings for the warehouse facility and any incidental support functions directly related to warehousing may be separately classified under RG 560. Refer to E-560-02, *Refrigerated Warehousing* or E-560-03, *Other Storage and Warehousing Operations* for information. Separate classification categories will apply in accordance with the WSIB's policies on segregated payrolls.

Included in this category is the trucking activity carried out by an air and/or ocean freight forwarder defined under I-958-28, *Freight Forwarders (Air and/or Ocean)*. Refer to I-958-28 for more information. The trucking activities must be classified separately in accordance with the WSIB's policies on segregated payrolls.

For information on the classification of a combined trucking and freight brokering/forwarding operation, refer to I-958-03, *Freight Brokers (Ground Freight)*. The freight brokering/forwarding operation, as defined in I0958-03, may be separately classified provided that all the stated criteria are met.

[17] The Board changed the employer's classification to Rate Group 958 Classification Unit 4592 Freight Brokers/Forwarders (Ground Freight) effective January 1, 2005. The description of CU 4592 is as follows:

Business activities include arranging the transportation of goods by truck and/or rail on behalf of a shipper/customer, using non-associated* carriers. Freight forwarders who arrange transportation primarily by air/ocean are classified under **I-958-28, Freight Forwarders (Air and/or Ocean)**.

Employers in this category act as intermediaries in transactions between shippers/customers and the carriers who transport the goods. These firms may be termed freight brokers, load brokers, freight forwarders or freight agents; regardless of the name, it is the nature of the activities as described below, that determines classification in this CU. For the purpose of this policy, they will be referred to as Freight Brokers/Forwarders and the operation, a Brokerage.

Freight brokers/forwarders under this category typically engage in the following activities, including

- searching/selecting suitable carriers based on load requirements, destination etc.
- negotiating freight rates
- making arrangements with carriers for pick-up/delivery of freight
- invoicing the customer for the transportation costs and paying the carriers
- tracking shipments from origin to final destination.

Freight brokers/forwarders under this category do not possess the licensing or operating authority of a carrier. They do not lease, own, or operate trucks or trailers. They also do not handle or store freight in a terminal or warehouse. Refer to RG 570 for trucking activities and RG 560 for warehousing activities.

Freight brokers/forwarders who operate a separate and distinct warehousing or trucking operation or provide trucking or warehousing services through an associated firm may qualify for I-958-03 for their brokerage operation if they meet all of the criteria indicated below.

...

Exclusions

The following activities are excluded from this classification category

- any trucking activity as described in one of the CUs in RG 570. Included under 570 is the activity of freight brokering/forwarding for only part of a route, for instance, when a trucking firm that has a contract to transport

goods from origin to final destination, trucks the goods part of the distance and brokers out the rest to a third party. This may happen with long-distance trucking or with the transfer of freight (or trailer) by rail in the case of intermodal freight. The brokered portion of the transaction does not fall within the threshold criteria (75%) established above for classification in this CU.

- any warehousing activity as described in one of the CUs in RG 560. Included under 560 is the activity of arranging for the delivery or pick up of freight to/from a warehouse. This is considered incidental to warehousing under RG 560. An employer engaged in warehousing will only qualify, in part, for classification under 958-03 if it has a separate brokerage operation that meets all of the criteria listed above under "**Freight brokering/forwarding combined with trucking or warehousing activities.**"

(iii) Analysis

[18] The Hearing Panel finds that the appeal should be allowed.

[19] The Hearing Panel notes that the evidence on file clearly supports the conclusion of the Board's audits that the employer cannot be considered to be associated with a transport company owned and operated by the owner's ex-common law spouse. That transport company went out of business in October 2005. The information shows that the transport company accounted considerably less than 25% of the processed customer orders, in 2005 it accounted for 3.6%. Similarly, out of a total work order value of C\$1, 969, 718, to which must be added US\$189,116 in 2004, the transport company accounted for only C\$181, 758 or approximately 5%.

[20] The Panel accepts the owner's testimony that the business has not changed the nature of its business since its inception in 1999, and more specifically that there was no difference in its operations before or after 2005.

[21] The Hearing Panel notes that the ARO decision dated April 26, 2007, concluded that the exclusions of Rate Group 958 applied. That decision quotes the ECM description exclusions as follows:

Excluded from this category is any of the above activities when carried on in conjunction with, or under the same contract as, a contract

- to provide or arrange for trucking services in the CU's in RG 570, or
- to warehouse goods as described in the CU's in RG 560.

[22] The Policy package provided by the Board provides an updated version of the ECM description which includes illustrative examples, the following bolded sections have been added:

- any trucking activity as described in one of the CUs in RG 570. Included under 570 is the activity of freight brokering/forwarding for only part of a route, for instance, when a trucking firm that has a contract to transport goods from origin to final destination, trucks the goods part of the distance and brokers out the rest to a third party. This may happen with long-distance trucking or with the transfer of freight (or trailer) by rail in the case of intermodal freight. The brokered portion of the transaction does not fall within the threshold criteria (75%) established above for classification in this CU.
- any warehousing activity as described in one of the CUs in RG 560. Included under 560 is the activity of arranging for the delivery or pick up of freight to/from a warehouse. This is considered incidental to warehousing under RG 560. An employer engaged in warehousing will only qualify, in part, for classification under 958-03 if it has a separate brokerage operation that meets all of the criteria listed above under "**Freight brokering/forwarding combined with trucking or warehousing activities.**"

[23] In the Hearing Panel's opinion, the clarification added by the addition of examples to illustrate the exclusions is critical to the determination of this appeal. The clarification highlights that it is not, as the ARO concluded, the existence of a contract which is determinative of the application of the exclusion but rather the mixing of brokering and performance of transport by transport companies that excludes the latter from falling within the classification of RG 598, CU 4592. This is not the case here.

[24] It is not in dispute that the appellant employer is a "pure" transport brokerage which does not perform, nor indeed has the equipment to perform, any transport of freight.

[25] Consequently, it is the Hearing Panel's conclusion that the appellant employer should be classified within RG 958, CU 4592 Freight Brokers/Forwarders (Ground Freight) for the period from January 4, 1999 until December 31, 2004.

DISPOSITION

[26] The appeal is allowed.

Appeal allowed.

Decision No. 644/09

Vice-Chair: Patterson

Decision — July 8, 2009

Neutral Citation: 2009 ONWSIAT 1623

Jurisdiction, Tribunal (binding nature of determination) – Agreement (parties) – Parties (representation) (paralegal) (exceptions) (relative, friend or neighbour) – Labour market re-entry (suitability of program).

Representative, who was formerly a paralegal, but was now only representing the worker, who was his cousin, for no remuneration, was allowed to represent the worker – Prior Tribunal decision was made pursuant to mediated agreement – Neither the decision nor the agreement could be revisited.

The worker suffered a low back injury in 1999, for which she was granted a 32% NEL award. In *Decision No. 398/06*, which was made pursuant to a mediated agreement, the Tribunal found that modified work offered by the employer was not suitable, that the worker was partially disabled since 2001 but had failed to co-operate with ESRTW, that she was entitled only to 50% LOE benefits and that she was entitled to LMR services.

The Board provided LMR services and identified a SEB. The worker appealed, claiming that she was completely disabled. The appeal was dismissed.

In a preliminary matter, the Vice-Chair noted that the worker's representative was a paralegal prior to enactment of licensing requirements for paralegals. The representative was not involved in representing anyone else but continued to represent the worker, who was his cousin, on a friendship basis for no remuneration. The Vice-Chair was satisfied that the representative met requirements for exemption under the *Law Society Act*.

The Vice-Chair was bound by *Decision No. 398/06* in which it was determined that the worker was only partially disabled. Neither the mediated agreement nor the decision could be revisited. Evidence did not indicate that the worker and her representative had not understood the terms of the agreement.

Evidence did not indicate any significant deterioration of the worker's condition since the agreement was made.

The SEB identified by the Board was appropriate. The worker was not entitled to full LOE benefits.

Compétence du Tribunal (nature obligatoire de la décision) – Accord (parties) – Parties (représentation) (parajuriste) (exceptions) (parent, ami ou voisin) – Réintégration sur le marché du travail (caractère approprié du programme).

Le représentant, qui était anciennement parajuriste et qui ne représentait plus que sa cousine sans se faire rémunérer, a été autorisé à représenter la travailleuse – La décision précédente du Tribunal avait été rendue conformément à un accord de médiation – Ni la décision ni l'accord ne pouvait être réexaminé.

La travailleuse avait subi une lésion à la région lombaire en 1999 pour laquelle elle avait obtenu une indemnité pour perte non financière (PNF) de 32 %. Dans la *décision n^o 398/06*, rendue conformément à un accord de médiation, le Tribunal a conclu ce qui suit : le travail modifié offert par l'employeur n'était pas approprié; la travailleuse était partiellement invalide depuis 2001 mais avait négligé de collaborer à son retour au travail rapide

et sans danger; la travailleuse avait droit à des prestations pour perte de gain (PG) de 50 % seulement; la travailleuse avait droit à des services de réintégration sur le marché du travail (RMT).

La Commission avait fourni des services de RMT et avait identifié un emploi ou entreprise approprié (EEA). La travailleuse a interjeté appel en soutenant qu'elle était totalement invalide. L'appel a été rejeté.

Avant d'examiner le fond de l'appel, le vice-président a noté que le représentant de la travailleuse était parajuriste avant la promulgation des exigences relatives au permis de parajuriste. Le représentant ne représentait plus personne, mais il continuait à représenter la travailleuse, qui était sa cousine, pour lui rendre service, et ce, sans se faire rémunérer. Le vice-président était convaincu que le représentant remplissait les exigences voulues pour être exempt aux termes de la *Loi sur le Barreau*.

Le vice-président était lié par la *décision n^o 398/06*, dans laquelle le Tribunal a déterminé que la travailleuse était seulement partiellement invalide. Ni l'accord de médiation ni la décision ne pouvait être réexaminé. La preuve n'indiquait pas que la travailleuse et son représentant n'avaient pas bien compris les dispositions de l'accord.

La preuve n'indiquait pas de détérioration importante dans l'état de la travailleuse depuis la conclusion de l'accord.

L'EEA identifié par la Commission était approprié. La travailleuse n'avait pas droit à des prestations pour perte de gain totale.

Cross-References:

Decision No. 398/06 (March 22, 2006) [2006 ONWSIAT 658]

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APPEAL by the worker from a decision of the Appeals Resolution Officer regarding ongoing benefits.

