Workplace Safety and Insurance Appeals Tribunal

505 University Avenue 7th Floor
Toronto ON M5G 2P2
Tel: (416) 314-8800
Fax: (416) 326-5164
TTY: (416) 212-7035
Toll-free within Ontario:
1-888-618-8846

Web Site: www.wsiat.on.ca

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

505, avenue University, 7e étage
Toronto ON M5G 2P2
Tél. : (416) 314-8800
Téléc. : (416) 326-5164
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Quarterly Production and Activity Report

July 1 to September 30, 2015

Production Summary

At the end of the third quarter 2015, the active inventory totaled 9,405 appeals. This is approximately 1 % higher than the active inventory at the end of the second quarter in 2015.

Incoming Appeals

Incoming appeals for Q3-2015 numbered 1,026; of these, 914 were appeals from WSIB decisions, and 112 appellants advised they were ready to proceed to hearing following a period of inactive status. In 2014, incoming appeals averaged 1,269 per quarter

The weekly average of hearing-ready appellants in Q3-2015 is 72. This figure excludes cases reactivated from the Inactive status. In 2014, the weekly average of hearing-ready appellants was 87, excluding reactivations.

Dispositions

Dispositions in the third quarter of 2015 totaled 1,045. This includes 332 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts, and 713 after-hearing dispositions; of the after-hearing dispositions, 698 followed from Tribunal decisions.

Inactive Inventory

At the end of Q3-2015, the inactive inventory was 1,798 cases. This is a decrease of approximately 5% from the inactive inventory at the end of Q2-2015.

Decisions Released within 120 Days

For the year to date ending Q3-2015, 92% 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 2015, the notice inventory included 1,410 dormant cases, the active inventory totaled 9,405 cases, and the inactive inventory totaled 1,798 cases.

Production Tables and Charts

A. Active Inventory End of Quarter

Period	Active Inventory
Q1-2014	7971
Q2-2014	8395
Q3-2014	8667
Q4-2014	8835
Q1-2015	9087
Q2-2015	9310
Q3-2015	9405

B. Incoming Appeals

Period	Incoming Appeals
Q1-2014	1369
Q2-2014	1386
Q3-2014	1214
Q4-2014	1107
Q1-2015	1158
Q2-2015	1149
Q3-2015	1026

C. Dispositions

Period	Dispositions – Total	Pre-hearing	After Hearing
Q1-2014	934	305	629
Q2-2014	993	302	691
Q3-2014	895	269	626
Q4-2014	980	313	667
Q1-2015	1001	332	669
Q2-2015	1046	331	715
Q3-2015	1045	332	713

