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, 2014

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Production Summary

At the end of the first quarter 2014, the active inventory totaled 7,973 appeals. This is approximately 7% higher than the active inventory at year end 2013.

Incoming Appeals

Incoming appeals for Q1-2014 numbered 1,372; of these, 1,238 were appeals from WSIB decisions, and 134 appellants advised they were ready to proceed to hearing following a period of inactive status. This is a decrease of 6.5%, as compared to Q4-2013. Comparisons to earlier quarters can be found in Table B.

The weekly average of hearing-ready appellants in Q1-2014 is 78. This figure excludes cases reactivated from inactive status, and is an increase from 2013 of 6.8%.

Dispositions

Dispositions in the first quarter of 2014 totaled 933. This includes 304 dispositions in the pre-hearing areas resulting from alternative dispute-resolution (ADR) efforts, and 629 after-hearing dispositions; of the after-hearing dispositions, 601 followed from Tribunal decisions.

Decisions Released within 120 Days

For the year to date ending Q1-2014, 82% of final decisions were released within 120 days. Comparisons to earlier years can be found in section F: Production Charts.

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 inventory includes cases that are not ready to proceed when the appeal is filed. 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 2014, there were 1,764 dormant cases.

Active Inventory

The Tribunal's caseload target of 4,000 appeals represents an inventory of cases spread throughout the appeal process. Increased levels of incoming appeals from the WSIB have resulted in an additional caseload at the Tribunal. The Tribunal's active inventory at the end of Q1-2014 was 7,973 cases.

Inactive Inventory

At the end of Q1-2014, the inactive inventory was 2,275 cases. This represents a decrease of 3% from year end 2013.

Production Tables and Charts

A. Active Inventory End of Quarter

Period	Active Inventory
Q1-2013	6236
Q2-2013	6675
Q3-2013	6966
Q4-2013	7436
Q1-2014	7973

B. Incoming Appeals

Period	Incoming Appeals
Q1-2013	1414
Q2-2013	1566
Q3-2013	1406
Q4-2013	1468
Q1-2014	1372

C. Dispositions

Period	Dispositions – Total	Pre-hearing	After Hearing
Q1-2013	889	281	608
Q2-2013	976	283	693
Q3-2013	937	284	653
Q4-2013	944	305	639
Q1-2014	933	304	629

