

Workers' Compensation Appeals Tribunal

Annual Report
For the Year Ending March 31, 2017



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**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, 2017.

Respectfully submitted,

Sandy MacIntosh
Chief Appeal Commissioner



**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, 2017.

Respectfully submitted,

The Honourable Diana C. Whalen
Minister Responsible for Part II of the *Workers' Compensation Act*

Tribunal Personnel

Colleen Bennett
Supervisor, Office Services

Tricia Chiasson
Clerk/Scheduling Coordinator

Charlene Downey
Secretary/Receptionist

Dawn Evans
Clerk

Carla Gauvin
Secretary

Samantha Mayen
Clerk/Scheduling Coordinator

Sandy MacIntosh
Chief Appeal Commissioner

Sharon Pierre Louis
Executive Assistant to the
Chief Appeal Commissioner

Leanne Rodwell Hayes

Alison Hickey

Glen Johnson

Christina Lazier

Brent Levy

Andrew MacNeil

Diane Manara (Registrar)

David Pearson

Andrea Smillie

Appeal Commissioners

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Executive Summary

The tribunal resolves appeals from final decisions of hearing officers of the Workers' Compensation Board (the board). It also decides whether the Workers' Compensation Act (the act) bars a right of action against employers. The tribunal is legally, physically and administratively separate from the board to ensure that it is independent.

In 2016–17, the tribunal provided 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 increased slightly from last year. In 2016–17, workers and employers filed 695 appeals. Our appeal commissioners decided 476 appeals and a total of 606 appeals were resolved.

The tribunal's registrar worked effectively to resolve preliminary matters on appeals. The work of the tribunal is a team effort. Dedicated tribunal staff assisted workers and employers.

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. The extent of employers' entitlement to disclosure of workers' claim files to respond to an appeal will be addressed by the Court of Appeal in 2017–18.

The tribunal has “stated a case” to the Court of Appeal. The board's hearing loss policy prohibits claims unless a worker had an audiogram test within five years of hazardous occupational noise exposure. The tribunal has asked the Court of Appeal to rule on whether the five-year requirement in the board's hearing loss policy is lawful.

In 2016–17, the tribunal saw the retirement of a long-time appeal commissioner and the appointment of a new appeal commissioner.

At his retirement celebration, Gary Levine reminded us of how important our work is as it has real impact on people's lives. With Gary's retirement, the tribunal lost an experienced decision-maker who deeply cared about his work. He will be missed.

Our newest appeal commissioner, Christina Lazier, can conduct hearings in French. She has a diverse background in management, law and public service, including experience in workers' compensation law.

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 decides appeals and right of action applications. Within that mandate, opportunities exist for cooperation with system partners and the community, including injured worker 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.

In the management and adjudication of appeals, the tribunal strives to strike a balance between access to justice, efficiency 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 try 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 schedule because: there is more than one participant involved; representatives' workloads; the time it takes 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.

The Tribunal's Year in Review

Operations Overview

The tribunal's appeal volume increased slightly from last year. Decision output dropped. The main cause of the decrease in decision output resulted from WAP not setting down appeals for hearings or submissions. There is no backlog of appeals to be heard, but an increasing number of appeals where the participants are not ready to have the appeals set down for hearing.

The tribunal continues to develop procedures aimed at resolving appeals more quickly. Unfortunately, appeals have become more complex. A significant portion of the outstanding appeals are awaiting additional medical evidence that has been requested by WAP and, on occasion, by employers. Also, the degree of employer participation in tribunal appeals is increasing.

There is a trend of appeals taking longer to resolve. The tribunal remains committed to operating on a readiness model. This means that the tribunal generally waits until participants are ready to proceed before setting down appeals. The tribunal continues to work with WAP to find efficiencies. However, if the trend in timeliness continues, the readiness model may need to be reconsidered.

The issues raised most commonly on appeal are whether a claim should be accepted and questions around permanent medical impairment ratings. Most appeals proceed by way of oral hearings as opposed to written submissions.

The tribunal allows, at least in part, almost half of appeals. A significant number of appeals are resolved prior to hearing.

Ten tribunal decisions were appealed to the Court of Appeal, a decrease from the previous year.

The tribunal's appeal commissioners continue to produce well-reasoned decisions in the face of increasing issue complexity.

Appeal Management

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

She, or someone acting on her behalf, calls unrepresented participants and provides information about the appeal process. Where there is more than one participant to an appeal, she regularly conducts conference calls to assist in getting appeals ready to be heard. Some of the more complex appeals are assigned to individual appeal commissioners for case management.

The tribunal works closely with WAP to track appeals and avoid delays. The "WAP new evidence process" results in a significant number of appeals being resolved without a hearing. This year the tribunal also developed, in cooperation with WAP, a "quick appeal process" to rapidly resolve some uncontested WAP appeals.

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 Worker Adviser, the Manager of the board's Internal Appeals department and a board legal department representative.

IRWG was formed to discuss issues arising from the adjudication of claims and appeals. The committee allows effective 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 holds bi-monthly meetings at which appeal statistics from each agency are shared and methods to improve the appeal system are discussed.

The Appeal Issues Discussion Group, a subcommittee of IRWG, was also active this year.

The tribunal, board and WAP have also formed an Appeal System Improvement Committee.

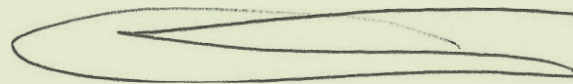
Regulations Development

The tribunal is considering creating regulations to give additional protection to personal information that may be disclosed as part of the appeal process, and to set an 18-month time limit on resolving an appeal.

The tribunal sought public consultation on these draft regulations. The tribunal received several helpful submissions. Generally, the idea of the disclosure regulation was well received with several suggestions on how to enhance it. There were mixed views on the appropriateness of the 18-month time limit. These submissions are still under review.

Financial Operations

In 2016–17, the tribunal's total expenditures were within 78 per cent of the original authority and within 88 per cent of our revised forecast. Net expenditures totaled \$1,737,935, a slight increase from the previous year.



