Workplace Safety and Insurance Appeals Tribunal

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

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Quarterly Production and Activity Report

October 1 to December 31, 2011

Production Summary

At the end of the fourth quarter 2011 the active inventory totaled 4,440 appeals. This is approximately 15% higher than the active inventory at the beginning of 2011.

Incoming appeals

Incoming appeals numbered 1,222, of these 1,114 were appeals from WSIB decisions and 108 appellants advised they were ready to proceed to hearing following a period of inactive status. This compares to 1,005 new appeals and 154 reactivated appeals recorded in the third quarter of 2011.

In the 4th quarter of 2010 the Tribunal recorded 885 new appeals and 108 reactivations.

In 2010, the weekly average of hearing-ready appellants was 56. For Q4-2011, the weekly average of hearing-ready appellants is 70. This figure excludes cases reactivated from inactive status.

Dispositions

Dispositions numbered 938. This includes 314 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts and 624 after-hearing dispositions; of the after-hearing dispositions, 598 followed from Tribunal decisions.

In Q4-11, 85% of final decisions were released within 120 days. In 2010, 84% of final decisions were released within 120 days.

Inactive Inventory

At the end of Q4-11, the inactive inventory was 2,704 cases (at the end of Q3-211, the inactive inventory was 2,746 cases).

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 fourth quarter of 2011, the notice inventory included 1,477 dormant cases, the active inventory totaled 4,440 cases, and the inactive inventory totaled 2,704 cases.

Production Tables and Charts

A. Active Inventory end of Quarter

Period	Active Inventory
Q1-2010	3866
Q2-2010	3863
Q3-2010	3878
Q4-2010	3858
Q1-2011	3890
Q2-2011	4012
Q3-2011	4197
Q4-2011	4440

B. Incoming Appeals

Period	Incoming Appeals
Q1-2010	1036
Q2-2010	1022
Q3-2010	998
Q4-2010	993
Q1-2011	1108
Q2-2011	1082
Q3-2011	1159
Q4-2011	1222

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q1-2010	1018	326	692
Q2-2010	943	319	624
Q3-2010	915	313	602
Q4-2010	1030	323	707
Q1-2011	993	287	706
Q2-2011	993	309	684
Q3-2011	906	300	606
Q4-2011	938	314	624

