

Workers' Compensation Appeals Tribunal

Annual report
for the year ending March 31, 2013



Workers' Compensation Appeals Tribunal

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Ross Landry
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, 2013.

Respectfully submitted,

A handwritten signature in cursive script that reads "Louanne Labelle".

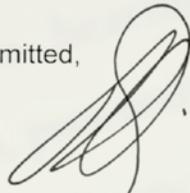
Louanne Labelle
Chief Appeal Commissioner

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, 2013.

Respectfully submitted,



Ross Landry
Minister Responsible for Part II of the *Workers' Compensation Act*

Tribunal Personnel 2012–13

Colleen Bennett
Supervisor, Office Services

Arlene Kennedy
Acting Registrar

Charlene Downey
Secretary/receptionist

Joy Fowler
Secretary

Samantha MacGillivray
Secretary

Diane Smith
Scheduling coordinator

Appeal Commissioners

Louanne Labelle
Chief Appeal Commissioner

Leanne Rodwell Hayes

Alison Hickey

Glen Johnson

Gary Levine

Brent Levy

Sandy MacIntosh

Andrew MacNeil

David Pearson

Andrea Smillie

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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 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.

Operations Overview

The tribunal's appeal volumes remain comparable to last year. The tribunal received 765 appeals in 2012–13, compared to 832 in the previous year. The tribunal was able to increase decision output for the second consecutive year as the number of decisions issued by the tribunal increased from 664 in 2011–12 to 714 in 2012–13. Therefore, at year-end, 605 appeals remained to be resolved, compared to 670 last year.

Timeliness to decision has not improved, even though more appeals were resolved last year. Appeals continue to take longer to resolve primarily due to requests for additional medical evidence by WAP and, on occasion, by employers. Approximately 52 per cent of decisions were released within six months of the date the appeal was received, the same as in the previous year. Approximately 70 per cent of decisions were released within 9 months of the date the appeal was received, compared to 72 per cent last year. Over 25 per cent of appeals took more than 11 months to resolve as compared to 20 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, as well, decide, on occasion, to discontinue their participation in an appeal prior to a hearing.





Of the 714 decisions issued this past year, 54 per cent of workers were represented by WAP. However, of the 605 outstanding appeals at year-end, 70 per cent of workers were represented by WAP.

Employers participated in 29 per cent of the resolved appeals in 2012–13 and are participating in 40 per cent of the appeals outstanding at the tribunal at year-end. Many employers are unrepresented but can benefit from the advice offered by the Office of the Employer Advisor. The tribunal communicates directly with unrepresented participants – whether workers or employers – to provide them with information on appeal processes.

During the year 2012–13, entitlement to new or increased benefits for permanent impairment was again the issue most often on appeal, representing 23 per cent of issues on appeal. Recognition of claim was also significant at 21 per cent of issues on appeal.

The tribunal heard most appeals (58 per cent) by way of oral hearing, a decrease from last year's total of 63.4 per cent.

Outcomes on appeal for the year 2012–13 remained constant. The overturn rate (appeals allowed or allowed in part) by the tribunal increased slightly to 44.4 per cent from 43.82 per cent the year previous. The number of appeals referred back to the hearing officer increased slightly to 14.71 per cent, from 12.95 per cent. The number of appeals denied decreased to 40.76 per cent, from 42.32 per cent.

The tribunal resolved more appeals without the need for a hearing through the efforts of a full-time registrar. In total, 116 appeals were withdrawn in 2012–13, an increase from 96 the previous year. The tribunal resolved a total of 830 appeals this past year.

Appeals continue to be filed predominantly by workers (96 per cent).

Appeals to the Court of Appeal decreased during 2012–13 to 14 (2 per cent of decisions rendered) from 18 the previous year. At year end, 11 appeals remained at the Court of Appeal. Of the decisions issued by the Court this year, 6 appeals were denied at the leave stage, 4 were denied on the merits, upholding the tribunal's decision and 2 were resolved by consent order directing a rehearing.

The tribunal continued to issue a consistent and coherent body of decisions, providing clarity and guidance to adjudicators, injured workers and employers.

Of note, on December 6, 2012, the tribunal issued a decision involving a challenge to the stress exclusion in s. 2(a) of the *Workers' Compensation*

Act (Decision 2011-359-AD). 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.

This matter is now on appeal to the Court of Appeal. The board is currently developing a policy to apply to stress claims under the act.

Again, I would like to recognize this year the individual contributions of all tribunal staff to the efficient and fair resolution of appeals during this past year. Their dedication and commitment ensured that the tribunal maintained not only its efficient operations but also the standard of quality and consistency expected by all participants.

Strategic planning

This past year, the tribunal benefitted from the secondment of Arlene Kennedy from the board as a full-time registrar. This secondment met all expectations in terms of the performance goals established at the outset. With the collaboration of WAP, case management improved, and the number of unscheduled appeals decreased from 455 to 287 as at the end of January, 2013 when the secondment ended.

Ms Kennedy also facilitated the resolution of appeals. Between April 1, 2012 and the end of January 2013, 98 appeals were discontinued largely due to her efforts in communicating with participants (particularly self-represented participants), representatives and board adjudicators. Other appeals were referred back to the board by agreement between participants.

An appeal commissioner has assumed the registrar's duties on a full-time basis until the tribunal can fill this position by competition, as the workload continues to demand the attention of a full-time registrar.

We continue to emphasize, with WAP and all participants, the need for a more timely and effective resolution of appeals. By this collaborative effort, the tribunal is improving the effective management of appeals.

Internally, the tribunal's case management team involved all staff in a review to update processes to respond better to the needs of participants. The tribunal also reviewed and revised its procedures regarding the disclosure of documents to better achieve a balance between adequate and fair disclosure and the protection of privacy. This effort continues.

Interagency Cooperation

As Chief Appeal Commissioner, I am a member of the Heads of Agencies Committee, which oversees implementation of the WSIS strategic plan. I also meet regularly with 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 to discuss issues arising from the adjudication of claims and appeals. This group forms the Issues Resolution Working Group (IRWG) whose mandate is to develop and implement issue resolution initiatives to support improved communication, information sharing and overall efficiency of the workers' compensation system.

During 2012–13, IRWG worked very closely with the Internal Appeals Review Project team during the consultation phase and more recently the implementation phase of the project.

Proposed initiatives included: implementing a coaching model in the service delivery units; implementing plain language decisions in service delivery; and, refocusing the current Internal Appeals function to achieve a more collaborative approach to resolving appeals.

The tribunal hosted a stakeholder consultation session in the fall of 2012 which provided an opportunity for the Internal Appeals Review Project team to update external partners and stakeholders on the recommendations for change. It also provided the opportunity for employer and worker representatives to exchange ideas and express their concerns relating to adjudication and claim issues.

Partner agencies have continued to monitor implementation of the recommendations and provide ongoing feedback as specific initiatives are implemented.

IRWG and its sub-committee, the Appeal Issues Discussion Group, participated in the development of a new process implemented by the board's service delivery units to ensure that additional evidence provided by WAP on appeal is reviewed by case managers. This initiative may help resolve appeals more effectively.

We also provided feedback to the board respecting training programs being offered to adjudicators around entitlement issues. These initiatives achieve a level of system learning that improves the quality of decisions.

The Appeal Issues Discussion Group also continued to monitor progress on hearing loss claims in an effort to promote consistency throughout the system.

Interaction with stakeholders

Tribunal members take the opportunity to speak with injured worker groups and employer representatives to inform participants and obtain feedback on tribunal processes. As mentioned, the tribunal held a consultation session in the fall of 2012 to obtain feedback on proposed initiatives for the appeal system.

I also met with worker and employer representatives on several occasions to discuss matters of concern including privacy issues, disclosure of documents and employer participation in appeals. The tribunal participated in a workshop offered by the Office of the Employer Advisor on the appeal system. We also collaborated with the OEA in the planning of a mock hearing for employers who are participating in greater numbers in the appeal system.

On a yearly basis, I meet with the board's Board of Directors to bring them up to date on operations at the tribunal. On May 8, 2012, the Deputy Minister of Labour and Advanced Education and the Chair of the board's Board of Directors hosted the eighth annual meeting of stakeholders. This was an opportunity for partner agencies such as the tribunal to answer questions from stakeholders on tribunal operations.

Financial Operations

In 2012–13, the tribunal's total expenditures were within 87 per cent of the original authority and within 97 per cent of our revised forecast. Net expenditures totaled \$1,762,235.73, an increase from the previous year due to salary adjustments.

