THE JURISPRUDENCE OF MCS IN QUÉBEC

2013-2017

Environmental Health Association of Québec
Association pour la santé environnementale du Québec

Johannie Simard, LL.B

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Interpretation

In this document,

“The attending physician who is in charge" refers to the physician who is in charge of the employee's injury evaluation and diagnosis. The injured worker chooses the physician;

“**CNESST**” or ‘’**Commission**” refers to the Commission des normes, de l’équité, de la santé et de la sécurité du travail, which was previously known as the “**CSST**” (“Commission de la santé et de la sécurité du travail”);

"**DRA**” is the Administrative Review Division, which is the internal body responsible for the administrative oversight of the CNESST's initial decision on the claim's outcome ("Direction de la révision administrative");

"**TAT**" or "**Tribunal**" refers to the Administrative Labor Tribunal ("Tribunal administratif du travail"), which was previously known as the "**CLP**" ("Commission des lesions professionnelles"). It is an administrative tribunal responsible for adjudicating (deciding) various labor law disputes in Quebec. Among other things, the TAT hears appeals of decisions rendered by the divisions of the CNESST;

“**AIAOD**" or "**LATMP**" is the Act Respecting Industrial Accidents and Occupational Diseases ("Loi sur les accidents du travail et les maladies professionnelles");

"**ES/MCS**" refers to "*multiple chemical sensitivity*," with the understanding that the term "environmental sensitivity" (ES) is a general term that encompasses multiple conditions. This letter uses the more specific term "environmental sensitivity/multiple chemical sensitivity" (ES/MCS) to refer to chemical sensitivity. The consensus definition of ES/MCS developed by experts and validated by the Environmental Health Research Unit at the University of Toronto (1) is as follows (2):

1. Symptoms are reproducible after [repeated] chemical exposure.
2. The condition is chronic.
3. Low levels of exposure [below those previously or commonly tolerated] result in the manifestation of symptoms.
4. Symptoms improve or disappear when the push factors are removed.
5. Responses occur to multiple chemically unrelated substances.
6. The symptoms involve several organ systems.

“**Employment injury**” or “**professional injury**” means an injury or a disease arising out of or in the course of an industrial accident or an occupational disease, including a recurrence, relapse, or aggravation. These terms refer to both occupational disease and professional injury. It is also referred to as “**work-related injury**”;

“**Occupational disease**” is a disease contracted out of or in the course of work and characteristic of that work or directly related to the risks peculiar to that work;

“**Industrial accident**” means a sudden and unforeseen event, attributable to any cause, which happens to a person, arising out of or in the course of his work and resulting in an employment injury to him.

Can any category of worker make a claim to the CNESST?

The *Act respecting Industrial Accidents and Occupational Diseases* (from now on "AIAOD") benefits any "**worker"** but frames its definition. In legal terms, a worker is "a natural person performing work, for an employer, for remuneration, under an employment contract or apprenticeship."

In addition, certain types of workers are excluded from the law:

- ⇒ **Domestic worker**, who is a natural person hired by an individual for compensation to perform household chores in the individual's home OR to care for a child, sick, disabled, or older adult while residing in the employer's home;
- ⇒ The **care worker**, who is a natural person hired by an individual for remuneration to care for a child, a sick person, a disabled person, or an older adult while **not** residing in the employer's home;
- ⇒ An **officer** or **board member** of a corporation (company, business, etc.).
- ⇒ The **caregiver is** a natural person who acts as an intermediate or family-type resource.

- these excluded categories of workers can purchase personal labor coverage under the AIAOD for a fee [1]-

Note that a special plan applies to **federal government employees.** It is subject to the *Government Employees Compensation Act* [2](GECA) rather than the AIAOD:

> The AIAOD is complementary to the GECA. The GECA refers to but does not incorporate the protections of applicable provincial legislation. Since 1989, the GECA applies the same definitions of workplace injury/industrial accident, compensation, and occupational disease as the LATMP for workers who would otherwise benefit from them.

[1] art. 18 AIAOD
[2] *Government Employees Compensation Act*, R.S.C. (1985) c. G-5

Does the presence or absence of a collective agreement affect a CNESST claim?

The AIAOD is authoritative in La Belle Province. However, it has extraterritorial application in certain circumstances when a Quebec employee is affected in another province or territory.

Being a public order law of protection, an employer or an agreement cannot under any circumstances depart from the protections granted by the AIAOD. In other words, employees who benefit from the AIAOD can benefit from the protections and exercise the rights provided regardless of whether there is a collective agreement, an individual agreement, or a decree. However, when one of these three contracts applies to the worker, they must study them since the employer may grant more extensive protections than those set out in the AIAOD.

In the event of a dispute with the employer, the collective agreements provide for a first recourse to grievance arbitration rather than to the CNESST. The worker will then file before the grievance arbitrator. The arbitrator's function is to decide disputes concerning the interpretation or application of a collective agreement. Therefore, in a situation where a collective agreement provides for a more advantageous measure than the AIAOD, for example, concerning the right to return to work or the right to rehabilitation measures after an employment injury, the worker cannot go directly to the CNESST.

- ***Unifor and Prelco inc. (Roger Lévesque),*** 2017 QCTA 990

  The worker is represented by his union against the employer, who unjustly refuses his return to work after he had suffered a work-related injury in 2014 under the diagnosis of multiple chemical sensitivity. The union claims that the employer violated both the collective agreement and the Charter by not allowing the worker to come back in a position that meets the worker's functional limitations, including that of no exposure to volatile products. In this case, the collective agreement provides a more advantageous measure for the return to work. Indeed, the collective agreement allows workers to obtain any position in the plant that they can perform due to seniority and professional capacity. That said, an investigation by the CSST (CNESST), commissioned by the employer and conducted in the meantime, revealed that no existing position could allow the worker not to be exposed to volatile chemicals. As the factory's industrial fans operate in an open-plan area, exposure to volatile products is inevitable. In a professional arbitration proceeding, the arbitrator responds that he can find that the worker can perform the regular duties of a packaging job, a position the worker wanted to fill. Still, as the union requests, the arbitrator cannot find that the worker's functional limitations do not prevent him from working in that position. The removal of previously recognized functional limitations is the exclusive responsibility of the CSST (CNESST) since it concerns the physical integrity of the worker. Therefore, it is not a question of determining the worker's capacity and right to occupy a certain position under the collective agreement, but whether this position is dangerous for his state of health following his employment injury. Claim dismissed.

On what basis can a claim for environmental sensitivities/multiple chemical sensitivity developed in connection with working conditions be accepted?

A worker' compensation claim for environmental sensitivities/multiple chemical sensitivity in connection with working conditions may, depending on the circumstances, be accepted as an illness resulting from a work accident, an occupational disease, or a "relapse" of a previously recognized employment injury.

Regardless of the type of claim accepted, the person is entitled to the same benefits. Even if only one is sufficient, and as long as the evidence supports them, the worker may allege several of these means to prove an employment injury.

What if the injured worker already had multiple chemical sensitivity at the time of the occupational injury?

The CNESST may recognize a pre-existing personal condition if demonstrated that the aggravation of their health condition, such as an environmental sensitivity/multiple chemical sensitivity made symptomatic and as long as the aggravation occurred as a result of a work accident or corresponds to an occupational disease.

