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

April 1 to June 30, 2014

Production Summary

At the end of the second quarter 2014, the active inventory totaled 8,395 appeals. This is approximately 5% higher than the active inventory at the end of the first quarter 2014.

Incoming Appeals

Incoming appeals for Q2-2014 numbered 1,386; of these, 1,265 were appeals from WSIB decisions, and 121 appellants advised they were ready to proceed to hearing following a period of inactive status. This is an increase of 1% compared to Q1-2014. Comparisons to earlier quarters can be found in Table B.

The weekly average of hearing-ready appellants in Q2-2014 is 88. This figure excludes cases reactivated from inactive status, and is an increase from 2013 of 20%.

Dispositions

Dispositions in the second quarter of 2014 totaled 993. This includes 302 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts, and 691 after-hearing dispositions; of the after-hearing dispositions, 675 followed from Tribunal decisions.

Inactive Inventory

At the end of Q2-2014, the inactive inventory was 2,223 cases. This represents a decrease of 2.3% from Q1-2014.

Decisions Released within 120 Days

For the year to date ending Q2-2014, 84% 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 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 second quarter of 2014, the notice inventory included 1,733 dormant cases, the active inventory totaled 8,395 cases, and the inactive inventory totaled 2,223 cases.

Production Tables and Charts

A. Active Inventory End of Quarter

Period	Active Inventory
Q1-2013	6237
Q2-2013	6676
Q3-2013	6967
Q4-2013	7437
Q1-2014	7971
Q2-2014	8395

B. Incoming Appeals

Period	Incoming Appeals
Q1-2013	1414
Q2-2013	1566
Q3-2013	1406
Q4-2013	1468
Q1-2014	1370
Q2-2014	1386

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	934	304	630
Q2-2014	993	302	691