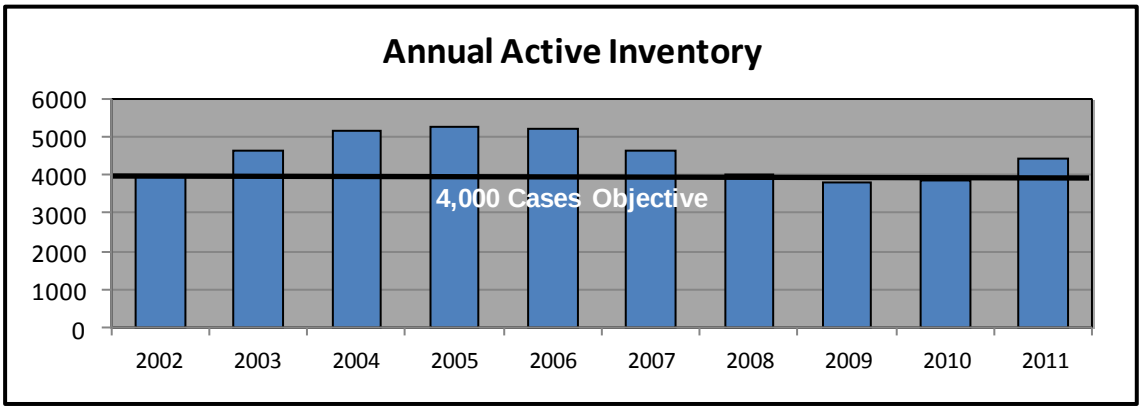
D. Inactive Inventory

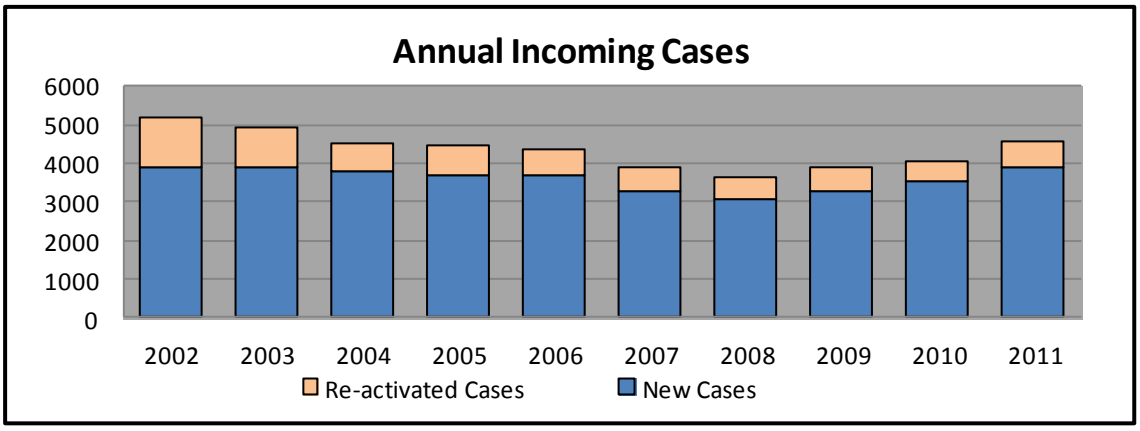
Period	Inactive Inventory
Q1-2010	3320
Q2-2010	3273
Q3-2010	3214
Q4-2010	3158
Q1-2011	2963
Q2-2011	2809
Q3-2011	2746
Q4-2011	2704

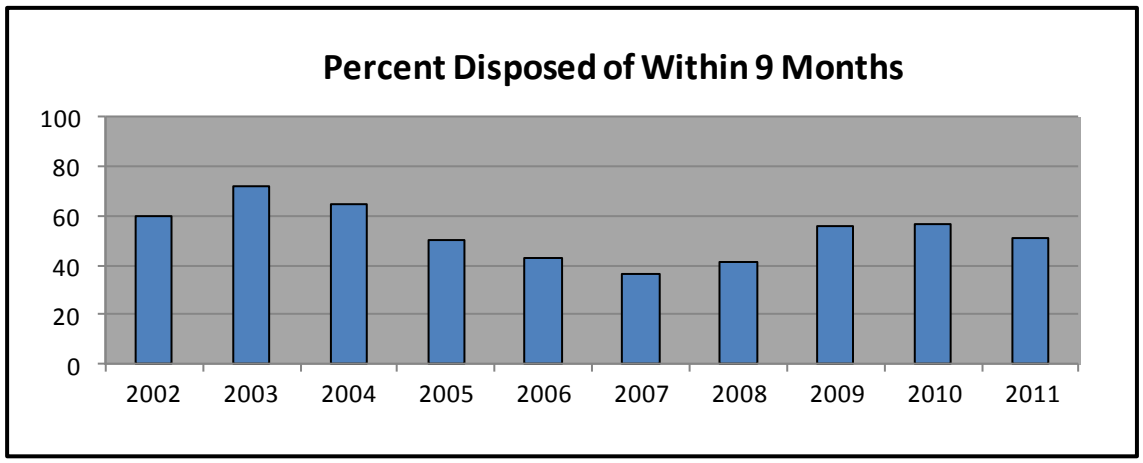
E. Notice of Appeal (Dormant cases)

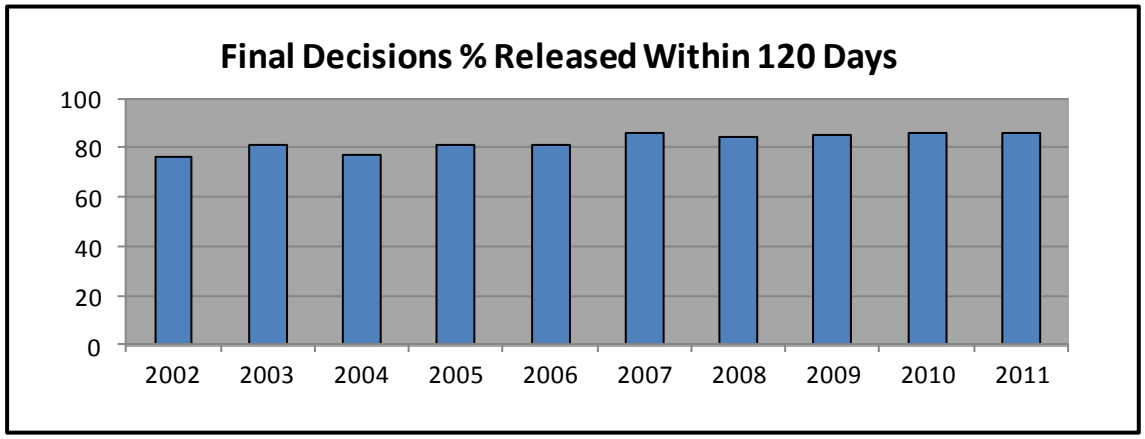
Period	Total Dormant	Change from previous quarter
Q1-2010	1185	-16
Q2-2010	1267	82
Q3-2010	1335	68
Q4-2010	1317	-18
Q1-2011	1400	83
Q2-2011	1367	-33
Q3-2011	1435	68
Q4-2011	1477	42