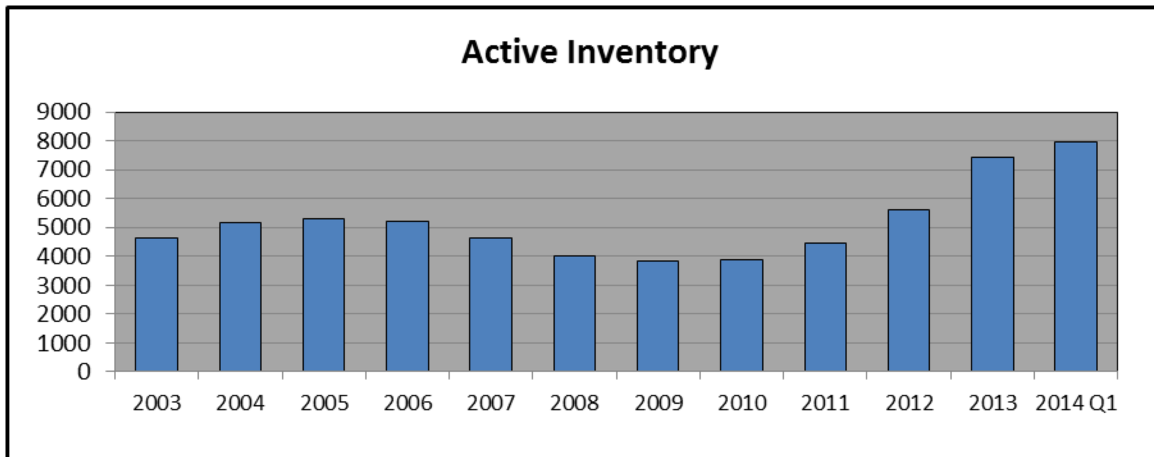
D. Inactive Inventory

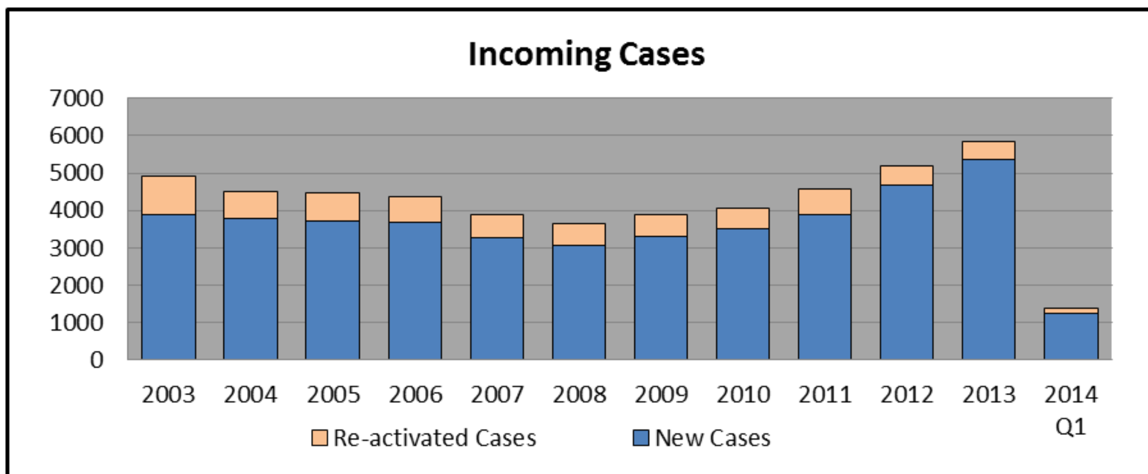
Period	Inactive Inventory
Q1-2013	2475
Q2-2013	2466
Q3-2013	2423
Q4-2013	2344
Q1-2014	2275

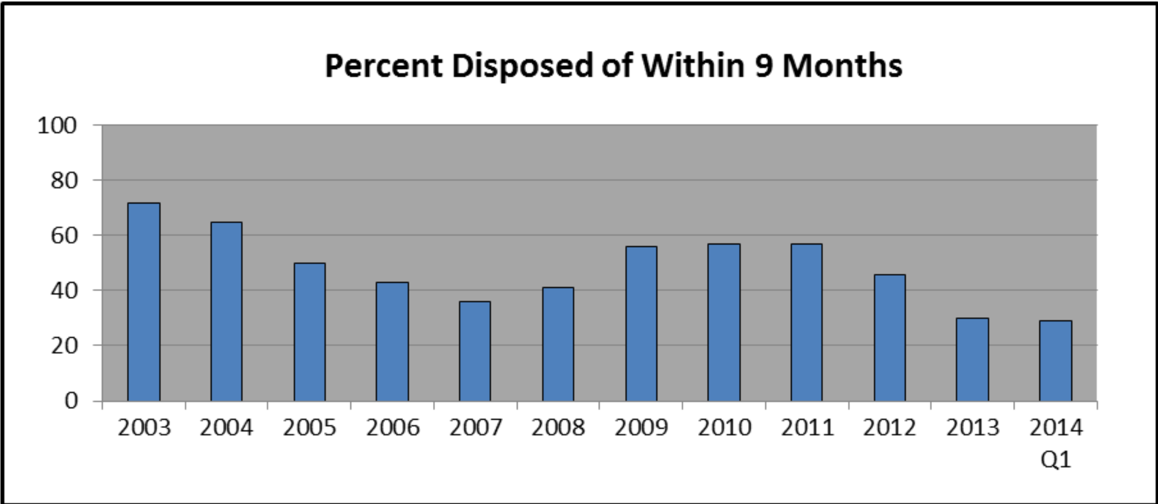
E. Notice of Appeal (Dormant cases)

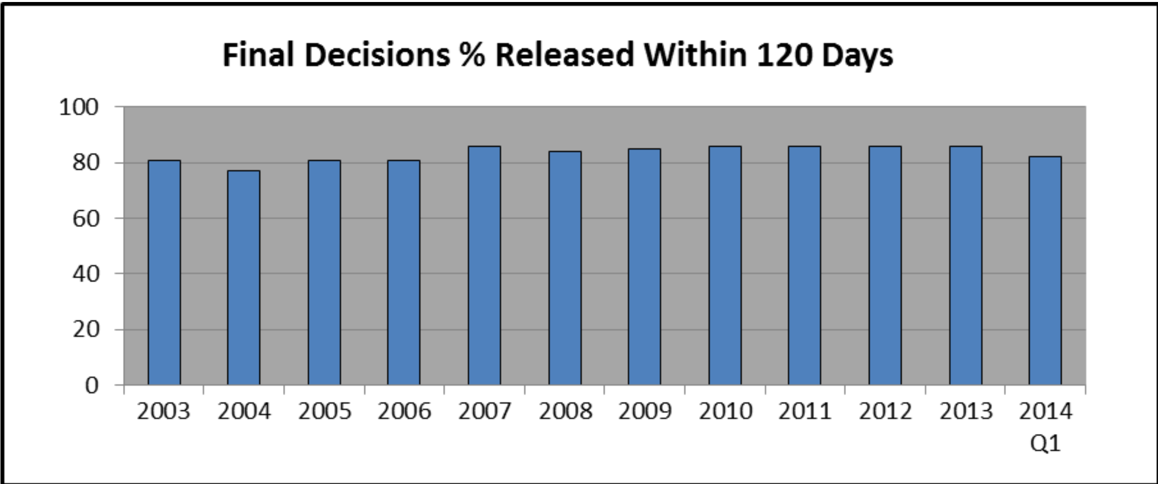
Period	Total Dormant	Change from Previous Quarter
Q1-2013	1479	-116
Q2-2013	1630	151
Q3-2013	1808	178
Q4-2013	1862	54
Q1-2014	1764	-98

