WORKERS' COMPENSATION APPEALS TRIBUNAL

CELEBRATING 20 YEARS
OF EXCELLENCE

ANNUAL REPORT
FOR THE YEAR ENDING MARCH 31, 2016

NOVA SCOTIA

WORKERS' COMPENSATION APPEALS TRIBUNAL

ANNUAL REPORT
FOR THE YEAR ENDING MARCH 31, 2016

NOVA SCOTIA

NOVA SCOTIA
Workers' Compensation
Appeals Tribunal

Diana Whalen
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, 2016.

Respectfully submitted,

Sandy MacIntosh
Chief Appeal Commissioner

NOVA SCOTIA
Workers' Compensation
Appeals Tribunal

His Honour
Brigadier-General The Honourable J.J. Grant, CMM, ONS, CD (Ret'd)
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, 2016.

Respectfully submitted,

Diana Whalen
Minister Responsible for Part II of the *Workers' Compensation Act*

TRIBUNAL PERSONNEL

Colleen Bennett
Supervisor, Office Services

Tricia Black
Clerk

Charlene Downey
Secretary/receptionist

Carla Gauvin
Secretary

Samantha MacGillivray
Clerk/Scheduling coordinator

Sandy MacIntosh
Chief Appeal Commissioner

Leanne Rodwell Hayes
Alison Hickey
Glen Johnson
Gary Levine
Brent Levy
Andrew MacNeil
Diane Manara (Registrar)
David Pearson
Andrea Smillie
Appeal Commissioners

CONTENTS

CELEBRATING 20 YEARS OF EXCELLENCE

The Workers' Compensation Appeals Tribunal (the tribunal) is busy, always facing new challenges, while striving for improvement. When people are busy, they sometimes forget to take a breath and think of their accomplishments. For the tribunal, this is an apt time to pause and celebrate how far we have come. It is the tribunal's 20-year anniversary.

The tribunal first opened its doors in January of 1996. Since that time, the tribunal has decided over 10,000 appeals.

The tribunal has helped bring clarity to many complex areas of workers' compensation rules. It has been a national leader in making appeal procedures user-friendly for unrepresented appellants. Many Court decisions resulting from tribunal decisions are of national importance. The tribunal has engaged in years of comprehensive system strategic planning, while never forgetting that it was established to provide an independent review of final decisions of the Workers' Compensation Board (the board).

The most enduring decisions of the tribunal are the 2000 and 2001 *Martin* and *Laseur* decisions. In these decisions, the tribunal found that the equality protections under the *Canadian Charter of Rights and Freedoms* were something it could consider. In other words, the tribunal found that the *Charter* was something people should be able to access where they seek justice, not merely in courts.

The tribunal then went on to find in *Martin* and *Laseur* that the rules governing compensation for chronic pain were so discriminatory as to be unconstitutional. Both of these findings were confirmed by the Supreme Court of Canada in 2003.

The independence and fortitude of tribunal members is illustrated by the *Martin* and *Laseur* decisions. The tribunal reached its conclusions as to its authority to consider the *Canadian Charter of Rights and Freedoms* even though both the board and the Province of Nova Scotia opposed this finding.

Here are some of the milestones in the tribunal's history:

1995 Judith Ferguson appointed first Chief Appeal Commissioner.

1996 First appeal commissioners appointed and the tribunal begins operations. It inherits a large backlog of appeals from the former appeal board.

1997 Alternative dispute resolution introduced as a measure to address backlog.

1998 Webpage established. Both the Auditor General and a Legislature Select Committee issue reports which lead to legislative reform and performance measures to increase tribunal efficiency.

1999 Katherine Carrigan appointed Chief Appeal Commissioner.

2000 Appeal backlog eliminated. Active inventory of appeals reduced from 2,429 to 545.

2001 Standard rules for key appeal procedures published. Use of electronic files begins.

2002 The tribunal begins participation in system strategic planning as recommended by the Dorsey report.

2003 The Supreme Court of Canada confirms tribunal findings in *Martin* and *Laseur*.

2004 Louanne Labelle appointed Chief Appeal Commissioner. The tribunal starts calling all self-represented appellants to ensure they understand the process.

2005 The tribunal posts a video of a mock hearing to its website.

2009 The tribunal begins publishing all decisions on a publically available database.

2011 A full-time registrar appointed.

2013 A method to have the board review important new evidence, filed on appeal, is established.

2016 Sandy MacIntosh appointed Chief Appeal Commissioner.

EXECUTIVE SUMMARY

The tribunal resolves appeals from final decisions of hearing officers of the board and determines whether the Workers' Compensation Act (the act) bars a right to sue against employers. The tribunal is legally, physically and administratively separate from the board in order to ensure that it is, and is seen to be, independent of the board.

In 2015–16, the tribunal continued to provide timely, quality decision-making consistent with the act, policy and tribunal precedent. The tribunal continued to develop new procedures, both internally and with system partners, to improve the appeal process.

The tribunal is a high volume tribunal with court-like powers. Our appeal volumes decreased slightly from last year. In 2015–16, workers and employers filed 672 appeals. Our appeal commissioners decided 603 appeals and a total of 732 appeals were resolved.

The tribunal's registrar worked effectively to resolve all preliminary matters on appeals prior to their assignment to an appeal commissioner. Administrative staff assisted workers and employers by providing information about the appeal process, and ensuring they both understood the process and were treated fairly.

The tribunal continued to bring clarity to workers' compensation law over the past year. Issues surrounding the compensability of gradual onset stress remain an area of controversy. It had been hoped that the Court of Appeal would bring certainty to this area of law last year. However, the Court did not address whether the statutory exclusion of gradual onset stress from compensation violates constitutional equality rights.

Alison Hickey was the acting Chief Appeal Commissioner for 11 months of the fiscal year. She resumed her role as an appeal commissioner in late February of 2016, following the appointment of Sandy MacIntosh as the new Chief Appeal Commissioner.

During her term as acting Chief Appeal Commissioner, Ms. Hickey ensured the careful fiscal management of the tribunal, while working on improving appeal procedures and interagency cooperation. The tribunal thanks her for many hours of long and challenging work over the past year.

INTRODUCTION

The act governs the operation of the tribunal, and its decisions are made pursuant to the act. The act permits the tribunal to set its own procedures. The tribunal must follow the board's policies concerning compensation and assessments, provided they are consistent with the act.

The tribunal operates within the Workplace Safety and Insurance System (WSIS). The partner agencies comprising WSIS are the tribunal, the board, the Workers' Advisers Program (WAP), and the Occupational Health and Safety division of the Department of Labour and Advanced Education.

Tribunal Mandate and Performance Measures

The tribunal's mandate is to decide appeals and right to sue applications. Within that mandate, opportunities exist for cooperation with system partners and the community, including injured workers' groups and the Office of the Employer Advisor. The tribunal works with its partner agencies to develop practices and procedures to improve the appeal process. At the same time, the tribunal is careful to ensure that its independence is never compromised or seen to be compromised.

In the processing and adjudication of appeals, the tribunal strives to strike a balance between procedural efficiency, access to justice and fairness. Its work is directed by principles of natural justice within the context of the act. Its performance is shaped by, and measured against, several parameters drawn from the act, and from community expectations.

The tribunal's decisions are written. Appeal commissioners strive to release decisions within 30 days of an oral hearing or the closing of deadlines for written submissions (the act requires that decisions be released within 60 days of a hearing).

Optimally, the tribunal can hear an appeal within 30 days of receiving an appeal. Most appeals take longer to be scheduled as: there is more than one participant involved; it takes time for WAP to decide whether to represent a worker; the failure of participants to request medical evidence or disclosure in a timely manner; and, the time it takes for doctors to respond to requests for opinion evidence when requested.

THE TRIBUNAL'S YEAR IN REVIEW

Operations Overview

The tribunal's appeal volume decreased slightly from last year. The tribunal received 672 appeals in 2015–16, compared to 744 in the previous year. Appeals continue to be filed predominantly by workers (94 per cent). The tribunal resolved a total of 732 appeals this fiscal year compared with 699 the previous year.

The tribunal was able to increase decision output during the year and the number of decisions issued by the tribunal increased from 578 in 2014–15 to 603 in 2015–16. At year-end, 655 appeals remained to be resolved, compared to 715 last year.

Despite these good statistics, there remain too many older appeals. There are 72 appeals which have been with the tribunal for over two years and the participants are resisting the tribunal's efforts to have them set down for hearing. Of the 72, 66 are represented by the WAP and 40 of those involve an employer.

The tribunal continues to develop procedures aimed at resolving appeals more quickly. Unfortunately, appeals are routinely becoming more complex both procedurally and substantively. The tribunal must balance between resolving appeals quickly and ensuring maximum fairness. A significant portion of the appeals filed at the tribunal are awaiting additional medical evidence which has been requested by WAP and, on occasion, by employers.

Approximately 33 per cent of decisions were released within six months of the date the appeal was received. This is a lower percentage than the previous year. Approximately 53 per cent of decisions were released within nine months of the date the appeal was received, compared to 63 per cent last year. Over 39 per cent of appeals took more than 11 months to resolve, as compared to 28 per cent the previous year.

The tribunal reports decisions by representation based on the information available at the time decisions are released. Of the 603 decisions issued this past year, 63 per cent of workers were represented by WAP. However, of the 655 outstanding appeals at year-end, 82 per cent of workers were represented by WAP.

Employers participated in 24 per cent of the resolved appeals in 2015–16 and are participating in 35 per cent of the worker appeals outstanding at year-end. Many employers are unrepresented but can access assistance from the Office of the Employer Advisor. Tribunal staff speak directly with unrepresented participants, both workers and employers, to provide them with information on appeal processes.

During 2015–16, recognition of a claim was the issue most often on appeal, representing 23 per cent of issues on appeal. New/increased benefits for permanent impairment were also significant at 20 per cent.

The tribunal heard most appeals (72.5 per cent) by way of oral hearing, an increase from last year's total of 64.7 per cent.

Outcomes on appeal for 2015–16 varied slightly. The overturn rate (appeals allowed or allowed in part) by the tribunal increased to 46.3 per cent from 43.3 per cent the previous year. The number of appeals referred back to the hearing officer decreased to 9.6 per cent from 15.4 per cent. The number of appeals denied increased to 43.6 per cent from 40.8 per cent.

The tribunal resolved 129 appeals without the need for a hearing, an increase from last year's total of 121. The resolution of appeals without hearing is achieved primarily by the registrar, prior to the assignment of an appeal to an appeal commissioner.

