

COURT OF APPEAL FOR ONTARIO

BETWEEN:

PAUL TAYLOR

Appellant
(Applicant)

and

WORKPLACE SAFETY AND INSURANCE BOARD – WSIB
and
WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL –
WSIAT

Respondents
(Respondents)

**FACTUM OF THE RESPONDENT
WORKPLACE SAFETY AND INSURANCE BOARD**

July 17, 2018

**WORKPLACE SAFETY AND
INSURANCE BOARD**
Legal Services Division
200 Front Street West, 22d Floor
Toronto, ON, M5V 3J1

Jean-Denis Bélec
LSUC # 40140R
Tel. (416) 344-3136
Fax. (416) 344-3160

Lawyer for the Respondent
Workplace Safety and Insurance Board

TO: **Paul Taylor**
52 Swift Crescent
Guelph, ON, N1E 7J3

Tel. (226) 780-9107
Fax. (226) 500-6059

Appellant

AND TO: **PALIARE ROLAND LLP**
Barristers and Solicitors
155 Wellington Street West, 35th Floor
Toronto, ON, M5V 3H1

Michael Fenrick
LSUC # 57675N

Tel. (416) 646-7481
Fax. (416) 646-4301

Lawyer for the Respondent
Workplace Safety and Insurance Appeals Tribunal

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PART I – OVERVIEW

1. This is an Appeal by Mr. Taylor from Justice Petersen’s decision of March 20, 2018, dismissing his Application for Judicial Review (“**the Application**”) brought against the Workplace Safety and Insurance Board (“**WSIB**” or “**Board**”) and the Workplace Safety and Insurance Appeals Tribunal (“**WSIAT**”).

2. The WSIB denied Mr. Taylor’s claim for reimbursement of the cost of over-the-counter medications he purchased, in a decision dated October 11, 2017. Mr. Taylor launched an administrative appeal of that decision. In addition to his administrative appeal, he brought an Application seeking leave to have it heard on an urgent basis

before a single judge of the Superior Court of Justice under section 6(2) of the *Judicial Review Procedure Act* (“**the JRPA**”). The Application sought an Order compelling the WSIB to schedule and hold an oral appeal hearing within specific timeframes and deliver electronic reasons within five days of the hearing. He also sought a similar remedy against the WSIAT.

3. Since the Application was brought under section 6(2) of the JRPA, Mr. Taylor must seek leave from this court to bring this Appeal. He has not done so. As such this Appeal is not properly before this Court. This ground alone should be sufficient to dispose of this Appeal.

4. Even if this Court decides to hear this Appeal, it should be dismissed because there was no error by Justice Petersen in deciding that Mr. Taylor’s Application was not urgent. In a prior action against the WSIB, Mr. Taylor claimed benefits exceeding \$6 million. However, this Application did not include that claim for previous benefits and Mr. Taylor conceded before justice Petersen that these claims were not urgent despite their significant amount. In addition, Mr. Taylor waited over four months before commencing his Application. Although Mr. Taylor may have experienced financial hardship due to denial of coverage for medications, financial hardship alone does not constitute urgency. If any financial hardship was caused by the denial of coverage for prescription medication this was due to Mr. Taylor’s own inaction by not submitting updated medical information in support of ongoing use and need of the prescribed drugs.

5. Further, Justice Petersen was correct in deciding that the Application was premature. Mr. Taylor commenced an administrative appeal of the WSIB's decision. He will further appeal the issue to the WSIAT. He is currently waiting for a hearing date. Mr. Taylor is essentially asking the Courts to "micro-manage" an administrative process where the jurisprudence is clear that Courts will not do so short of exceptional circumstances which are absent in this case.

6. For all of these reasons this Appeal should be dismissed.

PART II – THE FACTS

7. The WSIB is established by the *Workplace Safety and Insurance Act* (“**the Act**”) to administer the workers’ compensation system in Ontario.¹ The WSIB collects and administers premiums from employers to fund the insurance plan in order to provide benefits to injured workers.² In doing so, the WSIB must act in a financially responsible and accountable manner.³

8. Under the Act, the WSIB has exclusive jurisdiction to decide a worker’s entitlement to Health Care which includes over-the-counter and prescription drugs.⁴

9. A worker may appeal an adverse entitlement decision to the Appeals Services Division of the WSIB. Administrative appeals are heard and decided by an Appeals Resolution Officer (“**ARO**”).⁵ A worker has a further right of appeal of an ARO decision to the WSIAT.⁶ The WSIAT is the final level of appeal in Ontario for workers’ compensation matters. The WSIAT is a body corporate independent of the WSIB and sets its own practice and procedure.⁷

¹ The Act, ss. 159, 161. Schedule “B”.

² The Act, ss. 81, 85. Schedule “B”.

³ The Act, ss. 1, 96. Schedule “B”.

⁴ The Act, ss. 32, 33, 118. Schedule “B”.

⁵ Appeal Book, Alton Affidavit, Tab 12, at p. 174, para 20. Compendium of the Respondent Workplace Safety and Insurance Board (“**WSIB’s Compendium**”), Tab 1, at p. 2.

⁶ Appeal Book, Alton Affidavit, Tab 12, at pp. 170 - 174, Paras. 2 - 20(e). The Act, s. 125, Schedule “B”.

⁷ Appeal Book, Alton Affidavit, Tab 12, at p. 170, para. 2. The Act ss. 123 and 173. Schedule “B”.

A. Litigation History

10. The Appellant was injured in a workplace accident on February 6, 1997.⁸ He disagreed with a number of WSIB decisions regarding his entitlement, amount and duration of benefits under the insurance plan. He appealed a number of those decisions before the Appeals Services Division⁹ of the WSIB and ultimately to the WSIAT.¹⁰

11. Following his administrative appeals to the WSIAT, Mr. Taylor filed an Application for Judicial Review in the Superior Court of Justice seeking to set aside the WSIAT decisions. However he abandoned that application on August 1, 2013.¹¹

12. Instead of proceeding with a Judicial Review Application, Mr. Taylor commenced an action against the WSIB and the WSIAT seeking damages in the sum of \$6, 460, 455.00 for loss of earnings benefits, loss of future earnings, costs of retraining programs and non-economic loss awards.¹² His lawsuit was dismissed by Justice Price on February 22, 2017 with costs.¹³ Justice Price held that he did not have jurisdiction to award benefits and the proper forum to bring such claims was by way of Application for Judicial Review before the Divisional Court. Mr. Taylor's appeal of that decision was also dismissed with costs by this Court on February 6, 2018.¹⁴ To date all costs awards are still outstanding including the cost award of Justice Petersen.

