Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Quarterly Production and Activity Report

January 1 to March 31, 2012

Production Summary

At the end of the first quarter 2012, the active inventory totalled 4,901 appeals. This is approximately 11% higher than the active inventory at the end of 2011.

Incoming Appeals

Incoming appeals numbered 1,359; of these, 1,164 were appeals from WSIB decisions, and 195 appellants advised they were ready to proceed to hearing following a period of inactive status.

This compares to 1,107 new appeals and 108 reactivated appeals recorded in the fourth quarter of 2011.

In the 1st quarter of 2011, the Tribunal recorded 884 new appeals and 224 reactivations.

In 2011, the weekly average of hearing-ready appellants was 62. For Q1-2012, the weekly average of hearing-ready appellants is 68. This figure excludes cases reactivated from inactive status.

Dispositions

Dispositions numbered 931. This includes 288 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts, and 643 after-hearing dispositions; of the after-hearing dispositions, 627 followed from Tribunal decisions.

Inactive Inventory

At the end of Q1-2012, the inactive inventory was 2,568 cases (at the end of Q4-2011, the inactive inventory was 2,704 cases).

In Q1-2012, 84% of final decisions were released within 120 days. In 2011, 86% of final decisions were released within 120 days.

The Notice of Appeal Process

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the first quarter of 2012, the notice inventory included 1,433 dormant cases, the active inventory totalled 4,901 cases, and the inactive inventory totalled 2,568 cases.

Production Tables and Charts

A. Active Inventory End of Quarter

Period	Active Inventory
Q1-2011	3886
Q2-2011	4008
Q3-2011	4193
Q4-2011	4429
Q1-2012	4901

B. Incoming Appeals

Period	Incoming Appeals
Q1-2011	1108
Q2-2011	1082
Q3-2011	1159
Q4-2011	1215
Q1-2012	1359

C. Dispositions

Period	Dispositions – Total	Pre-hearing	After Hearing
Q1-2011	992	286	706
Q2-2011	993	309	684
Q3-2011	906	300	606
Q4-2011	938	314	624
Q1-2012	931	288	643

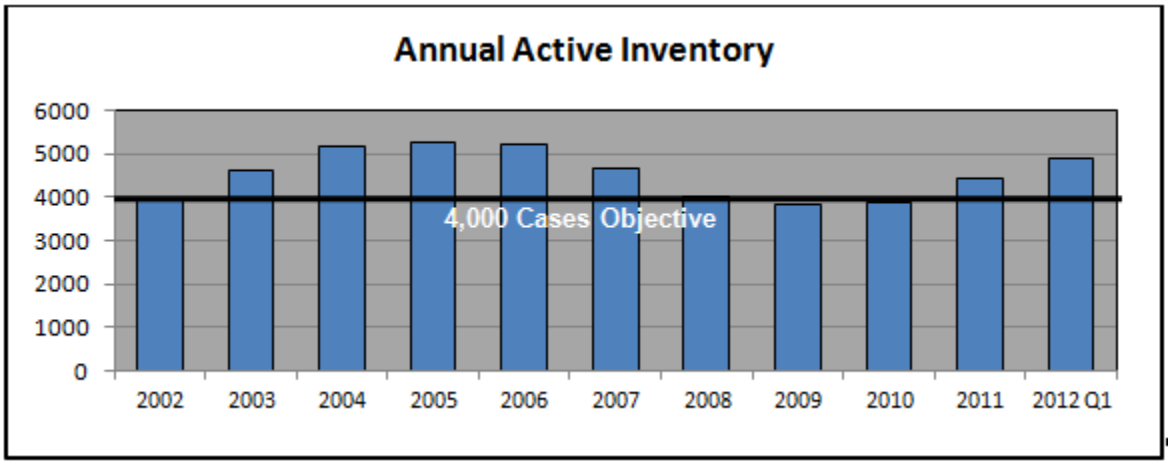
D. Inactive Inventory

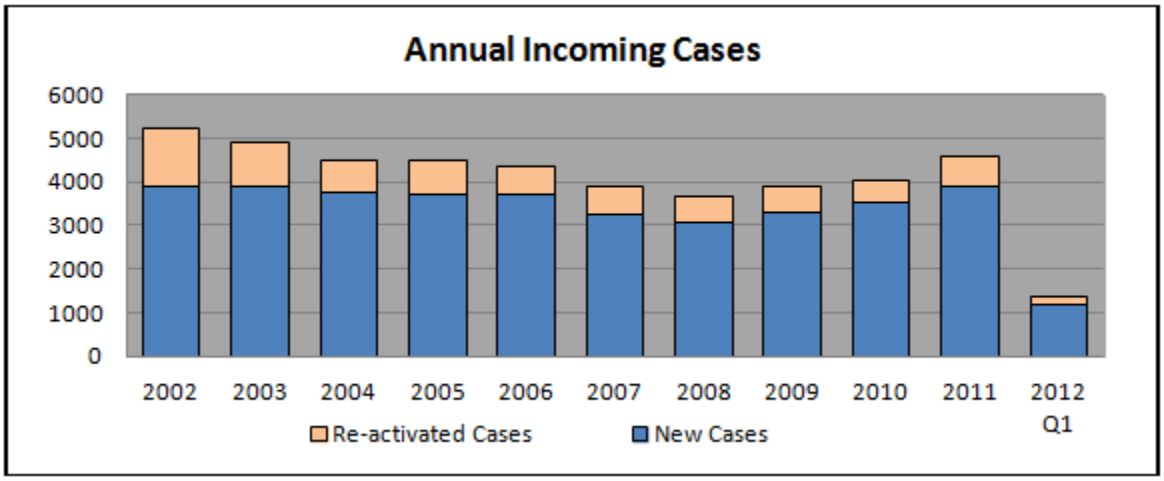
Period	Inactive Inventory
Q1-2011	2963
Q2-2011	2810
Q3-2011	2747
Q4-2011	2704
Q1-2012	2568

