CITATION: Toronto (City) v. WSIAT, 2025 ONSC 511
DIVISIONAL COURT FILE NO.: 109/23 and 110/23 and 111/23
DATE: 28-02-2025

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

HEENEY, BACKHOUSE AND MYERS JJ.

BETWEEN: CITY OF TORONTO Applicant **– and –** WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL, THE ESTATE OF RAYANNE DUBKOV, THE ESTATE OF LINDA MCLEAN and CAROL MEAGHER Respondents	*Cara Gibbons, Stephanie Moutsatsos* and *Olga Cairo*, for the Applicant *Christine Davies* and *Erin Sobat*, for the Respondents the Estate of Rayanne Dubkov, the Estate of Linda McLean and Carol Meagher *Chris Paliare* and *Mariam Moktar*, for the Workplace Safety and Insurance Appeals Tribunal **HEARD**: December 18, 2024 by videoconference

The judgment of the Court was delivered by,

HEENEY J.:

[1] This is an application for judicial review of nine decisions of the Workplace Safety and Insurance Appeals Tribunal (the "Tribunal"). Three of those decisions are interim, three are final and three are reconsideration requests.

[2] This sounds a great deal more complicated than it is. While each of the three groups of decisions involve different workers, they all involve identical issues and were decided in exactly the same manner by the Tribunal. For that reason, I will be able to decide this application by considering one set of rulings (one interim, one final and one reconsideration), and the results will apply to all three workers. Page and paragraph references will relate to the file involving the Estate of Rayanne Dubkov.

[3] Rayanne Dubkov, Linda McLean and Carol Meagher (the "workers") were employed by the applicant City of Toronto ("Toronto") as communications dispatchers for the Toronto Fire Department. All three contracted breast cancer. Rayanne Dubkov and Linda McLean passed away in 2015 and 2014, respectively, and these proceedings were continued by their estates.

[4] As will be explained in more detail below, pursuant to the statutory scheme and applicable policies, firefighters are presumptively eligible for workers' compensation benefits if they contract a listed "occupational disease", provided that they meet the relevant criteria. Breast cancer is one of the listed diseases. Dispatchers fall within the statutory definition of "firefighter", and the three workers satisfied the statutory criteria. Thus, they were presumptively entitled to benefits.

[5] However, the presumption of entitlement in the statute is a rebuttable one. Breast cancer is presumed to have occurred due to the nature of the worker's employment as a firefighter "unless the contrary is shown". The central issue in this application is the manner in which the Tribunal interpreted and applied the rebuttable presumption.

[6] In brief, Toronto wished to argue before the Tribunal that, as dispatchers, the workers' lack of exposure to the health risks typically associated with frontline fire suppression was relevant evidence in the rebuttal analysis, and clearly undermined the presumption that their breast cancer occurred due to the nature of their employment.

[7] The workers argued, and the Tribunal ruled, that work-relatedness should not be taken into account in determining whether a presumption of entitlement for occupational disease is rebutted, in the absence of statutory, regulatory, or policy provisions to that effect. The Tribunal concluded that to take such an approach undermines the intention of such presumptions, which are meant to streamline and simplify the process of establishing causation.

[8] As a result, the rebuttal analysis was confined to a consideration as to whether the City had proven that the dispatchers' breast cancer had been caused by something external to the workplace, such as genetics, lifestyle, smoking, and so on. Since Toronto did not meet that onus of proof, the presumption applied, and the Tribunal ruled that the workers were

entitled to breast cancer benefits as firefighters. A request for reconsideration was unsuccessful.

[9] At issue is whether the Tribunal's decision was reasonable.

Statutory Background:

[10] Section 15.1(4) of the *Workplace Safety & Insurance Act, 1997*, S.O. 1997 c. 16 Sch. A ("*WSIA*") states that if a firefighter or fire investigator suffers from and is impaired by a disease listed in the Regulation, the "disease is presumed to be an occupational disease that occurs due to the nature of the worker's employment as a firefighter or fire investigator, unless the contrary is shown."

[11] The relevant Regulation is O. Reg. 253/07. In 2014, it was amended to include breast cancer in the list of diseases presumed to be work-related for firefighters. The only relevant precondition for breast cancer is s. 5(2) of the Regulation, which provides that the firefighter must have worked in that capacity for at least 10 years prior to diagnosis.

[12] The Regulation adopts the definition of "firefighter" provided in the *Fire Protection and Prevention Act, 1997*, S.O. 1997 c. 4, which captures anyone employed in a fire department to undertake fire protection services. "Fire protection services" is defined broadly to include:

> (a) fire suppression, fire prevention and fire safety education,
>
> (b) mitigation and prevention of the risk created by the presence of unsafe levels of carbon monoxide and safety education related to the presence of those levels,
>
> (c) rescue and emergency services, and
>
> (d) *communication in respect of anything described in clauses (a) to (c)***.**

[13] There is no dispute that the three workers, having worked as communications/dispatch firefighters, meet the definition of "firefighter" for the purposes of s. 15.1(4) of *WSIA*. Since they were each employed for at least ten years prior to their breast cancer diagnosis, there is also no dispute that they are captured by the presumption in s. 15.1(4).