⁸ WSIB's Compendium, Tab 2, at p. 11.

⁹ WSIB's Compendium, Tabs 3 & 4.

¹⁰ Appeal Book, Tabs 7 & 8.

¹¹ WSIB's Compendium, Tab 5.

¹² Appellant's Book of Authorities ("**Appellant's BOA**"), Tab 1, at p. 4, at para. 14.

¹³ Appellant's BOA, Tabs 1 & 2.

¹⁴ Appellant's BOA, Tab 3.

B. The Appellant's Claim for Benefits and the WSIB Decision

13. On September 20, 2017 Mr. Taylor submitted a claim for reimbursement of the costs of over-the-counter medications and topical creams.¹⁵

14. A few weeks later Mr. Taylor wrote to the WSIB complaining about the level of service and indicating that he was working “to prepare my file to be published on the internet. The purpose of which is to publicly show the cruelty, inconsistency. And above all bad faith with the decisions of the WSIB over the past twenty-year life time of my claim.”¹⁶

15. In addition to over-the-counter medications, the Appellant was also covered for prescribed medications.¹⁷ The WSIB notified him on October 4, 2017 that his coverage for the prescribed medications would expire on January 3, 2018. Mr. Taylor was invited to provide a medical report from his treating physician should he continue to require the prescribed medications beyond January 3, 2018. To date this medical information has not been provided to the WSIB to determine continued entitlement to the prescribed medications.¹⁸

¹⁵ WSIB's Compendium, Tab 6, at p. 31.

¹⁶ WSIB's Compendium, Tab 7.

¹⁷ Appeal Book, Labuntog Affidavit, Tab 11, at p. 167 at para. 4.

¹⁸ Appeal Book, Labuntog Affidavit, Tab 11, at pp. 167 - 168, at paras. 5 - 6.

16. The WSIB wrote to Mr. Taylor on October 5, 2017 regarding his complaints about the level of service and his claim for over-the-counter medications. The WSIB agreed to expedite his request.¹⁹

17. Six days later, in a decision dated October 11, 2017 (“**the decision**”), the WSIB denied his claim for over-the-counter medications. The WSIB informed Mr. Taylor of other medication options that are covered in the WSIB’s drug formulary.²⁰ The decision noted that the last medical report that was on file pertaining to his medications was dated May 25, 2007.

18. The WSIB attempted to call the Appellant to discuss his claim, but Mr. Taylor replied by e-mail on October 14, 2017 indicating that he would not communicate with the WSIB by telephone but preferred to communicate by e-mail. He also indicated that if he did not get a response within three days he would file for a writ of mandamus with the courts.²¹ Mr. Taylor then commenced his administrative appeal of the decision.²²

19. The WSIB wrote to Mr. Taylor on October 24, 2017 indicating that it would facilitate his administrative appeal being expedited.²³ The WSIB followed up on

¹⁹ WSIB’s Compendium, Tab 8.

²⁰ WSIB’s Compendium, Tab 9.

²¹ WSIB’s Compendium, Tab 10.

²² WSIB’s Compendium, Tabs 11 & 12.

²³ WSIB’s Compendium, Tab 13, at p. 50.

November 9, 2017 by sending a copy of his claim file to Mr. Taylor and sending an Appeal Readiness Form.²⁴

20. Mr. Taylor then wrote to the WSIB on December 15, 2017 accusing it of “bias and inherent conflict of interest” with respect to methods of communications; accusing WSIB staff, his employer and the WSIAT of “knowingly, intentionally and deceptively misleading me about information”. That letter repeated that he would seek a writ of Mandamus.²⁵

C. The Application for Judicial Review

21. Four months after the release of the decision, Mr. Taylor commenced his Application.²⁶ Although he issued his Application on February 21, 2018, he did not serve it on the WSIB until a few weeks later. He sought leave to bring his Application before a single judge of the Superior Court of Justice on the basis of urgency under section 6(2) of the JRPA.

22. His Application sought an Order compelling the WSIB to:

- (a) Schedule and hold an oral appeal hearing within five days of the Court’s order;
- (b) Render a written decision within five days after holding the hearing; and
- (c) Issue the decision by e-mail.

²⁴ WSIB’s Compendium, Tab 14.

²⁵ WSIB’s Compendium, Tab 15, at pp. 57 - 58.

²⁶ Appeal Book, Tab 5.

Mr. Taylor sought similar relief against the WSIAT in the event that he disagreed with the WSIB Appeal decision.

23. Justice Petersen heard Mr. Taylor's application on March 20, 2018. Justice Petersen decided that there was no urgency warranting a hearing before a single judge of the Superior Court of Justice. She declined to transfer the application before the Divisional Court but instead dismissed it on the basis that it was premature.²⁷ Justice Petersen also ordered Mr. Taylor to pay costs to the WSIB and WSIAT, which are still outstanding.

²⁷ Appeal Book, Tab 3.

PART III – ISSUES AND THE LAW

24. A preliminary issue is whether this Appeal is properly before this Court because the Appellant did not seek leave. Should this Court decide to hear the Appeal then the remaining issues are whether Justice Petersen erred in: (1) deciding that the application was not urgent under section 6(2) of the JRPA and (2) deciding that the Application was premature.

25. The WSIB submits that failure to seek leave should be sufficient in itself to dispose of this Appeal. In any event, the WSIB is prepared to address the substantive issues raised by this Appeal. The WSIB submits that none of the grounds for Appeal listed in the Appellant's factum provide any basis on which to reverse Justice Petersen's decision. For all of these reasons and what follows below, this Appeal should be dismissed.

