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

July 1 to September 30, 2013

Production Summary

At the end of the third quarter 2013, the active inventory totaled 6,967 appeals. This is approximately 24% higher than the active inventory at year end 2012.

Incoming Appeals

Incoming appeals for Q3-2013 numbered 1,407; of these, 1,281 were appeals from WSIB decisions, and 126 appellants advised they were ready to proceed to hearing following a period of inactive status. This is a total decrease of 10% as compared to Q2-2013. Comparisons to earlier quarters can be found in Table B.

The weekly average of hearing-ready appellants in Q3-2013 is 81. This figure excludes cases reactivated from inactive status, and is an increase from 2012 of 23%.

Dispositions

Dispositions in the third quarter of 2013 totaled 937. This includes 284 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts, and 653 after-hearing dispositions; of the after-hearing dispositions, 637 followed from Tribunal decisions.

Inactive Inventory

At the end of Q3-2013, the inactive inventory was 2,423 cases. This represents a decrease of 4% from year end 2012.

Decisions Released within 120 Days

For the year to date ending Q3-2013, 86% 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 third quarter of 2013, the notice inventory included 1,808 dormant cases, the active inventory totaled 6,967 cases, and the inactive inventory totaled 2,423 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	6236
Q2-2013	6675
Q3-2013	6967

B. Incoming Appeals

Period	Incoming Appeals
Q1-2012	1355
Q2-2012	1298
Q3-2012	1246
Q4-2012	1294
Q1-2013	1413
Q2-2013	1566
Q3-2013	1407

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
Q2-2013	976	283	693
Q3-2013	937	284	653

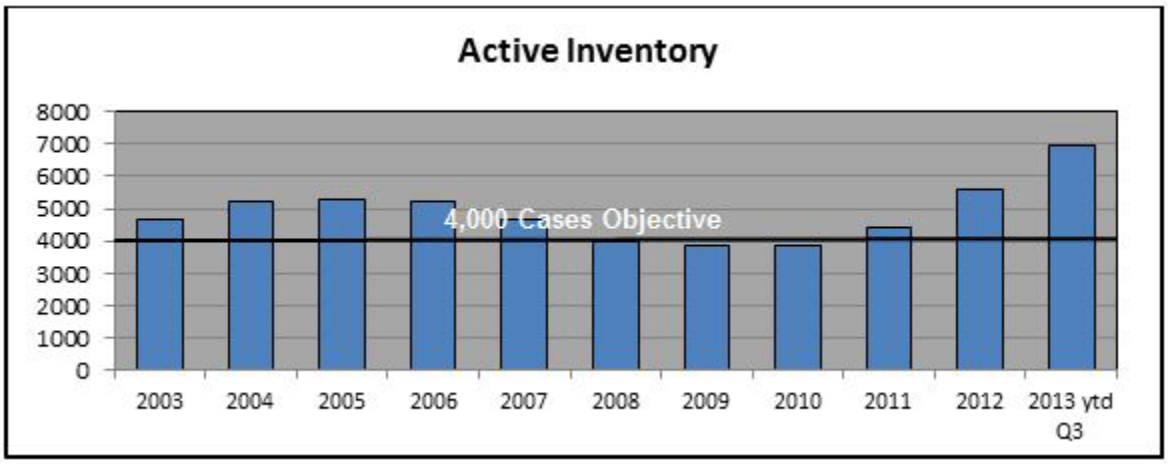
D. Inactive Inventory

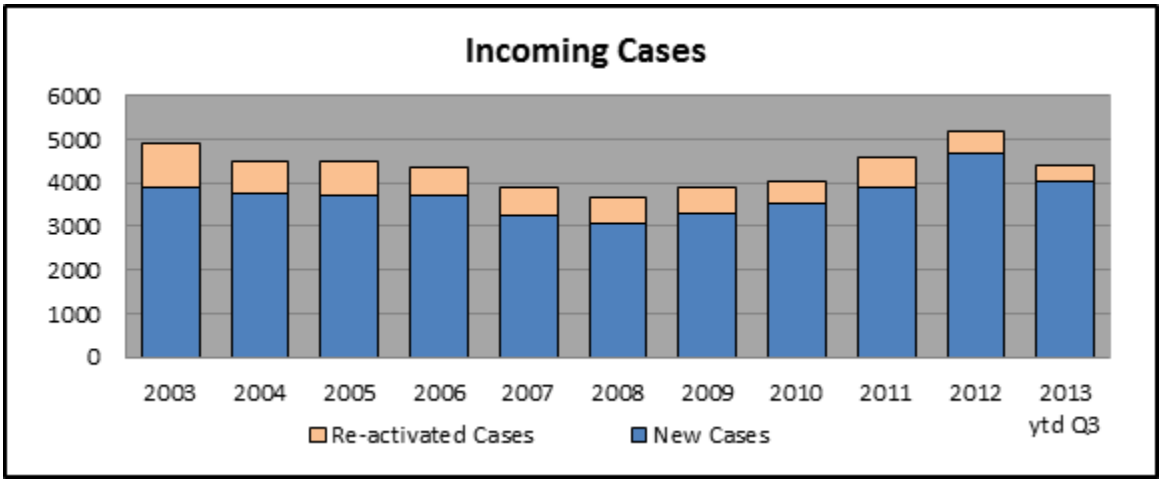
Period	Inactive Inventory
Q1-2012	2569
Q2-2012	2515
Q3-2012	2500
Q4-2012	2519
Q1-2013	2475
Q2-2013	2466
Q3-2013	2423