Key Initiatives for the Year Ahead

- Timely and efficient adjudication of appeals – the tribunal's strategic plan developed in 2011–12 – identified timeliness as a key priority. This past year we engaged our partners, primarily WAP, in developing strategies to improve timeliness. We have made progress in reducing the number of unscheduled appeals and in resolving appeals that were outstanding for more than one year. This joint effort will be ongoing during the coming year facilitated by a newly created full-time position of appeal commissioner/registrar.
- Consistent and quality decision making ensured by performance management and peer review.



- Simplified and fair appeal processes ensured by continued efforts by the tribunal to educate, inform and assist self-represented appeal participants. The tribunal will update our communication tools in 2013-14 to keep up with changes in appeal processes in an effort to provide our clients with the information they need to access the tribunal. We continue to participate in workshops on the appeal system hosted by stakeholder groups.
- Cooperation with partner agencies within the workers' compensation system particularly in the area of developing an issue resolution strategy aiming at a less adversarial system. The focus of our efforts this year will be the implementation of the recommendations of the Internal Appeals Review Project aimed at improving the quality of case management at the board and refocusing the Internal Appeals function based on a more collaborative approach to resolving appeals.
- The continuing review of the tribunal's policies and procedures regarding privacy issues and the disclosure of information has culminated in a three month pilot project starting on April 1, 2013 in cooperation with the Internal Appeals division to improve service delivery and outcomes relating to the disclosure of information on appeals.



Louanne Labelle
Chief Appeal Commissioner

Introduction

The tribunal hears appeals from final decisions of hearing officers of 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.

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 765 appeals in 2012–13, compared to 832 in the previous year (see Figure 1). The tribunal was able to increase decision output for the second consecutive year as the number of decisions issued by the tribunal increased from 664 in 2011–12 to 714 in 2012–13 (see Figure 2). Therefore, at year-end, 605 appeals remained to be resolved, compared to 670 last year (see Figure 3).

Timeliness of decisions has not improved, even though more appeals were resolved last year. Appeals continue to take longer to resolve primarily due to requests for additional medical evidence by WAP and, on occasion, by employers. Approximately 52 per cent of decisions were released within six months of the date the appeal was received, the same as in the previous year (see Figure 4). Approximately 70 per cent of decisions were released within 9 months of the date the appeal was received, compared to 72 per cent last year. Over 25 per cent of appeals took more than 11 months to resolve as compared to 20 per cent the previous year.

Please see Appendix containing specific data for the following figures.

Figure 1
Appeals Received

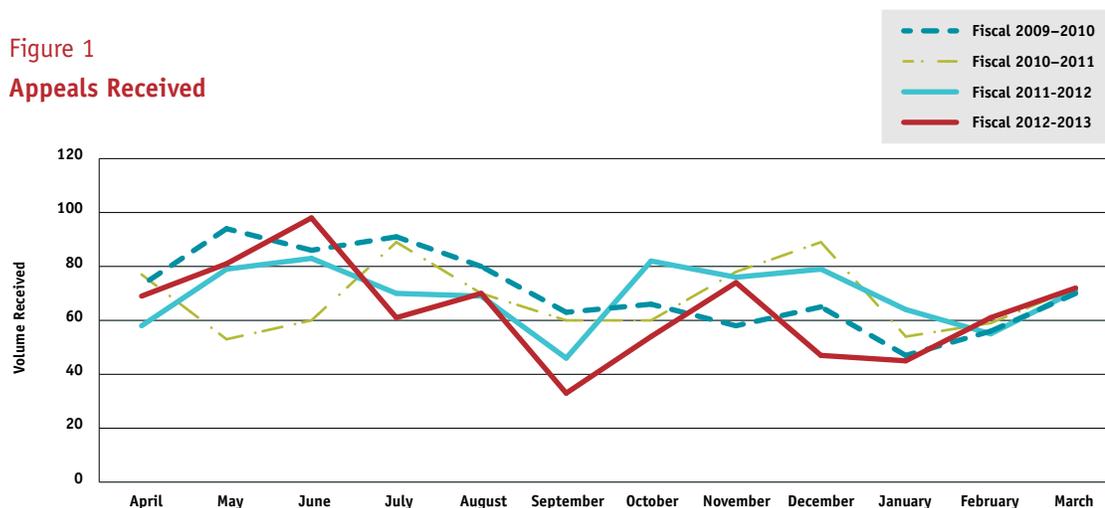


Figure 2
Decisions Rendered

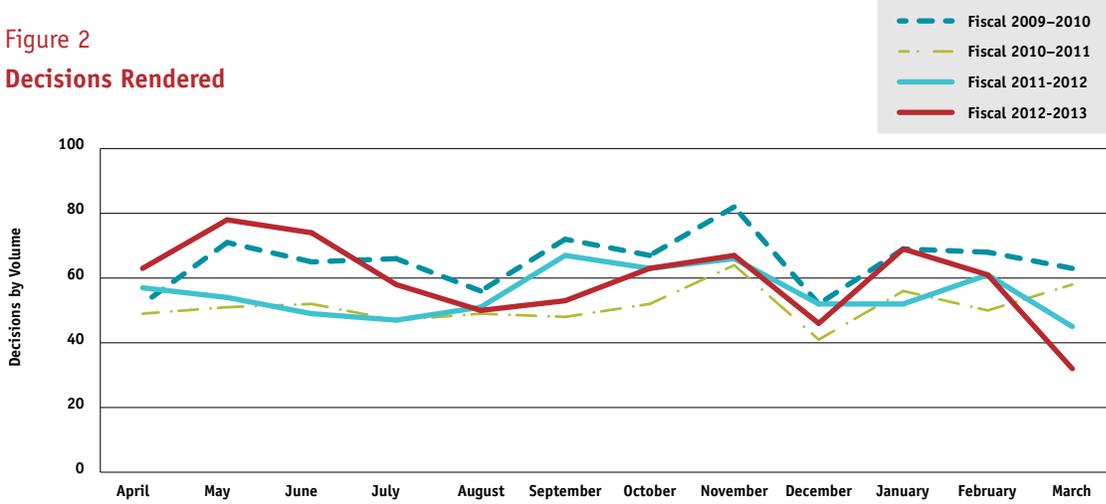


Figure 3
Appeals Outstanding at Year End

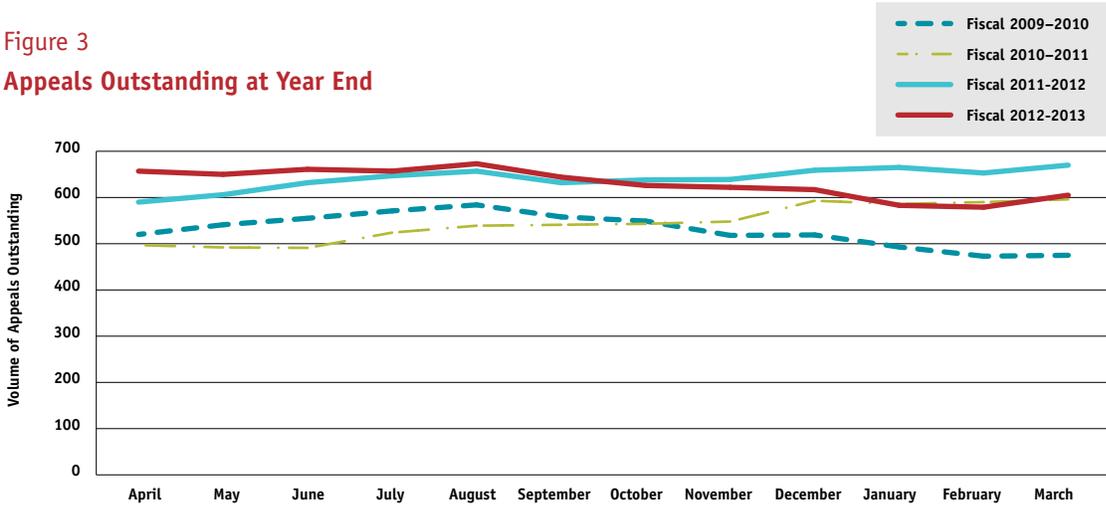
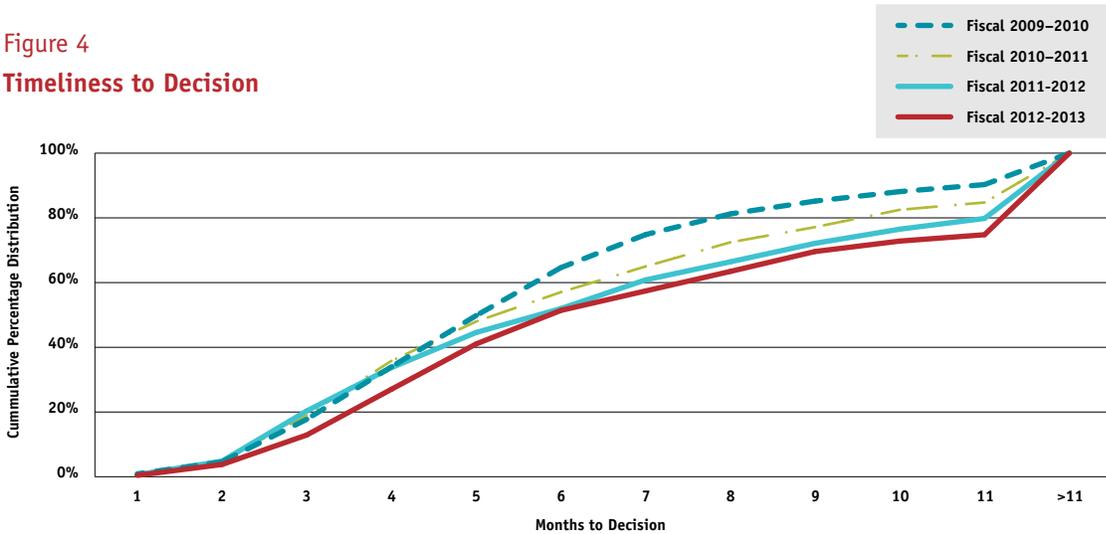


