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, 2015

Production Summary

At the end of the fourth quarter 2015, the active inventory totaled 9,435 appeals. This is less than 1% higher than the active inventory at the end of the third quarter in 2015.

Incoming Appeals

Incoming appeals for Q4-2015 numbered 1,056; of these, 946 were appeals from WSIB decisions, and 110 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 Q4-2015 is 66. 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 fourth quarter of 2015 totaled 1,164. This includes 359 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts, and 805 after-hearing dispositions; of the after-hearing dispositions, 784 followed from Tribunal decisions.

Inactive Inventory

At the end of Q4-2015, the inactive inventory was 1,748 cases. This is a decrease of approximately 3% from the inactive inventory at the end of Q3-2015.

Decisions Released within 120 Days

For the year to date ending Q4-2015, 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 fourth quarter of 2015, the notice inventory included 1,273 dormant cases, the active inventory totaled 9,435 cases, and the inactive inventory totaled 1,748 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	8836
Q1-2015	9088
Q2-2015	9311
Q3-2015	9406
Q4-2015	9435

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
Q4-2015	1056

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	979	312	667
Q1-2015	1001	330	671
Q2-2015	1046	330	716
Q3-2015	1045	330	715
Q4-2015	1164	359	805

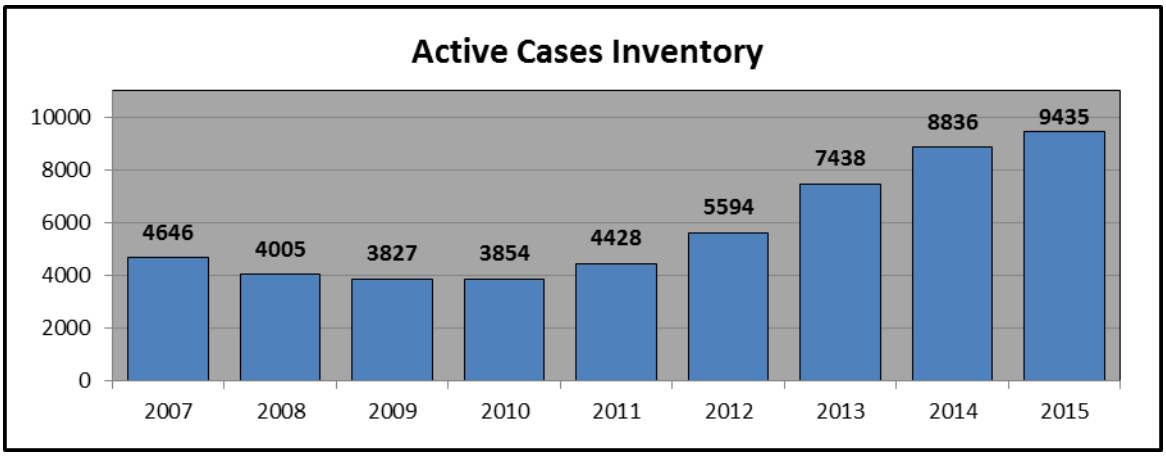
D. Inactive Inventory

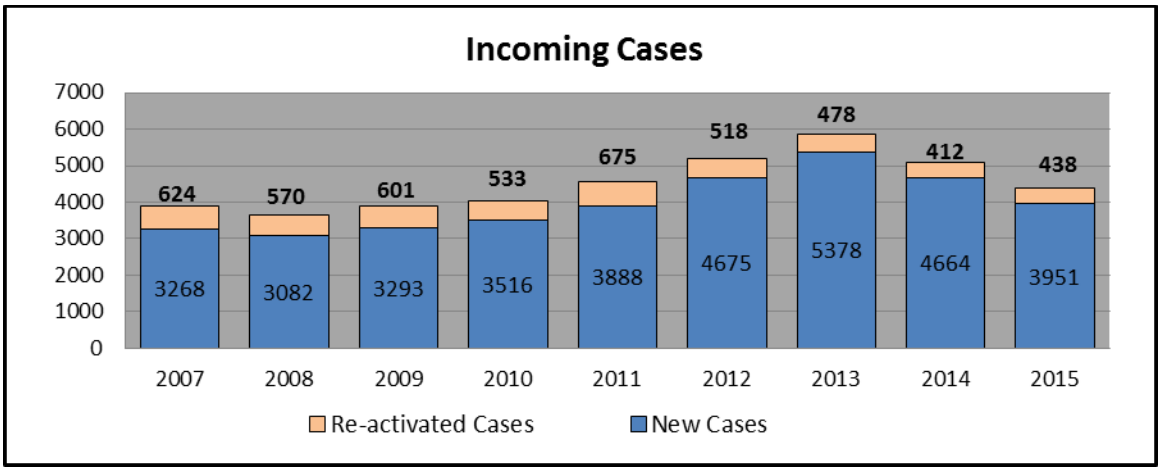
Period	Inactive Inventory
Q1-2014	2272
Q2-2014	2220
Q3-2014	2148
Q4-2014	2091
Q1-2015	2006
Q2-2015	1890
Q3-2015	1798
Q4-2015	1748

