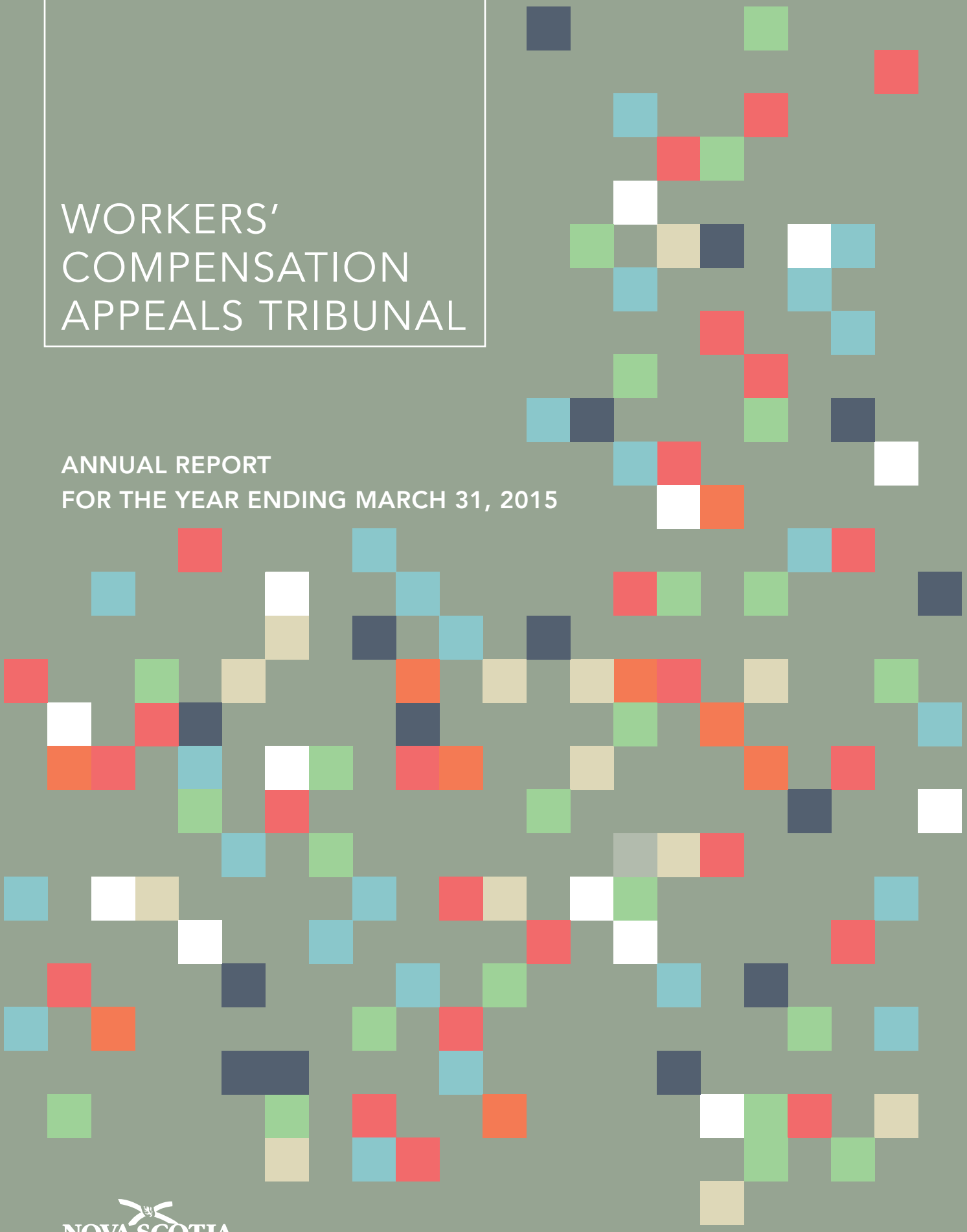
WORKERS' COMPENSATION APPEALS TRIBUNAL

ANNUAL REPORT
FOR THE YEAR ENDING MARCH 31, 2015



NOVA SCOTIA

WORKERS' COMPENSATION APPEALS TRIBUNAL

ANNUAL REPORT
FOR THE YEAR ENDING MARCH 31, 2015

NOVA SCOTIA

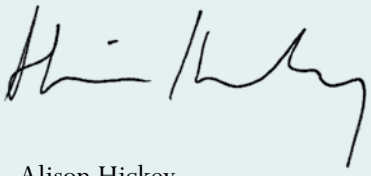
NOVA SCOTIA
Workers' Compensation
Appeals Tribunal

Lena Metlege Diab
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, 2015.

Respectfully submitted,



Alison Hickey
Acting 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, 2015.

Respectfully submitted,

Lena Metlege Diab
Minister Responsible for Part II of the *Workers' Compensation Act*

TRIBUNAL PERSONNEL

Colleen Bennett
Supervisor, Office Services

Charlene Downey
Secretary/receptionist

Samantha MacGillivray
Clerk/Scheduling coordinator

Diane Smith
Clerk

Tamara Spencer
Secretary

Louanne Labelle
Chief Appeal Commissioner

Alison Hickey
(Acting Chief Appeal Commissioner)

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

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EXECUTIVE SUMMARY

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

The focus of the tribunal in 2014–15 was to continue to provide quality decision making consistent with the act, policy and tribunal precedent, in a timely manner. This year was one of developing new procedures both internally and with system partners, for improving the appeal process. The tribunal also closely monitored and improved on those procedures that had been recently put in place.

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

The tribunal is a high volume tribunal. Appeal volumes remained comparable to last year. In 2014–15 workers and employers filed 744 appeals. Our appeal commissioners decided 578 appeals and a total of 699 appeals were resolved. The tribunal's registrar, and those acting in that position, worked effectively to resolve all preliminary matters on appeals prior to their assignment to appeal commissioners. Administrative staff assisted workers and employers by providing information about the appeal process, and ensuring that both understood the process and were treated fairly.

The tribunal continues to await the decision of the Court of Appeal on the appeal of Decision 2011-359-AD. That decision dealt with a challenge under the Charter to s. 2(a) of the act, which contains the exclusion for stress that is not an acute reaction to a traumatic event. In that decision, a panel of three Appeal Commissioners found that although s. 2(a) draws a distinction on the basis of an enumerated ground of discrimination (disability), this distinction does not amount to discrimination because it does not create a disadvantage by perpetuating a prejudice or stereotype.

A Panel of appeal commissioners is currently considering a Charter challenge to board Policy 1.3.6 which deals with psychological injuries under the Government Employees Compensation Act. This decision should be released early in 2015–16.

The tribunal's Chief Appeal Commissioner, Louanne Labelle, retired at the end of January 2015. She was recognized for her dedication and contribution to the tribunal and to the Workplace Safety and Insurance System, with a reception held at the tribunal offices. On February 1, 2015, Alison Hickey moved from her position as an Appeal Commissioner to the role of Acting Chief Appeal Commissioner.

INTRODUCTION

The act governs the operations of the tribunal, and tribunal decisions are made pursuant to the act. The board's policies are also applicable to the tribunal's decisions, provided they are consistent with the act. Final decisions of the tribunal may be appealed to the Nova Scotia Court of Appeal on a question of law, or of the tribunal's jurisdiction, but on no question of fact.

The tribunal operates within the system known as 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. The tribunal's sole mandate is to decide appeals. Within that mandate, however, and because it is part of WSIS, opportunities exist for administrative cooperation with system partners and stakeholders. The tribunal works in concert with its partner agencies to develop practices and procedures to enhance and improve the appeal process. It is vigilant in its cooperative endeavours to ensure that its independence is never compromised or seen to be compromised.

OPERATIONS OVERVIEW

The tribunal's appeal volumes remain comparable to last year. The tribunal received 744 appeals in 2014–15, compared to 787 in the previous year. Appeals continue to be filed predominantly by workers (93 per cent). The tribunal resolved a total of 699 appeals this past year and 721 last year.

The tribunal issued 578 decisions in 2014–15, down from 639 in 2013–14. At year-end, 715 appeals remained to be resolved, compared to 670 last year.

The tribunal continues to develop and implement procedures aimed at resolving appeals more quickly. Unfortunately, appeals are routinely becoming more complex both procedurally and substantively. The tribunal's ability to determine appeals quickly is at all times subject to the rules of natural justice. 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 42 per cent of decisions were released within six months of the date the appeal was received. This is the same as in the previous year. Approximately 63 per cent of decisions were released within 9 months of the date the appeal was received, compared to 60 per cent last year. Over 28 per cent of appeals took more than 11 months to resolve as compared to 30 per cent the previous year.

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

Of the 578 decisions issued this past year, 64 per cent of workers were represented by WAP. Of the 715 outstanding appeals at year-end, 79 per cent of workers were represented by WAP.

Employers participated in 27 per cent of the resolved appeals in 2014–15 and are participating in 33 per cent of the appeals outstanding at the tribunal at year-end. Many employers are unrepresented but can access assistance from the Office of the Employer Advisor (OEA). The tribunal communicates directly with unrepresented participants, both workers and employers, to provide them with information on appeal processes.

During 2014–15, 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 was also significant at 20 per cent.

The tribunal heard most appeals (64.7 per cent) by way of oral hearing, an increase from last year's total of 60.5 per cent.

Outcomes on appeal for the year 2014–15 varied slightly. The overturn rate (appeals allowed or allowed in part) by the tribunal decreased to 43.25 per cent from 48.7 per cent the previous year. The number of appeals referred back to a board hearing officer increased slightly to 15.39 per cent, from 13 per cent. The number of appeals denied increased to 40.83 per cent, from 38 per cent. The tribunal continued to issue consistent decisions which provided clarity and guidance to adjudicators, injured workers and employers.

