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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Ontario

Workplace Safety and Insurance Appeals Tribunal

Quarterly Production and Activity Report

January 1 to March 31, 2013

Production Summary

At the end of the first quarter 2013, the active inventory totaled 6,240 appeals. This is approximately 12% higher than the active inventory at the end of the fourth quarter 2012.

Incoming Appeals

Incoming appeals numbered 1,417; of these, 1,315 were appeals from WSIB decisions, and 102 appellants advised they were ready to proceed to hearing following a period of inactive status.

This compares to 1,210 new appeals and 84 reactivated appeals recorded in the fourth quarter of 2012.

In the 1st quarter of 2012, the Tribunal recorded 1,161 new appeals and 194 reactivations.

In 2012, the weekly average of hearing-ready appellants was 66. For Q1-2013, the weekly average of hearing-ready appellants is 64. This figure excludes cases reactivated from inactive status.

Dispositions

Dispositions in the first quarter of 2013 totaled 888. This includes 280 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts, and 608 after-hearing dispositions; of the after-hearing dispositions, 593 followed from Tribunal decisions.

Inactive Inventory

At the end of Q1-2013, the inactive inventory was 2,474 cases (at the end of Q4-2012, the inactive inventory was 2,519 cases).

In Q1-2013, 83% of final decisions were released within 120 days. In 2012, 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 2013, the notice inventory included 1,479 dormant cases, the active inventory totalled 6,240 cases, and the inactive inventory totaled 2,474 cases.

Production Tables and Charts

A. Active Inventory End of Quarter

Period	Active Inventory
Q1-2012	4897
Q2-2012	5188
Q3-2012	5382
Q4-2012	5595
Q1-2013	6240

B. Incoming Appeals

Period	Incoming Appeals
Q1-2012	1355
Q2-2012	1298
Q3-2012	1246
Q4-2012	1294
Q1-2013	1417

C. Dispositions

Period	Dispositions – Total	Pre-hearing	After Hearing
Q1-2012	930	287	643
Q2-2012	1005	341	664
Q3-2012	956	343	613
Q4-2012	1017	340	677
Q1-2013	888	280	608

