## Workers' Compensation Appeals Tribunal

Annual Report For the Year Ending March 31, 2018





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Workers' Compensation Appeals Tribunal

Mark Furey 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, 2018.

Respectfully submitted,

Sandy MacIntosh Chief Appeal Commissioner



Workers' Compensation Appeals Tribunal

His Honour The Honourable Arthur J. LeBlanc, ONS, QC 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, 2018.

Respectfully submitted,

The Honourable Mark Furey Minister Responsible for Part II of the *Workers' Compensation Act* 

## Tribunal Personnel

**Colleen Bennett** Supervisor, Office Services

**Tricia Chiasson** Clerk/Scheduling Coordinator

**Charlene Downey** Secretary/Receptionist

**Dawn Evans** Secretary

**Anne Rouse** Clerk Sandy MacIntosh Chief Appeal Commissioner

**Sharon Pierre Louis** Executive Assistant to the Chief Appeal Commissioner

Leanne Rodwell Hayes Alison Hickey Glen Johnson Christina Lazier Brent Levy Andrew MacNeil Diane Manara (Registrar) David Pearson Brian Sharp Andrea Smillie Appeal Commissioners

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## Executive Summary

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

In 2017/18, the tribunal provided timely, quality decision making consistent with the act, policy, and tribunal precedent. The tribunal continued to develop new procedures, both internally and with system partners, to improve the appeal process.

The tribunal is a high-volume tribunal with courtlike powers. Appeal volumes were slightly higher than last year. In 2017/18, workers and employers filed 697 appeals. Appeal commissioners decided 535 appeals and a total of 644 appeals were resolved.

The work of the tribunal is a team effort. The tribunal's registrar worked effectively to resolve preliminary matters on appeals and keep appeals moving toward resolution. Tribunal staff assisted workers and employers at various stages throughout the appeal process.

While the tribunal tries to clarify workers' compensation law, there were some challenges this past year.

There was difficulty reaching consensus on the factors considered in determining whether the medical use of cannabis is consistent with health-care practices in Canada. Due to this difficulty, the chief appeal commissioner used his authority under s. 247 to try to bring clarity. He has asked the chair of the board to consider a policy specifically addressing the medical use of cannabis or to otherwise clarify the current policy framework.

Two appeal commissioners were appointed to the tribunal in the past year. One was only with us for a few months before she received a federal appointment. The second, Brian Sharp, was previously an appeal commissioner. His experience is valuable as it can take an inexperienced appeal commissioner a year or two before they can handle a full caseload of appeals. This is due to the complexity of the work of appeal commissioners.

#### **Role of the Tribunal**

The act governs the operation of the tribunal and its decisions are made pursuant to the act. The act permits the tribunal to set its own procedures. The tribunal must follow the board's policies concerning compensation and assessments, provided they are consistent with the act. The tribunal operates within the Workplace Safety and Insurance System (WSIS). The partner agencies comprising WSIS are the tribunal, the board, the Workers' Advisers Program (WAP), and the Occupational Health and Safety Division of the Department of Labour and Advanced Education.

#### **Tribunal Mandate and Performance Measures**

The tribunal decides appeals and right of action applications. Within that mandate, opportunities exist for co-operation with system partners and the community, including injured worker groups and the Office of the Employer Advisor. The tribunal works with its partner agencies to develop practices and procedures to improve the appeal process. At the same time, the tribunal is careful to ensure that its independence is never compromised.

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

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

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

#### **The Tribunal's Year in Review**

#### **Operations Overview**

The tribunal's appeal volume increased slightly from last year. Decision output increased. A significant factor in the increase stemmed from the tribunal referring the legality of part of the board's hearing loss policy to the Court of Appeal. Following the Court of Appeal's decision, the tribunal systematically remitted over 40 appeals back to the board to be re-adjudicated without applying an unlawful policy requirement.

The tribunal continues to work with participants to resolve appeals more quickly. Unfortunately, appeals are often complex. A significant portion of the outstanding appeals is awaiting additional medical evidence, which has been requested by WAP and, on occasion, by employers.

The time to resolve appeals is similar to last year. The tribunal remains committed to operating on a readiness model. This means that the tribunal generally waits until participants are ready to proceed before setting down appeals. The tribunal continues to work with WAP to find efficiencies. There has been an increase in employer demands for disclosure of evidence from workers, which tends to prolong the appeal process.

The most common appeal issues are whether a claim should be accepted and entitlement to permanent medical impairment rating reviews or increases. Most appeals proceed by way of oral hearing.