Figure 4
Timeliness to Decision



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 then may withdraw their representation prior to a hearing. Employers, as well, decide, on occasion, to discontinue their participation in an appeal prior to a hearing.

Of the 714 decisions issued this past year, 54 per cent of workers were represented by WAP (see Figure 5). However, of the 605 outstanding appeals at year-end, 70 per cent of workers were represented by WAP.

Figure 5
Decisions by Representation

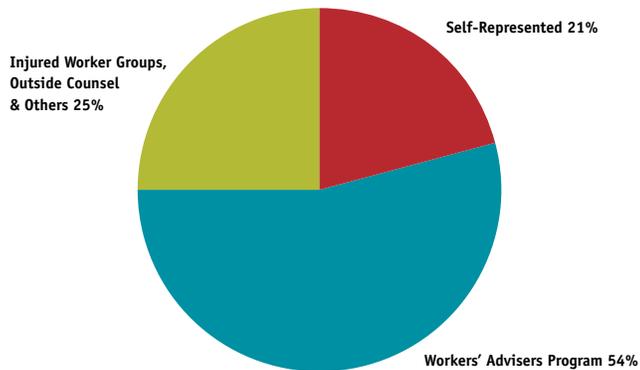
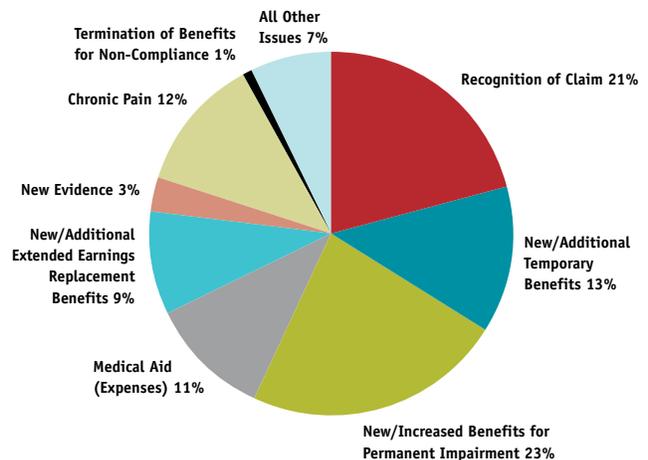


Figure 6
Decisions by Issue Categories – Worker



Employers participated in 29 per cent of the resolved appeals in 2012–13 and are participating in 40 per cent of the appeals outstanding at year-end. Many employers are unrepresented but can benefit from the advice offered by the Office of the Employer Advisor. The tribunal communicates directly with unrepresented participants – whether workers or employers – to provide them with information on appeal processes.

During the year 2012–13, entitlement to new or increased benefits for permanent impairment was again the issue most often on appeal, representing 23 per cent of issues on appeal (see Figures 6 and 7). Recognition of claim was also significant, representing 21 per cent of issues on appeal.

The tribunal heard most appeals (58 per cent) by way of oral hearing, a decrease from last year’s total of 63.4 per cent (see Figure 8).

Figure 7
Decisions by Issue Categories – Employer

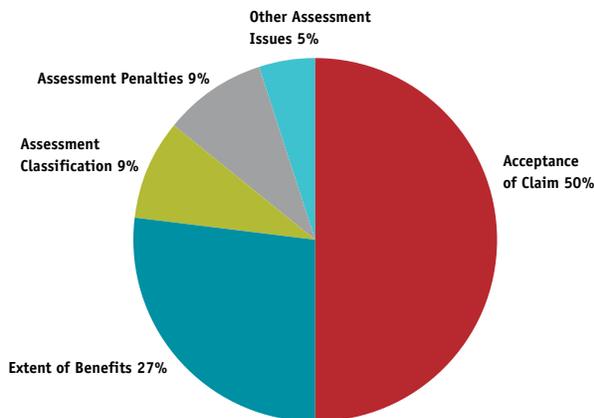
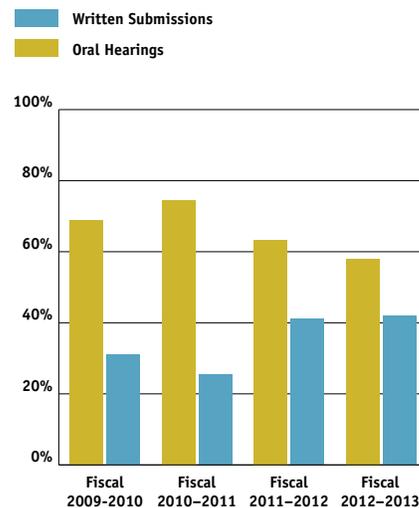


Figure 8
Decisions by Mode of Hearing



Outcomes on appeal for the year 2012–13 remained nearly constant. The overturn rate (appeals allowed or allowed in part) by the tribunal increased slightly to 44.4 per cent from 43.82 per cent the year previous (see Figure 9). The number of appeals referred back to the hearing officer increased slightly to 14.71 per cent, from 12.95 per cent. The number of appeals denied decreased to 40.76 per cent, from 42.32 per cent.

The tribunal resolved more appeals without the need for a hearing through the efforts of a full-time registrar. In total, 116 appeals were withdrawn in 2012–13, an increase from 96 in the previous year. The tribunal resolved a total of 830 appeals this past year.

Appeals continue to be filed predominantly by workers (96 per cent) (see Figure 10).

Figure 9
Decisions by Outcome

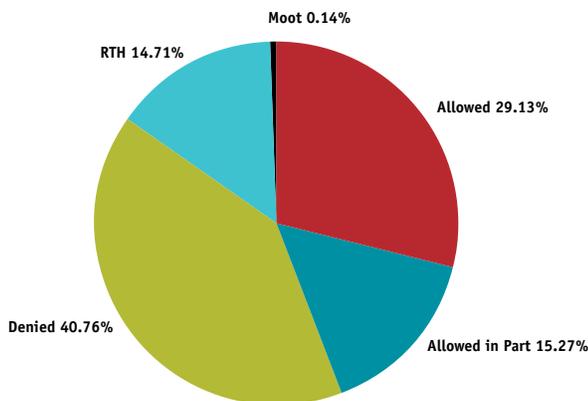
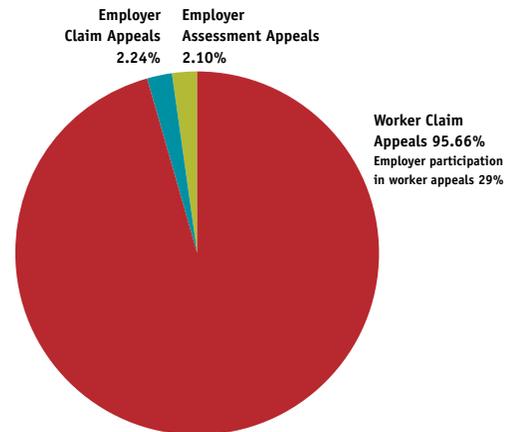


