

Sample Appellant's Factum: Application
for leave to appeal

Court File No. M31287

COURT OF APPEAL FOR ONTARIO

IN THE MATTER of the *Judicial Review Procedure Act*, R.S.O.
1990, c. J.1., as amended;

AND IN THE MATTER OF a decision of the Workplace Safety
and Insurance Appeals Tribunal, WSIAT #97-1132, Decision
#770/98IR, dated 5 February 2002

BETWEEN:

JANE ROACH

Applicant
(Responding Party)

- and -

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Respondent
(Moving Party)

FACTUM OF THE WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
(Motion for Leave to Appeal)

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**FACTUM OF THE WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
(Motion for Leave to Appeal)**

PART I - MOVING PARTY AND ORDER APPEALED FROM

1. The moving party, The Workplace Safety and Insurance Appeals Tribunal, seeks leave to appeal from a decision of the Divisional Court (*per* MacFarland, Then and Swinton JJ.A.) dated April 19, 2004. The Divisional Court quashed the decision of the Tribunal, the first time that has happened since the Tribunal was established 19 years ago.

Courts of Justice Act, R.S.O. 1990, c. C.43, as am., ss. 6(1)(a) and *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as am., Rule 61.03.1 (the jurisdiction and governing provision for this motion)

Order of the Divisional Court, dated April 19, 2004, Motion Record of The Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 2 at 7, para. 2

2. The Tribunal submits that the Divisional Court, while stating that it was applying a standard of “patent unreasonableness”, in fact applied a much stricter standard of review, reversing the Tribunal on an issue concerning its appreciation of the evidence before it, a matter within the highly specialized expertise of the Tribunal. The Divisional Court also held that the Tribunal failed to provide sufficient reasons in support of its decision. In making these rulings, the Divisional Court seems to have overlooked the fact that the Tribunal’s decision was a reconsideration decision, a decision where the benefits claimant, Jane Roach (the “worker”), bears a high burden of displacing the original decision, a decision that in this case was supported by detailed reasons analyzing the large amount of evidence placed before the Tribunal.

3. Leave should be granted in order to resolve the important legal questions, discussed below, that are raised by the Divisional Court’s decision concerning how the reconsideration decisions of administrative tribunals should be reviewed. More importantly, the Tribunal

handles hundreds of reconsideration decisions every year and this decision, the first one to result in a quashing of the Tribunal's decision in the history of the Tribunal, raises serious questions in this area. The guidance of this Honourable Court on the issues raised by this case is required.

PART II - STATEMENT OF FACTS

A. Nature of the Tribunal

4. The Tribunal is a specialized administrative tribunal. It finds facts, decides questions of law, and applies its understanding of the body of law, policy and jurisprudence that has developed around the workers' compensation system in Ontario. The Tribunal conducted over 3,500 hearings in 2001.

Annual Report 2001, Workplace Safety and Insurance Appeals Tribunal, The Tribunal's Book of Authorities

5. The Tribunal is separate from and independent of the Workplace Safety and Insurance Board. The Tribunal's primary function is to hear appeals from the Board's final decisions. The Tribunal is the final appellate forum in matters of workplace safety and insurance in Ontario. Its decisions are subject to a strongly worded privative clause in s. 123(4) of the *Workplace Safety and Insurance Act, 1997*.

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, ss. 123-126 and 173-175

6. The Tribunal has broad powers regarding the evidence it can consider and the rules and procedure it can follow. The Tribunal is required to determine its own practice and procedure and must base its decisions upon the real merits and justice of the case before it. While the Tribunal is not bound by legal precedent, it must provide the parties with a full opportunity for a

hearing. *The Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 does not apply to the Tribunal's proceedings and decisions.

Workers' Compensation Act, R.S.O. 1990, c. W.11, ss. 73, 90 and 92

Workplace Safety and Insurance Act 1997, S.O. 1997, c. 16, ss. 124(1) and 131

7. In this matter, the worker's entitlement to benefits are determined by the *Workers' Compensation Act*, as the worker's injury occurred prior to January 1, 1998, when the *Workplace Safety and Insurance Act, 1997* came into force.