The pre-existing personal condition is the susceptibility that the worker already has before an event occurs. It does not matter whether the health condition is symptomatic or asymptomatic.

The implication of such individual susceptibility may facilitate the recognition of an employment injury and, consequently, the right to compensation, rehabilitation measures, and reasonable accommodations.

Multiple chemical sensitivity could be recognized as a personal condition pre-existing the occupational injury

Even if a pre-existing personal condition can make you more likely to develop an occupational disease or suffer a work-related injury than your co-workers and peers, its aggravation does not defeat an employment injury recognition. This is the case, even if you are the only one in your workplace who has "gotten sick" at work due to an event.

"We must take the human person as he or she is, with his or her age, weaknesses, and vicissitudes." [3] – The Fragile Skull Theory applies to workplace injury compensation claim

[3] *Chaput v. S.T.C.U.M.*, [1992] C.A.L.P. 1253, 1265.

However, a personal condition that is aggravated or made symptomatic is not a third category of occupational injury, along with an occupational injury or disease. It is imperative that one of these two events has occurred or been provoked.

- ***Waterville TG inc. and Rousseau,*** 2017 QCTAT 2720

  This worker's hypersensitivity to fragrances cannot prevent her claim for compensation for a work-related accident caused by exposure to fragrances in the workplace since this exposure triggered the aggravation of her symptoms. Working in a laboratory, this technician suffered from throat irritation, headaches, and coughing following the installation of a fragrance diffuser and the wearing of perfume by her colleagues. Then, despite their employer's instructions, the worker's co-workers continued to diffuse perfume in the workplace. The worker then asked the TAH to recognize that she was the victim of an industrial accident. However, her employer maintained that the aggravation of the worker's symptoms was due to the very degeneration of her hypersensitivity to perfumes and was in no way caused by the working conditions in the laboratory since her colleagues had not reacted. In light of the evidence, the Tribunal first noted that the doctors consulted were all in agreement in identifying the odors diffused in the laboratory as the trigger for the aggravation of the worker's symptoms. It also noted that the physician designated by the employer had observed physical symptoms in the workplace, such as the loss of voice, which was recognizable and objectively verifiable. Thus, the Tribunal accepted the relationship between the exposures and the aggravation of her pre-existing physical symptoms related to a hypersensitivity to perfumes, resulting in a chemical hypersensitivity diagnosis. The connection was all the more obvious to the Tribunal since the worker could adequately perform her professional responsibilities in the laboratory before the events raised in the complaint and similarly after her transfer to another establishment, where she was not exposed to any synthetic odors. Claim accepted.

- ***Barbier and Société Laurentide inc.*** 2019 QCTAT 5828

  This worker, an industrial paint canner, alleged that he had an occupational disease under a diagnosis of osteonecrosis of the bilateral femoral head. However, his employer disagreed and argued that the worker's pathology was a manifestation of a personal condition. A specialist consulted determined that the source of the worker's condition was environmental. As a result, the Tribunal refused to recognize the diagnosis as an occupational disease since it was demonstrated that the osteonecrosis might not have been a characteristic of the canner's work, but rather that it could have been generated by components of his environment (diet, pollution, psychological state, or housing). Claim dismissed.

- ***Mattioli and CMC Electronics Inc.*** 2013 QCCLP 5222

  It was alleged that the condition of asthma is an occupational lung disease developed due to the risks associated with the job of a repairer. The pathologies of asthma with an environmental allergy to chemicals and environmental sensitivity were identified in the medical report written by the doctor who was in charge of the worker. Still, both diagnoses were rejected. The first, due to the absence of objective evidence of exposure to high concentrations of irritant substances in the workplace. The CLP did not accept the second due to the position of the Special Committee of Presidents deemed more credible. At the time, this Committee was composed of seven pulmonologists who believed that his asthma exclusively caused the worker's ES in the absence of evidence of chemical exposure or any other work-related cause that could explain the aggravation of his medical condition. Claim dismissed.

What happens if the symptoms of multiple chemical sensitivity appear after an occupational injury recognized by the CNESST?

The condition of multiple chemical sensitivity could be recognized as a recurrence or aggravation of an initial occupational injury

Suppose one develops multiple chemical sensitivity due to a previously recognized occupational injury or disease. In that case, this development could be considered a second occupational injury. This is a sort of rebirth of the work injury.

In light of the above, individual susceptibility to developing ES/MCS is not necessarily a barrier to a successful claim.

For this to happen, the evolution of the condition must be an evolutionary return, reappearance or flare-up of the original injury or its symptoms. In other words, there is a deterioration in the state of health, and there is a causal relationship between this new state of health and an occupational disease or industrial accident already recognized by the CNESST.

- ***R.B. and Company A,*** 2011 QCCLP 4701

  This worker was exposed to numerous neurotoxic substances in the course of his work as an automobile mechanic. He asked the Tribunal to recognize that he suffered a second relapse, recurrence, or aggravation of an employment injury on October 19, 2005. Three years earlier, he had suffered his first employment injury, for which he had been diagnosed with solvent encephalopathy. The second work-related injury occurred in 2005 during exposure to gasoline vapors, a solvent. A diagnosis of chemical hypersensitivity followed. The CLP (TAT) found in favor of the worker and overturned the Commission's initial decision. The CSST (CNESST) had not recognized that the worker had suffered a second occupational injury. In the Board's view, there was no deterioration in the worker's health, and his concurrent conditions of hepatitis C, bipolar disorder, and solvent encephalopathy on a weakened liver were involved. Nevertheless, the

Review Tribunal accepted that the hypersensitivity to chemicals, including strong odors and perfumes, demonstrated the solvent encephalopathy aggravation and therefore constituted a second employment injury. Claim accepted.

Why would an employer propose to a worker to recognize before the CNESST the worker's environmental sensitivities/multiple chemical sensitivity?

When recognizing an employment injury before the CNESST

The employee and employer may enter into an agreement recognizing multiple chemical sensitivity as a disability and defining its role in the occurrence of the occupational injury.

For example, the health condition is developed as a result of employment. Or the worker had the health condition before they developed an occupational disease or suffered a work-related injury.

The primary interest in entering into such an agreement recognizing a diagnosis is to allow easier recognition of the subsequent employment injury before the CNESST.

> ***How is an agreement reached?*** The agreement takes the form of an out-of-court settlement. It is part of a conciliation procedure provided by the CNESST.
>
> ***Beforehand, it is essential to obtain a clear medical opinion assessing the disability, which may also be a pre-existing personal condition and its impact on the work injury.

- ***Beaudin and Cité de la santé de Laval,*** 2017 QCTAT 5437

  In this case, the Tribunal noted that an agreement signed between the employer and the employee to recognize the latter's disability is only declarative of a disability for that specific purpose. In signing the agreement, the employer believed that it would be granted a deduction from the contribution it pays to the CNESST in return. Indeed, the employer must pay a special assessment when one of its employees is injured due to the work they perform. The Tribunal emphasized that an employer will not automatically receive such consideration when it signs an agreement recognizing a pre-existing disability in the employee. This is because the binding nature of a decision confirming such an agreement[4] is generally not helpful when used <u>outside of recognizing an employment injury.</u>

[44] After the agreement is signed between the employer and the employee, it is endorsed by the CNESST or the TAT.

