Workers' Compensation Appeals Tribunal

Annual Report
for the year ending March 31, 2006

NOVA SCOTIA
Workers' Compensation
Appeals Tribunal

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Workers' Compensation Appeals Tribunal

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To Her Honour
The Honourable Myra A. Freeman
Lieutenant-Governor of Nova Scotia

May It Please Your Honour:

I have the honour to submit the Annual Report of the Workers' Compensation Appeals Tribunal for the fiscal year ending March 31, 2006.

Respectfully submitted,

Murray K. Scott
Minister Responsible for Part II of the *Workers' Compensation Act*

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Murray K. Scott
Minister of Justice

Dear Honourable Minister:

The Workers' Compensation Appeals Tribunal is pleased to present its Annual Report for the fiscal year ending March 31, 2006.

Respectfully submitted,

Louanne Labelle
Chief Appeal Commissioner

Tribunal Personnel 2005–06

Mary Jewers
Office supervisor

Charlene Downey
Receptionist

Carolyn Casey
Typist

Diane Smith
Scheduling coordinator

Linda Campbell
Clerk-typist

Colleen Bennett
Executive assistant to the
Chief Appeal Commissioner

Appeal Commissioners

Louanne Labelle
Chief Appeal Commissioner

Leanne Rodwell Hayes
Alison Hickey
Glen Johnson
Gary Levine
Alexander MacIntosh
Andrew MacNeil
Michelle Margolian
David Pearson
Brian Sharp
Andrea Smillie

Contents

Executive Summary

The Workers' Compensation Appeals Tribunal cooperates with its system partners – the Workers' Compensation Board, the Workers' Advisers Program (WAP), and the Occupational Health and Safety Division of the Department of Environment and Labour (comprising the Workplace Safety and Insurance System, or WSIS) – in building a fair and sustainable compensation system.

System Planning

As chief appeal commissioner, I sit on the Heads of Agencies Committee that oversees implementation of the WSIS strategic plan. The WSIS plan was updated in preparation for the WSIS annual general meeting held on May 3, 2006, in Sydney. The plans of the individual system partners are expected to be consistent with the WSIS plan, yet be much more detailed, tailored to each agency's mandate and operation.

I also meet regularly with the Chief Workers' Adviser, the Chief Hearing Officer, and the manager of the board's Transitional Services Team (TST) to discuss issues arising from the adjudication of claims and appeals.

The tribunal has a representative on the new System Goals Advisory Committee mandated to implement system performance measures as recommended by a committee of stakeholders.

Two of our appeal commissioners assist with the planning of joint training sessions with the board and the WAP. Two other appeal commissioners are part of an appeal-issues discussion group that is presently preparing a training tool to be used throughout the system in the adjudication of claims. This initiative is aimed at improving consistency of system decision making.

Operations Overview

Overall, the number of appeals received by the tribunal and the number of decisions rendered have decreased compared to the previous year.

At year-end, 275 appeals remained with the tribunal for adjudication.

The majority of appeals continue to be filed by workers (94 per cent). Workers continue to be represented, in the main, by the WAP (66 per cent, with approximately 24 per cent of workers unrepresented). However, we have noted that, in recent chronic pain appeals filed with the tribunal, a significant proportion of workers are either unrepresented or represented outside of WAP.

The tribunal has made significant headway in improving timeliness in the resolution of appeals. Overall, 73 per cent of appeals were resolved within six months of the filing of the notice of appeal. The average number of days-to-decision has been reduced from 214 days to 171 days over 2005–06.

Chronic Pain Challenges

Appeals challenging the Chronic Pain Regulations as they apply to the s. 10E worker population are on hold pending a response from the Chair of the WCB Board of Directors to the tribunal's referral under s. 247(1) of the act.

The Chair of the Board of Directors has also stayed appeals dealing with entitlement to chronic pain benefits for chronic pain that developed before April 17, 1985.

The tribunal has no pre-1985 appeals as these claims have not yet been processed by the board.

Stress claims

On October 6, 2004, the Chair of the Board of Directors of the board exercised his authority under s. 248 of the act to postpone and adjourn appeals regarding the appropriate test to determine the compensability of stress under the federal Government Employees' Compensation Act (GECA).

On July 27, 2005, the Board of Directors adopted policy 1.3.6 dealing with the compensability of stress as an injury under GECA. The policy was effective July 25, 2005, and, in accordance with s. 250 of the act, the postponement of the stress appeals ended.

The tribunal requested submissions from all participants on whether a s. 251 Referral to the Hearing Officer would be an appropriate disposition of the appeals.

Board Counsel submitted that the tribunal should refer the appeals back to the hearing officer. The board submitted that it was more appropriate for the board to render the initial decisions under the new policy and obtain any additional information required to adjudicate the claims.

The tribunal has referred nine stress appeals back to the board. Submissions by the Workers' Advisers Program suggested that the tribunal retain jurisdiction on the basis that the policy did not apply to the appeals under s. 183(6A) of the act and that the policy was inconsistent with GECA, as it was too restrictive.

Financial Operations

In 2005–06, the tribunal's total expenditures were within 84 per cent of the original authority of $1,662,000. They were within 90 per cent of our revised forecast of $1,552,500. Actual expenditures were $1,392,937.77.

Improvements in Service Delivery

The tribunal has made several improvements to its internal procedures in an effort to address issues raised by the most recent worker survey. In particular, we have revised the appeal process to keep participants better informed on the progress of their appeal, whether or not they are represented. These changes will improve participants' understanding of timelines and reasons for postponements or adjournments. Tribunal letters have also been revised to improve clarity.

The tribunal has also finalized French translations of its notice of appeal form and information pamphlet on appealing a hearing officer decision. These documents are available on the tribunal's website.

WSIS Joint Initiatives

The tribunal participated in the WSIS annual meeting on Monday, May 9, 2005, and, as the chief appeal commissioner, I delivered an update on the many cooperative initiatives undertaken by the WSIS agencies in the past year.

On May 26, 2005, the tribunal also participated in a decision-writing training program intended for the adjudicators in the board's Transition Services Team. Representatives from WAP and the board's Internal Appeals department also participated.

On July 4, 2005, Gail Boone, manager of the board's TST Unit, made a joint presentation to workers' advisers and tribunal commissioners entitled "Rethinking Disability Case Management." Ms Boone's presentation described new strategies for disability case management, focusing on return to work and the prevention of chronic pain. The presentation also reviewed the adjudication process for determining entitlement under the chronic pain regulations, more specifically focused on the pain-related impairment process.

On September 21, 2005, appeal commissioners attended an educational session sponsored by the TST Unit. This session featured a presentation by Dr. Tom Evans of the Atlantic Spine Clinic in Moncton, New Brunswick, regarding the management of chronic pain. The session was also open to workers' advisers, board case managers, and medical advisors.

Both sessions were examples of joint education that enhanced decision makers' understanding of the issues involved in adjudicating chronic pain claims.

The tribunal has also participated in joint initiatives with partner agencies in WSIS, such as the Issues Resolution Working Group and Appeal Issues Discussion Group.

Andrew MacNeil, appeal commissioner; Louanne Labelle, Chief Appeal Commissioner; and Michelle Margolian, appeal commissioner.

Tribunal Initiatives

The tribunal completed the revision of its website. Our oral hearing video can be viewed on the site, where all tribunal forms are also available in three formats: Word, WordPerfect, and PDF. The tribunal's practice manual can also be accessed and is organized by relevant sections.

Commissioner Andrea Smillie and I participated in the Canadian Council of Administrative Tribunals' annual conference in Ottawa in June 2005 and gave presentations on the tribunal's self-represented participant process and our experience with constitutional questions. These were well received, and the tribunal's oral hearing video generated many positive comments.

The tribunal's annual report was published in mid-June 2005 and was circulated to stakeholder representatives. It is also available on the tribunal's website.

Performance Measures

The tribunal has established benchmarks for performance measures.

Appeal commissioners are expected to release decisions within 30 days, as opposed to the legislated 60 days. Approximately 10 per cent are issued over the 30-day period. Appeals are processed within 15 days of receipt by the tribunal. Approximately 15 per cent, for various reasons, take a greater time to process. Appeals that are set down through the docket day process are processed as quickly as possible.

Essentially, the tribunal can hear an appeal within 45 days of receiving notice that the participants are ready to proceed.

Privacy Concerns

Tribunal decisions contain personal and business information, particularly medical information. While hearings are held *in camera,* decisions are provided to appeal participants including the worker, the board, and the employer. The decisions are also available to the public through a subscription service that is provided by the Department of Environment and Labour as part of their database publication.

The tribunal has adopted a Decision Quality Guide that outlines quality standards for decision making. It includes a section concerning privacy issues, stating that "decisions should be written in a manner that minimizes the release of personal information." However, at the end of the day, a decision maker must have the discretion to include in a decision reference to evidence that the decision maker finds relevant to support the findings outlined in the decision.

A working group of FOIPOP administrators and legal counsel was set up in the fall of 2004 to review issues on the protection of personal information disclosed in decisions. Their work continues.

The Year Ahead

The tribunal anticipates a significant increase in the number of appeals in 2006 due to an increase in chronic pain appeals. Appeals filed with the board's Internal Appeals department have doubled since November 2005. At the end of March 2006, Internal Appeals had 579 appeals pending and 388 appeals ready to be assigned for decision.

A review of appeal statistics for January through March 2006 reveals that the tribunal received 206 appeals, representing 70 per cent of the appeals denied by Internal Appeals for the period December 2005 through February 2006 (297).

The reduction in appeals noted over the past year was due in part to the number of appeals being resolved by "other means" by Internal Appeals. However, these numbers have decreased significantly in past months.

Assuming that the outcome of appeals at Internal Appeals remains constant, the tribunal can anticipate a corresponding increase in appeals based on the increase noted at Internal Appeals.

We also note that, out of the 100 new appeals received by the tribunal in March 2006, 60 raised the issue of chronic pain benefit entitlement. The WAP was involved in only 38 of the 100 new appeals filed in March. The majority of workers were unrepresented or represented by injured worker groups such as the Pictou or Cape Breton Injured Workers' Group.

Challenges in the year ahead include the efficient and timely processing of chronic pain appeals.

Louanne Labelle
Chief Appeal Commissioner

Introduction

The Workers' Compensation Appeals Tribunal (the "tribunal") works with several partner agencies within a framework known as the Workplace Safety and Insurance System (WSIS). Our partner agencies are the Workers' Compensation Board (the "board"), the Workers' Advisers Program (WAP), and the Occupational Health and Safety Division (OHS) of the Department of Environment and Labour.