Workers' Compensation Act, R.S.O. 1990, c.W.11, s. 43

Workplace Safety and Insurance Act 1997, S.O. 1997, c. 16, ss. 101-102

B. The Incident Giving Rise to the Injury

8. On January 3, 1991, the worker was assaulted by a resident of a group home where she was employed as a resident counsellor. The worker suffered injuries as a result of the assault and was initially off work for approximately two months before returning to her regular duties. During those two months, she received temporary total disability benefits.

Decision No. 770/98 I R of the Workplace Safety and Insurance Appeals Tribunal, dated February 5, 2002, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 4 at 14, paras. 11 – 13

9. In April 1992, the worker quit her employment as a result of symptoms that she attributed to the assault. She has not returned to the workforce since.

Decision No. 770/98 I R of the Workplace Safety and Insurance Appeals Tribunal, dated February 5, 2002, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 4 at 14, paras. 11 – 13

10. The worker asserts that she suffers from Traumatic Vertebrobasilar Ischemia ("TVBI") as a result of injuries she sustained from the assault. TVBI is a condition in which blood flow to

parts of the body supplied by certain arteries is impeded. Occasionally, that blockage is caused by a traumatic injury.

Decision No. 770/98 I of the Workplace Safety and Insurance Appeals Tribunal, dated October 27, 1999, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 5 at 27, para. 20

11. The worker claims that as a result of her purported TVBI, she has no capacity for vocational rehabilitation. However, the worker failed to convince the Board of her claim that she suffered from TVBI. The Board held that the worker developed a chronic pain disorder as a result of injuries sustained in the assault and that she was capable of participating in a vocational rehabilitation program. The Board held that if the worker suffered from TVBI, it was not caused by the assault. This is a factual finding based on expert evidence.

Decision No. 770/98 I R of the Workplace Safety and Insurance Appeals Tribunal, dated February 5, 2002, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 4 at 14, paras. 11 – 13

Decision of G. Sicilia, Appeals Officer, dated January 14, 1997, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 4, Tab 22 at 1075-1078

C. Proceedings Before the Tribunal: The First Decision

12. There were two decisions at the Tribunal level. In each, one of the issues before the Tribunal was whether the worker was entitled to compensation benefits for TVBI.

13. In the first decision, the Tribunal heard extensive evidence, including conflicting medical opinions. The Tribunal held that the worker's injuries were more consistent with chronic pain disorder than with TVBI.

Decision No. 770/98 I of the Workplace Safety and Insurance Appeals Tribunal, dated October 27, 1999, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 5

14. One of the grounds upon which the Tribunal held that the worker was not suffering from TVBI was that the worker's first reports of the assault did not contain a reference to the worker striking the back of her head or neck. The Tribunal noted that the worker failed to report the injury to the back of her head and neck until over a year after the accident. The Tribunal held that the worker's change in her recollection and perception of her original injury and symptoms undermined the medical opinions tendered in her favour. These changes were consistent with a finding of chronic pain disability. This is very much like a finding of credibility.

Decision No. 770/98 I of the Workplace Safety and Insurance Appeals Tribunal, dated October 27, 1999, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 5 at 32-33, paras. 63-71

Letter from Dr. Franks to Dr. Steffens, dated October 8, 1993, Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 2, Tab 10-G at 360 and 364

D. The Tribunal's Second Decision: Reconsideration of the Tribunal's First Decision

15. The worker applied to the Tribunal for a reconsideration of Decision 770/98 I. The Workers' Compensation Act and the Workplace Safety and Insurance Act give the Tribunal authority to reconsider its decisions at any time where it considers it advisable to do so. The Tribunal releases thousands of decisions each year. Due to the need for finality in the appeal process, a long line of Tribunal decisions have articulated a high standard of review, or threshold test, which is applied on an application to reconsider. The Tribunal has developed a practice direction on reconsiderations which explains the process and the tests.