Appeals to the Court of Appeal increased during 2015–16 to 17 from 11 the previous year. At year-end, 15 appeals remained at the Court of Appeal. Of the decisions issued by the Court this year, four appeals were denied at the leave stage, four were dismissed by the Court, and two were discontinued.

The tribunal's administrative staff for 2015–16 was comprised of a number of veteran members as well as a couple of new staff members who are showing initiative and motivation in learning the tribunal's procedures.

The tribunal's appeal commissioners continue to produce well-reasoned decisions in the face of increasing issue complexity and workload. Several appeal commissioners also play a role in the larger administrative law community, filling positions such as board members on the Council of Canadian Administrative Tribunals and chairing the Nova Scotia Administrative law subsection of the Canadian Bar Association.

Appeal Management

Diane Manara is the tribunal's registrar. She actively schedules and manages appeals as they are filed.

The tribunal is committed to moving appeals through to resolution as efficiently and expediently as possible having regard, at all times, to the rules of natural justice and procedural fairness. While all reasonable attempts are made to accommodate the procedural requests of participants, the tribunal is mandated to determine its own procedures and is at all times keenly aware of the need to resolve appeals in a timely fashion. The collaborative practices put in place with our system partners are a useful tool in achieving the balance necessary for effective, fair and timely adjudication of appeals.

Communication with appeal participants by telephone is a significant aspect of the registrar's duties. Unrepresented participants are called and given information about the appeal process. Where there is more than one participant to an appeal, conference calls are regularly convened to keep participants informed on the appeal status, to ensure compliance with tribunal deadlines, and to streamline issues. Some of the more complex files are assigned to individual appeal commissioners who will take the necessary steps to ensure that an appeal moves steadily toward a decision.

The tribunal worked closely with WAP during 2015–16 to track appeals and avoid any unnecessary delays. The tribunal actively supports what has become known as the WAP/New Medical process. Additional evidence provided by WAP on a tribunal appeal is considered by the appropriate case managers prior to a decision being rendered by the tribunal. This continues to result in a significant number of appeals being resolved without a hearing.

The tribunal collaborates with the Internal Appeals department at the board with respect to the review and release of claim file information to employers for tribunal appeals. Together with the board, the tribunal has been exploring ways of streamlining the vetting and release process, as this process has become one requiring a significant time and labour commitment at the tribunal.

Interagency Cooperation

The Chief Appeal Commissioner is a member of the Heads of Agencies Committee/Coordinating Committee, which oversees implementation of the WSIS strategic plan. The Issues Resolution Working Group (IRWG) is comprised of the Chief Appeal Commissioner, the Chief Workers' Adviser, the Manager of the board's Internal Appeals department, the board's Client Relations Officer and a board legal department representative.

IRWG was formed to discuss issues arising from the adjudication of claims and appeals. The committee exemplifies communication and information sharing among agency partners. The committee's mandate is to develop and implement issue resolution initiatives to improve the overall efficiency of the workers' compensation system. IRWG held bi-monthly meetings during 2015–16 at which appeal statistics from each agency were shared and methods to improve the appeal system were discussed. These meetings have resulted in a reduction in appeals.

The tribunal, board and WAP have formed a committee to explore the impact of appeal delay on claim costs and determine methods to decrease the number of appeals and time it takes to resolve appeals.

Over the past year, the tribunal worked with the WAP on improving the efficiency of docket days. Also, the WAP and tribunal are exploring requiring all uncontested appeals to be set down within 12 months, except in extraordinary circumstances.

Financial operations

In 2015–16, the tribunal's total expenditures were within 73 per cent of the original authority and within 83 per cent of our revised forecast. Net expenditures totaled $1,629,166, a decrease from the previous year.

STATEMENT OF CHIEF APPEAL COMMISSIONER

As the new Chief Appeal Commissioner, I am proud to lead the tribunal at its twentieth year of existence.

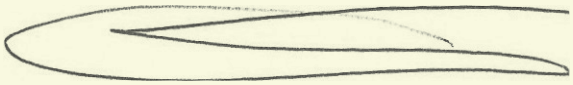
I would like to introduce myself.

I have 17 years of experience as an appeal commissioner. I have extensive experience in interagency cooperation and strategic planning. I have a long history of community involvement including having been a volunteer lawyer at the Halifax Refugee Clinic, having been the president of the Kinsmen Club of Halifax, serving on Barristers' Society committees, and chairing the Nova Scotia Administrative Law section of the Canadian Bar Association.

Over the next few years, I hope to improve timeliness of the appeal process, so as to respect the expectations of the historic compromise upon which workers' compensation is based. I want to decrease legalistic parts of the appeals system as had been recommended by the Dorsey report.

I am committed to a straightforward and fair appeal process for all participants. The tribunal's steps to inform, educate and assist all those participants to the system, and in particular the unrepresented participants, will continue.

The work of the tribunal is a team effort. I am honoured to be leading competent and experienced appeal commissioners, a highly efficient office supervisor, a registrar who continuously looks for improvements, and dedicated support staff who truly care about the people we serve.



Sandy MacIntosh
Chief Appeal Commissioner

INTRODUCTION

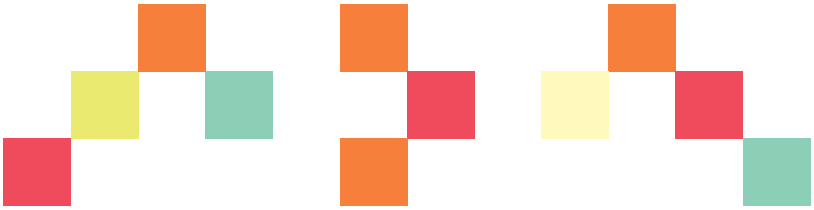
The Workers' Compensation Appeals Tribunal hears appeals from final decisions of hearing officers of the Workers' Compensation Board (the board) and determines whether the act bars a right to sue against employers. The tribunal is legally and administratively separate from the board and ensures an independent and impartial review of board decisions.

An appeal commissioner or a panel of three appeal commissioners decides an appeal according to the act, regulations and board policies. The tribunal takes into consideration documentary evidence previously submitted to, or collected by, the board, the decision under appeal, any additional evidence the participants present, any submissions of the participants and any other evidence that the tribunal may request or obtain (section 246 of the act).

Once an appeal is assigned to an appeal commissioner(s), the Chief Appeal Commissioner or others cannot intervene to influence the judgment of the commissioner. All questions of process, evidence or form of hearing are addressed to the presiding appeal commissioner(s) (the appeal commissioner(s) to whom the appeal has been assigned) with full disclosure to all participants. In its adjudicative role, the tribunal is guided by the principles of independence, fairness and consistency.

The tribunal works with several partner agencies within the framework known as the Workplace Safety and Insurance System (WSIS). Partner agencies are the board, the Workers' Advisers Program (WAP) and the Occupational Health and Safety Division of the Department of Labour and Advanced Education.

This annual report will highlight the processing and adjudication of appeals as well as the tribunal's participation in joint initiatives with system partners.



RELATIONSHIP TO THE BOARD

Although the tribunal is an external appeal agency, independent of the board, the tribunal interacts with the board on several different levels. The following is a brief outline of the parameters that guide interactions between the tribunal and the board.

Board – as funder

The tribunal is funded by the Accident Fund. Practically speaking, expenses are paid out of the Consolidated Revenue Fund of the Province and they are reimbursed from the Accident Fund. The Chief Appeal Commissioner reports to the House of Assembly through the Minister of Justice. This reporting relationship helps to ensure independence.

Board – as appeal participant

The tribunal's mandate is to hear and decide appeals from final decisions of the board. Participants in appeals include injured workers, employers and board representatives. On occasion, the Attorney General of Nova Scotia and any other interested parties may participate.

The board has the same rights and obligations as other participants. As a participant in every proceeding, the board's legal department is aware of the status of every appeal currently before the tribunal. In most cases, the board does not actively participate in appeals. Instead, the board maintains a watching brief. On occasion, the board hires outside legal counsel.

Board – as policy maker

The board's Board of Directors has policy making authority. The Board of Directors may adopt policies to be followed in the application of the act or regulations. The tribunal's independence is underscored by section 183(5) of the act which states that the tribunal is not bound by board policy where it is inconsistent with the act or the regulations.

Section 248 of the act provides that the Chair of the board's Board of Directors may adjourn or postpone an appeal before the tribunal. This can only be done where the Chair is of the opinion that an appeal raises an issue of law and general policy that should be reviewed by the Board of Directors under section 183 of the act. Similarly, the tribunal may ask the Chair whether an appeal raises an issue of law and general policy which should be reviewed by the Board of Directors.

Board – as partner

The tribunal is a partner in the WSIS and participates in joint committees, such as the Heads of Agency Committee (HAC) and the Issues Resolution Working Group (IRWG).

HAC's mandate is to oversee the implementation of a strategic plan for WSIS. The mandate recognizes that cooperation and communication between and amongst agencies is crucial for the implementation of the strategic plan.

The tribunal is mindful that participation at any level with partner agencies does not compromise, and must not be perceived to be compromising, the independence of the tribunal.

TRIBUNAL MANDATE AND PERFORMANCE MEASURES

While governed by the same enabling statute as the board, the tribunal is legally and administratively separate from it, and is ordinarily not bound by board decisions or opinions.

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

The tribunal's performance is shaped by, and measured against, several parameters drawn from the act, and by its own survey of participants.

The tribunal's decisions are written. Although the act requires that decisions be released within 60 days of a hearing, appeal commissioners strive to release decisions within 30 days of an oral hearing or the closing of deadlines for written submissions.

New appeals are processed within 15 days of receipt by the tribunal. Optimally, the tribunal can hear an appeal within 30 days of receiving notice that the participants are ready to proceed. Most appeals take longer to schedule because, increasingly, there is more than one party involved and additional medical evidence, often from specialists, is sought. Disputes concerning disclosure are increasingly slowing the processing of appeals.

OPERATIONS

The tribunal's appeal volume decreased slightly from last year. The tribunal received 672 appeals in 2015–16, compared to 744 in the previous year. Appeals continued to be filed predominantly by workers (94 per cent) (see Figure 1). The tribunal resolved a total of 732 appeals this past year and 699 the preceding year.

Despite the decrease in appeals received, the tribunal increased decision output from 578 in 2014–15 to 603 in 2015–16 (see Figure 2). At year-end, 655 appeals were outstanding, compared to 715 last year (see Figure 3).