Figure 10
Decisions by Appellant Type



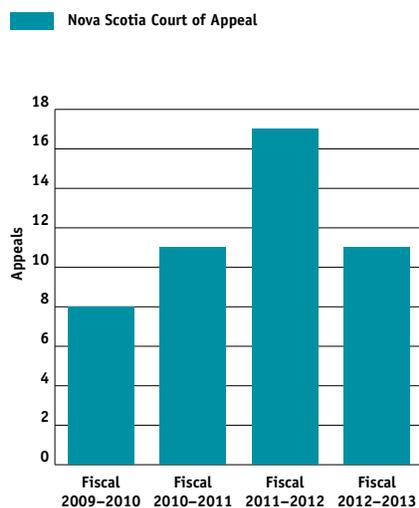
Appeals to the Court of Appeal decreased during 2012–13 to 14 (2 per cent of decisions rendered) from 18 in the previous year (see Figure 11). At year end, 11 appeals remained at the Court of Appeal. Of the decisions issued by the Court this year, 6 appeals were denied at the leave stage, 4 were denied on the merits, upholding the tribunal’s decision and 2 were resolved by consent order directing a rehearing.

The tribunal continued to issue a consistent and coherent body of decisions, providing clarity and guidance to adjudicators, injured workers and employers.

Of note, on December 6, 2012, the tribunal issued a decision involving a challenge to the stress exclusion in s. 2(a) of the *Workers’ Compensation Act* (*Decision 2011-359-AD*). 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.

This matter is now on appeal to the Court of Appeal. The board is currently developing a policy to apply to stress claims under the act.

Figure 11
Appeals Before the Courts at Year End





Strategic planning

This past year, the tribunal benefitted from the secondment of Arlene Kennedy from the board as a full-time registrar. This secondment met all the performance goals established at the outset. With the collaboration of WAP, case management improved, and the number of unscheduled appeals decreased from 455 to 287 by the end of January, 2013 when the secondment ended.

Ms Kennedy also facilitated the resolution of appeals: between April 1, 2012 and the end of January 2013, 98 appeals were discontinued largely due to her efforts in communicating with participants (particularly self-represented participants), representatives and board adjudicators. Other appeals were referred back to the board by agreement between participants.

An appeal commissioner has assumed the registrar's duties on a full-time basis until the tribunal can fill this position by competition, as the workload demands the attention of a full-time registrar.

We continue to emphasize, with WAP and all participants, the need for a more timely and effective resolution of appeals. By this collaborative effort, the tribunal is improving the management of appeals.

Internally, the tribunal's case management team involved all staff in a review to update processes to better respond to the needs of participants. The tribunal also reviewed and revised its procedures for the disclosure of documents, to better achieve a balance between adequate and fair disclosure and the protection of privacy. This effort continues.

Interagency Cooperation

The Chief Appeal Commissioner is a member of the Heads of Agencies Committee, which oversees implementation of the WSIS strategic plan. She meets regularly with the Chief Workers' Adviser, the Manager of Internal Appeals, the Manager of the board's Client Services department and board legal counsel to discuss issues arising from the adjudication of claims and appeals. This group forms the Issues Resolution Working Group (IRWG), whose mandate is to develop and implement issue resolution initiatives to support improved communication, information sharing and overall efficiency of the workers' compensation system.

During 2012–13, IRWG worked very closely with the Internal Appeals Review Project team during the consultation phase and more recently the implementation phase of the project.

Proposed initiatives include: implementing a coaching model in the service delivery units; implementing plain language decisions in service delivery; and, refocusing the current Internal Appeals function to achieve a more collaborative approach to resolving appeals.

The tribunal hosted a stakeholder consultation session in the fall of 2012 which provided an opportunity for the Internal Appeals Review Project team to update external partners and stakeholders on the recommendations for change. It also provided the opportunity for employer and worker representatives to exchange ideas and express their concerns relating to adjudication and claim issues.

Partner agencies have continued to monitor implementation of the recommendations and to provide feedback as specific initiatives are implemented.

IRWG and its sub-committee, the Appeal Issues Discussion Group, participated in the development of a new process implemented by the board's service delivery units to ensure that additional evidence provided by WAP on appeal is reviewed by case managers. This initiative may help resolve appeals more effectively.

The tribunal also provided feedback to the board on training programs being offered to adjudicators that address benefit entitlement. These initiatives are intended to improve the quality of decisions.

The Appeal Issues Discussion Group also continued to monitor progress on hearing loss claims in an effort to promote consistency throughout the system.





Interaction with stakeholders

Tribunal members take the opportunity to speak with injured worker groups and employer representatives to inform participants and obtain feedback on tribunal processes. As mentioned, the tribunal held a consultation session in the fall of 2012 to obtain feedback on proposed initiatives for the appeal system.

The chief appeal commissioner also met with worker and employer representatives on several occasions to discuss matters of concern including privacy issues, disclosure of documents and employer participation in appeals. The tribunal participated in a workshop offered by the Office of the Employer Advisor on the appeal system. The tribunal also collaborated with the OEA in the planning of a mock hearing for employers who are participating in increasing numbers in appeals.

The chief appeal commissioner meets annually with the board's Board of Directors to bring them up to date on operations at the tribunal. On May 8, 2012, the Deputy Minister of Labour and Advanced Education and the Chair of the board's Board of Directors hosted the eighth annual meeting of stakeholders. This was an opportunity for partner agencies, including the tribunal, to answer questions from stakeholders on WSIS operations.

Appeal Management

Management of the tribunal's appeal inventory demands the attention of a full-time registrar. This fiscal year has seen an increased emphasis on efforts to resolve appeals at the earliest possible stage, including referral back to the board shortly upon receipt of the appeal, when warranted; liaising with board staff to facilitate contemporaneous adjudications which may resolve issues on appeal at the tribunal; and working with appeal participants towards alternate resolution or withdrawal of appeals where possible.

The tribunal was involved in the development of a new process implemented in the board's service delivery units to ensure that additional evidence provided by WAP on appeal is considered by the appropriate case managers prior to a decision being rendered by the tribunal.

Early results for the period from January to April 2013 are encouraging and demonstrate that a timely review of new information may resolve some appeals sooner, without the need for a hearing. It may also avoid the referral back of an appeal for reconsideration based on new information if the board has a mechanism by which to review the information. The process is intended to ensure that case managers have access to current information and that they stay engaged in a claim even if it is on appeal.

Communication by various means remains a focal point of the registrar's role. This includes, as previously reported, keeping participants informed on the appeal status in addition to maintaining compliance with tribunal deadlines. The tribunal continues to work closely with WAP to try to resolve appeals in a more timely manner, above and beyond the monthly docket meetings held with the WAP.

The tribunal has also recently initiated a collaborative approach with the Internal Appeals division at the board with respect to the review and release of claim file information to employers. The value of this initiative will be evaluated in the months to come.

Freedom of Information and Protection of Privacy

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

14.00 PUBLICATION OF TRIBUNAL DECISIONS

14.10 General

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

Decisions 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.gov.ns.ca/lae/databases.

Decisions made after January 1, 2010, without identifying features, are available on the Canadian Legal Information Institute's free website at 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 second 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 use discretion to include, in a decision, reference to evidence that the decision maker finds relevant in supporting the findings 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, reflects these requirements and refers 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 2012–13

Of the 714 decisions issued during fiscal year 2012–13, 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 adjudicated. These noteworthy decisions are categorized by general topic area below:

Assessments and Classifications

The tribunal issued several assessment decisions this last year. The first two examples below concern the SIC (standard industrial classification) system the board is mandated to apply in assessing firms. Two additional decisions mentioned concern issues infrequently before the tribunal.

In *Decision 2012-50-AD* (May 1, 2012), the tribunal found that a firm was properly classified under “janitorial services”. The tribunal noted that SIC assignments are to be based upon the industry of the company, not by occupation. In this case, the firm did not perform janitorial services, per se, it sold franchises for janitorial service opportunities. These were the only franchises it sold. Following an analogous case before the Nova Scotia Court of Appeal, *Halifax Employers Association v. Workers’ Compensation Appeals Tribunal (N.S.) et al*, 2000 NSCA 86, the tribunal found that the industry associated with the firm’s activity was the janitorial services industry. Therefore, a reclassification was denied.