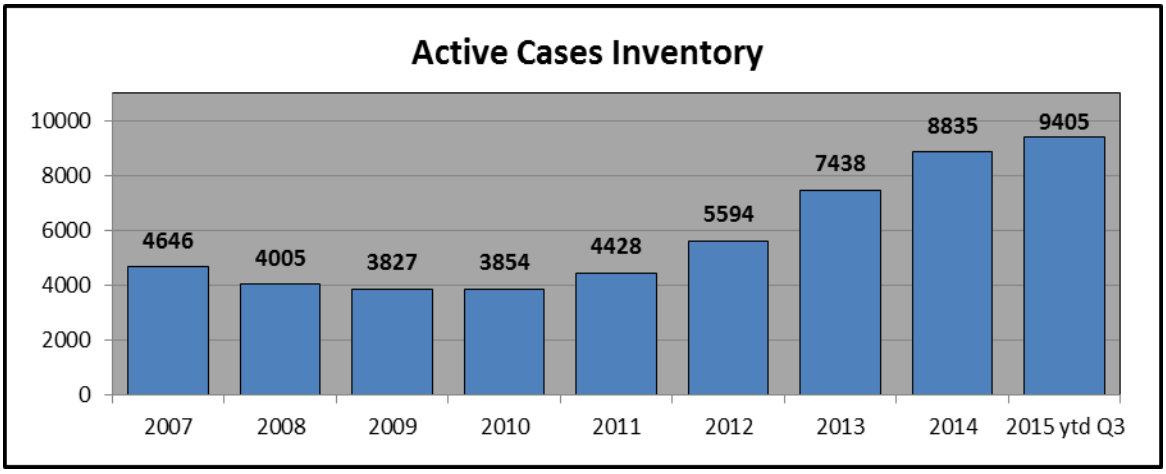
D. Inactive Inventory

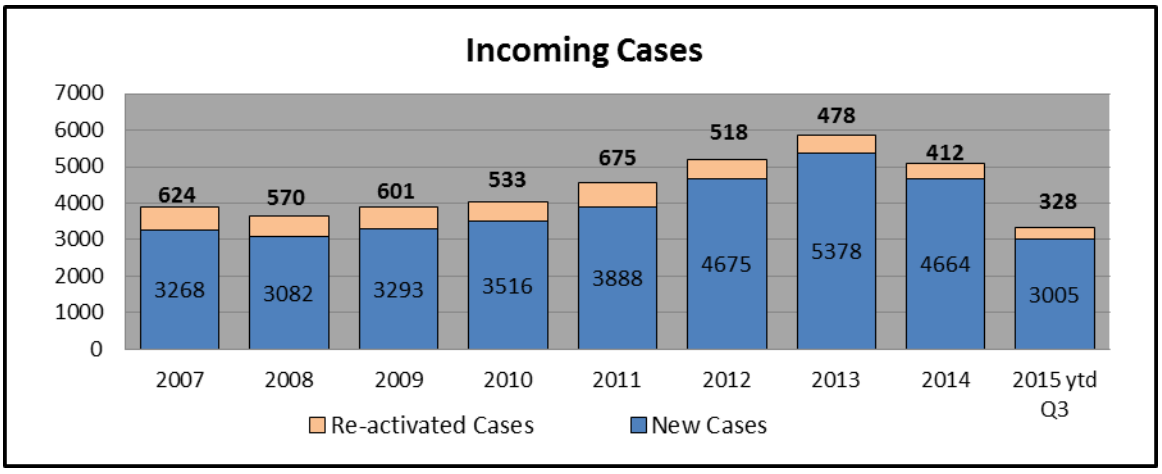
Period	Inactive Inventory
Q1-2014	2272
Q2-2014	2220
Q3-2014	2148
Q4-2014	2091
Q1-2015	2006
Q2-2015	1890
Q3-2015	1798

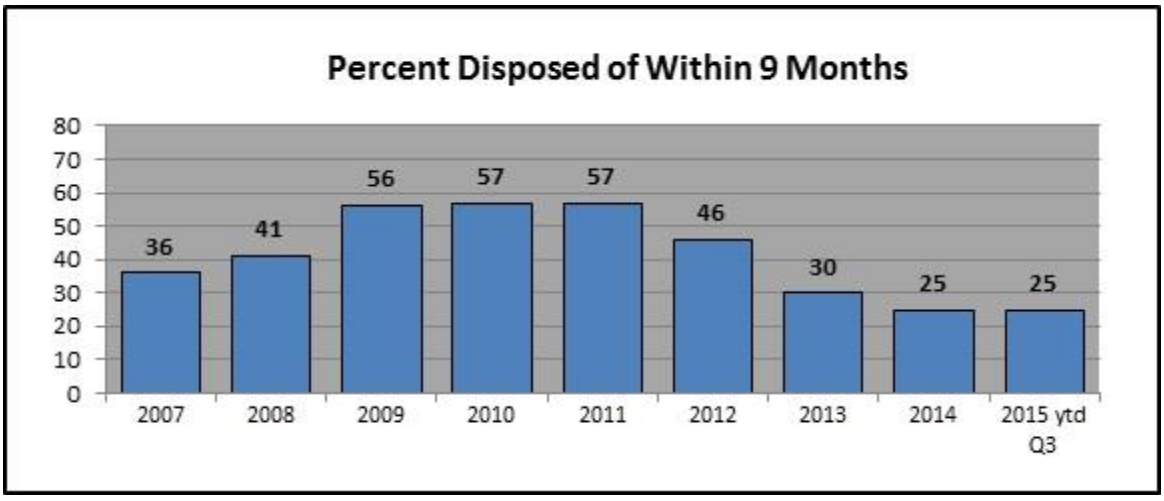
E. Notice of Appeal (Dormant cases)