Sandy MacIntosh
Chief Appeal Commissioner



Introduction

The tribunal hears appeals from final decisions of board hearing officers and determines whether the act bars a right of action against employers. The tribunal is legally and administratively separate from the board, which 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: the board claim file; the decision under appeal; additional evidence the participants may present; submissions of the participants; and, any other evidence that the tribunal may request or obtain.

Once an appeal is assigned to an appeal commissioner, the Chief Appeal Commissioner cannot intervene to influence the commissioner's judgment. 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 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.

Relationship to the Board

The tribunal is independent from the board. However, it interacts with the board in four ways: funder, appeal participant, policy maker and system partner.

Board – as funder

The tribunal is funded by the board-managed Accident Fund. Expenses are first paid by the Province, then the Province is reimbursed from the Accident Fund. The board has no financial influence over the tribunal. The tribunal is accountable to the Legislature for budgetary matters through its reporting to the Minister of Justice.

Board – as appeal participant

Workers, employers and the board regularly participate in tribunal appeals. 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 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 can create binding policies that decision-makers must follow, including appeal commissioners. However, the tribunal is not bound by board policy where it finds a policy inconsistent with the act or the regulations.

The Chair of the board may adjourn or postpone an appeal before the tribunal for policy development reasons. This can only occur where the appeal raises an issue of law and general policy. Similarly, the tribunal may ask the Chair whether an appeal raises an issue of general law and policy that should be reviewed by the Board of Directors.

Board – as system partner

The tribunal is a partner in the Workplace Safety and Insurance System and participates in joint committees, such as the Heads of Agencies Committee and the Issues Resolution Working Group.

The Heads of Agencies Committee's mandate is to oversee the implementation of a strategic plan for the Workplace Safety and Insurance System. The mandate recognizes that cooperation and communication between 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 compromise, the tribunal's independence.

Tribunal Mandate and Performance Measures

In the management and adjudication of appeals, the tribunal strives to strike a balance between efficiency and fairness. Its work is directed by statute and principles of natural justice.

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. The act requires that decisions be released within 60 days of a hearing or, if the appeal proceeded by written submissions, the date on which all submissions have been received. Appeal commissioners try to release decisions within 30 days of an oral hearing or the closing of deadlines for written submissions.

New appeals are usually processed and acknowledged within 10 days of receipt. Optimally, the tribunal can hear an appeal within 30 days of receiving notice that the participants are ready to proceed.

Most appeals take much longer to schedule. Increasingly, there is more than one party involved and additional medical evidence, often from specialists, is sought. Representatives often limit how many hearings they wish to do in a month. Disputes concerning disclosure are increasingly slowing down the timely scheduling for hearing of appeals. In short, the tribunal is experiencing many of the same challenges that impact timeliness in courts in Canada.



Operations

The tribunal's appeal volume increased slightly from last year. The tribunal received 695 appeals in 2016–17, compared to 672 in the previous year (see Figure 1). Appeals were predominantly filed by workers (94 per cent). The tribunal resolved a total of 606 appeals this fiscal year compared to 732 the previous year.

The tribunal's decision output decreased this year from 603 to 476 (see Figure 2). At year end, 744 appeals remained to be resolved, compared to 655 last year (see Figure 3).

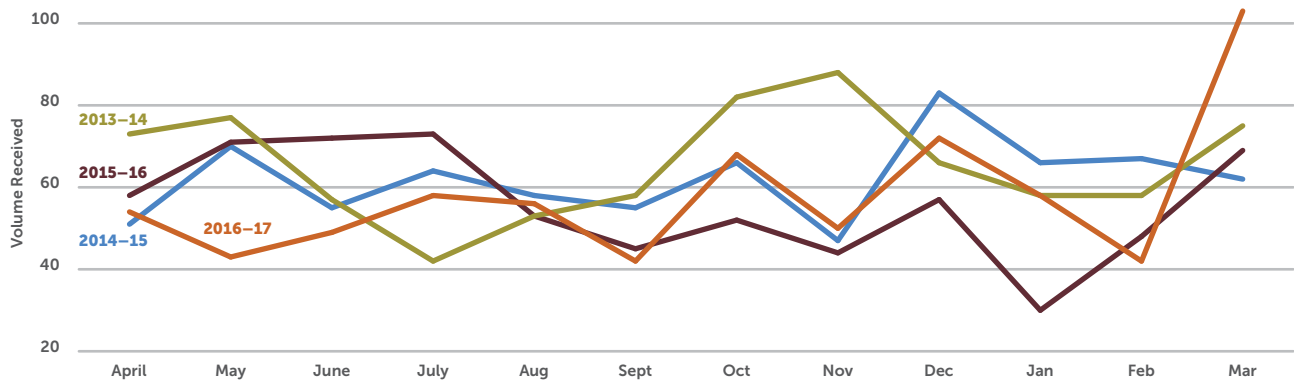
The main cause of the decrease in decision output resulted from WAP not being ready to set down appeals. The WAP is involved in over 80 per cent of appeals. It typically takes longer for WAP to set down appeals than it does for self-represented workers or those represented by injured worker groups.

There are 70 appeals which have been with the tribunal for over two years. Of the 70, 66 are represented by WAP and 35 of those involve an employer.