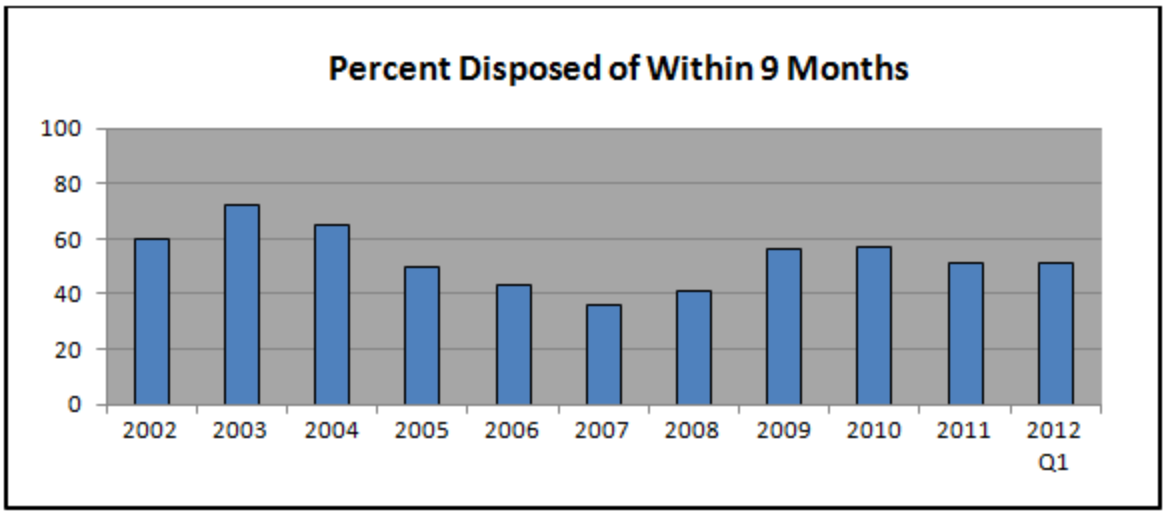
E. Notice of Appeal (Dormant cases)

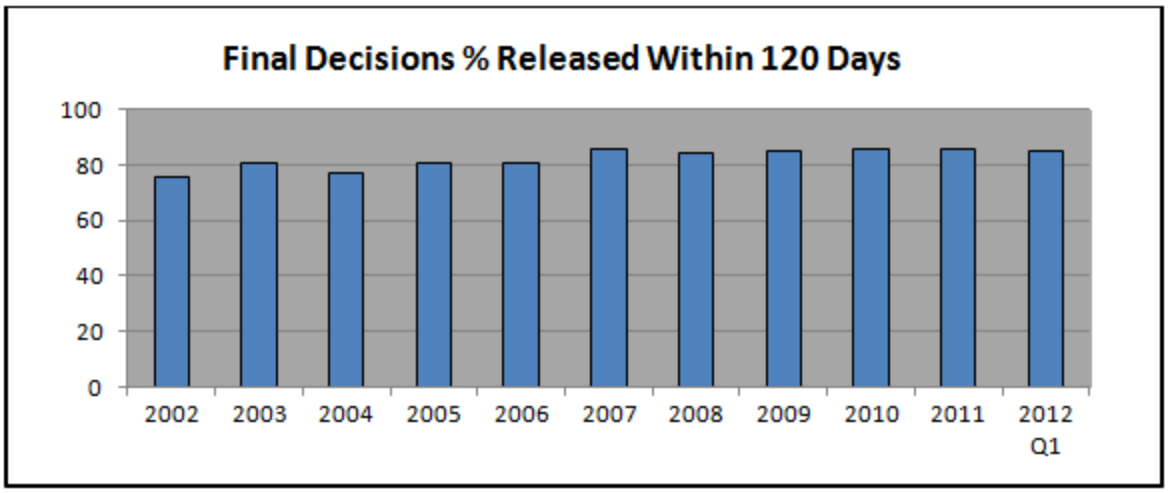
Period	Total Dormant	Change from Previous Quarter
Q1-2011	1400	83
Q2-2011	1367	-33
Q3-2011	1435	68
Q4-2011	1477	42
Q1-2012	1433	-44

F. Production Charts: Annual from 2002 up to the end of the current quarter






Percent Disposed of Within 9 Months
100
80
60
40
20
0
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012 Q1


Final Decisions % Released Within 120 Days
100
80
60
40
20
0
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012 Q1

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the first quarter of 2012 is set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. Most applications for judicial review are handled by General Counsel and the lawyers in the Tribunal Counsel Office.

1. Decisions 774/09 (April 21, 2009) and 774/09R (August 20, 2009)

The plaintiff was the resident manager of a residential apartment building. His regular hours were 8am to 5pm, Monday to Friday, but he was on call outside of those hours. As a result of a flood in the parking garage, a plumber was called. The following day (a Saturday), when the worker was not scheduled to work, the plumber returned. The plaintiff interrupted packing for a trip to accompany the plumber to check to see if the flooding problem was over. While inspecting the drains, the plaintiff was injured when he fell over a piece of wood left by a contractor.

Although the plaintiff at first claimed benefits from the Board, he subsequently decided to bring an action. The defendant commenced a section 31 application to determine whether the right of action was taken away under the Act.

The Vice-Chair held the right of action was taken away. Although the plaintiff was not scheduled to be on duty at the time of the accident, the Vice-Chair found he was a worker in the course of his employment when the accident occurred. The Vice-Chair found the plaintiff fell within the requirements for "time, place and activity" in Board policy. When he checked the flooding situation this was consistent with his workplace practices, which involved coming back on duty whenever there was a situation requiring him to perform his job duties.

The plaintiff commenced an application for judicial review. Plaintiff's counsel originally filed an affidavit with their materials. Following negotiations between counsel, it was agreed to remove the affidavit.