Despite the tribunal's good statistics for 2015–16, and the efforts to resolve appeals more quickly, there remain too many older appeals. There are 72 appeals which have been with the tribunal for more than two years, and the participants in these appeals are resisting the tribunal's efforts to have them set down for hearing. Of the 72 appeals, WAP represents the appellant in 66 and 40 of those involve an employer.

Please see Appendix (pages 31–34) containing specific data for the following figures.

FIGURE 1
APPEALS RECEIVED

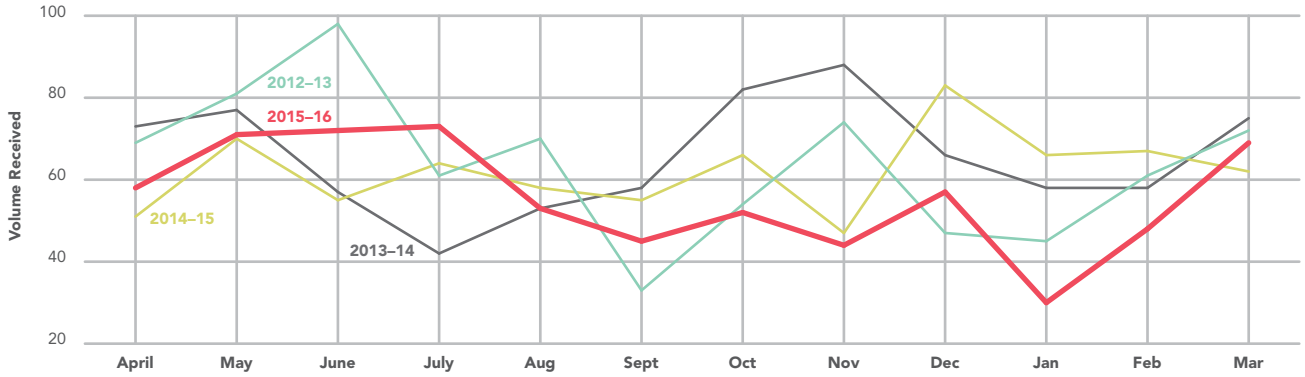


FIGURE 2
DECISIONS RENDERED

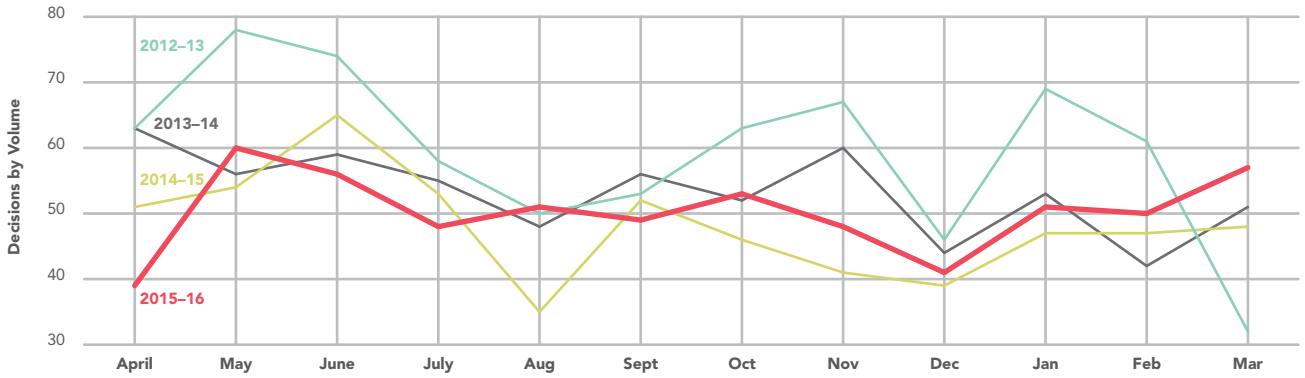
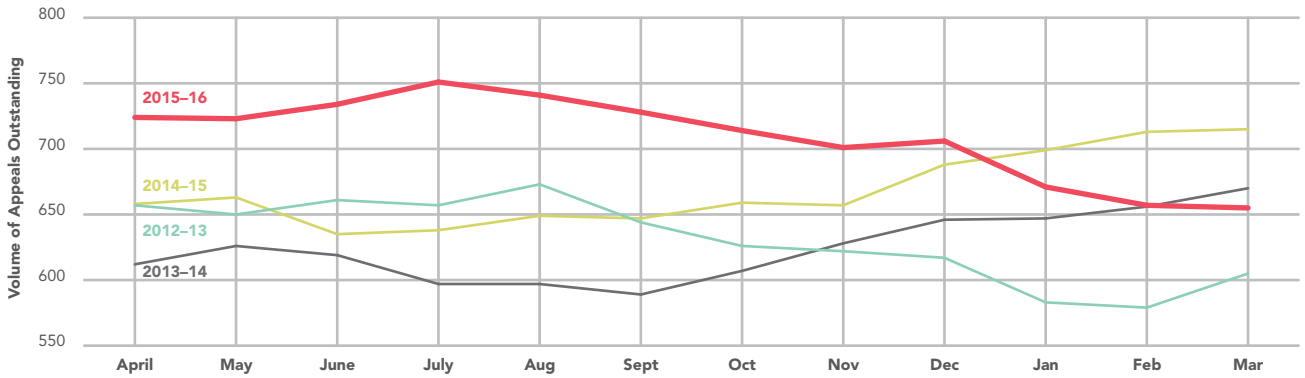


FIGURE 3
APPEALS OUTSTANDING AT YEAR END



Approximately 33 per cent of decisions were released within six months of the date the appeal was received. This is a decrease compared to the two preceding years (2014–15 and 2013–14), when approximately 42 per cent of decisions were issued within six months of receipt of the appeal.

Approximately 53 per cent of decisions were released within nine months of the date the appeal was received, compared to approximately 63 per cent last year. Approximately 39 per cent of appeals took more than 11 months to resolve, compared to 28 per cent the previous year (see Figure 4).

The tribunal reports decisions by representation based on the information available when decisions are released. In some appeals, WAP may represent workers when the Notice of Appeal is filed but may withdraw representation prior to a hearing. Employers may also decide, on occasion, to discontinue their participation prior to a hearing.

Of the 603 decisions issued this past year, 63 per cent of workers were represented by WAP (see Figure 5). However, of the 655 outstanding appeals at year-end, 82 per cent of workers were represented by WAP.

Employers participated in 24 per cent of the appeals resolved in 2015–16 and are participating in 35 per cent of the worker appeals outstanding at year-end. Many employers are unrepresented but can access assistance from the Office of the Employer Advisor (OEA). The tribunal calls unrepresented participants, both workers and employers, to provide them with information on appeal processes.

During 2015–16, the most common issue on appeal was recognition of a claim, representing 23 per cent of issues on appeal. New/increased benefits for permanent impairment was also significant at 20 per cent (see Figures 6 and 7).

The tribunal heard most appeals (72.5 per cent) by way of oral hearing, an increase from last year's total of 64.7 per cent (see Figure 8). The tribunal continued to issue consistent decisions which provided clarity and guidance to adjudicators, injured workers and employers.