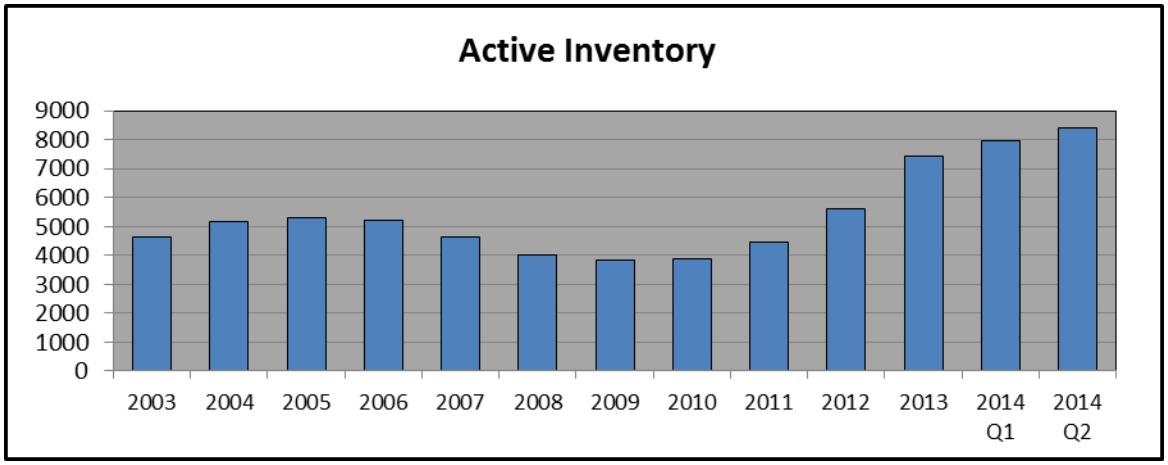
D. Inactive Inventory

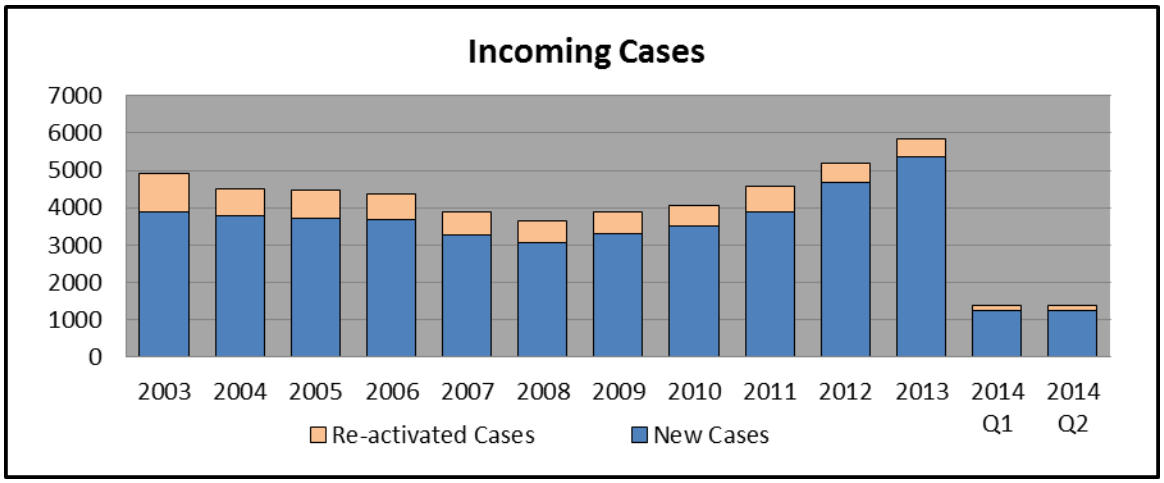
Period	Inactive Inventory
Q1-2013	2474
Q2-2013	2465
Q3-2013	2422
Q4-2013	2343
Q1-2014	2275
Q2-2014	2223

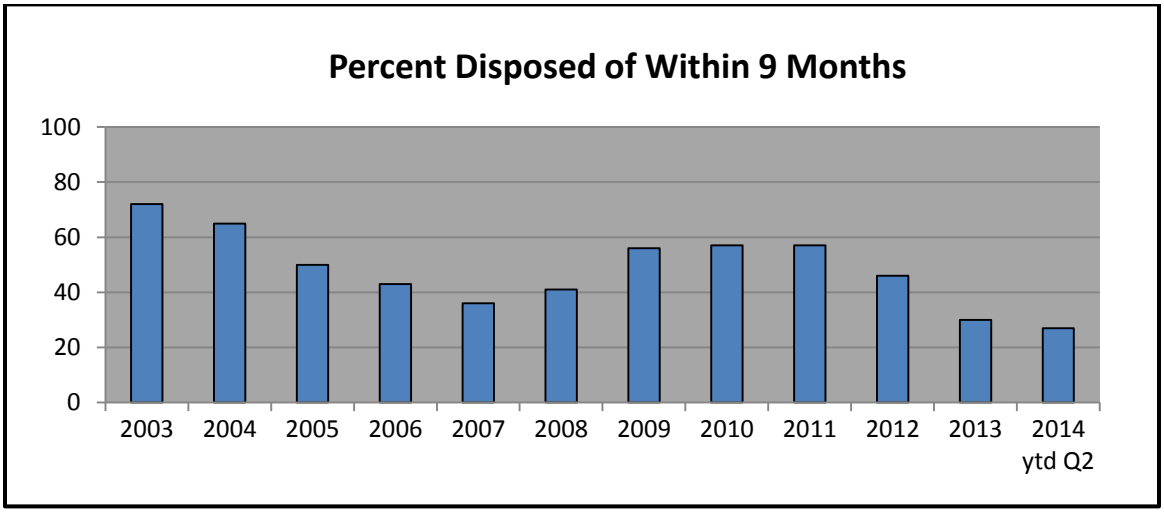
E. Notice of Appeal (Dormant cases)

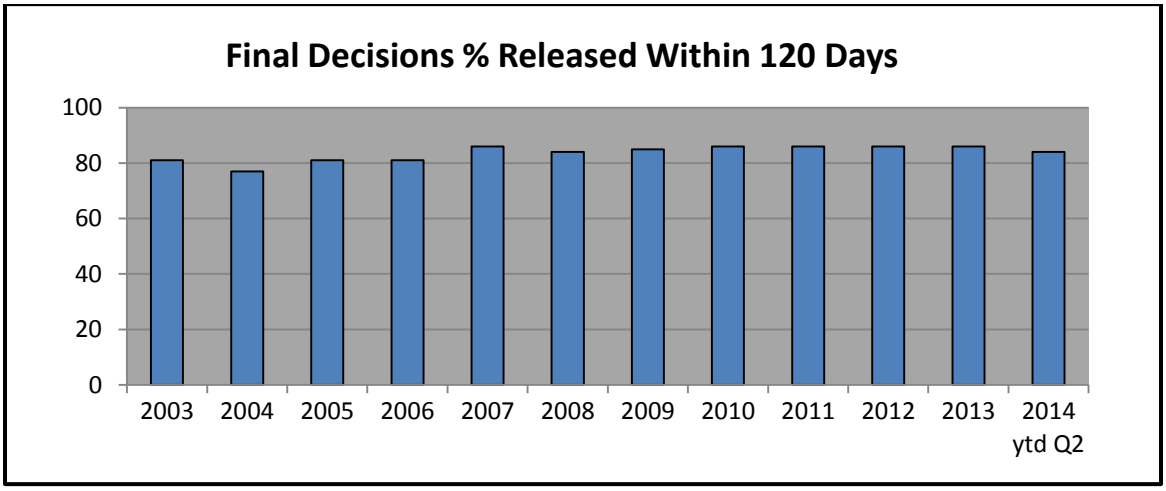
Period	Total Dormant	Change from Previous Quarter
Q1-2013	1479	-116
Q2-2013	1630	151
Q3-2013	1808	178
Q4-2013	1862	54
Q1-2014	1764	-98
Q2-2014	1733	-31