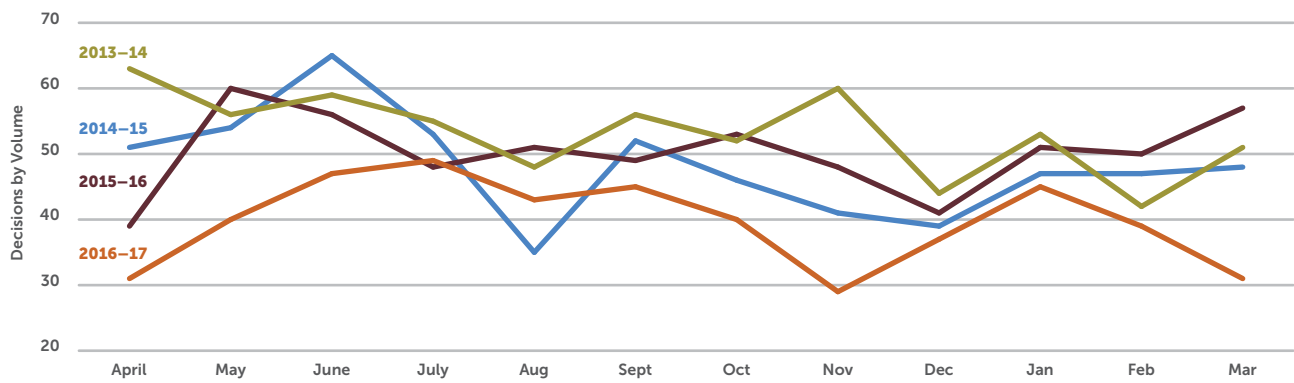
The tribunal continues to develop procedures aimed at resolving appeals more quickly. Unfortunately, appeals have become more complex both procedurally and substantively. The tribunal must balance between resolving appeals quickly and ensuring maximum fairness. A significant portion of the appeals are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

Please see Appendix (pages 21–24) containing specific data for the following figures.

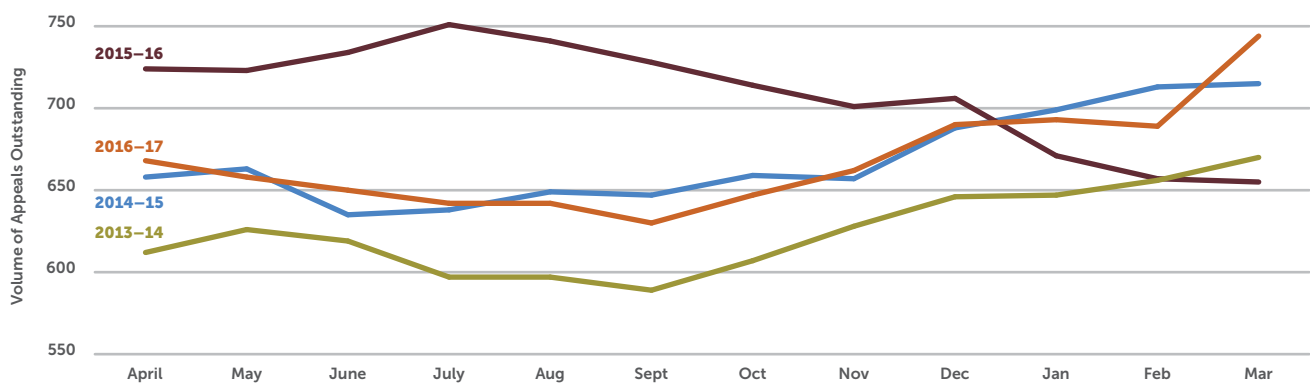
**FIGURE 1
Appeals Received**



**FIGURE 2
Decisions Rendered**



**FIGURE 3
Appeals Outstanding at Year End**



Approximately 25 per cent of decisions were released within six months of the date the appeal was received. Approximately 48 per cent of decisions were released within nine months of the date the appeal was received, compared to 53 per cent last year. Over 42 per cent of appeals took more than 11 months to resolve, compared to 39 per cent the previous year (see Figure 4).

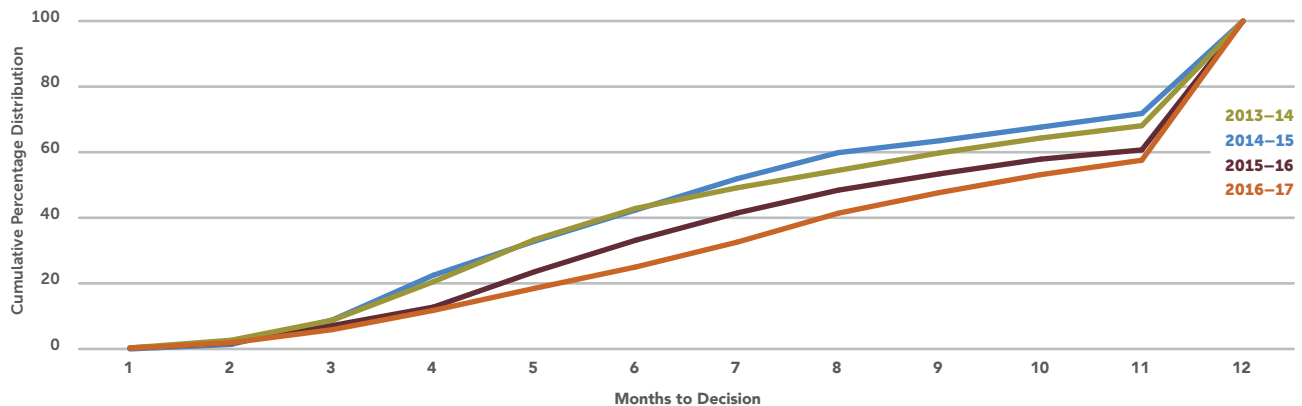
The tribunal reports decisions by representation based on the information available at the time decisions are released. Of the 476 decisions issued this past year, 67 per cent of workers were represented by WAP (see Figure 5). However, of the 744 outstanding appeals at year-end, 82 per cent of workers were represented by WAP.

Employers participated in 32 per cent of the resolved appeals and are participating in 29 per cent of the unresolved worker appeals. Many employers are unrepresented but can access assistance from the Office of the Employer Advisor. Tribunal staff speak directly with unrepresented workers and employers to provide them with information on appeal processes.