F. Production Charts: Annual from 2002 up to the end of the current quarter






Percent Disposed of Within 9 Months
100
80
60
40
20
0
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011


Final Decisions % Released Within 120 Days
100
80
60
40
20
0
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011

Judicial Review Activity

Fourth Quarter 2011

The status of applications for judicial review involving the Tribunal for the fourth quarter of 2011 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.774/09 (April 21, 2009) and 774/09R (August 20, 2009)

The plaintiff was the manager of an apartment building. His regular hours were 8 to 5, Monday to Friday, but he was on call outside of those hours. As a result of a flood in the parking garage, a plumber was called. The following day, while checking to see if the flooding problem was over, the plaintiff fell and injured himself.

Although the plaintiff at first claimed benefits from the Board, he subsequently decided to bring an action. The defendant commenced a section 31 application to determine whether the right of action was taken away under the Act.

The Vice-Chair held the right of action was taken away. Although the plaintiff was not scheduled to be on duty at the time of the accident, he was a worker in the course of his employment when the accident occurred. He fell within the requirements for "time, place and activity" in Board policy. When he checked the flooding situation this was consistent with his workplace practices, which involved coming back on duty whenever there was a situation requiring him to perform his job duties.

The plaintiff commenced an application for judicial review. Plaintiff's counsel originally filed an affidavit with their materials. Following negotiations between counsel, it was agreed to remove the affidavit. The Tribunal has filed its factum. It is expected that this case will be heard in Ottawa in January or February 2012.

2. Decisions Nos.1976/99I (November 30, 1999), 1976/99 (December 12, 2002), and 1976/99R (September 2, 2005)

The worker was granted entitlement on an aggravation basis for benefits from March 1991 until February 1992 for fibromyalgia. The worker did not seek medical treatment from November 1991 until September 2004. She then sought additional benefits for the period after 1992. The hearing Panel found the worker was suffering from regional myofascial pain, rather than fibromyalgia and denied the appeal.

A different Vice-Chair in the reconsideration decision held the hearing Panel may have been mistaken in making this determination, and also that this distinction in diagnosis was not sufficient to disqualify the worker from entitlement. However, he also held that even if the worker suffered from fibromyalgia, she would still not be entitled to benefits because it was not clear the worker continued to suffer from a work injury, the medical reporting did not relate her

ongoing condition to work, there was significant discrepancy in the medical reporting, and her allegation of significant worsening from 1991 to 1994 suggested another intervening cause of her disability.

The worker commenced an application for judicial review. However she was represented by an unlicensed paralegal from Quebec, who did not have the status to represent her at Divisional Court. The Tribunal served its Record of Proceedings. The worker served her factum. Her factum was improper and in the Tribunal's view should not have been accepted by the Ottawa Divisional Court. The Tribunal raised this with the Ottawa Divisional Court, and on October 12, 2010 Justice Linhares deSousa directed that the worker's factum be returned to the worker, with instructions that the worker must seek authorization before a single justice of Divisional Court to file her factum.

On March 4, 2011 the worker's motion to be allowed to file a 55 page factum was heard by Justice Smith in Ottawa. Her request was not granted, but the Court granted her 60 days in which to file a 45 page factum. The Tribunal was granted the right to file a 45 page factum in reply.

Both the worker and the Tribunal have served and filed their factums. At the end of this quarter the Tribunal was waiting for the judicial review to be scheduled. This judicial review will be heard in Ottawa.

