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

October 1 to December 31, 2013

Production Summary

At the end of the fourth quarter 2013, the active inventory totaled 7,437 appeals. This is approximately 33% higher than the active inventory at year end 2012.

Incoming Appeals

Incoming appeals for Q4-2013 numbered 1,469; of these, 1,336 were appeals from WSIB decisions, and 133 appellants advised they were ready to proceed to hearing following a period of inactive status. This is an increase of 4.5% as compared to Q3-2013. Comparisons to earlier quarters can be found in Table B.

The weekly average of hearing-ready appellants in Q4-2013 is 75. This figure excludes cases reactivated from inactive status, and is an increase from 2012 of 14%.

Dispositions

Dispositions in the fourth quarter of 2013 totaled 944. This includes 305 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts, and 639 after-hearing dispositions; of the after-hearing dispositions, 620 followed from Tribunal decisions.

Inactive Inventory

At the end of Q4-2013, the inactive inventory was 2,344 cases. This represents a decrease of 7% from year end 2012.

Decisions Released within 120 Days

For the year ending December 31, 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 fourth quarter of 2013, the notice inventory included 1,862 dormant cases, the active inventory totaled 7,437 cases, and the inactive inventory totaled 2,344 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	6966
Q4-2013	7437

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	1406
Q4-2013	1469

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
Q4-2013	944	305	639

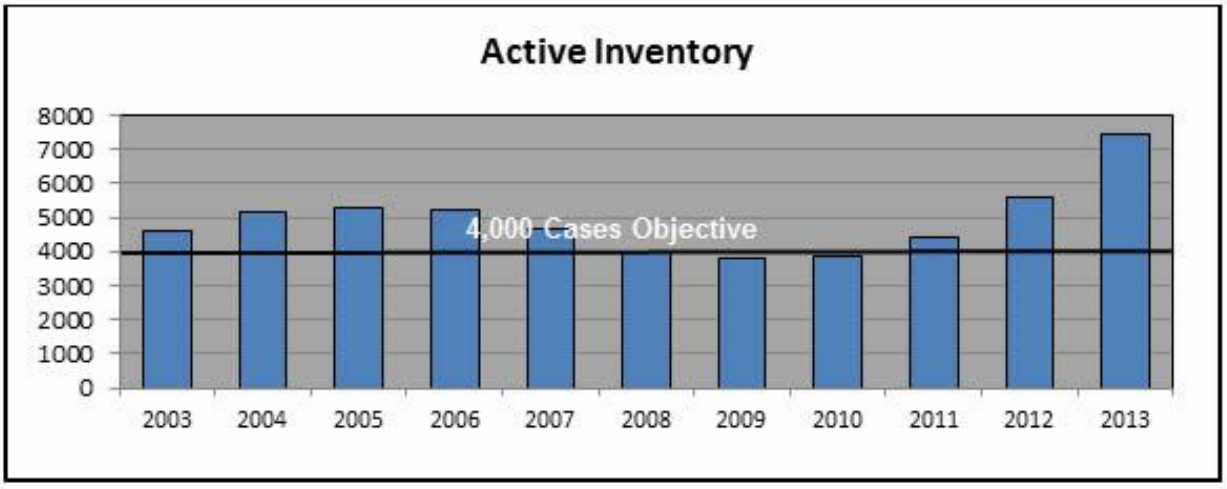
D. Inactive Inventory

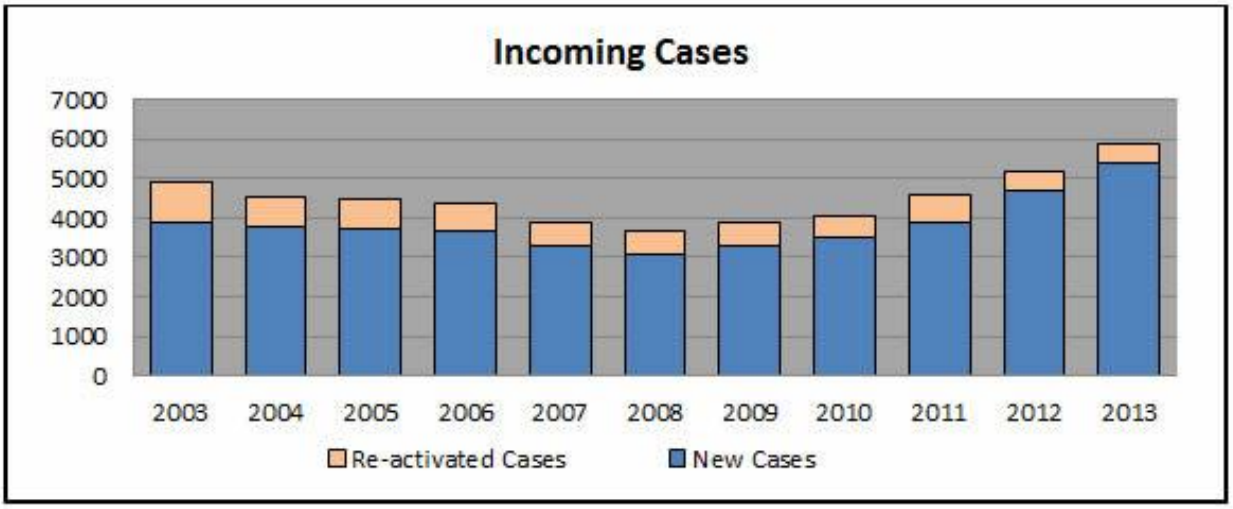
Period	Inactive Inventory
Q1-2012	2569
Q2-2012	2515
Q3-2012	2500
Q4-2012	2519
Q1-2013	2475
Q2-2013	2466
Q3-2013	2423
Q4-2013	2344

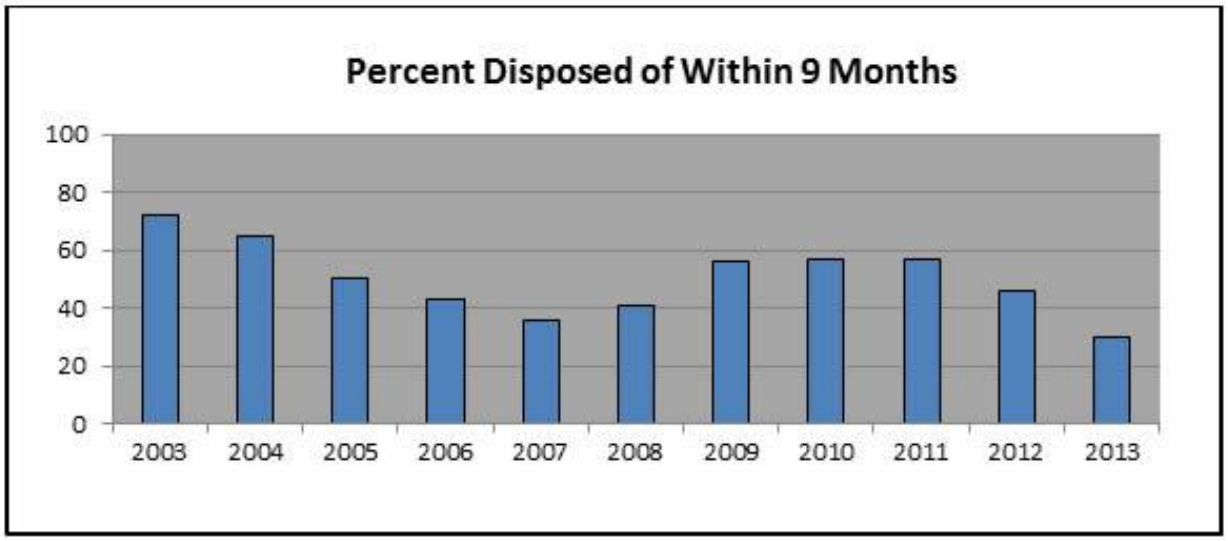
E. Notice of Appeal (Dormant cases)