A. The Appellant did not seek leave from this Court

26. The Appellant has not complied with section 6(4) of the JRPA which states that:

An appeal lies to the Court of Appeal, with leave of the Court of Appeal, from a final order of the Superior Court of Justice disposing of an application for judicial review pursuant to leave granted under subsection (2).

27. Failure to seek leave is sufficient in itself to quash an appeal according to this Court's decision in *Waskowec v. Hydro One Networks Inc.*²⁸ Interestingly enough, this

²⁸ *Waskowec v. Hydro One Networks Inc.*, [2013] O.J. No. 5770, 2013 ONCA 763 at paras. 7 - 8. Book of Authorities of the Respondent Workplace Safety and Insurance Board ("WSIB's BOA") Tab 1.

was a case involving a self-represented litigant that appealed an Order of Justice Backhouse dismissing his application for an order of Mandamus requiring the Respondent to deliver his hydro bills by courier. The Appellant did not seek leave to appeal. This Court held that:

[...] Given that the application was heard pursuant to s. 6(2) of the *Judicial Review Procedure Act*, an appeal only lies to this court with leave under s. 6(4).

Because the appellant has not obtained leave to appeal, his appeal is not properly before this court and therefore must be quashed.²⁹

28. There is no doubt that Mr. Taylor's application was brought and heard under section 6(2) of the JRPA. This is clearly set out in the Appellant's own materials³⁰ including paragraph five of his Factum, and the reasons of Justice Petersen. The *Waskowec* case is clear that absent leave the appeal is not properly before the Court.

(i) No basis to grant leave

29. The WSIB submits, that even had a motion for leave been brought by Mr. Taylor, leave would not have been granted since Mr. Taylor cannot meet the test for granting leave.

30. Lack of merit of the Appeal alone can be a sufficient basis to deny an extension of time to file a Notice of Leave to Appeal.³¹ Further, before granting leave the Court

²⁹ *Waskowec, ibid at p. 2, Paras. 7 - 8.*

³⁰ Appeal Book, Tab 3 – at pp. 14 - 15, Tab 4 – at p. 22, para. 2. Tab 5 - at p. 38.

³¹ *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131 at p. 4, para. 16, 114 OR (3d) 636. WSIB's BOA Tab 2.

must be satisfied that the proposed Appeal presents an arguable question of law, or mixed law and fact, requiring consideration of matters such as the interpretation of legislation which raises a special circumstance or a matter of public importance.³²

31. As stated in *Sault Dock*, it is the impact that the decision or question will have on the development of the jurisprudence in Ontario that is important. If the resolution of the issues would have significance only to the parties and would not settle for the future a question of general interest to the public, the requirements for leave will not have been met. As indicated below, this Appeal doesn't raise any question of statutory interpretation. The Act is clear that both the WSIB and the WSIAT have discretion in terms of the type of hearings it can conduct and have broad powers in terms of setting its own practice and procedure. The issues in Mr. Taylor's Appeal revolve around his own claim for benefits under the insurance plan. There are no facts or issues that transcend his claim for benefits thereby raising special circumstances or elevating the issue to one of public importance.

³² Re Sault Dock Co. Ltd. and City of Sault Ste. Marie, [1973] 2 O.R. 479 (C.A.), 34 D.L.R. (3d) 327 at pp. 2 - 3, WSIB's BOA Tab 3.

(ii) Application for a Writ of Mandamus had no merit

32. Based on what is set out below, the application for a Writ of Mandamus was bound to fail and it raised no arguable question of law.

33. An agency's decision as to how and when its statutory powers to enforce legislation are to be exercised is purely a matter of policy.³³

34. Mr. Taylor cannot demonstrate any error on the part of Justice Petersen since he must establish that the WSIB owes a public duty to him and that he has a clear right to performance of that duty.³⁴ Based on the legislative framework and the WSIB's statutory powers, Mr. Taylor cannot establish a clear right to an oral hearing, let alone a hearing within five days.

35. The WSIB has broad statutory powers and discretion to set its practice and procedure. Section 131 of the Act states that:

131. (1) The Board shall determine its own practice and procedure in relation to applications, proceedings and mediation. With the approval of the Lieutenant Governor in Council, the Board may make rules governing its practice and procedure.

(2) Subsection (1) applies with necessary modifications with respect to the Appeals Tribunal.

(3) The *Statutory Powers Procedure Act* does not apply with respect to decisions and proceedings of the Board or the Appeals Tribunal.

³³ *Northern Lights Fitness Products Inc. v. Canada (Minister of National Health and Welfare)*, [1994] F.C.J. No. 319 at p. 4, paras. 13 - 16. WSIB's BOA Tab 4.

³⁴ *Apotex Inc. v. Canada (Attorney General)*, [1993] F.C.J. No. 1098 (C.A.), 1993 CanLII 3004 at pp. 9 - 10, para. 45. WSIB's BOA Tab 5.

36. Furthermore, section 119(3) of the Act expressly speaks about hearings before the WSIB. That section provides that the WSIB “shall give an opportunity for a hearing”. However the right to a hearing is qualified by section 119(4) which gives the WSIB discretion in the method of hearing in that the WSIB may conduct hearings orally, electronically or in writing.

37. The Act provides the WSIB with discretion in terms of the method of hearing and it is silent with respect to the timing of such hearings. Further, the Act does not obligate the WSIB to hold an oral hearing in every case, let alone in five days. The WSIB has the discretion to determine which method of hearing is appropriate in the circumstances.³⁵ As a result, the authority in relation to hearings under the Act is discretionary and not mandatory. As such, there was no basis for a writ of Mandamus to issue and no error by Justice Petersen. Mr. Taylor’s request for Mandamus was bound to fail.

³⁵ WSIB’s Compendium, Tab 1, at pp. 5 - 6.

B. The Application was not urgent

38. Even if Mr. Taylor did not seek leave, the WSIB is nevertheless prepared to address the substantive issues raised by the Appeal if this Court determines it is proper to do so. To that end, the WSIB submits that Justice Petersen did not err when she decided the application was not urgent.

39. Section 6(2) of the JRPA provides that:

An application for judicial review may be made to the Superior Court of Justice with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice.