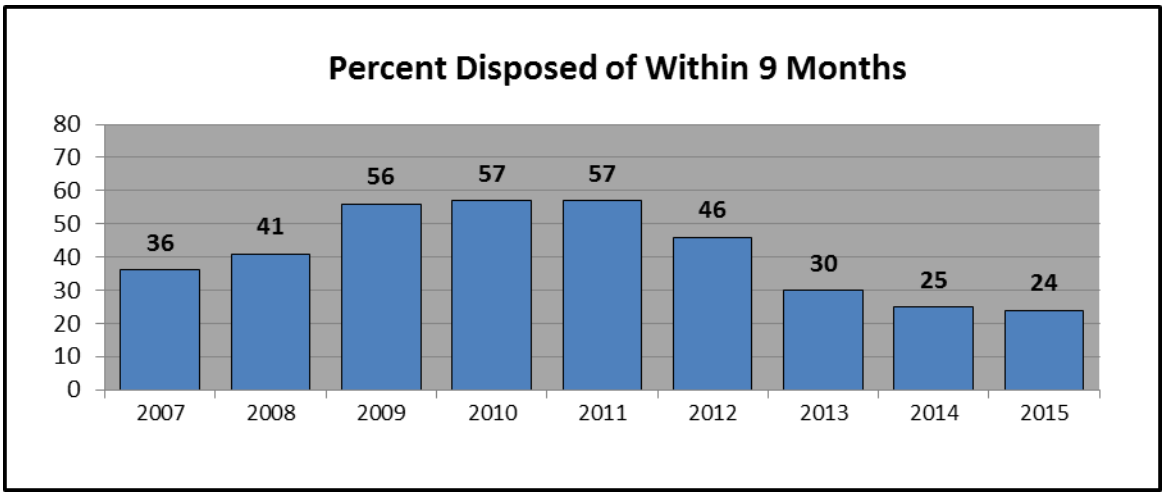
E. Notice of Appeal (Dormant cases)

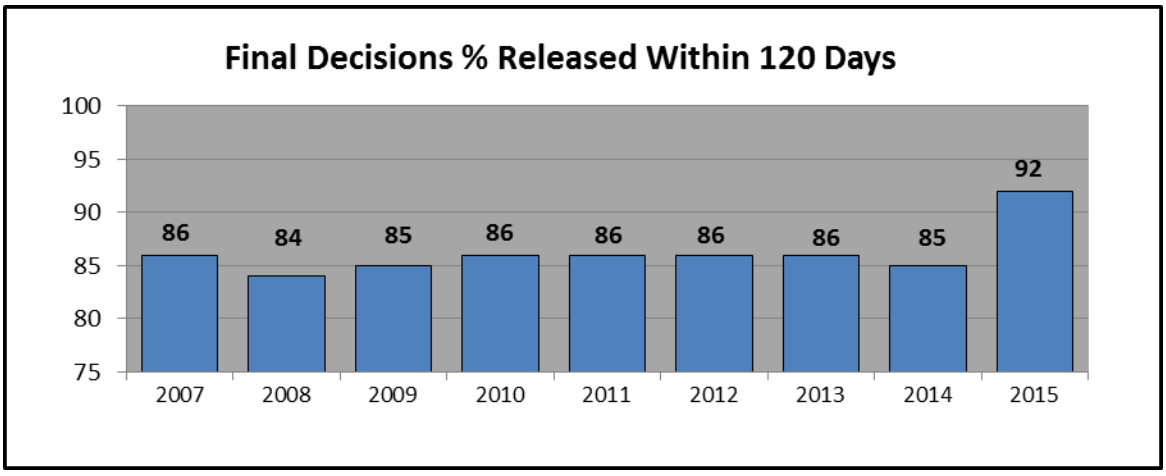
Period	Total Dormant	Change from Previous Quarter
Q1-2014	1764	-98
Q2-2014	1733	-31
Q3-2014	1780	47
Q4-2014	1739	-41
Q1-2015	1644	-95
Q2-2015	1524	-120
Q3-2015	1410	-114
Q4-2015	1273	-137