FIGURE 4
TIMELINESS TO DECISION

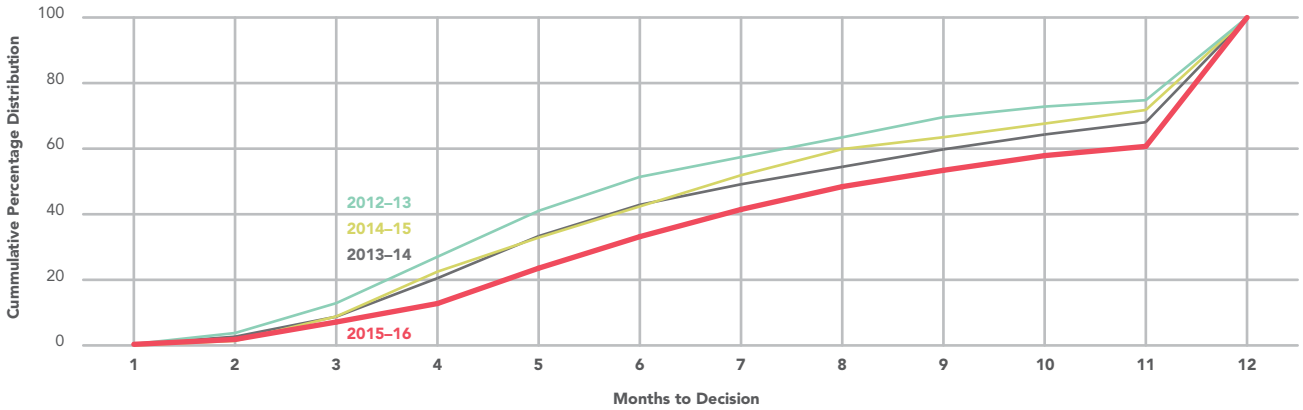


FIGURE 5
DECISIONS BY REPRESENTATION

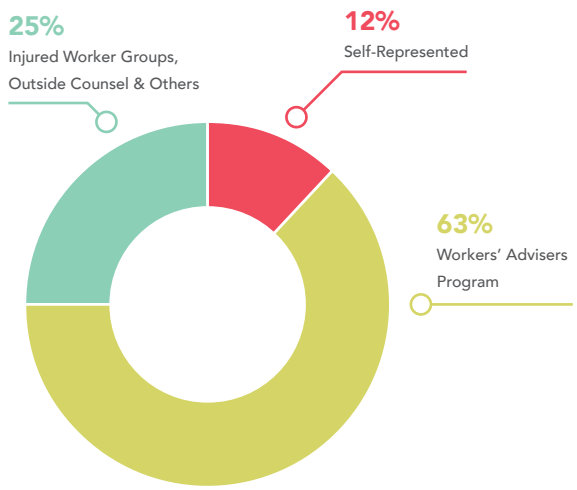


FIGURE 6
DECISIONS BY ISSUE CATEGORIES – WORKER

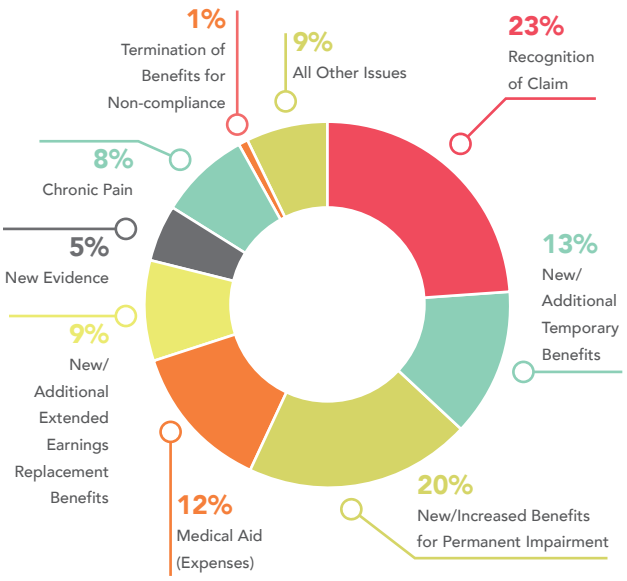


FIGURE 7
DECISIONS BY ISSUE CATEGORIES – EMPLOYER

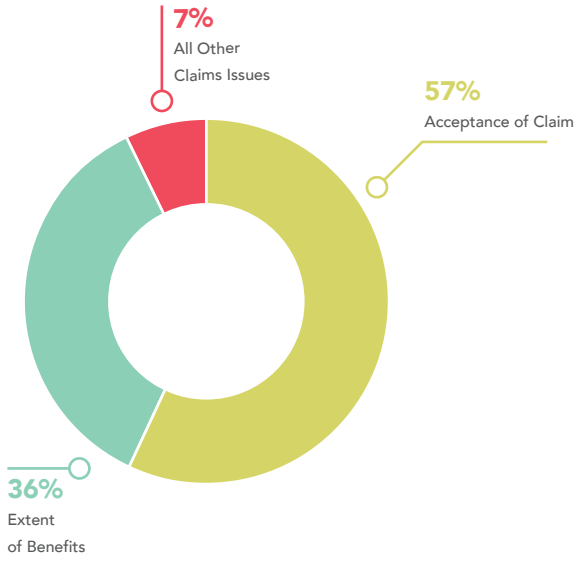
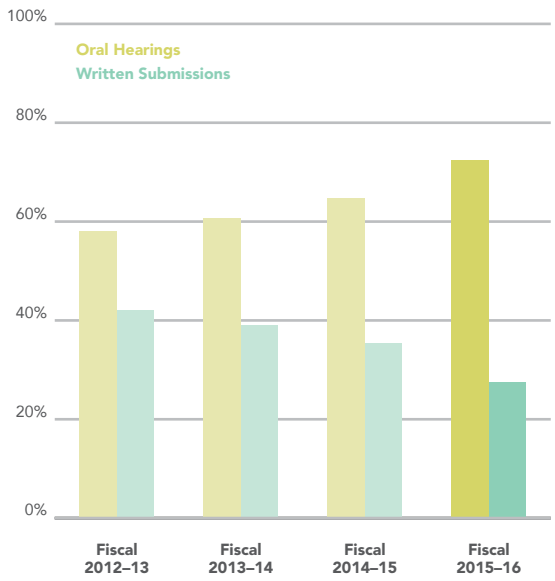


FIGURE 8
DECISIONS BY MODE OF HARDING



Outcomes on appeal for the year 2015–16 varied slightly. The overturn rate (appeals allowed or allowed in part) by the tribunal increased to 46.3 per cent from 43.3 per cent the previous year (see Figure 9). The number of appeals referred back to a board hearing officer decreased to 9.6 per cent from 15.4 per cent. The number of appeals denied increased to 43.6 per cent from 40.8 per cent.

The tribunal resolved 129 appeals without the need for a hearing, a slight increase from last year's total of 121. The resolution of appeals without a hearing is achieved primarily by the registrar, prior to the assignment of an appeal to an appeal commissioner.

Since most appeals are still filed by workers (94 per cent), most decisions released originated with worker appeals (95.5 per cent) (see Figure 10).

Appeals to the Court of Appeal increased during 2015–16 to 17 (less than 3 per cent of decisions rendered) from 11 the previous year (see Figure 11). At year-end, 15 appeals remained at the Court of Appeal. Among the decisions issued by the Court in 2015–16, four appeals were denied at the leave stage, four were dismissed by the Court, and two were discontinued.

The tribunal's administrative staff for 2015–16 was comprised of a core of veteran members and new staff members, who are showing initiative and motivation in learning the tribunal's procedures. Together, they are committed to serving the workers and employers who participate in our proceedings.

The tribunal's appeal commissioners continue to produce well-reasoned decisions in the face of increasing issue complexity and workload. Several of our appeal commissioners also play a role in the larger administrative law community, filling positions as board members on the Council of Canadian Administrative Tribunals and chairing the Nova Scotia Administrative law subsection of the Canadian Bar Association.

FIGURE 9
DECISIONS BY OUTCOME

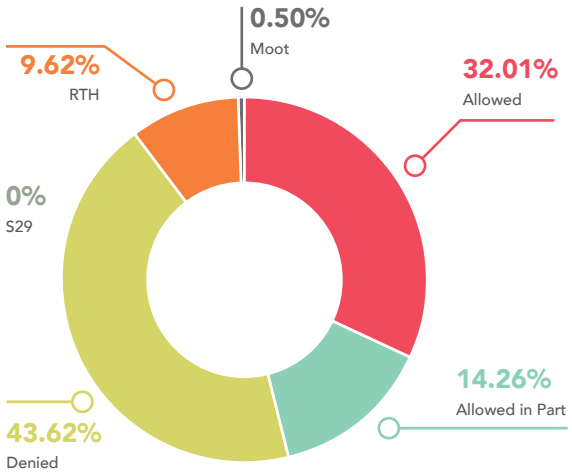


FIGURE 10
DECISIONS BY APPELLANT TYPE

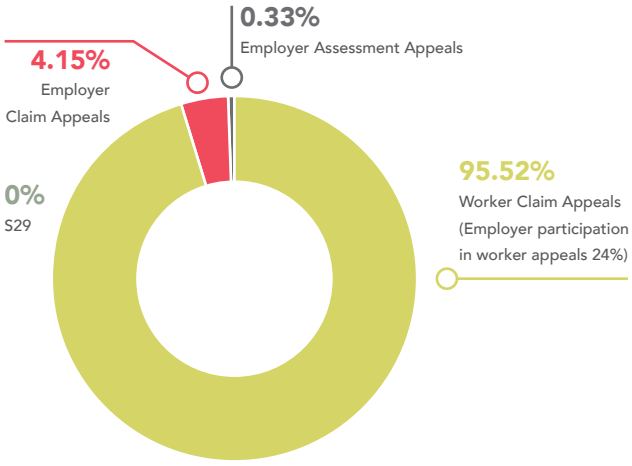
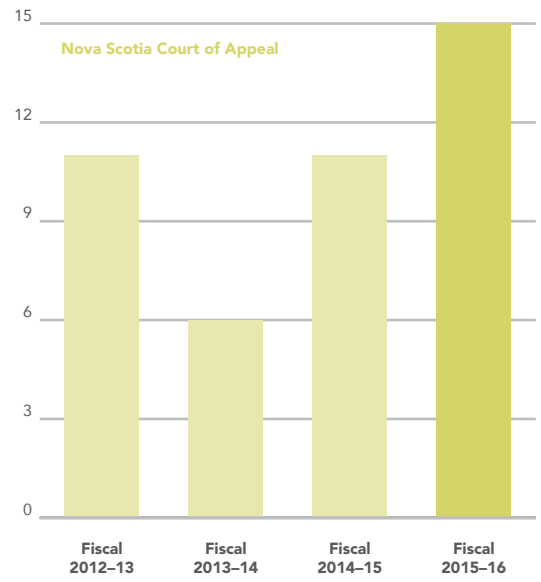


FIGURE 11
APPEALS BEFORE THE COURTS AT YEAR END



APPEAL MANAGEMENT

Diane Manara is the tribunal's registrar. She actively schedules and manages appeals as they are filed.

The tribunal is committed to moving appeals through to resolution as efficiently and expeditiously as possible having regard, at all times, to the rules of natural justice and procedural fairness. While all reasonable attempts are made to accommodate the procedural requests of participants, the tribunal is mandated to determine its own procedures and is at all times keenly aware of the need to resolve appeals in a timely fashion. The collaborative practices put in place with our system partners are a useful tool in achieving the balance necessary for effective, fair and timely adjudication of appeals.

Communication with appeal participants by telephone is a significant aspect of the registrar's duties. Unrepresented participants are called and given information about the appeal process. Where there is more than one participant to an appeal, conference calls are regularly convened to keep participants informed of the appeal status, to ensure compliance with tribunal deadlines, and to streamline issues. Some of the more complex files are assigned to individual appeal commissioners who will take the necessary steps to ensure that an appeal moves steadily toward a decision.

The tribunal worked closely with WAP during 2015–16 to track appeals and avoid any unnecessary delays. The tribunal actively supports what has become known as the WAP/New Medical process. Additional evidence provided by WAP on a tribunal appeal is considered by the appropriate case managers prior to a decision being rendered by the tribunal. This continues to result in a significant number of appeals being resolved without a hearing.

The tribunal collaborates with the Internal Appeals department at the board concerning the review and release of claim file information to employers for tribunal appeals. Together with the board, the tribunal has been exploring ways of streamlining the vetting and release process, as this process has become one requiring a significant time and labour commitment at the tribunal.

INTERAGENCY COOPERATION

The Chief Appeal Commissioner is a member of the Heads of Agencies Committee/Coordinating Committee, which oversees implementation of the WSIS strategic plan. The Issues Resolution Working Group (IRWG) is comprised of the Chief Appeal Commissioner, the Chief Workers' Adviser, the Manager of the board's Internal Appeals department, the board's Client Relations Officer and a board legal department representative.

IRWG was formed to discuss issues arising from the adjudication of claims and appeals. The committee exemplifies communication and information sharing among agency partners. The committee's mandate is to develop and implement issue resolution initiatives to improve the overall efficiency of the workers' compensation system.

IRWG held bi-monthly meetings during 2015–16 at which appeal statistics from each agency were shared and methods to improve the appeal system were discussed. These meetings have resulted in a reduction in appeals.

The tribunal, the board and WAP have formed a committee to explore the impact of appeal delays on claim costs and determine methods to decrease the number of appeals and time it takes to resolve appeals.

Over the past year, the tribunal worked with the WAP on improving the efficiency of docket days. Also, the WAP and tribunal are exploring requiring all uncontested appeals to be set down within 12 months, except in extraordinary circumstances.