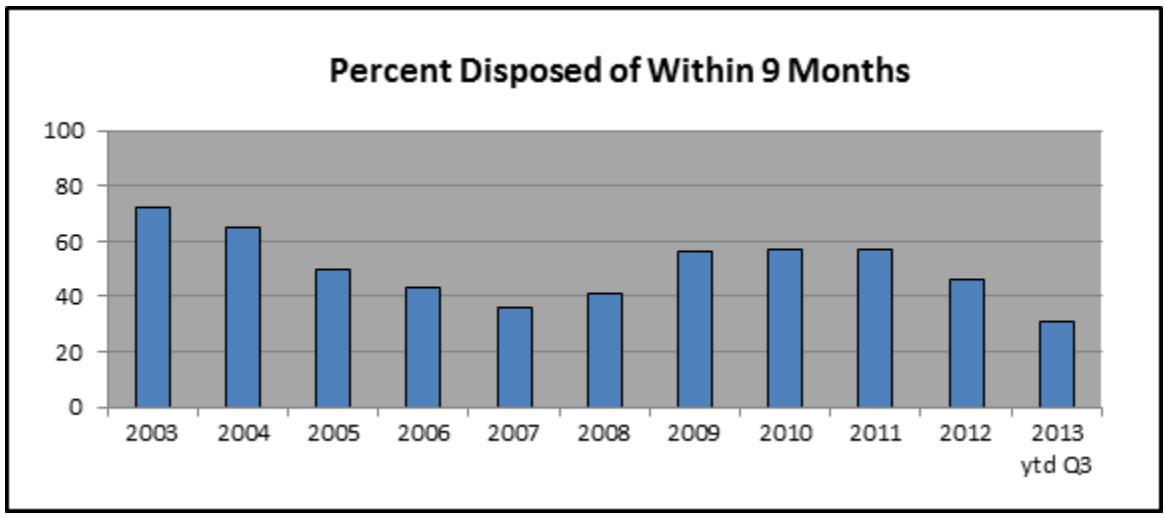
E. Notice of Appeal (Dormant cases)

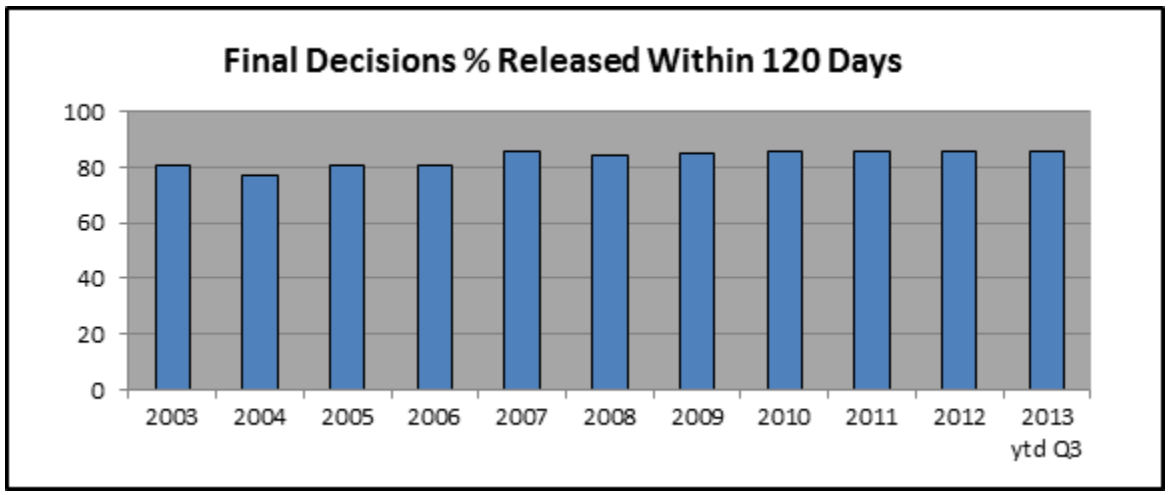
Period	Total Dormant	Change from Previous Quarter
Q1-2012	1433	-44
Q2-2012	1435	2
Q3-2012	1531	96
Q4-2012	1595	64
Q1-2013	1479	-116
Q2-2013	1630	151
Q3-2013	1808	178