3. Decisions Nos.756/89L (December 11, 1989) and 756/89LR (October 3, 1990)

In Decision 756/89L, the worker applied for leave to appeal a decision of the former WCB Appeal Board dated November 27, 1978. The Appeal Board decision denied the worker entitlement to benefits for a bilateral knee disability, which he claimed was related to a work accident in 1977. The Appeal Board did not accept that the worker had an accident as he alleged. The Appeal Board denied the worker's reconsideration requests on December 14, 1979; August 15, 1980; October 27, 1983 and September 5, 1984. Two reviews of the worker's file by the Ombudsman did not support that the worker's disability was related to a work accident.

Applying the statutory tests, in its December 1989 decision the Tribunal Panel denied leave, holding there was no substantial new evidence and no reason to doubt the correctness of the Appeal Board's decision.

The worker applied to reconsider Decision 756/89L. The same Panel released Decision 756/89LR on October 3, 1990, which denied the reconsideration.

Over the succeeding twenty years, the worker made a series of further applications for reconsideration. In October of 2010 he commenced an application for judicial review, representing himself.

As some of the original appeal materials were missing, the Tribunal made strenuous efforts to re-create the file in order to compile a Record of Proceedings. After several months and consulting numerous sources, the Tribunal filed as complete a Record of Proceedings as it could with the Divisional Court.

The Tribunal filed its factum. Although the worker filed a factum, he failed to perfect. The judicial review was dismissed for delay on December 1, 2011.

4. Decisions 1110/06 (November 2, 2006), 1565/08I (July 25, 2008), 1565/08 (May 13, 2020), and 1565/08R (February 9, 2011)

The worker was injured in June 1990. He was granted 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 vocational rehabilitation program. He was undergoing a retraining program when he was involved in a motor vehicle accident in 1993, forcing him to quit the program. The supplement ended when he withdrew from 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 condition. The worker's entitlement was revoked retroactive to September 1990.

The worker appealed to the Tribunal. He claimed he was entitled to a 100% FEL award as he was unable to earn anything in suitable and available employment as a result of the 1990 work accident.

In Decision 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 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 work as a civil engineering technician. The worker appealed to the Tribunal again.

In Decision 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 higher FEL.

In Decision 1565/08 the Panel found the worker was not totally permanently disabled before the motor vehicle accident. 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 more, and hence have a lower FEL. The Panel allowed the worker's appeal on that issue, finding his earning capacity would not have increased. Thus the worker was entitled to a partial FEL commencing in 1993. The Panel also confirmed the Boards' NEL determination.

In Decision 1565/08R a different Vice-Chair denied the worker's application to reconsider Decision 1565/08, finding the threshold to reconsider had not been met.

The worker commenced an application for judicial review of Decisions 1565/08 and 1565/08R. The worker is self-represented. The precise arguments which the worker intends to make are not yet apparent but 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 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 to be included in the Record of Proceedings. The worker refused. The Tribunal ordered the transcripts itself and filed a Record of Proceedings.

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 1110/06. The motion was heard in September 2011 by Madam Justice Swinton, who allowed the worker to have a friend present in the courtroom for assistance. However, Justice Swinton indicated that the worker should speak for himself

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.

At the end of the quarter the Tribunal was waiting for the worker to serve his factum.

5. Decision 62/11 (August 22, 2011)

In Decision 62/11, the Vice-Chair denied the worker's appeal for full LOE benefits subsequent to April 1, 2008. She also denied the employer's cross-appeal for SIEF.

Counsel for the worker served the Tribunal with a Notice of Appeal, which she filed in the London Divisional Court.

The Tribunal wrote to the worker's counsel to point out there is no appeal from a Tribunal decision by virtue of section 123(4) of the WSIA.

On December 1, 2011 the London Divisional Court dismissed the judicial review application for delay, with costs fixed at $750.00.

6. Decision 3164/00 (December 18, 2000) and Decision 3164/00R (March 28, 2001)

The worker was a baker. She injured her back in 1994. She was paid total benefits for about a month until she returned to work, and then for a recurrence for a further seven months. In 1997 she was granted entitlement for a right elbow disability arising out of her job duties.

She appealed for entitlement for a FEL and further vocational rehabilitation arising out of the back injury. She also appealed ongoing entitlement for the right elbow condition. Finally she appealed for entitlement for fibromyalgia, which she alleged arose out of either the back or the elbow injury.

The Vice-Chair granted entitlement to a FEL and vocational rehabilitation assistance for the back injury. He denied entitlement for fibromyalgia and the right arm/elbow.