The tribunal's annual report for the year 2005–06 will highlight four areas: tribunal-appellant interaction, the tribunal's responsibility to protect confidential information, the adjudication of appeals in noteworthy cases, and participation in several joint initiatives with our partner agencies.

Tribunal Mandate and Performance Measures

The tribunal hears appeals from final decisions of hearing officers of the board. Although governed by the same enabling statute as the board, the tribunal is legally and administratively separate from it, and is not ordinarily bound by board decisions or opinions, ensuring a truly independent review of contested outcomes.

In the processing and adjudication of appeals, the tribunal strives to strike a balance between procedural efficiency and fairness. Its work is directed by principles of administrative law, by statute, and by decisions of superior courts.

Its performance is shaped by, and measured against, several parameters drawn from the Worker's Compensation Act (the "act," as amended) and by its own survey of client groups (chiefly, injured workers).

Appeal commissioners are expected to release decisions within 30 days of an oral hearing or the closing of deadlines for written submissions, as opposed to the legislated 60 days. Approximately 10 per cent are issued over the 30-day period.

New appeals are processed within 15 days of receipt by the tribunal. Approximately 15 per cent, for various reasons, take a greater time to process.

Appeals that are set down through the docket day process are processed as quickly as possible.

Essentially, the tribunal can hear an appeal within 45 days of receiving notice that the participants are ready to proceed.

Operations Overview

Overall, the number of appeals received by the tribunal and the number of decisions rendered have decreased compared to the previous year (see Figures 1 and 2).

At year-end, 275 appeals remained with the tribunal for adjudication (see Figure 3).

The majority of appeals continue to be filed by workers (94 per cent). Workers continue to be represented, in the main, by the WAP (66 per cent, with approximately 24 per cent of workers unrepresented). However, we have noted that, in recent chronic pain appeals filed with the tribunal, a significant proportion of workers are either unrepresented or represented outside of WAP.

The tribunal has made significant headway in improving timeliness in the resolution of appeals. Overall, 73 per cent of appeals were resolved within six months of the filing of the notice of appeal. The average number of days-to-decision has been reduced from 214 days to 171 days over 2005–06.

Please see Appendix 1 containing specific data for the following figures.

Figure 1
Appeals Received

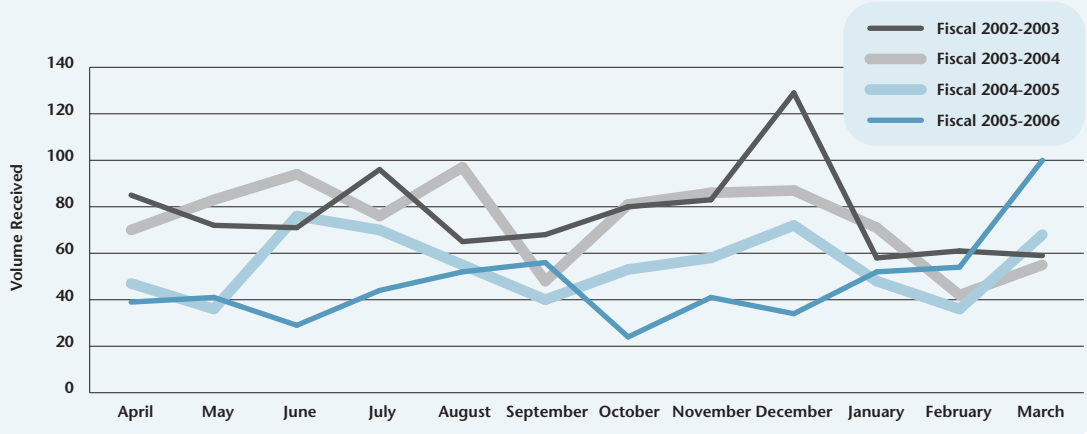


Figure 2
Decisions Rendered

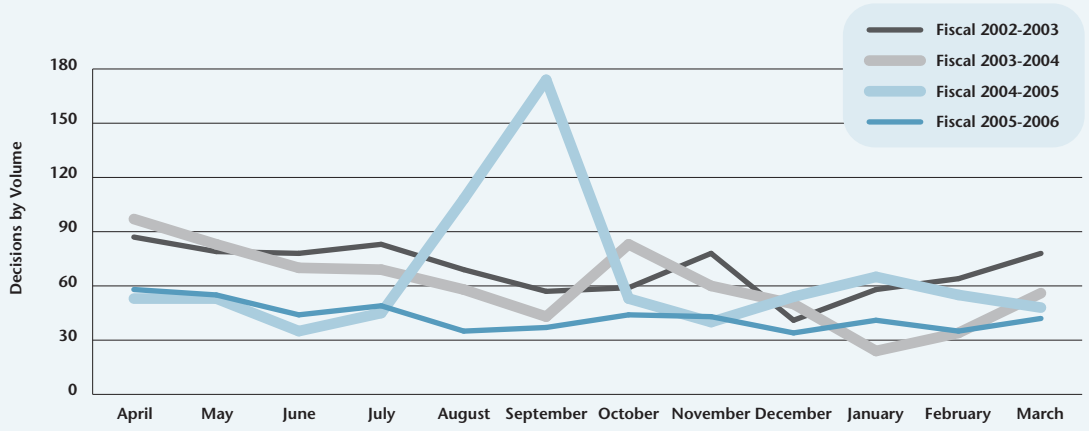
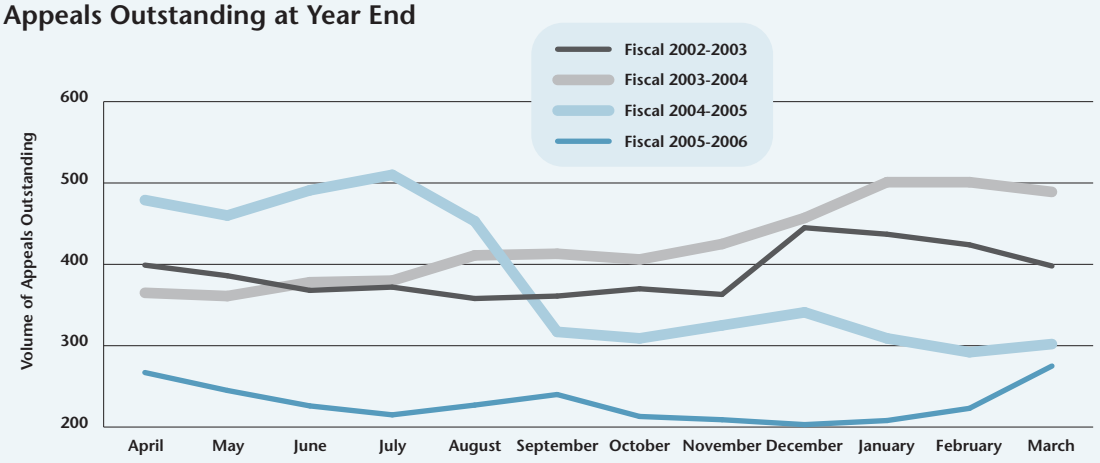


Figure 3
Appeals Outstanding at Year End



Tribunal-Appellant Interaction

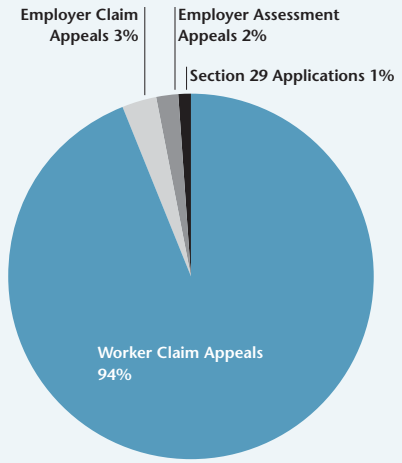
The tribunal exists to adjudicate appeals by workers and employers from final decisions of the board, and to consider applications concerning the "right to sue" under s. 29 of the act. In an attempt to improve service to participants in those appeals and applications, the tribunal regularly evaluates its interactions with participants.

Client Satisfaction and Service Delivery

Corporate Research Associates Inc. conducted an anonymous survey of tribunal participants (specifically, injured workers) by telephone from June 6 to July 23, 2005 (see Figure 4 for a breakdown of decisions by appellant type). This survey was conducted exactly two years after a 2003 survey and used the same questionnaire.

One of the key findings of the report is that the overall satisfaction with the tribunal experience is notably higher in 2005 as compared with 2003. Seventy-five per cent of respondents are very or somewhat satisfied with their experience with the tribunal, an increase of a full 10 percentage points over the 2003 results. The most commonly identified reason for satisfaction with the tribunal is client interaction with staff (i.e., helpful staff and staff attitude). In contrast, dissatisfaction generally stems from the way the claim was handled, from not receiving the desired decision, and from the length of time required to process the appeal.

Figure 4
Decisions by Appellant Type



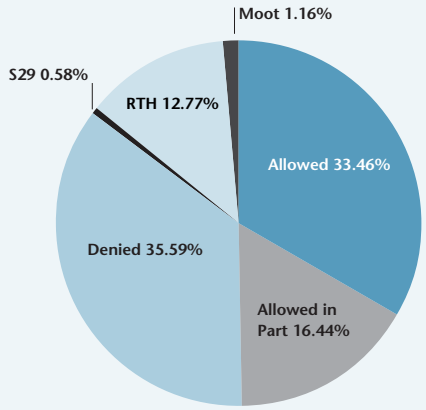
Specifically, satisfaction has increased across most service factors (respectfulness, politeness, clarity of letters, ability to answer questions, and accessibility) evaluated in 2005 compared with findings from 2003; the lone exception being satisfaction with the appeal outcome.

More clients now agree that the tribunal helped them to understand the appeals process. The tribunal did a good job keeping them informed about their appeal. However, clients are slightly less likely than in 2003 to agree that the tribunal understood their situation (possibly a reflection of the appeal outcome: greater understanding is assumed to mean a higher level of appeals allowed).

Corporate Research Associates Inc. noted that while the 10-point gain in overall satisfaction was to be applauded, it was unlikely that such large improvements would be observed in the future due to the relatively high level of satisfaction and the nature of the population: overall satisfaction is strongly tied to a client's success with the appeals process (see Figure 5 for outcomes).

Any appellant's success is largely dependent upon the provisions of the act and the available evidence against which the act is applied, factors which are outside the tribunal's control or influence. It is generally less likely that an appellant whose appeal has been denied by the tribunal will be satisfied with the experience. Further, even in those appeals which are allowed, the appellant has often been in the appeal system for a number of years, awaiting benefits for which the appellant believes entitlement is obvious from the outset of the initial claim.