40. Mr. Taylor could not meet this test and there was no error by Justice Petersen on this point.

41. The apprehension of a negative result that may follow from an administrative body does not support a claim of urgency or of failure of justice and it will not be accepted by a court as a basis to interfere with an ongoing administrative proceeding.³⁶

42. The assessment of urgency and failure of justice is a fact-driven exercise that requires a consideration of the individual circumstances of the applicant, the nature of

³⁶ Jafine v. College of Veterinarians of Ontario (1991), 5 O.R. (3d) 439 (Gen. Div.), O.J. No. 1847, at p. 8. WSIB's BOA Tab 6.

the proceedings, the issues raised and the merits of the case. Economic hardship alone, even if proven, is not sufficient.³⁷

43. In the unreported decision of *West v. Workplace Safety and Insurance Board*,³⁸ Justice Shaughnessy held the following in relation to urgency under section 6(2) of the JRPA:

I find that there is no danger of substantial and irreparable pecuniary loss as a result of delay. I further find that any prospective financial loss and delay are insufficient to constitute urgency within the meaning of s. 6(2) of the *Judicial Review Proceedings Act*.

The mere fact that the application to the Divisional Court will cause some procedural delay in this case does not imply that there is urgency in the context of s. 6(2) of the Act. I also note that the final response of the WSIB to the Applicant was by way of correspondence dated February 6, 2003. This Application was not issued until August 6, 2003 and a hearing date for this motion was not obtained until some 9 months had elapsed from the final decision.

44. At Paragraph 50 of his Factum, Mr. Taylor states that the WSIB abruptly stopped his prescription coverages. This is incorrect. The record shows that Mr. Taylor was given three months' notice prior to the stoppage taking effect. Mr. Taylor had three months to provide additional medical records in support of his claim. The WSIB submits that the time frame was reasonable.

³⁷ *Myriam Michail v Ontario English Catholic Teachers' Association ('OECTA') et al. London District Catholic School Board ('LDCSB'), Ontario Labour Relations Board ('OLRB')*, 2017 ONSC 3986, [2017] O.J. No. 3350, at p. 6, paras. 26 - 27. WSIB's BOA Tab 7.

³⁸ *West v. Workplace Safety and Insurance Board*, (31 August 2004) at p. 5, paras. 23 - 24 (Ont. S.C.J.) [unreported]. WSIB's BOA Tab 8.

45. Mr. Taylor takes the position in his Factum that he has experienced countless delays by the WSIB in the 20-year history of his claim, which has caused him financial harm, yet he conceded before Justice Petersen that his historical claim for benefits valued in excess of \$6 million was not urgent. Further the Application did not relate to any of the prior decisions that were rendered by the WSIB or WSIAT in his claim. Any alleged historical delays are therefore irrelevant to the issue of urgency. As a result, the issue in this case revolves around a very narrow time window. Mr. Taylor's claim for over the counter medications was submitted in September 2017 and the WSIB released its decision the following month. The WSIB submits that this timeframe can hardly be considered undue.

46. The lack of urgency here is evident on the record. Mr. Taylor had threatened to seek a writ of Mandamus for several months despite his plea that he was in dire financial consequences as a result of the interruption in coverage of his prescribed medications. Mr. Taylor claims at Paragraph 54 of his Factum that it was out of his control to submit medical information to the WSIB. Mr. Taylor also implies that a worker should not bear the burden of providing the WSIB with medical information from his physician.

47. This is not accurate for several reasons. First, section 23 of the Act obligates a person receiving benefits to give the WSIB such information as the WSIB may require. This section reads as follows:

23 (1) A person receiving benefits under the insurance plan or who may be entitled to do so shall give the Board such information as the Board may require from time to time in connection with the person's claim.

Effect of non-compliance

(2) If the person fails to comply with subsection (1), the Board may reduce or suspend payments to him or her while the non-compliance continues.

Section 23 of the Act is clear that the obligation to provide information to the WSIB lies with a worker. Second, the WSIB submits that it is not out of one's control to follow up with his/her physician to see if the information has been provided, nor is this unreasonable to expect.

48. In fact the record shows that Mr. Taylor has submitted information on previous occasions during the life of his claim.³⁹ Not only has Mr. Taylor provided information in the past, but he also indicates in his Affidavit that he has no issues in providing medical information provided that proper notice is provided.⁴⁰ Yet, to this day, Mr. Taylor has not provided the WSIB with the necessary information to enable the WSIB to determine if coverage for his prescription drugs should be extended beyond January 3, 2018. Should Mr. Taylor provide the medical information required, his medication coverage may be reinstated.⁴¹

³⁹ WSIB's Compendium, Tabs 16 - 17, at pp. 60 - 63.

⁴⁰ Appeal Book, Taylor Affidavit Sworn March 16, 2018, Tab 9, at p. 156 at para. 14.

⁴¹ Appeal Book, Labuntog Affidavit, Tab 11, at p. 168 at para. 6.

49. The Appellant also contends that the termination of his prescribed drugs beyond January 3, 2018 was an act of “retaliation” by the WSIB. This allegation is unfounded for several reasons. First, a worker’s entitlement to prescribed drugs is driven by a “drug formulary”. A worker’s diagnosis determines the scope of the formulary.⁴² The intent behind the formulary is that it be reviewed every two years. However it appears that the last medical report in Mr. Taylor’s claim file in support of ongoing entitlement to drugs was dated May 25, 2007.⁴³ The WSIB has a statutory obligation to administer the Act in a financially accountable and responsible manner.⁴⁴ The fact that the WSIB did ultimately proceed with a review is a recognition of its statutory duty and consistent with it. On the other hand, Mr. Taylor’s contention that he should have indefinite entitlement to health care is not.

50. Any contention that the WSIB cannot review entitlement of health care after a certain period of time is incorrect. Although the Act does prohibit review of Loss of Earnings Benefits beyond 72 months⁴⁵, there is no equivalent provision for health care. In the absence of any provisions prohibiting review of health care entitlement, ongoing payment of health care does not give rise to any expectation that entitlement will continue indefinitely.

51. Mr. Taylor, at Paragraph 73 of his Factum, also relies on the fact that Justice Petersen did not consider the fact that he was self-represented in the assessment of the

⁴² Appeal Book, Labuntog Affidavit, Tab 11, at p. 167 at para. 3.