[14] Instead, the dispute centred on the approach to be taken in the rebuttal analysis, as briefly outlined above.

The Relationship Between the WSIB (The Board) and the WSIAT (The Tribunal):

[15] The *WSIA* creates two separate bodies for adjudicating claims. The Tribunal is independent of the Workplace Safety and Insurance Board (the "Board") and has exclusive jurisdiction to determine appeals from final decisions of the Board with respect to entitlement to compensation under the *WSIA*. The Tribunal is the final appellate body in matters of workplace safety and insurance in Ontario.

[16] Pursuant to s. 126(1) of the *WSIA*, the Tribunal is required to apply any Board policy applicable to the subject matter of an appeal. If the Tribunal determines that a policy is inconsistent with, or not authorized by, the *WSIA*, it cannot make a decision on the appeal until the policy has been referred to the Board for review (s. 126(4)). The Board will then issue a direction on whether the policy is harmonious with the *WSIA* and whether it applies. Once a direction is issued, the Tribunal will proceed with the matter accordingly.

Cancers in Firefighters Policy:

[17] One of the Board policies the Tribunal is required to apply pursuant to s. 126(1) is an operational policy manual entitled Cancers in Firefighters and Fire Investigators (the "Cancers in Firefighters Policy"). This document outlines the prescribed cancers and the circumstances under which they are presumed to be work-related occupational diseases.

[18] While the Cancers in Firefighters Policy largely repeats the requirements for breast cancer entitlements provided in the *WSIA* and Regulation, it does contain an additional statement that "the presumption may be rebutted *if it is established that the employment was not a significant contributing factor to the occurrence of the cancer*". It is this provision that Toronto relies on to argue that evidence concerning the nature of the work or work environment should be considered as part of the rebuttal analysis.

Procedural History:

[19] Prior to the 2014 amendment adding breast cancer to the list of diseases presumed to be work-related for firefighters, each of the three workers brought unsuccessful claims to the Board. However, after this amendment was introduced, the Board reconsidered each application.

[20] In three separate decisions released in October, 2014, the Board confirmed the prior decisions denying each application. It acknowledged that they each met the definition of "firefighter" under the Regulation, that they had been employed for at least ten years before their diagnosis, and that the presumption of entitlement therefore applied. However, it also determined that this presumption was rebutted by the nature of their employment. The Board reasoned as follows:

> Your work as a Communications Officer differs significantly from the usual duties of a firefighter. Most markedly, you did not typically attend fire scenes or engage directly in fire suppression … you did not have exposures that, in any way, approximated to a 10-year history of typical firefighting duties. Expressions of health concerns for firefighters are generally linked to harmful agents arising from their fire suppression activities.

[21] Accordingly, all three claims were dismissed.

[22] The workers then filed an objection with the Appeals Resolution Officer. They argued that the Board did not properly apply the presumption. On their view, once the presumption was found to apply, it was unnecessary to determine their level of workplace exposure.

Rather, they argued that the presumption could only be rebutted with evidence of some other external cause unrelated to employment, such as medical history or a genetic predisposition to breast cancer.

[23] The Appeals Resolution Officer disagreed, and found that this approach was not supported by the *WSIA* or the Cancers in Firefighters Policy, which "prescribe that the disease is presumed to be an occupational disease due to the nature of the worker's employment, *unless the contrary is shown*" [emphasis is in the original]. He interpreted this as a requirement to consider "whether there is any evidence against the presumption when some significant uncertainty exists as to whether the personal injury either did not arise 'out of' or 'in the course of' employment". Since the workers were employed in communications, they were not subject to the same degree of risk as "typical" firefighters. Accordingly, an investigation into the circumstances of their employment was warranted "to investigate her actual exposure risk to determine if her employment was not a significant contributing factor in the occurrence of her cancer". After assessing this evidence, he determined that the presumptions were rebutted in all three cases.

[24] The workers appealed this decision to the Tribunal.

The Tribunal's Interim Decision of February 25, 2022:

[25] The Tribunal issued two sets of interim decisions, only one of which is relevant here. The relevant set arrived at two conclusions:

1. Where the presumption in s. 15.1(4) applies, it cannot be rebutted based upon the nature of the work or the work environment, because that would undermine the intention of such presumptions, which are meant to streamline and simplify the process of establishing causation;

2. The Cancers in Firefighters Policy is inconsistent with the primary aim of the *WSIA* of providing compensation for work-related conditions because it lacked any provisions to "establish a causal connection between workplace exposure and the development of an occupational disease to support the application of a presumption of entitlement". In other words, the Policy failed to include a requirement that the workers engage in active suppression firefighting in order to enjoy the benefit of the presumption.