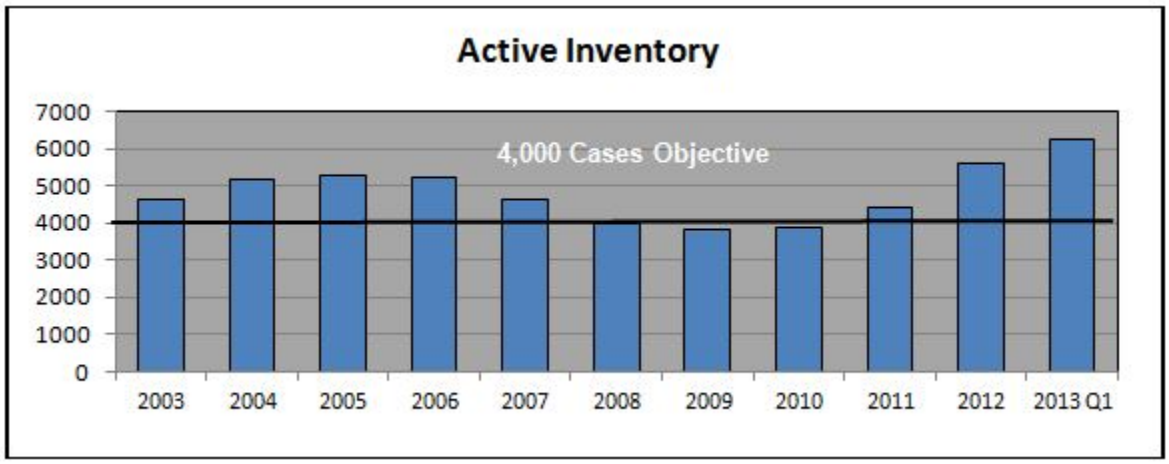
D. Inactive Inventory

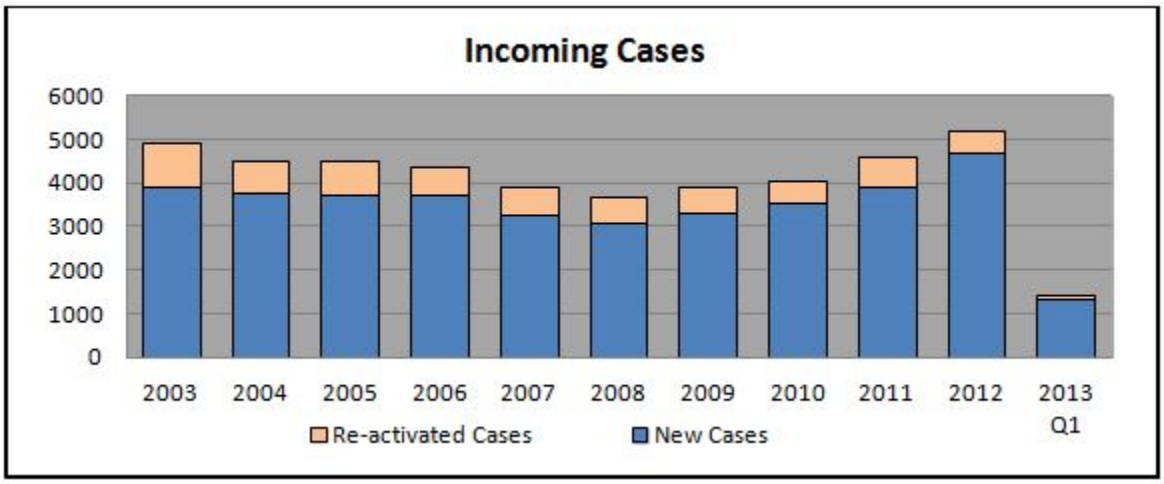
Period	Inactive Inventory
Q1-2012	2569
Q2-2012	2515
Q3-2012	2500
Q4-2012	2519
Q1-2013	2474

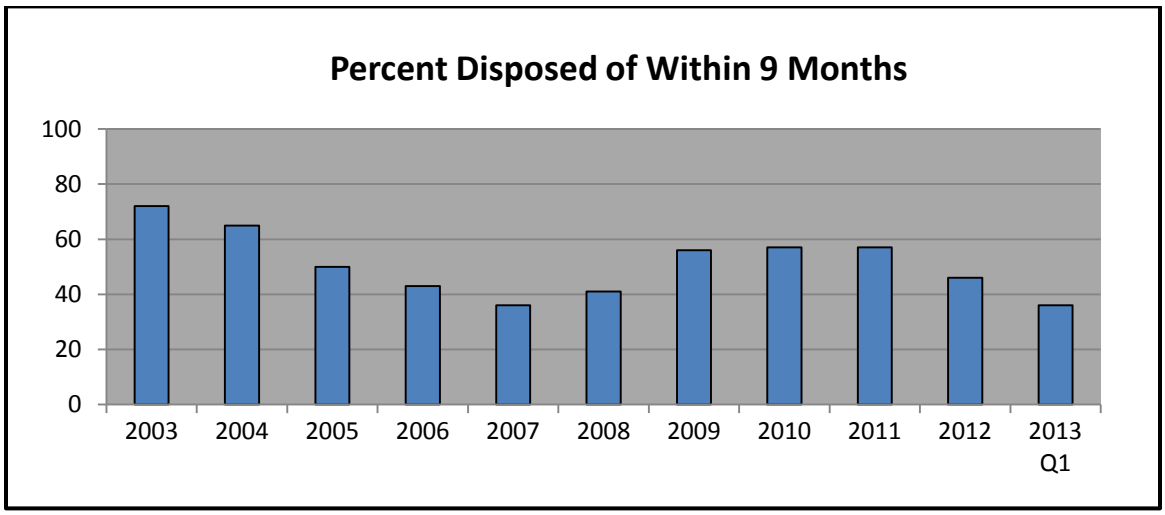
E. Notice of Appeal (Dormant cases)

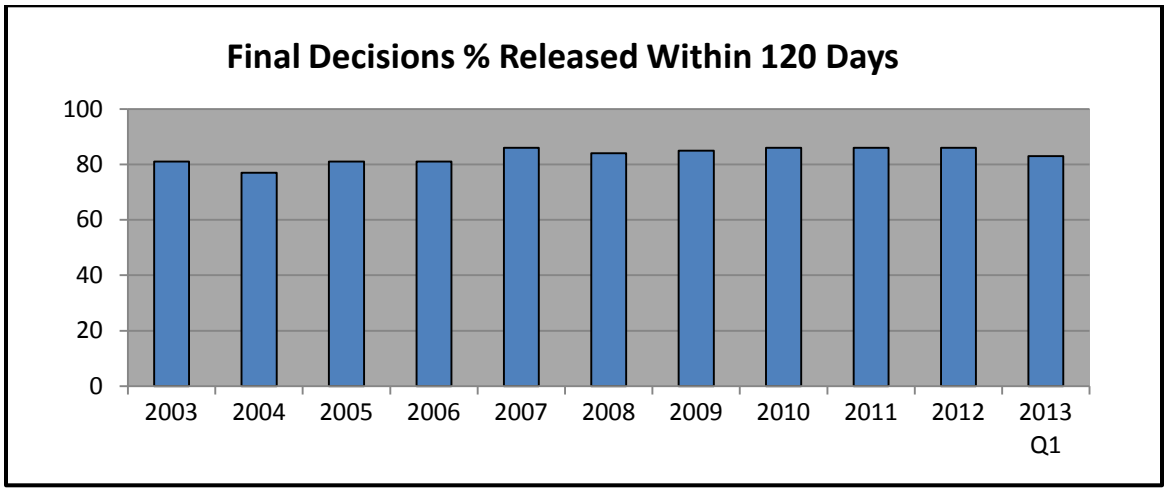
Period	Total Dormant	Change from Previous Quarter
Q1-2012	1433	-44
Q2-2012	1435	2
Q3-2012	1531	96
Q4-2012	1595	64
Q1-2013	1479	-116