F. Production Charts: From 2003 to 2014






Percent Disposed of Within 9 Months
100
80
60
40
20
0
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014 Q1


Final Decisions % Released Within 120 Days
100
80
60
40
20
0
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014 Q1

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the first quarter of 2014 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 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 the Workplace Safety and Insurance Appeals Tribunal (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 Vocational Rehabilitation (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, 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 was self-represented. The judicial review was heard in Thunder Bay on June 18, 2013, before Justices Matlow, Lederer and Mulligan.

The Divisional Court unanimously dismissed the worker's application in written reasons dated August 1, 2013. The Court found that, based on the worker's submissions to the ARO as well as a reading of s.147, the worker knew that his s.147(4) supplement would be in issue when he appealed to the Tribunal for a s.147(2) supplement for the same time period. The Court found there was no downside risk, as the worker received more benefits as a result of the Tribunal decision. Further, it was likely that, had the worker not appealed, the Board's error in granting a s.147(4) benefit for a two-year period would not have been discovered and the s.147(4) supplement would have stayed as it was, i.e. for a two-year period only.

The worker sought leave to appeal the Divisional Court's decision to the Ontario Court of Appeal. The Tribunal filed responding materials. On January 23, 2014, the Court of Appeal unanimously dismissed the worker's application for leave to appeal with costs, per Justices Rosenberg, Cronk and Tulloch.

The worker, still self-represented, then applied for leave to the Supreme Court of Canada. The Tribunal filed responding materials. At the end of the quarter, the Tribunal was waiting to see if the worker would be filing a Reply, following which the Supreme Court will decide whether to grant leave to appeal.

2. ***Decisions Nos. 292/11*** **(September 20, 2011) and** ***292/11R*** **(May 30, 2012)**

K, a part-time personal support worker, drove two patients to a pre-arranged location, then returned to her car. While sitting in her car reviewing a list of her clients to determine the rest of her day's activity, another vehicle struck her car. K sued the company that owned the other vehicle and the driver for damages.

The company was a Schedule 1 employer and the other driver was a worker in the course of his employment. The company applied to the Tribunal to take away K's right of action, alleging K was an employee in the course of her employment at the time of the accident. K alleged she was an independent operator, and that she was not in the course of her employment.

The Vice-Chair carefully reviewed the evidence, cited the relevant law and policy and found that the preponderance of evidence demonstrated that K was a worker, rather than an independent operator.

The Vice-Chair also found that K was in course of her employment at the time of the accident. Although there were periods during the day when the worker was not in the course of her employment, at the time K's vehicle was struck she was engaged in activity reasonably incidental to her employment.

The Vice-Chair thus found that K's right of action against the driver and company was taken away.

An application for reconsideration was dismissed by the same Vice-Chair.

The worker commenced an application for judicial review. The Tribunal has filed its factum. This judicial review will be heard in Ottawa in April, 2014.

3. *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.

At the end of the quarter, the worker had received a final decision from the Board denying entitlement for disablement issue. The worker has now appealed this issue to the Tribunal.

4. *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 Loss of Earning benefits (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 *Workplace Safety and Insurance Act* (WSIA).

The worker then alleged that limiting entitlement to LOE to two years post-injury for those workers over age 63 contravened s.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. In *Decision No. 512/06*, the majority of the Panel found there was no breach of the Charter. The Vice-Chair dissented and found there was a breach of s.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 s.15 of the Charter, it constituted a reasonable limit under s.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 s.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 then filed a request for reconsideration of the WSIAT decisions. Since the original Tribunal Vice-Chair has passed away, a new Vice-Chair had to be assigned to hear the reconsideration.

The reconsideration was denied in *Decision No. 512/06R*, released December 10, 2013. The new Vice-Chair did not accept the worker's argument that there was substantial new evidence not available at the time of the hearing which would likely have changed the outcome of the decision.