The judicial review was heard in Ottawa on February 3, 2012. The Divisional Court Panel of Hennessy, Matlow and Hambly unanimously dismissed the judicial review application. Noting that the critical issue was whether the accident occurred while the plaintiff was in the course of employment, the Court cited two specific paragraphs of Decision 774/09 in finding the decision was reasonable. The Court held, "We are satisfied that, in arriving at this finding, the [Tribunal] correctly applied the 'place, time & activity' test & that its finding was supported by the evidence."

2. Decisions 1976/99I (November 30, 1999), 1976/99 (December 12, 2002), and 1976/99R (September 2, 2005)

The worker was granted entitlement on an aggravation basis for benefits from March 1991 until February 1992. The worker did not seek medical treatment from November 1991 until September 2004. The Hearing Panel found the worker was suffering from regional myofascial pain, rather than fibromyalgia.

On reconsideration, a different Vice-Chair held the Hearing Panel may have been mistaken in finding the worker had myofascial pain, and also that this distinction in diagnosis was not sufficient to disqualify the worker from entitlement. However, the Vice-Chair also held that even if the worker did suffer from fibromyalgia, she would still not be entitled to benefits because it was not clear the worker suffered from a work injury, the medical reporting did not relate her condition to work, there was significant discrepancy in the medical reporting, and her allegation of significant worsening from 1991 to 1994 suggests another intervening cause of her disability.

The worker commenced an application for judicial review. She was initially represented by an unlicensed paralegal from Quebec, who does not have the status to represent her at Divisional Court. The Tribunal served its Record of Proceedings. The worker served her factum. Her factum was improper for several reasons, one of which was that it was 55 pages long. The Tribunal raised this with the Ottawa Divisional Court, and on October 12, 2010, Justice Linhares deSousa directed that the worker's factum be returned to the worker, with instructions that the worker must seek authorization before a single justice of Divisional Court to file her factum.

On March 4, 2011, the worker's motion to be allowed to file a 55 page factum was heard by Justice Smith in Ottawa. The Court grant her 60 days to file a 45 page factum. The Tribunal was granted the right to file a 45 page factum in reply.

Both the worker and the Tribunal have served and filed their factums. This judicial review is scheduled to be heard in Ottawa on April 19, 2012.

3. Decisions 1110/06 (November 2, 2006), 1565/08I (July 25, 2008), 1565/08 (May 13, 2010), and 1565/08R (February 9, 2011)

The worker was injured in June 1990. He was granted an 18% NEL. He was granted a FEL sustainability award at D1 in 1992. He was also granted a FEL supplement while he participated in a vocational rehabilitation program. He was undergoing a retraining program when he was involved in a motor vehicle accident in 1993, forcing him to quit the program. The supplement ended when he withdrew from the program.

At R1, in 1994, the worker was granted a FEL based on earnings which assumed he had been able to complete the training program.

In 1997, the Board ruled that the worker had recovered from the 1990 accident and his ongoing back problems were actually the result of a pre-existing condition. The worker's entitlement was revoked retroactive to September 1990.

The worker appealed to the Tribunal. He claimed he was entitled to a 100% FEL award as he was unable to earn anything in suitable and available employment as a result of the 1990 work accident.

In Decision 1110/06, the Tribunal determined the worker's pre-existing condition had been asymptomatic at the time of the 1990 injury, so the work injury was a significant factor contributing to the worker's ongoing impairment. The Panel held the worker had ongoing entitlement, that he had a permanent impairment, and that the entitlement to benefits he had at the time of the 1997 Board decision should be restored. The Board

was directed to reinstate the worker's benefits and determine his past and ongoing benefits.

Following Decision 1110/06, in 2007 the Board made a new FEL determination. The Board found the worker was only partially disabled because of his work injury, and his inability to work was due to the 1993 motor vehicle accident. The Board reinstated the NEL, but did not grant a full FEL. The Board awarded a smaller FEL starting in 1993 as it determined he could work as a civil engineering technician. The worker appealed to the Tribunal again.

In Decision 1565/08I, the Panel spent the first day of hearing considering the role of a person who appeared at the hearing with the worker and who characterized herself as a "facilitator." Following a lengthy discussion, it was decided that this person would characterize herself as a "friend" of the worker. As a friend, she would qualify under the exemption for a representative as set out in By-Law 4 passed pursuant to the *Law Society Act*; however, the Panel brought the circumstances of the case to the attention of the Tribunal Chair.

When the hearing reconvened, the Panel considered the worker's arguments that he was totally disabled before his motor vehicle accident, and hence he was entitled to a higher FEL.

In Decision 1565/08, the Panel found the worker was not totally permanently disabled before the motor vehicle accident. Further, the motor vehicle accident had a significant impact on the worker. The Panel found that the worker's inability to earn beyond the level determined by the Board was because of the motor vehicle accident. As a result, the Panel upheld the worker's D1 and R1 FEL award as determined by the Board.

However, at the R2 date, the Board had found the worker would have been able to earn more, and hence have a lower FEL. The Panel allowed the worker's appeal on that issue, finding his earning capacity would not have increased. Thus, the worker was entitled to a partial FEL commencing in 1993. The Panel also confirmed the Board's NEL determination.

In Decision 1565/08R, a different Vice-Chair denied the worker's application to reconsider Decision 1565/08, finding the threshold to reconsider had not been met.

The worker commenced an application for judicial review of Decisions 1565/08 and 1565/08R. The worker is self-represented. The precise arguments which the worker intends to make are not yet apparent but the Notice of Application for Judicial review contains a myriad of allegations of breaches of natural justice, bias, and decisions made on no evidence. The Notice of Application also alleges that the second Panel was barred from making certain findings in light of the conclusions in the earlier decision, Decision 1110/06.

In light of the allegations in the Notice of Application and pursuant to its usual practice, the Tribunal asked the worker to order the transcripts of the Tribunal hearings for the Record of Proceedings. The worker refused. The Tribunal ordered the transcripts itself, and filed a Record of Proceedings which included the transcripts.