F. Production Charts: From 2003 to 2013






Percent Disposed of Within 9 Months
100
80
60
40
20
0
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013 Q1


Final Decisions % Released Within 120 Days
100
80
60
40
20
0
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013 Q1

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the first quarter of 2013 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. *Decision No. 2484/11* (February 15, 2012)

The worker injured her wrist at work in 2006. She then stopped work in 2007 when she was diagnosed with tenosynovitis in the same wrist. She appealed entitlement to Loss of Earnings (LOE) benefits from September 2007 to February 2008, and from March 2008. The Vice-Chair allowed the worker's appeal in part, finding she was entitled to full loss of earnings benefits from September 2007 to October 2007, but not after that date.

However, the Vice-Chair also found on the evidence that the worker had failed to accept suitable work offered by the employer. Even though the worker was subsequently granted entitlement under the chronic pain policy, the Vice-Chair found this did not mean she was incapable of performing the work offered.

The worker commenced a reconsideration application, and then withdrew it to start an application for judicial review. In her factum, the worker argued that WSIAT's decision was unreasonable, and also that she was entitled to notice of the consequences of her refusal to accept modified work, in accordance with insurance principles. The judicial review was heard on March 20, 2013. The Divisional Court Panel of Justices Swinton, Brown and Lederer unanimously dismissed the application for judicial review.

2. *Decisions Nos. 3164/00* (December 18, 2000), *3164/00R* (March 28, 2001) and *3164/00R2* (March 6, 2012)

The worker worked in a donut shop. She injured her back in 1994. She was paid total benefits for about a month, then returned to work, and went off again for a further seven months. In September 1997, she was fired. In October 1997, she was granted entitlement for a right elbow disability arising out of her job duties.

The worker appealed for entitlement for Future Economic Loss (FEL) benefits and further vocational rehabilitation (VR) arising out of the back injury. She also appealed ongoing entitlement for a right elbow condition. Finally, she appealed for entitlement for fibromyalgia, which she alleged arose out of either the back or the elbow injury.

In *Decision No. 3164/00*, released in December 2000, the Vice-Chair granted entitlement to a FEL and VR assistance for the back injury. The Vice-Chair 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 five more reconsideration requests, which the Tribunal Chair found 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. The Tribunal expressed concern about the timeliness of this application, which was commenced 10 years after the Tribunal's initial decision. In May 2011, the worker's counsel asked if the Tribunal would consent to adjourn the judicial review while the worker pursued a seventh reconsideration. The Tribunal agreed.

In *Decision No. 3164/00R2*, released on March 6, 2012, a different Vice-Chair denied a further application for reconsideration. In this instance, the Vice-Chair was also not persuaded by the additional medical evidence. He noted that the evidence submitted in support of the reconsideration 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.

The worker decided to proceed with the judicial review. The Tribunal served a supplementary record, and the worker and the Tribunal filed their factums. The Tribunal also brought a motion to dismiss the judicial review for delay. The motion and judicial review were scheduled to be heard on December 5, 2012.

The Divisional Court Panel of Justices Aston, Hackland and Lederer unanimously granted the Tribunal's motion to dismiss for delay. The Court noted that the judicial review was commenced 18 years after the initial injury, 15 years after the second injury, and 10 years after the Tribunal's original decision. There was a three-year gap between the Tribunal's sixth reconsideration and the commencement of the judicial review. In exercising its discretion, the Court took into account the length of the delay, the lack of a reasonable explanation for the delay and the prejudice suffered by the delay due to the destruction of the hearing tapes and the integrity of the process.

The worker filed a notice of application for leave to appeal the Divisional Court's decision to the Court of Appeal. The Tribunal filed a responding factum. On March 15, 2013, Sharpe, Epstein and Pepall J.J.A. dismissed the application for leave to appeal.

3. *Decisions Nos. 1791/07* (August 28, 2007), *1791/07R* (March 3, 2008) and *1791/07R2* (September 21, 2009)

The worker, a kitchen helper, injured his neck in November 2004. He was granted LOE benefits from May 9, 2005 until the end of 2010. Entitlement was extended to include his low back, shoulders, and chronic pain disability. The worker was also granted a 45% Non-Economic Loss (NEL) award for chronic pain.

The worker appealed the denial of entitlement for carpal tunnel syndrome, entitlement for a psycho-traumatic disability, and the amount of a NEL award for chronic pain. The Tribunal held that the worker had no entitlement for carpal tunnel syndrome, that he was not entitled to a psycho-traumatic award and that he was not entitled to an increase in his NEL award.