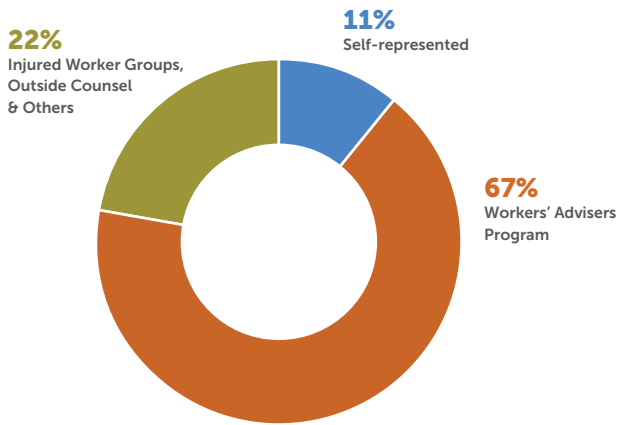
During 2016–17, recognition of a claim was the issue most often appealed to the tribunal, representing 28 per cent of issues on appeal. New/increased benefits for permanent impairment were also significant at 21 per cent (see Figures 6 & 7).

The tribunal heard approximately 70 per cent of appeals by way of oral hearing, a decrease from last year's total of approximately 73 per cent (see Figure 8).

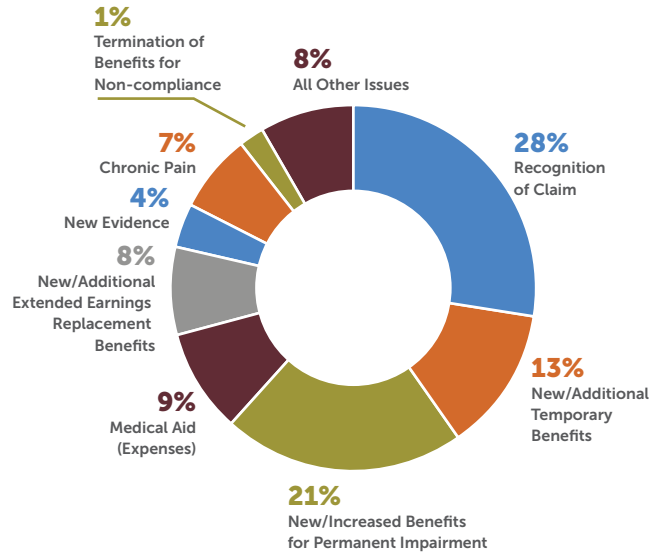
FIGURE 4
Timeliness to Decision



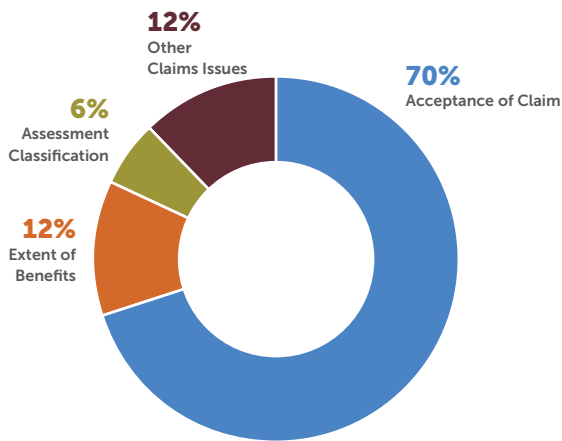
**FIGURE 5
Decisions by Representation**



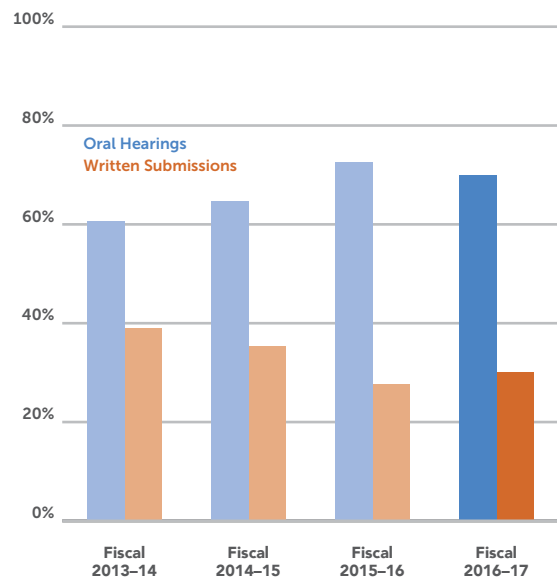
**FIGURE 6
Decisions by Issue Categories – Worker**



**FIGURE 7
Decisions by Issue Categories – Employer**



**FIGURE 8
Decisions by Mode of Hearing**



Outcomes on appeal for 2016–17 varied slightly. The overturn rate (appeals allowed or allowed in part) increased to 49 per cent from 46 per cent the previous year (see Figure 9). The number of appeals returned to hearing officers for reconsideration decreased to 8.4 per cent from 9.6 per cent. The number of appeals denied decreased slightly to 42 per cent from 44 per cent.

Ninety-five per cent of decisions decide worker appeals (see Figure 10). The tribunal resolved 130 appeals without the need for a hearing, a slight increase from last year's total of 129. The resolution of appeals without a hearing is achieved primarily by the registrar, prior to the assignment of an appeal to an appeal commissioner.

Appeals to the Court of Appeal decreased during 2016–17 to 10 (2 per cent of decisions were appealed), down from 17 the previous year. There remain 11 appeals at the Court of Appeal (see Figure 11).

The tribunal's appeal commissioners continue to produce well-reasoned decisions in the face of increasing issue complexity.