⁴³ WSIB’s Compendium, Tab 9, at p. 42.

⁴⁴ The Act, s. 1. Schedule “B”.

⁴⁵ The Act, s. 44. Schedule “B”.

time that it took him to bring his Application. With respect, this submission has little merit. The reality is that this is not the first time that Mr. Taylor is involved in litigation with the WSIB and the WSIAT, as the record shows. Mr. Taylor brought a Judicial Review Application in 2013. He also commenced a lawsuit against the WSIB and WSIAT and responded to Motions to Strike and appealed the ruling before this Court. Mr. Taylor is familiar with the litigation process.

52. For these reasons, the Appellant cannot establish any error by Justice Petersen in refusing to hear the Application for want of urgency.

C. The Application was premature

53. The WSIB submits that there was no error by Justice Petersen in holding that the Application was premature.

54. Judicial review is a discretionary remedy. The Court will not exercise its discretion to hear a judicial review application that is premature. This principle has been expressed by the court on many occasions, and the leading statement is the following from Justice Stratas: “Absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.”⁴⁶

⁴⁶C.B. Powell v. Canada (Border Services Agency), [2011] 2 F.C.R. 332, 2010 FCA 61, at p. 10, paras. 31 - 33. WSIB’s BOA Tab 9.

55. This principle has been enforced vigorously as demonstrated by the narrowness of the “exceptional circumstances” exception. As the Court stated in *C.B. Powell*: “the authorities show that very few circumstances qualify as exceptional and the threshold is exceptionally high.”⁴⁷ A court will refuse to “micro-manage” an administrative proceeding through procedural and interlocutory intervention.⁴⁸

56. As the record shows, Mr. Taylor’s application was premature. He is still waiting for the outcome of the administrative appeal. Mr. Taylor indicated himself that he will appeal the matter further to the WSIAT. Mr. Taylor is essentially asking the Court to do exactly what Courts have said they will not do – intervene to micro-manage an ongoing tribunal proceeding. Justice Petersen did not err when she concluded that the Application was premature.

57. Mr. Taylor alleges that the WSIB is “biased” and involved in an “inherent conflict of interest”. He accused WSIB staff of “knowingly and intentionally misleading him about information.” It is noteworthy that Mr. Taylor made similar allegations against the WSIB in his prior lawsuit which was dismissed by Justice Price.⁴⁹ A dismissal that was upheld by this Court. As stated in *C.B. Powell*, concerns about procedural fairness or bias are not exceptional circumstances allowing Mr. Taylor to bypass the administrative process.⁵⁰ The WSIB submits that Mr. Taylor’s allegations

⁴⁷ *C.B. Powell, supra*, para. 33. WSIB’s BOA Tab 9.

⁴⁸ *Cooney Bulk Sales Limited v. Teamsters Local Union No. 91*, 2017 ONSC 3651, [2017] O.J. 3054 at paras. 2 - 3. WSIB’s BOA Tab 10.

⁴⁹ *Taylor v. WSIB*, 2017 ONSC 1223. Appellant’s BOA, Tab 1, at p. 5, paras. 16(a)(e)(g)(h) and (k).

⁵⁰ *C.B. Powell, supra*, para. 33. WSIB’s BOA Tab 9.

of bias, retaliation and bad faith are unfounded and regardless it falls short of constituting exceptional circumstances.

D. Conclusion

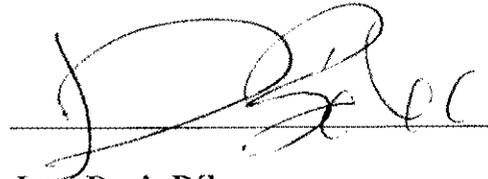
58. The Appellant did not seek leave from this Court to bring this Appeal. As a result his Appeal is not properly before this Court.

59. Even if this Court were to exercise jurisdiction over this Appeal, Justice Petersen was correct when she determined that the Application lacked any urgency and was premature. Further, since there was no basis in law to issue a writ of Mandamus against the WSIB on the basis of the governing legislative framework, Justice Peterson was also correct in dismissing the Application and her order should be upheld.

PART IV – ORDER REQUESTED

60. The WSIB respectfully requests that this Honourable Court quash and/or dismiss this appeal with costs and affirm the Order of Justice Petersen dated March 20, 2018 dismissing the Application for Judicial Review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of July 2018.

A handwritten signature in black ink, appearing to read 'J. Bélec', is written over a horizontal line. The signature is stylized and cursive.

Jean-Denis Bélec

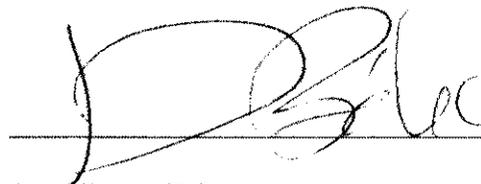
Lawyer for the Respondent
Workplace Safety and Insurance Board

CERTIFICATE

I, Jean-Denis Bélec, lawyer for the Respondent Workplace Safety and Insurance Board, certify that:

- (i) The record and the original exhibits from the court or tribunal from which the appeal is taken is not required.
- (ii) The estimated time of my oral argument is 15 minutes, not including reply.

July 17, 2018

A handwritten signature in black ink, appearing to read 'J. Bélec', is written over a horizontal line.