The worker commenced an application for judicial review. The Tribunal served and filed its Record, and was in the process of preparing its factum when it was noted that the worker's counsel had referred to evidence in his factum that was not before the Tribunal. After discussions with the worker's counsel, it was agreed that this judicial review would be put on hold while the worker pursued a further reconsideration.

The further reconsideration was denied by *Decision No.1791/07R2* (September 21, 2009).

The worker revived his application for judicial review. The application was heard in June 2010 by a Divisional Court Panel comprised of Justices Herold, Jennings and Lederman. At the outset of the hearing, the worker's lawyer abandoned the application in respect of the psycho-traumatic disability award. The Court unanimously dismissed the application in respect of entitlement to benefits for carpal tunnel syndrome.

Although the time to seek leave to appeal a decision of the Divisional Court is 15 days, over eight months later the worker brought a motion to extend the time to seek leave to appeal to the Court of Appeal. The Tribunal opposed the extension.

On March 30, 2011, Karakatsanis J.A. (as she then was) denied the time extension. She noted there was no evidence the Applicant had formed the intent to seek leave to appeal within 15 days, the delay was significant, the Applicant's allegations about illness and being unable to find counsel were unsubstantiated and not compelling, there would be prejudice to the Tribunal if an extension was granted, and in any event there was no merit to the appeal.

Over a year later, the worker then asked the Supreme Court to review the decision of Karakatsanis J. The Supreme Court Registrar was of the view that there was no final order of the Court of Appeal and that the Supreme Court therefore had no jurisdiction. He suggested that the worker's recourse was to go back to the Court of Appeal to try to have the order of Karakatsanis J. reviewed by a three member Panel of the Court of Appeal. However, when the worker went back to the Court of Appeal, he was out of time to ask for such a review and so had to ask the Court of Appeal to extend the time in which to ask a three-member Panel of the Court of Appeal to review the order of Karakatsanis J. The Tribunal opposed the worker's time extension request and filed a factum.

On July 12, 2012, the Court of Appeal dismissed the worker's time extension request. Justice Laskin noted that the Court of Appeal's Rules require that motions for review be brought within four days of the challenged decision. He set out the factors to be considered in deciding motions to extend time. He found that, even excusing the worker's error in initially bringing his matter to the Supreme Court, he did not bring his motion to the Supreme Court until 12 months after Karakatsanis J.A.'s decision. Justice Laskin found that, in light of the absence of prejudice to the Tribunal, he would be inclined to discount the importance of the lengthy unexplained delay if he saw any merit in the worker's proposed appeal. However, he found no merit in his appeal, even assuming that the worker would be allowed to revive the claim for psycho-traumatic disability that he had abandoned before the Divisional Court. Justice Laskin noted that the Tribunal considered all of the medical evidence. The Tribunal simply reached a different conclusion on the medical evidence from the conclusion for which the worker argues. Justice Laskin found that the submission that the Tribunal's decisions were unreasonable was not even arguable.

The worker then brought a motion before a panel of three judges to review Justice Laskin's order. The Tribunal opposed the motion and filed a factum.

On September 26, 2012, the Court of Appeal (MacPherson, Blair and Armstrong) dismissed the worker's motion, with costs to the Tribunal fixed at $500. In brief reasons,

the Court stated that it agreed with Laskin J.A.'s analysis and order, and also agreed with Karakatsanis J.A.'s underlying decision.

The worker then brought an application to the Supreme Court of Canada, seeking leave to appeal the September 26, 2012 decision of the Court of Appeal. On February 28, 2013, the Supreme Court of Canada dismissed the leave application with costs, per Justices Fish, Rothstein and Moldaver. At the end of the quarter, the worker, now self-represented, requested the Supreme Court to reconsider its decision.

4. *Decisions Nos. 2175/10* (November 9, 2010) and *2175/10R* (July 5, 2011)

The worker appealed for initial entitlement for specific injuries to both knees. The employer claimed the worker had knee problems when the worker was hired, that the worker did not report the injury, and that his knee problems were not related to work. After hearing testimony from a number of witnesses and reviewing the medical evidence, the Vice-Chair denied the appeal. She found significant discrepancies about the date of the accident, whether the accident was reported, and the nature of the injuries.

The worker commenced an application for judicial review. The worker filed an affidavit with his factum, to which the Tribunal objected. The judicial review was scheduled to be heard on February 28, 2013.

However, following discussions with the worker's counsel, the judicial review was adjourned sine die on consent. *Decision No. 2175/10* explicitly made a finding based only on whether there was entitlement on the basis of a "chance event." The worker is returning to the Board for a decision on whether there is entitlement on the basis of "disablement." If the worker is satisfied with the ruling of the Board (and if necessary, the Tribunal) on the issue of disablement, the judicial review will be abandoned.