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 ytd Q2


Final Decisions % Released Within 120 Days
100
80
60
40
20
0
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014 ytd Q2

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the second 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. 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 activities, 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 an 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 worker alleged the Tribunal's decision was unreasonable not to find she was an independent operator rather than a worker at the time of the accident, and also unreasonable to find that she was in the course of employment at the time of the accident. The Tribunal and the employer filed responding factums.

Judicial reviews are supposed to be brought within six months of the decision being challenged. Since it took the worker 16 months to bring the judicial review, the company brought a motion to dismiss the judicial review for delay. The Tribunal supported the motion.

The case was heard on April 9 in Ottawa, before Justice Whitten, Justice Thomas and Justice Minnema. After hearing submissions from all parties on the motion and the merits of the judicial review, the Court reserved its decision on both matters. On May 22, the Court released its judgment.

The Court denied the employer's motion to dismiss. The Court felt that the delay was not unreasonable in the circumstances. The Court noted that counsel for the worker had been on maternity leave during that time, the worker had travelled out of the country to see ailing

parents, and the worker herself was diagnosed with cancer. The Court stated that "it cannot be said that the impugned time is of such a magnitude to have caused an unreasonable delay."

The Court then went on to unanimously dismiss the application for judicial review. The Court stated:

> The decision was transparent, clear, and easy to understand, and the outcome, being the finding that the employee was an employee in both roles, is easily defensible in respect of the facts and the law.
>
> …On the second and third issues, again, the decision was transparent, clear and easy to apprehend, and the finding that the appellant was in the course of her employment is easily defensible in respect of the facts and the law. …There is nothing before us to suggest that the decisions of the Tribunal were anything but rational. For these reasons we dismiss the application.

The Tribunal did not seek costs. However, the company sought costs of over $31,000.00. Noting the worker had cancer and was living on $104.00 a week, the Court awarded no costs.

2. *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. On May 29, 2014, the worker's application for leave to appeal was dismissed by the Supreme Court of Canada, per Justices Abella, Rothstein, and Moldaver.

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. Once a decision is made, the worker will decide whether to pursue the judicial review application.

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 earnings 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 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 the Canada 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 filed a new application for judicial review of *Decisions Nos. 512/06* and *512/06R*. At the end of the quarter, the Tribunal was preparing its responding factum. The judicial review is expected to be heard at the end of 2014.

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 prepared a Record of Proceedings, and the worker filed a factum. At the end of the quarter the Tribunal was preparing its responding factum.

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 April 2014, the Tribunal filed its Record of Proceedings. At the end of the quarter, the Tribunal was waiting for the employer to files its factum.

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

An apprentice who worked for an auto repair shop helped his employer deliver a derelict vehicle to a recycling/scrap dealer. This worker steered the vehicle down a public street while being pushed from behind by his employer's vehicle. Once they arrived at the scrap yard, the worker remained in the derelict vehicle while a bobcat pushed it on to a weigh scale. Due to a failure to communicate, when the bobcat pushed the vehicle off the scale it was immediately crushed by a crane while the worker was still inside. The worker suffered serious injuries. The worker commenced an action against the scrap yard, and three employees of the scrap yard. These defendants then commenced a third party action against the worker's employer.

The worker received statutory accident benefits (SABs). The insurance company which provided these benefits, and those of the third parties, applied to the Tribunal under s.31 of the WSIA for a determination of whether the worker's rights of action was taken away. The only issue was whether the worker and the three workers of the scrap yard were in the course of their employment when the accident occurred.