In January 2014, the worker commenced a new application for judicial review. The Tribunal filed its Record of Proceedings, and is waiting for the worker to file his factum.

5. *Decisions Nos. 959/13* (June 13, 2013) and *959/13R* (October 31, 2013)

The worker's appeal for entitlement for a Non-Economic Loss benefits (NEL) for his low back, and to LOE benefits from August 17, 2010, was denied by the Tribunal Panel. The worker was a foreman with a paving company, who injured his back at work in April 2009. The Panel found that the worker's compensable condition resolved by the time the WSIB terminated LOE benefits in 2010, as the worker's non-compensable factors were responsible for his complaints. Further, the Panel found the worker had been offered suitable work at no wage loss.

In December 2013, the worker commenced an application for judicial review. The Tribunal filed an appearance. Once the worker provides a copy of the transcript of the Tribunal hearing, the Tribunal will be preparing a Record of Proceedings.

6. *Decision No. 1357/13* (September 12, 2013)

A family services worker became upset when she learned of the death of a three year-old client. The worker had an emotional reaction to the news and claimed she was unable to return to work. The Board denied entitlement for traumatic mental stress. The worker appealed to the Tribunal.

The Panel found the worker was entitled to benefit for traumatic mental stress, as she had suffered an acute reaction to a sudden an unexpected traumatic event (the sudden and unexpected death of a three year-old child) while she was in the course of employment.

Further, the way the worker learned of the death (through a phone call) exacerbated the shock. The worker was also concerned about potential personal liability. Eventually, she was unable to continue in her job.

In accordance with Board policy, the Panel also found the triggering event was identifiable, objectively traumatic and unexpected in the normal course of employment.

Finally, the Panel found the worker's acute reaction led to a psychological injury, causing the worker's loss of earnings. The Panel directed the Board to assess the worker's entitlement to benefits.

The employer commenced an application for judicial review. At the end of the quarter, the Tribunal was waiting for the worker to provide a copy of the transcript, so the Tribunal can serve and file a Record of Proceedings.

7. *Decisions Nos. 1135/12* (May 9, 2013) and *1135/13R* (December 16, 2013)

In *Decision No. 1135/12*, an employee of an auto repair service was injured when he was on the premises of a recycling business. The accident resulted in serious injury to the worker, who commenced a legal action against the corporate entity that operated the recycling business and three of its staff. In turn, the defendants in the lawsuit began a third party action against the corporate entity that operated the auto repair service centre. The worker received statutory accident benefits (SAB) under the *Ontario Insurance Act*. The insurance company who provided these benefits, and the third parties, applied to the Tribunal under s.31 of the WSIA for a determination as to whether the worker's rights of action was taken away.

In determining whether the lawsuit filed by the worker was barred or limited by the provisions of the WSIA, the Vice-Chair had to decide whether the worker and the defendant's employees were in the course of their employment for a Schedule 1 employer at the time the accident occurred and whether it was limited against the third parties.

The Vice-Chair found on the balance of probabilities that both the worker and the defendant's employees were in the course of their employment when the accident happened. The lawsuit brought by the worker was barred by s.28 of the WSIA and the grounds for the third party action no longer existed. Consequently, the worker was entitled to benefits from the insurance plan.

In coming to his conclusion, the Vice-Chair relied notably on the work-relatedness test, which is relatively flexible and involves the examination of a number of factors to determine whether a worker was in the course of employment. The Vice-Chair also looked at the definition of accident in s.2(1)(a) and 26 of the WSIA and relevant Board policy. The Vice-Chair determined the accident did not occur outside the scope of employment by virtue of the nature of the operation in which the worker participated while on the premises of the recycling business. In reviewing all the circumstances, the Vice-Chair also found that the activities of the defendant's employees in which they were

engaged at the time of the accident were part of or incidental to their regular job duties for a Schedule 1 employer.

The worker made a request for reconsideration of the decision. The Vice-Chair considered the evidence and the request was denied.

The worker commenced an application for judicial review. The Tribunal is currently waiting to receive confirmation that it has been added as a party before filing the Record of Proceedings.

Actions 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, it 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, the Health Professions 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 dismiss the action was heard in January 2014. At the end of the quarter, the Tribunal was waiting to receive the decision.

Injured Worker v. WSIAT and WSIB

A worker's appeal for initial entitlement, loss of earnings and health care benefits was denied by the WSIB. The worker appealed to the Tribunal.

For reasons which are not clear, while the Tribunal was processing the appeal, the worker decided to sue the WSIB and the Tribunal for a million dollars. The worker is self- represented.