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

Twelve tribunal decisions were appealed to the Court of Appeal, an increase of two from the previous year. The tribunal's appeal commissioners continue to produce well-reasoned decisions in the face of increasing issue complexity and volume of evidence.

#### **Appeal Management**

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

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

The tribunal works closely with WAP to track appeals and avoid delays. The "WAP new evidence process" results in a significant number of appeals being resolved without a hearing. This process allows case managers to review significant new evidence generated as part of an appeal to determine whether it changes their original decision.

#### **Interagency Co-operation**

The chief appeal commissioner is a member of the Heads of Agencies Committee/Coordinating Committee, which oversees implementation of the WSIS strategic plan.

The Issues Resolution Working Group (IRWG) is comprised of the chief appeal commissioner, the tribunal's registrar, the chief workers' adviser, a workers' adviser, the manager of the board's internal appeals department and a board legal department representative. IRWG was formed to discuss issues arising from the adjudication of claims and appeals. The committee allows open communication and information sharing among agency partners. The committee's mandate is to develop and implement issue resolution initiatives to improve the overall efficiency of the workers' compensation system.

IRWG holds meetings every two months at which appeal statistics from each agency are shared and methods to improve the appeal system are discussed. IRWG sometimes meets with key stakeholders in the appeal system, such as the Office of the Employer Advisor and injured worker groups.

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

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

The auditor general will be conducting a performance audit of the board. The scope of the audit is not yet determined and could include aspects of the tribunal's performance. The tribunal is committed to co-operating with the audit in any manner that may be requested.

#### **Financial Operations**

In 2017/18, the tribunal's total expenditures were within 80 per cent of the original authority and within 71 per cent of our revised forecast. Net expenditures totalled \$1,718,405, a decrease from the previous year.



Sandy MacIntosh Chief Appeal Commissioner

## Introduction

he tribunal hears appeals from final decisions of board hearing officers and determines whether the act bars a right of action against employers. The tribunal is legally and administratively separate from the board, which ensures an independent and impartial review of board decisions.

An appeal commissioner, or a panel of three appeal commissioners, decides an appeal according to the act, regulations, and board policies. The tribunal takes into consideration the board claim file, the decision under appeal, additional evidence the participants may present, submissions of the participants, and, any other evidence that the tribunal may request or obtain. All decisions are based on the real merits and justice of the case.

Once an appeal is assigned to an appeal commissioner, the chief appeal commissioner cannot intervene to influence the commissioner's judgment. In its adjudicative role, the tribunal is guided by the principles of independence, fairness, and consistency.

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

#### **Relationship to the Board**

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

#### **Board** – as funder

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

#### Board – as appeal participant

Workers, employers, and the board regularly participate in tribunal appeals. On occasion, the attorney general of Nova Scotia and any other interested parties may participate.

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

#### **Board – as policy maker**

The board's board of directors adopts policies that decision makers must follow, including appeal commissioners. However, the tribunal is not bound by board policy if it finds a policy inconsistent with the act or the regulations.

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

#### Board - as system partner

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

The Heads of Agencies Committee's mandate is to oversee the implementation of a strategic plan for the WSIS. The mandate recognizes that co-operation and communication between agencies is crucial for the implementation of the strategic plan.

The tribunal is careful to ensure that co-operation with partner agencies does not compromise, and must not be perceived to compromise, the tribunal's independence.

#### Tribunal Mandate and Performance Measures

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

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

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

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

Most appeals take much longer to schedule. Often, more than one participant is involved and additional medical evidence, often from specialists, is sought. Representatives often limit how many hearings they wish to do in a month. Disputes among participants concerning disclosure slows the setting down for hearing of appeals.



he tribunal's appeal volume increased slightly from last year. The tribunal received 697 appeals in 2017/18, compared to 695 in the previous year (see Figure 1). Appeals were predominantly filed by workers (96 per cent). The tribunal resolved a total of 644 appeals this fiscal year compared with 606 the previous year.

The tribunal's decision output increased this year from 476 to 535 (see Figure 2). At year-end, 792 appeals remained to be resolved, compared to 744 last year (see Figure 3).

A significant factor in the increase in decision output resulted from the tribunal referring a legal question to the Court of Appeal for resolution. The tribunal asked the court whether the policy requirement that a worker have an audiogram within five years of leaving a noisy work environment was legal. The court determined this policy requirement was unlawful. The court's determination then allowed the tribunal to systematically remit 40 appeals to the board for re-adjudication where claims for hearing loss had been denied due to the lack of a timely audiogram. There are 81 appeals that have been with the tribunal for over two years, which is an increase of 11 compared to the end of the last fiscal year. Of the 81, 77 are represented by WAP and 36 of those involve an employer.