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY

Tribunal decisions contain personal and business information, particularly medical information. The decisions are provided to appeal participants including the worker, the board, and the employer.

Decisions from January 2010 to date are published on the Canadian Legal Information Institute's free public website at www.canlii.org. Decisions issued prior to January 2010 are available free to the public through the Department of Labour and Advanced Education website at www.novascotia.ca/lae/databases.

All personal identifiers are removed from published versions of decisions. This includes removing all names of participants and board claim numbers. A small number of decisions are not published because they contain extremely sensitive information.

The tribunal has adopted a decision quality guide which outlines quality standards for decision making. It includes a section concerning privacy issues, which states that "decisions should be written in a manner that minimizes the release of personal information." Ultimately, a decision maker must have the discretion to include in a decision evidence that the decision maker finds relevant to support the findings outlined in the decision.

Worker claim files are released to employers after vetting by the tribunal for relevance. The tribunal's file release policy ensures compliance with Freedom of Information and Protection of Privacy (FOIPOP) without compromising the need of participants to know the evidence on appeal. Of particular concern to the tribunal is the need to ensure that personal worker information is not used for an improper purpose, improperly released or made public by a third party. The tribunal's correspondence accompanying file copies reflects these requirements and refers to appropriate sanctions.

The tribunal rarely receives FOIPOP applications. There were no applications in 2015–16. Applications regarding claim files are referred to the board as they remain the property of, and are held by, the board, unless there is an active appeal. If there is an active appeal, no FOIPOP application need be made by an appeal participant, as the act provides for distribution of relevant claim files to appeal participants.

Most FOIPOP applications for generic information particular to the tribunal are addressed through the tribunal's Routine Access Policy, which is posted on the tribunal's website.

NOTEWORTHY DECISIONS FOR THE YEAR 2015–16

Of the 603 decisions issued by the tribunal during fiscal year 2015–16, a number are of general interest to the community because they set out or confirm an approach to an issue. Alternatively, they may highlight an aspect of workers' compensation not often considered. These noteworthy decisions are discussed by topic area:

ASSESSMENTS AND EMPLOYERS

Two noteworthy decisions are of particular interest to employers this year.

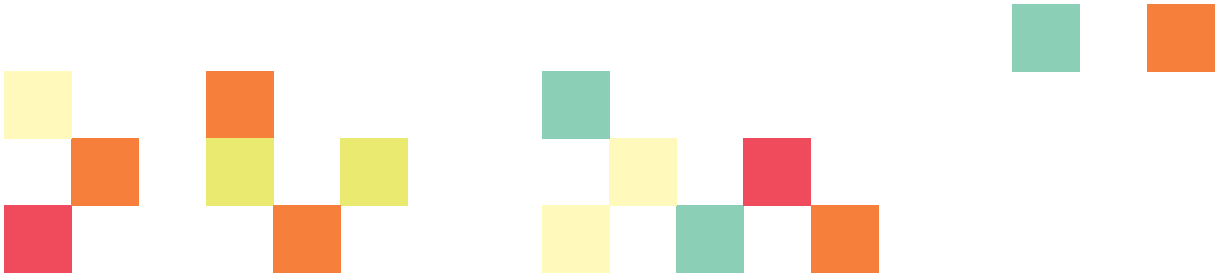
Decision 2015–162-AD (September 30, 2015, NSWCAT) concerned the joint and several liability of a director for a company where payroll amounts had been under-reported for two years. The under-reporting resulted in an under-payment of assessments to the board, for which it obtained a judgment and execution order against the director.

The director sought to be relieved of liability on the basis of "due diligence" and/or his good faith, honest reliance upon retained professionals and employees. These defences were not accepted by the appeal commissioner because the statutory provision which imposes joint and several liability on directors, section 136 of the act, does not allow for them.

Decision 2015–167-AD (October 26, 2015, NSWCAT) concerned the extent to which an employer may participate in the appeal process. A worker's representative acknowledged that an employer was able to challenge the initial recognition of a claim. Nonetheless, the representative submitted that an employer was precluded from challenging a worker's level of benefits. The representative cited the legislative history of the act for support, particularly the so-called "historic tradeoff" underlying the enactment of the legislation. The appeal commissioner found, however, that a plain reading of the act clearly supported an employer's entitlement to fully participate in the appeal process concerning all compensation issues.

CHRONIC PAIN

In *Decision 2013-483-AD & 2014-370-AD* (March 15, 2016, NSWCAT), an appeal commissioner was called upon to consider whether a worker's substantial pain-related impairment (PRI) was subject to apportionment by the board. The appeal commissioner reasoned that the Chronic Pain Regulations were authorized under the act as a "separate scheme."



Section 7 of the Chronic Pain Regulations requires that an injured worker with a substantial pain impairment be paid a benefit based upon a 6 per cent PRI rating. Section 9 of the same regulations requires that a worker's permanent impairment benefit calculation be determined in the manner provided by sections 34 to 48 of the act. Since neither the regulations nor the specified sections of the act provide for apportionment, the appeal commissioner found that the worker's PRI was not subject to apportionment.

EARNINGS-REPLACEMENT BENEFITS

Of the many appeals concerning temporary earnings-replacement benefits and extended earnings-replacement benefits, four decisions were selected for comment.

Decision 2015-55-AD (May 28, 2015, NSWCAT) exemplifies a number of recent appeals. A seasonal worker was injured in June of 2013. Board decision-makers determined the worker's long-term rate for purposes of an earnings-replacement benefit based on her earnings and EI benefits received from January to July 2013. The appeal commissioner found that policy 3.1.1R3 did not permit the board to use "estimated future earnings" in calculating a worker's pre-accident earnings for a long-term rate.

The appeal commissioner inferred that the post-injury earnings included to calculate pre-injury earnings had likely been negatively impacted by the injury. Accordingly, the board was directed to recalculate the worker's long-term rate. The appeal commissioner specified that the board was to base the worker's pre-injury earnings on an average of her 2011 and 2012 earnings, as these best represented her earnings-loss due to the accident.

Decision 2014-641-RTH (July 31, 2015, NSWCAT) is of interest because it highlights an unsettled question concerning the possible interplay between a "new evidence" reconsideration of a decision and a review and adjustment of temporary earnings-replacement benefits (TERB). Section 185(2) of the act and policy 8.1.7R2 limit the board's discretion to reconsider a "final decision"; whereas section 72 permits the board to review and adjust TERB at any time.

The case law is not entirely clear as to whether, and under what circumstances, the board may require new evidence pursuant to policy 8.1.7R2 when determining a worker's entitlement to a section 72 review and adjustment of TERB. The appeal commissioner outlined recent tribunal jurisprudence in this difficult area and exercised his discretion to send the matter back to the board pursuant to section 251 of the act to have board decision-makers consider an issue first raised before the tribunal and to evaluate additional documentary evidence.

Decision 2015-440-AD (December 17, 2015, NSWCAT) involved an independent franchisee and the calculation of his post-injury benefit. After his injury, the worker was unable to perform the full duties of his employment without the assistance of a paid helper. On appeal, he sought reimbursement for the cost of the helper. The appeal commissioner found that the payment of wages to a helper had already been taken into consideration when the board calculated his earnings-replacement benefits and denied the worker reimbursement.

Decision 2015-368-AD (March 31, 2016, NSWCAT) involves the timing and calculation of various benefits. The worker in question had been awarded an extended earnings-replacement benefit (EERB) and a PRI. A few days later, he was denied a period of TERB by a case manager. The Worker appealed the case manager's denial to a hearing officer seeking an increased PRI, backdating of his PRI and a period of TERB.

The tribunal awarded the worker a 6 per cent PRI and TERB. However, prior to the appeal being heard at the tribunal, the Worker was awarded a Canada Pension Plan (CPP) benefit. Subsequent case manager decisions adjusted his non-EERB benefits. When an issue concerning TERB was again appealed, a hearing officer directed that the worker's EERB should be reduced to reflect his receipt of CPP benefits (by virtue of section 38 of the act).

On further appeal to the tribunal, an appeal commissioner determined that the initial EERB award had never been the subject of an appeal. Hence, it was found to be a "final" determination. Alternatively, the EERB amount was finalized when the previous tribunal decision was rendered. As such, the appeal commissioner found that section 71 of the act precluded the board from adjusting the worker's EERB amount until a 36-month review is performed.

HEARING LOSS

Decision 2015-42-AD (August 28, 2015, NSWCAT) exemplifies a trend in the tribunal's more recent occupational noise-induced hearing loss (ONIHL) appeals. The worker in question retired in 1991 after having been exposed to excessive occupational noise. An audiogram done in 2001 showed insufficient hearing loss to satisfy the board's threshold for benefits for ONIHL. However, a 2013 audiogram showed that the worker's hearing loss exceeded the threshold for compensation, even though a portion of the loss must have been post-retirement and unrelated to occupational noise.

The appeal commissioner reviewed a number of recent ONIHL decisions which recognized workers' entitlement to benefits, subject to apportionment between compensable and non-compensable loss. The appeal commissioner concluded that a significant portion of the worker's hearing loss was compensable, entitling him to medical aid in the form of hearing aids.

MEDICAL AID

Issues concerning medical aid assistance gave rise to five decisions of interest.

The worker in *Decision 2014-724-AD* (May 29, 2015, NSWCAT) was issued parking tickets and incurred additional corresponding car rental charges in connection with trips for medical appointments. Reimbursement for these costs was denied by the board. The appeal commissioner expressed some sympathy for difficulties the worker encountered during the respective medical trips. However, the appeal commissioner found that reimbursement was precluded by board policy 2.1.1R12.

Decision 2015-19-AD & 2015-20-AD (June 10, 2015, NSWCAT) involved a worker who was the main caregiver for his disabled spouse. In 2014, he required total knee replacement surgery because of an old workplace injury. Following the surgery, he sought reimbursement for the cost of respite care and related expenses he incurred for his spouse, plus mileage reimbursements for his visits to see his spouse during his recuperation.

The appeal commissioner found that such respite care and travel costs were not covered by board policy. The appeal commissioner specifically referred to policies 2.3.1R, 2.1.1R10 and 2.1.6R and noted that only health care provided to injured workers and travel to attend medical appointments for compensable injuries are covered.