The tribunal resolved 121 appeals without the need for a hearing, an increase from last year's total of 82. 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 increased during 2014–15 to 11 (less than 2 per cent of decisions rendered) from 6 the previous year. At year end, 8 appeals remained at the Court of Appeal. Of the decisions issued by the Court this year, 3 appeals were denied at the leave stage, 1 was dismissed by the Court, 2 were allowed, 1 was remitted back by consent and 2 were discontinued.

The tribunal's administrative staff for 2014–15 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.

APPEAL MANAGEMENT

In August of 2014, Joseph Fraser vacated the position of the tribunal's full-time registrar and in December of 2014 it was filled by Diane Manara. In the interim period, several appeal commissioners filled the role on a part-time basis, balancing it with their appeal commissioner duties.

Since becoming the tribunal's registrar, Ms. Manara has worked diligently to familiarize herself with appeal management at the tribunal and has been actively scheduling and managing appeals as they are filed. She has a background in administrative law, having held positions as a Labour Standards Officer with the Department of Labour, and Executive Officer with the Labour Board. Ms. Manara has continued the practice of regular meetings with representatives from WAP and Internal Appeals, which was instituted as a measure to enhance the effective resolution of appeals.

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 by telephone with appeal participants 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. Often, 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 actively support what has become known as the WAP/New Medical process. Additional evidence provided by WAP in a tribunal appeal is considered by the appropriate case managers prior to a decision being rendered by the tribunal. A review of January-June 2014 statistics by the board revealed that the process is proving successful in resolving issues at the board level, which can and does result in the withdrawals of appeals at the tribunal.

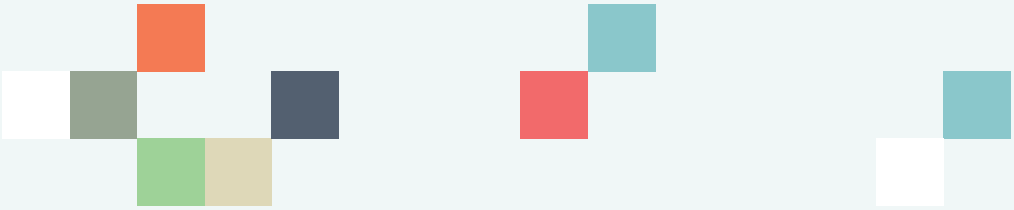
The tribunal continued to work closely with WAP during 2014–15 to track appeals and avoid any unnecessary delays. In addition to the registrar's monthly docket meetings held with individual advisers, Ms. Labelle met periodically with the Chief Workers' Adviser to address appeals outstanding for more than 12 months.

The OEA has been engaged directly by the tribunal in relation to appeals in which it is involved. The registrar meets on a monthly basis with Employer Advisors to monitor the status of those appeals and to resolve procedural issues as they arise.

The tribunal continues to collaborate with the Internal Appeals division 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 (HAC)/Coordinating Committee, which oversees implementation of the WSIS strategic plan. At its June 2014 meeting, the Chief Appeal Commissioner and the Chief Workers' Adviser reported on the activities of the Issues Resolution Working Group (IRWG) and participated in discussions surrounding the board's strategic plan.



IRWG is comprised of the Chief Appeal Commissioner, the Chief Workers' Adviser, the Manager of the Board's Internal Appeals department, the Manager of the Board's Client Services department and board legal counsel. It 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 regular meetings during 2014–15 at which appeal statistics from each agency were shared. Issues arising in relation to the WAP/New Medical process were addressed at IRWG meetings so that maximum benefit could be realized from the process. The board's internal review process continued in 2014–15 and IRWG was kept abreast of initiatives in that regard, such as plain language workshops and decision-making training for board decision makers. Mary Morris and Angela Peckford of the OEA attended several IRWG meetings in 2014–15 to discuss matters arising from the OEA's involvement in appeals.

There were no issues in the past year that warranted convening a meeting of the Appeal Issues Discussion Group, a subcommittee of IRWG.

INTERACTION WITH STAKEHOLDERS

There were a number of opportunities for the tribunal to interact with stakeholders this past year. The Chief Appeal Commissioner, Ms. Labelle, attended a stakeholder meeting in September involving the OEA and the WAP to discuss collaboration between appeal participants, early intervention at the board, and the WAP/New Medical process. She also participated in stakeholder consultation sessions which took place respecting the board's Internal Appeals Review Project.

In 2014, Ms. Labelle attended a number of stakeholder consultation meetings hosted by the board to solicit input into its strategic plan for 2016–20. In March 2015, the Acting Chief Appeal Commissioner attended the stakeholder meeting convened by the board to facilitate discussion of its draft strategic plan 2016–20.

The Chief Appeal Commissioner met once during the year with the board's Board of Directors to bring them up-to-date on operations at the tribunal. She also attended the annual general meeting for the WSIS system. This meeting provides an opportunity for partner agencies such as the tribunal to answer questions from stakeholders on its operations.

FINANCIAL OPERATIONS

In 2014–15, the tribunal's total expenditures were within 80 per cent of the original authority and within 91 per cent of our revised forecast. Net expenditures totaled $1,724,583.33, an increase from the previous year due to salary adjustments.

COMMUNICATION

The tribunal is ever-mindful of its obligation to potential appeal participants to make its processes as accessible and understandable as possible. As part of continuing efforts in that regard, a revised website was launched in February 2015. The new version of the website is intuitive and easy to use. Users are able to submit their information directly over a secure internet connection from any internet-enabled device. The tribunal's appeal forms can now be completed electronically and submitted through the website.

In January 2015, the tribunal's information pamphlets were re-designed, reviewed for plain language, and revised to reflect process changes. A new pamphlet aimed at those who represent participants before the tribunal (both lawyer and non-lawyer) was created. It sets out reasonable standards of conduct for representatives, and sanctions for conduct that fails to meet those standards. The pamphlet states that a fee cannot be charged to represent a participant unless authorized by provincial law.

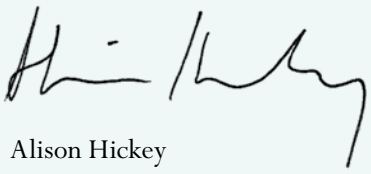
The tribunal's practice manual has been updated to include Sections 6.10 and 6.20 which set out who a representative is, and the Code of Conduct to apply to all representatives who interact with the tribunal. It is hoped that this initiative will clarify the responsibilities of those who represent participants before the tribunal, and enhance the quality of representation for those participants.

CONCLUSION

Since filling the role of Acting Chief Appeal Commissioner, I have been afforded a broader perspective on the operations of the tribunal and its place within WSIS. A review of the year 2014–15 shows where the tribunal along with its partner agencies and stakeholders has identified areas for improvement within the appeal system and worked collaboratively to address those areas. The collaborative approach has been of benefit to participants in the system.

The tribunal remains committed to a straightforward and fair appeal process for all participants. Its steps to inform, educate and assist all those participants in the system and, in particular, the unrepresented participant, will continue. The tribunal's registrar is well placed to identify any opportunity to improve the efficiency of our procedures.

I am pleased to be leading a team of highly competent and experienced appeal commissioners, as well as our capable support staff. I wish to thank them for their collective professionalism, expertise and hard work as we move into the year ahead.



Alison Hickey
Acting Chief Appeal Commissioner

INTRODUCTION

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

The tribunal also 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.

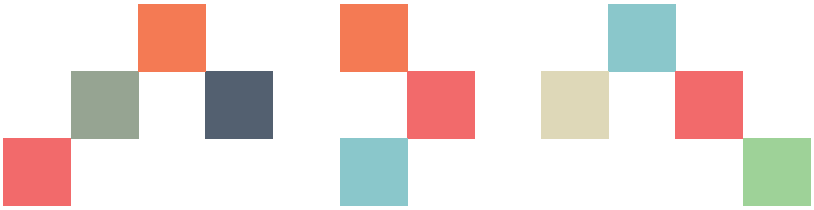
RELATIONSHIP TO THE BOARD

The following is a brief outline of the parameters that guide interactions between the tribunal and the board.

Although the tribunal is an external appeal agency, independent of the board, the tribunal interacts with the board on several different levels.

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, which is the cornerstone of an administrative tribunal.



Board – as appeal participant

The tribunal's mandate is to hear and decide appeals from final decisions of the board. Participants in appeals before the tribunal include injured workers, their representatives (primarily the WAP), employers and board representatives. On occasion, the Attorney General of Nova Scotia and any other interested party may also participate. The board is usually represented by counsel from the board's legal department. On occasion, the board hires outside legal counsel. As a participant in every proceeding, the board's legal department is aware of the status of every appeal currently before the tribunal. The board has the same rights and the same obligations as other participants. 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.

An appeal commissioner or a panel of three appeal commissioners decides an appeal according to the act, regulations and board policies, documentary evidence previously submitted or collected by the Board, any additional evidence the participants present, the decision under appeal, 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 can not intervene to influence the judgment of the commissioner.

In its adjudicative role, the tribunal is guided by the principles of independence, fairness and consistency.

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 at any time before a decision is rendered by the tribunal and direct that the appeal be reviewed by the Board of Directors 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 s. 183 of the act.

All appeals that, in the opinion of the Chair, raise the same issue or issues as an appeal postponed or adjourned pursuant to this section are deemed to be postponed or adjourned for the same period with respect to those issues.

Where the Chair postpones or adjourns a hearing, the Chief Appeal Commissioner shall ensure that the final disposition of the appeal is left solely to the independent judgment of the appeals tribunal.

In addition, the Chief Appeal Commissioner or the presiding appeal commissioner, as the case may be, may make an interim award in an amount and for a period of time as determined by the Chief Appeal Commissioner or the presiding appeal commissioner, as the case may be, while a matter is postponed or adjourned.