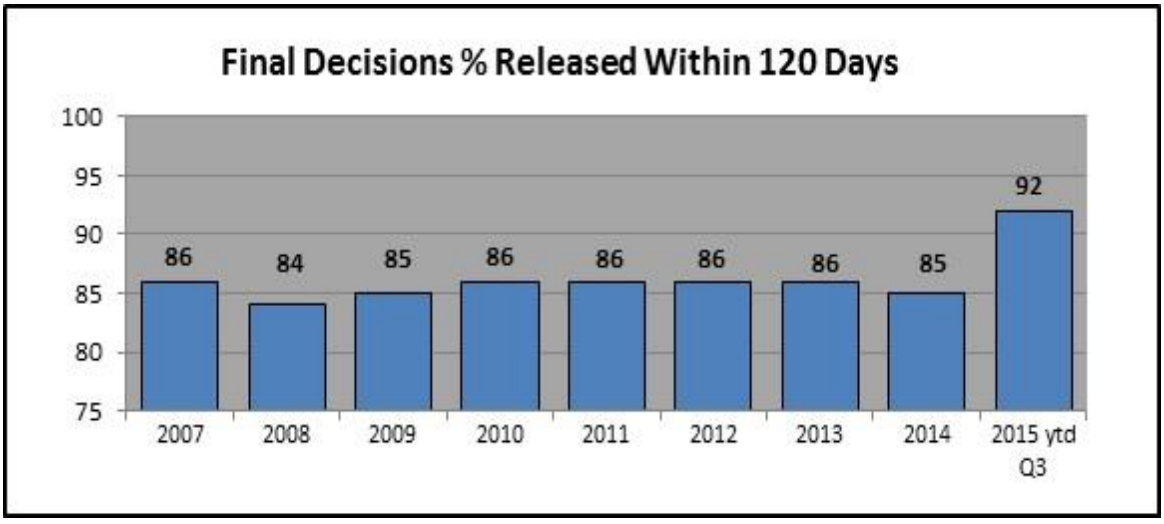
Period	Total Dormant	Change from Previous Quarter
Q1-2014	1764	-98
Q2-2014	1733	-31
Q3-2014	1780	47
Q4-2014	1739	-41
Q1-2015	1644	-95
Q2-2015	1524	-120
Q3-2015	1410	-114

F. Production Charts: From 2007 to 2015 year to date ending Q3






Percent Disposed of Within 9 Months
80
70
60
50
40
30
20
10
0
36
41
56
57
57
46
30
25
25
2007
2008
2009
2010
2011
2012
2013
2014
2015 ytd Q3


Final Decisions % Released Within 120 Days
100
95
90
85
80
75
86
84
85
86
86
86
86
85
92
2007
2008
2009
2010
2011
2012
2013
2014
2015 ytd Q3

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the second quarter of 2015 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. 959/13* (June 13, 2013) and *959/13R* (October 31, 2013)

The worker's appeal for entitlement for non-economic loss (NEL) benefits 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.

The worker's application for reconsideration was denied. In the reconsideration decision, the same Vice-Chair clarified that there had been no ruling on the worker's potential psychological entitlement, so there was nothing that would preclude the worker from pursuing entitlement at the WSIB pursuant to the Chronic Pain or Psychotraumatic policies.

In December 2013, the worker commenced an application for judicial review. Counsel for the worker and the Tribunal agreed the judicial review would not proceed until the worker had obtained a ruling on psychological/chronic pain entitlement. The WSIB denied the worker's appeal on these issues, so the worker has now appealed to the Tribunal. A hearing has been scheduled. Following the Tribunal's decision on these new issues, the worker will either abandon the judicial review, or request that the judicial review proceed on all issues.

2. *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. The insurance company which provided these benefits, as well as 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 on the balance of probabilities that both the worker and the Defendant's employees were in the course of their employment when the accident happened. The lawsuit brought by the worker was barred by s.28 of the *WSIA,* and the grounds for the third party action no longer existed. Consequently, the worker was entitled to benefits from the insurance plan.

The worker commenced an application for judicial review. Following the Tribunal's request for the worker to amend his proceedings to add the Tribunal as a party, the Tribunal filed its Record of Proceedings, as well as a responding factum. The judicial review was heard on April 15, 2015. The Tribunal is awaiting the release of the Court's decision.

3. *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 force 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.

Due to the date of the 1967 accident, 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.

In May 2014, the worker, who is self-represented, commenced an application for judicial review. In June 2014, the worker asked the Tribunal to postpone its activities related to the judicial review application so that he could receive legal direction from the OWA regarding his application. In January 2015, the worker informed the Tribunal that he wished to move forward with his application. The Tribunal filed its Record of Proceedings in early March 2015 and is waiting to receive the worker's factum.