⇒ **Once the Commission or Tribunal approves the agreement**, its contents are irrevocable and final. Therefore, another diagnosis cannot be submitted to explain symptoms that predate the deal but were denied as part of the agreement.

- ***Millette and University Institute in Mental Health of Montreal***, 2018 QCTAT 5936

  This worker was an occupational therapist. She suffered an occupational disease on December 13, 2004, and a recurrence, relapse, or aggravation of that disease on June 10, 2012. These occupational injuries had already been recognized as such by her employer. Her occupational disease was accepted under the diagnosis of chronic fatigue syndrome. The Commission's decision then confirmed their agreement. Both parties agreed that the worker developed a cough, scratchy throat, and chronic fatigue syndrome due to exposure to mold on the employer's premises. However, in applying this agreement, the worker obtained contradictory expertise from an environmental specialist regarding her functional limitations. She then asked the Tribunal directly to recognize that she had suffered a higher degree of disability than that determined by her treating physician at the time of the agreement. After reiterating that a Commission decision confirming an agreement creates the same legal effects as a judge's decision (or a CNESST commissioner) following an adversarial debate, the Tribunal rejected the worker's request. These legal effects, particularly for the recognized diagnosis, caused particular difficulties in evaluating the specialist's testimony mandated by the worker. These difficulties were due to the fact that he based his assessment of the disability on a diagnosis considered to be exclusively personal to the worker, namely her ES. Specifically on the mutual symptoms and intimate connection that chronic fatigue syndrome and ES/MCS share. Claim dismissed.

After the CNESST recognizes an employment injury

When an employee suffers a work-related injury, the employer must assume certain related costs. To do so, the employer contributes to the CNESST fund, which pays indemnities to workers.

The AIAOD also provides that the employer may request cost-sharing when a worker, victim of an employment injury, is already disabled at the time of the injury. The sharing of all or part of the cost of benefits is then charged to all other contributing employers. This recourse may have an impact on the evaluation of the benefits payable for the worker's disability.

A worker who is "already disabled" within the meaning of this remedy has a **physical or mental impairment** that affects the occurrence of the work injury or its consequences.

⇒ The deficiency may be congenital or acquired;

⇒ The impairment may or may not result in a limitation in the worker's ability to function normally;

⇒ The impairment may also exist in a latent state without having manifested itself before the occurrence of the occupational injury.

"The only [genetic] predisposition or susceptibility to develop a pathology does not correspond to a deficiency." [5]

⇒ It can be said that **not every pre-existing personal condition is a disability**. Still, every disability involves a pre-existing personal condition.

- ***Jean Coutu Pharmacy***, 2013 QCCLP 5711

In a challenge before the Tribunal, the employer alleged entitlement to a division of benefit costs on the basis that the worker was already disabled at the time of her recognized occupational disease, which is rhinitis of unknown origin. The employer argued that because of the worker's latent MCS, she was personally impaired before the onset of the rhinitis. This last point is at the heart of the decision. The Board had previously rejected this argument, finding that there was no disability. In its view, the medical report diagnosing MCS would not have met the standard of a diagnosis of exclusion because it would not have refuted other possible causes of the worker's symptoms. In deciding the case, the Tribunal reiterated the analysis of the medical evidence. It reiterated that an individual's mere susceptibility to developing a hypersensitivity does not equate to a disability. The evidence must suggest that the "syndrome" was present in the worker as a disability.

First of all, the physicians reinforced the hypothesis of a "latent MCS syndrome" in the worker since, while they were unanimous on the existence of rhinitis, they could not identify its source. Then, the employer demonstrated through the testimony of its mandated expert that ES/MCS affects 1 to 2% of the Canadian population to establish the worker's deviation from the average condition of people of the same age.

After examining the evidence on file, the Tribunal concluded that the causal link was established since the hypersensitivity syndrome led to an aggravation of rhinitis symptoms, thus causing the worker's disability. That is the extreme difficulty of employability of the worker due to the combination of her illnesses. Based on the medical evidence submitted, the Tribunal concludes that the worker's latent ES/MCS is a pre-injury disability that affects approximately 1-2% of the population and led to developing the worker's occupational disease. Therefore, the employer was deemed entitled to cost-sharing since it had proven that the worker was a carrier of latent MCS at the onset of her rhinitis. Employer claim accepted.

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[5] E.g., *Ministère de la Sécurité publique*, 2011 QCCLP 213; *Olymel Flamingo*, 2013 QCCLP 1559; *Manac inc.*, 2017 QCTAT 2384; *Ville de Sherbrooke*, 2018 QCTAT 665 ; *Investissement immobilier CCSM ltée*, 2020 QCTAT 4966.

Does a workplace event have to be identified for environmental sensitivities/multiple chemical sensitivity diagnosis to be treated as an occupational injury by the CNESST?

A diagnosis of ES/MCS indeed implies a health disorder in the worker who has this medical condition, or even a "disease." Still, the diagnosis does not oblige the worker to claim an occupational disease. Among other implications, ES/MCS may be a consequence of a **work-related accident**.

An unexpected and sudden event, an event that happens unexpectedly and suddenly

Except for the presumptions provided for in the AIAOD and conditional on specific circumstances surrounding the production of the employment injury, it is **up to the worker alleging that they have been the victim of an employment injury to show that it is more likely than not that a specific event or series of events*** related to their employment resulted in an employment injury.

The worker must demonstrate that an "unforeseen and sudden" event led to the injury. This notion is flexible and can be interpreted broadly to include, in particular, **injuries caused by unusual effort, a false movement, a constraining work position, hard effort, or even microtrauma*.**

It will then be necessary to demonstrate that, due to an *unforeseen and sudden event attributable to any cause and that occurs in the course of work*, the worker has developed an occupational injury.

***** See "A condition of environmental hypersensitivity/multiple chemical sensitivity and occupational microtrauma" on page 16.

To note:

- In cases where the worker has an ES/MCS, exposure to chemicals is usually alleged. For example, suppose a worker is exposed to chemical gases during a leak in the pipes of a building and subsequently develops an ES/MCS. In that case, they claim with the CNESST for a work-related accident.
- It is important to note that it is not the pain or the symptoms that must be unexpected and sudden, but the event that causes the work injury which must be. Thus, a person who experiences symptoms of ES/MCS at work has not necessarily suffered a work-related injury. The worker will have to show that they are experiencing these symptoms due to an "unforeseen and sudden" event that took place during or as a result of their employment.

  - ***Sabourin and Plancher Avant-Guard,*** 2016 QCTAT 1282

    This worker assembled cabinet panels in a manufacturing plant. Before the Tribunal (TAT), she challenged a decision of the Commission (CNESST) refusing to recognize that she had developed ES/MCS, chronic laryngitis, bronchitis, and rhinosinusitis following exposure to silicone – which is composed of silicon, a chemical element. The TAT accepted the worker's claim, confirming that she had suffered an industrial accident that likely caused her to develop ES/MCS in addition to her other conditions. In TAT's view, the introduction of a new work tool, silicone glue, and the circumstances of its use allowed it to conclude that the event was unforeseen and sudden. On the one hand, the employer asked for the abandonment of the white construction glue and ordered the use of silicone, whose chemical odor was strong and annoying, in addition to being accentuated by the faulty ventilation system. On the other hand, the worker systematically and intimately used the new work tool in the course of her duties. The relationship between the diagnoses and the use of the glue with silicone, supported by the medical evidence, is explained by the worker's immediate reaction: the first symptoms of the worker appeared from the first use of the new type of industrial glue (silicone). In addition, when she was assigned to another plant where she did not use the silicone glue and was not exposed to chemicals, her symptoms of irritation were greatly reduced. In terms of evidence, the TAT relied primarily on the worker's medical evidence, the factors that triggered her symptoms, i.e., her work environment, and the worker's credible testimony on her physical reactions. Claim accepted.