A reclassification of an SIC assignment was also denied in *Decision 2012-724-AD* (January 23, 2013). The firm in question provided traffic control and traffic safety services. It was classified under SIC 4599, “Service Industries Incidental to Transportation n.e.c.” (not elsewhere classified). The firm argued that it should have been classified under a more general category, SIC 9999, “Other Services n.e.c.”. The tribunal noted that the firm’s principal business activity facilitated transportation by maintaining public safety and traffic control. “Transportation” referred to transportation in general, not just transporters and carriers. The word “incidental” denoted a relationship between a firm’s activity and transportation. Considering the alternatives, the board’s selection was the best fit. Also, an alternative classification system (“NAICS”) included concordance tables and descriptions helpful in discerning which SIC best suited a given enterprise. The NAICS information supported use of SIC 4599.



Decision 2010-656-AD & 2012-196-AD & 2012-665-AD (February 22, 2013) involved appeals from the board's assessment which included labour costs for five subcontractors. Basically, the firm was assessed for the labour costs of all non-covered companies who provided services to it. In the decision, the tribunal interpreted the word "contractor" in board policy 9.1.3 and found it to be consistent with the same term used in regulation 9(1). Applying principles of statutory interpretation, the tribunal accepted the meaning of "contractor" applied by a hearing officer. The tribunal found that a subcontractor provided a necessary or integral service for the fulfillment of a main contract. A subcontractor hired for purposes of carrying out a contract will always be hired for the purpose of a business, even if the hiring is infrequent or casual. However, subcontractors do not include service providers who only provide ancillary or indirect services. Further, to be captured by the policy, a service provider must be hired to help carry out a specific contract, not as a vendor or service provider for general operations. Accordingly, the tribunal found that the firm was properly assessed for some, but not all, of the service providers.

Decisions 2012-405-AD , 2012-406-AD and 2012-407-AD (November 28, 2012) all dealt with the firm's request for cost relief due to alleged mismanagement of claim files by the board resulting in excessive TERB paid to workers. It was argued that the alleged excessive claims experience resulted in a higher assessment rate and higher annual assessments. Board decision-makers never reached the merits of the allegations because they found no authority to provide cost relief under the act. Upon review of the act and policies, particularly 9.4.3R1 and 9.4.4R2, the tribunal agreed with the board's position. There was no express authority found for cost relief. The tribunal further found that policy 9.4.2R1 precluded cost relief because calculation of claim costs required inclusion of actual cash payments of benefits to workers. This was subject to exclusions. The exclusions listed did not include, and were inconsistent with, cost relief.

Arising out of and in the Course of Employment (Recognition)

Of the numerous appeals in the last year dealing with the threshold issue of recognizing a compensable injury, *Decision 2011-753-AD* (May 11, 2012) exemplifies many of the factors to be considered. The worker in the appeal performed home support work. While backing her car out of her driveway to go to her first appointment of the day, she lost control. The car proceeded out her driveway, onto a road and then into a tree-lined ditch. As a result, the worker sustained a back injury. She claimed a workplace injury, but the board denied the claim on the grounds that it had not occurred out of and in the course of her employment.

In its decision, the tribunal weighed the following factors of work-relatedness, including: her injury occurred off her property; she was en route to her first appointment of the day; and she was arguably doing something beneficial for the employer. On the other hand, she was not being compensated, either with an hourly wage or in a mileage allowance, at the time of her injury and the injury did not result from an additional risk the worker faced because of her employment. The terms of her employment were considered important indicators as to when her work began and ended. Under the circumstances, the tribunal found that she was not in the course of her employment when injured and not entitled to compensation.

Chronic Pain

Many decisions concerning chronic pain were issued during the last year. One appeal, *Decision 2010-619-AD & 2011-417-AD* (July 18, 2012), was selected for comment because it highlights the troubling intersection between chronic pain and psychological/psychiatric impairments. Psychiatric or psychological problems resulting from chronic pain are considered in setting the rating for a pain-related impairment (PRI). If caused by chronic pain, the relative severity of such symptoms will only be used in estimating a PRI rating; i.e., compensation will be limited to chronic pain benefits. In order to warrant a separate PMI rating for psychiatric or psychological problems, causation must be linked to the compensable injury, but not specifically to chronic pain. In the appeal in question, doctors consistently linked the worker's psychiatric symptoms to ongoing pain and his related disability. As such, the tribunal found that his symptoms were part of his chronic pain which was compensated by way of an award of chronic pain benefits. Accordingly, a separate psychiatric PMI award was inappropriate.

Extended Earnings-Replacement Benefits (EERB)

Several decisions in the past year considered EERB awards.

The determination of an EERB requires, among other things, that the board calculate a worker's long-term earnings rate based upon pre-accident earnings and probable (estimated) deductions. Deductions include those for income tax, Canada Pension Plan premiums, EI and others authorized by regulation. In *Decision 2012-458-AD* (December 13, 2012), a worker with pre-injury earnings in excess of \$100,000 per year had post-injury earnings of approximately \$30,000 per year. He sought a change in his deduction code (i.e., his TD1 code) to reduce his taxes and increase his benefit. He argued this would be commensurate with his reduced earnings. However, the tribunal found that his long-term rate was properly calculated based upon his pre-injury earnings profile. It was not appropriate to calculate his benefits by using earnings from a pre-injury year and a post-injury year deduction code.

In *Decision 2012-389-AD* (September 27, 2012), a worker injured in 2006 had her pre-injury earnings calculated based upon the average of her 2003 through 2005 earnings. Her benefits became payable in 2007, so the board indexed the calculated pre-injury earnings to 2007 to obtain her long-term rate. The worker apparently thought that this meant earnings were taken from 2007. She argued that her deductions (i.e., EI and CPP) should also be taken from 2007. The tribunal upheld the use of 2004 as an appropriate year from which to take probable deductions.

Another EERB appeal, *Decision 2012-379-AD* (March 11, 2013), involved an employer appealing an EERB awarded to a worker injured in August 2010. The worker was unable to return to his pre-injury duties. He might have been able to return to a less demanding accommodation position, but none had been found within the year following his injury. It was also unlikely that he could obtain suitable sedentary work elsewhere in his area. In August 2011, he accepted a retirement incentive package offered to eligible workers. He would not have retired but for his injury and he had to accept the package within a limited time. Shortly after accepting it, the employer identified an alternative position for him. However, the tribunal found that the worker had acted reasonably under the circumstances. He had faced a loss of earnings due to his injury with no tangible prospect of employment at the time the offer was accepted. The subsequent alternative position did not break the chain of causation between the accident and loss of earnings. The tribunal noted that causation for workers' compensation can differ from other claims.

Hearing Loss & Tinnitus

This last year, multiple causes for hearing loss and the severity of tinnitus were frequent subjects of adjudication. In *Decision 2011-685-AD* (July 25, 2012), the tribunal considered opinion evidence to be unpersuasive where the opinion relied upon the presence of asymmetry in left and right-sided hearing at frequencies other than those designated by policy. Presbycusis for a worker under the age of 60 and theoretical medical conditions where there was an absence of positive medical evidence for such conditions were also inappropriate bases for the opinion.

Decision 2010-657-AD (May 24, 2012) also considered asymmetry between left and right-sided hearing loss. According to an ACOEM (American College of Occupational and Environmental Medicine) consensus statement, hearing loss due to industrial noise is generally symmetrical and bilateral unless exceptional factors are present. It appears that the board adopted a position that asymmetry in excess of 10 dB at measured frequencies is not consistent with the pattern of noise-induced hearing loss. It was also noted that noise exposure, alone, usually does not produce a loss greater than 75 dB in higher frequencies and a loss greater than 40 dB in lower frequencies.

The tribunal accepted that the worker did not demonstrate compensable hearing loss in his left ear and the loss in his right ear may be subject to apportionment. However, the tribunal found that a so-called “screening audiogram” was insufficiently reliable to determine the worker’s entitlement and there were other issues which needed to be addressed. Therefore, the matter was returned to the board for further determinations.

In *Decision 2011-298-AD* (July 18, 2012), an appeal commissioner for the tribunal accepted the consensus statement from ACOEM in considering a worker’s pattern of hearing loss shown in an audiogram. The ACOEM statement indicates that the first sign of occupational noise damage is typically notching at 3000, 4000 or 6000 Hz, with recovery at 8000 Hz. However, the location of the notch depends upon multiple factors including the frequency of the damaging noise. The appeal commissioner found that testing demonstrated noise measurements very close to unacceptable limits and audiogram evidence indicated noise was the cause for the worker’s hearing loss. A notch at 2000 Hz was explained by the frequency of low pitch noise in the workplace. He concluded, since audiogram and noise testing tolerances could make a difference, that it was appropriate to give the worker the benefit of the doubt and accept the claim.