[26] With respect to the first conclusion, the Tribunal explained the reasons behind its interpretation of the rebuttable presumption, at paras. 54–56:

> The Panel finds it appropriate to situate the interpretation within the context of the purpose of presumptions and policy guidelines for occupational diseases. In our view, it is fair to observe that occupational disease claims are among the most complex types of cases adjudicated in the workplace insurance system. Many types of cancer occur in the general population, as well as the working population. In the absence of tools such as Board policies and statutory or regulatory presumptions, the determination of causation in an individual case requires a detailed case-by-case assessment of occupational exposure and epidemiological data. It often

> requires the Tribunal to request an independent assessor's opinion. Due to the long latency of many diseases, the worker's occupational exposure may have occurred many years in the past and the relevant workplaces may no longer even exist. Moreover, the epidemiological evidence of causation of many diseases also evolves over time.
>
> In this context, presumptions and Board policies provide structure for the evaluation of causation and simplify the adjudicative process in occupational disease appeals.
>
> As noted above, the main point of contention is whether the evidence of work-relatedness of the worker's cancer ought to be taken into account in determining whether the presumption of entitlement is rebutted. The Panel finds that work-relatedness should *not* be taken into account in determining whether a presumption of entitlement for occupational disease is rebutted, in the absence of statutory, regulatory, or policy provisions to that effect. To take such an approach undermines the intention of such presumptions which are meant to streamline and simplify the process of establishing causation.

[27] As to the second conclusion, the Tribunal's reasoning is summarized at paras. 111 and 124:

> While recognizing that a broad and inclusive approach to adjudication of claims is consistent with the intention of the *WSIA*, the Panel notes that workplace causation is a fundamental tenet underlying the workplace insurance scheme. It is open to the Board to adopt policies that may represent a more progressive or expansive view of scientific literature in a manner consistent with these principles; however, such policies must be built upon a credible foundation of workplace causation: there must be an identifiable workplace injuring process or exposure.
>
> …
>
> In summary, in the circumstances of this appeal, the Panel concludes that [the Cancers in Firefighters Policy] is inconsistent with the Act because it lacks provisions to ensure that the process of occupational exposure is defined and the presumption is applied in cases where the worker has been exposed to the presumed occupational hazard, namely, fire suppression activities. In the Panel's view, [the Cancers in Firefighters Policy] is inconsistent with the fundamental requirement of workplace causation which is the foundation for entitlement to benefits under the *WSIA*.

[28] In effect, for its own administrative convenience, the Tribunal interpreted the Cancers in Firefighters Policy to preclude consideration of workplace causation for the workers' disease. Then, as a result of its interpretation, it held that the Cancers in Firefighters Policy was *ultra vires* the statute because it allowed workers to receive workers compensation benefits without a causal link being proven between their disease and the workers' employment.

[29] Having found the Cancers in Firefighters Policy to be inconsistent with the *WSIA*, the Tribunal referred the matter to the Board, as required by s. 126(4), and deferred any decision on the appeal pending the Board's direction.

The Board's Direction Regarding the Cancers in Firefighters Policy – June 30, 2022:

[30] Following receipt of the referral, and after considering the submissions of the parties, the Board released a Direction pursuant to s. 126(8) concerning the alleged inconsistency of the Cancers in Firefighters Policy with the *WSIA*. In that Direction, the Board determined that the Policy is consistent with, and authorized by, the *WSIA*, and applies to these appeals, on the following grounds:

1. Section 159(2) of the *WSIA* confers broad authority upon the Board to draft Operational Policies.

2. The Policy is essentially a restatement of O. Reg. 253/07, and does not deviate from it in any substantive way.

3. The Board does not have the legal authority to draft a policy that contradicts or contravenes O. Reg. 253/07, or any other applicable regulation.

[31] The Board then gave the following direction:

> The Tribunal is directed to apply the Policy in these appeals.

[32] The Board went on to make the following reconsideration request:

> In addition to directing the Tribunal to apply the Policy in these appeals, the Board also respectfully requests that the Tribunal reconsider the decisions, with respect to the conclusion that an adjudicator can never consider evidence of the extent of workplace exposures in determining if the presumption is rebutted, unless expressly authorized to do so by statute, Regulation or Policy. The Board submits that not only can an adjudicator consider workplace exposures in appropriate circumstances, but that to not allow for this essentially turns the rebuttable presumption of s. 15.1(1) into an irrebuttable presumption, which is not what is contemplated by the legislation.