16. The *Practice Direction on Reconsiderations* (Tribunal's Authorities, Tab 10) specifies that there is a different test on reconsideration than on appeal. In order for a decision to be overturned on a reconsideration, the Tribunal must find a significant defect in the administrative

process or the content of the decision which if corrected, would probably change the result. The following is an excerpt from the Practice Direction:

Generally, the Tribunal must find that there is a significant defect in the administrative process or content of the decision that, if corrected, would probably change the result of the original decision. The error and its effects must be significant enough to outweigh the general importance of decisions being final and the prejudice to any party of the decision being re-opened.

Because the power to reconsider is discretionary, a decision on the threshold test must be made on the facts of each request. Some examples of situations where the Tribunal might decide that it is advisable to reconsider the decision are:

- significant new evidence is discovered which was not available at the original hearing;
- the decision overlooks an important piece of evidence (as opposed to rejecting the evidence or distinguishing it);
- the decision contains a clear error of law (for example, the decision does not apply the relevant sections of the *Workplace Safety & Insurance Act*); and
- the decision contains a jurisdictional error (for example, the Tribunal decided an issue which it did not have the legal authority to decide).

17. In the worker's reconsideration application, the worker submitted new and fresh evidence. This included an affidavit and unsworn statement from the worker's mother, and two affidavits from Pauline Stewart, the worker's former co-worker. The worker also filed fresh medical evidence, including a report from Dr. Warnica, an ophthalmologist, prepared two months after the assault. The worker argued that Dr. Warnica's report illustrated that TVBI symptoms arose prior to April 1992 and that the worker sought treatment for those symptoms with a medical professional in a more timely manner than the Tribunal originally believed.

Decision No. 770/98 I R of the Workplace Safety and Insurance Appeals Tribunal, dated February 5, 2002, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 4 at 16, paras. 27-29

Affidavit of Pauline Stewart, sworn November 24, 1999, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 4, Tab 18 at 1006

Affidavit of Pauline Stewart, sworn May 11, 2000, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 4, Tab 21 at 1046

Letter from Dr. Warnica to Dr. Bailey, dated March 6, 1991, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 4, Tab 18 at 1013

Letter from Phyllis Roach to the Tribunal dated November 25, 1999, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 4, Tab 18 at 1016

Affidavit of Phyllis Roach, sworn May 10, 2000, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 4, Tab 21 at 1047

Letter from Dr. David Spence to Mr. Tascona, dated July 28, 1999, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 4, Tab 18 at 1017

Letter from Dr. Warnica to Dr. Bailey, dated March 6, 1991, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 4, Tab 18 at 1013

18. Ms. Stewart, in an affidavit sworn almost nine years after the assault and after the Tribunal's first decision against the worker was released, deposed that the worker sustained a blow to the front of her head and a blow to the back of her head or neck during the assault. Ms. Stewart also deposed that the worker exhibited signs of the neurological symptoms of which she subsequently complained between March 1991 to April 1992. The worker's mother in her affidavit and in her unsworn statement, both new, after-acquired evidence, said that since the assault the worker has suffered from various other ailments.

Decision No. 770/98 I R of the Workplace Safety and Insurance Appeals Tribunal, dated February 5, 2002, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 4 at 27, para. 27

Affidavit of Pauline Stewart, sworn November 24, 1999, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 4, Tab 18 at 1006

Letter from Phyllis Roach to the Tribunal dated November 25, 1999, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 4, Tab 18 at 1016

Affidavit of Pauline Stewart, sworn May 11, 2000, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 4, Tab 21 at 1046

Affidavit of Phyllis Roach, sworn May 10, 2000, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 4, Tab 21 at 1047

19. The worker argued that Ms. Stewart's affidavits proved that she suffered a traumatic injury to the back of her head consistent with the trauma required to give rise to TVBI. Therefore, the medical opinions tendered on behalf of the worker, including Dr. Frank's opinion, should be preferred over other conflicting opinions. The worker also explained her failure to

report the injury to the back of her head in a more timely fashion by relying on Ms. Stewart's affidavit evidence that the worker did not remember hitting the back of her head after the assault.