Figure 5
Decisions by Outcome



The majority of clients continue to believe it should take less than 12 weeks for the tribunal to resolve an appeal (see Figure 6 for timeliness to decisions). Improving response time and having a speedier process continued to be the most frequently mentioned suggestions for improving tribunal service. The report recommended that client expectations regarding timeliness associated with the appeals process should be actively managed.

The report also recommended that the tribunal continue to enhance communication with clients concerning the outcome of their appeal. The report noted that client perception of the clarity of the decision rendered concerning their claim was a key driver of satisfaction with the overall appeal experience.

Across the client population, those workers with one or two claims, clients represented by the WAP, and those who received an oral hearing were more likely to express satisfaction with respect to their experience (see Figure 7 for decisions by mode of hearing). Of interest, clients represented by the WAP and who receive an oral hearing offer the highest level of satisfaction with the tribunal, while those who represented themselves and received a paper hearing had lower levels of satisfaction.

Figure 6
Timeliness to Decision

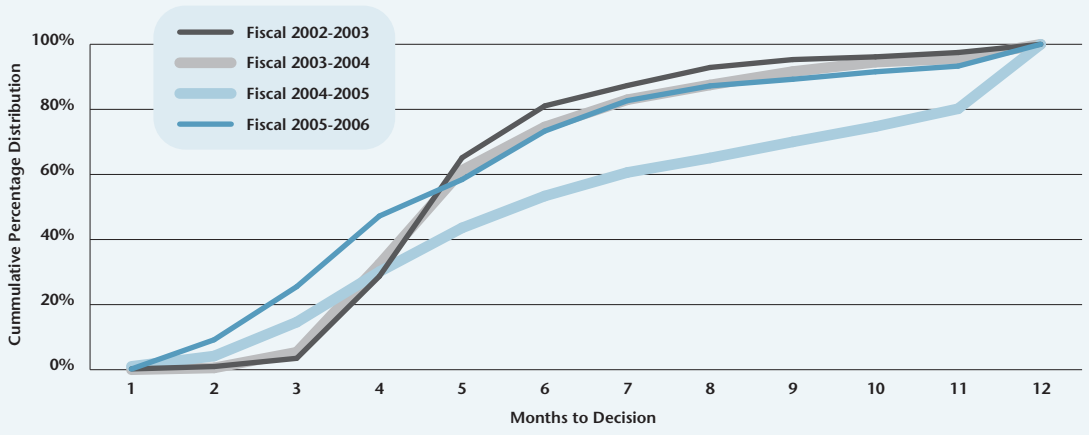
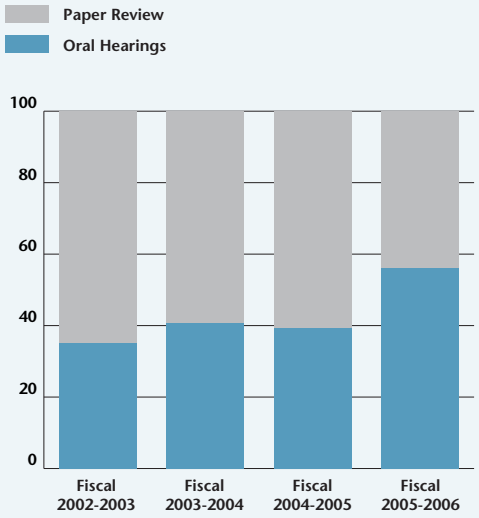


Figure 7
Decisions by Mode of Hearing



The tribunal is using the results of the survey to improve the services provided, especially with respect to enhancing communication with workers and to managing their expectations of timeliness. Efforts are also being made to improve decision and letter clarity: all standard tribunal letters were reviewed and revised after input from staff and appeal commissioners.

Some other tribunal initiatives in 2005–06 have also addressed accessibility to information. Resources developed by the tribunal and made available on its website include the following:

- a paper setting out practical and easy-to-understand tips to help representatives appearing before the tribunal
- a summary of all decisions rendered by the tribunal since 1996 respecting applications under Section 29, together with an article on the right to sue
- a summary of the most important court decisions pertaining to compensation matters in Nova Scotia

Self-Represented Participant Project

The tribunal continues to provide to self-represented appeal participants the name and telephone number of an appeal commissioner who is available to answer questions regarding the hearing process at any time before the hearing (this appeal commissioner will then not hear the appeal). A significant number of self-represented participants have taken advantage of this. In practice, it has resulted in telephone conversations, sometimes several, between self-represented participants and an appeal commissioner, after the initial telephone contact and before the hearing of their appeal.

The tribunal has also initiated a process whereby self-represented participants can contact a designated appeal commissioner after receiving their decision from the tribunal, if they wish to discuss the decision. Previously, they had no avenue for addressing questions or concerns regarding their decision. While this option has been available for some time, few calls seeking explanations have been received. This may be because the self-represented participants have had an opportunity to discuss relevant issues before, and during, their hearing. They may be less confused or surprised by their decision than represented participants, who call about their decisions fairly often.

The 2005 survey (discussed above) was the second survey in the tribunal's history (the first dating from 2003). The survey was intended to help the tribunal better understand the current perspective of injured workers in the appeals system.

The executive summary of the survey report notes that satisfaction has increased across most service factors evaluated. One of the results of the tribunal's self-represented participant project is the finding that more "clients" of the tribunal (94 per cent of whom are injured workers) now agree that the tribunal helped them to understand the appeals process and did a good job in keeping them informed about their appeal.

The survey confirmed the value of the self-represented participant project. Consequently, it was continued and has become standard practice for the tribunal.

Over the last year, the number of self-represented participants has increased. In every case where a notice of appeal is received by either a self-represented worker or employer, the self-represented participant is contacted by telephone to discuss the appeal process. Unless the participant is unable to participate in a hearing, a hearing is scheduled during this call, so often these appeals can be dealt with very quickly.

Feedback received by appeal commissioners making the telephone contact, and the feedback received at the hearings, has been positive. In virtually every case, the participants appreciate an opportunity to speak in person with someone at the tribunal before the start of the formal hearing process.

Appeal Management

The 2005 worker survey helped the tribunal to evaluate the effectiveness of procedural changes undertaken in the previous fiscal year. Timeliness (to decision), clarity of letters and decisions, and management of participant expectations have been identified as focus areas for tribunal improvement.

Now, within two weeks of filing a notice of appeal, appellants receive confirmation not only that their appeal has been received, but that the notice of appeal has been reviewed and that a mode of appeal — whether by written submission or oral hearing — has been determined, subject to any objections of the participants.

Generally, within the third week following receipt of a notice of appeal, the tribunal has determined if any other statutory participant (which includes the injured worker, the employer, and the board) will participate and has sent confirmation to the appellant.

Self-represented appellants are contacted by telephone. During this call, the hearing is often scheduled, a checklist of items concerning what to expect at the hearing is reviewed, and any questions the appellant may have are answered. If more than one participant is involved, a conference call involving all participants is held. This is also scheduled within one week.

On complex appeals, several conference calls may be held to facilitate receipt of evidence before the scheduling of the hearing. Appeals raising preliminary issues are referred to the presiding appeal commissioner, who may also conduct conference calls before the hearing is scheduled.

Appeal commissioners Gary Levine and Andrew MacNeil.

The increasing complexity of tribunal procedure reflects the variety of appeal scenarios and, more importantly, the continuing increase in employer participation.

The number of extension requests on both written submission and oral hearing appeals has remained static. These requests often pose last-minute problems for appeal commissioners' travel arrangements and workload, and frequently result in file re-assignments. In an effort to reduce these complications, this year the tribunal has become more rigorous in applying the 180-day procedural limit to the length of time an appeal may be outstanding. This is more difficult in complex appeals.

Each appellant now receives slightly more correspondence so as to keep all participants informed at each stage of the appeal and to set out the next steps in the process. Workers are now copied on all letters, regardless of representation.

The tribunal has begun holding oral hearings in new centres, including Baddeck and Port Hawkesbury, to increase convenience for participants in oral hearings. We continue to evaluate hearing locations and have communicated our specific needs regarding room setup to the host agencies or businesses.

Support staff Samantha MacGillivray, Carolyn Casey, Colleen Bennett, and Charlene Downey.

Freedom of Information and Protection of Privacy

Tribunal decisions contain personal and business information, particularly medical information. Hearings are held *in camera*. The decisions are provided to appeal participants including the worker, the board, and the employer. The decisions are available to the public through a subscription service that is provided by the Department of Environment and Labour as part of their database publication.

The tribunal is governed by Part II of the Workers' Compensation Act. The legislation does not specifically permit the publication of decisions. However, the tribunal has adopted a practice manual, available online, that sets out the tribunal's procedures and rules for the making and hearing of appeals as authorized under s. 240 of the act.

The tribunal's practice manual advises of the publication of tribunal decisions and provides as follows:

9.00 PUBLICATION OF TRIBUNAL DECISIONS

9.10 General

Tribunal decisions include a cover page setting out the names of participants and representatives. This information is not found in the body of the decision. The Tribunal endeavours to exclude any information from the body of a decision which could identify the participants. Decisions, without identifying features, are available through the Nova Scotia Department of Environment and Labour website. The database is developed and maintained by the Nova Scotia Environment and Labour Library. Anyone wishing to use the database should contact the Environment and Labour Library at 424-8474.

9.20 Personal Identifiers in Decisions

Generally, decisions are written without personal identifiers for participants, except on the cover page. The names of participants, lay witnesses and others (where the use of names would tend to identify the participants), are not used in Tribunal decisions. Witnesses may be identified by their role, for example, the "worker" or the "employer", or by initials.

Expert witnesses may be referred to by name. However, if an appeal commissioner considers that the use of an expert's name might identify the participant, the expert witness may be referred to by title, for example, the worker's attending physician, or by initials.

The names of representatives will generally not be used in the body of a decision. Instead, they may be referred to by their role, such as the worker's representative. Board claim file numbers or employer registration numbers are not included in the body of a decision.

Quotations contained within Tribunal decisions are edited to protect privacy. This will normally be accomplished by substituting a descriptive term for a name, and using square brackets to show the change, e.g., [the Worker].

A footnote at the bottom of the first page of every decision indicates that the participants have not been referred to by name in the body of the decision as the decision may be published. The published version of decisions on the Department of Environment and Labour database does not include any of the names of the participants nor claim numbers (which appear on the cover page of a decision).

Further vetting occurs after the decision has been released and before publication, if circumstances warrant. Requests have also been made to withhold decisions from publication due to the extremely sensitive material contained in the decisions. These requests are considered and decisions may be withheld from publication.