The worker brought a motion for an order to remove the transcripts from the Record, and to remove many of the materials pertaining to Decision 1110/06. The motion was heard in September 2011 by Madam Justice Swinton, who allowed the worker to have a friend present in the courtroom for assistance; however, Justice Swinton indicated that the worker should speak for himself.

Following oral argument by the worker and Tribunal Counsel, Justice Swinton dismissed the worker's motion, accepting the Tribunal's arguments that, in light of the allegations contained in the Notice of Application, the transcripts and materials from the prior appeal are properly included in the Record of Proceedings. Costs in the cause were awarded to the Tribunal.

At the end of the quarter, the Tribunal was still waiting to receive the worker's factum. The Divisional Court has notified the worker that his judicial review will be dismissed if the factum is not filed by early April.

4. Decision 62/11 (August 22, 2011)

In Decision 62/11, the Vice-Chair denied the worker's appeal for full LOE benefits subsequent to April 1, 2008. She also denied the employer's cross-appeal for SIEF.

Counsel for the worker served the Tribunal with a Notice of Appeal, which she filed in the London Divisional Court.

The Tribunal wrote to the worker's counsel to point out there is no appeal from a Tribunal decision by virtue of section 123(4) of the *Workplace Safety and Insurance Act, 1997* (WSIA).

On December 1, 2011, the London Divisional Court dismissed the judicial review application for delay, with costs fixed at $750.00. The Tribunal has requested payment of these costs. At the end of the first quarter, counsel for the worker had failed to respond to two letters from the Tribunal about the outstanding costs.

5. Decision 701/10 (June 18, 2010)

In 2007, a gas fitter was performing a service call at a residence which required removing a decommissioned natural gas standpipe. A gas leak resulted in an explosion, killing the resident of the home and injuring the gas fitter (the Applicant). The Applicant commenced an action against a gas company, and the company which the gas company retained to provide service calls for the clients of the gas company. The gas company and service company brought an application seeking an order that the right to sue was taken away because the Applicant was a worker under the WSIA.

The issue was whether at the time of the injury the Applicant was a worker or an independent operator of the service company. After considering the appropriate tests and applying the evidence of the nature of the employment relationship, the Vice-Chair found the Applicant was a worker. The Vice-Chair was persuaded by the evidence showing the degree of supervision and control over the Applicant, the work that was done, the small chance of profit or loss, the absence of indicia of a business enterprise,

the fact the Applicant was not free to hire help, and that he worked exclusively for one company on a full-time basis. Consequently, the right of action was taken away.

The Applicant commenced an application for judicial review. Surprisingly, the Applicant failed to serve the Tribunal with the notice of application. This is the first time in its twenty-five year history where a judicial review of a Tribunal decision has proceeded to be heard without notice being given to the Tribunal. The Divisional Court decision was released on September 20, 2011. The Tribunal only discovered the case had been heard by the Divisional Court two weeks after the Court had released its decision.

The judicial review was dismissed. The Divisional Court unanimously found the Vice-Chair's conclusions were grounded in, and supported by, the evidence. The Court held that there was:

> "no error in law and no misapprehension of the facts in the tribunal's reasons…the tribunal's review and analysis of the facts was transparent and intelligible, and the conclusions were consistent with the prevailing jurisprudence and the tribunal's policy as applied in 'right to sue' situations. The decision falls within the range of possible and acceptable outcomes that are defensible with regard to the facts and the law."

General Counsel wrote to the parties to advise that the Tribunal is a party to a judicial review of one of its own decisions, and it was entitled to notice of this application for judicial review. He advised that the Tribunal would be entitled to notice of any further proceedings that arise out of the judicial review, such as an application for leave to appeal. This case has since been reported in the Ontario Reports, *Wood v. Enbridge Gas Distribution Inc*, [2011] 107 O.R. (3d) 297.

6. Decision 3164/00 (December 18, 2000), 3164/00R (March 28, 2001), and 3164/00R2 (March 6, 2012)

The worker was a baker. She injured her back in 1994. She was paid total benefits for about a month, when she returned to work, and for a recurrence for a further seven months. In 1997, she was granted entitlement for a right elbow disability arising out of her job duties.

She appealed for entitlement for a FEL and further vocational rehabilitation arising out of the back injury. She also appealed ongoing entitlement for the right elbow condition. Finally she appealed for entitlement for fibromyalgia, which she alleged arose out of either the back or the elbow injury.

The Vice-Chair granted entitlement to a FEL and vocational rehabilitation assistance for the back injury. He denied entitlement for fibromyalgia and the right arm/elbow.

On the first reconsideration, the worker submitted additional medical documentation in support of her claim for fibromyalgia; however, the Vice-Chair found it was insufficient to warrant re-opening the appeal. The worker made a number of subsequent reconsideration requests which did not meet the threshold to be assigned for review by another Panel or Vice-Chair.

In January of 2011, the worker retained new counsel and commenced an application for judicial review. A concern about the timeliness of this application was raised with counsel for the worker. In May 2011, the worker's counsel asked if the Tribunal would consent to adjourn the judicial review while the worker pursued a further reconsideration. The Tribunal agreed. The worker submitted the reconsideration application.

In Decision 3164/00R2, released on March 6, 2012, a different Vice-Chair denied a second application for reconsideration. In this instance, the Vice-Chair was also not persuaded by the additional medical evidence. He noted that the evidence was actually "reply" evidence, obtained in an attempt to refute the Tribunal's conclusion, rather than new evidence. Further, he did not find the additional evidence demonstrated that the original decision should be reconsidered.

At the end of the quarter, counsel for the worker advised that he wished to proceed with the adjourned application for judicial review.