A revised ACOEM consensus statement setting out principal characteristics of noise-induced hearing loss was given considerable weight in *Decision 2010-269-AD* (May 17, 2012). The tribunal preferred the ACOEM view (accepted by the tribunal previously) that occupational noise would not cause a further deterioration in hearing once a worker is removed from a noisy environment. In this case, the worker's global hearing loss due to compensable and non-compensable factors was sufficient for a compensation award, subject to apportionment of benefits pursuant to board policy 3.9.11R1.

With respect to tinnitus, *Decision 2013-84-AD* (March 27, 2013) considered whether evidence established that a worker experienced the condition continuously. Tinnitus is a subjective condition. The tribunal found that tinnitus which is masked by noise, but always perceived in quiet, may qualify as "continuous" for purposes of policy 1.2.5AR. In other words, noise may mask the condition, but masking does not make the tinnitus intermittent.

Medical Aid/Attendant Allowance

There were a variety of sub-issues considered in the medical aid/attendant allowance area within the last year. In *Decision 2012-286-AD* (November 23, 2012), the tribunal again found there to be insufficient evidence that the use of medical marijuana was consistent with health care practices in Canada. This is required by board policy 2.3.1R. It was noted that the board's 2008 research paper on medical marijuana had been updated in September 2012.

In *Decision 2012-429-AD* (January 25, 2013), the tribunal accepted that medical aid should be awarded for acupuncture treatments despite the fact that the treatments were administered by a non-approved service provider. In this case, policy 2.3.1R was satisfied by the involvement of an orthopaedic surgeon, an authorized service provider. The doctor effectively monitored treatments. However, monitoring did not occur for massage and "cold laser" treatments. Reimbursement was not allowed for them.

The worker in *Decision 2012-430-AD & 2012-577-AD* (November 8, 2012) had bilateral leg amputations from a 1971 accident. He also suffered from a compensable lung condition requiring the use of an oxygen concentrator. He sought medical aid to cover the cost of a home electrical upgrade. The upgrade would permit the use of the oxygen concentrator. However, the Tribunal found that the need for the upgrade could not be attributed to the need for an oxygen concentrator. The upgrade was necessitated by the age and limitations of an existing electrical system which was the responsibility of the home owner. Hence, medical aid was denied.

The same worker also sought an increase to his attendant allowance for meal preparation. A number of tribunal decisions have found there to be a limited exception to the general limitation against providing an attendant allowance for meal preparation. The exception arises when an injured worker would otherwise go hungry. A personal care assessment (PCA) noted that the worker was not independent for toileting, he required a mechanical device to assist him in transferring to and from his chair and bed, he could not dress himself and he was on supplementary oxygen. Further, following the death of his spouse, he was unable to get meals for himself. Under the circumstances, an increased attendant allowance was warranted.

Decision 2012-54-AD (April 19, 2012) also involved a claim for an attendant allowance increase. The worker testified that he was given a shower brush, but he could not bend his arm behind him to use it. He also had difficulty using utensils to cut food, holding and drinking liquids, gripping a bar of soap, using a toileting aid, etc. Board decision-makers relied upon a PCA which indicated the worker could be somewhat independent and would not suffer harm performing such activities even though he would experience pain. The PCA used an “at risk” standard; i.e., whether an activity could be done without tissue damage or loss of tissue integrity.

The tribunal found that this did not conform to the “necessary or expedient” test per section 102 of the act. As a practical matter, the worker was not able to achieve independence with respect to his activities due to extreme pain. Therefore, he was entitled to a reassessment and reconsideration of his entitlement to an increased allowance.



New Evidence/Reconsideration

Decision 2011-500-AD (September 20, 2012) was rendered after *Enterprise Cape Breton Corporation (Cape Breton Development Corporation) v. Southwell*, 2012 NSCA 23. (*Southwell* dealt with a reconsideration of a prior final decision pursuant to board Policy 8.1.7R1). *Decision 2011-500-AD* involved a reconsideration of a 2008 final decision. The final decision denied the worker chronic pain benefits because he did not have compensable chronic pain. The worker initially sought reconsideration based upon two medical reports from specialists. These reports were found to be new evidence by the board. However, after the new evidence finding, two additional opinions were submitted which had not been assessed by the board to determine if they should also be considered new evidence. The first opinion was from a board medical adviser who concluded the specialists' reports did not support a finding of chronic pain. The second opinion was a follow-up report from one of the specialists. In it, the specialist expanded upon his previous opinion and expressed the view that the worker had chronic pain.

The tribunal reasoned that the recently submitted reports “flowed from” new evidence. To exclude such derivative evidence and require the opinions to be sent back to the board for adjudication would have been an unduly restrictive interpretation of *Southwell* and run counter to the true merits and justice of the case. Therefore, the additional reports were considered and weighed in the reconsideration process.

Permanent Medical Impairment (PMI)

Issues concerning PMIs for occupational diseases arose in a number of appeals. Two were selected for comment. The first, *Decision 2011-38-AD* (July 16, 2012), involved a worker with asthma triggered by exposure to dust, humidity and scents. Since her disease initially arose in 2008 in connection with a workplace exposure, she was awarded a PMI rating under the AMA (American Medical Association) Guides per Board policy. Two respirologists, one of whom was also a board medical advisor, independently applied ATS (American Thoracic Society) Guidelines. Although the AMA Guides are required to be used, a rating using the ATS Guidelines was considered the most accurate way of estimating the impairment. The rating was accepted by the tribunal as a “judgment rating” under the AMA Guides.

In *Decision 2012-777-AD* (February 22, 2013), an underground miner was awarded a 30 percent PMI rating for coal worker's pneumoconiosis (CWP), a gradually progressive condition. The board made the award effective in 2012, coinciding with the date of a pulmonary function test (PFT). However, it was clear that he had developed CWP over a period of time. A specialist initially recommended a 10% PMI for CWP in 1999 along with a 5 year follow-up reassessment. (The board's PMI Guidelines for respiratory conditions indicate that re-assessment intervals are generally between one to five years, depending upon a specialist's recommendation). The specialist based the estimated PMI rating upon an examination and x-rays suggestive of the condition. Nonetheless, the recommendation was rejected because x-rays were not definitive and a 1999 PFT was normal. No further tests occurred until x-rays were done in 2011 and 2012.

Based upon the progressive nature of the disease, the specialist's initial recommendation and the fact that PMI awards for CWP are typically provided in 10% increments, the PMI award was backdated. The worker was found to have had a sufficiently developed condition by 2004 warranting a 10% PMI rating at that time.

The tribunal also found it reasonable to assume that the disease progressed steadily during the following five year interval. Hence, the worker was found to be entitled to a 20% (cumulative) PMI rating in 2009. Finally, based upon PFT findings, it was undisputed that he was entitled to a 30% (cumulative) PMI rating in 2012.

Procedural Irregularities

A referral back to the board was made in *Decision 2011-762-RTH & 2011-763-RTH* (April 11, 2012). The employer appealed a decision by a board manager. The manager's decision addressed the employer's requests for a review of its assessment rate and cost relief. The requests were based upon allegations that there had been irregularities in the handling of several claims. The employer subsequently received notification from the registrar of the board that the appeals would not proceed for lack of an appealable decision and an inappropriate challenge to final decisions in claim files. However, the tribunal found that the issues raised were related to the employer's assessment. The fact that issues concerning handling of individual claim files were raised was not a reason to preclude the employer from its right to receive an appealable decision. Therefore, the appeals were referred back for reconsideration and decisions on the merits.

Suspended Benefit and Statute-barred Claims

Two interesting decisions, one concerning the suspension of benefits and the other concerning the statutory time limit to claim an injury, were decided this last year (also, another claim involving the statutory bar is discussed below in connection with stress). *Decision 2011-728-AD* (April 2, 2013), involved a worker's temporary earnings-replacement benefit (TERB) awarded in connection with a vocational rehabilitation (VR) program. TERB was suspended by the board. The suspension followed the worker's incarceration which made him unavailable to take part in his VR program. The worker sought to have his TERB redirected to his dependant.