The Tribunal has adopted a Decision Quality Guide that outlines quality standards for decision making. It includes a section concerning privacy issues, stating that "decisions should be written in a manner that minimizes the release of personal information." However, at the end of the day, a decision maker must have the discretion to include in a decision reference to evidence that the decision maker finds relevant to support the findings outlined in the decision.

A working group of FOIPOP administrators and legal counsel was set up in the fall of 2004 to review issues on the protection of personal information disclosed in decisions. Their work continues.

Decisions for the year 2005–06

The tribunal's business is to adjudicate appeals from decisions of the board, and to consider applications brought under s. 29 of the act to determine whether a party has a right to sue in the civil courts.

Adjudication is the tribunal's principal activity, and any decision may illustrate or advance the tribunal's approach to an issue, even those in already well-developed areas of adjudication. For the interest of advocates and stakeholders, a detailed discussion of noteworthy decisions, selected from the 517 decisions issued in the year 2005–06, is provided below (see Figures 8 and 9 for a breakdown of decisions by leading issues).

Figure 9
Decisions by Issue Categories – Employer

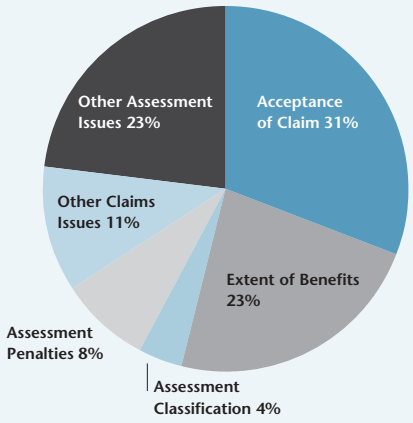
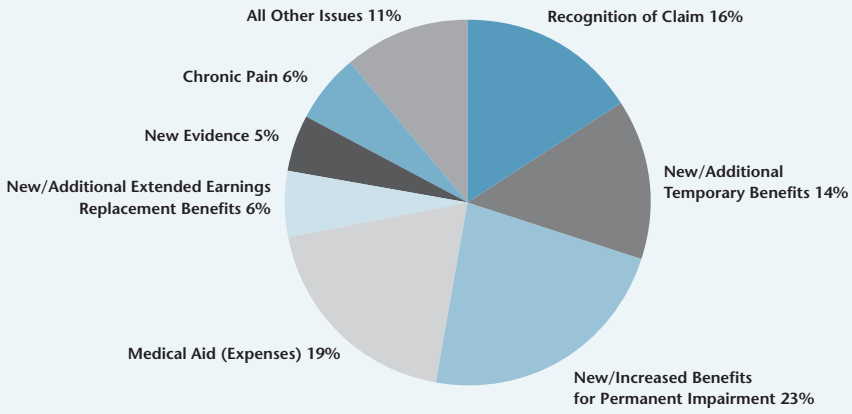


Figure 8
Decisions by Issue Categories – Worker



Noteworthy Decisions (by issue)

Chronic Pain

Decision 2005-83-AD (July 21, 2005, NSWCAT) was one of the tribunal's first decisions following the enactment of the province's new Chronic Pain Regulations. The regulations provide for a pain related impairment (PRI) award of 3 or 6 per cent when a worker's chronic pain is found to be related to a workplace injury. A 3 per cent PRI is awarded for a "slight" impairment, and a 6 per cent PRI is awarded for a "substantial" impairment. The tribunal confirmed the board's award of a 3 per cent PRI.

In *Decision 2005-227-AD* (September 19, 2005, NSWCAT), the tribunal considered a request for medical aid assistance in relation to chronic pain. The tribunal found that the worker's pain was not related to the compensable injury. The decision confirmed the need for a causal connection between the compensable injury and the development of chronic pain in order to qualify for benefits under the Chronic Pain Regulations.

Decisions 2006-21-AD (March 29, 2006, NSWCAT) and *2006-27-AD* (March 30, 2006, NSWCAT) both involved challenges to the board's definition of chronic pain. The tribunal held that it was bound by the definition of chronic pain contained in the act. The following excerpt from *Decision 2006-21-AD* is noteworthy:

> It must be stressed that although the dictionary meaning of the words "chronic pain" suggest pain that is ongoing or permanent, the term "chronic pain" in the *Act* is a term of art and is more specific than the ordinary meaning of the words. Chronic pain in the *Act* refers to pain for which (broadly speaking) there is no identifiable physical cause. It is pain of this nature that presented a challenge for the workers' compensation system and which gave rise to Bill 90 and eventually to the Chronic Pain Regulations. The Chronic Pain Regulations are aimed at a specific phenomenon. They should not be interpreted as providing an additional package of compensation for workers who have pain associated with a workplace injury.

Decision 2006-41-AD (March 28, 2006, NSWCAT) addressed the issue of apportionment in a situation where only some of the worker's chronic pain was related to her workplace injury. The tribunal decided that there should be no apportionment of the worker's 6 per cent PRI rating, as the worker's compensable chronic pain was sufficient to justify the 6 per cent rating.

Section 29

Section 29 of the act gives the tribunal authority to determine whether a right of action against an employer is barred by Part I of the act. Section 28(1) of the act sets out the historic tradeoff between workers and employers: namely, that the rights provided under Part I of the act are in lieu of all rights and rights of action against an employer subject to Part I, as a result of personal injury by accident. A party to an action may make application to the Chief Appeal Commissioner for a determination under the "bar to suit" provision. Section 3.40 of the tribunal's Practice Manual provides guidance in making such an application.

Since its formation, the tribunal has had occasion to make rulings on the "right of action" and related matters. While relatively few in number as compared with compensation-related appeals, the tribunal's determinations under s. 29 of the act are of significance. These decisions assist in clarifying the legal rights and obligations of employers and workers, respectively, and operate as a first-instance determination of the right to bring legal action against an employer.

In *Decision 2005-195-TPA* (September 15, 2005, NSWCAT), the worker sued the defendants — a hospital and a regional health authority — for the allegedly negligent medical treatment of a workplace injury. On application by the defendants, the actions were barred following the reasoning in *Queen Elizabeth II Health Sciences Centre v. Workers' Compensation Board (N.S.) et al.* (2001), 193 N.S.R. (2d) 385 (NSCA).

In *Decision 2005-381-TPA* (January 16, 2006, NSWCAT), the worker worked in a retail store, in a shopping mall. She fell in the parking lot. She was a covered employee, and both her employer and the mall owner/manager were covered employers. The worker was initially denied coverage by the board; the board suggested the possibility of a civil suit. The worker sued the mall. The mall brought an application under to section 29, to bar the action. The sole issue was whether the accident "arose out of and in the course of" employment.

The action was barred. The employer was obliged to contribute to the maintenance of the parking lot. It had a contractual and commercial interest in the parking lot (the site of the fall), per the commercial lease agreement with the mall. The accident did not occur on public property, or on property unconnected to the employer; it effectively occurred at the worker's place of employment.

In its analysis, the tribunal considered the Court of Appeal's test enunciated in *Nova Scotia (Department of Transportation & Public Works) v. Nova Scotia (Workers' Compensation Appeal Tribunal)*, 2005 NSCA 62, ["*Puddicombe*"]:

> [T]here are two main aspects of the 'arising out of and in the course of employment' inquiry: the nature of the work and the link between the activity of the employee giving rise to the injury and the risk of the work.

In *Decision 2005-119-TPA* (January 16, 2006, NSWCAT), the application was brought by a regional health board, which was the worker's employer. The worker was provided with allegedly negligent medical treatment of the injury by the authority and its treating physicians. The worker's suit was barred against the health authority, following the principle in *QEII Health Sciences Centre, supra,* namely, a covered employer cannot be sued for the negligent medical treatment of a workplace injury.

Procedural Issues

Decision 2005-33-AD (August 29, 2005, NSWCAT) involved a hearing loss claim that raised a "limitation of actions" question. The worker's claim form, which he filed in 2004, indicated that he was advised in 1989 that his hearing loss was work related. The worker later testified that a friend completed the form on his behalf and that he only became aware in 2004 of the link between his hearing loss and his employment. If it were determined that the worker was aware in 1989 that his hearing loss was work related, then his claim for benefits would be statute-barred under s. 83 of the act.

The tribunal accepted the worker's evidence that he became aware only in 2004 that his hearing loss was work related. In reaching this determination, the tribunal applied a *subjective*, rather than an *objective*, test (i.e., the worker must be *subjectively* aware that the hearing loss was work related) to start the limitation clock running. As the time started running in 2004, the worker's claim was not statute-barred.

Decision 2005-392-AD (February 24, 2005, NSWCAT) addressed the issue of a hearing officer's jurisdiction under s. 197 of the act. The worker, a federal employee under the Government Employees Compensation Act, R. S. C. 1985, c. G-8, filed a claim for a psychological stress injury. The claim was denied by a case manager, appealed to a hearing officer, then put on hold pending the issuance of new board policy. Once policy 1.3.6 was promulgated, the hearing officer issued a decision directing that the matter be returned to the case manager. The worker appealed to the tribunal on the ground that the hearing officer failed to render a decision in accordance with s. 197 of the act. The worker argued that the hearing officer did not have the discretion to refuse to hear and decide an appeal by referring it back to a case manager for re-adjudication.

In concluding that the hearing officer had the jurisdiction to refer the appeal back to the case manager for re-adjudication, the tribunal found that legislative intent in this case was to be garnered from examining all the provisions pertaining to appeals and giving them an efficacious interpretation. The hearing officer is bound by board policies and can render any decision which could have been rendered by a staff member under s. 6 of board policy 8.1.3R1. The case manager's decision was not a "final decision" under policy 8.1.7R1. Therefore, the new evidence reconsideration process under the latter policy need not be followed.

The tribunal concluded that the act and policies contemplated a "blended first-line adjudication within the board" as long as the decision in question was not a final decision. The fact that the act did not provide an explicit power of referral did not mean that a hearing officer lacked the power to make a referral.

The tribunal determined that the hearing officer exercised her power in accordance with the legislative scheme to provide for "a complete adjudication at the Claims Adjudicator and Hearing Officer level prior to an appeal to the Tribunal." The lack of a mandatory reconsideration stage with the repeal of s. 196 of the act did not preclude the discretionary power conferred on the board by s. 185(2) of the act to reconsider a decision.