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

The worker injured his back at work in June 1990. He was granted temporary benefits and 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 VR program. He was undergoing a retraining program to become a civil engineering technician when he was involved in a motor vehicle accident in 1993, forcing him to quit 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 back condition. The worker's entitlement was revoked retroactive to September 1990.

The worker appealed to the Tribunal.

In *Decision No. 1110/06* the Tribunal determined that 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 No. 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 have worked as a civil engineering technician but for the non-compensable motor vehicle accident. The worker appealed to the Tribunal again.

In *Decision No. 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 full FEL.

In *Decision No. 1565/08* the Panel found the worker was not totally 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 the average earnings of a fully qualified civil engineering technician, and hence have a lower FEL. The Panel allowed the worker's appeal in part on that issue, finding he would only have been able to make entry level earnings. Thus, the worker was entitled to a partial FEL commencing in 1993. The Panel also confirmed the Board's NEL determination.

In *Decision No. 1565/08R*, a different Vice-Chair denied the worker's application to reconsider *Decision No. 1565/08*, finding the threshold to reconsider had not been met.

The worker commenced an application for judicial review of *Decisions Nos. 1565/08* and *1565/08R*. The worker is self-represented. 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 No. 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 No. 1110/06.* The motion was

heard in September 2011 by Madam Justice Swinton. The Tribunal filed a factum for use on the motion.

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.

The Divisional Court Registrar later dismissed the worker's judicial review because he failed to file his factum and perfect his application within a year of filing the judicial review. The worker brought a motion to set aside Registrar's dismissal and to extend the time to file his factum. The Tribunal did not consent to the motion, but also did not oppose it. On June 20, 2012, the motion was granted.

The worker delivered his factum in July 2012. The Tribunal delivered its factum in August 2012. The hearing of the judicial review was scheduled for December 2012, but was adjourned at the request of the worker's counsel, who had recently been retained by the worker to attend for the hearing of the application. A new date has been set for October 2013.

6. *Decisions Nos. 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. He 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 No. 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.

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

The worker asked the Board for s.147(2) benefits from November 1989 to November 1991. The Appeals Resolution Officer (ARO) denied the appeal for s.147(2) benefits on the basis that the worker was not involved in Board-approved VR activities between 1989 and 1991.

In another ARO decision, the worker was denied s.147(4)(b) benefits after August 9, 1998.

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; and

- a finding that he sustained a new accident in December 1987, rather than a recurrence of the 1986 injury.

At the worker's request, his appeal was considered as a written case.

In *Decision No. 10/04*, the Vice-Chair held:

- the worker was entitled to a s.147(2) supplement rather than a s.147(4) supplement from November 1, 1989 to November 1, 1991;

- the worker was not entitled to a s.147(4) supplement after August 9, 1998; and

- the December 23, 1987 incident was a recurrence.

In regards to the period from November 1989 to November 1991, the Vice-Chair found that the Board had been in error in characterizing the s.147(4) benefits granted during this time as a "temporary" supplement, given the mandatory language contained in s.147(7). However, the Vice-Chair found that the Board's initial decision to award the s.147(4) benefit was in error because during that period, the worker was participating in a VR program; therefore, as of that date he should have been awarded a s.147(2) supplement rather than a s.147(4) supplement.

In regards to s.147(4) benefits after August 9, 1998, the Vice-Chair noted that the worker had already completed a VR 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 asked the Tribunal to reconsider *Decision No. 10/04* on the grounds that the Tribunal had no authority to terminate a s.147(4) supplement, that in regard to the period after August 1998 the Tribunal had failed to consider the increase in the worker's permanent pension, and that 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 VR. 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 No. 10/04R2*. In regards to the period from November 1989 to November 1991, 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 have benefitted from VR services.

The worker's applications for six further reconsiderations 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 s.147(4) benefits for the period November 1989 to November 1991 were at risk in the appeal.

In *Decision No. 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 s.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 s.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 No. 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) benefits, it is not reasonable to argue that the Tribunal is precluded from considering s.147(4) benefits for the same period. In any event, the notice question is no longer relevant as the worker had received two detailed reconsideration decisions.

In regards to downside risk, the Vice-Chair held there was no downside risk for the worker when he claimed s.147(2) benefits for the period November 1989 to November 1991. He noted that the original Vice-Chair did not remove the Applicant's entitlement to s.147 supplementary benefits for the period of November 1, 1989 to November 1, 1991. Rather, he simply found that the Applicant was entitled to those benefits on the basis of s.147(2) and not s.147(4). Not only was the worker's appeal on the issue granted, his benefits were increased for that period. 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. The worker is self-represented. He has filed a factum, and the Tribunal has filed its factum. As of the end of the quarter, the Tribunal had been verbally advised that the judicial review will be heard in June 2013.