The tribunal continues to develop procedures aimed at resolving appeals more quickly. Unfortunately, appeals have become more complex both procedurally and substantively.

The tribunal must balance between resolving appeals quickly and ensuring maximum fairness. A significant portion of the appeals is awaiting additional medical evidence that has been requested by WAP and, on occasion, by employers. Also, employer demands for additional disclosure from workers increased, which tends to prolong the duration of an appeal.

Please see Appendix (pages 22–25) containing specific data for the following figures.



FIGURE 2 Decisions Rendered



FIGURE 3 Appeals Outstanding at Year End



Approximately 23 per cent of decisions were released within six months of the date the appeal was received. Approximately 48 per cent of decisions were released within nine months of the date the appeal was received, the same as last year. About 41 per cent of appeals took more than 11 months to resolve, which is only a slight improvement over the previous year (see Figure 4).

The report on decisions by representation type is based on the representative at the time decisions are released (see Figure 5). Of the 535 decisions issued this past year, 65 per cent of workers were represented by WAP. However, of the 792 outstanding appeals at year-end, 76 per cent of workers were represented by WAP.

Employers participated in 21 per cent of the resolved appeals. Some employers are unrepresented but can access assistance from the Office of the Employer Advisor. Tribunal staff speak directly with unrepresented workers and employers to provide them with information on appeal processes. During 2017/18, recognition of a claim and new/ increased benefits for permanent impairment were the most commonly appealed issues to the tribunal, each representing 21 per cent of appeals. Employers tended to appeal acceptance of claim decisions (see Figures 6 and 7).

The tribunal heard approximately 59 per cent of appeals by way of oral hearing, a decrease from last year's total of approximately 70 per cent (see Figure 8). This figure was impacted by the hearing-loss remittals, which followed the Court of Appeal's decision, as all were determined by written submissions. If the remittals are removed, approximately two-thirds of appeals were determined by oral hearings, a decrease from last year.





FIGURE 5





FIGURE 7 Decisions by Issue Categories – Employer





**FIGURE 8** 

**Decisions by Mode of Hearing** 

Outcomes on appeal for 2017/18 varied slightly. The overturn rate (appeals allowed or allowed in part) decreased to 47 per cent from 49 per cent the previous year (see Figure 9). The number of appeals returned to hearing officers for reconsideration increased slightly to 8.8 per cent from 8.4 per cent. The percentage of appeals denied increased to 44 per cent from 42 per cent.

Ninety-six per cent of decisions resulted from worker appeals (see Figure 10). The tribunal resolved 109 appeals without the need for a hearing, a decrease from last year's total of 130. 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 2017/18 to 12 (2 per cent of decisions were appealed) up from 10 the previous year. At year-end, six appeals remained at the Court of Appeal (see Figure 11).

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





FIGURE 10 Decisions by Appellant Type







#### **Appeal Management**

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

The tribunal is committed to moving appeals through to resolution as efficiently and expediently as possible having regard to the rules of natural justice and procedural fairness. The collaborative practices put in place with our system partners are a useful tool in achieving the balance necessary for effective, fair, and timely adjudication of appeals.

Communication with appeal participants by telephone is a significant aspect of the registrar's duties. Unrepresented participants are called and given information about the appeal process. Where there is more than one participant to an appeal, conference calls are regularly held to keep participants informed on the appeal status, to ensure compliance with tribunal deadlines, and to streamline issues.

Early identification and resolution of disclosure issues is encouraged. Some of the more complex files are assigned to individual appeal commissioners who take the necessary steps to move appeals toward a decision.

The tribunal continues to work closely with WAP to track appeals and avoid any unnecessary delays. The tribunal actively supports what has become known as the "WAP new medical" process. Additional evidence provided by WAP for a tribunal appeal is considered by a board case manager prior to a decision being made by the tribunal. This results in a significant number of appeals being resolved without a hearing as the new evidence can change the decision under appeal.

#### **Interagency Co-Operation**

The chief appeal commissioner is a member of the Heads of Agencies Committee/Coordinating Committee, which oversees implementation of the WSIS's strategic plan. It meets a few times a year to consider the overall direction of the compensation and safety system.

The Issues Resolution Working Group (IRWG) is comprised of the chief appeal commissioner, the tribunal's registrar, the chief worker adviser, a worker adviser, the manager of the board's internal appeals department, and a board legal department representative.