[33] In the reasons that formed part of the Direction, the Board concluded that the legislature intentionally chose to adopt the definition of firefighter from the *Fire Protection and Prevention Act, 1997*, which includes dispatchers and others who may not regularly perform fire suppression activities as part of their job. This simply indicates that the legislature is of the opinion that firefighters who do not perform fire suppression activities are, by virtue of their employment, at a higher causal risk of developing certain prescribed diseases. But it followed those comments with this observation:

> In addition, it should be noted that the presumption in question is a rebuttable presumption – which means that the principle of causation is embedded in the presumption itself. In cases where there is no causal link between work and the development of a disease, the presumption is rebuttable.

[34] The Board also confronted the view of the Tribunal that considering evidence of work-relatedness undermines the intention of such presumptions, which are meant to streamline and simplify the process of establishing causation. It commented as follows:

> The fact that adjudicators may, in certain cases, consider evidence of workplace exposures in deciding whether a presumption is rebutted does not mean that the adjudication of claims under the presumption is not streamlined. Adjudicators should only consider such evidence when there is a reason to suspect that work was not a significant contributing factor; in most cases this analysis would not be necessary. The purpose of the presumption in terms of streamlined adjudication can still be met even when adjudicators perform this analysis in certain cases. Adjudication does not need to be streamlined in each and every single case for this purpose to be achieved.

[35] The Board also observed that streamlining adjudication is but one purpose of a presumption. Another purpose is to enable adjudicators to reach the correct decision more easily. This purpose would be thwarted if workplace exposure evidence could never be considered. Instead, adjudicators should have the ability to consider workplace exposure (or lack thereof), and should be able to rebut the presumption based on a consideration of all factors, when there is sufficient evidence to establish that work was not a significant contributing factor. It concluded as follows:

> In support of this position, it should be noted the legislature clearly intended that the presumption applicable to this case be rebuttable, and did not place any limitations on when or how the presumption can be rebutted, indicating only, "unless the contrary is shown".

[36] At this point, then, the ball was well and truly back in the Tribunal's court.

The Tribunal's Final Decision, January 20, 2023:

[37] Following receipt of the Board's Direction, the Tribunal issued its final decision on the appeal. Its conclusions are set out at para. 21:

> This decision sets out the reasons for the following conclusions:
>
> • The WSIB's request for a reconsideration is denied. This is the unanimous decision of the Panel.
>
> • The worker's appeal is allowed because the presumption of entitlement applies and it has not been rebutted. This is a decision of the Panel majority as the Employer Member has issued a dissent.

[38] As to the reconsideration request, the Tribunal acknowledged, as it must, that it is bound by the Board's direction. However, it quickly signalled, at para. 21, that it was not about to follow it:

> Pursuant to section 126, the Tribunal is bound by the Board's direction that the Cancer in Firefighters Policy is consistent with the Act; however, the Board does

> not have the authority to direct how the Tribunal interprets Board policy. See generally: *Decision No. 2346/12I5* 2017 ONWSIAT 1899.

[39] The Tribunal then repeated its previous analysis of the rebuttable presumption, at paras. 25-26:

> Therefore, the outcome of the appeal turns on the rebuttal of the presumption. The Panel's interpretation of the rebuttal analysis took into account the general purposes of presumptions as well as relevant case law. The Panel has concluded that it is not appropriate to weigh evidence of work-relatedness in determining whether a presumption of causation is rebutted for occupational disease entitlement. Instead, in the absence of policy provisions stating otherwise, the analysis of the rebuttal ought to focus on whether there is evidence of non-work-related causal factors sufficient to outweigh the presumption itself.
>
> To weigh evidence of work-relatedness in the rebuttal analysis would be inconsistent with the purpose of presumptions for occupational disease, whether they are set out in the statute, regulation, or Board policy. The Panel agrees with the submissions of the appellant's representatives that considering evidence of work-relatedness in the rebuttal analysis would result in an incoherent approach to the presumption. The presumption itself is meant to replace the complex factual analysis required to establish work-relatedness. If the rebuttal analysis involves weighing evidence of work-relatedness, then the purpose of the presumption is undermined. Furthermore, the approach put forward by counsel for the WSIB would lead to inconsistency in adjudication.

[40] The Tribunal referred to, and relied upon, jurisprudence from the Worker's Compensation Appeal Tribunal of British Columbia to support their opinion. These cases will be discussed below.

[41] In the end, the Tribunal considered only causation evidence that was external to the workplace, and concluded that the workers' non-compensable risk factors were modest. The majority therefore allowed the appeal, and found that the presumption that the workers' breast cancer arose out of employment had not been rebutted, and the workers were entitled to benefits for breast cancer.

[42] Toronto's Request for Reconsideration was subsequently dismissed by the Tribunal, on March 4, 2024.