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

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

The worker commenced an application for judicial review. The worker filed an affidavit with his factum, which the Tribunal objected to. 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

returned to the WSIB for a decision on whether there was entitlement on the basis of "disablement."

The WSIB denied entitlement for disablement. The worker appealed this issue to the Tribunal. It was heard on November 13, 2014. *Decision No. 2066/14*, released on January 6, 2015, allowed the worker's appeal in part granting initial entitlement for benefits for a bilateral knee condition. The worker's legal counsel has advised that his client is satisfied with the ruling of the Tribunal, and therefore the judicial review has been abandoned.

5. *Decisions Nos. 1769/11* (November 17, 2011) and *1769/11R* (March 14, 2013)

The worker was employed in two jobs, one in construction and one in a night club. He was injured on the construction job. He was initially granted WSIB benefits calculated on the short-term basis of his earnings from his concurrent employment with both employers.

The worker had an inconsistent employment history. When his long-term benefits were calculated, the benefits were based on a finding that the night club job was only short-term. The worker appealed, alleging that his long-term average earnings should be the same as his short-term earnings.

The appeal was denied. The Panel examined the worker's employment history, as well as the two concurrent jobs. It found the worker's employment pattern demonstrated short-term, non-permanent employment, which included both the worker's concurrent jobs. Board policy established that it was not fair to calculate long-term earnings on the basis of non-permanent jobs. The Panel agreed with the Board that the long term earnings should be calculated on the basis of average earnings from all concurrent employment during the recalculation period.

The worker's application for reconsideration was dismissed by a different Vice-Chair.

In November 2014, the worker commenced an application for judicial review. It is not clear why there was a delay of almost three years in commencing the judicial review application. The Tribunal filed its Record of Proceedings in February 2015 and is waiting to receive the worker's factum.

6. *Decision No. 398/14* (March 11, 2014)

B was a passenger in a car driven by P, his co-worker. B was injured when P's car went off the road. B applied for, and received statutory accident benefits. The insurer of the driver of the car applied to WSIAT for an order that B's right of action was taken away.

Both B and P had been hired to work on a construction project at a cottage in a rural area. They were staying at a nearby motel, which was booked and paid for by their employer. P was paid some monies for mileage by the employer for the use of his car. Both B and P were given a per diem for food and other expenses while working remotely. While working at the cottage, they drove to a restaurant, located in the town closest to their worksite, for their lunch break. The accident occurred after lunch, on the way back to the worksite. The main issue was whether B and P were in the course of employment at the time of accident.

The Vice-Chair characterized the issue as whether B was involved in an activity that was reasonably incidental to employment at the time of the accident. He reviewed Board policy, and noted that although the general rule was that a person is not in the course of employment after leaving the worksite, there was an exception for workers travelling on their employer's business and who must stay overnight at a motel paid for by their employer.

Further, although a worker is often not in the course of employment during a lunch break, Tribunal decisions have taken a broader approach to what is reasonably incidental when travelling workers are staying overnight at accommodations paid for by their employer. Lunch breaks in this situation have been viewed to be reasonably incidental to employment.

The Vice-Chair noted that a worker can still take themselves out of the course of employment if he or she was engaged in a personal activity at the time of the accident that was not connected to his employment. The Vice-Chair found that in this case there was no personal activity other than going to lunch. The workers had eaten at the closest and only restaurant in the area. After lunch, the two workers proceeded directly back towards the worksite.

The Vice-Chair found that B's right of action was taken away.

In September 2014, B commenced an application for judicial review. Following a dispute about whether all the appropriate parties were named in the style of cause, the Notice of Application has been formally amended and the Tribunal has now filed an Amended Notice of Appearance, as well as its factum. Pursuant to an agreement between the parties, the Tribunal has not filed a Record of Proceedings.

7. *Decision No. 797/14* (July 31, 2014)

The worker sustained a compensable injury to his low back in September 1986. In October 1988, the worker was awarded a 10% permanent disability pension (PD). In October 2005, the worker was re-assessed for his PD. In June 2006, the worker's PD award was increased from 10% to 15% between October 1988 and August 2001 and to 20% as of August 2001. The 20% PD award was upheld in a January 2013 decision of an Appeals Resolution Officer. The worker appealed this decision to the Tribunal. After a written hearing, the Vice-Chair denied the worker's appeal in a July 2014 decision.