The Vice-Chair found that both the worker and the defendant's employees were in the course of their employment when the accident happened. In coming to his conclusion, the Vice-Chair relied on the definition of accident in the WSIA, Board policy and the "work-relatedness test" which involves the examination of a number of factors to determine whether a worker was in the course of employment.

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

The worker commenced an application for judicial review. At the end of the quarter the Tribunal was completing its responding factum.

8. *Decision No. 2214/13* (March 21, 2014)

In 1967, the worker, then employed as a police officer, suffered injuries to his upper body when he was attacked by a prisoner. He left the police two years later. He then embarked on a career operating garages, working for a truck rental company, and as a millwright. He was involved in a motor vehicle accident in 1973, and suffered a number of work accidents including various low back injuries. The WSIB denied ongoing entitlement for the low back, and initial entitlement for the neck, shoulders and arms. The worker appealed to the Tribunal.

The pre-1985 Act applied to the worker's appeal.

The Panel held the worker did not have ongoing entitlement for the low back or shoulders as a result of the 1967 accident. However, the Panel found the 1967 accident caused a temporary aggravation of a pre-existing back and neck condition.

The worker, who is self-represented, has commenced an application for judicial review. Some initial concerns about service of the application have been resolved. The Tribunal is waiting for the worker to provide the transcript of the Tribunal hearing, following which the Tribunal will file its Record of Proceedings.

9. *Decision No. 1032/08* (June 27, 2012)

The worker, a miner, appealed for initial entitlement for a 1986 injury to his face, additional entitlement for his right shoulder from a 2004 accident and LOE benefits after September 28, 2005.

The Panel allowed initial entitlement for the scar on the worker's face, but as it was not substantial or cosmetically offensive, there was no eligibility for compensation. The Panel denied entitlement for the worker's shoulder condition, as it was not caused by work, and confirmed the termination of LOE benefits as of September 28, 2005.

The worker has commenced an application for judicial review. The worker had counsel at the Tribunal hearing, but is now self-represented. There are some issues with the worker's materials, which have been raised with the worker. At the end of the quarter, the Tribunal was in the process of preparing its Record of Proceedings. The judicial review will be heard in Sudbury.

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 was clear that the worker was suing WSIAT because of that decision.

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

Crown Law Office Civil (CLOC) agreed to represent a number of defendants, including the Tribunal. CLOC brought a motion to dismiss the action, or, in the alternative, to strike out the statement of claim. The motion was heard in January, 2014 and the decision was released on April 24th. The action was dismissed against WSIAT and all the defendants, with the exception that the worker could amend her pleadings as against the Crown.

Decisions Nos. 691/05 (February 11, 2008) and *691/05R* (June 13, 2013)

Following four days of hearing, the Panel allowed this self-represented worker's appeal in part. The worker was granted initial entitlement to benefits for his neck, and for various periods of temporary partial disability benefits. He was denied initial entitlement for an injury to his upper and mid-back; for a permanent impairment for his upper, mid-back and neck; for labour market re-entry (LMR); and for reimbursement of travel expenses. The WSIB's determination of the worker's future economic loss (FEL) and his supplemental employee benefits (SEB) were found to be correct.

In July 2013, the Tribunal and the Board were served with a Notice of Application, issued out of the Superior Court of Justice, asking that *Decisions Nos. 691/05* and *691/05R* be set aside. The

Tribunal wrote to the worker to advise that he had clearly commenced proceedings in the wrong court. If he wanted to challenge the Tribunal's decisions, he was required to bring an application for judicial review in the Divisional Court. The Tribunal further advised the worker that if he did not immediately file a Notice of Abandonment, the Tribunal would bring a motion to dismiss the application.

The worker abandoned his action in August, 2013.

In February 2014, the worker commenced a new action against the WSIB and the Tribunal, this time claiming relief of over six million dollars. Much of the claim contains allegations against the WSIB, but the claim also takes issue with the Tribunal's decisions, alleging errors and bad faith. It alleged the worker had been threatened by one of the Panel members. The worker also served the Tribunal with what appears to be a surreptitious recording.

The Tribunal and the Board are bringing motions to dismiss the worker's action, which will likely be heard in October. The worker has said he will bring a motion before then on an urgent basis, apparently to seek an order granting him interim benefits.