Standard of Review:

[43] All parties agree that the applicable standard of review on this application is reasonableness. That standard has been explained and defined in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. The factum filed by Toronto contains a helpful, and accurate, compilation of various relevant principles enunciated in *Vavilov*, at para. 39 [footnotes omitted]:

> The reasonableness standard is a deferential standard that focuses "on the decision the administrative decision maker actually made, including the justification offered for it..." Such decision must be intelligible, transparent, and justifiable. The intelligibility and justifiability of the decision must not be "in the abstract;" it requires the decision to be "based on an internally coherent and rational chain of analysis […] that is justified in relation to the facts and law that constrain the decision maker." Reasonableness "relates primarily to the transparency and intelligibility of the reasons given for a decision." A decision that is lacking in internal coherence and a rational chain of analysis in relation to the facts and law that constrained that decision maker will not meet the reasonableness standard. Nor will a reviewing court uphold a decision that contains a "fatal flaw in its overarching logic" or that fails "to reveal a rational chain of analysis" that "add up" on a "critical point" or that failed to "take into account the evidentiary record."

[44] Additional principles from *Vavilov* were summarized at para. 35 of the factum filed by the counsel for the workers:

> It affirmed that "reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers." In carrying out its review, a reviewing court should take a "reasons first" approach, which focuses on the decision actually made by the decision maker, including both the reasoning process and the outcome. The court should not decide the issue de novo, by asking what decision it would have made in place of the decision maker, nor should the court attempt to ascertain the range of possible conclusions that would have been open to the decision maker. Rather, reasonableness is concerned with justification, transparency, and intelligibility. A decision will be reasonable if it is based on an internally coherent and rational analysis and if it is justified in relation to the constellation of law and facts that are relevant to the decision.

[45] In *Thales DIS Canada Inc. v. Ontario (Transportation)*, 2023 ONCA 866, the Court of Appeal described two types of "fundamental flaws" that may make a tribunal's decision unreasonable. Favreau J.A. described the second type of error at para. 94, as follows:

> Second, a decision may be unreasonable because it is "untenable in light of the relevant factual and legal constraints that bear on it": *Vavilov*, at para. 101. Again, as described in *Turkiewicz*, at para. 60, the relevant factual and legal constraints include "the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the parties' submissions; the past practices and decisions of the administrative body; and the potential impact on the individual to whom it applies": see also *Vavilov*, at para. 106.

[46] With the benefit of this guidance, I now move to a consideration as to whether the Tribunal's final decision, as outlined above, is reasonable.

Analysis:

[47] At issue is the Tribunal's interpretation and application of the rebuttable presumption in s. 15.1(4) of the *WSIA*, as well as the Cancers in Firefighters Policy.

[48] At para. 52 of its February 25, 2022 decision, which formed the groundwork for its final decision, the Tribunal outlined the approach it planned to take in interpreting the rebuttable presumption in s. 15.1(4):

> The WSIAT has followed the courts in adopting the modern principle of statutory interpretation, which requires that the words of an Act be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act, and the intention of Parliament or the Legislature.

[49] It then proceeded with its analysis at paras. 54 - 56, before arriving at the conclusion that "work-relatedness should *not* be taken into account in determining whether a presumption of entitlement for occupational disease is rebutted". Those paragraphs are quoted in full, at para. 26 above. As is clear from reading those reasons, the Tribunal engaged in absolutely *no* analysis of the grammatical and ordinary meaning of the words used by the legislature. Instead, the Tribunal essentially jumped to the conclusion that work-relatedness should not be taken into account, for reasons of efficiency, without ever considering what the words in the statute mean.

[50] It is appropriate, then, for this court to examine the ordinary, grammatical meaning of the words in question.

[51] Section 15.1(4) of the *WSIA* states that if a firefighter or fire investigator suffers from and is impaired by a disease listed in the Regulation, the "disease is presumed to be an occupational disease that occurs due to the nature of the worker's employment as a firefighter or fire investigator, unless the contrary is shown."

[52] The key question is the meaning of the words "unless the contrary is shown".

[53] The plain and ordinary meaning of "the contrary" is "the opposite", or some similar word. It is the negation of the proposition in question, which is often reflected by use of the word "not".

[54] The proposition that is presumed by s. 15.1(4), adjusted to conform to the facts of this case, is this: the cancer occurred due to the nature of the worker's employment as a firefighter.

[55] The contrary proposition is this: the cancer *did not* occur due to the nature of the worker's employment as a firefighter.

[56] A party choosing to challenge the presumption would have the onus of proving this contrary proposition. Proving a negative is not an easy task. There are two general groups of evidence that a litigant could proffer to meet that onus. The first is to put forward evidence as to the nature of the worker's employment, and demonstrate that there was nothing about those employment conditions that created a risk of causing cancer (i.e. "*ruling out*" causation from employment). The second is to put forward evidence as to potential causes that are external to the workplace, such as genetics, lifestyle and so on, to demonstrate that those causes were the probable genesis of the cancer (i.e. "*ruling in*" external causes).

[57] The Tribunal chose to consider the latter, but expressly excluded the former from consideration. There is no logical basis, arising from the plain words used by the legislature, to either require or permit such an approach, because the section is open-ended and does not prescribe or limit the manner in which "the contrary" could be proven. There is no rational chain of analysis evident in the Tribunal's reasons that justifies this result, given that the Tribunal is constrained by the words chosen by the legislature.