FIGURE 9
Decisions by Outcome

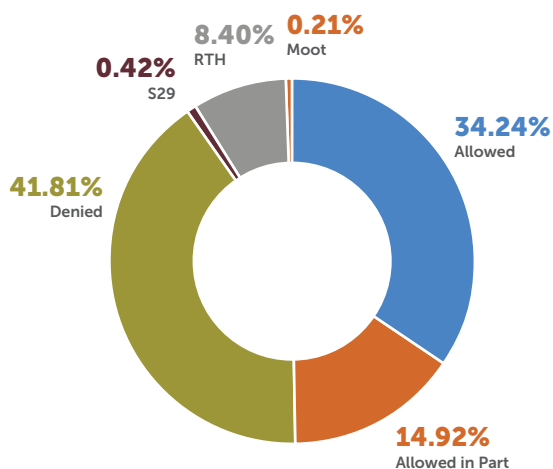


FIGURE 10
Decisions by Appellant Type

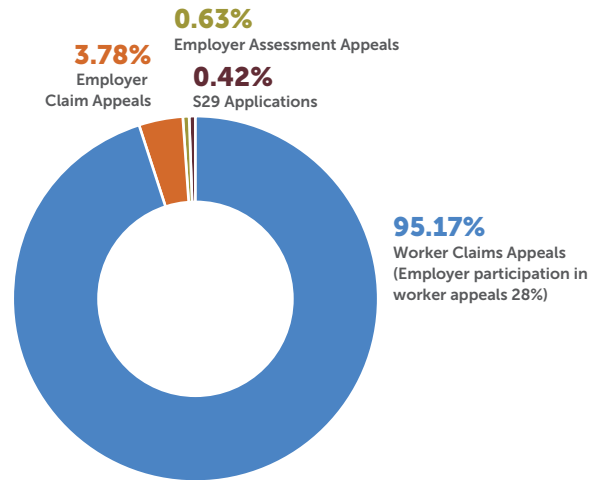
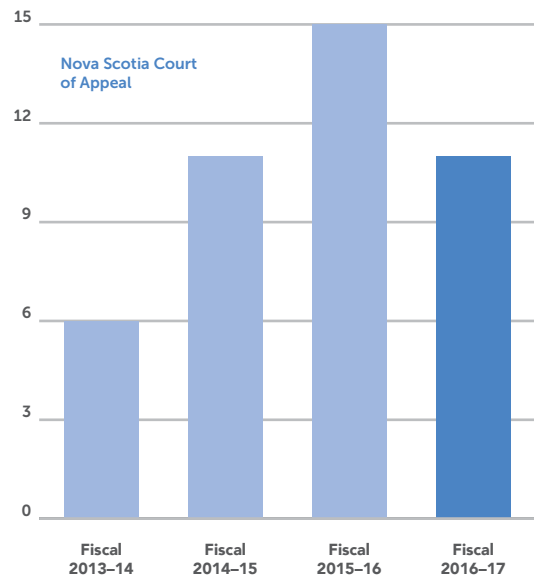


FIGURE 11
Appeals before the Courts at Year End



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 expediently as possible, having regard to the rules of natural justice and procedural fairness. 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 continues to work closely with WAP 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 for a tribunal appeal is considered by a board case manager prior to a decision being made by the tribunal. This results in a significant number of appeals being resolved without a hearing as the new evidence can change the decision under appeal.

The tribunal also developed a "quick appeal process" to rapidly resolve some uncontested WAP appeals that do not require additional evidence or testimony.

Interagency Cooperation

The Chief Appeal Commissioner is a member of the Heads of Agencies Committee/Coordinating Committee, which oversees implementation of the Workplace Safety and Insurance System's strategic plan. It meets a few times a year to consider the overall direction of the compensation and safety system.

The Issues Resolution Working Group (IRWG) is comprised of the Chief Appeal Commissioner, the Chief Worker Adviser, the Manager of the board's Internal Appeals department and a board legal department representative.

IRWG was formed to discuss issues arising from the adjudication of claims and appeals. The committee provides an open, frank exchange of ideas and information. The committee's mandate is to develop and implement issue resolution initiatives to improve the overall efficiency of the workers' compensation system.

IRWG holds bi-monthly meetings at which appeal statistics from each agency are shared and methods to improve the appeal system are discussed. IRWG also met with representatives from the Office of the Employer Advisor this year resulting in a good exchange of ideas, views and information.

The tribunal, the board and WAP have formed an Appeal System Improvement Committee. This committee meets bi-monthly to explore the impact of appeal delays on claim costs and determines methods to decrease the number of appeals and the time it takes to resolve appeals.



Freedom of Information and Protection of Privacy

The tribunal rarely receives Freedom of Information and Protection of Privacy (FOIPOP) applications. There was one application in 2016–17. 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 needs to be made by an appeal participant because 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.

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.” Because decisions must be transparent, they need to include a description of the evidence that is relevant to support the findings in the decision.

Worker claim files are released to employers after vetting by the tribunal. The tribunal is concerned that personal information not be 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 is considering strengthening these protections through a regulation.

Workers' personal information must be disclosed to employers for them to be able to participate in appeals. The necessary degree of disclosure has been a point of conflict over the years which has caused delays in setting down appeals. The degree of necessary disclosure is now before the Court of Appeal in the Baker appeal. The tribunal is hopeful that the Court will provide clear guidance which will reduce conflict between workers and employers.



Noteworthy Decisions

The following decisions, organized by topic area, are being described as they may be of general interest to the community.

Assessments and Employers

Decision 2015-691-AD (April 5, 2016, NSWCAT) considered an employer's appeal of the board's classification of a company that provided hotel management services primarily to hotels owned by its parent company. In upholding the company's classification within the hotel industry, the tribunal found that the standard industry classification (SIC) numbers used by the board are assigned by industry not by occupation.

Decision 2015-176-AD (June 23, 2016, NSWCAT) considered the "rate group" an employer was placed in for 2015. The board placed the employer in a rate group that had significantly higher costs than its industry group. The tribunal concluded that the board used data beyond the five-year window permitted by policy and that the rate group used did not reflect industry groups with similar accident experiences.

Decision 2015-408-AD (December 22, 2016, NSWCAT) considered whether a charitable organization was responsible for the claim costs associated with an injury. The organization entered into independent contractor agreements with individuals to operate kiosks. An employee of an independent contractor was injured at work,

but the contractor had not purchased workers' compensation coverage.

The tribunal concluded that the kiosks fell within the retail establishments industry for which coverage is mandatory. The tribunal found that the injured employee was a "deemed worker" of the organization and that it was liable for the claim costs associated with the injury.

Earnings-Replacement Benefits

Many appeals pertain to temporary earnings-replacement benefits or extended earnings-replacement benefits. The following four decisions were selected for comment.