7. *Decisions Nos. 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 of 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 was 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 *Workplace Safety and Insurance Act* (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 I employer;

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

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

The Tribunal sent several follow-up requests to the Applicant's counsel to provide transcripts so that the Tribunal could prepare and file the Record of Proceedings. The Applicant's counsel failed to respond and ultimately the Tribunal filed the Record without the transcript. The Applicant's counsel then filed the transcripts separately.

The Applicant's counsel delivered a factum in December 2012. The Tribunal has filed a responding factum. Responding factums have also been filed by the co-respondents. The application is scheduled to be heard in June 2013.

8. *Decisions Nos. 1093/11* (July 25, 2011) and *1093/11R* (December 13, 2011)

The worker injured his back in 1986. He injured his shoulder in 1993. Tribunal *Decision No. 1022/02R3* found the worker was entitled to benefits for his shoulder on a disablement basis. The Board then granted entitlement to a Labour Market Re-entry (LMR) assessment to identify an appropriate suitable employment or business (SEB). By then the worker had bought and was running a convenience store. An ARO decision found the SEB was a retail trade manager, and based the worker's temporary disability benefits and his FEL on deemed mid-entry wages for this SEB. The worker appealed to the Tribunal, alleging the SEB was not suitable, and the deemed wages were too high.

The worker's appeal was denied. The Vice-Chair found that the SEB of retail trade manager was appropriate because it included the job the worker had been doing since 2000. The worker was operating his own small store. This employment was suitable given the worker's restrictions and his vocational background.

The Vice-Chair also found that the deemed wages were suitable. Even though benefits are usually calculated based on actual wages, since the worker was self-employed the actual earnings did not reflect his actual wages. The worker lived above his store in Quebec, and used the store's vehicle and food. He paid his spouse a salary. The Vice-Chair also found it was appropriate to use the Ontario-based wage calculation even though the worker now resided in Quebec.

The worker's application for reconsideration was denied. The worker argued the Vice-Chair was biased towards the worker because she questioned the accuracy of the worker's tax returns, and that the Vice-Chair failed to consider factors that would suggest the earning capacity should have been based on higher wages. The Vice-Chair found that there was no reasonable apprehension of bias, as she had not suggested the Applicant cheated on his tax returns as the worker alleged. *Decision No. 1093/11* relied on Tribunal jurisprudence in calculating appropriate earnings for self-employed workers, and this does not demonstrate bias. Further, the Vice-Chair pointed out that she had

found the Board's calculation, which was based on average rather than high-end wages, was appropriate.

In June 2012, the Applicant commenced an Application for judicial review. The Tribunal agreed to file its factum by the end of March. The judicial review was scheduled to be heard in May 2013. However, in preparing its responding factum, the Tribunal found a document in the Applicant's Application Record that had not been in the record before the Tribunal. The Tribunal objected, and the Applicant asked if he could withdraw the judicial review application without prejudice to bring a further reconsideration at the Tribunal. The Tribunal agreed, on the condition that the Applicant pay the Tribunal's costs of $500. The Applicant agreed, and the judicial review application has been abandoned.

9. *Decisions Nos. 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 No. 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 *Canadian Charter of Rights and Freedoms* (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 interveners. 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 Canadian Pension Plan (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 be 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. After the Tribunal filed its Record, counsel for the worker attempted to submit new evidence for the judicial review. As the respondents objected, counsel for the worker then attempted to commence an application to reconsider *Decision No. 512/06*, while the judicial review was still pending. As the respondents objected to this approach as well, the worker decided to withdraw the judicial review and pursue a further reconsideration at the Tribunal. The respondents consented to the withdrawal, though the Tribunal insisted on payment of costs incurred from producing the Record.

The worker has filed the materials in support of a request for reconsideration. Since the original Tribunal Vice-Chair has passed away, a new Vice-Chair will need to be assigned to hear the reconsideration.

10. *Decision No. 2410/11* (April 13, 2012)

A plaintiff was struck by a pickup truck that was clearing snow in her employer's lot. The truck was driven by GB and owned by FB. She commenced an action against GB and FB, who were brothers involved in the snow clearing business. She also sued D, the company that leased the truck to them. The leasing company applied to the Tribunal for an order taking away the right of action against the brothers. The Vice-Chair held that the right of action was not taken away against any of the defendants.

A representative for the plaintiff's employer attended the hearing as an observer. Following the hearing, the representative contacted the Tribunal and supplied a copy of the snow removal contract. Neither the plaintiff nor the respondent objected, so the contract was admitted and relied upon by the Vice-Chair in her decision.

The issues were: whether the plaintiff was in the course of her employment at the time of the accident, whether s.28(4) of the WSIA took away the right of action against all defendants, and whether GB was a worker in the course of employment.

The Vice-Chair considered the contract which had been admitted after the hearing, and concluded that the employer owned the parking lot and controlled its maintenance. The Vice-Chair referred to prior Tribunal decisions which have generally held that a worker is found to be in the course of employment if they were in an employer-controlled parking lot while coming to work, as this is reasonably incidental to employment. She held the plaintiff was in the course of her employment when she was injured.