- In addition, the **worker's exposure may have been caused by contaminants or substances that would not typically be found in the workplace**.

  - ***Bélanger and Optimum Graphics inc***. 2015 QCCLP 4284

    This worker had been a graphic designer for the employer since 2006. She asked the CLP-TAT to reverse the decision rendered on May 5, 2015, by the CNESST (DRA) and to declare that she suffered an occupational injury on July 30, 2014, the diagnoses of which were environmental sensitivity (ES), chronic fatigue syndrome, allergic rhinitis, and an aggravation of her asthma. The

CLP granted the worker's motion and concluded that exposure to a contaminant, not normally found in a workplace, amounted to an industrial accident within the meaning of the AIAOD. In this case, it was more likely than not that the worker's diagnosis of environmental sensitivity was the result of repeated exposure to the employer's dog occurring between October 2011 and July 2014. That is, the worker was already a carrier of allergies to certain animals, but from the time of her first contact at work with the dog, her condition progressively deteriorated. Since the exposure to the dog remained continuous, this led her to develop ES.

Supported also by the medical evidence in the record, the CLP accepted the relationship between the employer's exposure to the dog and her symptoms of ES and chronic fatigue since the rhinitis symptoms at the time were used to resolve on weekends and evenings. Still, the worker’s return to the office after a period of teleworking caused a resurgence and thus, sensitized her. What's more, the symptoms of ES first appeared after the start of contact with the dog, even though before December 2013, she had never had any problems with hypersensitivity to any irritant.

The CLP was firm. The preponderance of the evidence, both factual and medical, shows that the worker was exposed to a particular risk at work, namely a dog, since she suffered from an asthmatic condition and a known allergy to dogs and cats and that as a result of this particular risk her health condition deteriorated. In other words, the evidence demonstrated that it was the exposure to the dog that initiated all of the worker's ES symptoms and contributed to a cascade of consequences on her psychological and physical state, leading to the diagnoses of aggravation of her asthma, allergic rhinitis, environmental sensitivity, and chronic fatigue syndrome. Claim accepted.

A condition of environmental sensitivities/multiple chemical sensitivity and work-related microtrauma

A series of events

A claim may be accepted as an industrial accident or occupational_disease by the theory of microtrauma. This theory holds that a series of events such as toxic exposures - even at a concentration level that does not cause a reaction in other exposed persons - can cumulatively constitute the "sudden and unforeseen event" that is conditional to any industrial accident.

There is also a tendency in employment injury cases to consider that when the alleged injuries are habitual, repeated, and sustained actions of the worker, they may constitute specific risks in assessing the occurrence of an occupational disease. [6]

In other words, an accumulation of traumas, which, taken individually, do not produce an injury to the worker but which, taken as a whole, may be sufficient to cause the diagnosed employment injury. [7]

- ***Canadian and Auto Photo Canada Ltd***, 2013 QCCLP 1870

  This worker filed a claim with the CSST (CNESST) for an occupational disease under the diagnosis of total bilateral anosmia, i.e., a gradual deterioration - but which will prove total for the worker after several years - of taste and smell. He was employed in a workshop where he maintained damaged photo booths. In each defective booth, there was a mixture of substances in the camera's pumps, namely "developer," chlorine, "fixer," and water. When the worker opened it, he could find between an inch and a foot of liquid. He was then exposed to the fumes and odors caused by the contact of the products between them. These substances and maintenance chemicals were poured into the shop's indoor sinks. The worker was the only one of the five employees who was not required to leave the workshop. Almost a year before the last trauma, he constantly smelled chemicals. In the months preceding the date in question, the worker experienced certain symptoms at work, mainly when products were spilled in a sink, including by other workers. His vision changed, and he felt as if he was looking through a plastic film. He also experienced headaches. When he noticed other workers coughing, he opened the two doors at either end of the shop. Himself always had a dry cough when mixing certain products.

  The medical report of the doctor in charge of the worker concluded that the disabling symptomatology of the worker was in very high probability related to the prolonged and repeated exposure to chemical substances in the framework of his work.

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[6] *Hébert and Centre dentaire Leblanc & associés,* C.A.L.P. 61956-60-9408, 96-02-12 (L. Thibault) ; *Plourde and Bombardier Inc,* C.L.P. 172175-01A-0111 (J.M. Laliberté) ; *Campbell Materials and M.R.N.F.P., Ville Ste-Anne-des-Monts, Hector Laforest Inc. (closed), Brousse-Nord 2000 Inc. and Therrien*, C.L.P. 188680-01C-0208, 2004-03-26, par. 39 and 93 (L. Desbois).
[7] *Gauthier and Purolator Courrier Ltée,* C.A.L.P. 14948-60-8910, 91-11-18 (G. Lavoie) ; *Arseneault and Centre du camion Beaudoin Inc,* C.L.P. 209801-05-0306, 2003-10-17 (L. Boudreault); *Truong and Golden Brand Canada Clothing, Ltd,* C.L.P. 201850-72-0303 and 205039-72-0304, 2003-10-23 (Y. Lemire).

Before the CLP, the worker did not produce evidence quantifying his level of chemical exposure during his 22 years of employment at the shop. In deciding the worker's claim, the CLP relied on a scientific article on multiple chemical sensitivity stating that MCS symptoms can be caused by single or repeated exposure to extremely low concentrations of several common chemicals - even that symptoms can appear without signs of illness.

Finally, by inference from the facts testified to by the worker, the diagnosis and resulting symptoms were related to the atelier. The worker could not be required to present scientific evidence that the medical community could not provide. In the opinion of the CLP, the workplace was the most likely cause of his anosmia since the worker had demonstrated that he had been exposed to chemicals for several years, some of which were likely to cause the anosmia he had, as indicated in the medical article. Claim accepted.

Since a diagnosis of environmental sensitivities/multiple chemical sensitivity is always subject to medical controversy, can such a diagnosis interfere with accepting a CNESST claim?

ES/MCS is considered a diagnosis of exclusion by the medical community as well as the legal community. For the worker filing an employment injury claim, that implies that before diagnosing a person with ES/MCS, his physician who's in charge must rule out all other diagnoses that could explain the patient's symptoms.

Consequently, undue time constraints are taken into account by the CNESST and the TAT, particularly when excusing a worker who files their employment injury claim outside the prescribed time frame.

That said, a failure to rule out other explanations can be particularly problematic when the employer disputes the diagnosis of ES/CMS made by the worker's treating physician.

- ***Turcotte and Contre-plaqué St-Casimir inc.*** 2016 QCTAT 2318

The worker held the position of sizer of sheets used in the manufacture of plywood and forklift operator for her employer from 1997 to 2000. After a first refusal by the CNESST, the worker asked the TAT to recognize that she had suffered an aggravation of a first occupational injury that occurred in 1998 when she had been the victim of carbon monoxide poisoning.