Decision 2016-29-AD (June 27, 2016, NSWCAT) considered a worker's entitlement to earnings-replacement benefits. The worker was injured while performing duties as a volunteer firefighter and this injury was aggravated several years later. The tribunal found that the board had not considered the provisions in the Workers' Compensation General Regulations or policy 1.3.4 concerning volunteer firefighters, and provided direction concerning reconsideration of the worker's entitlement to benefits.

Decision 2015-522-AD (September 19, 2016, NSWCAT) considered a request for an extended earnings-replacement benefit for a worker who was injured before March 23, 1990 (known as a

pre-Hayden injury). The worker had been awarded a permanent impairment rating for a 1984 back injury, which was periodically reassessed. The worker worked until 2014, when he had back surgery.

The tribunal concluded that the worker was not entitled to an extended earnings-replacement benefit or the calculation of his permanent impairment benefit based on his earnings in 2014. The tribunal found that the worker had a permanent impairment rating from his original injury which crystallized his benefits under section 227 of the act, which was characterized as a complete code for the payment of compensation for injuries that occurred before March 23, 1990.

Decision 2015-436-AD (November 14, 2016, NSWCAT) also considered a worker's request for an extended earnings-replacement benefit for a pre-March 23, 1990 injury. The worker suffered recurrent back problems which led to surgeries in 2005 and 2009 with periodic increases in his impairment rating. The worker was also awarded a psychiatric impairment rating.

The tribunal concluded that the worker suffered a worsening of his condition over time rather than new injuries. The tribunal rejected the argument that the psychiatric impairment was a new injury and found that while it was a separate condition, there was only one injury. The tribunal concluded that section 227 of the act applied and that the worker was not entitled to an extended earnings-replacement benefit.

Decision 2016-90-AD (December 23, 2016, NSWCAT) dealt with the review of a worker's extended earnings-replacement benefit 36 months after its award. At the time of the initial award, the worker was considered a contractor and his benefits were calculated based on his special protection coverage. The tribunal concluded that the worker's circumstances had changed and that he was no longer a contractor. The tribunal directed that the worker's benefits be recalculated.

Hearing Loss

Decision 2016-299-PAD (February 2, 2017, NSWCAT) considered an appeal where the board concluded that the worker's claim could not be adjudicated because he did not have an audiogram within five years of leaving the workplace with excessive occupational noise. The tribunal concluded that, without such a requirement, the worker would be entitled to have his claim considered by the board. The tribunal has stated a case to the Court of Appeal concerning the legality of the five-year requirement.

Medical Aid

Appeals concerning medical aid assistance are also common and the following four decisions were selected for comment.

Decision 2013-358-AD (July 27, 2016, NSWCAT) considered a worker's request for medical aid in the form of a number of medications, including herbal medical marijuana and intravenous Lidocaine. The tribunal relied on the opinions of the worker's treating specialists, a neurologist and an anesthesiologist specializing in pain management, and awarded herbal medical marijuana, intravenous Lidocaine and several other items requested. In awarding the herbal marijuana, the tribunal noted that the treating physicians had followed a protocol of trying ever increasingly powerful pain medications, only prescribing marijuana when all others failed to be effective.

Decision 2016-260-AD (September 21, 2016, NSWCAT) also considered entitlement to herbal medical marijuana. The tribunal concluded that the provision of medical marijuana was not consistent with the standards of health care practices in Canada. The tribunal took into consideration a Doctors Nova

Scotia position statement to the effect that there is insufficient evidence demonstrating the clinical efficacy of medical marijuana. The tribunal also considered restrictions concerning medical marijuana in the Province's Employment Support and Income Assistance Regulations.

Decision 2015-238-AD (January 11, 2017, NSWCAT) considered another request for coverage of the costs associated with herbal medical marijuana. The tribunal considered the magnitude of the worker's pain, the lack of satisfactory results with other medications and his positive response to medical marijuana. The tribunal relied on opinion evidence from the worker's family doctor and pain management specialist. The tribunal found that the prescription of marijuana for pain control was an accepted practice where other methods of pain control fail and awarded medical marijuana.

Decision 2016-80-AD (March 28, 2017, NSWCAT) considered whether a request for medical aid in the form of dental work was causally related to the worker's back injury. The worker was prescribed a variety of narcotics over the years to treat persistent back pain. The tribunal canvassed cases in other provinces and accepted that the narcotics prescribed for the compensable injury caused a dry mouth which in turn increased the risk of developing the cavities for which the dental work was required.

New Evidence/Reconsideration

A "final decision" can be reconsidered if there is "new evidence," in which case the "new evidence" will be considered along with the evidence that was previously available. One decision was considered noteworthy.

Decision 2014-654-AD-CA-RTH (September 7, 2016, NSWCAT) came to the tribunal as a new evidence appeal, but new evidence was found not to be the true issue before the tribunal. The worker sought a finding that there was new evidence warranting reconsideration of whether there had been a compensable injury.

The tribunal concluded that information from the family physician and the fact of the worker's illiteracy was not new evidence. The tribunal found, however, that the underlying issue was not whether there was new evidence but whether the worker was entitled to an extension to file an appeal. This question was referred to the board for further consideration.

Permanent Medical Impairment

Decision 2015-512-AD (April 4, 2016, NSWCAT) considered whether the combined values chart in the American Medical Association's Guides to the Evaluation of Permanent Impairment applies to a pain-related impairment rating. The tribunal reviewed the Chronic Pain Regulations and concluded that combining a pain-related impairment and permanent medical impairment rating is not permitted.

Decision 2016-393-AD (October 28, 2016, NSWCAT) dealt with a worker's entitlement to an impairment rating where her dental injury led to the loss of three teeth and the provision of a partial dental plate. The tribunal directed the board to reassess whether the worker was left with a permanent impairment, in part, by considering provisions in the rating guidelines concerning prosthesis, which the dental plate was considered.

Recognition

“Recognition” refers to the basic question in compensation cases, which is whether an injury or disease is compensable. Recognition is the most common issue on appeal and the following six decisions were considered noteworthy.