Recent Decisions

Mental stress provisions and the Charter (Equality Rights)

Decision No. 2157/09 (April 29, 2014), found that the mental stress provisions under ss.13(4) and (5) of the WSIA and OPM Document No. 15-03-02, "Traumatic Mental Stress" (the "Policy") to be contrary to the Charter. The effect of ss.13(4) and (5) of the WSIA is that the general definition of accident does not apply to mental stress claims, in that it does not permit mental stress claims by way of a disablement, and sets out additional requirements that the injuring process be traumatic, sudden and unexpected. These provisions and related Policy violated s.15(1) equality rights under the Charter and were not saved under s.1. The further provision in s.13(5) of the WSIA that excludes from entitlement mental stress caused by an employer's decisions or actions was not before the Tribunal in this appeal.

The parties made extensive legal arguments and introduced expert epidemiological evidence on job stress and mental stress. The Panel reviewed authorities regarding s.15 equality claims under the Charter, and in particular Supreme Court decisions, including *Martin* v*. Nova Scotia Workers' Compensation Tribunal*, [2003] 2 S.C.R. 504, and more recent decisions such as *R*. v. *Kapp,* [2008] 2 S.C.R. 483 and *Withler* v. *Canada (A.G.)*, [2011] 1 S.C.R. 396**.** To determine whether the impugned provisions infringe s.15 of the Charter, it must be determined whether ss.13(4) and (5) of the WSIA creates a distinction based upon an enumerated or analogous ground, and whether the distinction is substantively discriminatory in that it perpetuates disadvantage or stereotyping. The Panel found that the appropriate comparator group is workers with physical injuries. The enumerated ground in s.15 of the Charter in this case is mental disability. Sub-sections 13(4) and (5) of the WSIA create a distinction based on that enumerated ground, as the effect of the provisions is to preclude workers with mental stress disabilities from establishing claims for an injury by accident by way of disablement. Workers with acute onset mental disabilities are also limited to a narrow set of circumstances.

The Panel concluded that the impugned provisions were substantively discriminatory as they had the effect of perpetuating prejudice and disadvantage and did not correspond to the actual circumstances and characteristics of the claimant group. They deprive mental stress claimants of the benefits of the historic trade-off of the no-fault workers' compensation scheme and

exacerbate their disadvantage by reducing their options to a tort remedy with increased complexity and costs, the requirement to prove negligence and lack of security of payment.

Experts agreed that epidemiological evidence demonstrated an association between job strain and mental disorders. The Panel found that the strength of association was moderate preferring the evidence of the worker's expert which was more in keeping with other studies and the evidence in this case. While experts disagreed about whether clinicians are able to determine accurately whether a mental disorder is causally related to workplace stressors, the Panel accepted expert evidence that they could and that the temporal sequence of the stressor and mental health effects can be ascertained by careful history-taking from the subject and others. The Panel also noted that there is no "gold standard" for determining work-relatedness for the vast majority of physical injury claims. The Panel noted that mental stress claims at the Tribunal did not generally fit within the parameters of job strain, but rather, often involved some elements of hostile interactions in the workplace or harassment, as in this case. The Charter determination did not turn on the strength of the epidemiology but whether the evidence on work relatedness of mental disorders is distinguishable from physical injury claims such that different treatment is required.

The Panel did not accept that the thin skull principle, which applies to physical injuries, would result in blanket coverage if applied to mental stress claims. Many conditions are multifactorial. In determining causation of mental stress claims, Tribunal cases have considered many factors including whether there is a Diagnostic and Statistical Manual of Mental Disorders (DSM) diagnosis, whether there was a workplace injuring process, whether there are co-existing or prior non-work stressors, whether there is prior psychiatric history that is in the nature of a crumbling skull, whether there is a temporal connection, whether medical professionals have a complete and accurate understanding of the work and non-work factors and whether there are inferences that can be drawn from the worker's employment history.

Since the Tribunal does not have the jurisdiction to make a general declaration, the Panel's ruling only applies to this case. *Decision No. 2157/09I* had previously concluded that the worker's appeal would have succeeded but for ss.13(4) and (5) of the WSIA and the related Policy. Accordingly, the worker was granted initial entitlement for mental stress.

Workplace exposure and prostate cancer

In *Decision No. 364/13* (April 23, 2014), the worker claimed entitlement for prostate cancer arising from his work as a welder from 1971 to 2000. He retired at age 57 and was diagnosed with prostate cancer at age 62.

A Board occupational hygienist reviewed the worker's exposures. In some years, the exposures to cadmium in certain work areas were well below the regulatory limits but in other years, there was the potential for high exposure to cadmium. There were potential exposures in the zinc roaster, copper refinery and copper smelter, along with a suspected high exposure to arsenic.