7. Decisions 834/09 (August 5, 2010) and 834/09R (April 15, 2011)

In this right to sue application, the applicants sought determinations as to whether the rights of action of Ms. M and Ms. R were taken away by the Act. Both Ms. M and Ms. R suffered serious injuries in a motor vehicle accident that occurred on November 18, 2005, when their van, driven by Ms. M, spun out while they were travelling on a highway. After the van came to rest, both Ms. M and Ms. R exited the van. While they were at the rear of the van, another driver, Mr. K, lost control his van near the same location as where Ms. M had lost control of the van she was driving. Both Ms. M and Ms. R were struck by K's van, and suffered severe injuries including the amputation of one leg each.

Ms. M was scheduled to work the morning of the accident. She attended the offices of A (the company) and delivered flowers to a synagogue. She loaded up the van with items to be delivered to a banquet hall for the next day's event.

Ms. R was not scheduled to work the day of the accident. She attended at A, the company's office, in the morning, to collect her pay cheque. She intended to then meet her mother for lunch. Ms. M offered to drive Ms. R to the restaurant. They left the company's offices together in the van. After leaving the office, they stopped at the company's storage facility, where they loaded additional items for an upcoming event. The accident happened some time after leaving the storage facility.

Ms. M, Ms. R and their family members brought actions against various individuals and entities. The right to sue application was brought by the sole proprietor of the company, and the company from whom the van was leased, with a co-application brought by Mr. K and his company and the owner of his van, and the company which maintained the highway.

A, the company, was not registered with the Board at the time of the accident.

At issue in the application were whether A was a Schedule 1 employer; whether Ms. M and Ms. R were workers or independent contractors and whether they were in the course of their employment at the time of the accident; whether Mr. K was acting in the course of his employment at the time of the accident; and whether, if the actions of

Ms. M and/or Ms R were taken away, the *Family Law Act* (FLA) claims were also taken away by the WSIA.

The Vice-Chair found that it was not necessary to decide A's classification, but rather whether A, a party décor business, was a Schedule 1 employer at the time of the accident. She found that while the words "party décor" are not specifically included in Schedule 1, the various components that make up party décor are found in Schedule 1. She found that A was compulsorily covered under Schedule 1.

The Vice-Chair found that both Ms. M and Ms. R were workers of A at the time of the accident. However, she found that Ms. M was in the course of her employment at the time of the accident, while Ms. R was not. She further found that Mr. K was in the course of his employment at the time of the accident.

The Vice-Chair concluded that Ms. R's action and that of her FLA claimants was not taken away by the WSIA. However, she found that Ms. M's action against the sole proprietor, Mr. K, Mr. K's employer, and the company which maintained the highway was taken away by the WSIA. The right of action of the FLA claimants in Ms. M's action was not taken away by the WSIA.

The Vice-Chair made no determination with respect to rights of action against the highway and the Ontario Ministry, as they did not participate in the application.

Both Ms. M and the applicants made requests for reconsideration of the decision. The reconsideration requests were denied.

Ms. M then commenced an application for judicial review, seeking a declaration that, at the time of the accident:

(i) A was not a Schedule 1 employer;

(ii) Ms. M was not a "worker" as defined by the WSIA; and

(iii) Ms. M was not in the course of her employment.

The Tribunal filed a Notice of Appearance. The other respondents have also filed Notices of Appearance. The Tribunal is waiting for the Applicant's counsel to provide transcripts so that the Tribunal can prepare and file the Record of Proceedings.

8. Decisions 512/06I (May 12, 2006) and 512/06 (November 2, 2011)

The worker injured his back in 2001, when he was 63 years of age. The Board paid the worker LOE until May 31, 2002, when the worker turned 65, which was also the mandatory retirement date of the employer.

The worker appealed to the Tribunal for LOE benefits after May 31, 2002, for his back, and also for benefits for a right shoulder injury. In Decision 512/06I, a single Vice-Chair denied the appeal for the worker's right shoulder, but granted the worker entitlement to LOE benefits from May 31, 2002 until February 5, 2003, (which was two years after the injury) pursuant to s.43(1)(c) of the WSIA.

The worker then alleged that limiting entitlement to LOE to two years post-injury for those workers over age 63 contravened section 15(1) of the Charter.

The Ontario Attorney General participated in the Tribunal hearing. The Office of the Worker Adviser (OWA) and the Office of the Employer Adviser (OEA) were invited to participate as intervenors. The OWA accepted, and became co-counsel with the worker's representative. The OEA withdrew from the appeal.

The hearing reconvened with a full Panel to consider the Charter issue. The majority of the Panel found there was no breach of the Charter. The Vice-Chair dissented and found there was a breach of section 15 of the Charter.

The majority considered the historical context of workers' compensation law, the background to the dual award scheme, and the evidence of expert witnesses. It found the workplace insurance plan operates primarily as an insurance scheme, rather than a social benefits program.

The majority characterized the test for whether the Act violates s.15 of the Charter to be (a) if the Act creates a distinction based on an enumerated ground; and (b) if there is a distinction, whether it is discriminatory in that it perpetuates disadvantage or stereotyping. The worker alleged there was a discriminatory distinction based on age. The majority agreed that there was a distinction on an enumerated ground, but did not agree that the distinction perpetuated disadvantage or stereotyping.

The majority noted there had been no Charter decision in a Canadian court which had successfully challenged the termination of benefits at age 65, that age 65 is still when most people retire, and that it was reasonable for an insurance plan to rely on actuarial probabilities and terminate benefits at age 65 rather than continuing payments for life. The worker himself had not demonstrated that he would have worked after age 65 or had any expectation of being employed after age 65, and in fact did not work after age 65.

Although the worker was not disadvantaged himself based on age, the majority went on to consider the comparator group as a whole. It noted that almost all workers injured after age 61 return to work, meaning most are not disadvantaged by the two-year statutory limit. Further, a two-year limit takes into account the life circumstances of those persons in their sixties, as opposed to those in their twenties. Workers at age 65 are eligible for other sources of income, such as CPP. Viewed contextually, the majority found the two-year limit does not perpetuate prejudice of workers aged 63 and older. Even if s.43(1)(c) did violate section 15 of the Charter, it constituted a reasonable limit under section 1 of the Charter.