The facts supporting her claim were as follows: following two exposures to carbon monoxide and one to xylene, each of which occurred in the late 1990s - while these exposures were of very short duration and were separated by several weeks or months - the worker had no significant symptoms of ES/MCS before 2005. After she experienced them more acutely, particularly from 2009, the year she was diagnosed with MCS, as evidenced by the medical reports written at that time for the injury claim. There was a very long latency period between the exposure to carbon monoxide and xylene and the onset of symptoms. In addition, at the time of the exposures, she was a smoker and heated with wood and then presented various medical problems from 1998 to 2005, all related to her smoking.

Moreover, even if the TAT is bound to the diagnosis of ES/MCS by the worker's physician, he cannot ignore the fact that several diagnoses were made, some of which were retained by the physicians who treated the worker to explain the symptoms that appeared to be ES/MCS, including somatoform disorder, fibromyalgia, and vasomotor rhinitis. The worker's physician argued that she developed ES/MCS, otherwise a neurological condition, through the accumulation of chemical exposures. However, exposure to carbon monoxide and xylene made her more susceptible to developing this disease than the general population. In the opinion of the TAT, all of this evidence casts doubt on the actual existence of the diagnosis of ES/MCS since all other possible causes of the worker's symptoms had not been eliminated. Consequently, the TAT found no causal relationship between the intoxications that the worker may have suffered from carbon monoxide and xylene and the development of a multiple hypersensitivity syndrome to chemicals. Claim dismissed.

- ***Bélanger and Optimum Graphics inc***. 2015 QCCLP 4284

The worker had held a position as a graphic designer since 2006. She asked the CLP (TAT) to overturn a May 5, 2015, CSST decision and recognize that she had suffered an occupational injury on July 30, 2014, with environmental sensitivity and chronic fatigue syndrome diagnoses. The employer did not dispute the existence of the diagnosis of ES but argued that the work environment had no connection to the worker's development of this medical condition. In light of its 'exclusionary' nature, the CLP discussed the burden of proof a worker must meet to show that such a diagnosis is an employment injury and provided an important reminder: in claims where a diagnosis of exclusion is alleged, it is all the more critical for the CNESST(CSST) or TAT(CLP) decision-maker to respect the principle that they should not require irrefutable proof of the existence of the relationship between the event that led to the occupational injury and the diagnosis attesting to that injury. In other words, the worker should not face a higher burden of proof because of the rarity of the diagnosis or the medical controversy surrounding it. Claim accepted.

- ***S.G. and Cégep A,*** 2013 QCCLP 2954

The worker held a maintenance job for his employer, a public college. After a refusal before the CSST, he asked the CLP to recognize an occupational injury that occurred as a result of intoxication by cleaning products, the diagnoses of which were intoxication by organic solvents and hypersensitivity to solvents. The CLP again rejected the worker's claim because the evidence submitted was not sufficiently probative to establish the relationship between the diagnoses) and the circumstances of the employment. Indeed, no evidence was presented to show that hypersensitivity to alcohol vapors (or solvents) was characteristic of housekeeping work or that this

diagnosis was directly related to the specific risks of this occupation to accept that the diagnoses were an occupational disease, nor to prove that an event in the workplace would have led to

intoxication by organic solvents or caused the onset of symptoms related to hypersensitivity to accept that the diagnoses were the result of an occupational accident. Despite the worker's claims, the CLP concluded that the most likely explanation for the worker's symptomatology was

psychological. Specifically, a somatoform disorder diagnosed by four psychiatrists. Claim dismissed.

- ***Morneau and Armoires de cuisine Bernier inc***. 2015 QCCLP 1864

The worker challenged the CSST's decision that the worker's diagnosis of encephalopathy secondary to exposure to solvents was not an occupational disease within the meaning of the AIAOD. As a diagnosis of exclusion, other explanations for the symptoms must have been eliminated to conclude that only a diagnosis of encephalopathy explains the worker's condition. In this case, the worker's loss of tolerance to chemicals could be explained differently since he had asthma. This was especially true since the specialist consulted, a neuropsychologist, conducted two expert reports on the worker. The results of which were fundamentally contradictory. It followed that the worker was simulating for financial gain when he underwent the first neurological evaluation. The CLP questioned his credibility and that of the diagnostic tests, finding them inconclusive. For these reasons, the claim was dismissed.

⇒ **The absence of another proven cause for the symptoms of** ES/MCS or any other medical condition **does not necessarily imply that work is the cause** and that the claim will automatically be accepted.

- ***Chevrier and Sir Mortimer B. Jewish General Hospital Davis***, 2020 QCTAT 864

The worker was a laboratory technician in a hospital. She alleged that she had suffered an occupational injury during a change in her duties that involved exposure to chemicals. The diagnoses were sarcoidosis and hypersensitivity pneumonitis. Their existence was not contested before the TAT, but their qualification as an occupational injury was. One of the worker's claims was that exposure to chemicals in the workplace had a "trigger effect" on an asymptomatic, pre-existing sensitivity that she carried, allowing the development of sarcoidosis or pneumonitis. The TAT ultimately rejected this explanation. Although there was a temporal relationship between the product, aggravation, and onset of symptoms following contact with chemicals at her workplace, - i.e., certain chemicals likely to cause serious health problems, - this link was not sufficient to prove a causal relationship. Moreover, the frequency and duration of exposure and the approximate concentration of these chemicals were not established. Even an air quality analysis in the laboratory was found to be normal. According to the TAT, it was even more difficult to deduce the existence of a causal relationship from the evidence submitted by the worker, as her treating physician could not identify a chemical present in her work environment or, simply, an element of the worker's life likely to give rise to the worker's diagnoses. In addition, the job description produced, and the worker's testimony were both considered imprecise. Considering these flaws in the evidence, the fact that the worker's symptoms appeared following the handling of certain chemicals and that they faded outside of her work environment and then worsened as these contacts continued was not sufficient to prove that repeated exposure to chemicals had sensitized her metabolism to the point of developing hypersensitivity pneumonitis. Claim dismissed.

What should the worker do when an occupational injury causes at least one other diagnosis?

Because the human body is uniquely complex, it is not uncommon for a person suffering from ES/MCS to have other competing medical conditions. In an employment injury claim, this situation can both facilitate and hinder the worker's case before the Commission.

- ***Robillard and NCH Canada Inc,*** 2014 QCCLP 5487

  The worker was a road representative for industrial products. He filed a claim with the CSST-CNESST, which was initially denied. On appeal, he asked the CLP to recognize that he had suffered an occupational injury on May 29, 2009. The diagnoses were N-Propyl Bromide (nPB) and perchloroethylene (Perc) intoxication syndrome and fibromyalgia secondary to the central and peripheral impairment caused by exposure to these products. The diagnosis of fibromyalgia was relevant because the CLP recognized it under the notion of individual hypersensitivity to chemical substances and, therefore, is compensated as an occupational injury. This recognition was possible thanks to the testimony of a chemical expert for the worker. The expert explained that the symptoms of such hypersensitivity were varied: they included those associated with fibromyalgia and appeared when exposed to standards, even regulatory ones. Fibromyalgia is related to changes in the brain and hypersensitivity to chemicals. The scientific literature has demonstrated a link between fibromyalgia, hypersensitivity to a chemical substance, and increased sensitivity to a combination of chemical substances. Thus, the connection between brain changes and fibromyalgia was then the subject of scientific consensus.