Ongoing chiropractic care in the form of laser therapy and myofascial release massage was considered in *Decision 2015-85-AD* (August 13, 2015, NSWCAT). The board sought to align its position against the use of passive modalities for long-term pain management with guidelines from the American College of Occupational and Environmental Medicine (ACOEM). The appeal commissioner accepted that ACOEM guidelines provide an appropriate source of information for the board to consider, but noted that medical aid is not solely determined by such guidelines.

The appeal commissioner found that there was a lack of scientific support favouring such treatment on a maintenance basis. Hence, the appeal was denied for lack of sufficient evidence that the maintenance treatments in question were consistent with standards of health care practices in Canada as required by section 1 of policy 2.3.1R.

Decision 2014-642-AD-RTH & 2015-194-AD (November 10, 2015, NSWCAT) involved a worker who had undergone unsuccessful shoulder surgeries. In the course of treatment, the worker developed a collapsed lung and, allegedly, other complications. The worker's shoulder condition necessitated travel for consultations with an American orthopaedic specialist. Among other benefits, the worker sought costs of such travel, associated travel insurance and a Nexus card.

The appeal commissioner accepted that, although highly unusual, it was necessary for the worker to travel for treatment concerning his compensable injury, given its unfavourable treatment outcome. A Nexus card was found to be appropriate to facilitate his travel under the circumstances. Travel insurance was also allowed on a one-time basis, given the possibility that someone with a previous collapsed lung could experience problems during a flight.

The worker in *Decision 2014-624-AD* (December 23, 2015, NSWCAT) suffered a severe injury resulting in paraplegia. The worker sought financial assistance from the board for costs, over and above those inherent in building a standard home, to provide him with wheelchair-accessibility. Such incremental costs included extra square footage needed to use a wheelchair, upgraded flooring, accessible windows, a wheel-in shower and a custom stove.

The board expressed willingness to modify an existing home, but denied the worker's request to assist with incremental costs for the construction of a new home. In her reasons, the appeal commissioner considered the definition of "home modifications" in the board's policy manual, board procedure 7.10.1 (concerning safety modifications for access and for personal care activities) and the worker's evidence. The appeal commissioner found that it was an appropriate exercise of the board's discretion to cover the added costs requested for new home modifications to address the worker's accessibility needs.

NEW EVIDENCE/RECONSIDERATION

Section 185(2) and policy 8.1.7R2 provide for a reconsideration of a previous "final decision." Reconsideration may be available where "new evidence", as defined by policy, is presented which, in conjunction with evidence already available, is capable of impacting the outcome of a final decision. Three noteworthy appeals considered whether the new evidence criteria was satisfied.

In *Decision 2013-112-AD* (July 23, 2015, NSWCAT), a worker sought to have reports from his CPP claim file, which existed at the time of the final decision, found to be new evidence. The worker was literate, but had little formal education. The appeal commissioner applied an objective test: whether the documents in question could have been discovered and presented through the exercise of reasonable due diligence. Applying this test, the appeal commissioner found that the worker knew there was a likelihood such documents existed and that he could have acquired them in a timely way had he applied reasonable due diligence. Therefore, the CPP reports did not qualify as new evidence.

Decision 2014-654-AD (November 30, 2015, NSWCAT) concerned an illiterate worker who made a late attempt to appeal a case manager's decision denying her recognition for an alleged workplace injury. Medical evidence had "technically" been available. However, it had been late in arriving at the board and had been overlooked by all concerned. The appeal commissioner considered that the worker's literacy placed her at a "serious and lasting disadvantage in claiming benefits."

The appeal commissioner found, in effect, that had the worker been able to appropriately respond to the decision denying her recognition within the appeal period, she would have filed a timely appeal. The appeal commissioner concluded that such evidence satisfied the new evidence criteria because it could not have been presented at the time the final decision was made.

Decision 2015-409-AD (February 5, 2016, NSWCAT) was decided by the same appeal commissioner who rendered *Decision 2014-654-AD* and it involved many of the same circumstances. The worker was described as having little education, a "modest intellect" and was unrepresented at highly contested proceedings which led to a final decision. The worker's representative for the new evidence appeal submitted additional evidence in the form of affidavits, statements and testimony.

Given the worker's cognitive and educational deficits, the appeal commissioner accepted that it was not possible for the worker to have adequately presented his case for recognition in the initial proceedings, particularly in the face of aggressive opposition. Since the additional evidence could not have been presented earlier, the appeal commissioner found that it qualified as new evidence warranting a return of the matter to the board for reconsideration of the final decision.

PERMANENT MEDICAL IMPAIRMENT (PMI)

An employer appeal of a PMI award for bilateral dermatitis of the hands gave rise to *Decision 2015-38-AD* (August 27, 2015, NSWCAT). The board found that the worker was entitled to a 24 per cent PMI rating following an assessment by a board medical advisor. A differing opinion, recommending a 2.2 per cent PMI rating, was provided by a former medical advisor with considerable experience.

The appeal commissioner attempted to weigh the divergent opinions in light of the applicable American Medical Association's *Guides to the Evaluation of Permanent Impairment, Fourth Edition* (AMA Guides). The appeal commissioner thought that the AMA Guides were somewhat ambiguous concerning the condition in question. In order to resolve the ambiguity, the appeal commissioner reasoned that the AMA Guides had been adopted for use by the board pursuant to policy 3.3.4R and section 34 of the act. The appeal commissioner concluded that the AMA Guides were, in effect, a species of law. As such, general principles of statutory interpretation could be applied.

The appeal commissioner also cited legal authority which held that workers' compensation legislation should be interpreted liberally. If reasonable doubts or ambiguities arise, they should be resolved in favour of the worker. Applying this reasoning to the facts, the appeal commissioner noted that the AMA Guides differentiate severity in terms of daily use of potent prescription medication and the impact of a condition upon activities of daily living. Viewed in these terms, the AMA Guides categorized the worker's impairment beyond the PMI rating supported by the employer and within the range estimated by the assessing board physician. Therefore, the employer's appeal was denied.

RECOGNITION

The threshold inquiry in compensation cases is whether a personal injury or disease may be "recognized" as work-related and compensable under the act.

In *Decision 2014-770-AD* (June 30, 2015, NSWCAT), the pivotal issue was whether an injury was employment-related. The reasons of the appeal commissioner demonstrate the highly fact-specific analysis inherent in such cases. Briefly, the worker sustained an injury during a paid coffee break. She left the employer's premises, as there was no cafeteria there. On her return trip, she stepped off a sidewalk onto a parking lot, which was not part of her employer's premises, in order to retrieve a five dollar bill. In so doing, she slipped on ice and injured herself.

The appeal commissioner found that the incident occurred in the course of the worker's employment. Therefore, he focused on the second part of the basic recognition test: whether the incident arose out of employment. The appeal commissioner cited leading authority from the Nova Scotia Court of Appeal, decisions from Ontario's Workplace Safety and Insurance Appeals Tribunal (WSIAT) and board policy 1.3.7. The appeal commissioner concluded that, even considering the presumption under subsection 10(4) of the act, the evidence demonstrated that it was more likely than not that the incident had not arisen out of her employment.

The appeal commissioner thought that the following factors militated against recognition: the incident was not on the employer's premises; she did not face any greater risk than was experienced by a member of the general public; she was not under any direct supervision or instructions from the employer at the time in question; and traveling for a snack was not incidental to a duty of employment. Therefore, he denied the worker's appeal.

The remaining three appeals selected for comment in this subject area involve psychological conditions.

Decision 2013-126-PAD (April 30, 2015, NSWCAT) was a panel decision rendered by three appeal commissioners. The panel considered whether a federal employee's claim for a gradual-onset psychological injury should be determined pursuant to the *Government Employees Compensation Act* (*GECA*) and board policy 1.3.6, which allows for claims of gradual-onset stress. As such, it imposes different conditions upon federal workers than are otherwise provided by the act (and policy 1.3.9 which deals generally with claims of psychological injury arising from traumatic events).

The panel relied upon a recent Supreme Court of Canada decision, *Martin v. Alberta (Workers' Compensation Board)*, 2014 SCC 25 (*Martin*). In *Martin*, the Court accepted that Parliament intended to treat federal employees the same as their provincial counterparts. The Court found that *GECA* allows for provincial statutes and boards to supply uniform conditions for entitlement to benefits.

Since policy 1.3.6 treats federal and other employees differently, the panel found that the policy was contrary to the express provisions of the act. Therefore, the worker in question must proceed pursuant to policy 1.3.9. As a footnote, an appeal from the panel decision to the Nova Scotia Court of Appeal was not allowed to proceed. The Court found that a preliminary decision by the tribunal was not appealable to the Court because it lacked the requisite finality.

In *Decision 2014-719-AD* (May 12, 2015, NSWCAT), an appeal commissioner considered whether a youth advocate worker had experienced an acute reaction to a traumatic event pursuant to section 2(a) of the act and board policy 1.3.9. The appeal commissioner noted that the policy required a traumatic event to be assessed objectively; i.e., the so-called "reasonable person" standard.

The worker claimed she had suffered a psychological trauma resulting in depression and "burnout" when she learned a client had attempted suicide soon after being seen by the worker. The appeal commissioner determined that the policy required either a direct personal experience of a traumatic event, or that such an event be directly witnessed, in order to meet the policy threshold for acceptance as an acute reaction to a traumatic event. Since this had not occurred, the appeal was denied.

Decision 2015-29-AD (February 23, 2016, NSWCAT) also involved a psychological injury. Unlike the appeals discussed above, the psychological injury was said to have arisen from a minor slip and fall accident. The appeal commissioner provided a helpful discussion of policies 1.3.5, 1.3.6 and 1.3.9 and found that policy 1.3.5 applied. In contrast to the claim discussed in *Decision 2014-719-AD* (applying policy 1.3.9), the appeal commissioner rejected the argument that policy 1.3.5 requires objectively traumatic circumstances in order to accept a claim for psychological trauma secondary to a physical injury.

The appeal commissioner noted that policy 1.3.5 codified common law causation principles. In this case, the worker had developed an extreme fear of falling and re-injury soon after the physical injury. He was diagnosed with anxiety, major depressive disorder and panic disorder. Based on the evidence, the appeal commissioner found that a causal connection between the physical injury and psychological condition existed. Therefore, it was appropriate for the board to have recognized a psychological injury and the employer's appeal was denied.

RECURRENCE

The two decisions presented in this sub-heading demonstrate the approach the tribunal has taken following the Nova Scotia Court of Appeal decision in *Ellsworth v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2013 NSCA 131* (*Ellsworth*). The first decision discussed below is also recommended for its clear and concise summary of some of the complexities surrounding recurrences.