The tribunal may also refer a question of law or general policy to the Board of Directors.

Under s. 247 of the act, where the Chief Appeal Commissioner or the presiding appeal commissioner is of the opinion that an appeal raises an issue of law and general policy that should be reviewed by the Board of Directors pursuant to s. 183, the Chief Appeal Commissioner or the presiding appeal commissioner, to whom the appeal has been assigned, shall postpone or adjourn the appeal and refer the appeal to the Chair.

The Chair may direct that any appeal referred to the Chair be reviewed by the Board of Directors pursuant to s. 183, or returned to the tribunal.

Again, all appeals that, in the opinion of the Chief Appeal Commissioner, raise the same issue or issues as an appeal postponed or adjourned pursuant to this section are deemed to be postponed or adjourned for the same period with respect to those issues.

The Chief Appeal Commissioner or the presiding appeal commissioner, as the case may be, may make an interim award in an amount and for a period of time as determined by the Chief Appeal Commissioner or the presiding appeal commissioner, as the case may be, while a matter is postponed or adjourned.

The referral to the Chair of the Board of Directors under s. 247 is within the sole discretion of the Chief Appeal Commissioner or of the presiding appeal commissioner(s) if an appeal has been assigned for decision.

The referral is in writing with full disclosure to all participants and the referral triggers an adjournment.

Board – as partner

The tribunal is a partner in the WSIS and participates in joint committees, such as the HAC and the Issues Resolution Working Group.

HAC's mandate as outlined in the Memorandum of Understanding signed by partner agencies is to oversee the implementation of a strategic plan for WSIS, recognizing that cooperation and communication between and amongst agencies is crucial for the implementation of the strategic plan.

We are mindful that our 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. This ensures a truly independent review of contested outcomes.

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

Its performance is shaped by, and measured against, several parameters drawn from the act, and by its own survey of user groups.

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, although the act requires that decisions be released within 60 days of a hearing.

New appeals are processed within 15 days of receipt by the tribunal.

Optimally, the tribunal can hear an appeal within 45 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 or more (specialist) medical evidence is sought. As demand for representation by WAP rises, it necessarily takes longer for WAP to meet with a potential client, and more time for WAP to evaluate a potential client's claim.

OPERATIONS

The tribunal's appeal volumes remain comparable to last year. The tribunal received 744 appeals in 2014–15, compared to 787 in the previous year. Appeals continue to be filed predominantly by workers (93 per cent). The tribunal resolved a total of 699 appeals this past year and 721 last year (see Figure 1).

The tribunal was not able to increase decision output during the year and the number of decisions issued by the tribunal decreased from 639 in 2013–14 to 578 in 2014–15 (see Figure 2). At year-end, 715 appeals remained to be resolved, compared to 670 last year (see Figure 3).

The tribunal continues to develop and implement procedures aimed at resolving appeals more quickly. Unfortunately, appeals are routinely becoming more complex, both procedurally and substantively. The tribunal's ability to determine appeals quickly is at all times subject to the rules of natural justice. As noted above, 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.

Please see Appendix (pages 33–36) containing specific data for the following figures.

FIGURE 1
APPEALS RECEIVED

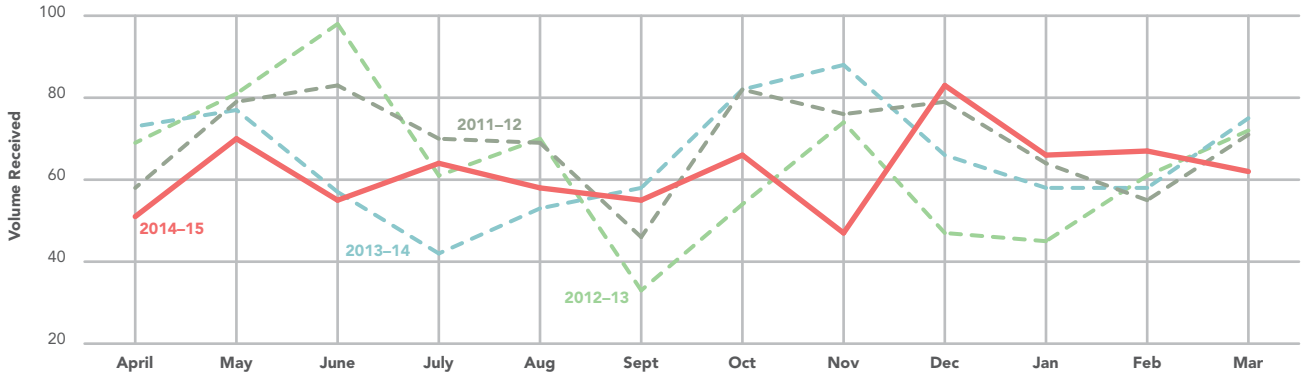


FIGURE 2
DECISIONS RENDERED

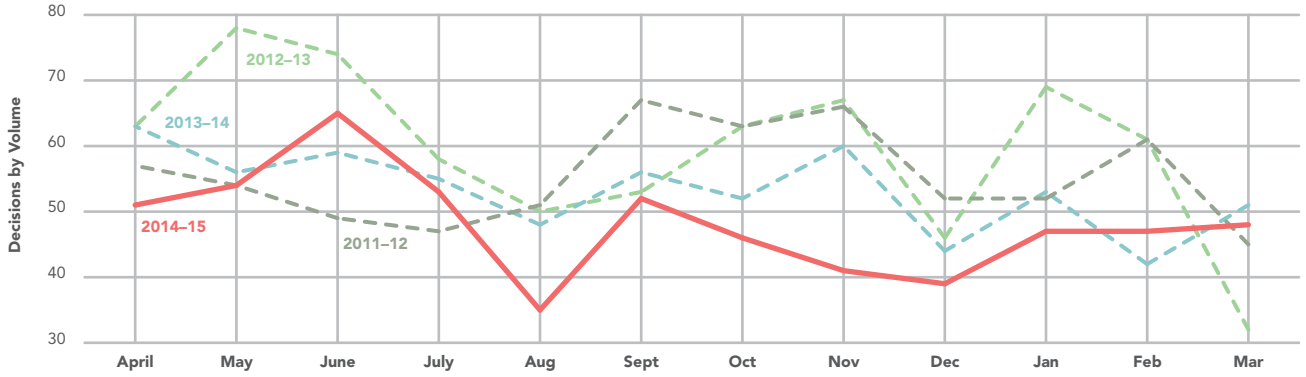
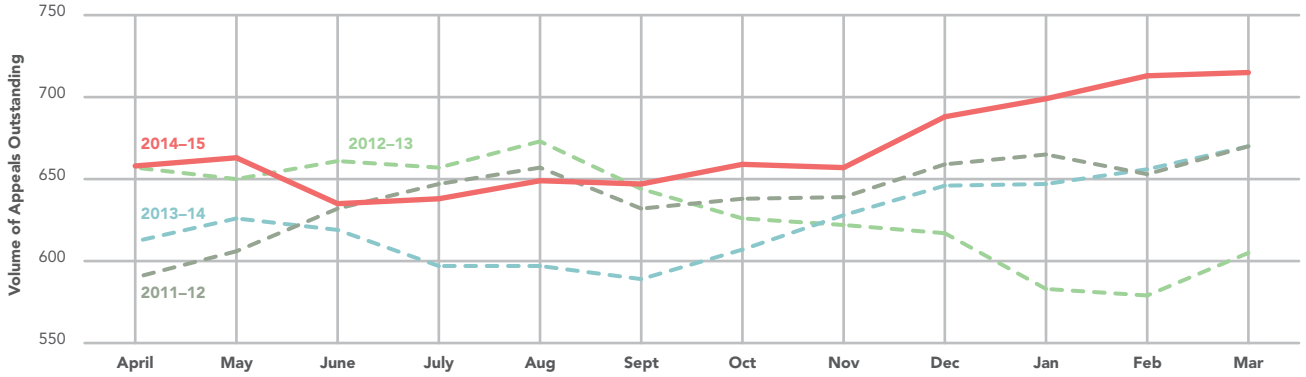


FIGURE 3
APPEALS OUTSTANDING AT YEAR END



Approximately 42 per cent of decisions were released within six months of the date the appeal was received. This is the same as in the previous year. Approximately 63 per cent of decisions were released within 9 months of the date the appeal was received, compared to 60 per cent last year (see Figure 4). Over 28 per cent of appeals took more than 11 months to resolve as compared to 30 per cent the previous year.

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

Of the 578 decisions issued this past year, 64 per cent of workers were represented by WAP (see Figure 5). However, of the 715 outstanding appeals at year-end, 79 per cent of workers were represented by WAP.

Employers participated in 27 per cent of the resolved appeals in 2014–15 and are participating in 33 per cent of the appeals outstanding at the tribunal at year-end. Many employers are unrepresented but can access assistance from the Office of the Employer Advisor (OEA). The tribunal communicates directly with unrepresented participants, both workers and employers, to provide them with information on appeal processes.

During 2014–15, 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 was also significant at 20 per cent (see Figures 6 and 7).