July 8, 2009. THE TRIBUNAL: —

BEFORE: A.T. Patterson, Vice-Chair

HEARING: March 27, 2009 at Toronto, Oral

DECISION(S) UNDER APPEAL: WSIB ARO decision dated January 3, 2008

APPEARANCES:

For the worker: DG, exempt representative

For the employer: Did not participate

REASONS

(i) Introduction

[1] The worker injured her back in January 1999. Initial entitlement was granted and a 32% non-economic loss award was granted. She attempted to work on a number of occasions after the accident but has not worked since September 1, 2001.

[2] A prior Workplace Safety and Insurance Appeals Tribunal decision, *Decision No. 398/06* (March 20, 2006), made further to a mediated agreement, concluded that the worker was unlikely to be able to perform modified duties offered by the accident employer. It was accepted that the worker was partially disabled since September 2001 but since she had failed to cooperate in early and safe return to work she was only entitled to a 50% loss of earnings (LOE) benefit. As suitable modified work was not available with the accident employer, labour market re-entry (LMR) services were granted.

[3] LMR services were provided and a SEB was identified. The worker objected to the SEB and submitted that she was completely disabled in support of a claim for full LOE benefits.

[4] Appeals Resolution Officer B.J. Romano, in a decision dated January 3, 2008, denied the worker's request for full LOE benefits and found that the SEB selected was suitable. The worker appeals these issues to the Tribunal.

[5] The worker was represented by DG. DG was a paralegal prior to the entry into force of amendments to the *Law Society Act*, R.S.O. 1990, c. L.8, as am. S.O. 2006, c. 21, Sched. C, which require the licensing of paralegals in Ontario. Mr. DG provided correspondence to the Tribunal on March 6, 2009 in which he indicated that "at [the worker]'s request, I continue to assist her with her WSIAT file on a friendship basis only." Mr. DG reiterated this at the hearing and indicated that he is not involved in any other representation nor receiving any financial consideration from the worker for his assistance in this matter. I also note that DG is the worker's cousin. I concluded, based on the above, that D.G satisfied the requirements for exemption under the *Law Society Act*.

[6] The accident employer informed the Tribunal on March 27 that she was unable to attend the hearing and that she consented to the matter proceeding in her absence.

[7] The worker's family physician, Dr. Joann Himann, attended the hearing to provide testimony. Dr. Himann was excluded from the hearing room during the worker's testimony. As a preliminary matter Dr. Himann's *curriculum vitae* was requested by myself and entered into evidence. The document was identified as Exhibit No. 7.

(ii) Background

[8] As noted above, prior issues arising from this claim have been considered in Tribunal *Decision No. 398/06* (March 22, 2006). That decision sets out the background in the following terms [at paras. 1-14]:

The worker injured her lower back in the course of her employment in January 1999. At the time of the injury, she was employed as a cook. She was granted entitlement to benefits for the back injury under the *Workplace Safety and Insurance Act*. One month after the accident, the worker claimed entitlement to benefits for the left shoulder. That claim was denied.

Benefits for the low back were terminated on March 1, 1999 when the worker returned to modified work with the accident employer. She discontinued work two days later, on March 3, 1999, because of pain. Benefits were not reinstated. The worker returned to modified work again on June 15, 1999 and was granted partial loss of earnings ("LOE") benefits.

In April 2000, the Board accepted that the worker had a permanent low back impairment. She was granted a 32% non-economic loss award in March 2002.

On February 12, 2001, the worker stopped work because of back pain. She requested reinstatement of LOE benefits. This request was initially denied. However, in April 2004, the Board granted retroactive entitlement for the lay-off of February 12, 2001 but terminated entitlement as of September 1, 2001 on the basis that the worker was able to return to work at that point.

The worker objected to the denial of benefits from March 3, 1999 to June 15, 1999, and from September 1, 2001 onward. Her objection was denied by the ARO in the decision noted above. The worker now appeals to the Tribunal.

...

With respect to the worker's claims for entitlement for her left shoulder, the parties agree that the fact that the worker did not notice symptoms of shoulder pain until one month after the compensable accident was fatal to the worker's claim in this regard. I agree.

With respect to LOE benefits in 1999, I am persuaded that the extent of the worker's impairment from March 3–June 15, 1999 was greater than the Board realized. This fact is demonstrated to my satisfaction by the medical evidence during that period. I accept the parties' agreement that the worker was totally disabled at that time and unable to work in any meaningful capacity despite that fact that the accident had modified employment available for her. The medical evidence also indicates that the worker was capable of performing modified work by June 15, 1999, when she returned to modified work with the accident employer.

Regarding the period from September 2001 onward, I am persuaded that the extent of the worker's impairment worsened after she underwent surgery in February 2001. This worsening was reflected in a change in the worker's restrictions that made it unlikely that the worker would be able to perform the modified duties provided to her by the accident employer. The worker was, therefore, entitled to ongoing LOE benefits from that date.

However, the worker was partially disabled from that point and not totally disabled. She was, therefore, capable of some form of competitive employment. The parties agree that, because she claimed that she was unable to work at all, she failed to co-operate as required by the Act and was, in accordance with the Board's practice, only entitled to 50% LOE benefits from September 1, 2001. I accept this agreement.

Finally, on the basis of the fact that the accident employer ceased to have modified employment available for the worker, the parties agree that the worker is entitled to be considered for LMR assistance in accordance with subsection 42(1) of the *Workplace Safety and Insurance Act*.

[9] Further to *Decision No. 398/06* the worker was referred to LMR services on June 28, 2006 and assessed on July 5 and 6, 2006. She therefore received 50% LOE benefits from September 1, 2001 until July 5, 2006, the date of the LMR assessment. A suitable employment or business (SEB) of NOC 145 Library, Correspondence, and Related Information Clerks, was eventually selected.

[10] The worker disagreed with the SEB selected from the beginning: the LMR Plan Proposal Summary dated July 17, 2006 indicates: "worker was not in favour of this SEB option, as she wished to pursue employment recording stories for children."

[11] The worker was to start upgrading on August 29, 2006 but on August 30, 2006 the LMR service provider contacted the Claims Manager to advise that the worker had not attended on the 30th and had indicated that it was her belief that she was physically unable to participate in training. The worker was informed of her duty to cooperate but did not respond to the correspondence. LMR services were closed and LOE benefits were terminated as of September 25, 2006.

(iii) Analysis

[12] The worker's representative submitted that it should be concluded, based on the medical evidence on file, that the worker is "totally disabled". In accordance with the applicable Act, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A, I understand the representative to be arguing that she is competitively unemployable. In the alternative, he submitted that the SEB identified by the Board is unsuitable as it exceeds her functional abilities.

[13] I note that the worker agreed to the mediated agreement, which is appended to and forms the basis of *Decision No. 398/06*. That decision concluded, based on the agreement, that the modified work offered by the accident employer was not suitable after September 1, 2001. The decision to allow 50% LOE benefits for the period after that date until the date of the LMR assessment was predicated on the worker's admission that she was partially, not totally, disabled during that period.

[14] In my view I have no jurisdiction to revisit the finding in *Decision No. 398/06* that the worker was partially disabled up to the date of the LMR assessment. That decision has not been challenged by means of reconsideration request or otherwise.

[15] I do not accept the representative's submission that the mediated agreement or the decision can be revisited because the worker and her representative "had not understood" that by admitting that she was partially disabled and had failed to cooperate in LMR she was agreeing that she could perform suitable modified work on a full-time, rather than part-time, basis. It is the parties' responsibility, when they come to an agreement to ensure that they fully understand the terms of that agreement. Moreover, I find it unlikely that this misunderstanding arose since another term of the agreement was that the worker would be provided with LMR services to obtain work in a suitable SEB.

[16] Finally, I asked the worker and her physician whether there had been any significant deterioration in her medical condition between the date of the agreement, February 14, 2006, and the date of the hearing before me. Their evidence was that there had not. I accept that evidence. More to the point, I find that the worker's condition has not significantly deteriorated since March 22, 2006, the date of *Decision No. 398/06*, and March 27, 2009, date of the hearing before me.

[17] Given that the worker has not suffered a significant deterioration in her medical condition since March 22, 2006 to the present, and given that she admitted that she was partially disabled and prepared to participate in an LMR program, there is no basis to find that the worker was competitively unemployable (or "totally disabled", as she asserts) in September 2006 to the present time.

[18] Following surgery to the back in February 2001 the worker has restrictions of no prolonged sitting, standing or walking, and no lifting or bending. She is in receipt of a 29% NEL award for the back and 10% for the left knee. The worker also has a non-compensable left shoulder condition, and was diagnosed with a chronic pain disorder by Dr. William Bull, a psychologist, in May 2003. Entitlement under the chronic pain policy has not been granted.

[19] In a report dated September 1, 2006 Dr. Himann indicated:

There are some complications to the vocational training that is being suggested. [The worker] lives out of town and would need to drive for 20-30 minutes to reach the course location. As mentioned above, she reduces her pain meds so that she can drive. She also finds that sitting for greater than 20 minutes aggravated her pain. She would be starting the course in a deficit immediately. During the course she would need to have all her restrictions enforced. She would need to change positions frequently. There are times that she needs to lie down to alleviate the pain. [The worker] also has left shoulder problems that limit her ability to do any concentrated hand/shoulder work (i.e. computer work).

[20] The LMR program closure report dated October 13, 2006 indicates that on August 30, 2006 the LMR service provider advised with regard to "modifications that they were willing to make for the worker such as an ergonomic chair, a podium to change positions, and a cot to lie down if necessary." These modifications were never explored as the worker maintained that she was unable to work due to her injury and unable to participate in the LMR program.

[21] For the reasons outlined above, and notwithstanding the testimony of Dr. Himann and the worker with respect to the worker's alleged total disability and competitive unemployability, I am unable to set aside the findings from *Decision No. 398/06* that she is not totally disabled. There is no jurisdiction, and indeed, no reason to set aside findings based in part on an agreement which was entered into in good faith by the accident employer and the worker. As noted previously, it has not been argued that the worker has suffered a significant deterioration since the agreement was made. I therefore cannot conclude that the worker was competitively unemployable on August 29, 2006.