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

IRWG holds meetings every two months at which appeal statistics from each agency are shared and methods to improve the appeal system are discussed. IRWG also met with representatives from several injured worker groups resulting in a good exchange of information and ideas.

## Freedom of Information and Protection of Privacy

he tribunal rarely receives Freedom of Information and Protection of Privacy (FOIPOP) applications. There were no applications in 2017/18. Applications regarding claim files are referred to the board as they remain the property of, and are held by, the board unless there is an active appeal. If there is an active appeal, no FOIPOP application needs to be made by an appeal participant because the act provides for disclosure of claim files to workers, and employers are entitled to relevant documents to respond to an appeal.

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

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

Decisions from January 2010 to date are published on the Canadian Legal Information Institute's free public website at www.canlii.org. Decisions issued prior to January 2010 are available free to the public through the Department of Labour and Advanced Education website at www.novascotia.ca/lae/databases. All personal identifiers are removed from published versions of decisions. This includes removing all names of participants and board claim numbers. A small number of decisions are not published because they contain extremely sensitive information.

The tribunal has adopted a decision-quality guide that outlines quality standards for decision making. It includes a section concerning privacy issues, which states "decisions should be written in a manner that minimizes the release of personal information." However, as decisions must be transparent, they need to include a description of the evidence that is relevant to support the findings in the decision.

Worker claim files are released to employers after vetting by the tribunal. The tribunal is concerned that personal information not be used for an improper purpose, improperly released, or made public by a third party. The tribunal's correspondence accompanying file copies reflects these requirements and refers to appropriate sanctions.

Workers' personal information must be disclosed to employers for them to be able to participate in appeals. The necessary degree of disclosure has been a point of conflict over the years. The Baker decision of the Court of Appeal has provided direction on the necessary degree of disclosure. Employers are only entitled to relevant documentation.



he following decisions, organized by topic area, are being described as we feel the reader of this annual report may find them interesting.

#### **Acceptance of claims**

*Decision 2016-348-AD (April 12, 2017, NSWCAT)* considered whether a motor vehicle accident was compensable. The unionized worker routinely reported to a hiring hall where he received work assignments. A motor vehicle accident happened while the worker was travelling from the hiring hall to the worksite.

The tribunal rejected the argument that the hiring hall was an adjunct of the employer's facilities and that travel between the hiring hall and worksite was akin to travel between worksites. The tribunal concluded that travel between the hiring hall and assigned workplace was comparable to injuries that occur during workers' regular commutes to and from work, which are not compensable.

Decision 2016-439-AD (April 20, 2017, NSWCAT) considered whether spindle cell sarcoma, a cancer, was related to a prior compensable injury, which caused trauma to the worker's upper thigh. A number of physicians testified on behalf of the worker's estate, but none of them had expertise in oncology. While there is a school of thought in the scientific community that sarcomas can be attributable to trauma, the tribunal concluded that there was insufficient evidence from qualified experts to arrive at such a conclusion in the appeal.

Decision 2015-274-AD (September 14, 2017, NSWCAT) considered whether a worker suffered an injury in the form of stress. The worker had a claim for occupational hearing loss when he learned that his employer failed to disclose, for a considerable period, a noise assessment report that found failure to use hearing protection posed a serious risk to its employees' hearing. The tribunal accepted that a traumatic event had occurred and accepted his stress claim.

#### **Assessments and Employers**

*Decision 2017-600-AD (February 16, 2018, NSWCAT)* dealt with a firm's objection to the board's backdating of its assessment and the application of a penalty. The tribunal concluded that the requirement for firms to register with the board is mandatory and so are the penalties for failing to do so. There was no discretion to waive penalties because the failure to register was accidental.

The tribunal, however, accepted that the children of the firm's principal lived at home and were excluded from the act. The tribunal directed that the firm's assessment be recalculated to remove the assessments on the childrens' wages.

#### **Discrimination**

Decision 2017-196-AD (November 27, 2017, NSWCAT) dealt with an allegation that a worker's employment was terminated because she filed a workers' compensation claim. The tribunal found that the worker's termination was for economic reasons, rather than retaliation for filing a claim, which is prohibited by section 88(f) of the act.

#### **Earnings-Replacement Benefits**

Many appeals pertain to temporary earningsreplacement benefits or extended earningsreplacement benefits. The following three decisions were selected for comment.

Decision 2017-22-AD (May 15, 2017, NSWCAT) found that the requirement for new evidence does not apply to a request to reconsider a decision concerning the scope or quantum of temporary earningsreplacement benefits. This is because section 72 of the act provides that such findings can be reviewed at any time.