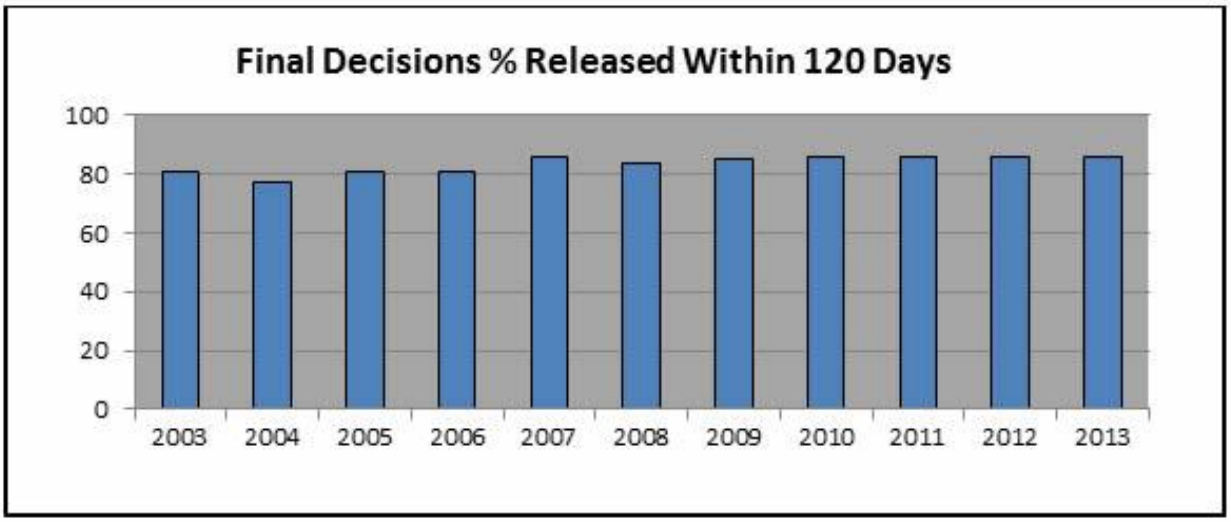
Period	Total Dormant	Change from Previous Quarter
Q1-2012	1433	-44
Q2-2012	1435	2
Q3-2012	1531	96
Q4-2012	1595	64
Q1-2013	1479	-116
Q2-2013	1630	151
Q3-2013	1808	178
Q4-2013	1862	54

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


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

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the fourth 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. 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% Non-Economic Loss (NEL). He was granted a Future Economic Loss (FEL) sustainability award at D1 in 1992. He was also granted a FEL supplement while he participated in a Vocational Rehabilitation (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 *Decision Nos. 1565/08* and *1565/08R*. The worker was self-represented. The Notice of Application for judicial review contained 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. He did not pursue the natural justice arguments initially set out in the Notice of Application. 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. The application was heard October 25, 2013. In reasons released November 25, 2013, the Divisional Court (Justices Himel, Sachs and Warkentin) unanimously

dismissed the application, finding that both *Decision Nos. 1565/08* and *1565/08R* carefully and reasonably dealt with the issues before the Tribunal.

2. *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/leased 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. The plaintiff did not object to the admission of this evidence, and the respondent explicitly consented, 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 *Workplace Safety and Insurance Act* (WSIA) took away the right of action against all defendants, and whether GB was a worker in the course of employment at the time of the accident.

The Vice-Chair considered the contract which had been admitted after the hearing. She 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 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 judicial review was heard on December 18, 2013, and unanimously dismissed by Himel, Sachs and Nolan JJ.

In its decision, the Divisional Court began by noting that the issue fell squarely within the Tribunal's area of experience and expertise, so the applicable standard of review was reasonableness. It then reviewed D's arguments.

The Court did not accept D's argument that it was "blindsided" by the Tribunal's handling of the evidence of the contract. The Applicant had consented to the admission of the contract and had an opportunity to make submissions in response to the plaintiff. The Court also rejected D's position that the contract should not have been found to be a significant piece of evidence, as that determination was entitled to weigh the evidence.

The Court also did not accept D's argument that the Tribunal was required to advise it in advance of the significance it was attaching to the contract, stating:

"Procedural fairness does not require an adjudicative body to give a party advance notice of the significance that it attaches to a particular piece of evidence. Once the parties have been afforded the opportunity to address the issue, the Tribunal is entitled to make its own findings without further notice."

D's argument that the Tribunal's finding on the contract issue constituted an abandonment of its investigative mandate, and raised a reasonable apprehension of bias was also rejected. The Court noted, as the Applicant, D had the onus to establish whether the plaintiff's right of action was taken away. Further, as a prior Tribunal decision had pointed out, for right to sue applications, the Tribunal is less likely to exercise its investigative mandate than for other types of appeals.

D's third argument, that the Tribunal had not properly weighed the evidence, was not accepted. The Court noted that fact-finding by the Tribunal deserves considerable deference from the Court.