Jean-Denis Bélec
Lawyer for the Respondent
Workplace Safety and Insurance Board

SCHEDULE “A” - LIST OF AUTHORITIES CITED

From Respondent’s Book of Authorities

Tab #	Authority Cited
1	<i>Waskowec v. Hydro One Networks Inc.</i> , [2013] O.J. No. 5770, 2013 ONCA 763.
2	<i>Enbridge Gas Distribution Inc. v. Froese</i> , 2013 ONCA 131, 114 O.R. (3d) 636.
3	<i>Re Sault Dock Co. Ltd. and City of Sault Ste. Marie</i> , [1973] 2 O.R. 479 (C.A.), 34 D.L.R. (3d) 327.
4	<i>Northern Lights Fitness Products Inc. v. Canada (Minister of National Health and Welfare)</i> , [1994] F.C.J. No. 319, [1994] A.C.F. No. 319.
5	<i>Apotex Inc. v. Canada (Attorney General)</i> , [1993] F.C.J. No. 1098, 1993 CanLII 3004.
6	<i>Jafine v. College of Veterinarians of Ontario (Gen. Div.)</i> , 5 O.R. (3d) 439, [1991] O.J. No. 1847.
7	<i>Myriam Michail v Ontario English Catholic Teachers’ Association (‘OECTA’) et al, London District Catholic School Board (‘LDCSB’), Ontario Labour Relations Board (‘OLRB’)</i> , 2017 ONSC 3986, [2017] O.J. No. 3350.
8	<i>West v. Workplace Safety and Insurance Board</i> , (31 August 2004), (Ont. S.C.J.) [unreported]
9	<i>C.B. Powell v. Canada (Border Services Agency)</i> , [2011] 2 F.C.R. 332, 2010 FCA, 61.
10	<i>Cooney Bulk Sales Limited v. Teamsters Local Union No. 91</i> , 2017 ONSC 3651, [2017] O.J. 3054.

SCHEDULE "B" - RELEVANT STATUTES

1. *Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Schedule A.*

1 The purpose of this Act is to accomplish the following in a financially responsible and accountable manner:

1. To promote health and safety in workplaces.
2. To facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease.
3. To facilitate the re-entry into the labour market of workers and spouses of deceased workers.
4. To provide compensation and other benefits to workers and to the survivors of deceased workers.

23 (1) A person receiving benefits under the insurance plan or who may be entitled to do so shall give the Board such information as the Board may require from time to time in connection with the person's claim.

Effect of non-compliance

(2) If the person fails to comply with subsection (1), the Board may reduce or suspend payments to him or her while the non-compliance continues.

Notice of material change in circumstances

(3) A person receiving benefits under the insurance plan or who may be entitled to do so shall notify the Board of a material change in circumstances in connection with the entitlement within 10 days after the material change occurs.

Definition

32 In this Part,
“health care” means,
(c) drugs,

Entitlement to health care

33 (1) A worker who sustains an injury is entitled to such health care as may be necessary, appropriate and sufficient as a result of the injury and is entitled to make the initial choice of health professional for the purposes of this section.

Arrangements for health care

(2) The Board may arrange for the worker’s health care or may approve arrangements for his or her health care. The Board shall pay for the worker’s health care.

Same

(3) The Board may establish such fee schedules for health care as it considers appropriate.

Questions re health care

(7) The Board shall determine all questions concerning,
(a) the necessity, appropriateness and sufficiency of health care provided to a worker or that may be provided to a worker; and
(b) payment for health care provided to a worker.

Review re loss of earnings

44 (1) Every year or if a material change in circumstances occurs, the Board may review payments to a worker for loss of earnings and may confirm, vary or discontinue the payments.

No review after 72-month period

(2) Subject to subsection (2.1), the Board shall not review the payments more than 72 months after the date of the worker's injury.

Premiums, all Schedule 1 employers

81 (1) The Board shall determine the total amount of the premiums to be paid by all Schedule 1 employers with respect to each year in order to maintain the insurance fund under this Act.

Apportionment among classes, etc.

(2) The Board shall apportion the total amount of the premiums among the classes, subclasses and groups of employers and shall take into account the extent to which each class, subclass or group is responsible for, or benefits from, the costs incurred under this Act.

Premium rates

(3) The Board shall establish rates to be used to calculate the premiums to be paid by employers in the classes, subclasses or groups for each year.

Same

(4) The Board may establish different premium rates for a class, subclass or group of employers in relation to the risk of the class, subclass or group. The rates may vary for each individual industry or plant.

Payments by Schedule 2 employers

85 (1) The Board shall determine the total payments to be paid by all Schedule 2 employers with respect to each year to defray their fair share (as determined by the Board) of the expenses of the Board and the cost of administering this Act and such other costs as are directed under any Act to be paid by the Board.

Special funds

(2) The Board, where it considers proper, may add to the amount payable by an employer under subsection (1) a percentage or sum for the purpose of raising special funds and the Board may use such money to meet a loss or relieve any Schedule 2 employer from all or part of the costs arising from any disaster or other circumstance where, in the opinion of the Board, it is proper to do so.

Insurance fund

Definitions

96 (1) In this Part,

“current benefits” means the benefits payable under the insurance plan in the current calendar year; (“prestations courantes”)

“future benefits” means the present value of the cost of benefits that will become due under the insurance plan in the future in respect of current or past claims, as determined by the Board’s actuary. (“prestations futures”) 2010, c. 26, Sched. 21, s. 1 (2).

Insurance fund

(2) The Board shall maintain an insurance fund for the following purposes:

1. To pay for current benefits and to provide for future benefits under the insurance plan to workers employed by Schedule 1 employers and to the survivors of deceased workers.
2. To pay the expenses of the Board and the cost of administering this Act.
3. To pay such other costs as are required under any Act to be paid by the Board or out of the insurance fund.

Sufficiency of fund

(3) Subject to the regulations, the Board shall maintain the insurance fund so that the amount of the fund is sufficient to allow the Board to meet its obligations under this Act to make payments under the insurance plan for current benefits as they become due and to provide for future benefits.

Same

(4) The Board shall meet its obligation under subsection (3) in accordance with the regulations.

Same

(5) The Board shall maintain the insurance fund so as not to burden unduly or unfairly any class of Schedule 1 employers with payments,

(a) in any year in respect of current benefits; or

(b) in future years in respect of future benefits.

Jurisdiction

118 (1) The Board has exclusive jurisdiction to examine, hear and decide all matters and questions arising under this Act, except where this Act provides otherwise.

Finality of decision

(3) An action or decision of the Board under this Act is final and is not open to question or review in a court.

Same

(4) No proceeding by or before the Board shall be restrained by injunction, prohibition or other process or procedure in a court or be removed by application for judicial review or otherwise into a court.

Board: miscellaneous rules

Principle of decisions

119 (1) The Board shall make its decision based upon the merits and justice of a case and it is not bound by legal precedent.