FIGURE 4
TIMELINESS TO DECISION

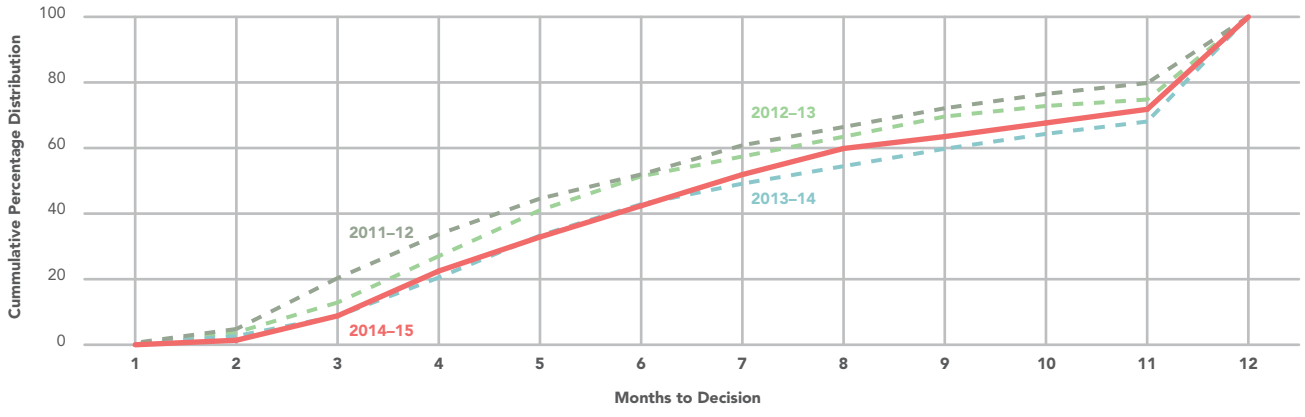


FIGURE 5
DECISIONS BY REPRESENTATION

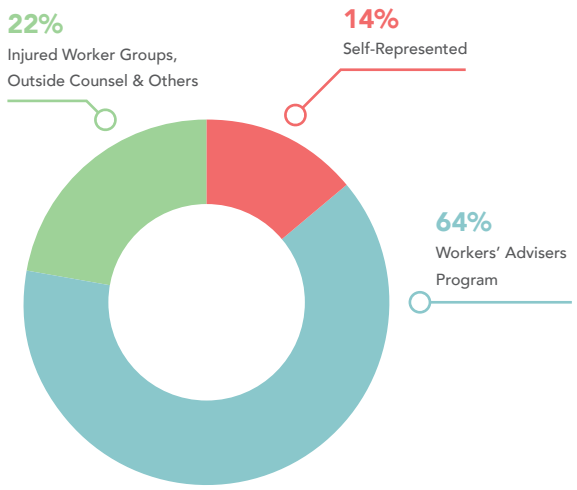


FIGURE 6
DECISIONS BY ISSUE CATEGORIES – WORKER

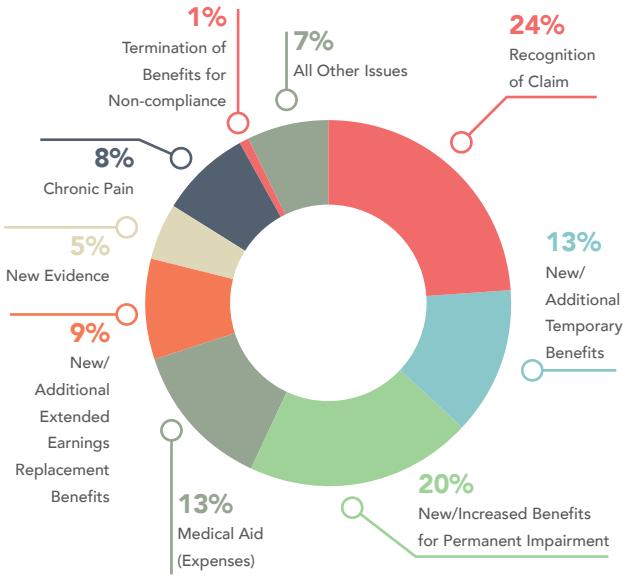
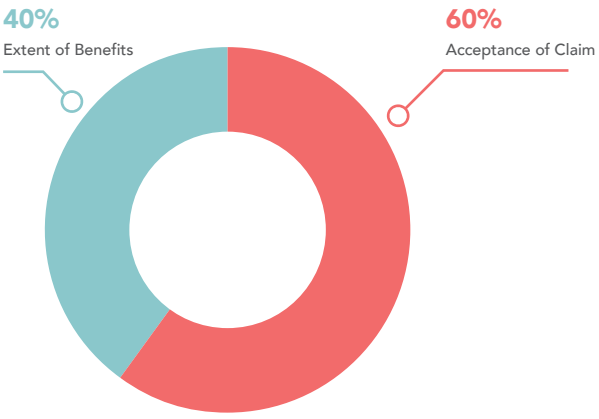


FIGURE 7
DECISIONS BY ISSUE CATEGORIES – EMPLOYER



The tribunal heard most appeals (64.7 per cent) by way of oral hearing, an increase from last year's total of 60.5 per cent (see Figure 8).

Outcomes on appeal for the year 2014–15 varied slightly. The overturn rate (appeals allowed or allowed in part) by the tribunal decreased to 43.25 per cent from 48.7 per cent the previous year (see Figure 9). The number of appeals referred back to a board hearing officer increased slightly to 15.39 per cent, from 13 per cent. The number of appeals denied increased to 40.83 per cent, from 38 per cent. The tribunal continued to issue consistent decisions which provided clarity and guidance to adjudicators, injured workers and employers.

The tribunal resolved 121 appeals without the need for a hearing, an increase from last year's total of 82. The resolution of appeals without a hearing is achieved primarily by the registrar, prior to the assignment of an appeal to an appeal commissioner.

FIGURE 8
DECISIONS BY MODE OF HEARING

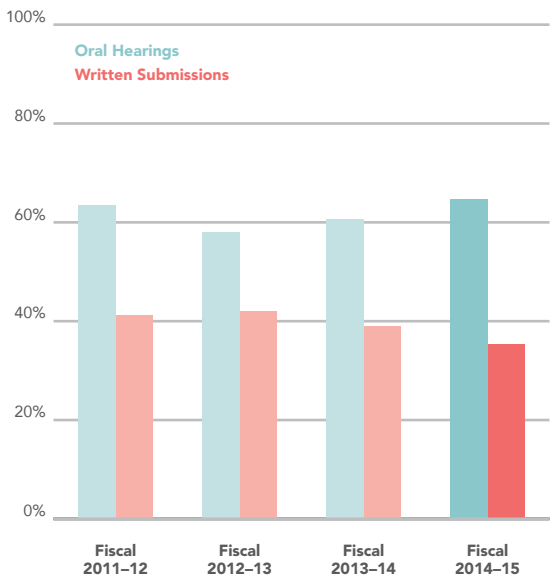
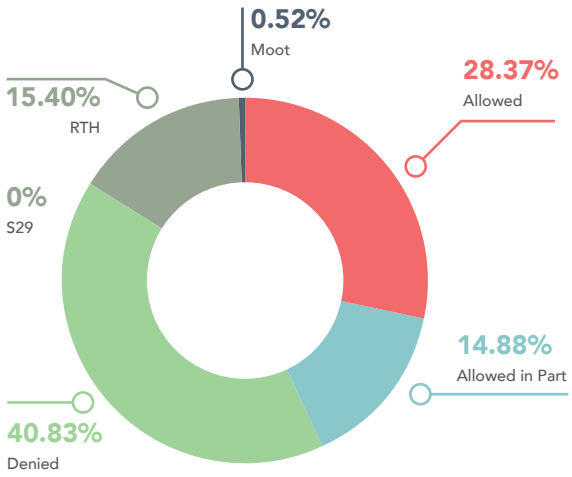


FIGURE 9
DECISIONS BY OUTCOME



Since most appeals are still filed by workers (93 per cent), most decisions released originated with worker appeals (95.7 per cent) (see Figure 10). In any year, the difference between the number of appeals filed and the number of appeals released is accounted for by delay in the hearing of an appeal due, for example, to a representative's schedule or a delay in receiving requested medical evidence.

Appeals to the Court of Appeal increased during 2014–15 to 11 (less than 2 per cent of decisions rendered) from 6 the previous year (see Figure 11). At year end, 8 appeals remained at the Court of Appeal. Of the decisions issued by the Court this year, 3 appeals were denied at the leave stage, 1 was dismissed by the Court, 2 were allowed, 1 was remitted back by consent and 2 were discontinued.

The tribunal's administrative staff for 2014–15 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 10
DECISIONS BY APPELLANT TYPE

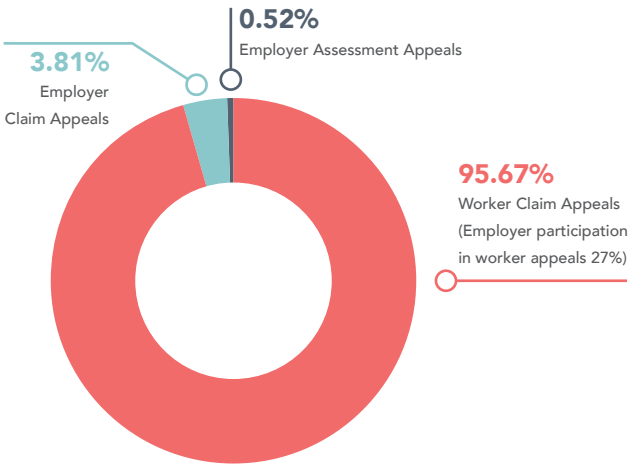
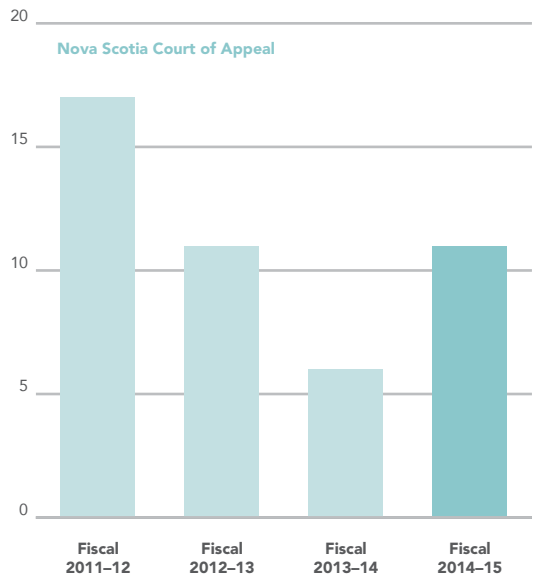


FIGURE 11
APPEALS BEFORE THE COURTS AT YEAR END



APPEAL MANAGEMENT

In August of 2014, Joseph Fraser vacated the position of the tribunal's full-time registrar and in December of 2014 it was filled by Diane Manara. In the interim period, several appeal commissioners filled the role on a part-time basis, balancing it with their appeal commissioner duties.