[58] In effect, the Tribunal has rewritten the rebuttable presumption, by replacing the words "unless the contrary is shown" with the words "unless it is shown that the disease occurred due to causes external to the worker's employment". With respect, such an approach is not an exercise in statutory interpretation, it is an exercise in statutory draftsmanship.

[59] It is no justification for the Tribunal's approach to say that permitting the consideration of work-relatedness would undermine the presumption. The presumption would remain operative. All that the worker would need to prove are the statutory criteria for entitlement. If another party, presumably the employer, wished to challenge the presumption, the onus of proof would shift to that party to prove that the cause of the cancer was not work-related. If they failed to do so, or the evidence was inconclusive either way, the presumption would prevail and benefits would be awarded.

[60] Quite apart from logic and the plain meaning of the words used in s. 15.1(4), the Tribunal's approach is contrary to the law and policy that constrains it in its decision-making, particularly the binding nature of the Cancers in Firefighters Policy.

[61] Section 159(2) of the *WSIA* prescribes the powers of the Board, and reads, in part, as follows:

> (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;
>
> …

[62] The Board's Cancers in Firefighters Policy is both a policy regarding evidentiary requirements for establishing entitlement to benefits, and a policy regarding the interpretation and application of the Act. In directing that "the presumption may be rebutted if it is established that the employment was not a significant contributing factor to the occurrence of the cancer", the Policy prescribed the manner in which the rebuttable presumption in s. 15.1(4) was to be interpreted and applied. Furthermore, it implicitly directed that evidence that the employment was not a significant contributing factor to the

occurrence of the cancer was relevant evidence to be considered in the rebuttal analysis. Thus, the Policy fell squarely within the statutory powers of the Board to establish.

[63] The Tribunal, pursuant to s. 126(1), is obligated to apply an applicable Board policy when making its decision. They clearly did not do so. They interpreted the rebuttable presumption in a manner contrary to the Policy, in that they held that only evidence of external causation could be considered, and in so doing they refused to consider evidence of work-relatedness (or lack thereof) that the Policy clearly rendered relevant to the analysis.

[64] In my view, this decision is untenable in light of the relevant factual and legal constraints that the Policy represents, as discussed in *Thales*, above, and is therefore unreasonable.

[65] The Tribunal's answer is that they did this in the guise of "interpretation", which is a matter within their authority. Assuming, without deciding, that they do have this authority (notwithstanding s. 159(2)(a.1) and s. 126(1) of the *WSIA*), their interpretation is clearly and obviously unreasonable. The Board's Policy stands for the proposition that the presumption *can* be rebutted by evidence that employment was not a significant contributing cause of the cancer. The Tribunal's interpretation stands for the proposition that the presumption *cannot* be rebutted by evidence that employment was not a significant contributing cause of the cancer. An interpretation that results in the opposite outcome of what the plain meaning of the words dictates is unintelligible and unreasonable. It amounts to ignoring the Policy, not interpreting it.

[66] The Tribunal placed considerable reliance upon jurisprudence from the Worker's Compensation Appeal Tribunal of British Columbia to support their opinion. They said this, at para. 30 of the January 20, 2023 final decision:

> In this regard, we agreed with the reasoning contained in B.C. WCAT *Decision No. WCAT-2008-00216(Re)*, 2008 CanLII 9212 (BC WCAT), and will repeat a key passage from the decision: "I do not consider that it is open to a decision-maker to rebut the presumption by second-guessing the basis for the actual presumption and rendering it meaningless." In turn, this decision cited B.C. WCAT *Decision No. WCAT-2005-02493-RB (Re)*, 2005 CanLII 89385 (BC WCAT), which considered arguments regarding the rebuttal of a presumption of entitlement for lung cancer for workers with prolonged exposure to particulate polycyclic aromatic hydrocarbons (PAHs), among other substances. After determining that the deceased worker did meet the definition of "prolonged exposure" to PAHs, the Vice-Chair reviewed arguments related to the epidemiological studies on the strength of the association between PAH exposure and lung cancer. The Vice-Chair rejected that approach with respect to the presumption, stating:
>
> > However, to what extent can the evidence in the literature be used to rebut the presumption that there is a causal link between primary cancer of the lung and prolonged exposure to PAHs? I do not consider that the literature can be used in that fashion. To do so would be to rebut the very presumption in Schedule B, rather than the presumption in the specific worker's case.

[67] The distinguishing feature between these cases and the case at bar is that the B.C. legislation presumes causation only where there was "prolonged exposure" to PAHs. Prolonged exposure had been established in those cases. Thus, to allow a party to call evidence challenging the causal link between prolonged exposure to PAHs and lung cancer would indeed amount to allowing a frontal assault on the presumption itself, and the science behind it, thereby undermining the purpose of the presumption.