Policy 8.1.3R

In *Decision 2005-402-AD* (December 15, 2005, NSWCAT), the worker sought an extended earnings replacement benefit (EERB). The hearing officer had declined jurisdiction over the issue, as it had not been addressed at the case management level. The tribunal applied board policy 8.1.3R1 (which provides that a hearing officer can render any decision that could have been rendered by a staff member) and concluded that the hearing officer had jurisdiction to consider the worker's entitlement to an EERB.

"Arising Out of and in the Course of Employment"

Decision 2005-73 (June 16, 2005, NSWCAT) reaffirmed the general rule that injuries occurring on the commute to work do not constitute accidents "arising out of and in the course of employment."

In this case, the worker sought benefits for injuries sustained in a motor vehicle accident while on his way to work. The tribunal noted that the determination of whether a particular incident constitutes an accident arising out of and in the course of employment must be made with reference to several factors: the specific time, place, and circumstances under which the accident took place; the link between these factors and the injury; and the risk created by or related to the employment.

Although there are some circumstances that might give rise to conditions creating an exception to the general rule that an accident on the way to work is not compensable (as was found in tribunal *Decision 2004-231-AD* (August 31, 2004, NSWCAT)), these circumstances were not present in this instance: the worker was reporting to work for a regularly scheduled work day and had not yet arrived at his regular work site. He was not being compensated for the time or cost of his travel to work, and his employment did not place him at a greater risk of harm than the general public also traveling the highway on the accident date.

The fact that the worker was on call, that he was transporting a company employee to work with him, and that he was driving a company vehicle were not circumstances either bearing on the determination of whether it was an accident arising out of and in the course of employment, or which took him outside the general rule that an accident occurring while commuting to work is not compensable. The tribunal concluded that the time, place, and circumstances of the worker's motor vehicle accident did not create the necessary link between his injury and his employment so as to entitle the worker to recognition that he suffered a compensable work-related injury.

Decision 2005-57-AD (June 29, 2005, NSWCAT) presents a vivid example of the operation of the presumption contained in s. 10(4) of the act. When a worker is injured while in the course of his employment, s. 10(4) presumes that the injury is work related. In order to rebut this presumption, the party seeking to rebut the presumption must meet the civil standard of proof, that being a "balance of probabilities."

In this case, the worker suffered a heart attack while on the job. The job was not particularly stressful, either psychologically or physically. Absent the presumption in s. 10(4), there was likely insufficient evidence to recognize the injury. However, because the worker suffered the attack while "on the job," it was presumed that the attack arose out of his employment. The presumption was not rebutted, and the worker's claim was recognized.

Decision 2005-158-AD (June 23, 2005, NSWCAT) also involved recognition of a heart condition. The worker was a scallop fisher who became ill at sea on the first night of what turned out to be an 11-night fishing trip. The skipper refused the worker's request to be returned to shore. When the worker returned to shore, he was equivocally diagnosed with having had either pneumonia or early signs of heart failure. He subsequently experienced chest pains and was eventually diagnosed with myocarditis and dilated cardiomyopathy.

The issue before the tribunal was whether the worker's dilated cardiomyopathy was compensable. The medical evidence was conflicting and somewhat speculative because of the extended time of the worker's illness at sea. There were two theories about what had caused the worker's myocarditis: alcohol use and a virus. There was also opinion evidence that timely care of the worker's illness at sea could have prevented him from developing myocarditis.

The tribunal determined that there was insufficient evidence to link the worker's myocarditis to alcohol use, but found the skipper's action of delaying medical treatment could have adversely affected the worker's heart problems. The tribunal concluded that the delay in treatment aggravated the worker's heart condition, and the worker's claim was recognized.

Medical Aid

Board policy 2.3.1R directs the consideration of two criteria when adjudicating entitlement to medical aid. The proposed medical aid must be (1) appropriate for the compensable injury, and (2) "consistent with standards of health care practices in Canada."

The second criterion represents a wording change implemented in 2005. Before that time, the policy required that the medical aid be "consistent with generally accepted practices with the healthcare community."

Decision 2005-208-AD (August 25, 2005, NSWCAT) addressed the changed language in policy 2.3.1R. The tribunal noted that while the purpose of policy 2.3.1R remained the same — to ensure that injured workers receive safe and appropriate treatment for their injuries — the new language potentially provided for broader coverage of medical aid benefits:

> The "healthcare community" in the old Policy language was not defined, and was open to argument. It could be a town, a Province, a region, all of Canada, amongst all Pain Specialists, or so on; the possibilities were numerous. The Policy changed this to "health care practices in Canada". While this could be interpreted to mean that only treatments that are available across Canada can be approved, I find this would unduly narrow coverage. A treatment may be readily available and widely used in certain areas, but used little or not at all elsewhere. Provided it is safe and effective, its relative usage across Canada should not matter.
>
> The language "generally accepted treatment practices" has been replaced by "standards of health care practices." The new language acknowledges that there may be more than one standard or practice, which bolsters my interpretation of community, above. The language of "standards" appears to rely on the *bases* upon which a community might decide whether to approve a treatment or not. It could, thus, incorporate by reference *tests* or *standards* used in making this determination in certain cases.

The tribunal allowed the worker's request for intravenous Lidocaine treatment, noting the lack of evidence of what standards apply to its provision.

In *Decision 2005-380-AD* (December 13, 2005, NSWCAT), the tribunal denied medical aid in the form of a personal trainer. Although the worker's family physician had recommended a personal trainer, the tribunal found that the board's approach — following a gym program designed by a physiotherapist — was equally effective. Factors for consideration included cost-effectiveness of medical aid and the fact that the personal trainer was not a board-approved service provider.

Supplementary Benefits

Section 227 and board policy 3.8.1R4 provide for the payment of supplementary benefits. To qualify, an injured worker must meet the following four criteria:

- be receiving a permanent partial disability benefit for an injury that occurred before March 23, 1990
- be receiving, or entitled to receive, his/her permanent partial disability benefit on a periodic basis
- be receiving a Canada or Quebec Pension Plan disability pension for his/her compensable injury; or in the opinion of the board, be ineligible to receive a Canada or Quebec Pension Plan disability pension for his/her compensable injury, only because of having made insufficient, or no, contributions to the Plan, and
- have a personal income below the threshold set for individuals under the GIS program

In *Decisions 2004-444-AD* & *2005-43-AD* (April18, 2005, NSWCAT), the worker sought a re-calculation of supplementary benefits awarded for two successive 12-month periods in 2002 and 2003. Policy 3.8.1R4 provides a definition of "personal income" for purposes of the threshold of the GIS program used to arrive at a figure for supplementary benefits (per s. 227). "Personal income" is equal to "total income" (for tax purposes), less supplementary benefits received from the board. "Total income" is set out on line 150 of the tax returns.

Although the board used earnings figures from the worker's 2002 and 2003 tax returns in calculating the worker's supplementary benefits, it did not use the amount set out on line 150. For the first year, the board added in CPP disability benefits not shown on the tax return (presumably paid in the next year as a retroactive payment). In the second year, the board added a CPP lump sum payment from line 152 of the respective return. The tribunal found that the board had erred in the calculation of the worker's supplementary benefits, as there was no statutory or regulatory authority to alter (add to) the line 150 amount. The worker was entitled to a recalculation of his supplementary benefits.

In *Decision 2005-185-AD* (June 28, 2005, NSWCAT), the worker sought an earlier effective date for her supplementary benefit. The tribunal noted that previous tribunal decisions had upheld the prohibition contained in board policy against paying retroactive supplementary benefits.

Board policy 3.8.1R4 is a revised version of the policy considered by the tribunal in those previous decisions. It applies to all decisions made on or after September 10, 2004, and is therefore affected by the amended s. 30(2) of the regulations. Section 30 grants the board the authority to fix an effective date not earlier than October 1, 2002, if the criteria of s. 227(4)(a), (b), and (c) of the act were met as of the date s. 227 was proclaimed, which was April 1999.

The worker met the criteria at that time, as she was injured before March 23, 1990, was receiving a permanent disability pension, and had the requisite low income. She also met the criteria of s. 29(2) of the regulations as she is under 65 and would be eligible for a CPP disability pension if she had enough contributions. The board was directed to pay the worker supplementary benefits as of October 1, 2002.

Employer Assessments

In *Decision 2005-446-AD* (February 28, 2005, NSWCAT), the employer appealed its assessment, seeking to exclude a portion of claim costs for a worker whose condition was misdiagnosed. The misdiagnosis resulted in "exaggerated costs." The tribunal considered policy 9.4.4R1 for purposes of excluding the costs from the employer's experience rating. However, it concluded that since none of the circumstances described in that (or any other) board policy applied to the facts, there was no mechanism to grant the relief sought.

Decision 2005-439-AD (January 27, 2006, NSWCAT) dealt with a situation in which the worker's injury was attributed to the employer for whom he was working at the time of the accident, even though there had been several previous employers. The employer appealed on the basis that the claim costs had been improperly assigned to it.

The tribunal found that the worker's carpal tunnel syndrome had arisen predominately out of his work with the employer, as opposed to his work with other employers; therefore, the claim costs had been properly assigned. The tribunal considered policy 9.4.1R1, which deals with exclusions from a firm's experience rating. In order to overturn the claim costs, the employer would have to establish that it was unlikely that the worker's condition arose predominately out of his work with the employer. As this was not done, the employer's appeal was denied.

In *Decision 2005-01-AD* (November 15, 2005, NSWCAT), the appellant, one of two remaining directors of an electrical contracting company that had ceased actively carrying on business, sought a determination that he was not liable for assessments. He submitted that, as he was merely a "nominal" director, the obligations for assessments under s. 136 of the act making directors jointly and severally liable should not apply to him. He also argued that the assessment liability accrued subsequent to the company having ceased business operations, so he should not be personally liable for it. In the alternative, he argued that he should only be liable for one-half the amount of the assessments since there were two directors.

The tribunal found that the appellant was a director in fact and continued to be a director. There was no evidence that he resigned his position. He could still act in the capacity of a director. The tribunal also found that there was no due diligence or good faith exemption under the act as exists under the Income Tax Act, the Excise Tax Act, the Companies Act, and the Revenue Act. The absence of such language reflects a legislative intent not to provide a defence in the context of workers' compensation. It follows that there is no statutory defence. Section 186 of the act cannot be invoked to imply such a defence. Under the facts, the appellant was not considered to be a mere "nominal" director. He actively worked with the company, provided funds to it, and had standing to compel it to divulge assessment information. The alternative argument was also rejected for lack of statutory authority. The appeal was denied.