[22] In my view, there is no basis to find that the SEB selected by the Board was unsuitable. While I note that Dr. Himann raised a number of concerns relating to the worker's ability to participate in the LMR program, it does not appear that Dr. Himann was aware that the LMR provider was able and prepared to take steps to address the worker's needs and restrictions. I do not find that the worker's need to drive for 20-30 minutes, at a reduced dosage of pain-killers, to be sufficient to find that the LMR program or SEB were unsuitable. The LMR program involved 3.5 hours of vocational training a day leaving the worker with ample time to take multiple breaks while driving to the LMR service provider, for this reason I place limited weight on Dr. Himann's views.

[23] The worker failed to communicate her needs with respect to accommodation to the LMR provider because she maintained that she was totally disabled. This precluded any opportunity on the part of the LMR provider to determine how it could meet the worker's needs.

[24] In conclusion, I find that the SEB of library clerk, correspondence and other related clerks was suitable. Given that the worker has not participated in the LMR program and is not competitively unemployable, there is no basis to allow full LOE benefits after September 25, 2006.

DISPOSITION

[25] The appeal is denied.

[26] The SEB of library clerk, correspondence and other related clerks is suitable.

[27] The worker is not entitled to full LOE benefits after September 25, 2006.

Appeal dismissed.

Decision No. 880/09

Vice-Chair: Martel

Decision — May 25, 2009

Neutral Citation: 2009 ONWSIAT 1264

Loss of earnings (older worker) – Employment (retirement) (mandatory).

Injured worker returned to work one month after accident, and retired one year after accident at age 65 in accordance with employer's retirement policy – Worker was not entitled to LOE benefits after retirement.

The worker was injured on June 22, 2005, at age 63. He returned to modified work in July 2005, and continued to work until he retired on June 23, 2006, at age 65, in accordance with the employer's retirement policy. The worker appealed a decision of the Appeals Resolution Officer denying LOE benefits from June 23, 2006 until two years after the accident. The appeal was dismissed.

The worker wanted the further benefits under s. 43(1)(c) of the *Workplace Safety and Insurance Act, 1997*, which provides for LOE benefits for two years after the accident if the worker was 63 years of age or older on the date of the accident. However, the Vice-Chair found that s. 43(1)(a) was applicable, in that the worker's loss of earnings ceased when he returned to modified work at pre-accident wages in July 2005. The Vice-Chair distinguished *Decision No. 512/061*, in which the worker had not returned to work when he turned 65 years of age. In this case, the worker's loss of earnings after June 2006 was not the result of his compensable accident. Even if uninjured, the worker would have retired and been unable to continue working with the accident employer and with no intention of working with any other employer.

Perte de gains (travailleur âgé) – Emploi (retraite) (obligatoire).

Le travailleur blessé était retourné au travail un mois après l'accident et avait pris sa retraite un an après l'accident, à l'âge de 65 ans, conformément à la politique de retraite de l'employeur – Le travailleur n'avait pas droit à des prestations pour PG après avoir pris sa retraite.

Le travailleur avait été blessé le 22 juin 2005 à l'âge de 63 ans. Il était retourné à un emploi modifié en juillet 2005 et avait continué à travailler jusqu'à ce qu'il prenne sa retraite le 23 juin 2006, à l'âge de 65 ans, conformément à la politique de retraite de l'employeur. Le travailleur a interjeté appel de la décision par laquelle le commissaire aux appels a refusé de lui reconnaître le droit à des prestations pour PG pendant une période de deux ans à partir de la date de l'accident du 22 juin 2005. L'appel a été rejeté.

Le travailleur désirait d'autres prestations en application de l'alinéa 43 (1) c) de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997). Cette disposition prévoit des prestations pour PG jusqu'au jour qui tombe deux ans après la date où la lésion est survenue si le travailleur avait au moins 63 ans à cette date-là. La vice-présidente a toutefois conclu que c'était l'alinéa 43 (1) a) qui était applicable étant donné que la perte de gain du travailleur avait cessé quand il était retourné à un emploi modifié à son salaire d'avant l'accident en juillet 2005. La vice-présidente a établi une distinction entre ce cas et celui traité dans la *décision n^o 512/061* dans lequel le travailleur n'était pas retourné au travail quand il avait eu 65 ans. En l'espèce, la perte de gain du travailleur après juin 2006 ne résultait pas de l'accident indemnisable. Même s'il n'avait pas été blessé, le travailleur aurait pris sa retraite et aurait été incapable de continuer à travailler pour

l'employeur au moment de l'accident sans avoir l'intention de travailler pour un autre employeur quelconque.

Tribunal Decisions Considered:

Decision No. 512/06I (2007), 81 W.S.I.A.T.R. (online) distd

Board Directives and Guidelines Considered:

Operational Policy Manual

Document No. 18-03-04 (October 12, 2004) (since revised)

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APPEAL by the worker from a decision of the Appeals Resolution Officer denying loss of earnings benefits after the worker retired at age 65.

May 25, 2009. THE TRIBUNAL: —

BEFORE: S. Martel, Vice-Chair

HEARING: May 1, 2009 at Toronto, Oral

DECISION(S) UNDER APPEAL: WSIB ARO decision dated April 30, 2008

APPEARANCES:

For the worker: Mr. F. Evangelista, Paralegal

For the employer: In-house, President

REASONS

(i) Introduction

[1] The worker appeals the Appeals Resolution Officer (ARO) decision of April 30, 2008, which denied entitlement to loss of earnings (LOE) benefits after June 23, 2006. The worker was injured at work on June 22, 2005, when he was 63 years old. He returned to modified work with the employer on July 25, 2005 and continued to work until he turned 65 years old on June 23, 2006 and was essentially “forced” to retire in accordance with his employer’s then policy on mandatory retirement at the age of 65. The worker seeks LOE benefits from June 23, 2006 until two years after the accident.

[2] The worker also initially appealed the quantum of his non-economic loss (NEL) award but Mr. Evangelista advised at the outset of the May 1, 2009 hearing that the worker was withdrawing his appeal of this issue.

[3] The worker and the employer’s President testified. Mr. Evangelista made submissions. The employer’s

President made brief comments opposing the worker's appeal. I also considered five documents entered as exhibits.

(ii) Background

[4] The worker was born on June 23, 1941. He worked for the accident employer as an electric motor winder from 1966 until the time of his injury. The worker developed a bilateral onset of thumb and index finger arthritis, which he related to his repetitive duties as an electric motor winder. The Board accepted the claim for arthritis on an aggravation basis with an accident date of June 22, 2005. The worker was off work from June 23, 2005 to July 25, 2005. He then returned to modified work in the employer's stockroom. The worker continued to work at modified duties until June 23, 2006 when he was forced to retire at the age of 65 in accordance with his employer's then retirement policy.

(iii) Submissions

[5] Mr. Evangelista provided detailed submissions, including a written copy of his submissions. In summary, Mr. Evangelista submits that the worker is entitled to LOE benefits from June 23, 2006 until June 22, 2007, two years after the accident. He submits that the worker was unable to continue working in modified work beyond retirement age because of the employer's policy and actions. Mr. Evangelista relies on *Decision No. 512/06I* (2007), 81 W.S.I.A.T.R. (online), where a worker was found to be entitled to benefits beyond the age of 65 despite the employer's policy of mandatory retirement at 65. Mr. Evangelista submits that the worker was essentially in an early and safe return to work (ESRTW) phase when he returned to work at modified duties in July 2005. Mr. Evangelista submits that the employer's actions put an end to the ERSTW and that the worker should have then received additional benefits from the Board.

[6] The employer's President indicated that the employer had a longstanding company policy of retirement at 65, which was still in effect when the worker turned 65. He submitted that the worker stopped working for the employer in accordance with its retirement policy.

(iv) Law and Policy

[7] The worker's accident occurred in June 2005; as a result the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA), applies.

[8] Section 43(1) of the WSIA sets out a worker's entitlement to LOE benefits:

43(1) A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins. The payments continue until the earliest of,

- (a) the day on which the worker's loss of earnings ceases;
- (b) the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury;
- (c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury;
- (d) the day on which the worker is no longer impaired as a result of the injury.

[9] The applicable Board policy, entitled "Older Workers and LOE Benefits" is set out in *Operational Policy Manual* Document No. 18-03-04 dated October 12, 2004 and essentially reiterates the provisions of the legislation:

If the worker is 63 years of age or older on the date of injury, LOE benefits continue until the earliest of:

- the day the loss of earnings ends, or
- the day on which the worker is no longer impaired as result of the injury, or
- 2 years after the date of injury.

[10] I agree with the analysis of *Decision No. 512/06I* regarding the interpretation of section 43 wherein the Vice-Chair states [at para. 23]:

When read in its entire context, the most coherent interpretation of section 43(1) (c) is not that it provides for LOE benefits automatically for a full two years after the injury, but rather that it provides for that possibility up to two years post-injury. A worker who sustains an injury at age 63 or later would only be entitled to LOE benefits for the full two years after the injury if the worker continued to suffer a loss of earnings as a result of the injury *and none of the other provisions of section 43(1) had come into play to end entitlement to benefits prior to that date*. Entitlement to LOE benefits would end before the two years post injury even for a worker who was 63 years old at the time of the injury if the loss of earnings ended before that date, pursuant to section 43(1) (a), or if the worker was no longer impaired as a result of the injury, pursuant to section 43(1) (d). Therefore, the way in which the Board has restated the legislative provisions in its policy is correct. [Emphasis added]

[11] Ultimately, I find that the worker in the present case falls under the provisions of section 43(1)(a) and that his loss of earnings ended when he returned to modified work on July 25, 2005 at his pre-accident wages.

(v) Analysis

[12] While the worker agreed that his employer had a retirement policy at age 65, he also testified that other employees, such as foremen, had in the past been kept on beyond the age of 65. The employer's President clarified that two foremen had retired at age 65 pursuant to the company's retirement policy but had been brought back on contract afterwards. The employer's President also testified that one of the worker's co-workers in the motor electric winding department retired the same week as the worker. The worker agreed that a co-worker retired around the same time as he did. The President also testified that the modified work that the worker was doing in the stockroom continued to be available. The worker's employment ended because of the employer's then retirement policy.¹

[13] Ultimately, I accept that the worker was in no way forced to retire because he had been injured. His retirement was solely as a result of the employer's retirement policy. While a couple of foremen with the accident employer had in the past been offered work on a contractual basis after turning 65, the worker never worked as a foreman. There is no evidence that the worker would have been offered a similar contract had he not been injured. On the contrary, a co-worker who worked as an electric motor winder was, like him, "forced to retire" the same week as the worker when they both turned 65 years old. This co-worker did not return to work on contract after turning 65.