In March 2015, the worker commenced an application for judicial review. The Tribunal has filed its Record of Proceedings and has received the worker's factum. The Tribunal is currently in discussions with the worker's legal representative, and with the agreement of the worker, the Tribunal has not yet filed its factum.

8. *Decisions Nos. 2185/13* (November 26, 2013) and *2185/13R* (November 10, 2014)

Defendants in a civil action initiated a right to sue application relating to a motor vehicle accident. The Defendants asked the Tribunal to determine that the Plaintiff's right of action had been taken away. It was determined that the Defendants were Schedule 1 employers at the time of the accident and the Plaintiff was a worker of a Schedule 1 employer and in the course of her employment at the time of the accident. Therefore, it was determined that the Plaintiff's right of action was taken away.

Neither the Plaintiff nor the Plaintiff's legal representative appeared at the Tribunal hearing. The Plaintiff's legal representative had also not confirmed that he was planning on attending the right to sue hearing, nor had he filed any responding materials. A week after the hearing, the representative informed the Tribunal that he had arrived late to the hearing and that the hearing had already concluded. The representative filed a reconsideration request alleging that there had been a fundamental error of procedure by proceeding with the hearing in his absence.

The application to reconsider was denied. The hearing was scheduled to start at 9 am. The recording of the hearing indicated that it commenced at 9:15 am, 15 minutes after the scheduled time. At 9:20 am, the Vice-Chair noted that the Plaintiff and her representative were still not present, and decided to proceed with the hearing. The hearing concluded at 9:46 am. On reconsideration, the Vice-Chair concluded that the use of the word "shall" in the Tribunal's Practice Direction regarding *Right to Sue Applications* unequivocally indicates that a Respondent must file materials. As the Respondent in this case had not filed materials, the Tribunal's Practice Direction on *Notice of Hearing and Failure to Attend* did not apply, and neither did the requirement to wait 30 minutes as the Plaintiff had not given any indication that she wished to participate in the hearing. Accordingly, it was determined that there was no error of process.

The Tribunal received notice of a judicial review application in February 2015 and filed a Notice of Appearance. Following the exchange of materials, discussions took place between the Plaintiff and the Defendant to the civil claim. In June 2015, the application for judicial review was abandoned.

9. *Decisions Nos. 645/11* (June 14, 2012) and *645/11R* (March 23, 2015)

Decision No. 645/11 granted the worker LOE benefits after mid-July 2004, as well as entitlement to benefits for a psychotraumatic disability.

The WSIB paid the worker full LOE benefits until October 2006 and then partial LOE benefits until the worker reached age 65 in 2012. The worker initiated a judicial review application seeking a writ of *mandamus* to compel the WSIB to implement *Decision No. 645/11* fully by granting her full LOE benefits to age 65. The Tribunal was not named as a party in the original judicial review application.

The WSIB subsequently sought clarification from the Tribunal regarding *Decision No. 645/11* regarding the duration of the allowance of full LOE benefits.

In *Decision No. 645/11R*, the Vice-Chair considered whether the request for clarification should proceed or whether the clarification request should be put on hold until the worker's court application had resolved. The Vice-Chair determined that the request for clarification should proceed without waiting for the resolution of the court proceeding. The Vice-Chair noted that proceeding with the request was the quickest and most efficient way of resolving the apparent dispute as to the intent of *Decision No. 645/11* regarding ongoing LOE benefits. Further, the Tribunal was in the best position to understand the nature of the dispute and to provide clarification, which could help avoid unnecessary litigation.

The Vice-Chair clarified *Decision No. 645/11* by stating that the decision did not grant the worker full LOE benefits to age 65. Instead, the decision granted full LOE benefits to

the worker after mid-July 2004, with the duration of those benefits being left to be determined by the WSIB and the worker having all usual rights of appeal.

In June 2015, the Tribunal was served with an amended Application for judicial review that now named the Tribunal as an additional Respondent. The Tribunal has filed its Record of Proceedings. Following discussions between the Tribunal and the worker's representative, the worker has agreed to put the judicial review on hold in order to explore appeal options at the WSIB pertaining to the implementation of *Decision No. 645/11*.