Decision 2012-254-AD & 2013-165-AD (May 12, 2015, NSWCAT) involved a worker who injured his knee in 1979. The injury resulted in a time loss and PPD (i.e., an award under prior legislation which equates with a PMI). More recently, the worker developed cardiac problems causally related to medication prescribed for his knee. The board awarded a PMI for his cardiac problems, but denied entitlement to an EERB pursuant to section 227 because the condition related to a pre-1990 injury. That is, the act only entitles workers to an EERB where their respective injuries occurred on or after March 23, 1990.

On appeal to the tribunal, the worker argued that his cardiac problems should be considered a new injury entitling him to an EERB. A number of tribunal decisions dating back to 2010 were cited in support of this argument. However, the appeal commissioner rejected the earlier line of decisions as no longer accurately representing the current state of the law.

The appeal commissioner distinguished the facts in the appeal before him from *Ellsworth*. He reasoned that the worker had already been recognized for a permanent impairment as a result of his original injury. This crystallized the worker's benefits under section 227. As well, the cardiac problems were said to be inexorably linked to the 1979 injury and could not stand on their own as a compensable injury. Hence, an EERB was denied.

The issue in the second matter, *Decision 2015-158-AD* (November 23, 2015, NSWCAT), was whether a worker's injury was a new injury or a recurrence. The worker was a roofer who injured his back in 2012 while working for a previous employer (employer 1). After a period of recuperation, the worker returned to work for another employer (employer 2) and developed further back problems in 2014.

Board decision-makers eventually concluded that there had been a new injury for which employer 2's experience rating would be affected. Employer 2 appealed seeking a finding that the injury was a recurrence of a prior injury for which employer 1 was responsible. The appeal commissioner thoroughly reviewed the available facts. He concluded that, while the worker's symptoms were consistent with a recurrence of the 2012 injury, the recurrence was caused by employment duties with employer 2. As such, employer 2 was the responsible employer.

SURVIVOR BENEFITS

Section 60 of the act provides for compensation to be paid to survivors when a worker dies as a result of a compensable injury. Two noteworthy decisions in this area are discussed below.

Decision 2014-567-AD (October 26, 2015, NSWCAT) arose in relation to a worker who died in a motor vehicle accident while driving an assigned company vehicle. For the most part, he had not used the vehicle for purposes other than commuting between his home and his regular jobsite. When the fatal collision occurred, he was the sole occupant in his vehicle and he had just left his home for his regular jobsite. He had been going to his regular jobsite, which was some distance from the employer's premises, for about three weeks prior to his death.

Other than temporary assignments, it was anticipated prior to the worker's death that he would have continued to work at the regular jobsite for another 10 months.

Despite the use of a company vehicle, the appeal commissioner found that the general rule excluding accidents during a commute to or from work applied. Therefore, the worker's fatal injuries were found not to have arisen out of and in the course of employment. As a result, the worker's surviving spouse was not entitled to survivor benefits.

Decision 2014-734-AD (July 27, 2015, NSWCAT) demonstrates the interplay between survivor benefits and the board's special protection coverage. A worker died of a compensable heart attack while being provided the minimum amount of special protection coverage offered by the board. Ironically, due to a business downturn, the worker had elected to reduce his coverage for the year of his death; whereas in previous years his coverage had been at the maximum available.

The board limited survivor benefits to the special protection coverage amount. The deceased worker's surviving spouse argued that paragraph 13 of policy 3.1.1R3 was inconsistent with section 42 of the act (providing for calculation of gross earnings) because the policy failed to consider the deceased worker's earnings for the three years prior to his death.

The appeal commissioner rejected the surviving spouse's argument. He noted that section 4(7) allows the board to set "terms of admission" for workers brought into the act who would otherwise not be covered and found that paragraph 13 of policy 3.1.1R3 set a term of admission.

SUSPENSION/TERMINATION OF BENEFITS

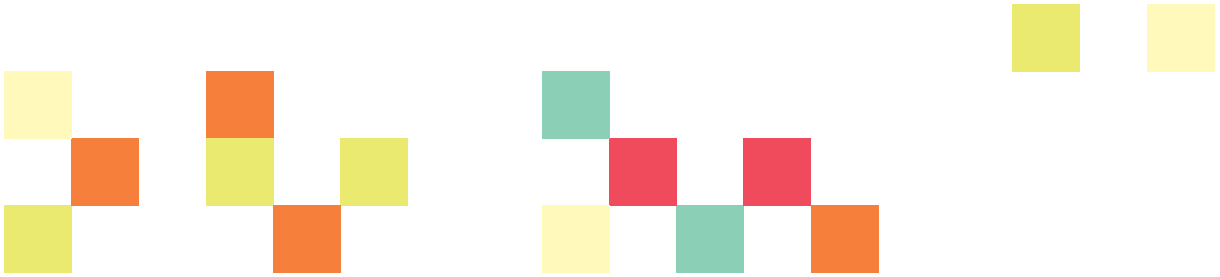
In *Decision 2015-266-AD* (January 26, 2016, NSWCAT), an appeal commissioner was called on to address the exercise of the board's discretion pursuant to section 81 of the act. This section allows the board to refuse or limit compensation or treatment for conditions where a worker was previously injured, and would be vulnerable to re-injury under similar employment conditions. In order to exercise its discretion, the board must first put a worker on notice and offer to provide necessary vocational rehabilitation to avoid re-injury.

The worker in this appeal, a heavy equipment mechanic, had a left elbow injury in 2011. He subsequently obtained similar work with another employer, but had flare-ups of his injury for which the board provided benefits. In 2014, he sustained a right-sided injury which led to overuse of his left elbow and another flare-up.

The board put the worker on notice that it would not provide benefits beyond the current flare-up. The appeal commissioner gave a strict reading to section 81 and found that the worker had not sustained an injury "of the same nature" as the injury in the earlier claim. Therefore, section 81 was found to be inapplicable and the worker's eligibility for benefits was not affected.

PROCEDURAL QUESTIONS AND OTHER

Five additional appeals were considered noteworthy concerning procedural questions raised or issues not encompassed by other categories.



Decision 2013-413-AD (May 21, 2015, NSWCAT) demonstrates that the tribunal may take an assertive role to discourage undue delay and unnecessary postponements. The appeal had been set down for hearing in May 2014. A postponement was allowed because it was anticipated that a medical report from the family physician, which had been requested in November 2013, would be received.

Shortly before the April 2015 rescheduled hearing date, the worker's representative requested a referral back to the board pursuant to section 251. The request was based on non-receipt of the medical report and a fresh assertion that two of the worker's other claim files contained evidence relevant to the appeal and had not been considered. The presiding appeal commissioner denied the request based on the 17-month delay, the likelihood that the medical report might never be received and the uncomplicated nature of potentially relevant evidence from the additional claim files.

Thereafter, a further request for postponement was made, purportedly based upon the representative's recent discussions with the family physician. The second request for postponement was also denied (although a limited time post-hearing was allowed for the representative to obtain the medical report in question, which was never tendered).

Decision 2015-293-AD (August 27, 2015, NSWCAT) involved a worker denied entitlement to an EERB by a case manager in 2011. Following the release of the *Ellsworth* decision by the Nova Scotia Court of Appeal, the worker's representative sought to have the 2011 decision reviewed. An appeal of a denial of an extension of time to appeal the 2011 decision was eventually appealed to the tribunal.

The appeal commissioner found that the circumstances were insufficient to warrant granting an extension of time. The most compelling reason for the denial was the appeal commissioner's finding that the worker had no intention to appeal the matter in 2011. The worker only changed his mind years later after learning that he might benefit from a more recent interpretation of the law. The appeal commissioner concluded that no injustice would result if an extension of time was not granted.

Decision 2014-763-AD (December 9, 2015, NSWCAT) is considered noteworthy because the appeal commissioner made a negative credibility finding based upon the worker's previous fraud conviction. The fraud had been perpetrated against the board. In his decision, the appeal commissioner cited various authorities in support of a negative credibility finding.

Decision 2015-407-RTH (January 18, 2016, NSWCAT) is a practical example of how an employer may obtain a worker's relevant MSI records. The appeal commissioner thought that the employer's request for MSI records would be best dealt with by the board pursuant to its authority in section 109(3) of the act. The matter was referred back to the board with a direction for additional investigation pursuant to section 251 of the act.

Decision 2015-314-AD (January 28, 2016, NSWCAT) involves a significant retroactive attendant allowance, which had previously been awarded following a direction by the tribunal to do so. The award was for the period 1977 until the worker's death in 2009. In calculating the award, the board applied repealed legislation as well as the current act (i.e., three different pieces of legislation). However, the appeal commissioner considered previous tribunal decisions concerning the retrospective application of policies and found that the retroactive attendant allowance should be calculated with reference only to the current act.

APPEALS FROM TRIBUNAL DECISIONS

The tribunal is the final decision-maker in the workers' compensation system. In limited circumstances, the Workers' Compensation Act permits appeals from tribunal decisions to the Nova Scotia Court of Appeal.

The Court of Appeal can only allow an appeal of a tribunal decision if it finds an error in law or an error of jurisdiction. The Court does not re-determine facts or investigate a claim.

A participant who disagrees with a tribunal decision can ask the Court of Appeal to hear an appeal of the decision. An appeal must be filed with the Court within 30 days of the tribunal's decision. Under special circumstances, the Court can extend the time to file an appeal.

An appeal has two steps.

First, the person bringing the appeal must seek the Court's permission to hear the appeal. This is called "seeking leave to appeal." Where it is clear to the Court that the appeal cannot succeed, it denies leave without giving reasons and no appeal takes place.

Second, if leave is granted, there is an appeal hearing and the Court will allow or deny the appeal.

During 2015–16, 17 appeals from tribunal decisions were filed with the Court of Appeal:

- 13 decisions were appealed by workers;
- 3 decisions were appealed by employers; and,
- The board appealed one decision.

During 2015–16, 10 appeals were resolved as follows:

- 2 appeals were discontinued by the party who filed the appeal;
- leave to appeal was denied 4 times; and,
- 4 appeals were decided by the Court of Appeal – all were denied.

At the beginning of 2015–16, there were 8 active appeals before the Court of Appeal. At the end of 2015–16, there were 15 active appeals.

DECISIONS OF THE COURT OF APPEAL

The Court decided four appeals this fiscal year.