[14] The facts of this case are distinguishable from those of *Decision No. 512/06I*. In that case, the worker was not back at work when he turned 65 years old. That worker was still receiving LOE benefits when he turned 65. The worker in the present case was not receiving any benefits when he turned 65. The worker of *Decision No. 512/06I*, who worked as a cleaner prior to his accident in that case, testified that he likely would have found some work as a cleaner with another employer past the age of 65 had he not been injured. The Vice-Chair stated that the question was not just whether the worker could have continued working with the accident employer but whether the worker could have continued working with either the accident employer or another employer past 65 [at para. 27]:

In this case, the worker claims that he would have continued working past age 65 had it not been for the compensable injury. Tribunal decisions have generally interpreted that we should not assess the wage loss that an injured worker suffers because of a compensable injury solely in relation to the employment relationship with the accident employer. Rather, we must assess the worker's wage loss in a broader context. As Mr. Fink put it, the question is not just whether the worker could have continued working with the accident employer but whether the worker could have continued working either with the accident employer or with another employer after the age of 65, but for the injury.

[15] The Vice-Chair accepted the worker's testimony in that case and found that there was sufficient evidence upon which to conclude that the worker would have continued working past age 65 if not for the compensable injury.

[16] There is no similar evidence in the present case. From the time that the worker arrived in Canada in 1966, he

only ever worked for one employer: the accident employer. He worked for them from 1966 until 2006, when he retired. The worker had limited education and employment skills beyond his experience with the accident employer. He also had limited written English skills. It is highly unlikely that he would have worked for any other employer besides the accident employer even if he had not been injured. In his testimony and in his statements to the Board, the worker only ever expressed a desire to remain with the accident employer beyond age 65 rather than work for anyone else. There was no evidence that the worker intended to continue working after his retirement from the accident employer. The reason that the worker was unable to work with the accident employer beyond age 65 therefore had nothing to do with his compensable injuries.

[17] As noted by *Decision No. 512/06I*, section 43(1) of the WSIA does not provide for an automatic right to benefits for two years after the injury when a worker is 63 years old or older at the time of the accident. The possibility of receiving benefits two years post injury in these cases exists only if other provisions of section 43 are not in play. I am of the view that the circumstances of this case fall squarely within the provisions of section 43(1)(a). The worker's loss of earnings ceased when he returned to suitable modified work at no wage loss on July 25, 2005. There was evidence from the President, which I accept, that the modified duties were available on an ongoing basis. The only reason the worker could no longer work the modified duties was due to the employer's retirement policy, which the employer enforced for all of its employees. The worker's loss of earnings after June 23, 2006 is therefore not as a result of his compensable accident. I find on the balance of probabilities that even if uninjured, the worker would have retired at that time and been unable to continue working with the accident employer with no intention to work for any other employer.

[18] I therefore deny the appeal.

DISPOSITION

[19] The worker's appeal is denied.

Appeal dismissed.

1. *Decision No. 512/06I* made the following general comments at paragraph 26 regarding mandatory retirement law in Ontario:

There is no mandatory retirement law in Ontario as of December 12, 2006. However, there was no mandatory retirement even previously. Rather, the status of the law in Ontario prior to December 12, 2006 was that it was not a breach of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, for employers to require their employees to retire at age 65. That meant that employment contracts and collective agreements could, and generally did, specify a retirement age of 65. However, the law as it was then did not prevent employers from continuing to employ workers past age 65 and did not prevent workers from continuing to work past age 65.



Decision No. 1062/09 (Joly v. State Farm Mutual Automobile Insurance Co.)

Indexed as: Decision No. 1062/09

Vice-Chair: Moore

Decision — June 19, 2009

Neutral Citation: 2009 ONWSIAT 1494

Right to sue – Election (withdrawal) – Subrogation – Jurisdiction, Tribunal (election).

Accident occurred in circumstances that allowed plaintiff to claim workplace insurance benefits or pursue legal action – Election to claim benefits did not extinguish right to pursue action – Rather, Board became subrogated to plaintiff's right – Tribunal did not have jurisdiction to consider appeal regarding validity of election or Board's denial of request to withdraw election.

The plaintiff in a civil action was injured in a motor vehicle accident in the United States in 2002. He elected to claim benefits in Ontario rather than in the jurisdiction in which he was injured. He then elected to claim benefits under the *Workplace Safety and Insurance Act, 1997*, rather than pursue legal action.

In 2004, the plaintiff informed the Board that he wanted to pursue legal action rather than claim workplace insurance benefits. The plaintiff then commenced the action. The Board advised that it would not permit the plaintiff to withdraw his claim for benefits. It informed the plaintiff that his only remedy would be an application for judicial review.

The defendant applied for a declaration that the plaintiff's right to continue his action was barred. The plaintiff applied to nullify or reverse his election to claim benefits. The applications were denied.

The plaintiff's lawsuit was not barred. The accident occurred in circumstances that allowed the plaintiff either to claim workplace insurance benefits or to pursue legal action. The choice to claim benefits did not extinguish the right to pursue legal action. Rather, the Board became subrogated to the plaintiff worker's rights with respect to the legal action. Thus, the right of action was not extinguished but the plaintiff cannot pursue the action unless and until he obtains the authorization of the Board to do so.

Under s. 123(2) of the WSIA, the Tribunal does not have jurisdiction over appeals from decisions under ss. 26 to 30. Elections fall within the ambit of s. 30. Thus, the Tribunal did not have jurisdiction to consider an appeal regarding the validity of the original election or the denial of the request to withdraw the election. The appropriate remedy for the plaintiff worker, if he wishes to challenge the decision of the Board regarding the election, is an application for judicial review.

Droit d'intenter une action – Choix (retrait) – Subrogation – Compétence du Tribunal (choix).

L'accident était survenu dans des circonstances telles que le demandeur pouvait demander des prestations d'assurance contre les accidents du travail ou intenter une action – Le choix de demander des prestations n'abolissait pas le droit d'intenter une action – La Commission était plutôt devenue subrogée aux droits du demandeur – Le Tribunal n'était pas compétent pour examiner l'appel relatif à la validité du choix ou au rejet de la demande de désistement visant ce choix.

Le demandeur dans une action civile avait été blessé dans un accident d'automobile aux États-Unis en 2002. Il avait choisi de demander des prestations en Ontario plutôt que dans de la juridiction dans laquelle il avait été blessé. Il avait ensuite choisi de demander des prestations d'assurance en application de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* (Loi de 1997) plutôt que d'intenter une action.

En 2004, le demandeur a informé la Commission qu'il désirait intenter une action plutôt que de demander des prestations d'assurance contre les accidents du travail. Le demandeur a alors intenté l'action. La Commission a informé le demandeur qu'elle ne lui permettrait pas de se désister de sa demande d'indemnité. Elle a informé le demandeur que son seul recours était de faire une demande de révision judiciaire.

Le défendeur a demandé au Tribunal de déclarer que la Loi supprimait le droit du demandeur de poursuivre son action. Le demandeur a fait une demande pour infirmer ou annuler son choix de demander des prestations. Les demandes ont été rejetées.

L'action du demandeur n'était pas interdite. L'accident était survenu dans des circonstances telles que le demandeur pouvait demander des prestations d'assurance contre les accidents du travail ou intenter une action. Le choix de demander des prestations n'abolissait pas le droit d'intenter une action. La Commission était plutôt devenue subrogée aux droits du demandeur. Par conséquent, le droit d'action n'était pas aboli, mais le demandeur ne pouvait poursuivre son action à moins d'y être autorisé par la Commission ou jusqu'à ce qu'il obtienne une telle autorisation.

Aux termes du paragraphe 123 (2) de la Loi de 1997, le Tribunal n'est pas compétent à l'égard des appels contre les décisions rendues aux termes des articles 26 à 30. Comme le choix de demander des prestations ou d'intenter une action relève de l'article 30, le Tribunal n'était pas compétent pour examiner l'appel relatif à la validité du choix initial ou au rejet de la demande de désistement visant ce choix. S'il désirait contester la décision de la Commission au sujet de son choix, le demandeur avait pour seul recours de faire une demande de révision judiciaire.

Tribunal Decisions Considered:

Decision No. 1434/97 (1999), 49 W.S.I.A.T.R. 20 consd

Decision No. 24/91 (October 2, 1991) consd

Decision No. 108/01I (January 26, 2001) [2001 ONWSIAT 186] consd

Decision No. 1782/04I (March 20, 2006) [2006 ONWSIAT 633] consd

Other Decisions Considered:

West v. Workplace Safety and Insurance Board (2005), 78 O.R. (3d) 270 (Ont. Div. Ct.) consd

Workplace Insurance Legislation Considered:

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

s. 30

s. 31

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[DISPOSITION](#)

APPLICATIONS by the plaintiff and defendant in a civil case regarding the right to sue.

June 19, 2009. THE TRIBUNAL: —

BEFORE: J.P. Moore, Vice-Chair

HEARING: May 26, 2009 at Toronto, Oral

APPLICATION: For an order barring legal action commenced under Court File No. 04-14576 in the Ontario Superior Court of Justice in Hamilton

APPEARANCES:

For the applicant: J. Sullivan, Lawyer

For the respondent: F. Siddiqui, Lawyer

REASONS

(i) Introduction

[1] On November 6, 2002, the respondent, Mr. Joly, was injured in a motor vehicle accident in New Jersey in the United States of America. At the time of the accident, Mr. Joly was working for and driving a truck owned by a Schedule 1 employer. There is no dispute that he was performing his employment duties at the time of the accident.

[2] On November 8, 2002, Mr. Joly signed a “Form 7” completed by his employer reporting the accident of November 6, 2000 to the Workplace Safety and Insurance Board. On November 28, 2002, Mr. Joly signed a form entitled “Election to Claim Benefits”. In that form, Mr. Joly declared that he was choosing to claim benefits in Ontario rather than in the jurisdiction where he was injured. On December 3, 2002, Mr. Joly completed a “Form 6” reporting the accident to the Board.

[3] On December 3, 2002, Mr. Joly signed an “Election Form” in which Mr. Joly chose to take benefits out of the Insurance Plan rather than pursue legal action. The form contained the following statement:

I understand that by choosing to receive benefits under the Insurance Plan I transfer my right to any legal action to the Workplace Safety and Insurance Board and I cannot take any legal action on my own against anyone concerning this accident. I understand that the Workplace Safety and Insurance Board cannot bring any legal action on my behalf.