F. Production Charts: From 2007 to 2015






Percent Disposed of Within 9 Months
80
70
60
50
40
30
20
10
0
36
41
56
57
57
46
30
25
24
2007
2008
2009
2010
2011
2012
2013
2014
2015


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

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the fourth 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. 1959/14* (May 20, 2015) and *1959/14R* (November 4, 2015)

During the construction of a bridge overpass MI was injured when the bridge collapsed while he was operating machinery. The owner of the property, a County, had hired the company BM as consulting engineers to design and oversee the project as well as AH, a company to act as a general contractor for the project. The company GBL was also engaged as a subcontractor and the company EF was hired to supply falsework and formwork materials. Another company, IB, was hired to provide concrete refinishing services, and it was through this company that MI was engaged to perform work.

After being injured, MI commenced a civil action in negligence against AH, BM, GBL, the County and McG, a professional engineer assigned to the project. Another company and engineer were also added as defendants to the action, and MI's wife and IB were included as plaintiffs. A section 31 Application was initiated by EF and McG, seeking an order to remove MI's right to sue as well as his wife's claim. The issue in the application was whether MI was an "independent operator" or "worker," or whether he was an "executive officer" of IB.

During the hearing it was understood that MI had conceded that he was not an independent operator, and therefore the only issue that remained to be determined was whether MI was a worker or an executive officer of IB at the time of the accident. The Vice-Chair determined that MI was a worker and not an executive officer of IB at the time of his accident and therefore the application was allowed. As a result, the action of MI and his wife was deemed to be barred.

MI filed a request for reconsideration, arguing that it had not been conceded that MI was not an independent operator, but instead that it was conceded that MI was not an independent contractor. MI also submitted a number of records that had not been produced during the original hearing. The Vice-Chair determined that MI had failed to demonstrate any fundamental error of law or process during the original hearing and that the threshold test had not been met. The Vice-Chair also determined that MI had failed to provide substantial new evidence that had not been available at the time of the original hearing that would have likely resulted in a different decision. Accordingly, MI's request for reconsideration was denied.

In December 2015, MI commenced an application for judicial review, although the Tribunal was not served with the Notice of Application until January 2016. The Tribunal has filed a Notice of Appearance as well as its Record of Proceedings and is waiting to receive the Applicant's factum.

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

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

The worker commenced an action against the scrap yard, and three employees of the scrap yard. These defendants then commenced a third party action against the worker's employer.

The worker received statutory accident benefits (SABs). The insurance company which provided these benefits, and the third parties, applied to the Tribunal under s. 31 of the *WSIA* for a determination of whether the worker's right 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. In a decision released on January 6, 2016, the Divisional Court dismissed the worker's application for judicial review, concluding that the Tribunal's decision was reasonable.

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 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.

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. The worker has not filed any other documents.

4. *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 Loss of Earning (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 taken place and post-hearing work is in progress. 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.

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. WSIB policy established that it was not fair to calculate long term earnings on the basis of non-permanent jobs. The Panel agreed with the WSIB 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 early March 2015. In late November 2015, the Divisional Court dismissed the application for delay.

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 SABs. 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 WSIB 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. The Tribunal is waiting to receive notice of a hearing date.