On reconsideration the worker submitted additional medical documentation in support of her claim for fibromyalgia, but the Vice-Chair found it was insufficient to warrant re-opening the appeal. The worker made a number of subsequent reconsideration requests which 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. A concern about the timeliness of this application has been raised with counsel for the worker. In May 2011 the worker's counsel asked if the Tribunal would consent to adjourn the judicial review while the worker pursued a further reconsideration. The Tribunal agreed. In May 2011 the worker submitted a new reconsideration application. At the end of the quarter the reconsideration was being processed.

7. Decisions Nos.1509/02 (February 2, 2004); 1509/02R (September 27, 2006); 2021/07E (October 30, 2007) and 2021/07ER (July 22, 2009)

Two sisters were suspended at the same time for smoking in a non smoking area at work in 1999. Sister #1 reported an accident within a few hours of returning after her suspension. Sister #2 reported an accident later that day, before the suspension took effect.

Sister #1's claim was denied by the Board. Her appeal to the Tribunal was dismissed (Decision 1384/03). She brought an application for judicial review. On April 6, 2005 the Divisional Court unanimously dismissed the application for judicial review. The Court stated "In our view, the Tribunal carefully reviewed the evidence and gave reasons for its decision. The decision it reached on the basis of the evidence was not patently unreasonable."

However, Sister #2's claim had been allowed by the Board. The employer appealed to the Tribunal. A Panel of the Tribunal allowed the employer's appeal, reversing initial entitlement for the worker (Decision 1509/02). Sister #2 commenced an application for judicial review in April 2004.

Following discussions with her former counsel, in November 2002 it was agreed that the judicial review application would be adjourned to allow the worker to pursue an application to reconsider Decision 1509/02.

In her reconsideration application the worker alleged the Panel had failed to consider that she had suffered a recurrence of a 1992 injury. Decision 1509/02R was released on September 27, 2006. In that decision the Tribunal found that although the worker had raised a cross-appeal in Decision 1509/02, the worker had not raised entitlement on the basis of a recurrence of the 1992 injury as an issue in that cross-appeal. Consequently, there was no error in Decision 1509/02 and the application for reconsideration was denied.

However, the Vice-Chair in Decision 1509/02R noted that it was still open to the worker to bring an appeal on the recurrence issue to the Tribunal, though it would be necessary to make an application to extend the time to appeal that issue.

The worker retained new counsel, and commenced an application to extend the time to appeal the Board decision. In Decision 2021/07E, the worker's application to extend the time to appeal the issue of recurrence in the June 4, 2001 ARO decision was denied.

The worker commenced an application to reconsider Decision 2021/07E. In Decision 2021/07ER, released July 22, 2009, the Tribunal allowed the reconsideration and granted an extension of time to appeal the recurrence aspect of the ARO Decision.

The Tribunal hearing on the recurrence was heard in October 2010. Decision 2021/07I was released on December 13, 2010. This decision granted the worker's appeal on the basis that her pain in 1999 was a recurrence of the 1992 injury. The worker was given four weeks to decide whether to also ask the Tribunal to address the period of entitlement for benefits for the recurrence.

The worker confirmed that she did not want to pursue this matter further.

On December 30, 2011 the worker filed a Notice of Abandonment of the Judicial Review with the Divisional Court.

8. Decisions Nos.1233/08 (June 9, 2008), 1233/08R (May 29, 2009) and 1233/08R2 (April 6, 2010)

The worker brought an appeal for initial entitlement for respiratory irritation from workplace exposure to paint odours. He was granted initial entitlement and loss of earnings benefits for a few weeks. His appeals for permanent impairment and for psychological entitlement for stress were denied. The worker made a request for reconsideration which was denied.

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings and the worker filed his factum.

The Tribunal then determined that it should reconsider its decisions on its own motion. The worker's counsel agreed to place the judicial review on hold pending the outcome of the Tribunal's reconsideration.

The Tribunal released its reconsideration decision, Decision 1233/08R2. That decision found that the worker had not been given a full opportunity at the Tribunal to make submissions on the duration of benefits. The Tribunal's decisions were varied to have the matter of the duration of benefits remitted to the Board, subject to the parties' usual appeal rights.

A decision of the Board then confirmed the same few weeks of benefits. The worker's lawyer wrote to the Tribunal and suggested that he might revive the judicial review, but the Tribunal pointed out that that would be premature. It is expected that the worker will appeal the Board's decision. The judicial review is still on hold pending the worker's appeal.