[4] Mr. Joly received benefits from the Insurance Plan until July 28, 2003. On October 21, 2003, the Board determined that Mr. Joly was capable of returning to work effective November 25, 2003.

[5] On September 30, 2004, a lawyer retained by Mr. Joly wrote to the Board informing the Board that Mr. Joly wished to pursue legal action rather than claim benefits from the Insurance Plan. A Statement of Claim was filed on Mr. Joly’s behalf on October 15, 2004. The claim was defended by State Farm Mutual Automobile Insurance Company.

[6] On November 3, 2004, the Board informed Mr. Joly that he would not be permitted to withdraw his claim for benefits from the Insurance Plan. The letter concluded with the following statement:

As this is a final decision of the Legal Services Division regarding third party actions, your remedy of appeal is only by way of Application for Judicial Review to the Divisional Court pursuant to s. 123 WSIA.

[7] The defendant, State Farm, then brought a motion before the Superior Court of Justice in Hamilton for dismissal of Mr. Joly's action. The resulting endorsement by Crane J. is dated September 20, 2007, and reads as follows:

I find that the exclusive jurisdiction to decide the issue of this motion is with the Appeals Tribunal of WSIA – see ss 123 and 31(1).

[8] State Farm then filed the present application.

[9] In its application, State Farm requests an order from the Tribunal taking away Mr. Joly's right to commence legal action in this case. Alternatively, State Farm seeks the Tribunal's direction to a Court authorizing the Court to dismiss Mr. Joly's action.

[10] In response, Mr. Joly is seeking a declaration by the Tribunal that Mr. Joly's initial election to claim benefits was a nullity and ought to be reversed. Alternatively, Mr Joly seeks a declaration allowing him to de-elect benefits from the Insurance Plan and elect, instead, to pursue legal action.

[11] During the course of the hearing of this application, I discussed with the parties jurisdictional issues raised by the application with respect to the remedies sought by the parties. After hearing submissions from counsel, I issued an oral decision on jurisdiction the details of which are set out below.

(ii) The Issues

[12] The issues raised by the parties are:

1. whether the applicant, State Farm, is entitled to a declaration barring Mr. Joly's right to continue legal action in respect of an accident that occurred in the course of his employment on November 6, 2002;
2. whether the respondent, Mr. Joly, is entitled to a declaration nullifying or reversing the election he made on December 3, 2002 to claim benefits[13] from the Insurance Plan rather than to pursue legal action.

(iii) The Decision

[14] Having considered the submissions of the parties, I am persuaded that the Tribunal lacks the jurisdiction to provide the remedies sought by the parties. Mr. Joly's lawsuit is not barred by the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule (WSIA). However, Mr. Joly has no right to pursue the legal action he initiated until such time as he obtains a reversal of the Board's decision of November 3, 2004 by way of judicial review.

(iv) Analysis

[15] This application is brought pursuant to section 31 of the WSIA. Section 31(1) and (2) reads as follows:

31(1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,

- (a) whether, because of this Act, the right to commence an action is taken away;
- (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
- (c) whether the plaintiff is entitled to claim benefits under the insurance plan.

(2) The Appeals Tribunal has exclusive jurisdiction to determine a matter described in section (1).

Also relevant to this application are certain provisions found in section 30 of the WSIA:

30(1) This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance

plan with respect to an injury or disease and is also entitled to commence an action against a person in respect of the injury or disease.

(2) The worker or survivor shall elect whether to claim the benefits or to commence the action and shall notify the Board of the option elected.

...

(4) 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.

(5) The Board may permit the election to be made within a longer period if, in the opinion of the Board, it is just to do so.

(6) If an election is not made or if notice of election is not given, the worker or survivor shall be deemed, in the absence of evidence to the contrary, to have elected not to receive benefits under the insurance plan.

...

(10) If the worker or survivor elects to claim benefits under the insurance plan and if the worker is employed by a Schedule 1 employer or the deceased worker was so employed, the Board is subrogated to the rights of the worker or survivor in respect of the action. 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.

(a) The Applicant's Request

[16] The applicant, State Farm, is seeking a declaration barring Mr. Joly's action. On behalf of State Farm, Mr. Sullivan argued that the Tribunal had exclusive jurisdiction to determine whether Mr. Joly's action was taken away. Mr. Sullivan further argued that, by virtue of electing to receive and receiving benefits from the Insurance Plan, Mr. Joly forfeited his right to pursue legal action. Mr. Sullivan sought a declaration to that effect. Alternatively, Mr. Sullivan sought directions from the Tribunal that might be taken to a Court of appropriate jurisdiction.

[17] While the Tribunal has exclusive jurisdiction over the question of whether a worker's right to commence legal action is taken away, that jurisdiction is circumscribed by the provisions in the WSIA governing rights of action. The action commenced by Mr. Joly is not barred by any of the provisions in the WSIA. The accident occurred in circumstances that conferred on Mr. Joly the right either to claim benefits from the Insurance Plan or to pursue legal action. The fact that he chose to receive benefits from the Insurance Plan does not, under the legislation, extinguish the right to pursue legal action for the same accident. Rather, under section 30(10), the Board becomes subrogated to the worker's rights with respect to legal action. Section 30(10) stipulates in part:

30(10)...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.

[18] I am unable to find any Tribunal decisions that have addressed the question of election/subrogation within the context of the WSIA. However, a number of Tribunal decisions have discussed these matters in the context of the pre-1997 *Workers' Compensation Act*, which contains provisions that are essentially the same in all respects. In *Decision No. 24/91* (October 2, 1991) a Tribunal Panel stated, at page 7:

In the view of the Panel, the sections taken together suggest that the right to claim benefits and the right to take legal action are not, therefore, extinguished by exercising the s. 8(1) election. The effect of that election, in our view, is to determine the extent to which the worker and the Board will control the worker's legal action. If the worker simply elects to take legal action without claiming any benefits, the worker has complete control over the lawsuit.... If the worker elects to claim benefits, the worker's legal action comes under the Board's control with the Board acting on the worker's behalf.

[19] At page 9, the Panel stated:

In our view, once a worker elects to rely on the Board to compensate him for a workplace injury, he or she accepts the Board's sovereignty over any present or future rights of action for personal injury compensation arising from the worker's

compensable injury.

[20] A later Tribunal decision, *Decision No. 1434/97* (1999), 49 W.S.I.A.T.R. 20, cited *Decision No. 24/91*, and stated at paragraph 74:

Pursuant to section 10(4), once the worker elects to claim benefits for the work-related injury, the worker's right of action against the third party in respect of any matter related to the work-related injury is subrogated to the Board, provided that the right of action is not taken away because of the status of the third party. Unless the right of action is extinguished, the right of action remains but, pursuant to section 10(5), it is for the Board to decide how or whether to proceed.

[21] In my view, the analysis set out in those decisions regarding election/subrogation under the pre-1997 legislation applies also to the provisions set out in the WSIA. Section 30(10) of that Act clearly indicates that, where a worker has a right of action and claims benefits, the worker's right of action becomes subrogated to the Board and remains under the Board's discretion. The worker's right of action is not extinguished; the right to pursue that action resides with the Board. The worker cannot pursue his action unless and until he obtains the Board's authorization to do so. In the present case, the Board has exercised discretion not to pursue the lawsuit and not to permit the worker to do so. The correctness of that decision is being challenged by the Respondent in this application. However, for the purposes of the request made by the applicant in this case, I conclude that the circumstances of the case do not permit extinguishing the worker's right of action. Rather, the appropriate declaration is that the worker's right to continue his action remains in the hands of the Board which, according to section 30(10), is "solely entitled to determine whether or not to commence, continue or abandon the action and whether to settle it and on what terms."

[22] Hence, it is up to the Board to decide whether the action will continue. The worker has no power or right at this point to pursue the legal action that he initiated.

(b) Reversal of Mr. Joly's Election

[23] In response to the application brought by State Farm, Mr. Joly has requested that the Tribunal declare that the election made by Mr. Joly to receive benefits from the Insurance Plan be either nullified or reversed. However, I am not persuaded that the Tribunal has jurisdiction to provide the remedies sought by Mr. Joly.

[24] As I have noted above, Mr. Joly's accident of November 6, 2002 occurred in circumstances that triggered the application of section 30 of the WSIA. As section 30(1) indicates, that section applies where a worker is either entitled to benefits from the Insurance Plan or entitled to commence legal action. Section 30 contains a full protocol regarding the election process and the effects of a worker's election, including subrogation rights conferred on the Board.

[25] Under the pre-1997 Act, the Tribunal had jurisdiction over determinations made under provisions similar to section 30. But, with the enactment of the WSIA, the Tribunal's jurisdiction over those determinations was removed. Section 123 of the WSIA describes the Tribunal's jurisdiction. Section 123(1) sets out the matters over which the Tribunal has jurisdiction. Section 123(2) sets out the areas where the Tribunal's jurisdiction is removed. Section 123(2) reads in part:

123(2) For greater certainty, the jurisdiction of the Appeals Tribunal under section (1) does not include the jurisdiction to hear and decide an appeal from decisions made under the following Parts or provisions:

...

2. Sections 26 to 30 (rights of action).

[26] As I understand those provisions, they stipulate that the Tribunal does not have jurisdiction to hear an appeal by a party from a decision made by the Board under section 30 of the WSIA. The decision that Mr. Joly challenges is a decision made by the Board on November 3, 2004, in which the Board denied a request by the worker to permit him to withdraw his claim for benefits under the Insurance Plan and change his election regarding the pursuit of legal action, all of which falls within the ambit of section 30. As that letter concluded, this decision constituted a final decision of the Board and the worker's remedy of appeal was by way of an

application of judicial review. In my opinion, that is a correct statement of the law. The decisions set out in the Board's letter of November 3, 2004 is, in my opinion, a decision over which this Tribunal has no jurisdiction, in accordance with section 123(2) of the Act.

[27] Mr. Siddiqui, counsel for Mr. Joly, cited two Tribunal decisions in which the Tribunal did exercise jurisdiction, under the WSIA, over determinations made by the Board regarding a worker's right of election. However, each of those decisions, *Decisions No. 108/01I* (January 26, 2001) and *1782/04I* (March 20, 2006), addressed accidents that occurred prior to January 1, 1998. A number of Tribunal decisions have concluded that the jurisdictional limitations set out in section 123(2) does not apply to accidents that occurred prior to January 1, 1998 since such accidents do not fall within the jurisdiction of the WSIA but, rather, fall within the jurisdiction of the pre-1997 legislation. One of the decisions cited by Mr. Siddiqui, *Decision No. 1782/04I*, explicitly acknowledged that fact, stating in paragraph 10:

The Panel concluded that the Tribunal has jurisdiction over this appeal. The Tribunal retains jurisdiction to hear such appeals from Board decisions for accidents occurring prior to January 1, 1998...