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 ytd Q3


Final Decisions % Released Within 120 Days
100
80
60
40
20
0
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013 ytd Q3

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the third 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 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 a Future Economic Loss benefits (FEL) 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.

The worker applied for leave to appeal the Court of Appeal's dismissal of her application for leave to appeal to the Supreme Court of Canada. The Tribunal filed responding materials in June. On August 22, 2013, the worker's application for leave to appeal was dismissed without costs by McLachlin C.J., Abella and Cromwell JJ.

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 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 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 section 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 has sought leave to appeal the Divisional Court's decision to the Ontario Court of Appeal. As of the end of the quarter the worker, still self-represented, had served his factum on the leave to appeal motion and the Tribunal was preparing its factum in response.

3. *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 LOE 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.

The worker filed a motion for leave to appeal to the Court of Appeal. The Tribunal filed a responding factum. At the end of the quarter the Tribunal was awaiting a decision from the Court of Appeal.

4. *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 sometime 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:

- A was not a Schedule I employer;
- Ms. M was not a "worker" as defined by the WSIA; and
- 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 filed a responding factum. Responding factums were then filed by the co-respondents. The judicial review was heard on June 5, 2013 by the Divisional Court Panel of Justices Herman, Molloy, and Harvison Young.

At the hearing of the judicial review, the judges raised the issue of the Tribunal's standing and expressed concern with the Tribunal's factum. The Court was of the view that, in light of the fact that there were co-respondents on the application, the Tribunal ought not to have taken the position in its factum that the Tribunal's decisions were reasonable. Counsel for the Tribunal took the Court through the *Children's Lawyer* decision of the Ontario Court of Appeal on the standing issue. She also submitted that the Tribunal participation was appropriate in light of the complexity of the issues before the Court and the Tribunal's expertise, and the fact that the participation of the co-respondents was speculative at the time the Tribunal prepared its factum.

On July 19, 2013, in a lengthy decision, the Divisional Court unanimously dismissed the judicial review. The Court found the Tribunal's reasons were "justified, transparent and intelligible, and its conclusions fall well within the range of possible outcomes." The Court did not address the *Children's Lawyer* decision or the fact that no other respondent had filed a factum at the time the Tribunal had filed its factum, though it did note a concern about the Tribunal standing issue in this case.

5. *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, s.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 who 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. The Applicant filed its factum. The Tribunal served its factum on June 28, 2013. The judicial review is scheduled to be heard in December 2013.

6. *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, a bus struck her car, causing injuries. K sued the bus company and the bus driver for damages. The bus company applied to the Tribunal for a determination 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 bus driver and bus company was taken away.

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

The worker has commenced an application for judicial review. The Tribunal has filed an appearance.

7. *Decision No. 2432/11* (January 3, 2013)

The worker was injured in his employer's parking lot. He sued the other worker who was involved in the accident. The defendant brought a right to sue application for a finding that the worker's right of action was taken away by the WSIA.

In *Decision No. 2432/11*, the Tribunal found that the worker was a worker in the course of employment at the time of the accident, and so his right of action was taken away by the WSIA.

The worker then made a claim to the Board for benefits, and provided a copy of the Tribunal decision to the Board. Based on the Board's parking lots policy, the Board Adjudicator found that the worker was not in the course of employment at the time of the accident, and denied the claim for benefits.

The worker then commenced an application for judicial review of the Tribunal's *Decision No. 2432/11*. He argued that the contradictory decisions of the Tribunal and the Board had left him with no right to sue in tort, and no right to receive benefits under the WSIA.

The Board agreed to take another look at its decision. The worker's lawyer agreed that the respondents did not have to file responding materials on the judicial review application unless, and until, the worker notified the respondents that it would proceed with the judicial review.