9. 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 a 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 his van near the same location as where Ms. M had lost control of the van she was driving. Both Ms. M and Ms. R were struck by K's van, and suffered severe injuries including the amputation of one leg each.

Ms. M was scheduled to work the morning of the accident. She attended the offices of A (the company) and delivered flowers to a synagogue. She loaded up the van with items to be delivered to a banquet hall for the next day's event.

Ms. R was not scheduled to work the day of the accident. She attended at A, the company's office in the morning to collect her pay cheque. She intended to then meet her mother for lunch. Ms. M offered to drive Ms. R to the restaurant. They left the company's offices together in the van. After leaving the office, they stopped at the company's storage facility, where they loaded additional items for an upcoming event. The accident happened some time after leaving the storage facility.

Ms. M, Ms. R and their family members brought actions against various individuals and entities. The right to sue application was brought by the sole proprietor of the company, and the company from whom the van was leased, with a co-application brought by Mr. K and his company and the owner of his van, and the company which maintained the highway.

A 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 FLA claims were also taken away by the WSIA.

The Vice-Chair found that it was not necessary to decide A's classification, but rather whether A, a party décor business, was a Schedule 1 employer at the time of the accident. She found that while the words "party décor" are not specifically included in Schedule 1, the various components that make up party décor are found in Schedule 1. She found that A was compulsorily covered under Schedule 1.

The Vice-Chair found that both Ms. M and Ms. R were workers of A at the time of the accident. However, she found that Ms. M was in the course of her employment at the time of the accident, while Ms. R was not. She further found that Mr. K was in the course of his employment at the time of the accident.

The Vice-Chair concluded that Ms. R's action and that of her FLA claimants was not taken away by the WSIA. However, she found that Ms. M's action against the sole proprietor, Mr. K, Mr. K's employer, and the company which maintained the highway was taken away by the WSIA. The right of action of the FLA claimants in Ms. M's action was not taken away by the WSIA.

The Vice-Chair made no determination with respect to rights of action against the highway and the Ontario Ministry, as they did not participate in the application.

Both Ms. M and the applicants made requests for reconsideration of the decision. The reconsideration requests were denied.

Ms. M then commenced an application for judicial review, seeking a declaration that, at the time of the accident:

(i) A was not a Schedule I employer;

(ii) Ms. M was not a "worker" as defined by the Workplace Safety and Insurance Act; and

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

The Tribunal filed a Notice of Appearance. The other respondents have also filed Notices of Appearance. At the end of the quarter the Tribunal was waiting for the Applicant's counsel to provide transcripts so that the Tribunal can prepare and file a Record of Proceedings.

10. Decisions Nos.512/06I (May 12, 2006), 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 for 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 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 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 the Charter.

The majority considered the historical context of workers' compensation law, the background to the dual award scheme, and the evidence of expert witnesses. It found the workplace insurance plan operates primarily as an insurance scheme, rather than a social benefits program.

The majority characterized the test for whether the Act violates s.15 of the Charter to be (a) if the Act creates a distinction based on an enumerated ground, and (b) if there is a distinction, whether it is discriminatory in that it perpetuates disadvantage or stereotyping. The worker alleged there was a discriminatory distinction based on age. The majority agreed that there was a distinction on an enumerated ground, but did not agree that the distinction perpetuated disadvantage or stereotyping.

The majority noted there had been no Charter decision in a Canadian court which had successfully challenged the termination of benefits at age 65, that age 65 is still when most people retire, and that it was reasonable for an insurance plan to rely on actuarial probabilities and terminate benefits at age 65 rather than continuing payments for life. The worker himself had not demonstrated that he would have worked after age 65 or had any expectation of being employed after age 65, and in fact did not work after age 65.

Although the worker was not disadvantaged himself based on age, the majority went on to consider the comparator group as a whole. It noted that almost all workers injured after age 61 return to work, meaning most are not disadvantaged by the two year statutory limit. Further a two year limit takes into account the life circumstances of those persons in their sixties, as opposed to those in their twenties. Workers at age 65 are eligible for other sources of income, such as 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. At the end of the quarter the Tribunal was preparing its Record.