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 the process of trying to resolve the worker's judicial review Application and with the agreement of the worker, has not yet filed its factum.

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

The issue in *Decision No. 645/11* was whether the worker should be granted further LOE benefits after July 2004, and whether the worker should be granted entitlement for psychotraumatic disability. In *Decision No. 645/11*, the worker was granted entitlement to both LOE benefits after July 2004 and to benefits for psychotraumatic disability. The worker's claim was returned to the WSIB for implementation. The WSIB paid the worker full LOE benefits until October 2006 and then partial LOE benefits until the worker reached age 65 in 2012.

Following the WSIB's implementation, the worker brought an application in the courts for 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 WSIB sought clarification and/or reconsideration of *Decision No. 645/11* at the Tribunal.

The question of whether the application for reconsideration/clarification should proceed or whether the Tribunal should wait until the resolution of the worker's court application was considered in *Decision No. 645/11R*.

The Vice-Chair determined that the WSIB's application for clarification should proceed without waiting for the resolution of the court proceeding, as the Tribunal was in the best position to understand the nature of the dispute and could provide the most efficient resolution of the dispute.

The Vice-Chair clarified *Decision No. 645/11* by stating that the decision granted further LOE benefits to the worker, with the nature and duration of those benefits to be determined by the WSIB. The decision did not grant full LOE benefits to the worker to age 65.

Following the release of *Decision No. 645/11R*, the worker amended her application for judicial review and added the Tribunal as a party. In addition to seeking a *mandamus* order, the worker is also arguing that *Decision No. 645/11R* is unreasonable.

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*.

9. *Decisions Nos. 493/13* (April 29, 2013) and *493/13R*

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 judicial review 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 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 WSIB 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 and Record of Proceedings.

10. *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 and Record of Proceedings.

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.

Three days prior to the release of *Decision No. 691/05*, the worker wrote to the Tribunal alleging he had been threatened by one of the panel members. Although the Tribunal informed the worker about the appropriate complaint procedures, no response was received from the worker for two and a half years. In September 2010, the worker made further allegations of panel misconduct, and requested a reconsideration.

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 commenced proceedings in the wrong court. 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 again 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 of one of the Panel's caucuses.

The Tribunal and the WSIB each brought a motion to dismiss the worker's action. The motions were scheduled to be heard 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 also adjourned and were scheduled to be heard in October 2015. The motions were again adjourned after a potential bias issue was raised and are now scheduled to be heard in May 2016.

Recent Decisions

Obtaining a report from a Tribunal Assessor – factors for consideration

The Tribunal hears a number of appeals from workers seeking entitlement to medical conditions, which may benefit from an opinion by a Tribunal Assessor in determining whether the worker's condition is work related. Section 134 of the *WSIA* allows the Tribunal Chair to establish a list of professionals from whom the Tribunal may seek assistance in determining matters of fact. *Decision No. 2692/15* noted that obtaining such an opinion prolongs the course of proceedings and involves considerable expenditure of the Tribunal's limited resources. As noted in *Decision No. 128/13I*, the decision on whether to retain a Tribunal Medical Assessor is within the discretion of the Vice-Chair or Panel.

Decision No. 2692/15 considered several factors in determining whether it is advisable to seek the opinion of an independent health professional, including: the extent to which the claim or issue is novel in the Tribunal's jurisprudence; the extent to which the medical condition or its causation is novel or controversial in the medical community; whether there are divergent medical opinions on the record; whether the diagnosis of the worker's condition is unclear; the quantity and quality of the medical opinions on file, which includes consideration of the qualifications and expertise of the health professionals who provided reports; the likelihood that an independent health professional would be in a better position to assess the issues than the health professionals who have already provided opinions, (including whether the opinions on file were given on the basis of an accurate understanding of the facts); and, whether the Tribunal's Medical Liaison Office (MLO) has reviewed the file and recommended an assessment.