  Supported by the medical and factual evidence submitted by the worker and by the worker's credible testimony on the extent of his symptoms, the CLP concluded that the worker had suffered from intoxication. Thus, the worker suffered from nPB and Perc poisoning, even though the level of exposure to these potentially neurotoxic substances may have been within the regulatory standard due to the hypersensitivity an individual may have to these chemicals. Claim accepted.

What is the deadline for filing a claim with the CNESST? Can a worker have his claim refused because he waited "too long"?

Given the delays in health and the lack of environmental health resources in Quebec, the CNESST and the TAT are usually understanding.

In addition, it is essential to explain that as a diagnosis of exclusion, all other diagnoses that may explain the worker's symptoms must be ruled out before formally identifying an ES/MCS.

On the other hand, the answer is more complex when a worker intends to challenge a decision denying their employment injury claim since they were diagnosed with ES/MCS after the first denial.

Reasonable cause is a serious, credible, and not far-fetched reason that demonstrates that a person was placed in a position of inability to act promptly.

- ***Bélanger and Optimum Graphics inc***. 2015 QCCLP 4284

  The failure of the worker to file a claim for a work-related accident within the prescribed time limit was raised by the employer, i.e., within six months of the alleged accident. Repeated exposure to a dog in the workplace over nearly four years, while the worker was allergic to dogs and cats, was at issue. Concerning the delay, the CLP excused the worker since she had a reasonable reason to justify her default, namely the absence of work stoppage and financial losses. Only when her doctor formally told her that she was causing irreparable damage to her health did she agree to be placed on sick leave.

- ***Fillion and Foyer d'accueil de Matane***, 2018 QCTAT 1278

  The worker, a beneficiary attendant, asked the TAT to recognize that her diagnosis of fibromyalgia had a relationship to a first recognized work injury for a dorsolumbar sprain suffered on February 27, 2014. The fact that fibromyalgia is a diagnosis of exclusion, just like ES/MCS, is the whole point of this decision. The CNESST refused to recognize the link between the two situations since there was a delay of more than six months between the occurrence of the dorsolumbar sprain and the beginning of the investigations for a neurological condition. These investigations led the worker's doctor and the employer's doctor, respectively, to conclude that fibromyalgia was present. On appeal of this decision, the TAT recalled that physicians must exclude other conditions that could explain the worker's symptoms before moving towards a diagnosis of exclusion. Consequently, it is common for many professionals to be consulted. It is, therefore, inevitable that long delays occur in this type of case to identify the diagnosis of exclusion behind the occupational injury. Especially when the secondary diagnosis is not a usual or logical consequence of the first. Thus, the presence of unusual symptoms in the worker, present since the lumbar sprain, was the reason for continuing the investigations for a secondary diagnosis. Claim accepted.

⇒ **<u>The time limit for filing a claim with the CNESST for an occupational disease</u>** is calculated from the worker's knowledge of the *occupational* nature of the disease.

- ***Gravel and PPG Architectural Coatings***, 2014 QCCLP 6735

  Initially, the CSST-CNESST refused to process the worker's claim because of the six-month time limit since her knowledge of an occupational disease had expired. On appeal before the CLP-TAT, she asked to be relieved of her default. Two events contradict each other. First, the worker was diagnosed with hypersensitivity to strong odors more than a year before filing her claim with the CSST. Then, less than six months before filing her claim, she had been diagnosed with ES/MCS. This implied that if the CLP admitted the diagnosis of ES/MCS as the starting point of knowledge of an occupational disease, the worker would no longer be in default. Conversely, the CLP concluded that at the time of the first diagnosis, the worker was likely in a position to know that her medical condition was work-related. The fact that the doctor did not use the exact words or diagnosis did not defeat knowledge because of the nature of the first diagnosed condition. Furthermore, the worker's treating physician had alluded to such a link in his correspondence with the employer. As for the possibility of the worker being relieved of her default, this was eliminated by the CLP since the worker was not unable to act. Furthermore, the worker had not filed a claim with the CSST at the time of the first diagnosis but instead continued to receive disability benefits from her insurance company. This fact implied a legal choice on the part of the worker not to file the first claim. Even though her doctor's failure to complete a medical certificate did not preclude the fact that the worker had continued to file documents with her wage-loss insurance company, which continued to compensate her while she was still within the time limit to file a claim before the CSST. Claim dismissed.

What are the options for an injured worker whose work injury has been recognized?

Quebec's occupational health and safety system operate based on an "internal responsibility system" that makes health and safety the responsibility of everyone (employer, supervisors, management, workers, etc.) in the workplace. The system is built around several laws and regulations, including the *Occupational Health and Safety Act, which is* a prevention law whose primary objective is the elimination of hazards at the source, and the Workplace *Accidents and Occupational Diseases Act, which is* a compensation law whose objective is the management of accidents and illnesses that occur in the workplace.

It follows that three fundamental rights are recognized for workers:

1. The right to participate;
2. The right to know;
3. The right to refuse dangerous work.

Excerpt from the guide to jurisprudence "When the environment makes you ill"

"The degree of permanent impairment and the type of functional limitations recognized, and the exposure triggers in the workplace will determine whether the person with environmental sensitivities can return to their job.

If the person is not able to return to their job, they have the right to follow a rehabilitation plan. They receive income replacement benefits until they are declared able to work again.

After that, while they are looking for work, they may receive benefits for up to one year. Once they are in a suitable employment or after one year, when they are deemed to be in a fair job, their benefits will be reduced accordingly."[8]

[8]R. COX (dir.), collab., K. LIPPE and M. MATTE (2011), *Guide to jurisprudence. When the environment makes you ill*, Environmental Health Association of Quebec (ASEQ-EHAQ), UQAM Community Services, TÉLUQ (2012), p. 17, (online : http://hypersensibiliteenvironnementale.com/images/pdfs/en/uqam_aseq-ehaq_jurisprudence-en.pdf) (ISBN: 978-2-923773-20-9).

After a recognized work injury, what about compensation?

Recognition of an employment injury may entitle the claimant to income replacement benefits (IRB) or personal injury benefits (PIB) under certain conditions.

IRB > For a worker who, while not necessarily disabled, is unable* to return to work - the job they usually perform**- because of the employment injury.

Generally, the IRB paid to the worker is 90% of the net income but will be reduced annually by 25% starting on the day the worker turns 65.

In addition, the injured worker's current employer pays 90% of their net pay for any day of disability that they would usually have worked, for 14 days following the onset of disability.

PIB > For the worker who has suffered a permanent physical or psychological injury.

Generally, the amount of PIB is determined based on the Personal Injury Schedule Regulation and the worker's age.

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* A worker who has not recovered or for whom doctors cannot conclude that there is no foreseeable improvement is considered "disabled," provided the injury has not consolidated.
** However, a worker is not entitled to IRR if they are already unable to perform a job because of a personal condition other than the conditions caused by the injury.

After a recognized occupational injury, what about accommodating environmental sensitivities/multiple chemical sensitivity upon return to work?