Since becoming the tribunal's registrar, Ms. Manara has worked diligently to familiarize herself with appeal management at the tribunal and has been actively scheduling and managing appeals as they are filed. She has a background in administrative law, having held positions as a Labour Standards Officer with the Department of Labour, and Executive Officer with the Labour Board. Ms. Manara has continued the practice of regular meetings with representatives from WAP and Internal Appeals, which was instituted as a measure to enhance the effective resolution of appeals.

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 by telephone with appeal participants 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. Often, 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 actively support what has become known as the WAP/New Medical process. Additional evidence provided by WAP in a tribunal appeal is considered by the appropriate case managers prior to a decision being rendered by the tribunal. A review of January–June 2014 statistics by the board revealed that the process is proving successful in resolving issues at the board level, which can and does result in the withdrawal of appeals at the tribunal.

The tribunal continued to work closely with WAP during 2014–15 to track appeals and avoid any unnecessary delays. In addition to the registrar's monthly docket meetings held with individual advisers, Ms. Labelle met periodically with the Chief Workers' Adviser to address appeals outstanding for more than 12 months.

The OEA has been engaged directly by the tribunal in relation to appeals in which it is involved. The registrar meets on a monthly basis with Employer Advisors to monitor the status of those appeals and to resolve procedural issues as they arise.

The tribunal continues to collaborate with the Internal Appeals division 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. At its June 2014 meeting, the Chief Appeal Commissioner and the Chief Workers' Adviser reported on the activities of the Issues Resolution Working Group (IRWG) and participated in discussions surrounding the board's strategic plan.

IRWG is comprised of the Chief Appeal Commissioner, the Chief Workers' Adviser, the Manager of the Board's Internal Appeals department, the Manager of the Board's Client Services department and board legal counsel. It 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 regular meetings during 2014–15 at which appeal statistics from each agency were shared. Issues arising in relation to the WAP/New Medical process were addressed at IRWG meetings so that maximum benefit could be realized from the process. The board's internal review process continued in 2014–15 and IRWG was kept abreast of initiatives in that regard, such as plain language workshops and decision making training for board decision makers. Mary Morris and Angela Peckford of the OEA attended several IRWG meetings in 2014–15 to discuss matters arising from the OEA's involvement in appeals.

There were no issues in the past year that warranted convening a meeting of the Appeal Issues Discussion Group, a subcommittee of IRWG.

INTERACTION WITH STAKEHOLDERS

There were a number of opportunities for the tribunal to interact with stakeholders this past year. The Chief Appeal Commissioner, Ms. Labelle, attended a stakeholder meeting in September involving the OEA and the WAP to discuss collaboration between appeal participants, early intervention at the board, and the WAP/New Medical process. She also participated in stakeholder consultation sessions which took place respecting the board's Internal Appeals Review Project.

In 2014, Ms. Labelle attended a number of stakeholder consultation meetings hosted by the board to solicit input into its Strategic Plan for 2016–20. In March 2015, the Acting Chief Appeal Commissioner attended the stakeholder meeting convened by the board to facilitate discussion of its Draft Strategic Plan 2016–20.

The Chief Appeal Commissioner met once during the year with the board's Board of Directors to bring them up-to-date on operations at the tribunal. She also attended the annual general meeting for the WSIS system. This meeting provides an opportunity for partner agencies such as the tribunal to answer questions from stakeholders on its operations.

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY

14.00 PUBLICATION OF TRIBUNAL DECISIONS

14.10 General

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

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

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

Tribunal decisions include a cover page setting out the names of participants and representatives. This information is not found in the body of the decision. The Tribunal endeavours to exclude any information from the body of a decision which could identify the participants.

Decisions made prior to January 1, 2010, without identifying features, are available free through the Nova Scotia Department of Labour and Advanced Education website at www.novascotia.ca/lae/databases.

Decisions made after January 1, 2010, without identifying features, are available on the Canadian Legal Information Institute's free website: www.canlii.org.

14.20 Personal Identifiers in Decisions

Generally, decisions are written without personal identifiers for participants, except on

the cover page. The names of participants, lay witnesses and others (where the use of names would tend to identify the participants), are not used in Tribunal decisions. Witnesses may be identified by their role, for example, the "worker" or the "employer," or by initials.

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

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

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

A footnote at the bottom of the first page of every decision indicates that the participants have not been referred to by name in the body of the decision as the decision may be published. The publication versions of the decisions on public databases do not include any of the names of the participants nor claim numbers (which appear on the cover page of a decision).

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

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

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 or improperly released or made public by a third party. The tribunal's correspondence accompanying file copies has also been revised to reflect these requirements and to refer to appropriate sanctions.

The tribunal rarely receives FOIPOP applications. 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 2014–15

Of the 578 decisions issued during fiscal year 2014–15, a number are of general interest to stakeholders because they articulate or confirm an approach to an issue. Alternatively, they may highlight an issue not often considered. These noteworthy decisions are discussed by topic area:

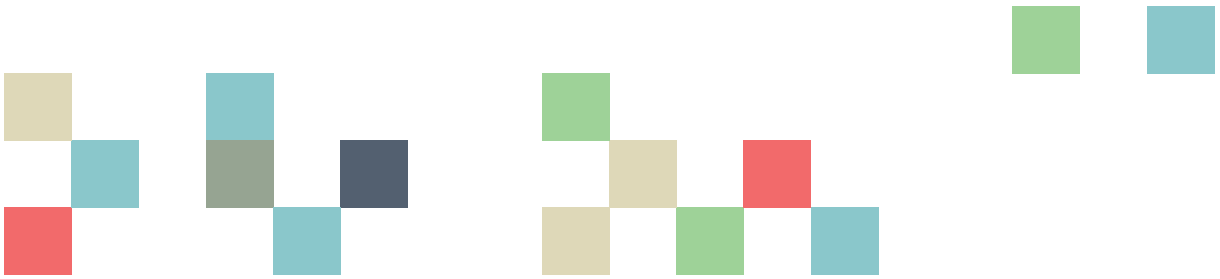
ASSESSMENT

Two appeals, *Decision 2013-557-AD* (January 22, 2015, NSWCAT) and *Decision 2014-447-AD* (March 30, 2015, NSWCAT), considered policy 9.4.5R2. The policy changed assessment rates to be applied against employers in the event of a workplace fatality. The question was whether the policy operated retroactively or retrospectively. A retroactive policy alters consequences which existed prior to its coming into effect. A retrospective policy only impacts upon future consequences, even though it may be triggered by past events. Section 183(6A) of the act limits the adoption of retroactive policies to those which benefit a worker. In both appeals, the tribunal found that the policy operated retrospectively and must be applied to the disadvantage of the employers in question.

A third assessment appeal addressed business classifications and accident ratings. The board properly reclassified three separate businesses carried on by a single employer. Two of the businesses were similar in operation; whereas the third was dissimilar and conducted operations which were considered more likely to put its workers at risk of injury. Prior to the reclassification, all three business were similarly classified and had a common experience rating. All three had been linked to an injury affecting their experience rating. Over the employer's objections, the board refused to alter an experience rating for two of the three businesses until a three-year period expired. However, the tribunal found that, upon reclassification, the experience rating for the two businesses in question should have been adjusted.

CHRONIC PAIN

One decision concerning chronic pain was particularly noteworthy for its review of a number of the tribunal's more recent decisions in this area. In *Decision 2012-383-AD, 2013-16-AD & 2013-416-AD* (June 26, 2014, NSWCAT), a worker had been awarded a 5 per cent partial permanent disability (PPD) by the Appeal Board, a predecessor appeal body to the tribunal. Board decision-makers subsequently determined that the worker was entitled to a 6 per cent pain-related



impairment (PRI). Nonetheless, his permanent impairment benefit was increased by only 1 per cent because the previous award by the Appeal Board was attributed to the chronic pain condition. In allowing the worker's appeal, the tribunal noted more recent WCAT decisions which had consistently recognized chronic pain awards as a separate scheme of benefits. Therefore, the worker was entitled to a permanent impairment benefit which reflected two distinct awards; i.e., a 5 per cent PPD and a 6 per cent PRI.

EXTENDED EARNINGS-REPLACEMENT BENEFITS (EERB)

Several noteworthy EERB appeals presented novel circumstances or arguments.

In *Decision 2011-217-AD* (May 6, 2014, NSWCAT), a panel of appeal commissioners considered the calculation of a worker's EERB in connection with an early retirement incentive program (ERIP). It had previously been determined by the Nova Scotia Court of Appeal in *Enterprise Cape Breton Corporation v. Hogan,* 2013 NSCA 3, that post-injury ERIP benefits are not to be included in a post-injury earnings profile when calculating a worker's EERB. The issue in *Decision 2011-217-AD* was whether the same principle applied to retroactive benefits (the worker's EERB was made retroactive, effective to October 15, 2000). The panel found that ERIP benefits should not be included in calculating the worker's EERB. In its reasons, the panel discussed the board's change in practice and principles applicable to policy changes pursuant to Policy 10.3.2R.