[28] The other decision cited by Mr. Siddiqui, *Decision No. 108/01I*, not only addressed a pre-1998 accident, but also considered an issue that seems not to fall within the scope of section 30: whether an individual was a worker or not when he was injured.

[29] Consequently, I am persuaded that the Tribunal does not have jurisdiction to hear an appeal from the Board's decision of November 3, 2004 denying the worker's request to de-elect to receive benefits from the Insurance Plan. The Tribunal also lacks the jurisdiction to determine whether the worker's initial election was valid.

[30] I note that the materials filed on behalf of Mr. Joly included a Court judgment that, in my view, sets out the appropriate forum for addressing Mr. Joly's concern. That judgment, *West v. Workplace Safety and Insurance Board* (2005), 78 O.R. (3d) 270, allowed a worker's request to nullify an election the worker made pursuant to section 30 of the WSIA. As the Court noted, the application was brought by way of "judicial review". In my view, that is the appropriate remedy if Mr. Joly wishes to challenge the Board's decision of November 3, 2004.

DISPOSITION

[31] The application is denied.

[32] The legal action initiated by Mr. Joly is not barred by the WSIA. The right to pursue that action is in the hands of the Board exclusively on the basis that the worker has elected to receive benefits from the Insurance Plan. The validity of that election is a matter over which this Tribunal does not have jurisdiction.

[33] Mr. Joly may not continue his legal action against State Farm unless and until such time as the Board permits him to do so or, alternatively, a Court of competent jurisdiction sets aside the decision made by the Board on November 3, 2004.

Application denied.



Decision No. 1067/09

Vice-Chair: Moore

Decision — July 20, 2009

Neutral Citation: 2009 ONWSIAT 1726

Future economic loss (calculation) (Canada Pension Plan).

Worker's pre-existing psychiatric condition was significantly aggravated by a work-related injury and, thus, became a compensable condition – CPP disability benefits were granted for the psychological injury resulting from the compensable accident – Board correctly offset worker's FEL benefits by the full amount of the CPP benefits.

The worker suffered knee and elbow injuries when she slipped and fell in 1995. She stopped working again in 1997 due to worsening pain. Also, in 1997, she applied for and was granted CPP disability benefits. In *Decision No. 125/06*, the Tribunal found that the worker had a permanent elbow impairment and that she was competitively unemployable and entitled to a full FEL award as of 1997. The decision also granted the worker initial entitlement for psychotraumatic disability on an aggravation basis.

In implementing *Decision No. 125/06*, the Board recalculated the worker's FEL benefits but offset the FEL benefits by the full amount of the CPP disability benefits. The worker appealed a decision of the Appeals Resolution Officer confirming the offset by the full amount of CPP benefits. The appeal was dismissed.

The worker submitted that the CPP benefits were granted in part for non-compensable arthritis. However, the Vice-Chair found that the arthritis was not a significant feature in the worker's inability to work and was not one of the factors that resulted in allowance of CPP benefits.

The worker submitted that the psychological component for which CPP benefits were granted should be seen as non-compensable because it reflected non-compensable chronic pain disability. However, the Vice-Chair found that the appropriate diagnosis of the worker's condition was psychotraumatic disability and not chronic pain disability. The worker's pain experience related to the organic conditions for which the worker had entitlement. The non-organic symptoms were related to psychotraumatic disability for which the worker also had entitlement.

The worker submitted that CPP benefits were granted for a non-compensable pre-existing psychiatric condition. The Vice-Chair agreed that the psychological condition was a significant factor in granting CPP benefits and that the worker had a pre-existing condition. However, the pre-existing condition was significantly aggravated by the work-related injury and, thus, became a compensable condition. The CPP benefits were granted, not for the pre-existing condition, but rather for the psychological injury resulting from the compensable accident.

The worker also noted that the Board granted the employer 25% SIEF relief. However, the Vice-Chair found that SIEF relief is granted in recognition of the impact of a pre-existing condition on a compensable injury. It does not imply that the resulting injury is any less work-related.

The workplace injury, with its physical and psychological effects, was the sole significant factor in the allowance of CPP benefits. The Board correctly offset the worker's FEL benefits by the full amount of the CPP benefits.

Perte économique future (calcul) (Régime de pensions du Canada).

Les troubles psychiques préexistants de la travailleuse avaient été considérablement aggravés par une lésion professionnelle et ils étaient dès lors devenus indemnifiables – La travailleuse avait obtenu des prestations du RPC pour les troubles psychologiques résultant de l'accident indemnifiable – La Commission avait correctement déduit le plein montant des prestations du RPC de l'indemnité pour PÉF de la travailleuse.

La travailleuse avait subi des lésions au genou et au coude quand elle avait glissé et était tombée en 1995. Elle avait cessé de travailler de nouveau en 1997 en raison d'une intensification de la douleur. En 1997, elle avait aussi demandé des prestations du Régime de pensions du Canada (RPC) et elle en avait obtenues. Dans la *décision n° 125/06*, le Tribunal a conclu que la travailleuse avait une déficience permanente au coude, qu'elle était inemployable sur le marché du travail et qu'elle avait droit à une indemnité pour perte économique future (PÉF) totale à partir de 1997. Dans cette décision, le Tribunal a aussi conclu que la travailleuse avait droit à une indemnité pour invalidité psychotraumatique découlant d'une aggravation.

Lors de la mise en œuvre de la *décision n° 125/06*, la Commission a calculé de nouveau l'indemnité pour PÉF de la travailleuse, mais elle en a déduit le plein montant des prestations d'invalidité du RPC. La travailleuse a interjeté appel de la décision par laquelle le commissaire aux appels a confirmé la déduction du plein montant des prestations du RPC. L'appel a été rejeté.

La travailleuse soutenait que les prestations du RPC lui avaient été accordées en partie pour de l'arthrite non indemnifiable. Cependant, le vice-président a conclu que l'arthrite n'était pas une composante importante de l'inaptitude au travail de la travailleuse et qu'elle n'était pas un des facteurs à l'origine de l'octroi des prestations du RPC.

La travailleuse soutenait que la composante psychologique pour laquelle elle avait obtenu des prestations du RPC devait être considérée comme non indemnifiable parce qu'elle reflétait des troubles non indemnifiables de douleur chronique. Le vice-président a toutefois conclu que c'était un diagnostic d'invalidité psychotraumatique qui était approprié dans le cas de la travailleuse, et non un diagnostic d'invalidité attribuable à la douleur chronique. La douleur de la travailleuse était liée à des problèmes organiques pour lesquels la travailleuse avait droit à une indemnité. Les symptômes non organiques étaient liés à l'invalidité psychotraumatique pour laquelle la travailleuse avait aussi droit à une indemnité.

La travailleuse soutenait que ses prestations du RPC lui avaient été accordées pour des troubles psychiques préexistants. Le vice-président a convenu que les troubles psychiques avaient été un important facteur de l'octroi des prestations du RPC et que la travailleuse avait des troubles préexistants. Cependant, les troubles préexistants de la travailleuse avaient été considérablement aggravés par la lésion professionnelle et ils étaient dès lors devenus indemnifiables. Les prestations du RPC avaient été octroyées non pas pour ses troubles préexistants mais plutôt pour les troubles psychologiques qui avaient résulté de l'accident indemnifiable.

La travailleuse a aussi noté que la Commission avait accordé une exonération de 25 % du Fonds de garantie pour travailleurs réintégrés (FGTR) à l'employeur. Le vice-président a toutefois conclu que l'exonération du FGTR est accordée en reconnaissance de l'incidence de la lésion préexistante sur la lésion indemnifiable, ce qui ne laisse pas sous-entendre que la lésion résultante est moins liée au travail.

La lésion professionnelle, avec ses conséquences physiques et psychologiques, était le seul facteur important dans l'octroi des prestations du RPC. La Commission avait correctement déduit le plein montant des prestations du RPC de l'indemnité pour PÉF de la travailleuse.

Workplace Insurance Legislation Considered:

Workers' Compensation Act, R.S.O. 1990, c. W.11
s. 43(7)

Board Directives and Guidelines Considered:

Operational Policy Manual
Document No. 18-01-13 (August 1, 2007)

Cross-References:

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APPEAL by the worker from a decision of the Appeals Resolution Officer confirming offset of the worker's future economic loss benefits by the full amount of Canada Pension Plan disability benefits.

July 20, 2009. THE TRIBUNAL: —

BEFORE: J.P. Moore, Vice-Chair

HEARING: May 27, 2009, at Toronto, Oral hearing

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

APPEARANCES:

For the worker: T. Zwiebel, Lawyer

For the employer: Not participating

REASONS

(i) Introduction

[1] On February 2, 1995, the worker injured her left knee and right elbow in a slip and fall injury at her place of work. At the time of the injury, the worker was 48 years of age and employed as a customer service representative in a retail store.

[2] The knee injury required surgery. The Workers' Compensation Board (as it then was) found that the worker was left with a permanent impairment of the left knee. The worker was granted non-economic loss (NEL) benefits for that condition. The Board also granted the worker partial future economic loss (FEL) benefits in recognition of loss of future earnings.

[3] The worker stopped work on July 31, 1997 because of worsening pain. The worker began experiencing psychological symptoms for which she sought treatment in 1997. In that year, the worker applied for and was granted disability benefits from the Canada Pension Plan (CPP).

[4] The worker then appealed a number of entitlement issues to the Tribunal. In a decision dated March 30, 2007, *Decision No. 125/06*, a Panel of the Tribunal concluded that the worker had a permanent right elbow impairment and granted entitlement for that condition. The Panel also altered the worker's FEL entitlement. Of significance for the present appeal, was a third determination by that Panel. The Panel allowed initial entitlement [at para. 27] for a "psychotraumatic disability ... on an aggravation basis".

[5] In implementing the Tribunal's decision, the Board recalculated the worker's FEL entitlement, including her retroactive entitlement. The Board then reduced the worker's FEL benefits by an amount equivalent to the quantum of the CPP disability benefits the worker was receiving. The Board reduced the worker's FEL benefits by the full amount of the CPP award. The worker objected to that decision. Her objection was denied by an Appeals Resolution Officer (ARO) in a decision dated April 17, 2008. The worker has appealed that decision to the Tribunal.