In his dissent, the Vice-Chair found that the workplace insurance scheme was both an insurance scheme for employers and a social benefits program for workers. He found that s.43(1)(c) was discriminatory as it failed to consider the disadvantaged position of older workers, and limited their entitlement to benefits they might have been entitled to if they had been younger. The Vice-Chair found that s.43(1)(c) was not saved under section 1 of the Charter. The Vice-Chair would have allowed the worker LOE benefits until age 71.

The worker commenced an application for judicial review. At the Tribunal's request, the Applicant amended his pleadings to add the employer as a respondent. At the end of the quarter, the Tribunal filed its Record of Proceedings with the Divisional Court.

9. Decisions 10/04 (May 19, 2004), 10/04R (December 29, 2004), 10/04R2 (September 7, 2005), and 10/04R3 (January 10, 2012)

The worker was injured in July 1986. He was paid total disability benefits until he returned to work in December 1986. In December 1987, he claimed he suffered a new injury. He was paid total disability benefits until May 1989, when he was granted a 7% permanent disability pension. The worker was paid a s.147(4) supplement from November 1989 until November 1991, when the Board terminated the supplement.

He was (following an appeal to WSIAT and the release of Decision 1546/00) granted a s.147(2) supplement from November 1991 until March 1995. The Board sponsored the worker to attend university from 1995 to 1998, during which time he received s.147(2) benefits. In October 1998, his entitlement to s.147(4) benefits was terminated.

By 2000, the worker's pension had increased to 15%.

The worker appealed to WSIAT, seeking:

- a s.147(2) supplement from November 1, 1989 to November 1, 1991;
- a s.147(4) supplement after August 9, 1998;
- a finding that he sustained a new accident in December 1987, rather than a recurrence of the 1986 injury.

The worker's appeal was considered as a written case.

In Decision 10/04, the Vice-Chair held:

- the worker was entitled to a s.147(2) supplement from November 1, 1989, to November 1, 1991;
- the worker was not entitled to a s.147(4) supplement after August 9, 1998;
- the December 23, 1987, incident was a recurrence.

In regards to s.147(4) benefits after August 9, 1998, the Vice-Chair noted that the worker had already completed a vocational rehabilitation program and had an earning *capacity* (as opposed to his actual earnings) that approximated his pre-accident earning capacity under s.147(2). Consequently the worker was not entitled to a s.147(4) supplement after August 1998.

The worker applied to reconsider Decision 10/04 on the grounds that the Tribunal had no authority to terminate a s.147(4) supplement; the Tribunal had failed to consider the increase in the worker's permanent pension; and the December 23, 1987, accident was a new accident, rather than a recurrence.

The Vice-Chair denied the reconsideration. He found the worker should never have received a s.147(4) supplement in the first place, because the evidence demonstrated

that as of 1989 the worker would have benefitted from a s.147(2) supplement. Accordingly, he should have received a s.147(2) supplement, which was what the Vice-Chair had granted. A worker cannot receive both a s.147(2) and a 147(4) supplement at the same time. The Vice-Chair held the Tribunal has jurisdiction to determine eligibility for a s.147(4) supplement, though it may not be rescinded once entitlement is established.

The Vice-Chair also found the increase in the worker's pension was taken into account in the original decision, and that the December 1987 accident was a recurrence rather than a new accident.

The worker's application for a second reconsideration was denied by the same Vice-Chair in Decision 10/04R2. The Vice-Chair confirmed that the Tribunal may find that s.147(4) benefits can be rescinded where they should never have been granted. Here the worker was entitled to s.147(2) benefits because he could benefit from vocational rehabilitation services. When his earning capacity had been increased, he consequently was not entitled to a s.147(4) supplement for that period. The Vice-Chair also confirmed that the December 1987 incident was a recurrence, rather than a new accident.

The worker's six further applications for reconsideration were denied by the Tribunal Chair. The worker retained counsel and commenced a ninth reconsideration application. Submissions made on behalf of the worker alleged a breach of procedural fairness, in that the original Vice-Chair did not notify the worker that his entitlement to s.147(4) benefits were at risk in the appeal. A new Vice-Chair held that the worker's counsel had raised an arguable case, so the employer was invited to make submissions on the threshold.

In Decision 10/04R3, the new Vice-Chair denied the application for reconsideration. In his reasons, the Vice-Chair stipulated that he was only considering the procedural fairness arguments, which had not been raised in prior reconsideration applications. These were:

- whether the Vice-Chair committed a procedural error in not giving the worker notice that his initial entitlement to section 147(4) benefits would be an issue under consideration;
- whether the Vice-Chair committed a procedural error in not advising the worker of the downside risk arising from his request for section 147(2) benefits from November 1, 1989 to November 1, 1991; and
- if either of these errors did exist, whether correcting them would likely produce a different result.

In regards to notice, the Vice-Chair acknowledged that initial entitlement to s.147(4) benefits was not identified in the list of issues in Decision 10/04, and the worker and employer were not given an opportunity to provide submissions on this issue. However, the parties were made aware that s.147 was in issue, and that should have been sufficient to put the parties on notice that the interplay between the different parts of s.147 were within the scope of the appeal. Section 147 is a comprehensive scheme of supplementary benefits for a permanent impairment, and its provisions cannot be read on a compartmentalized basis. Where a worker has claimed s.147(2) and (4) benefits for the same time period, it is not reasonable to argue that the Tribunal is precluded from

considering one of them. In any event, the notice question is no longer relevant as the worker raised the issue of jurisdiction and had received two detailed reconsideration decisions.

In regards to downside risk, the Vice-Chair held there was no downside risk for the worker's entitlement to s.147(4) benefits from November 1989 to November 1991 when he claimed s.147(2) benefits. He noted that when the worker appealed to WSIAT, he had been paid s.147(4) benefits from November 1989 to November 1991, he had been paid s.147(2) benefits from March 1995 to August 9, 1998, and (pursuant to Decision 1564/00) he had been paid s.147(2) benefits from November 1991 to March 1995.