Decision 2017-150-AD (January 9, 2018, NSWCAT) considered whether the board was required to give the worker notice that it intended to review his extended earnings-replacement benefit again 24 months following the 36-month review. The tribunal concluded that notice was required. As such, a 24 month-review conducted without notice was found to be invalid. Decision 2017-585-AD (February 23, 2018, NSWCAT) dealt with a worker's objection to the board's inclusion of a housing allowance as income as part of the 36-month review of his extended earnings-replacement benefit. The tribunal found the housing allowance was properly considered a taxable benefit to be included as post-loss of earnings income when recalculating the extended earningsreplacement benefit.

#### **Hearing Loss**

Decision 2016-181-AD (April 28, 2017, NSWCAT) considered whether a worker had an acceptable claim for noise-induced hearing loss under the board's old hearing loss policy, policy 1.2.5AR. The tribunal concluded that the worker's hearing loss, unadjusted for age-related hearing loss, was compensable. The tribunal noted that a material contribution is all that is required to establish causation. The decision also relied on the board's apportionment policy in coming to this conclusion.

#### **Long-Term Rate**

Decision 2017-81-AD (October 27, 2017, NSWCAT) dealt with a worker's objection to the long-term rate calculated by the board. The worker was employed by a small company operated by his spouse, who had paid the board assessments based on his earnings. The board was aware such wages were included in the assessments.

After being injured, the board advised that the worker was not eligible for benefits unless he had special protection coverage. The board offered retroactively to sell special protection coverage, but it only covered net earnings, rather than gross earnings. The tribunal found the worker, as an employee, was ineligible to purchase special protection coverage. Instead, the board should have allowed the worker to apply for coverage under section 4(6) of the act. As a remedy for the board's mishandling of the account, the tribunal directed the board to accept an application under section 4(6) to take effect before the injury and to calculate the worker's benefits in the usual manner.

#### **Medical Aid**

Appeals concerning medical aid assistance are common and the following 10 decisions were selected for comment. Many of the decisions noted pertain to requests for medical marijuana.

Decision 2016-266-AD (June 14, 2017, NSWCAT) considered a worker's entitlement to a service dog to assist with compensable post-traumatic stress disorder. This was a novel issue. The tribunal acknowledged that the provision of service dogs is an emerging area for which there was considerable anecdotal evidence. The tribunal, however, concluded there was insufficient evidence that the provision of a service dog satisfied the board's policy requirement that medical aid be consistent with health-care practices in Canada.

Decision 2017-129-AD (July 25, 2017, NSWCAT) dealt with a request for herbal marijuana. The tribunal found the prescription of marijuana by a physician was not evidence that its use is consistent with health-care practices in Canada. The tribunal concluded there was insufficient scientific evidence concerning the clinical efficacy of marijuana and its use was not consistent with the standards of healthcare practices in Canada. The tribunal also expressed concern about relying on the worker's self-reported benefits from using marijuana. The tribunal cited the Employment Support and Income Assistance Regulations, which do not fund the procurement or use of marijuana. The tribunal concluded it is appropriate to consider the practices of other closely related government agencies and it is appropriate to exercise discretion under the act in a similar manner.

Decision 2016-355-AD (July 26, 2017, NSWCAT) dealt with a request for Botox injections to manage persistent headaches related to a compensable injury. The tribunal accepted the opinions of the worker's treating pain specialist and awarded Botox injections on a trial basis.

Decision 2016-364-AD & 2016-566-AD (August 17, 2017, NSWCAT) considered a request for medical marijuana. The tribunal noted the worker participated in a clinical trial concerning the efficacy of marijuana under the supervision of a hospital's pain management unit.

The tribunal awarded medical marijuana because conventional tiers of analgesics were ineffective, or caused intolerable side effects, and the worker's treating specialist opined that marijuana provided effective pain control without side effects. The tribunal found the contrary evidence, including the board's position paper on medical marijuana, was generic and outdated.

Decision 2017-95-AD (September 13, 2017, NSWCAT) dealt with a request for medical aid in the form of meal expenses for a worker's children when they accompanied him and his spouse to medical appointments a considerable distance from their home. (The worker's spouse was his escort for such appointments, and her meal and travel expenses were covered.) The children, who are relatively young, were home schooled by the worker's spouse. The tribunal accepted the family did not have a support network in their community. The tribunal noted there are no policies pertaining to childcare costs but that the tribunal has awarded childcare costs incurred to facilitate attendance at medical appointments. The tribunal awarded coverage for meal expenses for the children when accompanying their parents to medical appointments.