"It was up to the Tribunal to weigh the evidence before it. There is no suggestion that the Tribunal misapprehended the evidence or ignored relevant evidence. Choosing to attach more weight to documentary evidence than to sworn testimony is not an error in law."

Similarly, the fourth argument (that the Tribunal erred in not giving more weight to the fact that neither FB nor the snow-clearing business was registered with the WSIB) was not an error, but a reasonable finding based on the evidence before it.

Finally, D argued that the Tribunal's decision failed to determine whether FB was a worker or employer at the time of the accident. The Divisional Court cited *Newfoundland Nurses Union v. Newfoundland (Treasury Board)*, 2011 SCC 62 at para 16, that a decision-maker is not required to make an explicit finding on each constituent element leading to its final decision. "… [I]f the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met." Here, there was no reason advanced to protect FB from suit under the WSIA. As the lessee of the truck, the right of action was not taken away against him.

3. *Decision 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, 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 s.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 was no longer relevant as the worker had received two detailed reconsideration decisions.

In regards to downside risk, the Vice-Chair held there was no downside risk for the worker when he claimed s.147(2) benefits for the period November 1989 to November 1991. He noted that the original Vice-Chair did not remove the Applicant's entitlement to s.147 supplementary benefits for the period of November 1, 1989 to November 1, 1991. Rather, he simply found that the Applicant was entitled to those benefits on the basis of s.147(2) and

not s.147(4). Not only was the worker's appeal on the issue granted, his benefits were increased for that period. It was not reasonable to characterize this result as a downside risk.

Following the release of this decision, the worker commenced an application for judicial review. The worker was self-represented. The judicial review was heard in Thunder Bay on June 18, 2013 before Justices Matlow, Lederer and Mulligan.

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

The worker sought leave to appeal the Divisional Court's decision to the Ontario Court of Appeal. The Tribunal filed a responding factum. At the end of the quarter the Tribunal was waiting for the Court of Appeal's decision.

4. *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 Earning (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.

In its reasons, the Divisional Court noted that there was no error of law by the Tribunal, and there was ample evidence to support its finding of notice. The Court stated that the Tribunal's "finding that the applicant was capable of trying to do the modified work was reasonable based on the evidence and its finding based on the applicant's credibility." The Court was also not persuaded that principles of insurance law now applied to cases determined under the WSIA, as it specifically held: "We reject the argument that the case law relating to the obligations of the private insurers with their insureds has any application to the obligations of the Workplace Safety and Insurance Board, which operates under a specialize statutory regime."

The worker filed a motion for leave to appeal to the Court of Appeal. The Tribunal filed a responding factum. On October 10th, the Court of Appeal dismissed the worker's application for leave to appeal, as per Pepall, MacPherson and Watt JA.

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

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

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

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

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

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

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

The worker commenced an application for judicial review. The Tribunal has filed its factum, and is waiting for a date. This judicial review will be heard in Ottawa.

6. *Decision Nos. 2175/1*0 (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.

Currently, the worker is still pursuing the disablement issue at the Board.

7. *Decision 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 Labour Market Re-entry (LMR) assessment to identify an appropriate Suitable Employment or Business (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. In *Decision No. 1093/11R*, 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 noted a document in the Applicant's Application Record that had not been in the record before the Tribunal. The Tribunal objected to this document being submitted for the first time on judicial review, 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 was abandoned.

In March 2013, the Applicant commenced a further request for reconsideration of the WSIAT decisions. He did not challenge the appropriateness of the SEB or the use of deemed Ontario wages for the SEB, but objected to the table used by the Board and submitted that

the new information he submitted on the second reconsideration suggested that the wage information used by the Board was inappropriate and that other information would be more reasonable. The reconsideration was assigned to the original Vice-Chair.

In *Decision No. 1093/11R2*, the Vice-Chair found that the new evidence did not provide a more accurate calculation of the worker's FEL arising from the injury. The Vice-Chair acknowledged that it was inaccurate for *Decision No. 1093/11R* to equate "mid-range" wages with "average" wages, as found at paragraph 14 of *Decision No. 1093/11R*: "mid-range" wages refer to the average wage earned by workers with a certain level of experience in their field. An "average" wage is the average of the wages earned by all workers of all levels of experience in that field of work. However, the Vice-Chair noted that the Board in this case used mid-range rather than average wages and the Board's decision was upheld by the Tribunal in *Decision Nos. 1093/11* and *1093/11R*. Correction of the erroneous terminology found at paragraph 14 of *Decision No. 1093/11R* would not lead to a different result, since the decision ultimately upheld the Board's use of mid-range wages.