Same

(2) If, in connection with a claim for benefits under the insurance plan, it is not practicable to decide an issue because the evidence for or against it is approximately equal in weight, the issue shall be resolved in favour of the person claiming benefits.

Hearing

(3) The Board shall give an opportunity for a hearing.

Hearings

(4) The Board may conduct hearings orally, electronically or in writing.

Jurisdiction

123 (1) The Appeals Tribunal has exclusive jurisdiction to hear and decide,

(a) all appeals from final decisions of the Board with respect to entitlement to health care, return to work, labour market re-entry and entitlement to other benefits under the insurance plan;

(b) all appeals from final decisions of the Board with respect to transfer of costs, an employer's classification under the insurance plan and the amount of the premiums and penalties payable by a Schedule 1 employer and the amounts and penalties payable by a Schedule 2 employer; and

(c) such other matters as are assigned to the Appeals Tribunal under this Act.

Same

(2) For greater certainty, the jurisdiction of the Appeals Tribunal under subsection (1) does not include the jurisdiction to hear and decide an appeal from decisions made under the following Parts or provisions:

1. REPEALED: 2011, c. 11, s. 22.
2. Sections 26 to 30 (rights of action) and 36 (health examination).
3. Section 60, subsections 62 (1) to (3) and sections 64 and 65 (payment of benefits).
4. Subsections 81 (1) to (6), 83 (1) and (2) and section 85 (allocation of payments).
5. Part VIII (insurance fund).
6. Part XII (enforcement), other than decisions concerning whether security must be given under section 137 or whether a person is liable under subsection 146 (2) to make payments.

Decisions on an appeal

(3) On an appeal, the Appeals Tribunal may confirm, vary or reverse the decision of the Board.

Finality of decision

(4) An action or decision of the Appeals Tribunal under this Act is final and is not open to question or review in a court.

Same

(5) No proceeding by or before the Appeals Tribunal shall be restrained by injunction, prohibition or other process or procedure in a court or be removed by application for judicial review or otherwise into a court.

Appeal

125 (1) A worker, employer, survivor, parent or other person acting in the role of a parent under subsection 48 (20) or beneficiary designated by the worker under subsection 45 (9) may appeal a final decision of the Board to the Appeals Tribunal.

Notice of appeal

(2) The person shall file a notice of appeal with the Appeals Tribunal within six months after the decision or within such longer period as the tribunal may permit. The notice of appeal must be in writing and must indicate why the decision is incorrect or why it should be changed.

Board policies

126 (1) If there is an applicable Board policy with respect to the subject-matter of an appeal, the Appeals Tribunal shall apply it when making its decision.

Notice of Board policies

(2) The Board shall state in writing which policy, if any, applies to the subject-matter of an appeal after receiving notice of the appeal under subsection 125 (3).

Same

(3) If the Board does not state that a particular policy applies in respect of the subject-matter of an appeal, the tribunal may ask the Board to notify it if there is an applicable policy and the Board shall do so as soon as practicable.

Referral by Appeals tribunal

(4) If the tribunal, in a particular case, concludes that a Board policy of which it is notified is inconsistent with, or not authorized by, the Act or does not apply to the case, the tribunal shall not make a decision until it refers the policy to the Board for its review and the Board issues a direction under subsection (8).

Same

(5) The tribunal shall make the referral in writing and state the reasons for its conclusion.

Board review

(6) If there is a referral under subsection (4), the Board shall review the policy to determine whether it is consistent with, or authorized by, the Act or whether it applies to the case.

Submissions

(7) The Board shall provide the parties to the appeal in respect of which there is a referral an opportunity to make written submissions with respect to the policy.

Board direction

(8) Within 60 days after a referral to it, the Board shall issue a written direction, with reasons, to the tribunal that determines the issue raised in the tribunal's referral under subsection (4).

Periodic payments pending decision

128 Periodic payments required by a decision that is under appeal must continue pending the outcome of the appeal.

Practice and procedure

131 (1) The Board shall determine its own practice and procedure in relation to applications, proceedings and mediation. With the approval of the Lieutenant Governor in Council, the Board may make rules governing its practice and procedure.

Same, Appeals Tribunal

(2) Subsection (1) applies with necessary modifications with respect to the Appeals Tribunal.

Non-application

(3) The *Statutory Powers Procedure Act* does not apply with respect to decisions and proceedings of the Board or the Appeals Tribunal.

Notice of decisions

(4) The Board or the Appeals Tribunal, as the case may be, shall promptly notify the parties of record of its decision in writing and the reasons for the decision. The Appeals Tribunal shall also notify the Board of the decision.

Board: continued, powers, etc.

Board continued

159 (1) The body corporate known as the Workers' Compensation Board is continued under the name Workplace Safety and Insurance Board in English and Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail in French and is composed of the members of its board of directors.

Powers of the Board

(2) Subject to this Act, the Board has the powers of a natural person including the power,

(a) to establish policies concerning the premiums payable by employers under the insurance plan;

(a.1) to establish policies concerning the interpretation and application of this Act;

(a.2) to establish policies concerning evidentiary requirements for establishing entitlement to benefits under the insurance plan;

(a.3) to establish policies concerning the adjudicative principles to be applied for the purpose of determining entitlement to benefits under the insurance plan;

- (b) to review this Act and the regulations and recommend amendments or revisions to them;
- (c) to consider and approve annual operating and capital budgets;
- (d) to review and approve its investment policies;
- (e) to review and approve major changes in its programs;
- (f) to enact by-laws and pass resolutions for the adoption of a seal and the conduct of business and affairs;
- (g) to establish, maintain and regulate advisory councils or committees, their composition and their functions;
- (h) to provide, on such terms as it sees fit, financial assistance to an employer who will modify the work or workplace so that an injured worker or the spouse of a deceased worker may re-enter the labour force;
- (i) to establish a program to designate return to work and labour market re-entry service providers, to monitor the service providers' performance and to charge them a fee for the cost of the program.

Duties of the Board

161 (1) The Board shall administer the insurance plan and shall perform such other duties as it is assigned under this Act and any other Act.

Duty to evaluate proposed changes

(2) The Board shall evaluate the consequences of any proposed change in benefits, services, programs and policies to ensure that the purposes of this Act are achieved.