The Vice-Chair accepted the opinion of a Tribunal medical assessor that it was not likely that the worker's workplace exposures caused his prostate cancer. The assessor's view was that, based on the current state of medical knowledge, none of the worker's exposures are known to cause prostate cancer in humans. The most significant factor that likely played a role in the worker's cancer was his age of 62. The probability of being diagnosed with prostate cancer for men age 60 to 69 is 1 in 15. The assessor's views were based on recent scientific knowledge from 2011 and 2012, while the other evidence was necessarily dated earlier, as early as 1998, 2000 and 2005.

The appeal was dismissed.

Activity and place of injury and entitlement for work accident

Decision No. 906/14 (May 28, 2014) is of interest for its analysis of the criteria of activity and place of injury in determining entitlement. The worker, a nurse, was injured when providing assistance in a patient transfer after her shift ended.

Board OPM Document No. 15-02-02 "Accident in the Course of Employment" (the "Policy") sets out criteria to assist in determining whether an accident is work-related. Time, place and activity are listed as criteria. The importance of the three criteria varies depending on the circumstances of each case and the Policy does not require all three to be satisfied. The worker's activity at the time of the accident is stated to be most important. As in the circumstances of this appeal, if the accident occurs outside the fixed working hours, the criteria of place and activity are applied to determine the accident's work-relatedness.

In this case, the accident occurred on the premises of the worker's workplace and while the worker was engaged in the performance of a work duty (transferring a patient). She had not removed herself from employment by engaging in a personal activity unrelated to work. Even if the worker should have informed the employer before working after 11 p.m., this did not convert the work-related patient transfer into a personal activity. The Policy criteria of activity and place were met.

The accident was work-related. The appeal was allowed.

Kidney cancer and cleaning solvent exposure

In *Decision No. 843/13* (April 9, 2014) the worker's estate claimed entitlement for renal cancer arising out of exposure to trichloroethylene ("TCE").

The Panel found that, from 1976 to 1994, the worker was exposed to TCE when cleaning rollers. It was likely that the cleaning products contained TCE, and that the exposure was an hour a day, five days a week. The Panel found, however, that that the evidence did not show it was probable that the TCE exposure contributed significantly to the onset of the worker's renal cancer. The weight of the medical evidence indicated that, at best, it was possible, but not probable, that the exposure significantly contributed to the renal cancer. In particular, the Panel relied on the report of a Tribunal Medical Assessor who concluded that even with the worker's most likely exposure of 30-50 ppm, the worker would fall into the category of low to medium (defined by the estimated 50 ppm) cumulative daily exposure, the odds ratio remains "low" at 1.34 and "non-significant." The worker's body mass index ("BMI") was at least as likely to have been a casual factor. The worker had two non-occupational risk factors, being male gender and overweight.

The benefit of the doubt did not apply and the appeal was dismissed.

Reliability of audiogram testing and date of accident

In *Decision No. 742/14* (April 23, 2014), the Tribunal considered the worker's claim for an accident date of 1987, not 2008, for noise-induced hearing loss.

The Board determined that the worker was exposed to excessive noise levels during his employment and that he was entitled to a NEL assessment, which was rated at 6% for hearing loss and tinnitus, with an accident date of February 19, 2008, based on testing conducted on that date in a Hospital. The worker objected, claiming that his hearing loss began in 1987, and relying on an audiogram demonstrating hearing loss in 1987.

The worker had four audiograms prior to 2008. In 1987, he had a dB loss of 28.75 and 33.75 in his right and left ear. In 1994, he had a 37.25 and 35 dB loss in the right and left ear. In 2000, he had a 32.5 and 38.75 dB loss in the right and left ear. In 2005, he had 31.25 and 30 dB loss in the right and left ear. While all the audiograms were conducted at the same clinic, they were not reliable. The measurements of hearing loss varied significantly between the tests and suggested a slight improvement in the worker's loss between 1994 and 2000.

By 2008, however, the worker had a 30 and 36.25 dB loss in the right and left ear, based on the Hospital audiogram. Moreover, it was not until 2008 that the worker's audiogram demonstrated hearing loss in higher frequencies which had some association with occupational noise exposure, in addition to hearing loss in the mid to low frequencies.

The Vice-Chair found the correct accident date to be in 2008, based on Board testing which indicated hearing loss in the higher frequencies. The appeal was dismissed.

WSIAT
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