The board's inclusion of so-called "sick" Employment Insurance (EI) benefits when calculating an EERB was challenged in *Decision 2014-39-AD* (August 21, 2014, NSWCAT). The tribunal found that Section 20 of the Workers' Compensation General Regulations, read in conjunction with Section 42 of the act, provide for the inclusion of such EI benefits. Therefore, the appeal was denied.

Another worker challenged the board's selection of TD1 tax withholding codes in calculating his EERB. Pursuant to Policy 3.1.2R, the board recalculated his benefits in his favour. The recalculation was based upon retroactive CRA adjustments to his tax returns. The worker appealed seeking to have the board also take into account his disability credit and reduced CPP/EI premiums. If his argument had been accepted, these factors would have reduced his post-injury earnings further, thereby increasing his EERB. However, the tribunal found that taking the disability credit and reduced premiums into account would have been inappropriate because it would have applied post-injury tax withholding codes to pre-injury earnings.

In *Decision 2014-619-AD* (January 7, 2015, NSWCAT), the tribunal considered the appeal of a worker under the age of 30 at the time of his injury. The worker sought the recalculation of his EERB pursuant to Section 46 of the act. This section may apply when pre-injury earnings do not fairly represent the worker's actual loss because due to the worker's age at the time of injury and his or her probable future increases in earnings. The facts and circumstances in this case supported a recalculation. The worker had been given a recent raise in recognition of his on-the-job training and de facto supervisory role, his plans to take a training course to advance his career, his experience and his impressive computer skills.

The last noteworthy decision in this topic area, *Decision 2013-488-AD* (June 5, 2014, NSWCAT), concerns an interpretation of s. 227 of the act. The worker sustained a workplace injury in 1987 and returned to work. In 2003 he was awarded a PMI, retroactively effective back to 1988. He went off work in 2012 and sought, but was denied, an EERB. The tribunal reviewed the seminal Nova Scotia Court of Appeal cases dealing with s. 227 and upheld the board's denial. In its reasons, the tribunal found that the statutory language in s. 227, "is entitled to receive compensation," should be interpreted to mean that entitlement is found at a later date. Accordingly, s. 227 operated to exclude the worker from an EERB based upon the date of his injury.

HEARING LOSS & TINNITUS

Three decisions concerning hearing loss and tinnitus claims were selected for discussion. The first, *Decision 2014-139-AD* (January 12, 2015, NSWCAT), rejected the application of policy 1.2.5AR1, recently adopted by the board, to a worker's hearing loss claim filed in 2012. The policy states that it applies to decisions made on or after January 1, 2015. If followed, it would operate to preclude the worker from claiming compensable hearing loss because he had not undergone audiological testing within 5 years after leaving his workplace. The tribunal found that the policy had a retroactive effect in this case. Since the result would have been unfavourable, s. 183(6A) of the act, precluded the application of the policy to the worker's claim.

The second matter, *Decision 2013-638-AD* (June 13, 2014, NSWCAT), reviewed the wording of policy 1.2.5AR. The tribunal determined that it was a precondition to awarding a PMI rating for occupational noise-induced hearing loss that there be audiograms and hearing loss testing. For this reason, the tribunal found that hearing loss benefits cannot be backdated to a date earlier than the respective audiogram.

The third decision in this topic area concerned tinnitus. *Decision 2014-439-AD* (October 31, 2014, NSWCAT), considered the board's "process" for managing tinnitus claims. The process incorporated various parameters including time frames for a worker to report having tinnitus, seek treatment and file a claim with the board. The process was not authorized by policy. Therefore, it was found to be a non-binding, generic document which didn't have to be followed by the tribunal.

MEDICAL AID/ATTENDANT ALLOWANCE

Issues surrounding medical aid gave rise to five decisions selected for comment.

The worker in *Decision 2014-319-AD* (September 9, 2014, NSWCAT) had been reimbursed for childcare costs. Childcare was needed in order for her to attend medical appointments. However, not all of her childcare costs had been covered. The tribunal accepted the reasoning of earlier decisions. The worker should have been reimbursed for all such costs she incurred in attending medical appointments related to her compensable injury, so long as the costs would not have been incurred otherwise.

The cost of meals incurred while traveling for medical appointments was discussed in *Decision 2014-249-AD* (September 18, 2014, NSWCAT). The worker in this appeal sought a pre-paid per diem amount for meals. However, the documents he submitted lacked information typically provided, such as the time of day the meals were taken and specifics concerning meals served. The tribunal found under the circumstances that it was appropriate for the board to require cash register receipts to document costs actually incurred.

Decision 2014-653-AD (February 12, 2015, NSWCAT) also pertained to travel claims for medical appointments. The worker in this case sought to have the board pay for his travel "home" to Sydney, even though he worked in the South Shore area. The tribunal noted that the worker had been in the South Shore area for close to three years and walk-in clinics were available in that area. Under the circumstances, the tribunal found that it was reasonable for the board to limit the worker's reimbursements to medical appointments in the South Shore area.

Medical aid may also encompass requests for orthotics or medication. An internal board research paper and a publicly available board position statement were considered in connection with a worker's request for orthotics in *Decision 2014-379-AD* (October 17, 2014, NSWCAT). The research paper was not identified as a peer reviewed paper or a board standard. The appeal commissioner in question inferred that the author was not a physician even though the author's qualifications were not provided. Neither the paper, nor literature in support of the author's conclusions, were given to the worker or available on the board's website. Therefore, evidence central to the board's decision had not been disclosed. Without such information, it was difficult to determine the reliability of the evidence or the weight such evidence should be given. Similarly, there was an insufficient basis to determine whether the paper reflected standards of health care practices in Canada. The tribunal noted, in addition, that the board's position statement did not preclude the approval of orthotics in the worker's circumstances. Therefore, neither the research paper, nor the position statement, supported the board's denial of orthotics and the appeal was allowed.

The last decision in this topic area, *Decision 2014-56-AD* (January 9, 2015, NSWCAT), concerned the board's denial of Sativex, a synthetic cannibinoid to an injured worker. The worker had been tried unsuccessfully on other medications; whereas Sativex had been helpful to him. The board's rejection of the requested medication was based on the opinion evidence from medical advisors and a position statement. In support of his claim, the worker provided testimony from Dr. Short, a specialist in physical medicine and rehabilitation. Dr. Short testified that the board's research was out of date and that use of Sativex was consistent with health care practice in Canada. The tribunal accepted and preferred Dr. Short's evidence and found that Sativex should be covered.

NEW EVIDENCE/RECONSIDERATION

A panel of appeal commissioners considered the board's general power of reconsideration in *Decision 2013-337-AD* (April 7, 2014, NSWCAT). A previous "final" decision found a worker's respiratory symptoms to be related to workplace exposures to allergens. Unlike most appeals involving reconsiderations, the board, on its own initiative, obtained expert medical evidence and reconsidered whether the worker's respiratory condition arose out of and in the course of employment.

The panel found that Policy 8.1.7R2 did not fetter the board's broad discretion to reconsider a matter under its general power to reconsider pursuant to s. 185(2) of the act. According to the panel, a contrary interpretation would be an overly restrictive, unreasonable reading of the policy and would not accord with the scheme of the act or duties of the board. The panel expressly rejected the argument that the board could not use "new evidence" to reconsider a decision unless it was provided by an employer or a worker.

[NB: *Decision 2013-337-AD* was rendered prior to the Nova Scotia Court of Appeal decision in *Nova Scotia (Workers' Compensation Board) v. Rhodenizer*, 2015 NSCA 15, which dealt with the statutory exception to the power to reconsider EERBs.]

Decision 2014-304-AD (January 20, 2015, NSWCAT) presents at least two findings of general interest in this topic area. The respective worker had apparently been injured while operating a cart at her place of employment. However, a 2012 decision, not appealed by the worker, found that the injury was non-compensable. Subsequent medical information presented to the board prompted a review and was found to be new evidence. This led to a successful reconsideration in favour of the worker.

The employer appealed to the tribunal. It argued that no evidence predating the board's final decision should have been considered in a reconsideration determination. The tribunal disagreed, noting that the context in which evidence had been obtained must be considered. It was noted that, in this case, the worker had been limited in her ability to present such evidence previously. Further, a blanket denial of such evidence would place too high a burden on health care providers and would preclude evidence procured by the board from being considered.

In addition, the tribunal adopted an Ontario WSIAT test referred to as "added peril." At its simplest, this doctrine refers to something about a workplace which presents an added risk to a worker. Applying this test, the tribunal found that the worker had been exposed to an added peril when operating the cart.

PERMANENT MEDICAL IMPAIRMENT (PMI) AND PERMANENT IMPAIRMENT BENEFIT (PIB)

A PIB is awarded in connection with a PMI. The board may commute an award and pay the benefit as a lump sum. *Decision 2014–158-AD* (July 11, 2014, NSWCAT) presented the unusual situation of a worker who died following a PMI assessment but before the board actually awarded a benefit. Following the worker's death, the board agreed to pay the worker's monthly PIB, to the date of death, to his surviving son. However, the son appealed, seeking a lump-sum commutation of the PIB. The tribunal denied the appeal based upon an interpretation of s. 34(5) of the act. The section provides that a PIB is payable for the lifetime of the respective worker. The tribunal reasoned that once the worker passes away, entitlement to the benefit ceases. Without such entitlement, there was no basis to commute the worker's future PIB.