Decision 2017-200-AD (October 31, 2017, NSWCAT) considered a request for medical marijuana. The tribunal reviewed a number of its prior decisions, and while acknowledging differing findings, concluded the majority of decisions accepted that the provision of medical marijuana, at least for the management of pain, is consistent with the standards of health-care practices in Canada. The worker was awarded medical marijuana.

Decision 2017-322-AD (November 16, 2017, NSWCAT) dealt with a request for medical marijuana. The tribunal suggested that whether the provision of medical marijuana for non-cancerous pain is consistent with health-care practices in Canada should not vary from case to case. The tribunal suggested varying outcomes at this stage reflect the evolving nature of research and acceptance of new treatment. The tribunal accepted the provision of medical marijuana for non-cancerous pain is consistent with health-care practices and the worker was awarded a trial of medical marijuana as recommended by the prescribing physician.

Decision 2016-559-AD (November 27, 2017, NSWCAT) considered a request for medical marijuana. In this decision, the tribunal concluded the consistent position of professional medical bodies does not support the use of herbal medical marijuana. The tribunal found it appropriate to follow the board's position statement on medical marijuana to facilitate consistent decision making. The tribunal also cited the Employment Support and Income Assistance Regulations, which do not fund medical marijuana, and found it appropriate to approach the matter in a manner consistent with other public agencies in Nova Scotia. The tribunal also cited the requirement in board policy 2.3.4R that medications be obtained from a provincially licensed pharmacy. The worker's appeal was denied.

Decision 2016-457-AD (January 22, 2018, NSWCAT) considered a further request for medical marijuana. The tribunal reviewed its prior medical marijuana decisions and accepted that there is sufficient evidence the use of medical marijuana for the management of chronic pain is consistent with health-care practices in Canada. The worker's appeal was allowed.

Decision 2017-497-AD (January 29, 2018, NSWCAT) considered entitlement to reimbursement for medical consultations and tests performed in the United States and coverage for surgery to also be performed in the United States. (The worker previously had consultations with the surgeon in the United States that were approved by the tribunal.)

Orthopaedic surgeons in Nova Scotia and Ontario concurred with the United States–based surgeon that further surgery was warranted. The surgery could not be performed in Nova Scotia. The orthopaedic surgeons acknowledged the expertise of the United States–based surgeon, accepted his treatment plan, and noted the worker had an established doctorpatient relationship with this surgeon.

The worker was awarded reimbursement for reasonable costs previously incurred to see the surgeon in the United States and undergo the diagnostic tests recommended. The worker was also awarded coverage for the cost of surgery with this surgeon.

#### **New Evidence/Reconsideration**

Decision 2017-59-AD (April 28, 2017, NSWCAT) considered how to deal with testimony received as part of a reconsideration based on new evidence, which may be a different type of new evidence itself. The worker's testimony provided additional evidence that the tribunal found must be considered by the board to first determine whether it satisfied the test for "new evidence" under the reconsideration policy. This decision illustrates the technical nature of the board's reconsideration policy, which can lead to multiple appeals.

#### **Post-Accident Earnings**

Decision 2016-541-AD & 2017-48-AD (September 11, 2017, NSWCAT) considered whether income as a property developer/investor and landlord should be considered post-accident earnings. (Post-accident earnings can reduce or eliminate entitlement to an extended earnings-replacement benefit.)

The tribunal concluded the worker's earnings from such endeavours were properly classified as regular salary and wages and was appropriately included as "earnings" under the act. The tribunal concluded that capital cost allowance should not be deducted because such deductions were not reflective of actual earnings.

#### Recurrence

Decision 2015-158-AD-CA (January 11, 2018, NSWCAT) addressed whether a worker suffered a new injury or recurrence to assess which of two employers was responsible for the claim costs. The tribunal concluded the evidence did not establish continuity or compatibility so there was insufficient evidence of a recurrence. The tribunal found there had been a new injury. As such, the most recent employer was responsible for the claim costs.

#### **Suspension of Benefits**

Decision 2017-139-AD (September 25, 2017, NSWCAT) considered a worker's duty to inform the board of material information following the acceptance of a claim. While in receipt of temporary earnings-replacement benefits, the worker pursued, without the board's knowledge, alternate employment by obtaining his taxi licence, working as a dispatcher and being otherwise involved with a taxi company. The tribunal found the worker had failed to cooperate when he did not disclose the taxi work, justifying a suspension of his benefits.



he tribunal is the final decision maker in the workers' compensation system. In limited circumstances, the act permits appeals from tribunal decisions to the Nova Scotia Court of Appeal.