However, the tribunal upheld the suspension pursuant to section 113 of the act because the worker's action leading to his incarceration was, in effect, a lack of co-operation. Given that TERB had been validly suspended, the tribunal further found that the benefit was unavailable for redirection to a dependent under section 78 of the act. The appeal commissioner noted, however, that the inability to redirect TERB may not apply to other benefits such as a permanent impairment benefit (PIB).

The second appeal, *Decision 2012-328-AD* (November 14, 2012), involved a late-filed claim. An injury was not reported prior to the worker leaving her employment under the mistaken belief that she had a year so to do. An extension of time might be available if no right of the employer, nor an interest of the board, were materially prejudiced. A board hearing officer barred the claim pursuant to section 83 of the act because it was considered unjust to the employer if the board were to extend the time to file. The employer argued that it had closed its plant, making witnesses unavailable. It further argued that it had lost the opportunity to try to mitigate the worker's loss.

However, the tribunal found that there was little prejudice to the employer or board because former employees could be easily located and compelled to testify. The tribunal also considered that the mitigation argument fell short because there had been a limited period of employment following injury before the plant closed. Therefore, the time to file the claim was extended.

Stress

Two stress appeals were selected for discussion. In *Decision 2011-359-AD* (December 6, 2012), a panel of the tribunal considered whether the definition of compensable stress in section 2(a) of the act offends section 15(1) of the Canadian Charter of Rights and Freedoms. The worker had developed gradual onset stress. He argued that the definition of "accident", which excludes stress other than an acute reaction to a traumatic event, was discriminatory because it treated his gradual onset stress as a non-compensable condition. The panel found that a distinction on the ground of mental disability was created by the provision. It recognized that compensation might be payable in relation to a mental disability arising from a physical injury. In order to recognize a mental disability, section 2(a) requires that the disability be triggered by a single event as well as a particular kind of event. By contrast, there were no such requirements for a gradual onset physical disability.

However, the panel did not find the distinction was discriminatory. The purposes of the provision were to enhance the financial health of the workers' compensation system, to ensure adequate compensation would be available and to avoid the compensation of injuries unrelated to work. Stress can arise from many factors, only some of which may be work related. The panel considered that the Legislature drew a reasonable line given the inherent subjectivity of a stress claim. It was, therefore, reasonable to require that a claim arise in connection with a traumatic event. The criteria doesn't preclude all stress claims and gives a desirable degree of clarity to the determination of compensable claim. In the worker's case, the panel found there was no evidence or a viable argument to support an affront to human dignity or statutory stereotyping/prejudice. Since the worker failed to meet the onus required to establish a Charter violation, his appeal was denied.

Lastly, *Decision 2011-486-AD (August 20, 2012)* dealt with a claim for post-traumatic stress disorder (PTSD). The claim arose in connection with a 1998 accident and loss of life. The worker spent 28 days gathering debris, including body parts, from the accident scene. In early 2009, he began receiving treatment from a psychologist who diagnosed him with PTSD secondary to the 1998 accident. Thereafter, he filed a claim with the board. The claim was denied as statute-barred under section 83 of the act because board decision-makers found that more than 5 years had elapsed before the worker filed his claim.

However, the tribunal allowed the appeal. In its reasons, the tribunal rejected the notion that the worker's 2001 "reactive stress" was related to the 1998 accident. The tribunal found that the worker suffered from an occupational disease peculiar to the nature of such recovery efforts (i.e., the second branch of the occupational disease definition). The 2009 diagnosis of PTSD linked symptoms to the recovery work. Because that was when the worker learned he had an occupational disease, it commenced the statutory claim period. The claim was filed within 5 years of that date, so it was not statute barred.

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. Such 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.

Generally, the tribunal takes a neutral role at the Court of Appeal. In rare circumstances, the tribunal will make legal arguments to the Court. For example, this year the tribunal actively responded to the *Boddy* appeal. It was an appeal which raised issues of general importance to the appeal system; lawyers from WAP were arguing that the appeal system should be technical and court-like.

During this fiscal year, 14 appeals from tribunal decisions were filed with the Court of Appeal:

- 12 decisions were appealed by workers
- 1 decision was appealed by an employer concerning compensation provided to a worker
- 1 decision was appealed by the workers' compensation board

During this fiscal year, 20 appeals were resolved as follows:

- 4 appeals were withdrawn
- 4 appeals were dismissed due to a failure to follow Court procedures
- leave to appeal was denied 6 times
- 4 appeals were decided by the Court of Appeal – all 4 were denied
- 2 appeals were resolved by consent orders directing a rehearing

At the beginning of this fiscal year, there were 17 active appeals before the Court of Appeal. At the end of this fiscal year, there remained 11 active appeals.

Decisions of the Court of Appeal

The Court decided four appeals this fiscal year.

Boddy v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2012 NSCA 73

Under s. 251 of the *Workers' Compensation Act*, the tribunal may refer “any matter connected with the appeal” back to a hearing officer for reconsideration.

Ms Boddy was awarded a full extended earnings-replacement benefit by the board. She appealed, claiming the board should have used a more generous pre-accident earnings-profile in calculating her long-term rate. In other words, she was arguing that she had a greater loss of earnings.

The tribunal noted that there was evidence of a pre-existing condition which had not been considered by the board. Under s. 251, the tribunal referred the appeal back to a hearing officer to address whether her benefits should be apportioned due to non-employment causes. Ms Boddy argued that the tribunal acted outside its authority when it asked the board to look at more than her earnings-profile.

The Court denied the appeal.

The Court noted that the tribunal has an obligation to decide cases based on their merits and justice. The Court noted that the tribunal is not limited to considering issues as stated in a notice of appeal – appeals before the tribunal are not a court-like process.

At paragraph 30 the Court wrote:

... Workers' compensation adjudication differs significantly from private fault based litigation. There are “participants” and not “parties”. There are no pleadings. The “participants” are frequently unrepresented. The system is more inquisitorial than adversarial. ... In such a system, meritorious compensation should not be trumped by a narrow application either of process or the principle of finality. After all, it was Ms. Boddy's appeal that kept the process alive. In light of her appeal, there was no final decision on how much earnings replacement to which she would be entitled.

***Bishop v. Nova Scotia (Workers' Compensation Appeals Tribunal),
2012 NSCA 95***

Mr. Bishop sought compensation for gradual onset stress which he claimed resulted from his many years working at the face of a coal mine. He had worked for the Cape Breton Development Corporation (subsequently renamed Enterprise Cape Breton Corporation, or ECBC) in the Phalen Colliery.

Board policy 1.3.6 sets out what types of stress are compensable for federal employees. For an underground coal miner, it requires that the stressors be “unusual and excessive”, “in comparison to the work-related events or stressors experienced by an average worker” at the face of a underground coal mine.

The worker wanted his experiences compared to those of miners in ECBC’s other mines. The tribunal rejected this comparison as too narrow as it did not represent the average coal worker. Instead, the tribunal looked at stressors faced by the average American underground coal miner, with some consideration of other parts of the developed world with geological conditions similar to Cape Breton. The tribunal found that Mr. Bishop had not experienced compensable stress. The tribunal found that the Phalen Colliery was the most stressful of ECBC’s mines. However, conditions in the Phalen Colliery were not unusual when compared to conditions found in mines throughout the United States, the United Kingdom and parts of Europe.

The Court denied the appeal.

The Court noted that the Canadian underground mining industry was very small. There were only two small Canadian underground mines outside Cape Breton. It noted that American and European expertise had been needed for ECBC to develop best practices for the Phalen Colliery. On this basis it found the tribunal’s choice of the comparator group to be reasonable. It found that the tribunal had carefully analyzed the evidence and that the outcome was reasonable.

Enterprise Cape Breton Corporation v. Hogan, 2013 NSCA 33

Mr. Hogan worked as an electrician at ECBC for many years until the mines closed in 2001. Mr. Hogan had a compensable knee injury while at ECBC, which gradually worsened over the years. When the mines closed, he was awarded Early Retirement Incentive Program (ERIP) benefits from ECBC. These are payments made to some long-term miners after retiring from ECBC to ensure that they would have some continuing income until age 65.

Mr. Hogan found alternative employment after the mines closed. In 2010, Mr. Hogan became unable to return to his new employment due to his worsening knee condition. The board began to pay Mr. Hogan temporary earnings-replacement benefits. ECBC wanted the board to include its ERIP payments to Mr. Hogan in his post-injury earnings calculation, so as to reduce the amount of temporary earnings-replacement benefit payable to him.

The act requires that “regular salary and wages” be included in calculating a loss of earnings. It further provides that the term “regular salary and wages” can only be expanded by a regulation.