Decision No. 770/98 I R of the Workplace Safety and Insurance Appeals Tribunal, dated February 5, 2002, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 4 at 16-17, paras. 33-34

20. The Tribunal considered Ms. Stewart's evidence and held that it was not "weighty evidence in favour of a finding that the Panel erred in its central finding in this case." In particular, the Tribunal held that Ms. Stewart's affidavit evidence further raised the question of why the worker did not report the injury to the back of her head when she saw her family physician in January 1991, which was after her co-worker had advised her of that injury. The Tribunal also noted that an incident report prepared by the worker's employer after the assault, based on information that came from the worker, contained no reference to the worker's alleged injury to the back of her head.

Decision No. 770/98 I R of the Workplace Safety and Insurance Appeals Tribunal, dated February 5, 2002, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 4 at 17, paras. 35, 36 and 39

21. In further support for its decision, the Tribunal cited Dr. Warnica's report, in which he made no reference to an injury to the back of the worker's head or neck. Dr. Warnica described headaches as the worker's only symptom from the injury, confirmed that the worker was not unconscious as a result of the injury and made no reference to the worker's purported memory loss. In light of these details, the Tribunal found that Dr. Warnica's report was consistent with the Tribunal's earlier findings.

Decision No. 770/98 I R of the Workplace Safety and Insurance Appeals Tribunal, dated February 5, 2002, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 4 at 18, paras. 48-51

Letter from Dr. Warnica to Dr. Bailey, dated March 6, 1991, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 4, Tab 18 at 1013

22. There was other evidence before the Tribunal regarding the worker's failure to report an injury to the back of her head and neck after the assault. The Tribunal relied on a report from Dr. Murphy, the physician who treated the worker in April 1992, which said that the worker was pushed into a wall and did not suffer a loss of consciousness. Dr. Murphy's report did not discuss any injuries to the back of the worker's head or neck. The Tribunal held that Dr. Murphy's report also supported the Tribunal's initial decision.

Decision No. 770/98 I R of the Workplace Safety and Insurance Appeals Tribunal, dated February 5, 2002, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 4 at 19, para. 52

Report of Dr. Murphy, dated April 27, 1992, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 2, Tab 10-G at 419

23. The Tribunal held that the worker suffered a single blow to the head initially that did not cause a loss of consciousness; she did not suffer a blow to the back of the head or neck; the initial symptoms associated with the worker's injury subsided and the worker developed a new constellation of symptoms in March 1992 that were substantially more debilitating than the symptoms she initially experienced from the injury. The worker's new evidence did not suggest the Tribunal erred on the issue of whether the worker suffered from TVBI. The Tribunal in effect reaffirmed its earlier decision on credibility.

Decision No. 770/98 I R of the Workplace Safety and Insurance Appeals Tribunal, dated February 5, 2002, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 4 at 19, para. 56

E. The Divisional Court's Decision

24. The Divisional Court held that the Tribunal wrongly focused on the issue of whether there was one blow or two to Ms. Roach's head rather than the issue in this case, which is whether the injury of January 3, 1991 caused Ms. Roach to suffer TVBI. Citing the decision of

Payne v. Ontario Human Rights Commission, [2000] O.J. No. 2987 (C.A.) at para. 148, the Divisional Court held that the tribunal had an obligation “to consider and clearly explain the basis for their rejection of the co-worker’s unchallenged sworn evidence”, as the Tribunal had earlier concluded that the issue of whether Ms. Roach suffered one or two blows to the head was “critical to the decision”. The Court also held that the Tribunal did not determine the conflict between the medical opinions of Dr. Silver and Horsey on one hand and Dr. Spence on the other.