The Vice-Chair also found that even if the Financial Services Commission does not use the tables in question for part-time employment, this does not necessarily mean that the Board cannot use the tables in this fashion, especially when its policies refer to these tables. The reconsideration request was denied.

To date, a new judicial review has not been filed.

8. *Decision 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. In *Decision No. 512/06* the majority of the Panel found there was no breach of the Charter. The Vice-Chair dissented and found there was a breach of 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 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 then filed a request for reconsideration of the WSIAT decisions. Since the original Tribunal Vice-Chair has passed away, a new Vice-Chair had to be assigned to hear the reconsideration.

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

9. *Decision Nos. 959/13* (June 13, 2013) and *959/13R* (October 31, 2013)

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

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

Actions in Superior Court - *Decision No. 1065/06* (September 28, 2012)

Decision No. 1065/06 denied the worker's appeal for initial entitlement for traumatic mental stress. In January 2013, the worker served WSIAT with a Statement of Claim and Amended Statement of Claim.

Although the Statement of Claim does not mention *Decision No. 1065/05*, and does not name any of the Panel members individually, it is clear the worker is suing WSIAT because of that decision.

The worker has also named as defendants the Crown, the Ministry of Health, the Ontario Human Rights Commission (OHRC), the 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 2014, which is the earliest date for a long motion in Toronto. HPARB is bringing a motion to strike returnable on the same date.

Injured Worker v. WSIAT and WSIB

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

For reasons which are not clear, while the Tribunal was processing the appeal, the worker decided to sue the WSIB and the Tribunal for a million dollars. The worker is self- represented. The Tribunal and the Board are both preparing motions to strike the worker's action, and are seeking to have the motions heard together.

Recent Decisions

Gastrointestinal cancer and epidemiological evidence

Decision No. 211/12 considered a claim for gastrointestinal cancer as a result of occupational exposure for an electrician employed in a nickel mining company for a period of about 30 years. The worker was diagnosed with the condition a year after his retirement and died the following year.

After reviewing a number of Tribunal and court decisions, the Panel acknowledged the importance of epidemiological evidence, but commented that entitlement to benefits cannot depend exclusively on such evidence. Nor can its absence be treated as determining that no causal relationship exists, given the length of time often required for developing such evidence. While often the best evidence, there would be many circumstances in which the absence of epidemiological evidence cannot conversely be seen as evidence of the absence of a causal link.

In this case, there was evidence that gastrointestinal cancer was generally the result of an external injury, usually chronic esophageal reflux, and that the condition was not idiopathic. Yet in this case, aside from one incident of hiatus hernia, the worker's previous medical history was unremarkable.

The Panel, however, considered an opinion of a Tribunal medical assessor that, in the absence of evidence of a non-compensable factor, "a workplace etiology is more likely than not," given the likely increase of risk to a significant level of the "cumulative exposure to a variety of weak carcinogens." In this regard, the Panel noted that there was evidence of some exposure to asbestos, as well as significant exposure to polychlorinated biphenyls (PCBs). The Panel also noted in the epidemiological evidence that there was a significant increase in risk of developing esophageal cancer for workers employed at the plant where the worker worked during the period of his employment. The Panel therefore allowed entitlement for the cancer in these circumstances.

Paralegal exemption

Section 1(8) para.4 of the *Law Society Act* (LSA) provides that an employee of a trade union who is acting on behalf of a member of the union in connection with a proceeding before an administrative tribunal is deemed not to be practicing law or providing legal services.

Decision No. 1696/13I found that this provision applies only to a union employee acting on behalf of a member of the same union, but not on behalf of a member of a different union or a non-union member. Accordingly, a member of a firefighter's association could not rely on s.1(1) 8 of the LSA to claim an exemption to the licensing requirement for paralegals, in order to represent a fire marshal investigator who was not a member of that association.

The representative explained that firefighters and fire marshals often work closely together and that his association had expertise in this area. The representative submitted that an exception should be made in this case and that he should be allowed to represent the estate for reasons of fairness.