However, section 28(4) of the WSIA provides that a right of action is not taken away if any employer, other than the worker's employer, supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers. Here the snow removal truck was rented, and D, the leasing company, did not provide workers, so the plaintiff's right to sue was not taken away against D. The issue was whether the right of action was taken away against GB and FB, neither of whom participated in the hearing.

The Vice-Chair followed previous Tribunal decisions which have held that the s.28(4) exemption only applies to the employer who supplied the vehicle without also supplying workers; that is, the employer who supplied the vehicle without also supplying workers is the only entity against whom the action may proceed. Other employers and workers are still protected from suit. "The removal of the right to sue applies to employers who had workers in the course of employment at the time of the accident, but not to employers who do not have that essential compensation nexus."

However, the Vice-Chair found on the evidence, including the contract that was submitted after the hearing, that because GB was an owner and was driving the truck at the time of the accident, GB and FB were not workers acting in the course of their employment. Hence the right of action was also not taken against GB and FB.

D, the rental company, commenced an application for judicial review of *Decision No. 2410/11*. The Applicant was required to amend its materials to include the Tribunal as a named party, following which the Tribunal filed its Record of Proceedings. At the end of the quarter the Tribunal was awaiting the Applicant's factum.

Action in Superior Court - *Decision No. 1065/06* (September 28, 2012)

Decision No. 1065/06 denied the worker's appeal for initial entitlement for traumatic mental stress. In January 2013, the worker served WSIAT with a Statement of Claim and Amended Statement of Claim.

Although the Statement of Claim does not mention *Decision No.1065/05*, and does not name any of the Panel members individually, is clear the worker is suing WSIAT because of that decision.

The worker has also named as defendants: the Crown, the Ministry of Health, the Ontario Human Rights Commission, Health Professionals Appeal and Review Board (HPARB) and the Ontario Labour Relations Board (OLRB). She is seeking damages of 1.5 million dollars, as well as other relief. The action relates to the worker's unhappiness about how her perceived wrongs have been handled by a variety of institutions.

Crown Law Office Civil has agreed to represent a number of defendants, including the Tribunal. A motion to strike has been scheduled for January 30, 2014, which is the earliest date for a long motion in Toronto. HPARB is bringing a motion to strike returnable on the same date.

Recent Decisions

Application of mental stress provisions in WSIA to federal employees

Decision No. 1354/07 looked at whether the mental stress provisions in WSIA apply to applicants for chronic occupational stress who are subject to the provisions of the *Government Employees Compensation Act* (GECA).

The Panel accepted that the definition of accident in the GECA extends to disablements and therefore extends to cases in which workplace stressors have been a significant contributing factor in the worker's development of an emotional disability. The Panel found that the strongest line of cases (including cases from other provinces) supports the view that the mental stress provisions in s.13 of WSIA are not incorporated into GECA because these provisions are not consistent with the definition of accident included in GECA. Section 13 would limit the ambit of the GECA definition of accident and therefore it is inconsistent with it. The Panel found that the result is not entirely clear and a contrary view is arguable. The Panel found it was not necessary to decide the issue since this case did not turn upon the application of s.13.

The Panel denied the worker entitlement for mental stress since her stress was due to her misperception of the workplace events and not the events themselves. Her misperceptions were a significant cause of her emotional reactions, and it was also possible that her psychiatric condition was a significant cause of her misperceptions. Workplace stressors were not of sufficient significance as contributing factors in the worker's illness for the worker's emotional breakdown to be compensable.

Familial relationships vs. employment relationships

Decision No. 2064/12 is of interest for its discussion of when a person is a worker when they do work for a family member. This case involved a right to sue application where the plaintiff was the brother and stepson of the potential employers. The plaintiff had agreed to mind the cash register of a food market store for a few hours while the brother was on vacation and the stepfather had to leave the store for a few hours. During that time, the plaintiff sustained a hand injury when he put meat in the meat grinder. As a result of the accident, two of his fingers were amputated. The plaintiff sued and the defendants brought a right to sue application.

The Vice-Chair acknowledged that family businesses present unique considerations because the arrangements are often casual, unwritten, and implied. This is particularly a concern where children of the business owners are involved. It may be difficult to construe the intentions of a child who was born into a family business and may have had little choice in whether to work or not. The Vice-Chair found that while the market was a Schedule 1 employer the plaintiff was not a worker. The Vice-Chair adopted the test for determining whether an individual is a worker found in Decision No. 577 which considered three factors: remuneration, intention, and control.

The Vice-Chair found that the plaintiff only worked sporadically at the store and did not receive remuneration in the form of wages or other benefits. The Vice-Chair also found that neither party's evidence revealed an intention to form an employment relationship beyond occasional favours between family members. There was also no evidence of control or supervision.