[68] The portions of the B.C. *Workers Compensation Act* that are specific to firefighters similarly contain an exposure criterion. Section 140 provides that if a firefighter contracts a designated disease, the presumption of causation does not apply unless the firefighter "has been regularly exposed to the hazards of a fire scene" for the period prescribed by regulation.

[69] By contrast, neither s. 15.1(4) of the *WSIA*, nor O. Reg. 253/07, nor the Cancers in Firefighters Policy prescribe an exposure criterion. The first two, combined, simply say that if it is a listed occupational disease, the worker is a firefighter, as defined, and has been so engaged for at least 10 years prior to the diagnosis, causation is presumed "unless the contrary is shown". As already noted, neither the statute nor the regulation impose any limitations on how "the contrary" is to be proven, leaving it essentially open-ended. The Policy repeats those criteria, but adds the additional proviso relating to how the contrary might be proven, in that "the presumption may be rebutted if it is established that the employment was not a significant contributing factor to the occurrence of the cancer".

[70] As is evident from the material filed, it has been common ground since this case first began that the presumption at issue arose out of a body of scientific evidence showing a causal link between exposure to fire suppression activities and the occurrence of certain cancers. That science is not under attack here. Quite the reverse. It is the *lack of any exposure* to fire suppression activities that is being relied upon to support a conclusion that the cause of the workers' cancer was not work-related. The B.C. authorities are clearly distinguishable.

[71] Suppose that the *WSIA* had contained a provision, like the B.C. legislation, that set a precondition to entitlement that the firefighter had to have been regularly exposed to the hazards of a fire scene for a minimum period of 10 years. No one could argue that considering evidence of the working environment of a dispatcher, and establishing that they had virtually no exposure to fire suppression activities, would undermine the presumption. Indeed, the dissenting member in the final decision read the Policy to apply to workers involved in fire suppression activities, and would have denied the appeal on the basis that work-relatedness was not established, given that the worker was not involved in active fire suppression.

[72] How is it, then, that the mere *silence* of the presumption on the issue of exposure to fire suppression activities could lead to the conclusion that the Tribunal is precluded from considering any evidence as to work-relatedness? Evidence that the worker had no exposure to fire suppression activities cannot undermine the presumption, because it

addresses a criterion that the presumption does not contain. There is no rational chain of analysis in the Tribunal's reasons that supports this leap of reasoning.

[73] There are other core provisions of the *WSIA* that also constrain the decision-making of the Tribunal, because they clearly connect the worker's entitlement to compensation to an injury or illness occurring during the course of the worker's employment. Section 13(1) is the embodiment of this "work-relatedness" concept, and reads as follows:

> 13 (1) A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.

[74] While this section refers to "personal injury by accident", it is made relevant to the case at bar by virtue of s. 15, relating to "occupational diseases". That section reads, in part, as follows:

> 15 (1) This section applies if a worker suffers from and is impaired by an occupational disease that occurs due to the nature of one or more employments in which the worker was engaged.
>
> (2) The worker is entitled to benefits under the insurance plan *as if the disease were a personal injury by accident* and as if the impairment were the happening of the accident. [emphasis added]

[75] In its interim decision of February 20, 2022, referred to above, the Tribunal concluded that the Cancers in Firefighters Policy, as the Tribunal interpreted it, is inconsistent with the primary aim of the *WSIA* of providing compensation for work-related conditions, because it lacked any provisions to "establish a causal connection between workplace exposure and the development of an occupational disease to support the application of a presumption of entitlement". They were, therefore, fully alive to the requirement of work-relatedness as a precondition to entitlement to benefits.

[76] After receiving the Direction of the Board that the Policy was not, in fact, contrary to the *WSIA*, the Tribunal proceeded to interpret and apply it in such a manner that precluded the consideration of evidence that the workers' employment was not a significant contributing factor to the occurrence of the cancer. They did this in the face of the clear words of the Policy that "the contrary" may be proven by a consideration of that very evidence.

[77] It is, in my view, illogical and unintelligible to recognize that work-relatedness is a precondition to entitlement, and then go on to award benefits after having refused to consider evidence showing that the cancers in question were not, in fact, work-related.

[78] For all of the above reasons, I conclude that the decision of the Tribunal to allow the appeal and award breast cancer benefits is unreasonable, and must be quashed.

[79] In view of this conclusion, it is unnecessary to consider the submissions relating to the Merit and Justice Policy.