Following discussions with the worker, it was requested that the action against the Tribunal be dismissed. On March 25th, 2014, the worker's action against the Tribunal was dismissed without costs.

Recent Decisions

When to reduce NEL ratings due to pre-existing conditions or pre-accident impairments

Decision No. 204/14 discusses the impact of a pre-existing condition or a pre-accident impairment on the quantum of a NEL award.

The worker was granted entitlement for a rotator cuff tear and shoulder impingement, for which she underwent surgery. The Board rated the shoulder NEL award at 22%. This was reduced by one half based upon a severe pre-existing condition, resulting in an 11% NEL award. The worker appealed.

The Vice-Chair confirmed the worker's NEL was correctly rated at 22%. The Vice-Chair then reviewed whether the NEL should be reduced. The Vice-Chair found that, under Board policy, a NEL is only reduced if a worker has a pre-accident impairment and not when a worker has a pre-existing condition.

The Vice-Chair concluded that a pre-accident impairment exists where there have been periods of disability, impairment, or illness in the past which have required treatment and disrupted employment. A pre-existing condition alone, being an underlying or asymptomatic condition made manifest, is not sufficient to permit reduction of NEL benefits.

Since the worker had no treatment or work disruption due to the pre-existing degenerative changes prior to the work accident, the appeal was allowed and the worker was entitled to the 22% NEL award without reduction.

Colon cancer, epidemiological evidence and firefighters

In *Decision No. 2574/11*, the worker was a firefighter. Because the worker had reached age 61 prior to the diagnosis of colon cancer, the presumption in s.15.1(4) did not apply pursuant to s.5(1) of WSIA's *O. Reg. 253/07*. The Panel obtained a report from a Tribunal medical assessor. The assessor opined that it was medically possible that the worker's cancer was related to work as a firefighter, but not medically likely. The estate submitted that the enactment of the presumption in *O. Reg. 253/07* was evidence to support a probable causal linkage between colorectal cancer and firefighting exposure. However, the Panel noted that a statutory presumption is not evidence but, rather, a framework for considering evidence. The Panel concluded that firefighting exposure was not a significant contributing factor to the worker's cancer.

Systemic mastocytosis, leukemia and welding

In *Decision No. 1013/12*, the worker was a welder from 1961 to 1975 who was diagnosed with with systemic mastocytosis in 2002 and with chronic myelomonocytic leukemia (CMML) in 2006. He died in 2007. The worker's estate appealed a decision of the ARO denying entitlement.

The Vice-Chair accepted the opinion of a Tribunal medical assessor and found that the worker had systemic mastocytosis. He also had mild monocytosis, but that was a feature of the systemic mastocytosis and not a separate condition. In addition, he had myelofibrosis but that was also associated with the systemic mastocytosis. Although it was initially speculated by the

worker's physicians that he had CMML, the assessor (in reviewing the medical evidence) found he did not have CCML.

There were no known risk factors for systemic mastocytosis. There was no alternative persuasive medical information supporting a relationship to the worker's occupational exposure. The Vice-Chair concluded that the worker did not have entitlement. The appeal was dismissed.

Causation and the benefit of the doubt in entitlement for hepatitis B

In *Decision No. 1968/13*, the worker was an English as a Second Language (ESL) teacher who worked at an ESL day camp on June 18, 2007. She was diagnosed with hepatitis B in October 2007.

The Vice-Chair referred to *Decision No. 1386/03*, which stated that where it is impossible to know with certainty whether an exposure is actually the cause of a worker's illness, the adjudicator must weigh the different possible causes and decide what is more probable than not. It is not essential that the medical or scientific experts opine firmly in favour of a work-related cause. The adjudicator must be satisfied on the balance of probabilities that the workplace exposure is a significant contributing factor. An inference may, in certain cases, support such a conclusion.

Many of the students at the camp were new refugees to Canada, who came from countries where hepatitis B is more common. Of particular importance to the Vice-Chair, in this case, is that a co-worker, who assisted the worker on the day in question, was also diagnosed with hepatitis B in October 2007. The worker and-co-worker did not work together on a daily basis and knew each other only from meetings three or four times per year.

Almost one-third of hepatitis B infections in Canada have no identified risk factors. The worker was not involved in any non-work-related high risk factors that are associated with the onset of hepatitis B. The temporal connection between the work at the camp in June and the onset of symptoms in October was significant, as it was within the documented incubation period.

The evidence was at least equal in weight. Applying the benefit of doubt in favour of the worker, the Vice-Chair concluded that the worker had entitlement for hepatitis B resulting from workplace exposure on June 18, 2007.

WSIAT

April 2014