Reasons for Judgment of the Divisional Court, dated April 19, 2004, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 3 at 10 and 11, paras. 2 and 3

25. The Divisional Court held that the Tribunal’s decision was patently unreasonable, quashed it and remitted it to the Tribunal in accordance with its decision.

Reasons for Judgment of the Divisional Court, dated April 19, 2004, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 3 at 10 and 11, paras. 2 and 3

PART III – QUESTIONS ON APPEAL

26. The Tribunal submits that the issues on this application are:

- (a) What is the standard of review in this case? The standard of review is patent unreasonableness but the Divisional Court applied a lower standard of review by:
 - (i) failing to appreciate that the decision under judicial review was a reconsideration of an earlier decision and that Ms. Roach faced a high threshold test under Tribunal policy in order to succeed in her application for reconsideration;

- (ii) not giving sufficient deference to the Tribunal's findings of fact and interpretation of medical evidence in its reconsideration decision, both of which are matters that are within the Tribunal's exclusive jurisdiction as a polycentric and expert body;
- (b) Whether the Divisional Court incorrectly held that the Tribunal in its reconsideration decision was obligated to give reasons more detailed than it did.

PART IV – SUBMISSIONS

A. The Test For Leave to Appeal

27. To obtain leave to appeal from the Divisional Court to the Court of Appeal, the Workplace Safety and Insurance Appeals Tribunal must demonstrate that it has an arguable question of law involving the interpretation of a general principle of law where the point in issue involves a question of public importance.

Sault Dock Co. v. Sault Ste. Marie, [1973] 2 O.R. 479 at 481 (C.A.) (*Tribunal's Authorities*, Tab 8)

28. The general issues are as set out above. But there is one fundamentally unsettled issue of principle that underlies and pervades all of them. In the Divisional Court, the worker sought an order quashing the Tribunal's reconsideration decision. That reconsideration decision was made in accordance with a Practice Direction that sets out the test for when the Tribunal will grant a

reconsideration application. In the Divisional Court, no relief was sought against that Practice Direction. What is the standard and methodology of review in such a circumstance? Is the Divisional Court to conduct its analysis within the rubric of the Practice Direction to which the Tribunal was subject? Or is the Divisional Court able to disregard the Practice Direction, examine the reasons for judgment on the application for reconsideration in isolation (not in conjunction with the original decision) and find those reasons wanting because they do not replicate all of the factual and other findings of the decision being reconsidered? There are a number of questions that are entirely unconsidered in the jurisprudence:

- How are reviewing courts to handle reconsideration decisions? Are they to be taken in isolation based on the standard for reconsideration (as the Tribunal will submit in this Court) or are they to be conducted as if they are a complete revisiting of the original decision (as the Divisional Court seems to have assumed)?
- Do practice directions and other so-called “soft laws” that bind administrative tribunals also bind reviewing courts?
- What amount of detail must be placed in reasons in reconsideration decisions, where reasons for decision already exist?

These are critical questions for the Tribunal, especially when it is dealing with reconsideration applications. The Tribunal receives hundreds of applications for reconsiderations every year. It has released over two thousand reconsideration decisions, all of which have relied on the test in

the Reconsideration Practice Direction. This is the first successful judicial review of a Tribunal decision since its existence in 1985. The Divisional Court's decision throws into question the practices and methodologies of the Tribunal in reconsideration applications. In the interests of clarity for the Tribunal and the parties who appear before it, leave to appeal should be granted.

B. Standard of review

29. In this case, the Divisional Court looked at the Tribunal's reconsideration decision without having regard to the high test for reconsideration set out in the Practice Direction. When assessing the reasons for judgment of the Tribunal, the Divisional Court seems to have imposed an obligation on the Tribunal to go through all of the evidence and in effect re-try the case. This is not the standard set out in the Practice Direction.

30. Under its Practice Direction, the Tribunal had to apply a test whether there was a "significant defect" with the original decision. The Tribunal, protected as it is by a strongly worded privative clause, is entitled to substantial deference in applying this test. The test involves an expert assessment of medical evidence, a fact-laden question, a qualitative question as to whether a defect is "significant".