The Vice-Chair acknowledged that some decisions have looked at whether either party was free to dispense with the relationship at any moment. In family situations, however, this factor must be carefully considered. The lack of freedom may arise from familial obligation, rather than an employment relationship. The Vice-Chair found that there were no particular factors to convert the parent-child relationship into a contract of service, implied or otherwise. Accordingly the plaintiff's right to sue was not removed by the WSIA.

The need for an assessor opinion when qualifying for occupational disease entitlement under policy

Decision No. 25/13 addresses whether further expert medical evidence was required in an occupational disease claim when the exposure and latency requirements of the relevant Board policy were satisfied. The employer appealed the Board's decision to allow entitlement for the worker's claim for colorectal cancer.

Under the Board's policy for "Gastro-Intestinal Cancer – Asbestos Exposure," claims are allowed if there is a clear and adequate history of occupational exposure to asbestos dust of a continuous and repetitive nature, which represents the major component of the occupational activity. The policy requires a minimum of 20 years between first exposure and diagnosis.

The employer representative questioned why the Board did not obtain a medical opinion about the relationship between the worker's asbestos exposure and his colorectal cancer in this case. The Vice-Chair found that when the facts described in the policy are found to exist, then it is not necessary to obtain a medical report that addresses the causation of the specific worker's cancer. Since the evidence is sufficient to satisfy the Vice-Chair on a balance of probabilities that the policy criteria are met, there is no need to exercise the statutory discretion to direct further investigation.

The policy required a minimum of 20 years between first asbestos exposure and diagnosis. The Vice-Chair found there were 32 years between first exposure and diagnosis in this case. The employer argued that since the worker was at stage III when diagnosed, the cancer must have been present for a considerable time prior to diagnosis and the latency period might not have been met if diagnosed earlier. This argument was rejected because the policy did not exclude cancers diagnosed at stage III. The Vice-Chair thus denied the employer's appeal as she found the facts met the provisions of the policy.

Time limits to appeal and entitlement to LOE and survivor benefits in occupational disease cases after retirement

Decision No. 422/13 examined the issue of entitlement to LOE benefits and the quantum of survivor benefits in cases where the worker was diagnosed with an occupational disease after the worker had retired. In addition the Vice-Chair looked at whether the employer had met the time limit to appeal these issues.

The worker was granted entitlement for colorectal cancer. The worker retired in 2000 and the accident date was in 2002. The worker died of his cancer in 2005. The employer did not appeal the granting of initial entitlement, but when it became aware that the calculation of LOE benefits had been put into issue in Tribunal decisions, it wrote the Board questioning the amounts paid. The Board then confirmed its payments and identified a time limit for appeal of February 12, 2011, which the employer met.

The worker submitted that the time limit to appeal these issues should run from the Board's September 5, 2007 letter outlining the quantum of LOE and survivor benefits paid. The Vice-Chair found that the September 5, 2007 letter did not constitute a Board decision, as it did not describe itself as a decision, did not inform the parties of the rationale for the decision nor the applicable time limits as required by Board policy. The Vice-Chair confirmed the employer met the time limit.

In relation to LOE entitlement, the Vice-Chair allowed the employer's appeal and found the worker was not entitled to LOE benefits because the worker was retired at the time of the accident and thus did not have an actual loss of earnings.

A January 18, 2010 Memorandum from the Board acknowledged that Tribunal decisions have held that workers who were not earning at the time of the injury were not entitled to receive LOE benefits and indicated that the Board's practice of awarding LOE benefits was changing prospectively as of December 7, 2009 in light of these decisions. The Memorandum indicated that the change would not be used to recalculate or terminate LOE benefits already in effect on December 7, 2009. The worker's representative argued that the Memorandum constituted Board policy and as such the Tribunal was bound to apply it. The Vice-Chair found that the Memorandum was not Board policy but rather only refers to Board practice. The Vice-Chair found that the Memorandum does not impede the employer's statutory right of appeal and interpreted the Memorandum to indicate that the Board would not exercise its power of reconsideration to re-open prior determinations.

The Vice-Chair also agreed with Tribunal caselaw in relation to the issue of the quantum of the survivor's benefits in this case. The Vice-Chair allowed the employer's appeal and found that since the worker's pre-injury net average earnings were zero then the statutory minimum should be used to calculate the survivor's benefits.

The Vice-Chair also confirmed that the worker's private pension plan income would not constitute pre-injury earnings. The Vice-Chair indicated if pension income constituted earnings, then the amounts would be included for the purposes of post-accident earnings. Workers who became entitled to a pension after ceasing work at any time after an injury would have their loss of earnings benefits reduced as if they had begun to receive employment income. The effects of this interpretation would be far reaching and to the detriment of many workers. The Vice-Chair found that if the legislature had intended retirement or private disability payments to be included in the calculation of net average earnings, it would have said so. That is especially the case given the references to CPP disability benefits in the Act.