10. *Decisions Nos. 493/13* (April 29, 2013) and *493/13R* (December 16, 2014)

In *Decision No. 1309/01*, the worker had been granted entitlement to s.147(4) supplementary benefits under the *pre-1997 Act*. The worker then appealed a decision of the WSIB regarding the calculation of the supplement.

In *Decision No. 1387/07*, the Tribunal upheld the decision of the WSIB and determined that the amount of benefits owing under s.147(4) is subject to subsections (8), (9) and (10). Therefore, it was determined that the WSIB had correctly based the supplement on the maximum payable pursuant to s. 147(8). The worker's subsequent request for reconsideration of *Decision No. 1387/07* was denied in *Decision No. 1387/07R*. The worker then applied for judicial review of *Decision Nos. 1387/07* and *1387/07R*. At the same time, judicial review of *Decision No. 1858/08* was also initiated, which was a decision concerning an identical issue. The Divisional Court dismissed both applications.

In *Decision No. 493/13*, the worker appealed a WSIB decision concerning whether supplementary benefits had been correctly calculated at the 24 and 60 months reviews. In the decision, the Vice-Chair referred to the Divisional Court's decision in *Rustum Estate v. Ontario (Workplace Safety and Insurance Appeals Tribunal)* (which was the judicial review decision of *Decision No. 1858/08*) as well as the Tribunal's *Decision No. 941/94*. The Vice-Chair concluded that the intent of s. 147(4) was not to provide income replacement, but instead to provide workers who were either unemployable or unable to benefit from vocational rehabilitation services with an additional amount. This additional amount would be calculated according to subsection (9) or (10), and would not exceed the Old Age Security cap pursuant to subsection (8).

The Vice-Chair noted that subsection (13) is a supplement given under subsection (4), and that on a plain reading of the section, subsection (4) is always subject to subsection (8). Therefore, the Vice-Chair determined that the Board had correctly determined the amount of the supplement benefits at the 24 and 60 months reviews, and the appeal was dismissed.

The worker then sought clarification of two issues arising out of *Decision No. 493/13*. First, the worker sought clarification that *Decision No. 941/94* dealt with a different issue than the issue before the Vice-Chair in *Decision No. 493/13*. The Vice-Chair noted that the review in *Decision No. 941/94* was thorough and had been relied upon in numerous other Tribunal decisions, and declined to grant this request for clarification. The Vice-Chair made a clarification regarding a reference to the *Rustum Estate v. Ontario (Workplace Safety and Insurance Appeals Tribunal)* decision but generally found that the worker was essentially trying to reargue issues raised and already addressed in *Decision No. 493/13*.

In June 2015, the worker commenced an application for judicial review of *Decisions Nos. 493/13* and *493/13R,* as well as *Decisions Nos. 827/13* and *827/13R,* which are discussed below. In this application, the worker is seeking an interlocutory order certifying the judicial review as a class proceeding on behalf of all persons whose benefits pursuant to s.147(13) of the *Workers' Compensation Act* have been subjected to a maximum cap pursuant to section 147(8) of the *Workers' Compensation Act*. The Tribunal has filed its Notice of Appearance.

11. *Decisions Nos. 827/13* (May 13, 2013) and *827/13R* (December 16, 2014)

In *Decision No. 827/13*, the worker appealed a WSIB decision regarding whether supplementary benefits had been correctly calculated at the 24 and 60 months reviews. The issue in this decision was the same as the issue raised in *Decision No. 493/13*.

The worker submitted that the calculation on the reviews should not be capped by the Old Age Security limit in s.147(8). The Vice-Chair disagreed with the worker's argument and noted that this argument had been considered and rejected in several previous Tribunal decisions, including *Decision No. 621/12*. The reasons for rejecting the argument were carefully reviewed in *Decision No. 621/12*, and it was determined that s. 147(8) applies in calculating a worker's benefits on reviews as well as on the initial determination. The Vice-Chair agreed with the reasoning in *Decision No. 621/12* and the appeal was dismissed.

The worker then sought clarification of *Decision No. 827/13*. The worker's request for clarification was denied as it was determined that the original Vice-Chair had made a thorough and persuasive review of the issue raised in *Decision. No. 827/13*.