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

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

An appeal has two steps.

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

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

During 2017/18, 12 appeals were filed with the Court of Appeal:

• All 12 were worker appeals.

During 2017/18, 17 appeals were resolved as follows:

- 4 appeals were discontinued by the party who filed it
- 2 appeals were dismissed for failure to follow court rules on timeliness
- leave to appeal was denied four times
- 3 appeals were resolved by consent
- 3 appeals were decided by the Court of Appeal –
  2 were allowed, the other dismissed
- The Court of Appeal answered a question of law in a stated case

At the beginning of 2017/18, there were 11 appeals before the Court of Appeal. At the end of 2017/18, 6 appeals remained.

# Decisions of the Court of Appeal

he Court issued three appeal decisions and answered a question of law from a stated case put to the court by the tribunal.

#### *Five Star Roofing and Masonry v. Nova Scotia (Workers' Compensation Board)*, 2017 NSCA 59

Mr. Marr had a workplace back injury in 2012 while working for McCarthy's Roofing. He then experienced back pain while working for Five Star Roofing and Masonry (Five Star) in 2014.

Board policy 1.3.8 sets out criteria to determine whether symptoms are a recurrence of an earlier injury. The tribunal found the return of symptoms in 2014 was a recurrence of the 2012 injury. However, it also found the recurrence was caused by work done for Five Star in 2014.

The appeal was unusual in that it was not about benefits payable to a worker. Instead it was a contest between two employers about who was responsible for claim costs.

The court allowed the appeal directing the tribunal to re-adjudicate whether there was a recurrence. It stated the tribunal's findings of a recurrence of the 2012 injury and that the back problems were caused by 2014 work duties were mutually exclusive. The court noted that finding an intervening event can take an injury out of the policy definition of recurrence.

#### Surette v. Nova Scotia (Workers' Compensation Board), 2017 NSCA 81

Mr. Surette had sought a finding that he had a valid claim for noise-induced hearing loss under policy 1.2.5AR1. The board found his claim was not acceptable, as he did not have an audiogram performed within five years of leaving the noisy workplace, a policy requirement.

Under section 206 of the act, the tribunal can ask the Court of Appeal to determine a legal question for it. This is called stating a case to the Court of Appeal.

The tribunal asked the Court of Appeal whether the requirement under board policy 1.2.5AR1 for an audiogram within five years of leaving noise exposure was inconsistent with the act. The Court of Appeal found it was inconsistent because it created a different limitation period than the one set out in the act. As such, that portion of the policy was unlawful.

The court wrote that the policy had changed "the limitation period in the Act from one which is based on when a worker learns of the occupational disease to one which is rigid and non-discretionary."

### Baker v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2017 NSCA 83

Employers are entitled to disclosure from workers' claim files to respond to appeals. There had been ongoing disputes between employers and workers as to the degree of disclosure. In Baker, the tribunal assigned a panel of appeal commissioners to determine the degree of disclosure in hopes of creating a leading case.

The panel issued a preliminary decision finding the employer was entitled to full disclosure. It found the tribunal's practice manual violated procedural fairness by restricting disclosure to documents it found relevant.

The court allowed Mr. Baker's appeal of the preliminary decision and remitted the appeal back to the tribunal to vet for relevancy.

The court found the tribunal must vet claim files for relevance before disclosure. The court stated procedural fairness does not require participants to have access to irrelevant documents. It noted issues of credibility can be reasonably assessed without full disclosure. It expressed the view that the tribunal's practice manual had reflected a balance between privacy and disclosure.

#### Skinner v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2018 NSCA 23

Board policy 2.3.1R sets out that medical aid must be "consistent with standards of health care practices in Canada."

Mr. Skinner sustained a workplace injury resulting in chronic pain. He was authorized to use medical marijuana. He sought medical aid from the board to cover the cost of the marijuana. The tribunal denied the coverage, finding the provision of marijuana inconsistent with standards of health-care practices in Canada.

Mr. Skinner appealed. He sought a finding that the policy requirement of "consistent with standards of health care practices in Canada" was inconsistent with the act.

The Court of Appeal denied the appeal.

## Financial Operations

n 2017/18, the tribunal's total expenditures were within 80 per cent of the original authority and within 71 per cent of our revised forecast (see Figure 12). Net expenditures totalled \$1,718,405, a decrease from the previous year.