RECOGNITION

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

Decision 2014-404-AD (October 29, 2014, NSWCAT) concerned a hospital worker injured on her way to work. The injury occurred when she slipped and fell in a crosswalk over a hospital road used by the general public. The site of the injury was within 35 feet of the entrance to the hospital building she worked in. The tribunal considered various factors set out in policy 1.3.7 and noted the general rule that an injury while commuting to work is not compensable. Under the circumstances, the tribunal found that the injury had not arisen out of and in the course of employment, so the claim was denied.

A second scenario involving a traveling worker was presented in *Decision 2014-409-AD* (March 10, 2015, NSWCAT). In that case, an outside sales representative sought to have her injury resulting from a motor vehicle accident recognized by the board. The motor vehicle accident occurred while she was driving a company vehicle. The evidence disclosed that the accident took place after normal business hours as the worker was driving home. She planned to take a supper break, wait until her children were in bed and then return to the employer's premises to load her vehicle.

The worker pointed out that her vehicle was "fully wrapped" with company advertising and had been assigned to her for her exclusive and unrestricted use. Gas and maintenance were provided by the employer. She was responsible for her own schedule and often worked later in the evening to load equipment and do paperwork. It was also her regular practice to drive directly to customer locations from home.

The tribunal noted the general rule that injuries suffered while going to and from work do not arise out of and in the course of employment. This rule is subject to exceptions, but the exceptions were found to be inapplicable in this case. The tribunal found that the worker's risks in traveling on a highway at the time of the accident were the same as any other member of the general public. The provision of the vehicle and cost coverage were fringe benefits and the employer received only an incidental marketing benefit. Non-work related factors suggested in policy 1.3.7 were found to outweigh work-related factors. Therefore, the worker's injury was not related to her work and she did not have a personal injury arising out of and in the course of her employment.

The last noteworthy case in this topic area involved an occupational disease. In *Decision 2013-237-AD (March 3, 2015, NSWCAT)*, the tribunal was asked to determine whether colon cancer could be causally linked to asbestos exposure in the workplace. The evidence before the tribunal included testimony from the worker detailing his significant exposure to asbestos at work and his non-contributing personal and family history. In addition, he indicated that at least two co-workers exposed to asbestos developed cancer from asbestos.

Two medical specialists with opposing views concerning causation presented the most significant pieces of medical evidence. The specialist for the worker opined that a causal connection was shown; while the board specialist held the opposite opinion. On balance, the tribunal held that it was at least as likely as not that the worker's cancer had been caused by asbestos exposure in his employment. Therefore, he was found to have an occupational disease which should be recognized.

SELF-PROTECTION COVERAGE

Decision 2013-629-AD (September 19, 2014, NSWCAT) involved an owner-operator of a truck who was injured at work. Since he had obtained self-protection coverage from the board, he claimed benefits. However, when his long-term earnings profile was calculated following receipt of 26 weeks of TERB, the board found that he had no "normal weekly earnings," so he was denied further benefits. The finding was based upon net income according to tax return information.

On appeal, the worker presented evidence showing that, for most of the three years prior to his injury, he was able to take regular draws from his business. He could do this, despite having little or no income for tax purposes, because his taxable income was offset by various non-cash deductions such as vehicle depreciation. Under the circumstances, the tribunal found that the tax return information did not accurately reflect the worker's normal rate of pay pursuant to policy 3.1.1R2. His earnings were more accurately reflected by his draws. Therefore, the board was directed to recalculate the worker's entitlement to TERB based upon his regular business draws.

In *Decision 2012-233-AD & 2014-60-AD* (August 22, 2014, NSWCAT), the owner of a building contracting business with voluntary special protection coverage suffered an injury. Following the injury, the board calculated his EERB entitlement based upon the minimum special protection coverage he had purchased, not upon his actual earnings. He appealed, claiming that he had been misled by a board representative at the time he obtained special protection as to the amount of benefits he would be entitled to in the event he was injured.

The board acknowledged that the field representative in question gave the worker unsatisfactory explanations about his coverage. However, the tribunal found there was insufficient evidence to show that the worker had been intentionally misled. It was just as likely that he misunderstood the explanation given to him as it was that he had been given incorrect information. The tribunal pointed out that the worker bore the responsibility of learning the extent of his coverage. He could have, for example, learned the correct facts by contacting the board for clarification or by looking at the board's online website. Moreover, it was difficult to accept that he could believe his purchase of minimum coverage entitled him to maximum coverage. The tribunal found there was insufficient evidence to void the Worker's application for special coverage or find that his EERB had been calculated incorrectly.

Decision 2014-84-AD (August 29, 2014, NSWCAT) involved an interesting question of timing. The worker, a self-employed mechanic, had special protection in place. He was injured while in the process of winding down his business and vacating his business premises. The board denied him benefits since it found that his injury did not arise out of and in the course of employment. However, the tribunal found that the location where he was injured continued to be the worker's business location. The tribunal further found that he was injured while carrying out duties incidental to the business. Therefore, his injury was found to be compensable and covered.

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.

Decision 2013-273-AD (September 11, 2014, NSWCAT), involved a challenge to the act pursuant to s. 15(1) of the *Charter of Rights and Freedoms*. The challenge was brought by a former spouse of a worker killed in an industrial accident. At the time, the ex-spouse had been receiving support payments under a Separation Agreement and Divorce Decree. The surviving ex-spouse applied for, but was denied, survivor benefits.

A panel of appeal commissioners applied a Supreme Court of Canada decision, *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65. The panel found that any disadvantage suffered by the ex-spouse was not based upon marital status. Absent such grounds, the Charter challenge failed. In the alternative, the panel found that the ex-spouse failed to show discriminatory treatment under s. 15(1).

SUSPENDED BENEFIT AND STATUTE-BARRED CLAIMS

Section 83(6) of the act provides that a claim for compensation is barred if brought five or more years from the happening of an accident or the date a worker learns of an occupational disease.

The worker in *Decision 2014-212-AD* (October 30, 2014, NSWCAT) appealed seeking reconsideration of a prior final decision. In essence, the matter involved a statute barred claim for a 1993 injury and the worker submitted that additional evidence showed he had an "unsound mind" from June 1998 until 2002. The tribunal reasoned that the worker's obligation under s. 83 of the act to notify the board of his claim began to run in June 1993. Even if his position was accepted and he was incapacitated from June 1998 until January 2002, the tribunal found that a period in excess of five years would have elapsed during which the worker could have given notice but failed to do so. As a result, the worker's claim was statute barred.

Another interesting appeal involving the statutory bar concerns notice given to the employer and the board of another province. The worker in *Decision 2014-05-AD* (April 2, 2014, NSWCAT) developed a shoulder problem related to his employment in the other province. He moved to Nova Scotia in 2002, went off work in June 2003 and notified the Nova Scotia board of a claim for an aggravation to his shoulder injury in 2012. The tribunal found that notice to the board of another province was insufficient to provide notice to the board in Nova Scotia because they are separate legal bodies. Despite the worker's assertion that he did not have certainty concerning the diagnosis of his shoulder problem until 2012, the tribunal found that he was well aware of his injury. Therefore, the limitation period began to run by 2004. Since the limitation period does not extend beyond five years, he had until 2009 to notify the board in Nova Scotia. Lastly, notice to an employer is also insufficient as notice to the board. For these reasons, the worker's claim was statute barred.

TERB

Of the many TERB appeals decided this year, two unusual decisions were selected for comment.

The first, *Decision 2013-538-AD* (August 25, 2014, NSWCAT) concerns a worker who sustained a shoulder injury but went back to full-time duties from 2011 until her surgery in 2014. Her evidence was that she could do most of her duties, but not all of them. She asserted that she paid her spouse to do those things she could not do from November 2010 until she went off for surgery. The tribunal found that neither the board, nor the employer, were on notice the worker was being assisted by her spouse and she was compensating him for this. In the tribunal's view, the arrangement was adopted informally; i.e., it was the worker's personal choice. The board had no input into her personal decisions. She could have, and should have, notified the board and employer of her deficiencies. Therefore, the tribunal did not accept that the worker had sustained a loss of earnings for which she should be compensated.

The second appeal, *Decision 2014-231-AD* (November 6, 2014, NSWCAT), involved a worker who had injured her shoulder in July 2013. She commenced a return to work program with her employer as an "extra" in October 2013 and returned to full duties on February 3, 2014. Over the period of the return to work program, she was paid TERB by the board and did not receive earnings from the employer.

The tribunal reviewed re-employment/ accommodation rights and obligations contained in sections 90-91 of the act and board Policies 5.2.4 and 5.2.6. The tribunal found there was a lack of evidence to support a finding that the employer experienced undue hardship in accommodating the worker. Without such evidence and an objection by the employer based upon undue hardship, the board did not have a basis to pay the worker TERB during the return to work program. The tribunal concluded that paying the Worker TERB had been contrary to the board's own policies. Instead, the worker was entitled to payment of her regular compensation from the employer during the return to work program.

PROCEDURAL QUESTIONS & MISCELLANY

In *Decision 2014-400-AD* (February 25, 2015, NSWCAT), the tribunal addressed a request for an extension of time to appeal a case manager decision to a hearing officer pursuant to s.190 of the act. Factors to be considered in such a request were gleaned from Nova Scotia Court of Appeal decisions, decisions of the tribunal and the tribunal's Procedure Manual. These factors include: a bona fide intent to appeal; a reasonable excuse for the delay in appealing; prejudice to participants; and compelling or exceptional circumstances warranting an extension of time. The overriding principle was whether injustice would result if the time limit to appeal is not extended. In this case, the length of the delay in seeking to appeal was not fatal to the worker's request for an extension. She was not given notice of information pertinent to her claim, which was considered a breach of natural justice. Her request for an extension was made within a short time after she received the information in question. In addition, there was no evidence of prejudice to other participants. Therefore, the tribunal found that an extension of time was warranted to avoid an injustice to the worker.