The Vice-Chair, however, noted that the LSA and its by-law did not provide for any "fairness" exceptions to the licensing and prescribed exemption requirements.

Intervener status in a constitutional challenge

Decision No. 1945/10I2 considered the question of the respective participation of the OWA and the Attorney General of Ontario (AGO/Ontario) in a constitutional challenge to the mental stress provisions in WSIA. In the case, the AGO elected to participate in the proceedings pursuant to s.109 of the *Courts of Justice Act.* The OWA had requested and been granted status to participate as an intervenor.

The Panel agreed with the submissions of Ontario, that the OWA should be limited regarding the extent to which they could make argument on the issues in this appeal, as the role of an intervener was limited to providing a perspective, from a particular point of view, beyond the immediate case.

The Panel acknowledged that the OWA represented a particular constituency, of which the worker in this case was broadly a member. The OWA's reply submissions should be limited to comment on points made by the employer and the AGO that address the impact of the provisions in issue on the broader worker community. The OWA, however, would not be permitted, in reply, to challenge submissions by the employer or the AGO that pertain to the application of those provisions to the worker in the particular circumstances of this case.

Conceding the difficulty in distinguishing between these two areas, the Panel directed that, upon completion of the initial closing submissions by the AGO and the employer, the OWA would submit a list of issues it wished to address in reply. The Panel would then determine which of these issues the OWA may address.

Health care and the *Regulated Health Professions Act*

Decision No. 1858/13 considered whether acupuncture treatments provided by a practitioner in Traditional Chinese Medicine constituted "health care" under the WSIA. Section 32 of the WSIA defines "health care" to include "professional services provided by a health care practitioner." Board policy (*Operational Policy Manual* (OPM) Document No. 17-01-02) defines a health professional as a member of a college of a health profession, as defined in the *Regulated Health Professions Act, 1991* (RHPA).

The Board initially denied entitlement as, at the time of the decision, a practitioner in Traditional Chinese Medicine was not a member of a college dedicated to this health profession. The *Traditional Chinese Medicine Act, 2006*, amended the RHPA to include practitioners of Traditional Chinese Medicine, but a college had not yet been established at the time of the Board decision.

At the Tribunal hearing, the worker's representative relied on a news release, issued by the Ontario Ministry of Health and Long Term Care, which indicated that from a date which was subsequent to the Board decision, Traditional Chinese Medicine and acupuncture practitioners were now required to register with the newly-established College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario, which governs the practice of Traditional Chinese Medicine in Ontario.

The Vice-Chair found, therefore, that treatment provided by a practitioner of Traditional Chinese Medicine, who is a member of the College, should now be considered "health care" within the meaning of the Act. The Vice-Chair then went on to find that health care for this treatment should be allowed on the basis that it was necessary, appropriate and sufficient as a result of the workplace injury in this case.

LOE following termination

Decision No. 893/13 considered the appropriate analysis for determining entitlement to wage loss (LOE) benefits when the worker was terminated from modified employment following an unproven allegation that the worker was sleeping on the job.

This case was unusual because the Employment Standards Officer had previously investigated the termination and found that the employer failed to produce evidence to refute the worker's claim that he was on an approved break when he was photographed sleeping. The employer entered into an agreement to settle under the *Employment Standards Act* where the employer agreed to amend its records to reflect that the worker was terminated because no suitable work was available.

The Vice-Chair's reasons reviewed Tribunal case law noting that there were two different approaches in Tribunal decisions on the issue of entitlement to LOE benefits following termination of a worker's employment. Both approaches examine the circumstances surrounding the termination to determine whether there is a causal link between the termination and the injury. One approach finds that, even if the termination is unrelated to the injury, it is still necessary to enter into a secondary analysis to determine whether the termination negates the significance of the compensable injury in the worker's subsequent loss of earnings. The other approach does not enter into the secondary analysis. According to this approach, if the termination is unrelated to the injury, the worker is not entitled to LOE benefits.

The Vice-Chair preferred the first approach, as it still considered whether the worker's injury continued to be the cause of loss of earnings following a termination. It was not necessary in this case, however, to enter into the secondary analysis of this approach, as the Vice-Chair decided that the termination was related to the compensable injury, finding that the settlement agreement was persuasive evidence that the compensable injury played a role in the worker's termination. Accordingly, the Vice-Chair awarded further LOE benefits after the worker's termination.

WSIAT
February 2014