Muggah v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2015 NSCA 63

Ms. Muggah was divorced. She was receiving spousal support from her former spouse when he died as a result of a workplace accident. She applied for, and was denied, survivor's benefits from the board.

The tribunal found that Ms. Muggah was not entitled to survivor benefits as she was not a "spouse" or member of the worker's family at the time of her former spouse's death. The tribunal further found that the failure to provide survivor benefits to former spouses did not violate the equality provisions under the *Canadian Charter of Rights and Freedoms*.

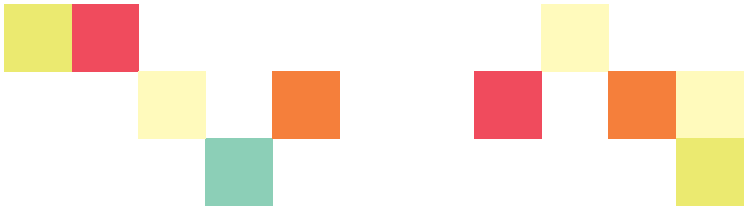
The Court of Appeal confirmed the tribunal's finding that there was no violation of Ms. Muggah's equality rights. The Court found that the constitutional equality guarantee in section 15 of the *Charter* applies to married and common law spouses, but not to former spouses. Further, the Court agreed with the tribunal's analysis in finding that the act's failure to provide survivor benefits for former spouses did not discriminate.

At paragraph 49 the Court wrote:

> The Workers' Compensation Fund isn't meant to be a universal social safety net. The trappings of the Workers' Compensation Board aren't designed to duplicate or replace the existing legal web that operates to support divorced spouses.... The Workers' Compensation Board isn't equipped with the expertise, the resources and infrastructure, the disclosure, or the statutory and procedural authority to replicate the operations of the family courts.

Dale v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2015 NSCA 71

Mr. Dale sought a finding that he was entitled to compensation for gradual onset stress. The act's definition of accident only includes stress which is an "acute reaction to a traumatic event." The board denied Mr. Dale's claim as there was no "accident," because gradual onset stress is not compensable. This finding was confirmed by the tribunal, which also found that the stress exclusion did not discriminate against Mr. Dale's constitutional equality rights.



The Court of Appeal dismissed Mr. Dale's appeal of the finding that the definition of accident did not violate section 15 of the *Canadian Charter of Rights and Freedoms*. The Court did not address the *Charter* argument on its merits.

Instead, the Court found it did not have enough facts to conduct a proper *Charter* analysis. This was because the tribunal's decision did not assess whether Mr. Dale's claim would have succeeded if there were no gradual onset stress exclusion.

Legere v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2016 NSCA 5

The tribunal, in a preliminary decision, ruled that board policy 1.3.9 applied to Mr. Legere's claim. The tribunal indicated that it would assess Mr. Legere's entitlement to compensation for stress under that policy after receiving further submissions and evidence.

Mr. Legere disagreed with this preliminary determination, and filed an appeal to the Court of Appeal.

The Court of Appeal dismissed Mr. Legere's appeal of this preliminary decision. The Court found that it had no authority to consider appeals from most preliminary matters.

The Court noted that section 256 of the act only permits appeals of final orders, rulings or decisions of the tribunal. As the tribunal had yet to decide whether Mr. Legere was entitled to compensation, there was no final decision.

Maritime Paper Products Limited Partnership v. LeBlanc, 2016 NSCA 13

Mr. LeBlanc was assessed for a permanent medical impairment by a board medical advisor using the AMA Guides. The board awarded the worker a 14 per cent permanent medical impairment based on this assessment.

On appeal to the tribunal, Maritime Paper retained a doctor. This doctor opined that the board medical advisor's method of assessment was not permitted by the AMA Guides. He indicated that the worker's award should have been less than 14 per cent.

The tribunal upheld the recommendation of the board medical advisor over that of the doctor retained by Maritime Paper.

The Court of Appeal dismissed Maritime Paper's appeal. The Court found that the tribunal properly considered all policies which applied to the award of a permanent medical impairment, and was reasonable in its weighing of conflicting evidence.

The Court found that the tribunal rightly placed the burden of proof on Maritime Paper to disprove the correctness of the 14 per cent award. This was because the board had found that Mr. LeBlanc was entitled to the 14 per cent award and Maritime Paper was challenging that award.

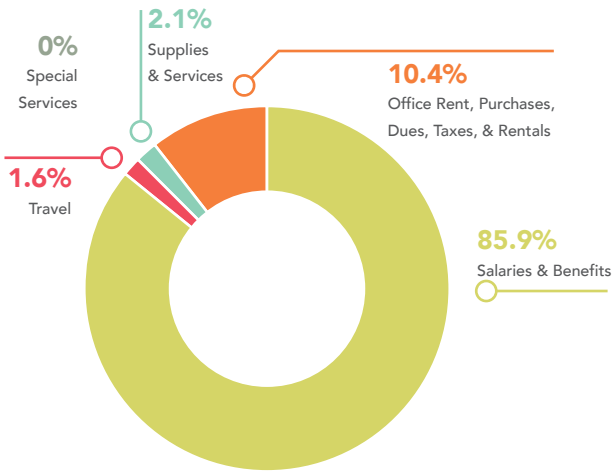
The Court of Appeal stated at paragraph 28:

> The Appeal Commissioner did not embark on an impermissible application of the burden of proof. To the contrary, she correctly considered the burden on Maritime Paper when challenging Mr. LeBlanc's claim. After weighing all of the evidence in a well-reasoned and thoughtful decision she determined it had not met that burden.

FINANCIAL OPERATIONS

In 2015–16, the tribunal's total expenditures were within 73 per cent of the original authority and within 83 per cent of our revised forecast (see Figure 12). Net expenditures totaled $1,629,166, a decrease from the previous year.

FIGURE 12
BUDGET EXPENDITURES
(for the Fiscal Year Ending March 31, 2016)



APPENDIX

FIGURE 1
APPEALS RECEIVED

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 2012–13	69	81	98	61	70	33	54	74	47	45	61	72	765
Fiscal 2013–14	73	77	57	42	53	58	82	88	66	58	58	75	787
Fiscal 2014–15	51	70	55	64	58	55	66	47	83	66	67	62	744
Fiscal 2015–16	58	71	72	73	53	45	52	44	57	30	48	69	672

FIGURE 2
DECISIONS RENDERED

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 2012–13	63	78	74	58	50	53	63	67	46	69	61	32	714
Fiscal 2013–14	63	56	59	55	48	56	52	60	44	53	42	51	639
Fiscal 2014–15	51	54	65	53	35	52	46	41	39	47	47	48	578
Fiscal 2015–16	39	60	56	48	51	49	53	48	41	51	50	57	603

FIGURE 3
APPEALS OUTSTANDING AT YEAR END

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
Fiscal 2012–13	657	650	661	657	673	644	626	622	617	583	579	605
Fiscal 2013–14	612	626	619	597	597	589	607	628	646	647	656	670
Fiscal 2014–15	658	663	635	638	649	647	659	657	688	699	713	715
Fiscal 2015–16	724	723	734	751	741	728	714	701	706	671	657	655

FIGURE 4
TIMELINESS TO DECISION (CUMULATIVE PERCENTAGE BY MONTH)

Months	1	2	3	4	5	6	7	8	9	10	11	>11
Fiscal 2012–13	0.42	3.78	12.89	27.03	41.04	51.40	57.42	63.45	69.61	72.83	74.79	100
Fiscal 2013–14	0.31	2.66	8.76	20.50	33.33	42.88	49.14	54.46	59.78	64.32	68.08	100
Fiscal 2014–15	0.00	1.38	8.82	22.49	32.87	42.39	51.90	59.86	63.49	67.65	71.80	100
Fiscal 2015–16	0.33	1.82	7.13	12.77	23.55	33.17	41.46	48.42	53.40	57.88	60.70	100

FIGURE 5
DECISIONS BY REPRESENTATION

Self-Represented	75
Workers' Advisers Program	378
Injured Worker Groups, Outside Counsel & Others	150

FIGURE 6
DECISIONS BY ISSUE CATEGORIES – WORKER

Recognition of Claim	177
New/Additional Temporary Benefits	102
New/Increased Benefits for Permanent Impairment	156
Medical Aid (Expenses)	90
New/Additional Extended Earnings Replacement Benefits	67
New Evidence	38
Chronic Pain	65
Termination of Benefits for Non-compliance	11
All other issues	72
Total	778

FIGURE 7
DECISIONS BY ISSUE CATEGORIES – EMPLOYER

Acceptance of Claim	16
Extent of Benefits	10
Assessment Classification	0
Assessment Penalties	0
Other Claims Issues	2
Other Assessment Issues	0
Total	28

FIGURE 8
DECISIONS BY MODE OF HEARING

	Oral Hearings	Written Submissions	Total
Fiscal 2012–13	414	300	714
Fiscal 2013–14	387	252	639
Fiscal 2014–15	374	204	578
Fiscal 2015–16	437	166	603

FIGURE 9
DECISIONS BY OUTCOME

Allowed	193
Allowed in Part	86
Denied	263
S29	0
RTH	58
Moot	3
Total Final Decisions	603
Appeals withdrawn	129
Total Appeals Resolved	732

FIGURE 10
DECISIONS BY APPELLANT TYPE

Worker Claim Appeals*	576
Employer Claim Appeals	25
Employer Assessment Appeals	2
Section 29 Applications	0
Total	603

*Employer participation in Worker appeals 24%

FIGURE 11
APPEALS BEFORE THE COURTS AT YEAR END

	Nova Scotia Court of Appeal	Supreme Court of Canada	Total
Fiscal 2012–13	11	0	11
Fiscal 2013–14	6	0	6
Fiscal 2014–15	11	0	11
Fiscal 2015–16	15	0	15

FIGURE 12
BUDGET EXPENDITURES
(for the Fiscal Year Ending March 31, 2016)

	Authority	Final Forecast	Actual Expenditures
Salaries & Benefits	$1,809,000	$1,561,000	$1,399,180
Travel	$56,000	$54,000	$26,171
Special Services	$85,000	$81,000	$691
Supplies & Services	$60,000	$64,000	$33,662
Office Rent, Purchases, Dues, Taxes, & Rentals	$210,000	$210,000	$169,462
Sub Total	$2,220,000	$1,970,000	$1,629,166
Less Recoveries	$0	$0	$0
Totals	$2,220,000	$1,970,000	$1,629,166