31. Further, it must be recalled that appeals to the Tribunal are part of the workplace safety and insurance system's investigation of the rights and benefits flowing from a workplace injury – the Tribunal is not engaged in resolving conflicts between private parties – and so the Tribunal adheres to an inquisitorial, rather than an adversarial, model of adjudication, a policy-laden exercise that invites greater deference from a reviewing court.

32. Many Courts have held that the decisions of this expert Tribunal are subject to the test of patent unreasonableness. However, the Divisional Court, while stating that it was applying a standard of patent unreasonableness, actually applied a much lower standard and reversed the expert Tribunal, failing to appreciate that this was a reconsideration decision. In effect, it second-guessed the Tribunal on a factual decision concerning whether a credibility-based decision should be revisited.

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, as amended, ss. 123(4)(5) (strong privative clause)

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, as amended, ss. 102 and 112 (strong privative clause made applicable to Tribunal decisions under the *Workers' Compensation Act*, R.S.O. 1990, c. W.11)

Canada Post Corp. v. Smith (1998), 40 O.R. (3d) 97 at 106 (C.A.) (*Tribunal's Authorities*, Tab 4), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 329 (S.C.C.) (QL), *Caleb Charles v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, [2003] O.J. No. 1388 at para. 4 (Div. Ct.), aff'd [2004] O.J. No. 452 (C.A.) (*Tribunal's Authorities*, Tab 3), and *Gowling v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, [2004] O.J. No. 919 at paras. 11-12 (Div. Ct.) (*Tribunal's Authorities*, Tab 5)

33. The pitfalls of courts interfering unduly with factual decisions of expert tribunals are well illustrated by this case. The Divisional Court quashed the Tribunal's reconsideration decision because it ruled that the Tribunal did not focus on the issue whether the first blow to the worker's head on January 3, 1991 caused TVBI. The Tribunal considered the issue of the TVBI injury in 29 paragraphs of reasoning concerning the multitude of expert and other evidence placed before it. Yet the Divisional Court chose to identify two particular paragraphs in that discussion, paragraphs 40 and 56, and discuss them in isolation from the rest of the reconsideration decision and from the findings in the original decision.

34. In paragraph 40 of its reconsideration decision, the Tribunal held that an affidavit of a co-worker – fresh evidence on the reconsideration decision – did not provide enough reason to

reverse the earlier finding in question and held that a second injury did not cause the TVBI injury. In paragraph 56, the Tribunal reaffirmed the finding in a report that provided the “clearest evidence of the history of the worker’s symptoms”, a report that showed that the initial symptoms subsided and “a new constellation of symptoms” developed that were “more debilitating” than the initial symptoms – thereby finding that the initial injury did not cause TVBI. The Tribunal did focus on the issue of cause and made its findings, even in the two paragraphs identified by the Divisional Court. This is apparent even if one looks at the reasons of the Tribunal’s reconsideration decision in isolation, not in conjunction with the original decision and the evidence referenced in that decision (see paragraphs 60-72), and even if one looks at the reasons of the Tribunal’s reconsideration decision as a decision at first instance rather than as a reconsideration decision.

C. Sufficiency of Reasons

35. What is the test for sufficiency of reasons? What is the threshold for a finding that reasons are insufficient? While the Supreme Court of Canada has said that reasons may be necessary in certain cases where important interests of the individual are affected (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Tribunal’s Authorities*, Tab 2); *R. v. Sheppard*, [2002] 1 S.C.R. 869 (*Tribunal’s Authorities*, Tab 9)) and while this Court has recognized that sufficient reasons are necessary in criminal cases to inform unsuccessful parties why they lost (see, e.g., *R. v. Maharaj*, (12 May 2004), Ontario C39044 (C.A.) (*Tribunal’s Authorities*, Tab 7)) and, on the facts of the particular case, in human rights cases (*Payne v. Ontario Human Rights Commission*, [2000] O.J. No. 2987 (C.A.) (*Tribunal’s Authorities*, Tab 6)), the case law in the area of sufficiency of reasons of administrative decision-

makers is scant and uncertain. None of the decisions of this Court specify a test or a threshold for a finding that reasons of an administrative tribunal are insufficient. We do not know what the test or threshold is for this Tribunal, a Tribunal that hears thousands of reconsideration cases a year, or other tribunals like it.