At issue before the tribunal was whether the ERIP payments were “regular salary and wages”. The tribunal found that “regular salary and wages” normally means income from active employment. Before the year 2000, the Regulations included an expanded definition of “regular salary and wages” which would have included ERIP payments. In the year 2000, the Regulations were amended by removing the expanded definition (and the board, instead, issued a policy containing the expanded definition).

The tribunal found that, in the absence of a Regulation, the expanded definition in the policy was inconsistent with the act. As such, ERIP payments could not be used to determine Mr. Hogan’s loss of earnings. In so finding, the tribunal gave no weight to background papers to the year 2000 amendment which stated that the purpose of the amendment was to “eliminate redundancy and ambiguity”.

The Court denied the appeal.

The Court found that the tribunal reasonably interpreted the phrase “regular salary and wages” to include only active income from employment (not payments made by ECBC after employment with ECBC ended). It found that the tribunal was entitled to give no weight to the background papers in determining the effect of the year 2000 amendment.

ECBC is seeking leave to appeal the Court of Appeal’s decision to the Supreme Court of Canada.

McGrath v. Nova Scotia (Workers' Compensation Board), 2013 NSCA 37

In 1997, Mr. McGrath fell seven feet at work, injuring his left ankle. He did not lose time from work and saw a doctor only once, about a week after the injury. The board opened a claim, but did nothing further as there was no time-loss.

In 2000, Mr. McGrath saw a specialist for ankle problems. He went on to require ankle surgeries in 2000 and 2008. In 2010, the worker began losing time from work due to his ankle and contacted the board for the first time since 1997.

The tribunal upheld the board's finding that the ankle problems in 2000 and later were unrelated to the 1997 injury. The tribunal concluded that there was "insufficient medical evidence to corroborate the worker's testimony that his left ankle problems are attributable to his 1997 injury".

Mr. McGrath appealed arguing that the tribunal failed to apply the benefit of the doubt found in s. 187 of the act and erred in law in requiring corroborating evidence.

The Court dismissed the appeal.

The Court noted that the tribunal had conducted a thorough analysis of the evidence. It was clear from the decision as a whole that the tribunal reviewed and analyzed all evidence before finding insufficient evidence to support a causal connection. Properly interpreted, the tribunal decision did not find that corroborating evidence is always necessary. The Court wrote:

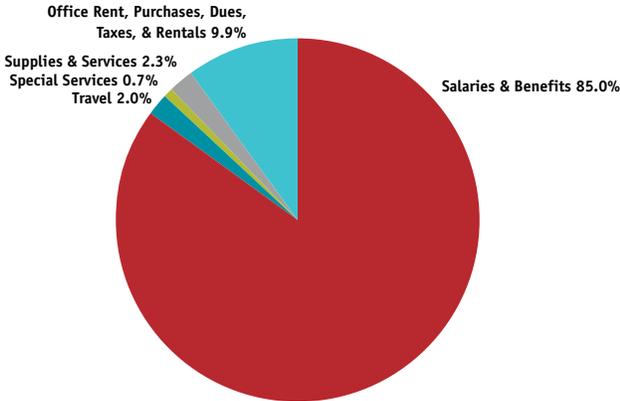
The Tribunal can always look to the record for corroboration, in the sense of determining what evidence there is to support or bolster the worker's claim, or the contrary position. There is nothing inherently wrong in such an approach – in fact it would be surprising if such an analysis were not undertaken by any decision-maker. What would be an error would be a ruling that a worker's claim failed simply because it had not been corroborated (in the sense of "backed up" or "affirmed") by other evidence.

The Court also stated that a s. 187 analysis is not necessary in every case. While s. 187 must always be kept in mind, its application is only triggered where there are evenly disputed possibilities.

Financial Operations

In 2012–13, the tribunal’s total expenditures were within 87 per cent of the original authority and within 97 per cent of its revised forecast. Net expenditures totaled \$1,762,235.73, an increase from the previous year due to salary adjustments (see Figure 12).

Figure 12
Budget Expenditures
(for the Fiscal Year Ending March 31, 2013)



Appendix

Figure 1 – Appeals Received

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 09–10	73	94	86	91	80	63	66	58	65	47	56	70	849
Fiscal 10–11	77	53	60	89	70	60	60	78	89	54	59	72	821
Fiscal 11–12	58	79	83	70	69	46	82	76	79	64	55	71	832
Fiscal 12–13	69	81	98	61	70	33	54	74	47	45	61	72	765

Figure 2 – Decisions Rendered

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 09–10	52	71	65	66	56	72	67	82	52	69	68	63	783
Fiscal 10–11	49	51	52	47	49	48	52	64	41	56	50	58	617
Fiscal 11–12	57	54	49	47	51	67	63	66	52	52	61	45	664
Fiscal 12–13	63	78	74	58	50	53	63	67	46	69	61	32	714

Figure 3 – Appeals Outstanding at Year End

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
Fiscal 09–10	520	541	555	571	584	558	549	518	519	493	473	475
Fiscal 10–11	497	492	491	524	539	541	543	548	593	586	590	596
Fiscal 11–12	590	606	632	647	657	632	638	639	659	665	653	670
Fiscal 12–13	657	650	661	657	673	644	626	622	617	583	579	605

Figure 4 – Timeliness to Decision (cumulative percentage by month)

Months	1	2	3	4	5	6	7	8	9	10	11	>11
Fiscal 09–10	0.89	4.60	17.75	33.97	49.81	64.62	74.84	81.23	85.19	88.12	90.29	100
Fiscal 10–11	0.97	5.02	18.96	35.82	47.97	57.05	64.99	72.45	77.15	82.50	84.76	100
Fiscal 11–12	0.60	4.82	20.33	33.73	44.58	51.96	60.84	66.42	72.14	76.51	79.82	100
Fiscal 12–13	0.42	3.78	12.89	27.03	41.04	51.40	57.42	63.45	69.61	72.83	74.79	100

Figure 5 – Decisions by Representation

Self-Represented	146
Workers' Advisers Program	387
Injured Worker Groups, Outside Counsel & Others	181

Figure 6 – Decisions by Issue Categories – Worker

Recognition of Claim	207
New/Additional Temporary Benefits	133
New/Increased Benefits for Permanent Impairment	226
Medical Aid (Expenses)	116
New/Additional Extended Earnings Replacement Benefits	94
New Evidence	29
Chronic Pain	116
Termination of Benefits for Non-Compliance	11
All other issues	67
Total	999

Figure 7 – Decisions by Issue Categories – Employer

Acceptance of Claim	11
Extent of Benefits	6
Assessment Classification	2
Assessment Penalties	2
Other Assessment Issues	1
Total	22

Figure 8 – Decisions by Mode of Hearing

	Oral Hearings	Written Submissions	Total
Fiscal 09–10	539	244	783
Fiscal 10–11	460	157	617
Fiscal 11–12	421	243	664
Fiscal 12–13	414	300	714

Figure 9 – Decisions by Outcome

Allowed	208
Allowed in Part	109
Denied	291
RTH	105
Moot	1
Total Final Decisions	714
Appeals withdrawn	116
Total Appeals Resolved	830

Figure 10 – Decisions by Appellant Type

	Total
Worker Claim Appeals*	683
Employer Claim Appeals	16
Employer Assessment Appeals	15
Total	714

* Employer participation in worker appeals 29%

Figure 11 – Appeals Before the Courts at Year End

	Nova Scotia Court of Appeal	Supreme Court of Canada	Total
Fiscal 09–10	8	0	8
Fiscal 10–11	11	0	11
Fiscal 11–12	17	0	17
Fiscal 12–13	11	0	11

Figure 12 – Budget Expenditures

(for the Fiscal Year Ending March 31, 2013)

	Authority	Final Forecast	Actual Expenditures
Salaries & Benefits	\$1,619,000.00	\$1,495,600.00	\$1,498,705.28
Travel	\$56,000.00	\$41,000.00	\$35,142.75
Special Services	\$85,000.00	\$15,000.00	\$12,894.60
Supplies & Services	\$60,000.00	\$64,000.00	\$41,205.51
Office Rent, Purchases, Dues, Taxes, & Rentals	\$210,000.00	\$203,000.00	\$174,287.59
Sub Total	\$2,030,000.00	\$1,818,600.00	\$1,762,235.73
Less Recoveries	\$0.00	\$0.00	\$0.00
Totals	\$2,030,000.00	\$1,818,600.00	\$1,762,235.73