[6] It is the worker's position that the Board ought to have reduced her FEL entitlement by an amount equivalent to either 50% or 25% of the worker's CPP disability benefits and not by an amount equivalent to 100% of those benefits.

(ii) The Issues

[7] The issue in this appeal is whether the Board has correctly determined the amount by which the workers' FEL entitlement should be reduced to reflect the worker's entitlement to CPP disability benefits.

(iii) The Decision

[8] On the evidence and submissions presented to me, I am persuaded on a balance of probabilities that the Board was correct in reducing the worker's FEL entitlement by the full amount of the worker's CPP disability benefit entitlement.

(iv) Analysis

[9] The worker was injured in 1995. Consequently, the pre-1997 *Workers' Compensation Act*, R.S.O. 1990, c. W.11, applies to the adjudication of the issue in this appeal.

[10] Section 43(7) of the Act stipulates in part:

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.

[11] The applicable policy is found in Document No. 18-01-13 of the Board's *Operational Policy Manual* (OPM). The policy stipulates, at page 6 of the document:

Apportioning CPP disability benefits

If the WSIB determines, or if the worker indicates, that CPP disability benefits are being paid for both work-related and non-work-related injuries/diseases, the WSIB reviews any relevant information that may indicate the basis for entitlement to CPP disability benefits ...

Based on this information, the WSIB

- assesses the medical significance of all contributing injuries/diseases ...
- assigns a percentage to each injury/disease based on the medical significance, and
- offsets the percentage of the CPP disability benefits related to the work-related injury/disease.

If the WSIB is unable to determine the medical significance of the injuries/diseases contributing to the allowance of the CPP disability benefits, the WSIB apportions the CPP disability benefits equally between the work-related and non-work-related injuries/diseases.

[12] In the present case, the Board determined that all of the conditions for which the worker was granted CPP disability benefits were conditions that resulted from the worker's 1995 workplace injury.

[13] In his submissions on behalf of the worker, Mr. Zwiebel argued that only 50% of the conditions for which the worker was granted CPP disability benefits were work-related and that the other 50% reflected the contribution of non-compensable chronic pain disability or, alternatively, a significant pre-existing psychological condition. Mr. Zwiebel also submitted that the worker had a non-compensable arthritis condition that was also a factor in the allowance of CPP disability benefits.

[14] Although the decision by the Canada Pension Plan regarding the worker's entitlement did not specify the factors for which entitlement was granted, I note that the medical report that was filed in support of the worker's application for CPP disability benefits described the following "illnesses or impairments" that prevented the worker from working:

- broken leg and left knee ...
- arthritis in hands
- clinical depression.

[15] The application also describes the impact of the worker's various injuries or impairments on her activities of daily living. The worker listed a number of functional difficulties. The emphasis in the list was on loss of mobility in the left leg and psychological issues. There is no indication that arthritis in the hands had any significant impact on activities of daily living.

[16] I am persuaded, therefore, that arthritis in the hands was not, in fact, a significant feature in the worker's inability to work. Mr. Zwiebel did not make a strenuous argument with respect to this particular issue. The NEL assessment the worker underwent to determine her entitlement for a psychotraumatic disability described significant left knee and right elbow pain and the functional impact of those injuries. The assessment did not refer at all to functional limitations in the use of the worker's hands as a result of arthritis.

[17] Consequently, I conclude that, while arthritis in the hands is a non-work-related condition, it was not a significant feature of the worker's inability to work and not one of the factors that resulted in the allowance of CPP disability benefits. In my view, CPP disability entitlement was granted for a left knee impairment and a psychological condition.

[18] The principal argument made by Mr. Zwiebel was that the psychological component of the disability for which CPP disability benefits were granted ought to be seen as non-compensable because it either reflects a non-compensable chronic pain disability or a pre-existing psychological condition that ought to be deemed non-compensable.

[19] With respect to the argument that the worker had non-compensable chronic pain disability, I note that there were some references in the medical evidence to a chronic pain condition. Those references were found in reports prepared by a psychiatrist, Dr. J. Cooper. In a report dated April 29, 1998, Dr. Cooper wrote that the worker was experiencing "an adjustment disorder with depression". Dr. Cooper went on to state: "She is also experiencing aspects of chronic pain syndrome."

[20] In a report written in September 1998, Dr. Cooper's handwritten notes appear to refer to chronic pain.

[21] In the Tribunal decision that allowed the worker entitlement for a psychotraumatic disability, the Panel explicitly found that the worker did not have chronic pain disability. The Panel noted the "conspicuous" absence of reference to "psychogenic pain". The Panel concluded that chronic pain disorder was not the appropriate diagnosis of the worker's condition and that she had both a significant organic impairment affecting her left knee and right elbow, and a significant psychotraumatic disability. In my view, that finding is consistent with the preponderance of the evidence. As I have already noted, although Dr. Cooper referred to "aspects of chronic pain syndrome", his diagnosis was "an adjustment disorder with depression". A psychotherapist who saw the worker, Dr. H. McConnell, wrote a brief report dated July 6, 1998, in which she stated:

[The worker] is currently seeing me for psychotherapy. She suffers from post-traumatic stress disorder related to multiple traumatic events which have occurred in her life. In my opinion, she is not fit for work.

[22] Later reporting appears to confirm the psychotraumatic nature of the worker's disability. In a report dated August 14, 2006, a person who was providing the worker with psychological counselling wrote:

In addition to the major depression [the worker] had a number of physical health issues. She wore a brace on her left leg and walked with a cane to help with mobility.

[23] The NEL assessment provided to the worker after the Tribunal allowed entitlement for a psychotraumatic disability was conducted by Dr. V. Rakoff, a psychiatrist. In a report dated October 19, 2007, Dr. Rakoff stated:

She gave no signs of pain-enhancing behaviour...

In summary, this woman who has a long history of affective disorder...

[24] Weighing all of this evidence, I am in agreement with the findings of the Panel in *Decision No. 125/06* that the appropriate diagnosis of the worker's condition was psychotraumatic disability and not chronic pain disability. Consequently, I do not accept Mr. Zwiebel's argument that the worker's CPP disability award was granted in part for chronic pain disability. I am persuaded that the worker's pain experience was related to organic conditions for which the worker has been granted entitlement. The worker's non-organic symptoms are related to a psychotraumatic disability for which the worker has also been granted entitlement. The worker does not have an additional chronic pain disorder nor was she granted CPP disability benefits for such a condition.

[25] With respect to Mr. Zwiebel's third argument – that CPP disability benefits were granted for what amounted to a non-compensable pre-existing psychiatric condition – I accept that the worker's psychological condition was a significant factor in the allowance of CPP disability benefits. I also accept that there is good evidence that the worker had a pre-existing psychiatric condition of which she experienced symptoms on several occasions prior to the 1995 work-related injury.

[26] However, I am not persuaded that the existence of a pre-existing condition makes the psychotraumatic disability for which the worker was granted entitlement a non-compensable condition for the purposes of apportioning FEL entitlement.

[27] The ruling in *Decision No. 125/06* that allowed the worker entitlement for a psychotraumatic disability stated at paragraph 28:

Given that the worker's family doctor and her treating psychiatrist both identified the workplace injury and its resultant pain as major stressors which resulted in the worker experiencing further episodes of depression, the Panel accepts that the worker's depression and anxiety, post-accident, have been influenced, at least partially, by the worker's pain levels from her compensable condition. As the workplace accident was a significant contributing factor to the perpetuation of the worker's depression, we find that she has entitlement on an aggravation basis to Psychotraumatic Disability benefits.

[28] In that decision, the Panel clearly ruled that the worker had a pre-existing condition that was significantly aggravated by her work-related injury. By making this ruling, the Panel found, as a fact, that what had been a pre-existing, non-compensable condition became a compensable condition by virtue of the impact of a work-related injury on that pre-existing condition. Hence, the psychological condition for which CPP disability benefits were granted, in part, were granted for what was, in fact and law, a compensable condition.

[29] Mr. Zwiebel's argument implies that the worker's psychotraumatic disability should be seen as work-related for the purposes of determining FEL entitlement but not work-related for the purposes of determining entitlement to CPP disability benefits. In my view, that is not a sustainable argument. CPP disability benefits were granted, not for the pre-existing psychological condition, but for the psychological injury that the worker's compensable accident led to. That is the clear implication of the finding in *Decision No. 125/06*. That is an implication that is fully consistent with the medical evidence.

[30] In her testimony, the worker stated that her previous episodes of psychiatric difficulty were related to family issues associated with the breakup of a marriage and the attendant financial consequences. However, according to the worker, at the time she was working for the accident employer, her "stress" appeared to be under control and

she was enjoying her work with the accident employer. She further testified that, after the injury, she had considerable difficulty facing the fact that she was “disabled”.

[31] In a reported dated November 10, 2000, Dr. Cooper attributed the worker’s ongoing depression to “reaction” the worker had to the pain associated with her knee injury. I note the following excerpt from that report:

[B]ecause she is in pain...she has bouts of not being able to sleep, she is more irritable and tense and difficult to get along with, and she feels badly about this and a vicious cycle ensues. She then becomes depressed and she feels that she cannot stand or sit for any length of time. She does have what is called or what used to be called a reactive depression and this is very different from a major affective disorder.

The key here is that this woman is in pain and it is the pain that prevents her from working, especially the pain in her left knee. The depression is consequent to the pain and is a reaction to the pain.

[32] Similarly, Dr. Rakoff’s NEL assessment report described the worker’s history of depressive episodes in relation to family issues but appeared to relate the worker’s current symptoms to “a state of chronic pain”.

[33] Finally, I note the worker’s application for CPP disability benefits, in which the worker stated that one of the factors that was preventing her from working was “clinical depression”. In describing how her illnesses/impairments prevented her from working, the worker cited “progressive pain” in her leg and knee and the fact that this caused her to be “depressed” with “little motivation”, associated with “sleep disturbance and frequent crying”. In listing the impact of her conditions on her activities of daily living, the worker described the physical and psychological impact of her injury. There is no indication in the worker’s application that her prior psychological difficulties were a factor in her inability to work. In my view, the tone of the application is one that supports a conclusion that the worker was unable to work because of the combined physical and emotional impact of her compensable injury.