[80] I cannot leave this discussion without noting that the Cancers in Firefighters Policy has recently been amended. These amendments are not relevant to the disposition of the matters before this court, because Board policy does not operate retroactively. However, it is worthwhile to observe how the Board has attempted to remedy the problems that have led to all of the litigation in the case at bar. The new policy reads as follows:

> **Rebutting the presumption**
>
> If a worker qualifies for the presumption, the worker's cancer is presumed to be an occupational disease that occurs due to the nature of the worker's employment as a firefighter or fire investigator, unless the contrary is shown. If the contrary is shown, the presumption of work-relatedness is rebutted.
>
> The presumption is only rebutted if the evidence establishes on a balance of probabilities that:
>
> • the worker either had negligible exposure or was never exposed to the hazards of a fire scene or to another known occupational risk factor for their cancer during their employment as a firefighter or fire investigator, or
>
> • the worker's non-occupational risk factors were of such importance that they overwhelmed any occupational exposure the worker had as a firefighter or fire investigator, rendering it insignificant in the development of the worker's cancer.

[81] It is noteworthy that the general statement in the earlier version — that the presumption may be rebutted if it is established that the employment was not a significant contributing factor to the occurrence of the cancer — has been replaced by specific references to "negligible exposure" or no exposure at all to the "hazards of a fire scene or to another known occupational risk factor".

[82] This additional clarity is helpful, and one hopes that it will ensure that the case at bar will never be repeated.

[83] Having said that, I am of the view that the new version is still sending, in a more detailed and specific way, the same message that the earlier version of the Policy did in a more general way: that the decision-maker should, in an appropriate case, look at working conditions and their potential to cause the disease in question, in determining whether the presumption has been rebutted.

Should the Matter Be Remitted to the Tribunal?

[84] The general rule is that when a decision reviewed by the reviewing court cannot be upheld, it is most often appropriate to remit the matter to the decision maker to have it reconsider the decision, with the benefit of the court's reasons. However, as explained in *Vavilov* at para. 142, there are exceptions:

> However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited

> scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95 (F.C.A.) , at paras. 18-19. An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland (Offshore Petroleum Board)*, [1994] 1 S.C.R. 202 (S.C.C.) , at pp. 228-30; *Renaud c. Québec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855(S.C.C.) ; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772 (S.C.C.) , at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1 (F.C.A.), at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175 (F.C.A.), at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319 (Ont. C.A.) , at paras. 54 and 88. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 (S.C.C.) , at paras. 45-51; *Alberta Teachers*, at para. 55

[85] If I were to remit the matter to the Tribunal, it would be with a direction for them to consider the evidence relating to the workers' employment and working conditions in their rebuttal analysis and, in particular, in determining whether it has been established that their employment was not a significant contributing factor to the occurrence of the cancer.

[86] However, both the Board and the Appeals Resolution Officer have already considered that evidence in their rebuttal analysis, and both concluded that the presumption had been rebutted. They did so for the obvious, common-sense reason that the work of a dispatcher is vastly different from the work of a front line firefighter, and does not involve the exposure to harmful agents arising from fire suppression activities that are commonly associated with these diseases.

[87] The Tribunal came to the opposite conclusion, but only did so while expressly refusing to consider the evidence relating to the workers' employment and working conditions in their rebuttal analysis.

[88] In my view, this is one of those cases where the outcome is inevitable, and remitting the case would serve no useful purpose. Accordingly, I would not remit the matter to the Tribunal for further consideration. The decision of the Tribunal having been quashed, the operative decision in each of these cases remains the decision of the Board.

Costs:

[89] At the hearing, counsel agreed that if the applicant Toronto was successful, they would be awarded costs in the total amount of $20,000 all inclusive, with $10,000 of that to be contributed by the Tribunal, and the remaining $10,000 to be contributed by the other three respondents, collectively. An order will go in that regard.

[90] Finally, we note that we have ignored paras. 56 to 97 of the factum delivered on behalf of WSIAT. Prior to para. 56, the Tribunal provided helpful submissions on the applicable statutory instruments and the interplay between the Tribunal and the Board to help inform the court on the administrative scheme. But with well-represented parties on both sides of the issue, the Tribunal should not be seen to be taking a position on the merits in this court: see, *Hydro Ottawa v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2019 ONSC 4898, *Radzevicius v. Workplace Safety and Insurance Appeals Tribunal*, 2019 ONSC 1678 (CanLII), *Irving Consumer Products Limited v. Singh*, 2024 ONSC 7186 (CanLII).

T. Heeney J.

I agree.

N. Backhouse J.

I agree.

F. Myers J.

Released: February 28, 2025

CITATION: *Toronto (City) v. WSIAT et al*., 2025 ONSC 511
Divisional Court File No.: 109/23 and 110/23 and 111/23

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

HEENEY, BACKHOUSE AND MYERS JJ.

BETWEEN:

CITY OF TORONTO

Applicant

– and –

WORKPLACE SAFETY AND
INSURANCE APPEALS TRIBUNAL,
THE ESTATE OF RAYANNE DUBKOV,
THE ESTATE OF LINDA MCLEAN and
CAROL MEAGHER

Respondents

REASONS FOR JUDGMENT ON AN APPLICATION FOR JUDICIAL REVIEW

Released: February 28, 2025