In June 2015, the worker initiated an Application for Judicial Review of *Decision Nos. 827/13* and *827/13R*, as well as *Decision Nos. 493/13* and *493/13R*, which are discussed above. In this application, the worker is seeking an interlocutory order certifying the judicial review as a class proceeding on behalf of all persons whose benefits pursuant to s.147(13) of the *Workers' Compensation Act* have been subjected to a maximum cap pursuant to s.147(8) of the *Workers' Compensation Act*. The Tribunal has filed its Notice of Appearance.

Action in Superior Court, *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 WSIB 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. The Tribunal informed the worker that 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 WSIB each brought a motion to dismiss the worker's action. The motions were scheduled for October 22, 2014. The worker subsequently advised that he wanted to adjourn the motions. The motions were subsequently scheduled to be heard on February 23, 2015. These motions were adjourned and have been scheduled to be heard in October 2015.

Recent Decisions

Retroactive interest and Board Policy on employer premium adjustments

Recent appeals addressed which Board policy applies to employer requests for retroactive interest payments or "credit interest": see *Decisions Nos. 576/15*, *895/15*, *934/15*, *902/15*, *969/15* and *962/15*. The appeals had similar facts: a credit adjustment to an employer's premium account was processed after the Board adopted a policy in 1997 to pay interest to employers on credit adjustments, but interest was not paid and was not requested at the time. Thus, the employers requested payment of interest to compensate for the lost time value of the money, from the time the overpayment was made to the time the Board refunded it.

The employers argued that OPM Document No. 14-02-07, "Employer Non-compliance Interest and Charges" applied and that there was no limit on retroactivity of credit interest, other than that it is not payable before 1997. In addition, they submitted that OPM Document No. 14-02-06, "Employer Premium Adjustments," which creates a two year retroactivity limit for "premium adjustments," only applies to "interest charges," not "interest payments," and that there was nothing in the policy to preclude payment of interest and, thus, no need to consider whether the employer's request fell under the "exceptions" in the policy. The employers did not argue the exceptions applied, nor did they identify any special circumstances which would warrant a variation from the usual two year rule.

The Vice-Chairs relied on prior decisions, to find that "interest" is included in the concept of "premiums" for the purposes of 14-02-06. Since the policy exclusions were not applicable and there were no exceptional circumstances, the general two year limit in 14-02-06 applied. The Vice-Chairs found support for this interpretation in a notation in 14-02-07 which specifically refers any premium adjustments back to 14-02-06.

Some of the decisions went on to state that even if "interest charges" in 14-02-06 were interpreted narrowly to refer only to debit interest, the general retroactivity rule would apply by analogy to interest payments or credit interest. The exclusions in 14-02-06 were not analogous and no policy reason had been advanced for treating debit and credit interest differently. Instead, the employers relied on 14-02-07 as creating a special retroactivity rule for interest payments. However, this provision referred to the date that the Board adopted policy with respect to paying employers interest and was not intended to provide that there should be no further limit on retroactivity of interest payments.

Offset of Canada Pension Plan Disability Benefits (CPPD) after the final LOE award

Decision No. 926/15 contains discussion of whether CPPD can be offset from LOE when LOE is reviewed after the final LOE review under s.44(2.1).

The worker was injured in 1998 and, at the time of the 2004 final LOE review, he was receiving a 28% NEL and partial LOE. He received entitlement for additional injuries after the 72 month date and his NEL increased to 52%. The worker was awarded 100% LOE benefits as of April 21, 2010, the permanent worsening date of his condition. The Board offset the worker's CPPD disability benefits as of that date, even though the Board was unaware of the CPP disability benefits until March, 2012.

The worker argued that while Board policy allows a claim to be reopened after the final LOE review, this was not applicable to claims that reached the lock-in date before the policy came into effect. The Vice-Chair noted that Board authority derives from the legislation. Section 44 permits the Board to consider a significant deterioration in a worker's condition after the lock-in date, resulting in the ability to increase a worker's LOE benefits if circumstances so warrant.

The Vice-Chair concluded that the legislation also permits the Board to consider CPPD benefits in the post-lock-in review. It was reasonable to conclude that, if a review might result in a change to the worker's benefits, it would also then provide for offsetting if appropriate, thus ensuring both that a worker did not receive two benefits for the same condition, and that workers in the same situation were treated similarly. The worker was treated in accordance with law and policy in a fair and equitable manner, and there was no basis on which to eliminate the offset applied in this case.