Duty to monitor

(3) The Board shall monitor developments in the understanding of the relationship between workplace insurance and injury and occupational disease,

(a) so that generally accepted advances in health sciences and related disciplines are reflected in benefits, services, programs and policies in a way that is consistent with the purposes of this Act; and

(b) in order to improve the efficiency and effectiveness of the insurance plan.

Appeals Tribunal

173 (1) The Workers' Compensation Appeals Tribunal is continued under the name Workplace Safety and Insurance Appeals Tribunal in English and Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail in French.

2. Judicial Review Procedure Act, R.S.O. 1990, c. J.1.

Application to Divisional Court

6 (1) Subject to subsection (2), an application for judicial review shall be made to the Divisional Court.

Application to judge of Superior Court of Justice

(2) An application for judicial review may be made to the Superior Court of Justice with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice.

Transfer to Divisional Court

(3) Where a judge refuses leave for an application under subsection (2), he or she may order that the application be transferred to the Divisional Court.

Appeal to Court of Appeal

(4) An appeal lies to the Court of Appeal, with leave of the Court of Appeal, from a final order of the Superior Court of Justice disposing of an application for judicial review pursuant to leave granted under subsection (2).

3. *Rules of Civil Procedure, R.R.O. 1990, Reg. 194.*

Motion for Leave to Appeal to Court of Appeal

Motion in Writing

61.03.1 (1) Where an appeal to the Court of Appeal requires the leave of that court, the motion for leave shall be heard in writing, without the attendance of parties or lawyers.

Notice of Motion

(2) The notice of motion for leave to appeal shall state that the motion will be heard on a date to be fixed by the Registrar.

(3) The notice of motion,

(a) shall be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and

(b) shall be filed with proof of service in the office of the Registrar within five days after service.

Moving Party's Motion Record, Factum and Transcripts

(4) The moving party shall serve a motion record and transcripts of evidence, if any, as provided in subrule 61.03 (2), and a factum consisting of the following elements:

1. Part I, containing a statement identifying the moving party and the court from which it is proposed to appeal, and stating the result in that court.

2. Part II, containing a concise summary of the facts relevant to the issues on the proposed appeal, with such reference to the evidence by page and line as is necessary.

3. Part III, containing the specific questions that it is proposed the court should answer if leave to appeal is granted.

4. Part IV, containing a statement of each issue raised, immediately followed by a concise statement of the law and authorities relating to that issue.

5. Schedule A, containing a list of the authorities referred to.

6. Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws.

(5) Parts I to IV shall be arranged in paragraphs numbered consecutively throughout the factum.

(6) The moving party shall file three printed copies of the motion record, factum and transcripts, if any, and an electronic version of the factum, with proof of service, within 30 days after the filing of the notice of motion for leave to appeal.

Responding Party's Motion Record and Factum

(7) The responding party may, if of the opinion that the moving party's motion record is incomplete, serve a motion record as provided in subrule 61.03 (3).

(8) The responding party shall serve a factum consisting of the following elements:

1. Part I, containing a statement of the facts in the moving party's summary of relevant facts that the responding party accepts as correct and those facts with which the responding party disagrees and a concise summary of any additional facts relied on, with such reference to the evidence by page and line as is necessary.

2. Part II, containing the responding party's position with respect to each issue raised by the moving party, immediately followed by a concise statement of the law and authorities relating to it.

3. Part III, containing a statement of any additional issues raised by the responding party, the statement of each issue to be followed by a concise statement of the law and authorities relating to it.

4. Schedule A, containing a list of the authorities referred to.

5. Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws.

(9) Parts I to III shall be arranged in paragraphs numbered consecutively throughout the factum.

(10) The responding party shall file three printed copies of the factum, and of the motion record, if any, and an electronic version of the factum, with proof of service, within 25 days after service of the moving party's motion record and other documents.

Moving Party's Reply Factum

(11) If the responding party's factum raises an issue on which the moving party has not taken a position in the moving party's factum, that party may serve a reply factum.

(12) The reply factum shall contain consecutively numbered paragraphs setting out the moving party's position on the issue, followed by a concise statement of the law and authorities relating to it.

(13) The moving party shall file three copies of the reply factum with proof of service within 10 days after service of the responding party's factum.

Date for Hearing

(14) The Registrar shall fix a date for the hearing of the motion, which shall not be before the earlier of the filing of the moving party's reply factum, if any, and the expiry of the time for filing the moving party's reply factum.

Oral Hearing

(15) If, on considering the written materials, the court determines that an oral hearing is warranted, the court shall, despite subrule (1), order an oral hearing to determine the motion, and the Registrar shall fix a date for it.

Time for Delivering Notice of Appeal

(16) Where leave is granted, the notice of appeal shall be delivered within seven days after the granting of leave.

Costs Appeal Joined with Appeal as of Right

(17) Where a party seeks to join an appeal under clause 133 (b) of the *Courts of Justice Act* with an appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or in a supplementary notice of appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Court of Appeal hearing the appeal as of right;

(c) where leave is granted, the panel may then hear the appeal.

Costs Cross-Appeal Joined with Appeal or Cross-Appeal as of Right

(18) Where a party seeks to join a cross-appeal under a statute that requires leave for an appeal with an appeal or cross-appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or cross-appeal or in a supplementary notice of appeal or cross-appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Court of Appeal hearing the appeal or cross-appeal as of right;

(c) where leave is granted, the panel may then hear the appeal.

Taylor, Paul

- and -

Applicant/Appellant)

**Workplace Safety & Insurance Board –
WSIB and The Workplace Safety &
Appeals Tribunal - WSIAT**
Respondents (Respondents in Appeal)

Court File No. C65144

COURT OF APPEAL FOR ONTARIO

**FACTUM OF THE RESPONDENT,
THE WORKPLACE SAFETY AND
INSURANCE BOARD**

Workplace Safety and Insurance Board
Legal Services Division
200 Front Street West, 22nd Floor
Toronto, Ontario M5V 3J1
Phone (416) 344-3136 Fax (416) 344-3160

Jean-Denis Bélec (LSUC #40140R)
Lawyer for Respondent,
The Workplace Safety and Insurance Board