A possible workaround to the long processing times at the Bureau d’évaluation médicale

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In recent years, the job market has changed considerably, especially further to the pandemic and the impacts it has had.

Employers and employees in Quebec faced unprecedented situations, and these appear to have led to a significant increase in claims for recognition of psychological occupational injuries, such as adjustment disorders and depression.[1]

Consequences of long processing times at the Bureau d’évaluation médicale

The increase in psychological injury cases is not without consequences for employers, and it is now common for the evaluation procedure at the Bureau d’évaluation médicale (BEM) to take several years. The considerable amount of time it takes to obtain an opinion from a member of the BEM has a major impact on the management of such occupational injury cases.

For example, many healthcare professionals (i.e., attending physicians) categorically refuse to confirm an injury when an employee is waiting for a expert medical opinion from the BEM, which can delay the resolution of a case for several years. Without a BEM opinion on the medical issue in dispute, it is impossible for employers to schedule hearings or even attempt settlement discussions.

Furthermore, in some cases, processing times can even lead to the deterioration of the employee’s health. Without an opinion from the BEM, it can be difficult for the employer in question to reintegrate the employee without a specific diagnosis or functional limitations having been established. This also makes it difficult for the employer to put proper measures in place to safely reintegrate the employee in the workplace.

Like many other Quebec organizations, the BEM is currently lacking personnel, especially psychiatric

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experts.[2] This specific problem causes many issues for Quebec employers in their management of occupational injury cases, and also generates enormous costs. However, another option to speed up the process is now available.

The *Paccar Canada (Usine de Ste-Thérèse)* case

Just recently, the occupational health and safety division of the Administrative Labour Tribunal (ALT) rendered a very interesting decision that provides Quebec employers with a way to obtain a medical expert opinion more quickly as part of a BEM procedure.

In this case,[3] a worker was injured when she fell in the parking lot of the plant where she works. The CNESST accepted her claim for an occupational injury having caused a contusion to her elbow and wrist, a cervical sprain and a mild concussion. A few months later, the worker's attending physician diagnosed her with major depression, which the CNESST subsequently recognized as being linked to the initial event. The employer challenged this decision. However, a hearing date cannot be set as long as the procedure is still under way at the BEM, in particular as concerns the diagnosis to be used to rule on whether the psychological injury is admissible.

After receiving a medical certificate from the worker's attending physician confirming the major depression diagnosis, the employer mandated a psychiatrist to assess her. The psychiatrist's medical opinion differed from that of the attending physician, in particular where the diagnosis was involved. In May 2021, the employer asked the CNESST to request an opinion from the BEM. In June 2021, the CNESST applied the BEM to obtain the opinion of a member, more specifically the opinion of a psychiatrist.

A month later, having still not received a notice to report from a member of the BEM, the employer asked the CNESST to designate a health professional so that they could render a medical opinion that would be binding on the parties, asking the CNESST to apply paragraph 3 of section 224.1 of the *Act respecting industrial accidents and occupational diseases* (AIAOD), which states the following:

224.1. Where a member of the Bureau d'évaluation médicale gives an opinion pursuant to section 221 within the time prescribed in section 222, the Commission is bound by that opinion and shall render a decision accordingly.

Where the member of the Bureau d'évaluation médicale fails to give his opinion within the time prescribed in section 222, the Commission is bound by the report obtained from the health professional it designated, where that is the case.

If the Commission has not obtained such a report, it may request, from the health professional it designates, a report on the matter mentioned in any of subparagraphs 1 to 5 of the first paragraph of section 212 which is the subject of the contestation; in that case, the Commission is bound by the opinion of the member of the Bureau d'évaluation médicale or the report of the health professional it has designated, whichever it receives first, and shall render a decision accordingly.

The Commission shall file in the worker's record any opinion or report it receives even though it is not bound thereby.

Section 222 of the AIAOD stipulates that the member of the BEM must render their opinion within 30 days of the date on which the record was transmitted to them and send it without delay to the Minister, with copies to the CNESST and to the parties.

We understand from section 224.1 of the AIAOD that the CNESST is bound by the medical opinion of the designated health professional and must render a decision accordingly, which may then be

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contested by the employer or worker, as the case may be. This would ultimately allow the parties to be heard by the ALT, which would then render a decision on the merits.

In the Paccar case, the CNESST denied the employer's request for an administrative review of the CNESST's refusal to refer the case to a health professional, in spite of paragraph 3 of section 224.1 of the AIAOD. This refusal was the crux of the dispute.

Thus, the ALT had to determine whether the CNESST should have granted the employer's request. The ALT did indeed determine that the CNESST should have done so, given the BEM's inability to appoint a psychiatrist within a reasonable time.

The decision

The CNESST argued that paragraph 3 of section 224.1 3 of the AIAOD provides discretionary power, as the section indicates that the CNESST **may request** a report from health professional it designates. In the CNESST's opinion, the word "may" gives it discretionary power, and it is thus not obliged to designate a health professional in all cases.

The ALT explained that considering the objectives of the AIAOD, the BEM procedure must be carried out **swiftly and efficiently**. Thus, if the BEM is unable to appoint a psychiatrist from among its members within a reasonable amount of time, the objectives of the AIAOD cannot not be achieved, and the result of it becoming impossible to complete the BEM procedure would be entirely inconsistent.

Clearly, this was not the government's intention. In this context, it would be difficult for the CNESST to justify not using its power to designate a health professional, because if it did not do so, the case would no longer move forward, and this would not be good for any of the parties involved, including the CNESST.

The ALT concluded that in accordance with section 9 of the *Act to establish the Administrative Labour Tribunal*,[4] **it had the power to enforce paragraph 3 of section 224.1 of the AIAOD**.In the Paccar decision, the CNESST had undertaken during the hearing to designate a health professional within a short time should the ALT so rule, who would proceed to assess the worker and render a decision accordingly.

Practical information to make the process easier

At this stage, it is very difficult to predict how the CNESST will apply section 224.1 of theAIAOD in the future. However, we have every reason to believe that many employers will unfortunately find themselves in the same situation as the employer in the Paccar case, if they aren't already, especially where psychological injuries are involved.

It is reasonable to assume that the CNESST will not apply paragraph 3 of section 224.1 of the AIAOD as long as an employer does not formally request that it do so.

In the future, we recommend that you closely follow the progress of your BEM request with the CNESST:

> Once 30 days have passed since you made your request, we recommend that you contact the CNESST agent assigned to your case to find out how far they have gotten in processing your request.
> If your request has not yet been submitted to the BEM, we recommend that you send a letter to the CNESST in which you request that it apply paragraph 3 of section 224.1 of the AIAOD, and more specifically that it designate a health professional. Remember to ask the CNESST to render a formal decision on your request so that you can apply for its review if it is not in your favour.

If you are facing this type of situation, we invite you to consult our team of employment law professionals, who can help you manage your case.

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1. For example, in 2021, the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST) reported a 9% increase in recognized stress-related injuries (1,679 cases in 2021). See portrait-violence-stress-harcelement-2018-2021.pdf (gouv.qc.ca, in French only).
2. AI_M20222152_stat-diverses-bem_MTESS.pdf (quebec.ca, in French only). The BEM has compiled organizational statistics for the period from 2017 to 2022. In particular, the BEM has reported a decrease in the number of opinions it issues, down from 11,045 in 2017–2018 to 9,651 in 2021–2022. The BEM also recorded a considerable increase in the average time taken to process a case (from 69.7 days in 2017–2018 to 138.7 days in 2021–2022).
3. *Paccar Canada (Usine de Ste-Thérèse)*, 2023 QCTAT 3989.
4. T-15.1.

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