Personal care and Independent Living Allowances (ILA)

The Tribunal hears a number of appeals from workers seeking an independent living allowance (ILA) or personal care allowance (PCA) although they do not have the 100% pension or 60% NEL required by Board policies to be considered severely impaired and entitled to these allowances. *Decision No. 1387/15* reviews when entitlement may be considered when the worker's NEL or PD does not meet the threshold in the policies.

The Vice-Chair reviewed prior case-law and found that the award of an ILA and/or PCA may be warranted where the individual's need for assistance arising from the work injury is highly exceptional, even though the PD rating is significantly less than 100%. Where the individual's needs for assistance due to the compensable injury are less exceptional, the individual's PD rating must be closer to the actual rating prerequisite in the policies in order to receive an allowance. In this appeal, the worker was 77 years old with a 75% pension. As the evidence did not establish that the worker's need for assistance due to her work injury was highly exceptional, and her pension was significantly less than 100%, neither of the two factors supported entitlement. Entitlement to an ILA or PCA award was denied.

The worker's representative argued that the restriction in the policies was inconsistent with s.54. The Vice-Chair found that s.54 does not establish entitlement where there are no exceptional circumstances when the pension falls well short of the threshold in the policy. To interpret the section otherwise could result in the award of the allowances to workers without severe levels of permanent disability and this was not the intended purpose of the section.

Effect of pre-existing conditions on entitlement

Decision No. 1214/15 is an example of a decision concerning pre-existing conditions and their effect on entitlement.

The worker had back and knee injuries. He received a 21% NEL for the back. LMR Services were initiated, but he could not continue due to his back pain and psychiatric issues. The Board determined he could not continue, due to non-compensable psychological factors. LOE at the final review in 2011 was based on entry level wages in a SEB identified by the Board.

The worker sought ongoing entitlement for his psychotraumatic disability under the back claim. The Board's Psychotraumatic Disability policy states that psychotraumatic disability is considered a temporary condition, and only in exceptional circumstances is considered permanent. While the Tribunal has not construed this to strictly limit entitlement to a permanent impairment, there were no exceptional factors present which justified acceptance of a permanent condition. There were several exceptional factors which weighed against this, including a long history of psychiatric issues, a diagnosis of recurrent major depressive disorder suggesting a pre-existing condition prone to exacerbation, and lack of supporting medical evidence. The Board properly granted entitlement for a period of temporary aggravation only.

The Vice-Chair agreed that the SEB identified by the Board was unsuitable, but she did not agree that he was unemployable due to his compensable conditions. Policy states that "Employable" means having the necessary skill and training to be capable of obtaining and performing employment on a regular basis in the labour market. Section 43 provides benefits for the loss of earnings arising from the work; as such, it is necessary to show a causal connection between the work injury and the wage loss. The determination of employability is multifactorial involving a consideration of restrictions due to the work injury, transferable skills and aptitude, English language ability/literacy, and age. While stable pre-existing impairments are considered in the same way as work-related impairments in determining employability, subsequently arising impairments or subsequent deterioration of pre-existing impairments are not considered.

The primary reason the worker could not work was his non-compensable psychiatric condition. His compensable back condition did not make him unfit for any type of work or incapable of working full time. Since his SEB was unsuitable, at the final LOE review he was entitled to LOE based on deemed full time earnings at minimum wage.

Worsening of permanent disability and entitlement to a pension reassessment

The Tribunal still hears appeals from workers seeking reassessment of pensions awarded for pre-January 1990 injuries under the *pre-1985* and *pre-1989 Workers' Compensation Acts*. Board policy permits a pension reassessment if the permanent disability "worsens." *Decision No. 1089/15* contains discussion of what this means, where a worker sought a reassessment of a 5% pension for a shoulder disability and medical evidence established the worker experienced a minor, but measureable, deterioration in mobility. The employer argued that this evidence did not support a significant deterioration.

While the Vice-Chair interpreted "worsens" in Board policy to mean more than a trivial, *de minimis* or insufficient worsening, she stressed that the test for a pension reassessment was not significant deterioration. The concept of significant deterioration (defined in Board policy to require a demonstrable, marked deterioration) applied to redetermination of NEL awards under the *pre-1997 Workers' Compensation Act* and the *WSIA*, and not to reassessment of pensions. Here, where the evidence established a minor but measureable deterioration in mobility which

could place the worker above his existing rating, the worker was entitled to a pension reassessment.

WSIAT
[October 2015]