In the course of the claim process, the physician in charge of the worker will evaluate the functional limitations and will determine the existence or evaluation of permanent impairment of physical integrity, in addition to ensuring its follow-up and prescribing care and treatment.

Given the complexity of environmental sensitivities, the physician in charge may refer the patient with ES/MCS to an environmental health physician for evaluation of their sequelae.

Through this assessment, workers with multiple chemical sensitivities who are able to return to work will be able to identify their accommodation needs and share them with their employer so that they can be actively addressed.

A worker's multiple chemical sensitivity may be treated as a functional limitation to a more common diagnosis (rhinitis, organic solvent intoxication, asthma, etc.).

For example, these functional limitations related to ES/MCS have already been identified by physicians:

⇒ Do not expose a worker to substances to which they are allergic and have them work in a controlled environment. [9]

⇒ No longer expose a worker to solvent odors in the workplace in order to prevent recurrence of their symptoms. [10]

⇒ No longer expose a worker to primarily irritating chemical agents. [11]

⇒ No longer directly or indirectly expose a worker to the products that caused their symptomatology, i.e., ethyl cyanoacrylate and dimethyl-toluidine. [12]

⇒ "In the section on functional limitations, he describes them as permanent or prolonged, while noting that the applicant is unable to tolerate exposure to scented products but remains functional in an environment that would be free of them." [13]

⇒ Due to the limitations of working in a building equipped with a mechanical ventilation system, working at home was recommended. [14]

⇒ Avoid contact with paints, paint strippers, and perfumes. [15]

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[9] *Carter and Primeteck Électroniques inc. and CSST*, CLP 140851-62-0006-R, March 6, 2003 (Mireille Zigby).
[10] *Serigraffiti Inc. and Cayouette,* CLP, 148264-70-0010 and 148802-70-0010, February 13, 2002 (Mireille Zigby).
[11] *Moreau v. Commission Scolaire Val-d'Or*, C.L.P.E. 2002LP-44 (Pierre Prégent).
[12] *Aubin and Paradox Security Systems Ltd*, 2009 QCCLP 6145.
[13] *K.K. v. Quebec (Labour, Employment and Social Solidarity),* 2015 QCTAQ 07391.
[14] *Cyr v. Treasury Board (Department of Human Resources and Skills Development*), 2011 PSLRB 35.
[15] *Waterville TG inc. and Rousseau*, 2017 QCTAT 2720.

However, the medical evidence must adequately justify the functional limitations of the employment injury/health condition.

⇒ "permanent or prolonged functional limitations, unable to tolerate exposure to scented products, but remains functional in a scent-free environment, and severe condition and chronic stage of evolution, <u>without specifying prognosis.</u>" [16]

⇒ "the functional limitation as first issued by the doctor is inadequate since one cannot determine, as they did, that a person must avoid all exposure to volatile products, this limitation being certainly much too extensive and unrealistic, adding that volatile products are found everywhere in the atmosphere, and even in water." [17]

In addition, certain functional limitations may prevent a return to work in a suitable position since no position is appropriate, despite the worker's impression.

⇒ According to his doctor, a factory worker who at the time of the evaluation of his after-effects "will have to avoid exposure to volatile products."

<u>Vocational Rehabilitation Program</u>

Under the Act respecting industrial accidents and occupational diseases, a disabled worker who has suffered a permanent impairment of their physical or mental integrity is entitled to rehabilitation measures regarding their social and occupational reintegration. This, in addition to the compensation provided for, including income replacement indemnity and compensation for bodily injury.

The worker thus has access to a personalized rehabilitation plan, prepared and implemented by the CNESST, with its collaboration. This plan may include a physical, social, and occupational rehabilitation program.

The purpose of the vocational rehabilitation program is to facilitate the reintegration of the worker into their job or an equivalent job or if this objective cannot be achieved, access to suitable employment.

The cost of rehabilitation is assumed by the CNESST. It may also reimburse the cost of adapting a workstation, including the cost of purchasing and installing the necessary materials and equipment, if this adaptation allows the worker who has suffered a permanent impairment of their physical integrity as a result of the employment injury to perform their job, an "equivalent job" or a "suitable job." It even includes the possibility that compensable changes be made to a workstation to adapt it and thus allow the worker to return to their job or perform an equivalent position or a suitable job.

It is reasonable to assume that since the Covid-19 pandemic, telecommuting will be a more readily available measure for individuals with an ES/MCS.

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[16] *K.K. v. Quebec (Labour, Employment and Social Solidarity),* 2015 QCTAQ 07391.

[17] *Lévesque (plaintiff) and Prelco inc. (respondent) v. CNESST,* 2017 QCTAT 180.

Reasonable accommodation

In the *Caron* decision, the Supreme Court of Canada confirmed[18] that an individual who becomes disabled due to a work injury should not be denied the principles applicable to all disabled persons, including the right to reasonable accommodation. This is in addition to the comprehensive workers' compensation and rehabilitation regime provided by the AIAOD.

It follows that a worker who develops a disability due to a recognized employment injury is considered to have a "handicap" within the meaning of the Charter of Human Rights and Freedoms (Charter). Consequently, a worker's recognized multiple chemical sensitivity may be accommodated to the extent required by the Charter.

For this reason, the CNESST and the Labour Administrative Tribunal may impose on the employer reasonably possible accommodation measures for the injury suffered by the disabled worker and the resulting circumstances.

- ⇒ The duty to accommodate requires an accommodation such that the employer can demonstrate that there are no other reasonable or practical measures that could have been taken to avoid the adverse consequences for the individual.
- ⇒ The accommodation process is, first and foremost, a matter of collaboration. The worker cannot force their employer to fulfill all their desires, but the employer must listen to the worker's needs and respond to them.

Yet, in decisions where an injured worker's claim is rejected for accommodations that should have been offered, the fault lies mostly with the fact that medical professionals have difficulty in clearly communicating the limits of the work injury or, alternatively, that there is confusion between the medical and legal definitions of disability in denying access to rehabilitation measures.

This is particularly true for cases involving a chronic illness such as HE/MCS because of their medical complexities.

- ***Unifor and Prelco inc. (Roger Lévesque***), 2017 QCTA 990

  The issue was the right to return to work following a work-related accident. The worker, represented by his union, claimed that the employer had violated the collective agreement and the Charter by not allowing him to return to work in a position that met his permanent functional limitations, including no exposure to volatile products. The physical restrictions stemmed from a work accident that occurred in 2014 and was recognized under the diagnosis of multiple chemical sensitivity. It turns out that after the diagnosis of chemical hypersensitivity, the worker had held a position in packaging for eight months without any apparent health problems. That said, a CSST investigation commissioned by the employer and conducted in the meantime revealed the complete absence of positions that met the worker's limitations. This finding resulted from the superposition of industrial

[18] *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron,* 2018 SCC 3, [2018] 1 S.C.R. 35.

fans in the open-plan factory. Exposure to volatile products was unavoidable, and this is why the employer removed the worker from the packing station. The union then invoked the employer's duty to accommodate and demanded that a workstation adapted to the worker's functional restrictions be installed. However, the employer demonstrated that compartmentalizing or partitioning the plant's departments would cause undue hardship because of the cost and the impossibility of ensuring the effectiveness of this measure since it is impossible to prevent all exposure to volatile products. Claim dismissed.