APPEALS FROM TRIBUNAL DECISIONS

The tribunal is the final decision-maker in the workers' compensation system.

A participant who disagrees with a tribunal decision can ask the Nova Scotia 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.

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 redetermine facts or investigate a claim.

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 this fiscal year, 11 appeals from tribunal decisions were filed with the Court of Appeal:

- 8 decisions were appealed by workers
- 3 decisions were appealed by employers regarding compensation awarded to workers

During this fiscal year, 9 appeals were resolved as follows:

- 2 appeals were discontinued by the party who filed the appeal
- 1 appeal was dismissed by the Court due to a failure to follow procedures
- leave to appeal was denied 3 times
- One appeal was remitted to the tribunal for a re-hearing by consent of all parties
- 2 appeals were decided by the Court of Appeal – both were allowed

At the beginning of this fiscal year, there were 6 active appeals before the Court of Appeal. At the end of this fiscal year, there remained 8 active appeals.

DECISIONS OF THE COURT OF APPEAL

The Court decided two appeals in this fiscal year.

Enterprise Cape Breton Corporation v. Anderson, 2014 NSCA 59

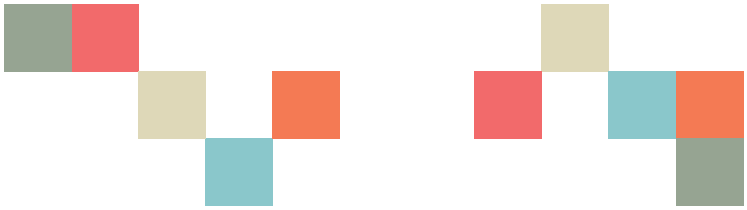
The board awarded Mr. Anderson, a former coal miner, a permanent impairment benefit for pneumoconiosis effective February 16, 2012, the date a pulmonary function test revealed a 30 per cent impairment. A prior pulmonary function test from 1999 had revealed no impairment. Mr. Anderson sought a back-dating of his award at the tribunal.

Despite a lack of investigations between 1999 and 2012, the tribunal found it reasonable to assume that the impairment progressed to 10 per cent by 2004 (as in 1999 a doctor had recommended that the Worker be reviewed in five years) and to 20 per cent by 2009.

The Court of Appeal allowed Enterprise Cape Breton Corporation's appeal.

The Court found that the tribunal's reasoning for backdating the award was nothing more than speculation. Further, the tribunal failed to follow policy 3.3.4R which, amongst other criteria, requires that the existence of a permanent medical impairment be "determined by medical means" and be based solely on demonstrable loss of bodily function. The Court found that the tribunal's findings were not based on medical evidence, but instead on "musings about what the evidence may have been at a certain point in time." As such, the back-dating was overturned.

The Court found that it did not have to decide whether evidence other than a pulmonary function test could be 'medical evidence' for purposes of establishing the effective date for a pulmonary impairment.



Nova Scotia (Workers' Compensation Board) v. Rhodenizer, 2015 NSCA 15

Mr. Rhodenizer injured his lower back in 2005. In 2009, he was awarded a partial extended earnings-replacement benefit. It was partial in that the WCB found him able to earn income as a customer service representative and deemed him to have such income.

Under s. 73 of the *Workers' Compensation Act*, extended earnings-replacement awards may be reviewed 36 months after the initial award, with a further optional review 24 months after the 36-month review (by policy the 36-month review is mandatory).

At Mr. Rhodenizer's 36-month review, he obtained an opinion from a physiotherapist who felt him incapable of employment as a customer service representative in 2009. He sought to have the 2009 decision reconsidered on the basis of 'new evidence' under the Board's reconsideration power.

The tribunal found that the board had a broad reconsideration power under s. 185 that would allow it to reconsider the initial award of an extended earnings-replacement benefit on the basis of new evidence.

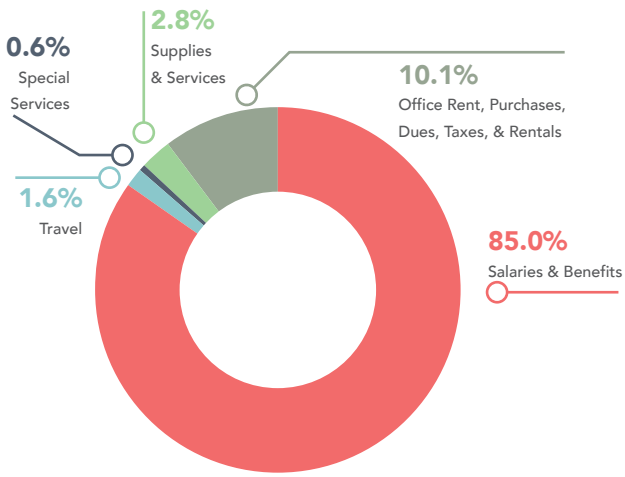
The Court of Appeal allowed the WCB's appeal.

The Court found that s. 73 is a complete code for the reconsideration of an extended earnings-replacement benefit award and that such awards are not subject to review on the basis of new evidence under s. 185 of the *Workers' Compensation Act*. The Court found that the Legislature intended to bring finality to extended earnings-replacement benefit awards though the provisions of s. 73.

FINANCIAL OPERATIONS

In 2014–15, the tribunal's total expenditures were within 80 per cent of the original authority and within 91 per cent of our revised forecast (see Figure 12). Net expenditures totaled $1,724,583.33, an increase from the previous year due to salary adjustments.

FIGURE 12
BUDGET EXPENDITURES
(for the Fiscal Year Ending March 31, 2015)



APPENDIX

FIGURE 1
APPEALS RECEIVED

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 2011–12	58	79	83	70	69	46	82	76	79	64	55	71	832
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

FIGURE 2
DECISIONS RENDERED

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 2011–12	57	54	49	47	51	67	63	66	52	52	61	45	664
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

FIGURE 3
APPEALS OUTSTANDING AT YEAR END

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
Fiscal 2011–12	590	606	632	647	657	632	638	639	659	665	653	670
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

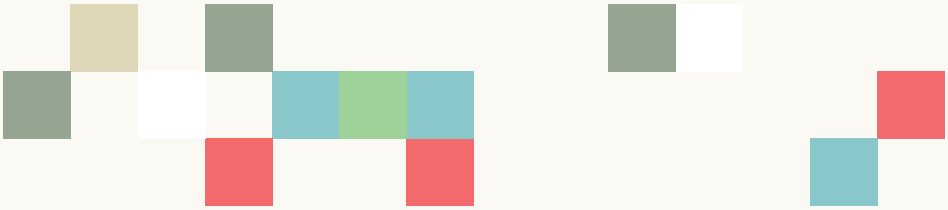


FIGURE 4
TIMELINESS TO DECISION (CUMULATIVE PERCENTAGE BY MONTH)

Months	1	2	3	4	5	6	7	8	9	10	11	>11
Fiscal 2011–12	0.60	4.82	20.33	33.73	44.58	51.96	60.84	66.42	72.14	76.51	79.82	100
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

FIGURE 5
DECISIONS BY REPRESENTATION

Self-Represented	82
Workers' Advisers Program	368
Injured Worker Groups, Outside Counsel & Others	128

FIGURE 6
DECISIONS BY ISSUE CATEGORIES – WORKER

Recognition of Claim	185
New/Additional Temporary Benefits	104
New/Increased Benefits for Permanent Impairment	158
Medical Aid (Expenses)	102
New/Additional Extended Earnings Replacement Benefits	72
New Evidence	36
Chronic Pain	60
Termination of Benefits for Non-Compliance	10
All Other Issues	54
Total	781

FIGURE 7
DECISIONS BY ISSUE CATEGORIES – EMPLOYER

Acceptance of Claim	12
Extent of Benefits	8
Assessment Classification	0
Assessment Penalties	0
Other Claims Issues	0
Other Assessment Issues	0
Total	20

FIGURE 8
DECISIONS BY MODE OF HEARING

	Oral Hearings	Written Submissions	Total
Fiscal 2011–12	421	243	664
Fiscal 2012–13	414	300	714
Fiscal 2013–14	387	252	639
Fiscal 2014–15	374	204	578

FIGURE 9
DECISIONS BY OUTCOME

Allowed	164
Allowed in Part	86
Denied	236
S29	0
RTH	89
Moot	3
Total Final Decisions	578
Appeals Withdrawn	121
Total Appeals Resolved	699

FIGURE 10
DECISIONS BY APPELLANT TYPE

Worker Claim Appeals*	553
Employer Claim Appeals	22
Employer Assessment Appeals	3
Section 29 Applications	0
Total	578

*Employer participation in Worker appeals 27%

FIGURE 11
APPEALS BEFORE THE COURTS AT YEAR END

	Nova Scotia Court of Appeal	Supreme Court of Canada	Total
Fiscal 2011–12	17	0	17
Fiscal 2012–13	11	0	11
Fiscal 2013–14	6	0	6
Fiscal 2014–15	11	0	11

FIGURE 12
BUDGET EXPENDITURES
(for the Fiscal Year Ending March 31, 2015)

	Authority	Final Forecast	Actual Expenditures
Salaries & Benefits	$1,754,000.00	$1,543,500.00	$1,465,396.00
Travel	$56,000.00	$56,000.00	$28,000.85
Special Services	$85,000.00	$26,000.00	$10,314.99
Supplies & Services	$60,000.00	$60,000.00	$47,430.53
Office Rent, Purchases, Dues, Taxes, & Rentals	$210,000.00	$210,000.00	$173,440.96
Sub Total	$2,165,000.00	$1,895,500.00	$1,724,583.33
Less Recoveries	$0.00	$0.00	$0.00
Totals	$2,165,000.00	$1,895,500.00	$1,724,583.33