Hearing Loss

The tribunal issued several hearing loss decisions. The following two decisions addressed the issue of apportionment where there was both an occupational and non-occupational aspect to the hearing loss:

Decision 2004-501-AD (May 31, 2005, NSWCAT) involved a case in which the worker had an 80-decibel loss in the right ear and a 180-decibel loss in the left ear. The left ear loss included a non-compensable component that medical opinion assessed at causing 130 decibel of the total loss. Only the remaining 50-decibel loss was due to noise exposure. No benefits were awarded for the right ear, as it did not meet the 100-decibel threshold. However, with respect to the worker's left ear, the tribunal assessed the whole loss under the American Medical Association's Guides to the Assessment of Permanent Impairment (AMA guides), which resulted in a 2 per cent whole-person impairment. The non-compensable 130-decibel portion was then assessed alone, resulting in a 1 per cent whole-person impairment. The compensable portion of 50 decibels was found to have materially increased the worker's impairment. The tribunal also applied the apportionment policy to the medical aid request, noting that there was no apportionment between compensable and non-compensable causes when medical aid was in issue. The worker was entitled to a PMI award and hearing aid for the left ear.

In *Decision 2005-212-AD* (September 29, 2005, NSWCAT), the worker had total hearing loss levels over the threshold for benefits, but was over 60 years of age. When one considered the presbycusis factor (a two-decibel deduction for each year over age 60), the worker fell below the threshold for a PMI or medical aid. The tribunal referred to *Decision 2004-501-AD*, *supra*, and found that the reduction for presbycusis was an exception to the proposition that medical aid for hearing aids was not affected by the apportionment provisions. The following excerpt is noteworthy:

> The rules respecting the presbycusis factor constitute one area where Policy 1.2.5AR does indeed impact on the general rules respecting apportionment between compensable and non-compensable causes of hearing loss and, in particular, with respect to the effect of age on the hearing loss process. The presbycusis rules operate by reducing the amount of the hearing loss on the audiogram by 2 decibels for each year a worker exceeds 60 years of age. The presbycusis rules therefore do not apportion between compensable and non-compensable causes, but rather impact on whether a worker meets the threshold levels of hearing loss necessary for a compensable claim.

Stress

In *Decision 2005-24*-AD, (October 4, 2005, NSWCAT), the worker was fired without notice. She developed disabling psychological symptoms and sought compensation. Section 2(a) of the act excludes coverage for stress other than an acute reaction to a traumatic event. The board found that the worker's depression and anxiety had developed over a nine-year period; consequently, it was stress that was excluded from the definition of accident, as it was not an acute reaction to a traumatic event. In reaching this determination, the tribunal followed the reasoning of the New Brunswick Court of Appeal in *D.W. v. Workplace Health, Safety and Compensation Commission,* 2005 NBCA 70, that wrongful dismissal is not an accident for workers' compensation purposes. In that decision, the Court accepted that a traumatic event is one "that is sudden and outside the realm of what is expected or usual within the workplace." The Court found that management decisions changing terms or conditions of employment, and decisions regarding lay-off or termination, regardless of cause, may all cause stress, but that such stress is "usual" stress. This decision is currently under appeal.

In *Decision 2004-607-AD* (April 29, 2005, NSWCAT), the tribunal found that the job demands of a correctional worker created the potential for frequent confrontations in the workplace. These confrontations, along with the employer's conduct regarding disciplinary treatment of the worker, were found to be within the realm of expected events in the workplace. As they were not traumatic, they were not compensable.

Similarly, in *Decision 2005-253-AD* (August 18, 2005, NSWCAT), the tribunal found that while the worker had been subjected to prolonged, stressful treatment by her supervisor and some co-workers, she had not suffered "an acute reaction to a traumatic event." The tribunal described a traumatic event as a psychiatric trauma or disturbance resulting from stressors other than day-to-day stressors found in ordinary business life. Traumatic events should be viewed objectively, not subjectively. An acute reaction was described as an immediate, intense response to the traumatic event that does not develop gradually over a period of time. This decision is also under appeal.

Decision 2005-139-AD (June 29, 2005, NSWCAT) dealt with the issue of apportionment of a psychiatric impairment under the AMA guides for a stress-related impairment. The worker had a pre-existing history of depression. After an incident that the board recognized as compensable stress, he suffered a major depressive episode that prevented him from working. The tribunal considered policy 3.9.11 and how the definitions of "minor" and "moderate" fit with the evidence regarding the pre-existing condition. In this decision, the tribunal did not apportion the impairment as between the pre-existing and the work-related causes.

Attendant Allowance

In *Decision 2005-248-AD* (September 28, 2005, NSWCAT), the tribunal allowed an attendant allowance where the assistance had previously been performed by a spouse, now deceased. The tribunal concluded that the worker's need for assistance was a consequence of the workplace injury, and not the death of her spouse. Simply because the worker's spouse had been able to provide this assistance before his death did not mean that the need for assistance only arose out of his death.

Multiple Chemical Sensitivities/ Environmental Illness Syndrome

In *Decisions 2004-451-AD; 2004-614-AD* (December 9, 2004, NSWCAT), the panel considered the use of threshold-limit values in exposure cases and concluded that the threshold-limit value was not the only measure of potential harm from a chemical. The following excerpt is noteworthy:

> The Panel finds that concentrations of chemicals in excess of the threshold limit value are not the only measure of potential harm from exposure to the chemical. There is a wide variation in individual susceptibility, and a small per centage of individuals may experience discomfort from some substances at concentrations below the threshold limit value. In some cases, this may result from a pre-existing condition or other environmental stresses to which the individual is exposed.

The employer had refused to allow the worker to return to work, pending an investigation into the cause of the worker's health problems. The panel found that the worker was entitled to earnings replacement benefits, as her loss of earnings was caused by the injury.

Decision 2006-011-AD (March 31, 2006, NSWCAT) was a panel decision that considered whether the worker's fibromyalgia was related to his workplace exposure to chemicals. The panel concluded that none of the chemicals to which the worker was exposed were known to cause fibromyalgia, that fibromyalgia was common in the general population without exposure to chemicals, and that it was unlikely that the worker's exposure caused his fibromyalgia.

Extended Earnings Replacement Benefits (EERB)

Decision 2004-633-AD (June 16, 2005, NSWCAT) dealt with the termination of the Worker's EERB at age 65. The worker started receiving an EERB in 1993. Reviews were conducted in 1996 and 2000. Under s. 73(9), the board terminated the worker's EERB in 2004, when he turned 65. The tribunal considered the issue of whether the termination of the worker's EERB amounted to a further review or adjustment, contrary to s. 73(3). The panel found that the intent of the act was to terminate earnings-replacement benefits at age 65. This mirrored most Nova Scotians' career pattern of having retired from active employment, and earning employment income, by age 65.

Section 75

Decision 2005-015-AD (July 25, 2005, NSWCAT) was a panel decision which dealt with s. 75 and subs. 37(2)and (4) of the act. The worker was injured on November 27, 1995, and received temporary earnings-replacement benefits (TERB) until September 26, 1997. In accordance with s. 37(4), the two-fifths of a week waiting period was applied to the worker's TERB payment. His claim was re-opened in 1999, and the two-fifths waiting period was again applied. In 2001, the worker's claim was again reopened, the two-fifths waiting period was applied, and the worker's TERB was paid at a rate of 75 per cent. Additional surgery was performed in 2004, and the two-fifths waiting period was again applied, along with payment of TERB at a rate of 75 per cent. The worker appealed, arguing that since he had already received TERB for more than 26 weeks in the past for the same injury, his TERB for the recurrence should be payable at a rate of 85 per cent, with no two-fifths waiting period applied.

The panel noted that s. 75(2) established a distinction between recurrences within one year and beyond one year of the date upon which the previous loss of earnings ended. Although the panel agreed with a previous tribunal decision (*Decision 2002-414-AD,* October 31, 2005, NSWCAT) which stated that the 26 weeks could be accumulated in either a consecutive or sporadic manner, it held that the accumulation would only be of significance for recurrences occurring within one year of the end of the previous compensable claim.

The panel concluded that, if the recurrence occurred beyond the one-year period, "the clock starts running again," with respect to the application of the two-fifths waiting period and the rate of 75 per cent. The panel indicated that the legislature could have, but did not, provide for a single application of the two-fifth waiting period. Unlike s. 40 of the act, s. 75 did not allow for a choice in the actual earnings used to calculate a worker's loss of earnings.

Referrals to a Workers' Compensation Board Hearing Officer

(under Section 251 of the Workers' Compensation Act)

Section 251 of the act permits the tribunal to refer appeals back to a board hearing officer for reconsideration. Referrals may occur if the quantity or nature of new or additional evidence, or the disposition of an appeal, merits the referral. The tribunal may make a referral at any point in the hearing of an appeal.

Historically, appeals have been referred for one of five reasons:

- to permit reconsideration of decisions in light of new or additional evidence that becomes available
- to ensure hearing officers consider all of the evidence and issues that are relevant to appeals
- to expedite claim management
- to consolidate issues that need to be adjudicated
- to make use of the board's resources to gather further relevant evidence

The tribunal resolved 66 appeals by referral back to the hearing officers in 2005–06. That total includes 9 referrals in response to the board's adoption of policy 1.3.6. For the first time since fiscal year 2002–03, the tribunal did not increase the proportion of the appeals it resolved by referring back to the hearing officers. In both 2004–05 and 2005–06, the tribunal referred approximately 13 per cent of the appeals it resolved during the fiscal year.

Hearing officers issued 27 final Reconsideration Decisions following referrals from the tribunal. These decisions resulted in 10 denials (37 per cent); 13 appeals allowed (48 per cent); and 4 appeals allowed in part (15 per cent).

Referrals Arising from New and Additional Evidence

The tribunal has consistently held that the act contemplates that the board will be the adjudicator of first instance. Consequently, the tribunal generally refers appeals back to the hearing officers for reconsideration when it receives new or additional evidence that it feels would have impacted significantly upon the hearing officers' original decisions. In 2005–06, the receipt of new or additional evidence accounted for approximately 47 per cent of the tribunal's referrals — clearly the most common reason the tribunal referred appeals back to the hearing officers.

Referrals Arising from Incomplete Adjudication

The tribunal often refers appeals back when it concludes that hearing officers have not considered all of the evidence, or decided all of the issues, that are relevant to an appeal. Incomplete adjudication was the second most common reason the tribunal issued referrals in 2005–06, accounting for approximately 9 per cent of all referrals.

Decision 2005-413-RTH (January 23, 2006, NSWCAT) is an example of a referral the tribunal made in 2005–06 because of incomplete adjudication. The worker had two accepted compensation claims: the first, for a right elbow injury; the second, for a left knee injury. One of the issues the tribunal had to decide was whether the worker was entitled to an extended earnings-replacement benefit. This required an assessment of whether an alternate job working for the employer was suitable and reasonably available employment for the worker.