#### **Budget Expenditure** (for the Fiscal Year Ending March 31, 2018) 10.3% 2.1% Supplies Office Rent, and Services Purchases, Dues, Taxes, 1.2% and Rentals Special Services 85.1% 1.4% Salaries and Benefits Travel

**FIGURE 12** 



#### FIGURE 1 Appeals Received

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 2014-15	51	70	55	64	58	55	66	47	83	66	67	62	744
Fiscal 2015-16	58	71	72	73	53	45	52	44	57	30	48	69	672
Fiscal 2016-17	54	43	49	58	56	42	68	50	72	58	42	103	695
Fiscal 2017-18	53	63	63	56	64	34	56	88	64	43	45	68	697

#### FIGURE 2 Decisions Rendered

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 2014-15	51	54	65	53	35	52	46	41	39	47	47	48	578
Fiscal 2015-16	39	60	56	48	51	49	53	48	41	51	50	57	603
Fiscal 2016-17	31	40	47	49	43	45	40	29	37	45	39	31	476
Fiscal 2017-18	40	37	42	41	35	50	47	45	74	42	38	44	535

#### FIGURE 3

Appeals Outstanding at Year End

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
Fiscal 2014-15	658	663	635	638	649	647	659	657	688	699	713	715
Fiscal 2015-16	724	723	734	751	741	728	714	701	706	671	657	655
Fiscal 2016-17	668	658	650	642	642	630	647	662	690	693	689	744
Fiscal 2017-18	736	753	764	770	789	764	764	800	784	775	777	792

#### FIGURE 4 Timeliness to Decision (cumulative age by month)

Months	1	2	3	4	5	6	7	8	9	10	11	>11
Fiscal 2014-15	0.00	1.38	8.82	22.49	32.87	42.39	51.90	59.86	63.49	67.65	71.80	100
Fiscal 2015-16	0.33	1.82	7.13	12.77	23.55	33.17	41.46	48.42	53.40	57.88	60.70	100
Fiscal 2016-17	0.21	1.89	5.88	11.76	18.49	25.00	32.56	41.39	47.69	53.15	57.56	100
Fiscal 2017-18	0.37	1.49	5.22	11.19	16.79	22.57	30.60	39.55	47.95	53.17	59.14	100

#### FIGURE 5

#### **Decisions by Representation**

Self-represented	56
Workers' Advisers Program	349
Injured Worker Groups, Outside Counsel and Others	130

#### FIGURE 6

#### **Decisions by Issue Categories – Worker**

Recognition of Claim	151
New/Additional Temporary Benefits	91
New/Increased Benefits for Permanent Impairment	152
Medical Aid (Expenses)	85
New/Additional Extended Earnings Replacement Benefits	48
New Evidence	35
Chronic Pain	65
Termination of Benefits for Non-compliance	11
All other issues	77
Total	715

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

Acceptance of Claim	15
Extent of Benefits	7
Assessment Classification	0
Assessment Penalties	0
Other Claims Issues	0
Other Assessment Issues	0
Total	22

#### FIGURE 8

#### Decisions by Mode of Hearing

	<b>Oral Hearings</b>	Written Submissions	Total
Fiscal 2014-15	374	204	578
Fiscal 2015-16	437	166	603
Fiscal 2016-17	333	143	476
Fiscal 2017-18	318	217	535

#### FIGURE 9

#### **Decisions by Outcome**

Allowed	184
Allowed in Part	66
Denied	236
S29	0
RTH	47
Moot	2
Total Final Decisions	535
Appeals Withdrawn	109
Total Appeals Resolved	644

#### FIGURE 10 Decisions by Appellant Type

Worker Claim Appeals*	511
Employer Claim Appeals	23
Employer Assessment Appeals	1
Section 29 Applications	0
Total	535
*Employer participation in Worker appeals 21%	

#### FIGURE 11

#### Appeals Before the Courts at Year End

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

#### FIGURE 12

#### Budget Expenditures

(For the Fiscal Year Ending March 31, 2018)

	Authority	Final Forecast	Actual Expenditures
Salaries and Benefits	\$ 1,773,000	\$ 1,488,000	\$ 1,462,153
Travel	\$ 56,000	\$ 56,000	\$ 23,248
Special Services	\$ 305,400	\$ 306,000	\$ 20,771
Supplies and Services	\$ 62,000	\$ 64,500	\$ 35,591
Office Rent, Purchases, Dues, Taxes, and Rentals	\$ 237,600	\$ 237,500	\$ 176,282
Sub-total	\$ 2,434,000	\$ 2,152,000	\$ 1,718,045
Less Recoveries	\$ 0	\$ 0	\$0
Totals	\$ 2,434,000	\$ 2,152,000	\$ 1,718,045