Recent Decisions

Charter

Decision No. 512/06, in the majority, found that section 43(1)(c) WSIA did not contravene s. 15(1) of the Charter. Section 43(1)(c) allows LOE benefits to be awarded for 2 years from the date of the work injury if the worker is 63 years or older at the time of the injury. The majority of the Panel considered the historical context of workers' compensation law, finding that workplace insurance law operates primarily as an insurance scheme, while acknowledging that it operates under the aegis of the provincial government for the public good and can be distinguished from the for-profit underpinnings of private insurance. While there may not be a mandatory retirement age, the majority found that most workers did retire by age 65. This is when they become eligible for other source of income, such as CPP. Insurance schemes are premised on actuarial probabilities, and these probabilities underpin the WSIA in limiting benefits after age 65. The majority of the Panel found that s. 43(1)(c) did create a distinction under the enumerated ground of age in s. 15 of the Charter. However, while the two-year limit on benefits may not serve every individual, it did not disadvantage the group as a whole. The two years of benefits reflected an appreciation for and understanding of older workers who continue to work past the expected retirement age of 65. Viewed contextually, the two-year limit did not perpetuate prejudice or negatively stereotype the individual. The limitation was effective in meeting the actual needs of the group as a whole and was consistent with the over-arching aims of the legislation. Even if s. 43(1)(c) did violate s.15, it would still constitute a reasonable limit under s. 1 of the Charter. The objective of the legislation was pressing and substantial. The limitation on benefits was rationally connected to the aim of ensuring that benefits were paid for wage loss and not as a retirement subsidy.

The dissenting decision, found that workplace insurance was an insurance scheme for employers but a social benefits program for workers. Section 43(1)(c) made a formal distinction based on age that failed to take into account the worker's disadvantaged position in society as an older worker. The section led to an arbitrary limitation of benefits and was, accordingly, discriminatory. The dissent noted that other jurisdictions have a less arbitrary system that allows for the possibility to determine, on a case-by-case basis, that a worker would have worked beyond the two-year period. In addition, the Vice-Chair found that s. 43(1)(c) was not saved by s. 1 of the Charter, in that there were less arbitrary measures to limit entitlement, such as in those other provinces.

Occupational Stress

Decision No. 1239/11 denied the worker entitlement for occupational stress which the worker related to harassment by his supervisor. The Panel found that the close supervision of the worker and the changing work assignments were decisions relating to the worker's employment that were excluded from entitlement under s. 13(5) of the WSIA. The main thrust of Board policy was to allow entitlement for traumatic mental stress in circumstances where danger or a threat to personal security was present. However, the list of events in the policy was not exhaustive. The Panel found that the policy would allow entitlement for traumatic mental stress in some circumstances where danger or a threat to personal security was not present. In this case, it was found that, when viewed objectively, the worker was not subjected to danger or violence or a

threat to personal security, even when considering the times when the supervisor stood nose to nose with the worker and when the supervisor threw a bag to the ground in the parking lot. The management techniques of the supervisor as applied to the worker were probably inappropriate but were intended with the general purpose of correcting the worker's job performance and plant productivity. The treatment of the worker by the supervisor therefore was not so egregious as to be considered outside of the employment functions.

Decision No. 1343/11 allowed the worker's claim for occupational stress as arising from a specific incident. In this case the worker was a custodian at a community centre. A group of youths were playing basketball in the gym. They went over their allotted time and refused to leave. A co-worker then turned off the lights in the gym. The youths then left but did not do so quietly. They congregated outside, started pushing, shoving and yelling, set off flares and damaged property. On the evidence, the Panel found that one of the youth waved a gun (either real or imitation) at the worker. The worker suffered an acute reaction to the sudden and unexpected traumatic event of having a gun waved at him. Even if there was no gun, the confrontation with a large group of youths who were causing damage and acting in a violent manner would constitute a sudden and traumatic event within the WSIA and Board policy.

Cancer

Decision No. 33/11 allowed an employer's appeal of an ARO decision which allowed the worker's claim for colorectal cancer as arising from exposure to coke oven emissions. A review of the medical literature indicated no causal association between coke oven work and colorectal cancer. Three of four medical professionals who had reviewed the literature indicated that the worker's coke oven exposure was not associated with an increased risk of developing colorectal cancer. Of those three doctors, one had a specialty in internal medicine and two had a specialty in occupational medicine. One doctor opined that the workplace exposure contributed significantly to the worker's colon cancer. But this doctor, while having experience in the occupational health field, was not a certified specialist.

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