The worker appealed for s.147(2) benefits from November 1989 to November 1991. In this he was successful, as the Vice-Chair granted him s.147(2) benefits during that period. Not only was the worker's appeal on the issue granted, his benefits were increased. It was not reasonable to characterize this result as a downside risk.

Following the release of this decision, the worker commenced an application for judicial review. At the end of the quarter, the Tribunal was in the process of preparing the Record of Proceedings.

Other Legal Matters – Human Rights Tribunal

A worker was unhappy with her WSIAT decision. She brought an application to the Ontario Human Rights Tribunal (OHRT), alleging discrimination on the basis of disability, sex, and family status. When advised that the OHRT had no jurisdiction to contest an adjudicative decision of WSIAT, the worker then characterized her application as being about services, rather than the WSIAT decision itself.

WSIAT took the position that the worker's application had nothing to do with services, that it was in fact an attack on the merits of the WSIAT decision, and that the OHRT had no jurisdiction to consider an appeal of WSIAT's decision.

The OHRT Vice-Chair agreed that most of the worker's submissions appeared to relate to the results of the WSIAT decision and WSIAT's adjudicative process. However, the OHRT Vice-Chair was unable to conclude that it was plain and obvious that the application did not fall within the Tribunal's jurisdiction. She directed the worker to file a more detailed statement of the alleged discrimination, which was to be provided to WSIAT.

WSIAT refused to file a complete response to the application. It filed a Request for an Order During Proceedings to dismiss the application on the grounds that the OHRT had no jurisdiction to consider the subject matter of the allegations. In the alternative, WSIAT requested the application be deferred until the worker's request for reconsideration of the WSIAT decision had been completed.

On March 8, 2011, the OHRT Vice-Chair granted WSIAT's request and dismissed the application on the basis that the OHRT had no jurisdiction to consider any of the allegations except for one, and for that allegation she agreed that it should be deferred until after the WSIAT reconsideration.

Following this decision of the OHRT, it was unclear if the worker was pursuing her WSIAT reconsideration. At one point she withdrew it, and then decided she did want to pursue it. She also expressed an interest in commencing an action against her employer, and bringing an application to see if her right of action is taken away.

In November 2011, the worker wrote to the OHRT, alleging that WSIAT had closed her reconsideration. She asked for an Order During Proceedings to reactivate her original complaint. The OHRT asked her to clarify her allegation, and the OHRT Registrar sent a letter to WSIAT instructing WSIAT not to respond until the OHRT provided further direction.

There was no further communication from the OHRT, until WSIAT received a Case Assessment Direction from an OHRT Vice-Chair, stating WSIAT had failed to respond within the time limit and ordering WSIAT to explain what the status of the worker's reconsideration was.

WSIAT requested the OHRT reconsider its finding that WSIAT failed to respond within the time limit. WSIAT simultaneously filed submissions demonstrating the extensive efforts that had been made to process the worker's reconsideration over the past year, and argued that any delay was due to the worker withdrawing her own reconsideration and her letters being difficult to understand. WSIAT again pointed out that the OHRT has no supervisory jurisdiction over WSIAT decisions.

In an Interim Decision dated March 14, 2012, an OHRT Vice-Chair agreed that the OHRT Registrar had directed WSIAT not to respond unless directed, and no such direction had been provided by the OHRT to WSIAT.

The OHRT Vice-Chair then held that it was not necessary to obtain further submissions from WSIAT. She agreed the WSIAT reconsideration process had not concluded, and there was no basis to revive the worker's Application. The worker's Request was denied.

Recent Decisions

LOE after retirement in occupational disease cases

Tribunal case law has held that a worker who has retired and then develops an occupational disease is not entitled to LOE benefits under s.43(1) of WSIA since there is no loss of earnings as a result of the injury. The Board subsequently changed its practice to reflect this analysis. This is discussed in Decision 87/12. The worker developed mesothelioma due to workplace asbestos exposure in 2005, 15 years after he retired. The Board found he was entitled to a NEL award and two years of LOE benefits as an older worker. After his death, his widow received spousal benefits based on his earnings at retirement. The Schedule 2 employer appealed to the Board's Appeals Resolution Officer, relying on the Tribunal's decisions. The ARO denied the appeal, indicating that the WSIB changed its practice effective December 7, 2009 and that in all new entitlement decisions in claims with accident dates on or after January 1, 1998, workers who are not working and are not earning on the date of accident will not receive LOE benefits. The ARO indicated that the WSIB's position is that this change will not be used to recalculate or terminate LOE or survivor benefits already in effect on December 7, 2009.

In allowing the employer's appeal that the LOE benefits paid to the worker should be rescinded, the Panel applied the reasoning in Tribunal decisions. The Tribunal is required to apply Board policy, but the ARO had applied Board practice, which the Tribunal is not required to apply. The Panel applied the WSIA provisions, which only provide for LOE benefits where the compensable condition results in a loss of earnings. With respect to the spousal benefits, the Panel also allowed the employer's appeal that these benefits should be reduced, observing that section 48(1) does not require that the worker be entitled to LOE benefits before these benefits are payable. The Panel agreed with Tribunal case law that if there is no loss of earnings to the worker, spousal benefits should be based on the minimum deemed earnings in s.48(3).

COLD: Accident date, apportionment and a *Human Rights Code* issue

The worker in Decision 1778/11 had entitlement for chronic obstructive lung disease (COLD) due to 23 years of exposure to dust from cutting steel. He also had a 20 pack year history of cigarette smoking. He appealed the Board's findings about his accident date, and the apportionment of his NEL, and raised a *Human Rights Code* argument. The Board ruled that the accident date was in 2005, when his respirologist formally diagnosed COLD. The worker argued it should be in 1993, when he first saw the doctor for respiratory problems. The Panel followed Tribunal case law, which holds that the accident date in occupational disease cases under WSIA and the pre-1997 Act is when the worker suffers an impairment, which is defined as a physical or functional abnormality or loss. The accident date was therefore in 1993, as there was convincing evidence that the worker's lungs were functioning abnormally and he was impaired by COLD at that time.