The tribunal concluded that the hearing officer had only considered evidence relating to the worker's elbow injury. Consequently, it referred the appeal back to the hearing officer and directed him to reconsider his decision in light of both of the worker's claims and injuries. The suitability of the alternate job could only be properly determined when both injuries were considered. In addition, the worker's knee claim file contained a significantly greater body of evidence about ongoing stress-related problems that the worker had than the elbow file. The tribunal found that stress was also a factor that should be considered when the suitability of the alternate job was assessed. Finally, the tribunal concluded that the hearing officer had failed to deal with evidence that the worker's pre-accident employer had dismissed him. This brought the availability of the alternate job into question and further justified reconsideration.

Referrals as a Case Management Tool

Since 2003–04, the tribunal's registrar has referred appeals back to the hearing officers when screening reveals obvious situations where reconsideration would be appropriate. Often these referrals are made when participants are waiting to file new evidence in support of their appeals. In 2005–06, the registrar referred four appeals back to the hearing officers, as a result of pre-screening.

Appeal commissioners David Pearson, Glen Johnson, Alexander MacIntosh, and Andrea Smillie.

Referrals to Consolidate Issues Within Claims

The tribunal often refers appeals back to hearing officers so that multiple issues arising from a single claim can be dealt with comprehensively, or to avoid piece-meal adjudication. The tribunal issued three consolidation referrals in 2005–06.

Decision 2006-008-RTH (March 29, 2006, NSWCAT) is an example of a consolidation referral. The worker incurred multiple injuries in a workplace accident and had a permanent impairment. The board had set his initial impairment rating, and he appealed that rating to the tribunal. The tribunal referred the appeal back to the board so that it could obtain additional medical information and re-assess the worker's impairment.

The board was considering whether the worker qualified for chronic pain compensation at the same time that his impairment rating was being adjudicated. Shortly after the tribunal referred the worker's impairment rating appeal back to the board, a hearing officer issued a decision denying the worker recognition that he had a pain-related impairment. This disqualified him from receiving chronic pain compensation.

Section 251 Referrals and the Board's Resources

The tribunal has the ability to gather evidence when it needs additional information to properly resolve an appeal. However, the tribunal often refers these appeals back to the hearing officers if board resources, such as its medical staff, can be used to obtain the necessary evidence quickly and cost-effectively. The tribunal issued seven referrals to access board resources in 2005–06.

Referrals Included with Final Decisions

The tribunal continued to resolve some issues within appeals and refer other issues in the same appeals back to the hearing officers this fiscal year. These hybrid referrals have the advantage of reducing the number issues to be resolved within claims. The tribunal issued four combined decisions and referrals during 2005–06. *Decision 2005-180-AD-RTH* (August 26, 2005, NSWCAT) is an example.

Other Reasons for Referrals

The tribunal also uses its discretion to refer appeals back to the hearing officers in situations where irregularities have occurred in the course of the decisions that have been appealed to the tribunal.

Decision 2005-479-RTH (February 27, 2006, NSWCAT) is an example of such a referral. The appeal involved a claim filed by a worker who had had significant workplace exposure to asbestos. The board recognized that he had a permanent respiratory impairment, but denied that he was entitled to compensation because he developed breast cancer and lung cancer. The tribunal referred the appeal back because it concluded that

- the hearing officer had missed or failed to consider evidence from the worker's treating surgeon that asbestos exposure had increased his risk of developing lung cancer, and
- none of the decision makers who had dealt with the worker's claim had considered board policy 1.2.11 when they adjudicated his entitlements — policy 1.2.11 expressly addresses adjudicating lung cancer claims for workers who are exposed to asbestos

Appeals from Tribunal Decisions

A participant who disagrees with a tribunal decision can ask the Nova Scotia Court of Appeal to hear an appeal of the decision. This is a two-step process.

First, the person wanting to bring the appeal must convince the Court that the proposed appeal raises a "fairly arguable" issue. A fairly arguable issue is one that the Court believes could result in the appeal being successful. Generally, if the Court is not convinced that the proposed appeal raises a fairly arguable issue, it will deny the person leave to appeal, without providing reasons. If leave to appeal is denied, there is no second step and the tribunal's decision is confirmed.

Second, if the Court believes the appeal raises a fairly arguable issue, it will hear the appeal and provide a written decision that will confirm, vary, or overturn the tribunal's decision.

During this fiscal year, 14 appeals from tribunal decisions were **filed** with either the Court of Appeal or the Supreme Court of Canada:

- Workers appealed nine tribunal decisions to the Nova Scotia Court of Appeal. Two were filed by the Workers' Advisers Program. The remainder were filed by workers who were unrepresented or who were assisted by injured workers' groups at the Court of Appeal.
- One worker asked the Supreme Court of Canada for leave to hear his appeal.
- Employers appealed two decisions concerning compensation provided to a worker.
- Two employers appealed decisions concerning their assessments.
- The board did not appeal any tribunal decisions.

During this fiscal year, 29 appeals were **resolved** as follows:

- Three appeals were withdrawn by the person who had asked the Court of Appeal for leave to appeal.
- The Court of Appeal dismissed 15 appeals at the leave stage.
- The Supreme Court of Canada dismissed one appeal at the leave stage.
- Six appeals were resolved by consent order directing a re-hearing (mostly chronic pain appeals affected by the Supreme Court of Canada's decision in *Nova Scotia (Workers ' Compensation Board) v. Martin,* [2003] S.C.J. No. 54).
- The Court of Appeal decided four appeals — two were allowed and two were denied.

A summary of these decisions is set out below (see Figure 10 for appeals before the Courts).

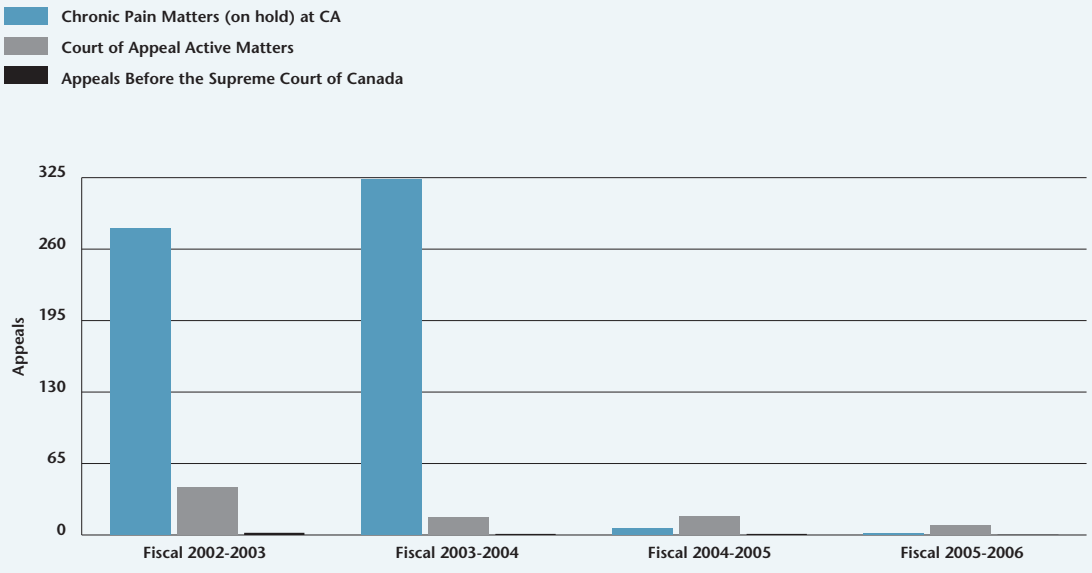
At the beginning of this fiscal year, there were 24 active appeals before the Court of Appeal. At the end of this fiscal year, there remained 10 active appeals. The Court of Appeal has issued a preliminary decision in one active appeal (Logan).

Decisions of the Court of Appeal

In *Nova Scotia (Department of Transportation and Public Works) v. Nova Scotia (Workers' Compensation Appeals Tribunal)* (2005), 231 N.S.R. (2d) 390 the Court found that the tribunal was reasonable in finding that William Puddicombe, a snowplow operator who had a car accident while traveling to work, had an acceptable claim.

While accidents that occur while traveling to or from work are generally not covered by workers' compensation, there are exceptions. The tribunal had found that Mr. Puddicombe was acting in the course of his employment when he had his accident as (1) he was traveling to work outside his regular hours to deal with an urgent situation at the request of his employer, and (2) the urgent situation was poor road conditions, and his accident occurred due to the poor road conditions.

Figure 10
Appeals Before the Courts



The Court recognized that determining what accidents are covered by workers' compensation raises broad policy questions, as that determination also takes away the right to sue covered employers. It stated that the tribunal has expert knowledge which assists in determining such questions:

> … the application of the "arising out of and in the course of employment" requirement is a fact-driven exercise which must be undertaken in light of the broad policies and purposes of the workers' compensation system. When WCAT is operating in that sphere, the nature of that exercise supports a measure of deference to that highly specialized tribunal.

In *John Ross & Sons Ltd. v. Baigent* (2005), 237 N.S.R. (2d) 81, the Court upheld the tribunal's finding that David Baigent was entitled to a period of temporary benefits. The Court of Appeal stated the tribunal's findings concerning causation were supported by the medical reports and the testimony of Mr. Baigent, and were not open to challenge at the Court of Appeal.

The Court stated that an incorrect reference by the tribunal to a duty for the employer to accommodate Mr. Baigent could be ignored, as it had no impact on Mr. Baigent's entitlement to temporary benefits. In other words, an irrelevant mistake by the tribunal is not a reason to overturn a tribunal decision.

In *Thermo Dynamics Ltd. v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [2005] N.S.J. No. 475 the Court found that the board has a discretion to extend the one-year statutory time limitation that applies to the over-assessment of firms to correct an injustice.

The board had incorrectly classified Thermo Dynamics since 1983, resulting in annual over-assessments. The firm contacted the board in 1998 requesting that it be re-classified. The board carried-out a classification audit in 2003, resulting in a change in classification. The board made the change in classification effective January 1, 2002.

The tribunal found that, due to s. 122(3) of the act, Thermo Dynamics' reclassification could not be made earlier than the year 2002. Section 122(3) states that when the board reclassifies a firm to correct a mistake, the refund is limited to one year before the correction is made. The Court of Appeal stated that the tribunal correctly interpreted that section of the act.