36. The Divisional Court does not provide detailed reasons for its decision on this issue: we can only assume that the Divisional Court believes that all administrative tribunals must give complete reasons for their decisions. This is a proposition wholly unsupported by any case law in the administrative law area.

37. The Tribunal devoted 29 paragraphs of its reasons in its reconsideration decision to the TVBI issue and the Tribunal devoted 65 paragraphs of its reasons in its original decision to the TVBI issue. In the 29 paragraphs in its reconsideration decision, the Tribunal reviewed the evidence before it, including fresh evidence offered by the worker, in detail – perhaps far more than necessary in order to apply the reconsideration test set out in its Practice Direction.

Decision No. 770/98 I R of the Workplace Safety and Insurance Appeals Tribunal, dated February 5, 2002, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 4 at 16-20, paras. 27-66

Decision No. 770/98 I of the Workplace Safety and Insurance Appeals Tribunal, dated October 27, 1999, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 5 at 26-33, paras. 7-72

38. The Tribunal, as a specialized tribunal, is very experienced in hearing expert medical evidence and resolving issues of credibility. In this case, the Tribunal in its reconsideration decision ruled that it preferred the findings in a report that provided “the clearest evidence of the history of the worker’s symptoms” over an affidavit proffered by the worker as fresh evidence, evidence that was no doubt available before the first hearing. To what extent must the Tribunal,

with its ample caseload, draft lengthy reasons attempting to articulate its expert reasons for its finding that the threshold for displacing the original decision was not met, a highly subjective and impressionistic assessment rooted in the Tribunal's expertise and specialization? Would the reasons of the Tribunal's reconsideration decision have been satisfactory if it simply copied out the reasons of the original decision? The original decision was quite explicit about the basis for the factual finding that the worker did not likely develop TVBI as a result of her injury on January 3, 1991: see paragraphs 60-72 of the original decision. The Divisional Court seems to suggest that it was incumbent on the Tribunal in its reconsideration decision to reweigh all of the evidence *de novo* despite the Practice Direction which does not require that and set that out in exhaustive detail in its reasons. The decision of the Divisional Court seems to suggest that the Tribunal, an administrative tribunal that conducts thousands of hearings a year, is obligated to give the fullest of reasons even in a reconsideration context where reasons have already been made in the original decision. We write "seems to suggest" because the Divisional Court did not provide detailed reasons and principles in its ruling that the reasons of the Tribunal were insufficient.

Decision No. 770/98 I R of the Workplace Safety and Insurance Appeals Tribunal, dated October 27, 1999, Motion Record of the Workplace Safety and Insurance Appeals Tribunal, Volume 1, Tab 5 at 31-33, paras. 60-72

D. Conclusion

39. The reasons of the Divisional Court are simple; profound are the difficulties they create. After a period of certainty over the last 19 years since its formation, the Tribunal now finds itself in considerable uncertainty concerning its position when parties ask the Tribunal to reconsider and its decision displaces earlier credibility-based findings. Must the Tribunal conduct a hearing

de novo and write exhaustive reasons that cover exactly the same ground as the original decision? Can it rely on its Practice Direction and require that a threshold, such as “significant defect”, be established? Just how critically can a reviewing court review a decision by the Tribunal to reaffirm earlier credibility-based findings?

40. The decision of the Divisional Court represents a significant extension of the jurisprudence and warrants the careful consideration of this Court.

41. Accordingly, the Workplace Safety and Insurance Appeals Tribunal respectfully requests leave to appeal on these uncertain and important issues. The Tribunal does not seek costs.

All of which is respectfully submitted,

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