Decision No. 2692/15 found that the evidence did not support a conclusion that the worker's condition, sarcoidosis, was occupational in origin. Medical opinions were either unsupportive of a causal connection or silent on the issue. There were no divergent opinions on the diagnosis of sarcoidosis or the potential that the worker's sarcoidosis was work-related. The existing opinions were of good quality and were based upon an accurate understanding of the facts. The MLO did not recommend any additional investigation. Further, entitlement for sarcoidosis is not novel or controversial in the Tribunal's jurisprudence. There was no basis for concluding there were recent developments in the potential for an occupational cause for sarcoidosis. The appeal was dismissed.

Suitable modified work, loss of earnings and re-employment obligation

Decision No. 511/14 considers LOE benefits after the accident employer offers suitable modified work to the worker and the factors in determining work suitability. It also considered the re-employment obligation where there is a disciplinary history.

In January 2007, the worker sustained an injury and filed a claim in June, 2007. Shortly after the claim was filed, the employer terminated the worker's employment. The Board granted entitlement for the worker's injury to the neck and shoulder and an 18% NEL

award. The worker sought LOE benefits after June 2007, and a finding that the employer breached its re-employment obligations. The Board denied the worker's claims and the worker appealed.

The Vice-Chair considered the suitability of duties performed by the worker from January to June 2007. Following *Decision No. 2066/11*, this required consideration of the worker's functional abilities or medical precautions and assessing them in the context of the job description, along with other evidence such as the worker's actual ability to perform the job (if attempted) and medical reporting about the worker's condition while performing the job. Consideration was also given to what accommodations were available to the worker during episodes of increased symptoms.

In this case, the worker had restrictions against lifting from the floor to overhead, and working above shoulder level. The Vice-Chair found that the work involved repetitive lifting; it did not, however, exceed the medical restrictions. The worker was able to perform the duties offered to her between January and June 2007. There was no significant medical evidence of complaint to her doctor about the appropriateness of her duties. Accordingly, the Vice-Chair found the job duties offered to the worker to be suitable, and also, that the employer would have been able to continue to provide the worker with suitable duties, had the employer not terminated her employment in 2007.

The worker had a disciplinary history. The Vice-Chair found that the employment termination in June 2007 was not related to the worker's compensable condition, and the worker was not entitled to LOE benefits. The employer did not breach its re-employment obligations when it terminated the worker in June 2007. The appeal was dismissed.

Recurrences and loss of earnings benefits

Decision No. 2054/15 examined the issue of entitlement for a recurrence for a hernia and LOE benefits. In 2006, the worker was granted entitlement for an umbilical hernia, and the medical evidence indicated that he would have a recurrence - likely within a year, if the worker did not lose weight. Approximately six years later, in 2012, the worker underwent a further surgery for a recurrent umbilical hernia. He sought entitlement for the recurrence and consequent LOE benefits.

Board *Operational Policy Manual*, (OPM) Document No. 15-04-08, entitled "Hernia" indicates that "If workers have a recurrence of a work-related hernia with no new incident, entitlement is considered under the original claim." The Vice-Chair considered whether the worker had a recurrence of his work-related hernia, in accordance with OPM Document No. 15-03-01, entitled "Recurrences." It provides that a recurrence of a compensable injury is allowed where it is clinically compatible with the original injury or if there is a combination of compatibility and continuity.

The Vice-Chair found the worker had a recurrence of the original compensable hernia, noting that a general surgeon opined that the worker would "definitely" have a recurrence. While the Board denied entitlement for the recurrence on the basis of the worker's weight, Policy allowed entitlement where there was clinical compatibility. There was no requirement that the recurrence has to occur at work, as long as it is

established that the initial compensable accident was a significant contributing factor to the recurrence. The Vice-Chair found that the worker's weight was a factor regarding the timing of the recurrence, but the fact that the worker would have a recurrence at some point in the future was a certainty. The worker was entitled to benefits for the recurrent hernia, regardless of the fact that his weight may have affected when he underwent the repair.

On LOE benefits, Board Policy on "Hernia" indicates that workers may be off work for up to two weeks prior to the surgery, and recovery may take up to eight weeks for an uncomplicated hernia.

The worker sought LOE benefits longer than contemplated by policy. The worker was granted entitlement for 2 weeks prior to the surgery and was cleared to return to work approximately 8 weeks after his surgery. The Vice-Chair allowed benefits for the 8 week period. The appeal was allowed in part.

WSIAT
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