[34] For these reasons, I am persuaded that the psychological condition for which the worker was granted CPP disability benefits was not a non-compensable condition but was, rather, a condition that was significantly related to and a result of the worker’s workplace injury in February 1995. I am persuaded that the worker’s CPP disability award was granted in exclusive recognition of disability associated with the worker’s workplace injury and that the only truly non-compensable factor – arthritis – was not a significant element in the award, in light of all of the medical evidence.

[35] Mr. Zwiebel submitted that the fact that the employer was granted 25% relief out of the Second Injury and Enhancement Fund (SIEF) justified, at the very least, recognition that 25% of the CPP disability benefit was granted for non-compensable reasons.

[36] However, SIEF relief is granted in recognition of the impact a pre-existing condition has on a compensable injury. It does not imply that the resulting injury was any less work-related. On the evidence before me, it is unlikely that, had the 1995 injury not occurred, the worker would have qualified for CPP disability benefits. It is clear to me that the workplace injury, with its physical and psychological effects, was the sole significant factor in the allowance of CPP disability benefits. The allowance of 25% SIEF relief does not imply a 25% apportionment of compensability but the presence of a pre-existing vulnerability.

[37] I conclude, therefore, that the CPP disability award granted to the worker was granted for disability associated with the physical and psychological consequences of a work-related injury that occurred on February 2, 1995. I am further persuaded that the Board was correct in reducing the worker’s FEL entitlement by the full amount of the worker’s CPP disability benefits.

DISPOSITION

[38] The worker’s appeal is denied.

Appeal dismissed.



Decision No. 1231/09I (Nicodemo v. Bell)

Indexed as: Decision No. 1231/09I

Vice-Chair: Moore

Decision — July 6, 2009

Neutral Citation: 2009 ONWSIAT 1611

Right to sue – Agreement (parties).

Concession was made by counsel for plaintiff to defendants in civil case regarding employee and Schedule 1 status of defendants – Concession was not irrevocable – Parties could not force Tribunal to make determination based solely on position of parties.

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. In this decision, the Vice-Chair dealt with a preliminary matter regarding a concession made by the plaintiff's previous counsel.

The previous counsel had advised the defendants by letter that she was willing to concede that the defendant driver was a Schedule 1 employee in the course of employment with the defendant Schedule 1 employer. Five weeks after making the concession, the lawyer left the firm. The new lawyer representing the plaintiff decided to require proof of the defendants' status.

The Vice-Chair ruled that the concession was not irrevocable. It was withdrawn in a timely manner. The concession involved not just factual matters but also the legal conclusions to be drawn from those facts. The Tribunal is required to make its decisions on the merits and justice and is not bound by strict legal precedent. The Tribunal also has the power to determine its own practice and procedure. It does not lie with the parties to force the Tribunal to make a determination based solely on a position taken by a party.

The Vice-Chair concluded that the defendants will have to provide evidence as to their status.

Droit d'intenter une action – Accord (parties).

La conseillère juridique de la demanderesse avait fait une concession au défendeur dans une action civile au sujet de leur statut d'employé de l'annexe 1 et d'employeur de l'annexe 1 des défendeurs – La concession n'était pas irrévocable – Les parties ne pouvaient pas forcer le Tribunal à décider en se fondant uniquement sur la position d'une partie.

Les défendeurs dans une action civile ont demandé au Tribunal de déterminer si la Loi supprimait le droit d'action de la demanderesse. Dans cette décision, le vice-président examine la question préliminaire relative à la concession faite par l'ancienne conseillère juridique de la demanderesse.

L'ancienne conseillère juridique de la demanderesse avait informé les défendeurs par lettre qu'elle était prête à concéder que le conducteur défendeur était un employé de l'annexe 1 en cours d'emploi au service de l'employeur défendeur de l'annexe 1. Cinq semaines après avoir fait cette concession, la conseillère juridique avait quitté le cabinet d'avocats. Le nouvel avocat de la demanderesse a décidé de demander la preuve du statut des défendeurs.

Le vice-président a conclu que la concession n'était pas irrévocable. Le nouvel avocat s'en était désisté rapidement. Cette concession concernait non seulement des questions factuelles, mais aussi les conclusions juridiques à tirer de ces faits. Le Tribunal doit rendre ses décisions en se fondant sur l'équité et le bien-fondé du cas, et il n'est pas lié par les précédents jurisprudentiels. Le Tribunal a aussi le pouvoir de déterminer sa pratique et sa procédure. Il n'appartient pas aux parties de forcer le Tribunal à décider en se fondant uniquement sur la position d'une partie.

Le vice-président a conclu que les défendeurs devront faire la preuve de leur statut.

Workplace Insurance Legislation Considered:

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

- s. 31
- s. 124(1)
- s. 131(1)

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DETERMINATION by the Vice-Chair of a preliminary matter regarding a concession made by one of the parties.

July 6, 2009. THE TRIBUNAL: —

BEFORE:	J.P. Moore, Vice-Chair
HEARING:	June 17, 2009, at Toronto, Oral
APPLICATION:	For an order barring an action commenced in the Ontario Superior Court of Justice, in Toronto, as Action No. 05-CV-297814
APPEARANCES:	
For the Applicants:	R. Besunder, Lawyer
For the Respondents:	M. Benzaquen and M. Rubin, Lawyers
For an Interested Party:	L. Cabel, Lawyer

REASONS

(i) Introduction

[1] On October 2, 2003, the respondent, A. Nicodemo, was injured in a motor vehicle accident. She commenced a lawsuit on behalf of herself and others against the applicants, G. Bell and Hyndman Transport, on September 30, 2005. The applicants are seeking a declaration under section 31 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A (WSIA) barring Ms. Nicodemo's action on the basis that all parties to the accident

were in the course of their employment for a Schedule 1 employer when the accident happened.

[2] The hearing of the application was scheduled to proceed on June 17, 2009. However, a preliminary issue arose that requires adjudication before the hearing can proceed. What follows is an interim decision that addresses that issue. Briefly, the issue requires a determination as to the extent to which the respondents are bound by a concession made by the respondents' previous counsel.

(ii) The Facts

[3] The concession that was made by respondents' previous counsel was made in November 2008 by a lawyer who was handling the respondents' file at that time. She was a member of the same firm as is the respondents' present counsel. In a letter dated November 19, 2008, the lawyer wrote to the applicants' counsel:

Further to your letter of November 11, 2008, we confirm that we are willing to concede that Mr. Bell was a Schedule 1 employee in a course of employment at the time of the accident and that Hyndman Transport was his Schedule 1 employer of the subject motor vehicle accident.

[4] Approximately five weeks after the concession was made, this particular lawyer left her firm along with several colleagues, taking a considerable number of files with them. She did not take the respondents' file. The ensuing reclamation of files resulted in a review of the November 2008 concession. Current counsel decided to require proof of the applicants' status and requested relevant documentation from the applicants in a letter dated April 22, 2009. Counsel for the applicants declined to provide the requested documentation.

[5] At the hearing of this application, counsel for the applicants took the position that they were not required to prove the status of the applicants and could rely on the earlier concession made by the respondents' counsel. Applicants' counsel further argued that the respondent was bound by counsel's concession and could not revoke the concession.

(iii) The Applicable Legislation

[6] The following provisions of the WSIA apply:

31(1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,

- (a) whether, because of this Act, the right to commence an action is taken away;
- (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
- (c) whether the plaintiff is entitled to claim benefits under the insurance plan.

(2) The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).

(3) A decision of the Appeals Tribunal under this section is final and is not open to question or review in a court.

...

124(1) The Appeals Tribunal shall make its decision based upon the merits and justice of a case and it is not bound by legal precedent.

...

131(1) The Board shall determine its own practice and procedure in relation to applications, proceedings and mediation. With the approval of the Lieutenant Governor in Council, the Board may make rules governing its practice and procedure.

(2) Subsection (1) applies with necessary modifications with respect to the Appeals Tribunal.

(iv) Analysis

[7] The present application comes to the Tribunal pursuant to the Tribunal's *exclusive* jurisdiction over the issue

in the application. The Tribunal is required to base our decisions on the merits and justice of the case and not on strict legal precedent. The Tribunal has full control over our practice and procedures.

[8] On the issue before me, I rule that the concession made by respondents' counsel in November 2008 was not an irrevocable concession. I find as a fact that the concession was withdrawn at a time and in a manner that gave the applicants' counsel full and timely notice that the respondents required the applicants to prove their status at the time of the accident.

[9] The applicant in a section 31 application has the onus of establishing, in fact and law, that a plaintiff's right of action is taken away. The determination of that issue requires the Tribunal to exercise its exclusive jurisdiction to make factual findings and legal rulings regarding the status of the parties to a section 31 application. It does not lie with the parties to force the Tribunal to make a particular determination based solely on a position taken by a party.

[10] The concession made by respondents' counsel in November 2008 involved conceding not just factual matters but also the legal conclusion to be drawn from those facts. Only the Tribunal can make such conclusions and it must do so based on a full review of the evidence and the applicable law, not on the basis of a concession by a party.

[11] It is clear that the concession made by counsel was made in circumstances that suggest that counsel may not have fully considered the interests of her client. It was likely an error for counsel to make the concession. The respondents' current counsel wished to rectify that error and withdrew the concession. I do not detect any prejudice to the applicants in the withdrawal since it was provided in a timely way and required the applicants to provide evidence in support of the ruling they seek in the exercise of the onus of proof they bear in this case.

[12] Counsel cited law within the context of civil litigation proceedings which may have circumscribed the respondents' ability to revoke their earlier concession as if it were made in civil litigation proceedings. However, in my view, that law does not bind the Tribunal (section 124(1), cited above). The Tribunal exercises full authority over its own practice and procedure (section 131(1), cited above) and could, in any event, grant permission to the respondents to revoke their earlier concession.

[13] But, in my view, that is not necessary. I am persuaded that the concession made by respondents' prior counsel in a letter dated November 19, 2008 did not bind the respondents because it was a concession that could not bind this Tribunal's determinations of fact and law.

[14] That being the case, the applicants are required, in the exercise of their onus to prove all elements of their assertion that the respondents' right of action is taken away, to provide evidence on the status of the applicants before or at the next hearing date of this application.

[15] I have issued directions by separate communication with the Tribunal counsel Office regarding the reconvening of this application. The hearing is to be reconvened in accordance with those directions.

DISPOSITION

[16] The application is adjourned. The applicants must adduce evidence regarding their status at the time of the accident in issue. The Tribunal counsel Office is to reconvene the hearing of the application in accordance with separate communication.

Order accordingly.