Decision 2015-631-AD (April 12, 2016, NSWCAT) considered a novel diagnosis. The worker suffered compensable injuries, including to her head, neck and a mild traumatic brain injury. The worker sought further benefits approximately a year later. The treating neurologist diagnosed the worker with a “functional cognitive disorder” and he cited the earlier compensable injury as the trigger for the onset of the disorder. The tribunal accepted that there was a causal relationship between the prior injury and the disorder.

Decision 2014-577-AD (April 18, 2016, NSWCAT) considered whether a slip and fall in a parking lot was compensable. The employer had directed its employees to park in the adjacent parking lot of another company. There was an arrangement in place between the employer and the company operating the adjacent parking lot. The tribunal found that the adjacent parking lot formed part of the employer’s premises and denied the employer’s appeal of the decision to accept the claim.

Decision 2012-111-AD (August 19, 2016, NSWCAT) considered whether a worker’s workplace harassment resulted in a compensable injury. The evidence demonstrated that the worker was harassed and ostracized based on his sexual orientation and that there were instances where he was assaulted or threatened with physical assault.

There was also an instance where the worker’s safety equipment, a breathing apparatus, was tampered with. The tribunal accepted that these incidents were traumatic events. Given the reports from the treating psychologist and assessing psychiatrist, the tribunal accepted that there was an acute reaction to the traumatic events and that the worker had suffered a compensable injury.

Decision 2016-400-AD (October 18, 2016, NSWCAT) considered whether a worker’s migraine symptoms were attributable to the installation of LED lighting at work. The tribunal cited evidence that light exposure is an accepted trigger for migraines and accepted that the worker had suffered a compensable injury.

Decision 2014-363-AD (January 27, 2017, NSWCAT) considered whether post traumatic stress, attributable to a sexual assault in the worker’s home by a supervisor, was compensable. The tribunal accepted that the assault occurred and that it affected the worker. Given the absence of similar appeals, cases from other provinces were considered. The tribunal found that the assault was not compensable because it was not incidental to the worker’s employment.

Decision 2016-225-AD & 2016-334-AD (February 27, 2017, NSWCAT) considered, in part, stress which developed over a period of time. The act excludes such stress from compensation. The tribunal considered whether the worker suffered from gradual onset stress that would be accepted as a compensable disablement were it not for the exclusion of such stress from compensability.

There is no definition or criteria for gradual onset stress in the act or board policy. The tribunal previously determined that policy 1.3.6, which provides guidelines for gradual onset stress for federally regulated workers, is not binding. The tribunal, however, accepted that policy 1.3.6 provides reasonable criteria to assess whether a worker has a claim for gradual onset stress. The tribunal found that the worker did not satisfy the criteria.

Suspension/Termination of Benefits

Decision 2015-282-AD (August 31, 2016, NSWCAT) considered whether a worker breached his obligations as an injured worker and made misrepresentations in violation of board policy. The worker suffered a compensable concussion. While off work and in receipt of earnings-replacement benefits, the worker participated in a placement to complete a university degree and resumed participation in organized paintball.

The tribunal found that the worker breached his obligations as an injured worker and that his failure to disclose his participation in the placement and paintball was a misrepresentation.

Procedural Questions & Other

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

Decision 2015-416-PAD (June 20, 2016, NSWCAT) considered an employer's appeal of the tribunal's practice of only disclosing evidence relevant to an appeal. The employer raised concerns about natural justice and procedural fairness. The tribunal found that its practice should not be continued and that the relevant sections of its practice manual should not be applied. Full disclosure of the file was ordered with some restrictions on the employer over the breadth and use of the evidence disclosed. This decision has been appealed to the Court of Appeal.

Decision 2016-569-AD (January 27, 2017, NSWCAT) dealt with a worker's request that the tribunal make a finding that the hearing officers were biased because one or more had been involved in case management meetings and because they had collectively discussed, at least in general terms, the worker's claim. The tribunal noted that it reviews decisions on a correctness standard. Given that the only remedy sought was the award of a pain-related impairment rating for chronic pain, which was awarded, no finding was made concerning the allegation of bias.

Vocational Rehabilitation

Decision 2016-201-AD (August 30, 2016, NSWCAT) considered, in part, a worker's claim that her employer had breached its re-employment obligations. The tribunal noted that the date of injury for the purposes of the re-employment provisions is the date of time loss and concluded that the employer's re-employment obligations had expired. As such, there was no breach.



Appeals from Tribunal Decisions

The tribunal is the final decision-maker in the workers' compensation system. In limited circumstances, the 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 2016–17, 10 appeals were filed with the Court of Appeal:

- 9 decisions were appealed by workers; and,
- 1 decision was appealed by an employer.

During 2016–17, 14 appeals were resolved as follows:

- 1 appeal was discontinued by the party who filed it;
- 3 appeals were dismissed for failure to follow court rules on timeliness;
- leave to appeal was denied 6 times;
- 2 appeals were remitted by consent to the tribunal for a new decision; and,
- 2 appeals were decided by the Court of Appeal – one was allowed, the other dismissed.

At the beginning of 2016–17, there were 15 appeals before the Court of Appeal. At the end of 2016–17, 11 appeals remained.

Decisions of the Court of Appeal

The Court decided two appeals, which arose from the same tribunal decision, so the Court issued a single decision addressing both appeals.

Messom v. Nova Scotia (Workers' Compensation Board), 2017 NSCA 14

Section 227 of the act provides that no extended earnings-replacement benefit is payable for injuries before March 23, 1990 where permanent medical impairment occurred prior to February 1, 1996.

Mr. Messom was injured in 1988 resulting in permanent medical impairment in 1995. He sought an extended earnings-replacement benefit after his injury worsened to the point of going off work in 2010. When Mr. Messom went off work in 2010, he was paid a temporary earnings-replacement benefit until his condition plateaued in 2011 (maximum medical recovery).

The tribunal found that Mr. Messom was not entitled to a temporary earnings-replacement benefit after September 13, 2011. The tribunal found that Mr. Messom had earnings capacity but that there was a lack of suitable employment for him. The tribunal also found that Mr. Messom was entitled to be assessed for an extended earnings-replacement benefit because he sustained a recurrence of the 1988 injury, taking his situation outside of section 227 of the act.