The Board then reversed its decision and granted entitlement to benefits. The Tribunal asked the worker to abandon the judicial review as against the Tribunal. The worker abandoned the judicial review as against the Tribunal and all other respondents, except for the Board. The worker is seeking over $10,000 in costs of the judicial review application from the Board on the basis that it was the Board's actions that made the judicial review application necessary.

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

The worker appealed a number of issues to the Tribunal. His appeal was allowed in part, granting him initial entitlement to a neck injury and LOE benefits for periods in 1998, 1999 and 2000. However, he was denied entitlement for other issues, including a back injury, suitability of his Self-Employment Benefit (SEB), an Labour Market Re-entry (LMR) reassessment, a FEL supplement, and an increase in Non-Economic Loss (NEL) award.

Several years later, the worker commenced a reconsideration application, alleging improper conduct by two of the Tribunal Panel members assigned to his appeal. A different Vice-Chair found no evidence to support the allegation against the original Panel members. The worker's application to reconsider the appeal regarding the suitability of his SEB was also denied.

In July 2013, the worker commenced an action in Superior Court asking to set aside *Decisions Nos. 691/05* and *691/05R*. Since it was clear the worker was really seeking to judicially review these decisions, his action had been commenced in the wrong court. The Tribunal agreed to allow the worker to abandon his action without costs.

There was some suggestion that the worker was planning on commencing another action against the Tribunal, which would also be improper. However, at the end of the quarter the Tribunal had not been served with any additional pleadings.

9. *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 third quarter the worker was still pursuing the disablement issue at the Board.

10. *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 on-going 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 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 on-going impairment. The Panel held the worker had on-going 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 on-going 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 the 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.

11. *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 LMR assessment to identify an appropriate 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 a 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.

In March 2013, the Applicant commenced a further request for reconsideration. At the end of the third quarter the reconsideration had been assigned to a Tribunal Vice-Chair.

12. *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 claimant 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 was assigned to hear the reconsideration. At the end of the quarter a reconsideration decision was pending.

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

Strikes, picket lines and entitlement to LOE

Decision No.1118/12 is particularly useful as it discusses the interpretation of Board work disruption policies and the WSIA, and Tribunal and court case law, where a worker sought LOE during a long strike. The worker had a NEL for his compensable injuries, but was not receiving LOE prior to the strike. The employer argued that it offered suitable modified work but that the worker chose not to cross the picket line.

OPM Document No. 15-06-05 entitled "Entitlement Following Work Disruptions: Strikes and Lockouts" provides that a worker who is unable to continue working due to a work disruption, and whose employability is affected by his work-related impairment as determined by the factors in the policy, may receive benefits including LOE. The general rule is that during a strike, the worker's benefit status is maintained, unless the worker's employability is clearly affected by the work-related impairment.

The Panel held that s.43 of the WSIA operates in conjunction with the policy. The policy contemplates the condition precedent in s.43, i.e., the loss of earnings must arise from the injury. To satisfy the criteria in both the policy and the Act there must be a determination of whether there was suitable modified work that was available to the worker during the strike.

The Panel received submissions canvassing case law on the role of picketing in labour disputes and possible repercussions against strike breakers. The Panel accepted that the phrase "unable to continue working due to a strike or lockout" in the policy could include a situation where the employer offered the worker suitable and available work but the worker chose not to cross his union's picket line during a lawful strike. The worker's inability to continue working would be the result of his personal choice not to cross the picket line.

The phrase "unable to continue working due to a strike" also included a situation where the suitable job is not "available" to the worker because he cannot cross the picket line due to potential repercussions or penalties that can occur in a lawful strike or due to safety concerns. In those cases, Board policy would require an analysis as to whether the worker's employability was affected by the work impairment, prior to eligibility for benefits.

The evidence established on a balance of probabilities that the modified job offered was suitable and available to the worker during the strike, and that the worker's concerns about his safety if he crossed the picket line were not genuine in the circumstances. The worker therefore made a personal choice not to cross the picket line in order to preserve union solidarity. The worker's LOE was not due to the work injury as he could have found alternate work in the general labour market and the employer offered suitable modified work which the worker chose not to take as he wanted to participate in the strike.

Charter challenges in mental stress cases

There were two mental stress decisions in this quarter containing Charter issues. In *Decision No. 1159/12I* the worker sought entitlement under the Board's traumatic mental stress policy on the basis that she was sexually harassed and assaulted. The majority of the Panel found that the assault and harassment did not occur and denied her appeal. It appears that the worker may pursue a *Charter* challenge with respect to ss.13(4) and (5) of the WSIA.