However, the Court stated that the tribunal was wrong in concluding that the board could not consider whether to extend the one year limit using s. 190 of the act. Under s. 190, the board can extend any time limit if enforcing the time limit would cause an injustice.

The Court sent the appeal back to the board for it to determine whether enforcing the one-year time limit would cause an injustice. The Court cautioned that an over-assessment is not automatically an injustice:

> The power under s. 190 is discretionary. The circumstances of each particular case need by carefully examined to see whether an "injustice" has occurred warranting an extension of time limits. ... it will be for the Board to consider whether [Thermo Dynamic's] request for a review in 1998, with yearly follow-ups, and the Board's repeated failure to do anything about it until 2003, invites the application of s. 190, thus allowing for a retroactive refund to at least January 1, 1997.

In *Canada Post Corp. v. Connolly*, [2006] N.S.J. No. 4, the Court interpreted the phrase "claim under appeal" contained in s. 10E of the act. Under s. 10E, certain workers were awarded compensation for chronic pain within a finite period: the chronic pain had to have developed following a workplace injury occurring on or after March 23, 1990, and before February 1, 1996; the worker must have been in receipt of temporary earnings-replacement benefits as of November 25, 1998, or, as of that date, have had a claim under appeal.

The Court of Appeal rejected Canada Post's argument that s. 10E of the act was inconsistent with s. 4 of the Government Employees Compensation Act, R.S.C. 1985, c. G-8 (GECA). Mr. Connolly had suffered a personal injury by accident arising out of and in the course of employment as required by s. 4(1) of GECA. Payment of s. 10E benefits is payment of compensation "at the same rate and under the same conditions" as is paid to other workers in Nova Scotia as required by s. 4(2) of GECA.

Further, the Court stated that the tribunal's conclusion that a "claim under appeal" could include an appeal by an employer of a worker's entitlement to compensation was rational and could not be changed by the Court of Appeal.

However, the Court of Appeal stated that the "claim under appeal" had to be in relation to chronic pain. It found that no decision maker had considered whether the claim under appeal had been in relation to chronic pain. It referred the appeal back to the board for it to determine whether the claim under appeal was in relation to chronic pain.

In *Logan v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [2006] N.S.J. No. 31, the Court made a preliminary decision regarding who can take part in the appeal of the tribunal decision.

Ms Logan had a stress reaction to a wrongful dismissal. The tribunal found that she did not have an acceptable claim, finding that a wrongful dismissal is not an accident for workers' compensation purposes. Ms Logan appealed the tribunal's decision to the Court of Appeal. The Canadian Manufactures & Exporters Association applied to the Court to take part in the appeal. The Canadian Manufactures & Exporters Association is an association that represents many large employers in Nova Scotia.

The Court gave permission for the association to take part in the appeal noting that Ms Logan's employer was not participating. It stated that the board's perspective was not the same as employers' perspectives. It added that there was value in hearing from private enterprise.

The Logan appeal was heard by the Court of Appeal in April of 2006. The decision is pending.

Appeal commissioners Alison Hickey and Brian Sharp.

Inter-agency Cooperation

Several standing inter-agency groups work together to improve service delivery:

- **Issues Resolution Working Group**
  Monthly meetings are held between the Chief Worker Adviser, Chief Appeal Commissioner, Chief Hearing Officer, the Manager of the TST Unit and the WCB Director of Service Excellence and Client Services to discuss issues arising from the adjudication of claims and for the processing of appeals within the appeals system in an effort to improve service delivery in these areas. The focus this year has been on chronic pain claims.

- **Appeals Issues Discussion Group**
  A sub-committee of representatives from the tribunal and the Workers' Advisers Program, Internal Appeals, and Client Services Department of the WCB meet as a group and have been developing a training tool to help improve the consistency of adjudication throughout the system. The training tool covers everything from the application of the act to benefit of the doubt, responsibilities of the worker and employer, survivor benefits, and appealing a claim. It outlines the basic principles for adjudication under these headings and will be adapted as needed as a training tool for both adjudicators within the system and for outside participants.

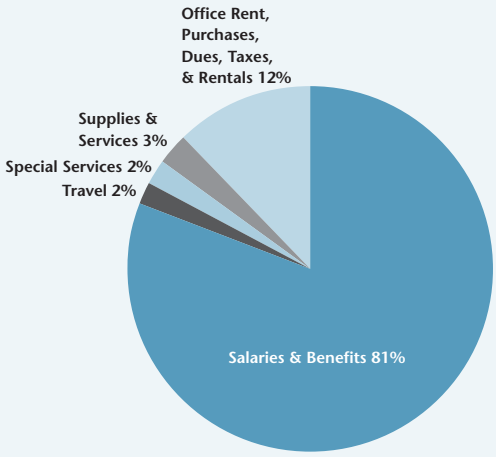
- **System Goals Advisory Group**
  A group of stakeholder representatives (from employer, labour, and injured-worker groups) and representatives from the tribunal and other system agencies have been working to develop performance measures and targets for the WSIS as a whole. Some of these measures and targets, by their nature, relate to individual agency performance.

Partner agencies continue to work together to provide joint training to decision makers and others in the workers' compensation system. Last year, this included training on a range of topics including decision writing, managing chronic pain, disability case management, and return-to-work strategies.

Financial Report

In 2005–06, the tribunal's total expenditures were within 84 per cent of the original authority of $1,662,000. They were within 90 per cent of our revised forecast of $1,552,500. Actual expenditures were $1,392,937.77 (see Figure 11).

Figure 11
Budget Expenditures
(for the Fiscal Year Ending March 31, 2006)



The Year Ahead

System Challenges

The tribunal expects that its operation in 2006–07 will be dominated by the adjudication of chronic pain appeals. It is anticipated that board-level adjudication of benefit claims for chronic pain will generate several hundred appeals. These appeals will be in addition to the appeals generated by board decision makers in the ordinary course of adjudication.

Tribunal Strategic Plan

Appeal commissioners and staff met for a full day in February 2006 to discuss strategic priorities for the coming year. Initiatives identified during this strategic planning session include the following:

- continue to fine-tune appeal management processes
- refine the self-represented participant process
- establish a feedback mechanism for advocates appearing before the tribunal
- establish a feedback mechanism for participant groups such as employers and injured workers
- continue to benchmark key performance indicators
- continue to participate in joint initiatives with system partners

Appendix 1

Figure 1
Appeals Received

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 02-03	85	72	71	96	65	68	80	83	129	58	61	59	927
Fiscal 03-04	70	83	94	76	97	48	81	86	87	71	42	55	890
Fiscal 04-05	47	36	76	70	55	40	53	58	72	48	36	68	659
Fiscal 05-06	39	41	29	44	52	56	24	41	34	52	54	100	566

Figure 2
Decisions Rendered

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 02-03	87	79	78	83	69	57	59	78	41	58	64	78	831
Fiscal 03-04	97	83	70	69	58	43	83	60	50	24	34	56	727
Fiscal 04-05	53	53	35	45	108	174	53	40	54	65	55	48	783
Fiscal 05-06	58	55	44	49	35	37	44	43	34	41	35	42	517

Figure 3
Appeals Outstanding at Year End

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
Fiscal 02-03	399	386	368	372	358	361	370	363	445	437	424	398
Fiscal 03-04	365	361	378	380	411	413	406	425	457	501	501	489
Fiscal 04-05	479	460	491	510	453	317	309	325	341	319	292	302
Fiscal 05-06	267	245	226	215	227	240	213	209	203	208	223	275

Figure 4
Decisions by Appellant Type

	Total
Worker Claim Appeals	488
Employer Claim Appeals	17
Employer Assessment Appeals	9
Section 29 Applications	3
Total	517

Figure 5
Decisions by Outcome

Allowed	173
Allowed in Part	85
Denied	184
S29	3
RTH	66
Moot	6
Preliminary Decisions*	3
Correcting Decisions*	5
Total Final Decisions	517

** Do not reduce the number of appeals outstanding.*

Figure 6
Timeliness to Decision (cumulative percentage by month)

Months	1	2	3	4	5	6	7	8	9	10	11	>11
Fiscal 02-03	0.24	0.97	3.50	28.71	65.14	81.06	87.33	92.88	95.30	96.14	97.47	100
Fiscal 03-04	0.00	0.55	5.36	32.42	61.26	74.59	82.97	87.50	91.62	94.51	95.60	100
Fiscal 04-05	1.02	4.19	14.61	30.11	43.58	53.37	60.61	65.06	70.01	74.71	80.18	100
Fiscal 05-06	0.21	9.19	25.52	47.22	58.43	73.33	82.69	87.22	89.25	91.55	93.29	100

Figure 7
Decisions by Mode of Hearing

	Oral Hearing	Paper Review	Total
Fiscal 02-03	291	540	831
Fiscal 03-04	295	432	727
Fiscal 04-05	308	475	783
Fiscal 05-06	287	230	517

Figure 8
Decisions by Issue Categories – Worker

Recognition of Claim	109
New/Additional Temporary Benefits	93
New/Increased Benefits for Permanent Impairment	163
Medical Aid (Expenses)	129
New/Additional Extended Earnings Replacement Benefits	42
New Evidence	33
Chronic Pain	42
All other issues	73
Total	684

Figure 9
Decisions by Issue Categories – Employer

Acceptance of Claim	8
Extent of Benefits	6
Assessment Classification	1
Assessment Penalties	2
Other Claims Issues	3
Other Assessment Issues	6
Total	26

Figure 10
Appeals Before the Courts

	Chronic Pain Matters (on hold) at CA	Court of Appeal Active Matters	Appeals Before the Supreme Court of Canada	Total
Fiscal 02-03	279	43	2	324
Fiscal 03-04	323	16	1	340
Fiscal 04-05	6	17	1	24
Fiscal 05-06	1	9	0	10

Figure 11
Budget Expenditures
(for the Fiscal Year Ending March 31, 2006)

	Authority	Final Forecast	Actual Expenditures
Salaries & Benefits	$1,265,500.00	$1,162,000.00	$1,130,984.08
Travel	$57,000.00	$58,000.00	$26,947.51
Special Services	$125,000.00	$58,500.00	$34,559.45
Supplies & Services	$52,500.00	$55,500.00	$38,734.01
Office Rent, Purchases, Dues, Taxes & Rentals	$199,000.00	$219,500.00	$162,754.27
Sub Total	**$1,699,000.00**	**$1,553,500.00**	**$1,393,979.32**
Less Recoveries	$37,000.00	$1,000.00	$1,041.55
Totals	**$1,662,000.00**	**$1,552,500.00**	**$1,392,937.77**