Mr. Messom appealed the tribunal's finding that he had earnings-capacity. The board also appealed the decision and challenged the finding that a post-

March 23, 1990 recurrence took Mr. Messom outside of section 227.

The Court denied Mr. Messom's appeal and allowed the board's appeal.

The Court found the tribunal's reasoning concerning the entitlement to additional temporary earnings-replacement benefits confusing. The Court, however, upheld the decision because a temporary earnings-replacement benefit is not payable after an injury reaches maximum medical recovery.

The Court found that the tribunal had misinterpreted its decision in *Ellsworth*. The Court explained that a recurrence of a pre-March 23, 1990 injury, in the absence of a new injury, cannot entitle a worker to an extended earnings-replacement benefit.

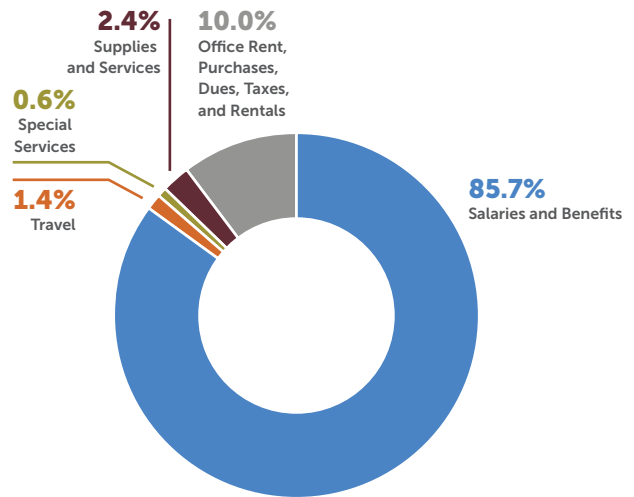
Once the finding of no new injury after 1990 was made, section 227 prohibited an assessment for an extended earnings-replacement benefit. At paragraph 79, the Court wrote:

To be abundantly clear, a worsening of an earlier compensable injury does not and cannot equate to a new s. 10(1) injury. WCAT found as a fact that Mr. Messom did not suffer a new injury. The WCAT decision was based on the position that Mr. Messom experienced a "recurrence" of his 1988 injury and, for some reason, this removes him from the scope of section 227 and entitles him to an EERB. With respect, that determination is not supported by any reasonable interpretation of section 227 of the Act or *Ellsworth*.

Financial Operations

In 2016–17, the tribunal’s total expenditures were within 78 per cent of the original authority and within 88 per cent of our revised forecast (see Figure 12). Net expenditures totaled \$1,737,935, a slight increase from the previous year.

FIGURE 12
Budget Expenditure
(for the Fiscal Year Ending March 31, 2017)



Appendix

FIGURE 1
Appeals Received

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
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
Fiscal 2016–17	54	43	49	58	56	42	68	50	72	58	42	103	695

FIGURE 2
Decisions Rendered

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
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
Fiscal 2016–17	31	40	47	49	43	45	40	29	37	45	39	31	476

FIGURE 3
Appeals Outstanding at Year End

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
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
Fiscal 2016–17	668	658	650	642	642	630	647	662	690	693	689	744

FIGURE 4
Timeliness to Decision (cumulative age by month)

Months	1	2	3	4	5	6	7	8	9	10	11	>11
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
Fiscal 2016–17	0.21	1.89	5.88	11.76	18.49	25.00	32.56	41.39	47.69	53.15	57.56	100

FIGURE 5
Decisions by Representation

Self-represented	53
Workers' Advisers Program	320
Injured Worker Groups, Outside Counsel and Others	103

FIGURE 6
Decisions by Issue Categories – Worker

Recognition of Claim	169
New/Additional Temporary Benefits	78
New/Increased Benefits for Permanent Impairment	131
Medical Aid (Expenses)	56
New/Additional Extended Earnings Replacement Benefits	48
New Evidence	24
Chronic Pain	42
Termination of Benefits for Non-compliance	13
All other issues	51
Total	612

FIGURE 7
Decisions by Issue Categories – Employer

Acceptance of Claim	12
Extent of Benefits	2
Assessment Classification	1
Assessment Penalties	0
Other Claims Issues	2
Other Assessment Issues	0
Total	17

FIGURE 8
Decisions by Mode of Hearing

	Oral Hearings	Written Submissions	Total
Fiscal 2013–14	387	252	639
Fiscal 2014–15	374	204	578
Fiscal 2015–16	437	166	603
Fiscal 2016–17	333	143	476

FIGURE 9
Decisions by Outcome

Allowed	163
Allowed in Part	71
Denied	199
S29	2
RTH	40
Moot	1
Total Final Decisions	476
Appeals Withdrawn	130
Total Appeals Resolved	606

FIGURE 10
Decisions by Appellant Type

Worker Claim Appeals*	453
Employer Claim Appeals	18
Employer Assessment Appeals	3
Section 29 Applications	2
Total	476

*Employer participation in Worker appeals 28%

FIGURE 11
Appeals Before the Courts at Year End

	Nova Scotia Court of Appeal	Supreme Court of Canada	Total
Fiscal 2013–14	6	0	6
Fiscal 2014–15	11	0	11
Fiscal 2015–16	15	0	15
Fiscal 2016–17	11	0	11

FIGURE 12
Budget Expenditures

(For the Fiscal Year Ending March 31, 2017)

	Authority	Final Forecast	Actual Expenditures
Salaries and Benefits	\$1,809,000	\$1,548,000	\$1,488,729
Travel	\$56,000	\$56,000	\$23,571
Special Services	\$85,000	\$79,700	\$9,630
Supplies and Services	\$60,000	\$61,000	\$41,540
Office Rent, Purchases, Dues, Taxes, and Rentals	\$210,000	\$220,300	\$174,465
Sub-total	\$2,220,000	\$1,965,000	\$1,737,935
Less Recoveries	\$0	\$0	\$0
Totals	\$2,220,000	\$1,965,000	\$1,737,935