⇒ **Failure to explain that environmental sensitivities/multiple chemical sensitivity present unique obstacles** as complex disabilities that lack definitive medical support in Québec and, as a result, do not fit easily into the conventional coping process may prove fatal to a judge or commissioner who lingers too long on the limitations in objective evidence that the medical community can offer.

⇒ One day, medical research may be able to answer unanimously the questions of etiology, diagnosis, and prognosis, but not yet.[19] In the meantime, **the worker with accommodation needs should not bear the consequences alone.**

- ***Syndicat des employés de soutien de l'Université de Sherbrooke v. Beaupré***, 2021 QCCS 1934

  The Superior Court reviewed an arbitrator's decision on the existence of a disability alleged by a worker. Ultimately, the worker requested that her employer implement specific and permanent accommodation measures, in addition to the temporary ones already granted. The Court concluded that the arbitrator did not make a serious and determinative error in assessing the alleged disability under the diagnosis of her rhinitis. The rhinitis could not constitute a disability in the legal sense of the term. In particular, because of the total absence of corroboration from witnesses when the worker alleged that she had these attacks in the workplace and because the worker connected her condition and her work environment, not the doctor who was consulted. The defect was singular in the lack of medical evidence supporting the worker's claim concerning this last point. In particular, that of an alleged allergy to penicillin, around which the problems of hypersensitivity of the worker to the molds present in the workplace seemed to be articulated. In addition, two appeals for occupational injuries filed by the worker had been previously dismissed. Although these elements alone were not fatal, a conclusion unfavorable to the worker could be deduced when combined in the same situation. Claim dismissed.

⇒ **The most common accommodation** for ES/MCS is an "odor-free" or "scent-free". Still, employers also change cleaning products, provide air cleaning devices and masks, transfer positions or workspaces and allow time off work. This is more in line with a "triggers-free" policy.

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[19] M. ABBAS and M. LYNK(dir.), "Accommodating Complex Disabilities: Chronic Pain Disorders in the Canadian Workplace ", *Electronic Thesis and Dissertation Repository*, Western University, 2016, (online: https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=5533&context=etd) referring to Alberta, Workers' Compensation Board, *Policy 03-02 Part II: Application 7: Chronic Pain/Chronic Pain Syndrome* [26 November 1996]; British Columbia, Workers' Compensation Board, *Practice Directive #C3-1* [1 January 2003].

⇒ **ES/MCS accommodations are more commonly institutionalized, as opposed to individualized.** That is, changes are being made to the workplace to address the systemic problem, with the expectation of a more inclusive environment and ultimately substantive equality.[20]

[20] Id.

After a recognized work injury, what about measures to help the worker meet the special needs caused by a severe and prolonged disability?

When a diagnosis of ES/MCS is recognized as an occupational injury, any person who suffers heavy physical sequels may be recognized as having a severe and prolonged disability.

On this occasion, if the person in this condition is unable to perform the ordinary maintenance of their residence, which they would perform themself notwithstanding their disability, they may be reimbursed for the expenses incurred in having this work done.

- ***Carter and Primetech Electronics Inc. (closed),*** 2017 QCTAT 4725

  The Tribunal determined whether the worker was entitled to be reimbursed for the costs of pruning the fruit trees located on her property. The claim was dismissed. In part because the only functional limitation following the worker's diagnosis of allergy and hypersensitivity was that she was no longer exposed to the identified chemicals, not to the flora. In addition to the fact that no evidence was submitted in this regard, the TAT inferred that she had the residual capacity to do the pruning herself. Claim dismissed.

⇒ As part of the rehabilitation program offered to injured workers, any person recognized as having a severe case of environmental sensitivity by the CNESST could be **reimbursed for certain expenses related to the illness.**

- ***Leclerc and Isotemp Ltée (F),*** 2013 QCCLP 5378

  Because of the after-effects of the work injury he had suffered in 1986 when he collided with a moose, this worker had asked the Court to recognize his right to reimburse the costs incurred for renting an air purifier and the purchase of two filters. Following an inconclusive pulmonary investigation, the worker alleged that he had developed an intolerance to chemical products because of the mold present in his former apartment and the various odors found in the environment. The air purifier in question was required for its microbial decontamination properties. However, the Tribunal rejected this claim due to the lack of objectivity in the medical report. It opposed the credibility of the diagnosis of intolerance to chemical products because of the lack of specific tests. For the Court, the pathology is based on a vague hypothesis or a range of possibilities. Even if the pathology was recognized, the relationship of the intolerance with the after-effects of the injury suffered in 1986 was not supported by the medical evidence. Claim dismissed.

What are the practices to adopt and those to avoid in the context of an employment injury claim?

When ES/MCS is involved in a case before the CNESST, most of the time, the worker is surrounded by a team of environmental health professionals. In order to do their part, it is essential for the worker to expose to their treating physicians the elements in their work environment and the events of their daily life that may be related to their condition and symptoms.

It is essential for the worker to present before the CNESST a piece of substantial medical evidence. Identifying, in particular:

- The worker's medical history;
- Neurological/metabolic mechanisms in the worker that may explain the development of ES/MCS in the worker;
- Symptom triggers present in the workplace and/or;
- The event or elements in the workplace that led the worker to develop an ES/MCS and/or;
- The event or elements in the workplace that caused the worker's health condition to worsen with an ES/MCS;
- The extent of the worker's functional limitations that are caused by the occupational injury and/or the EI/MCS condition;
- The existence and/or evaluation of a permanent physical or psychological injury.

During the claim process, the worker can repeat these three watchwords to himself: precision, consistency, and honesty. The ES/MCS may indeed be misunderstood, sometimes by the Commission or Tribunal, sometimes by the employer. Frustration is inevitable face to these challenges. Not to mention the pressure to be the "perfect patient" when the medical controversies behind the diagnosis are raised.

Nevertheless, suppose there is a lesson to be learned from employment injury claim decisions. In that case, it is that sincerity pays better than diffuseness in the evidence. Especially since the Commission des normes, de l'équité salariale et du travail is not a theater where it is good to be a dramatist. If you have to testify, credibility is one of your best allies: a sincere and concise account of the symptoms logically resulting from a diagnosis of ES/MCS and their impacts on your physical well-being is to be carefully thought out.

Indeed, there are still many barriers to accessibility and the recognition of this medical condition as a disability. The common barriers faced by workers with ES/MCS can attest to this, **barriers that can appear in both an accommodation request and a work injury claim:**

- Lack of objective medical evidence and reliance on subjective self-reporting;
- The scrutiny because of the variability of symptoms and questions of etiology;
- And the confusion of medical and legal definitions of disability to deny access to benefits. [21]

Nonetheless, claims alleging an EH/CS condition are increasingly accepted today, especially compared to how they were treated 20 years ago.

[21] M. ABBAS et M. LYNK(dir.), *supra* note 20.

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Association pour la santé environnementale du Québec / Environmental Health Association of Québec (ASEQ-EHAQ)

P.O. Box 364, Saint-Sauveur, Quebec J0R 1R0

☎ 514-332-4320 🖷 450-227-4143 office@aseq-ehaq.ca

aseq-ehaq.ca Environmentalsensitivities.com ecoasisquebec.ca EcoLivingGuide.ca