Decision No. 480/11I3 also involves an on-going mental stress appeal. The decision found that the worker's appeal for benefits for traumatic mental stress was barred by the WSIA s.13 even if the worker experienced an acute reaction to a sudden and unexpected traumatic event, because the employer's actions were within the management function. The worker had previously indicated that, in this event, he wished to raise a *Charter* challenge to s.13 and Charter values arguments about the "average worker" test. The decision deferred the *Charter* challenge with respect to s.13 and Board policy but asked for submissions on whether the worker suffered a disablement under the WSIA, including submissions on Charter values or the *Ontario Human Rights Code* (OHRC) with respect to the "average worker" test. The Panel noted the parties may wish to make submissions on recently issued *Decision No. 665/10I2* which considered and commented on the "average worker" test.

Charter challenge on basis of age

Decision No. 273/10I involves a challenge to the WSIA sections 43(1)(c) and 45(1) which impose age limitations on LOE and Loss of Retirement Income (LRI) benefits respectively. Section 43(1)(c) provides that for workers who are 63 years of age or older on the date of injury,

LOE is payable from the time the loss of earnings due to the injury begins until two years after the date of injury. Section 45(1), concerning payments for LRI, states that it does not apply with respect to a worker who was 64 years of age or older on the date of the injury.

In *Decision No. 273/10I*, the worker was injured when he was 65 years old. The Panel concluded that he would have continued working past the age of 67 but for his compensable injury and, accordingly, had an on-going loss of earnings when the Board terminated his benefits under section 43(1)(c). But for the worker's age, he would also have met the requirements for LRI benefits in s.45. The appeal is adjourned to consider the worker's constitutional question.

Decision No. 273/10I appears to be the first time that s.45(1) has been challenged. Note that a Charter challenge to s.43(1)(c) was previously rejected by the majority in *Decision No. 512/06*. A reconsideration request with respect to *Decision No. 512/06* is pending. A Charter challenge to s.43(1)(c) has also been raised in *Decision No. 1357/07I2* but is deferred pending the outcome on the merits.

Interest on delayed contributions to loss of retirement income

Decision No. 943/13 raises the somewhat novel issue of whether there is entitlement to interest when paying *into* the WSIB system towards LRI.

Under s.45(2) of the WSIA the Board sets aside 5% of LOE payments for LRI to be paid at age 65. Under s.45(3) a worker can elect to contribute an additional 5% of LOE payments into the LRI system. In this case, the worker indicated that he had sent a form to the Board in August 2000 electing to do so. The Board indicated that they had not received this form and did not know the worker wanted the extra 5% set aside until August 2003, when they began setting it aside. The worker was not asking the Board to make the additional 5% contribution for the period between 2000 and 2003. Rather, the worker wished to have the Board pay the interest which would have accrued on that money had these extra contributions been made as anticipated.

The Vice-Chair reviewed the Board's interest policy and found that while the Board will pay interest on delayed LRI *payments,* the policy does not permit interest payments on delayed *contributions*. The Vice-Chair also cited earlier case law that held that there is no authority under statute or Board policy to pay for a lost opportunity.

Decision No. 943/91 is also of interest for its analysis of sleep apnea as a secondary condition.

Entitlement for a fall in plaza parking lot

When a worker falls in a parking lot that is on the employer's premises, Tribunal case law has held that the worker is in the course of employment and entitled to compensation for injuries suffered. *Decision No. 661/13* addresses entitlement where the worker fell in a parking lot not owned by the employer. This decision contains a useful discussion of the interpretation of Board policies applicable to a fall in a plaza parking lot by a worker who was regularly required to travel to work in different locations.

On the day in question, the worker reported to her usual store, and was then assigned to another. Later, her supervisor instructed her to return to her regular location and offered her a ride in the company vehicle driven by a co-worker. The driver parked in the plaza parking lot by a door that was used exclusively by employees and not by the public. The worker fell and

injured her back outside the door when she left the company vehicle. When she entered the store, she was told she was not needed and she went home. The employer argued that the accident was not work related as she fell in a plaza parking lot after work.

The worker was found to have initial entitlement for her injury. While a consideration of whether the employer owned or controlled the premises where the worker fell was relevant, it was not determinative of whether the worker was in the course of employment in a situation where the worker was required to travel as part of her work. The worker was engaged in an activity reasonably incidental to her employment as the conditions of her employment required her to travel from her usual work location, there was no direct departure on a personal errand, and she was travelling to her regular location under the supervision and control of the employer. Even if the employer did not have formal control over the area where she fell, the area was allocated for exclusive use by employees, and not by the general public.

WSIAT
October 2013