The Board awarded a 12% NEL after rating his whole body impairment at 40%, but then apportioning 30% of his permanent impairment to work exposure and 70% to smoking. The Panel accepted Decision 484/06 which concluded that where COLD results from a combination of cigarette smoking and workplace exposures, there are two separate and identifiable components to the injury. While the relative contribution of these components cannot be precisely identified, it was reasonable to apportion the NEL using the formula in the Board's Adjudicative Support Material binder on COLD, although this is not binding on the Tribunal

because it is not policy. This approach was in keeping with the intention of worker's compensation legislation to compensate workers for impairments caused by their employment. Applying the formula, the relative contribution of work exposure was 45%, and of smoking was 55%. The NEL was therefore 45% of 40% of his whole body rating, or 18%.

The worker also raised an argument under the *Human Rights Code* that his NEL should not be reduced because of his smoking as this would discriminate against him on the basis of disability. The Panel found that the worker was simply not being compensated for the portion of his disability due a non-work related process, i.e. smoking, and this was not discriminatory.

NEL for repetitive strain injury

The worker in Decision 1941/11 appealed the quantum of her 5% NEL for bilateral carpal tunnel syndrome and the method by which it was assessed. The Board assessed a NEL for her left wrist only because she had carpal tunnel release surgery on that wrist, but did not have surgery on her right wrist. Surgery was not a pre-requisite for a permanent impairment under the WSIA. As the worker had entitlement for bilateral CTS, and the evidence established that this condition was permanent, she was entitled to an assessment of permanent impairment in both wrists.

The NEL was assessed pursuant to the Board's Adjudicative Advice document "Permanent Impairment (NEL) Rating Guideline for Upper and Lower Extremity Repetitive Strain Injuries." The worker challenged the Board's authority to use the document to rate her impairment instead of the AMA Guides. This document was developed in response to a caution in the AMA Guides that cumulative trauma should be assessed after a worker has been working for six to eight hours, something which is generally not realistic for the Board to arrange. Tribunal case law has approved the Board's practice of rating RSI injuries using the document as it ensures that workers still receive an award where there are no clinical findings, although this would not attract an award under the AMA Guides. The Vice Chair found that the procedures in the document are reasonable and the Board did not exceed its authority in following them. Although the evidence established that the worker's range of movement was normal, she had a reduction in grip strength in both hands. The AMA Guides provide that loss of strength should be assessed where it is a factor in the impairment which has not been taken into account, although generally grip measurements are functional tests not used for evaluating permanent impairment. The Vice Chair agreed with case law that held that loss of grip strength falls within the definition of impairment in the WSIA. As there were clinical findings present, the worker's NEL for bilateral CTS, including loss of grip strength, was to be assessed using the AMA Guides and not the Adjudicative Advice Document.

LOE entitlement after age 65 and plant closure, and *Human Rights Code* challenge

Decision 960/11 discusses LOE entitlement after a plant closure and also whether the worker can bring a *Human Rights Code* challenge on the basis that s.43(1)(c) of WSIA violates the Code. In this case, the worker was 64 years old when she was injured on April 10, 2007. The plant closed on June 30, 2009. Since the plant closure occurred more than two years after the date of injury, the Board found under s.43(1)(c) the worker was not entitled to LOE benefits. As part of her appeal, the worker raised an argument that the barriers to LOE entitlement in her case constitute age discrimination contrary to subsection 10(1) of the Code. The Vice-Chair first considered the case on the merits to determine whether the worker would have been entitled to

benefits but for subsection 43(1)(c) of WSIA. The Vice-Chair found that after the worker's 2007 injury, she returned to her essential pre-accident job duties. The Vice-Chair found the worker's loss of earnings after June 30, 2009, was not as a result of her compensable impairment, but rather as a result of the plant closure and a labour market that was not conducive to finding similar employment. The worker was not in any better or worse situation than her other non-impaired co-workers, who were also laid off, and facing similar difficulties in finding the same type of work, due to economic circumstances. Accordingly, the Vice-Chair found that since the loss of earnings was not related to her compensable impairments, it was not necessary to reconvene this case in order to hear arguments in respect of the *Ontario Human Rights Code*.

Fighting and assaults

In Decision 2044/11, a worker at a race track sought benefits after he was stabbed repeatedly by a coworker, R. He and R became involved in an argument and R got a knife. The worker grabbed a pitchfork. When he let go of this and began to walk away, R stabbed him in the back and then the chest. The Board denied benefits under Policy No. 15-03-11, entitled "Fighting, Horseplay and Larking," being of the view that the worker was a willing participant and therefore took himself out of the course of employment. Generally, the Tribunal has followed Board policy in finding instigators and aggressors in fights take themselves out of employment. Board policy also indicates that participants in a fight are not entitled to benefits. In interpreting the policy, the Tribunal treats workers who voluntarily participate in a consensual fight as having removed themselves from the course of employment. Workers whose involvement is reflective of their interest in self-defence have generally been found to remain in the course of employment. Board policy notes that workers participating in a fight that arises solely over a personal matter do not have coverage, but there may be coverage if the fight results solely over work. The policy is silent about fights that fall between these two extremes. In dealing with this, Tribunal cases have attempted to determine whether the fight or assault was reasonably incidental to employment. Personal animosity that develops between co-workers in the workplace is generally seen to be sufficiently work-related so that fights or assaults which arise from this animosity are seen to arise from the employment. The Vice-Chair allowed the appeal, finding that the worker was not the aggressor or a willing participant. He picked up the pitchfork in self-defence. He had attempted to defuse the situation, and was walking away when he was initially stabbed. The reason for the assault was substantially related to work. Therefore, the injuries arose out of and in the course of employment.