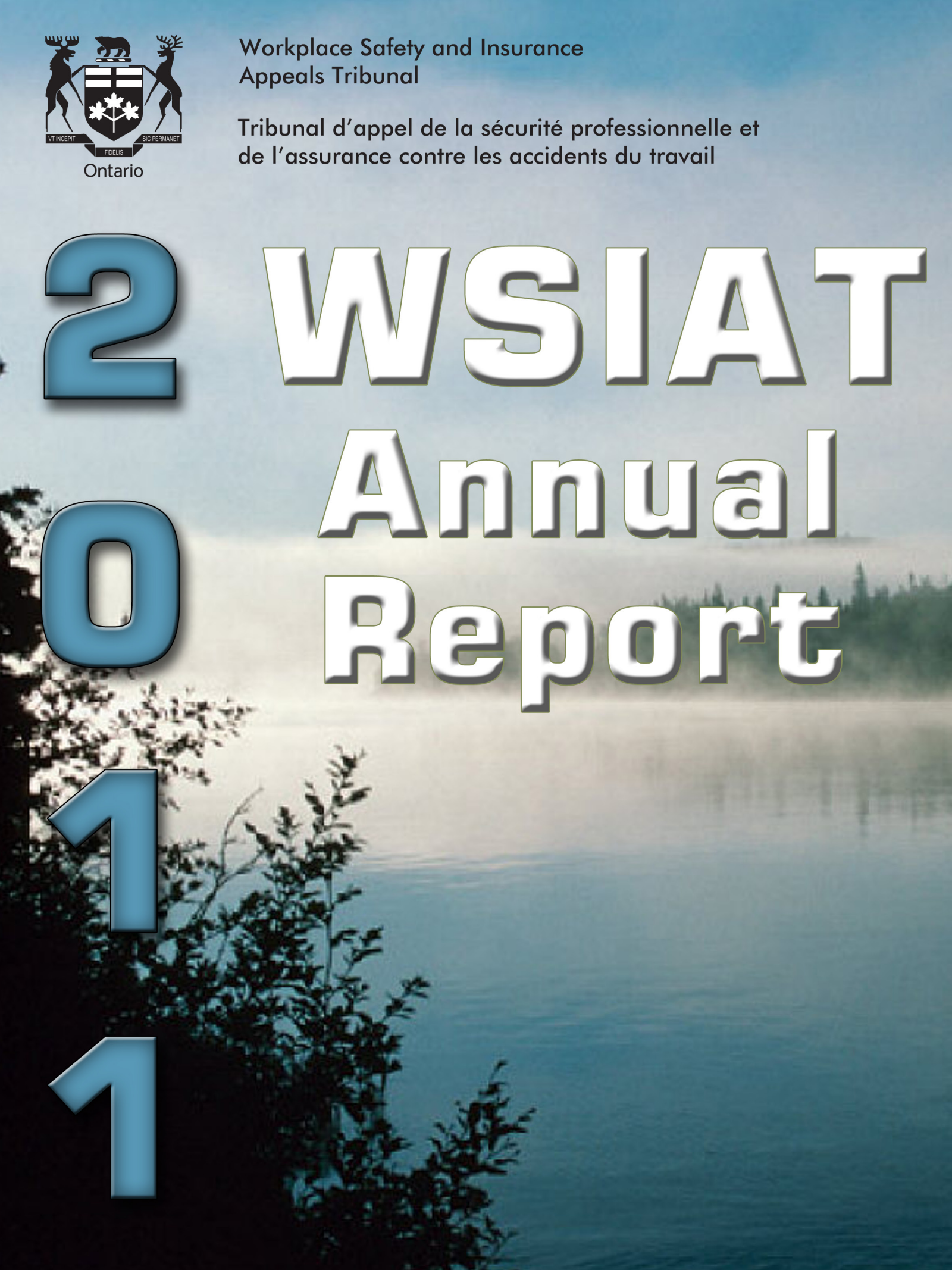
Ontario

Workplace Safety and Insurance
Appeals Tribunal

Tribunal d'appel de la sécurité professionnelle et
de l'assurance contre les accidents du travail

2011 WSIAT Annual Report



2011

WSIAT Annual Report

Workplace Safety and Insurance Appeals Tribunal
505 University Avenue, 7th Floor, Toronto ON M5G 2P2
www.wsiat.on.ca ISSN: 1480-5707

This Annual Report is printed on 100% recycled paper

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Introduction

The Workplace Safety and Insurance Appeals Tribunal (WSIAT or Tribunal) considers appeals from final decisions of the Workplace Safety and Insurance Board (WSIB or the Board) under the *Workplace Safety and Insurance Act, 1997* (WSIA).

The WSIA, replacing the *Workers' Compensation Act*, came into force January 1, 1998. The Tribunal is a separate and independent adjudicative institution. It was formerly known as the Workers' Compensation Appeals Tribunal, until the name was changed pursuant to section 173 of the WSIA.

This volume contains the Tribunal's Annual Report to the Minister of Labour and to the Tribunal's various constituencies, together with a Report of the Tribunal Chair. It is primarily a report on the Tribunal's operations for fiscal year 2011 and comments on some matters which may be of special interest or concern to the Minister or the Tribunal's constituencies.

The Tribunal Report focuses on Tribunal activities, financial affairs and the evolving administrative policies and practices.

Chair's Report

Administrative Justice and The Drummond Report

The release of The Drummond Report and its focus on reduced expenditures and value-for-money services caused a ripple effect throughout the administrative justice community in Ontario. It also triggered concerns with respect to the Appeals Tribunal's budget freeze over the past two years and a possible negative effect on the quality of the Tribunal's appeal process in future fiscal years.

Most informed representatives in the injured worker, employer and legal communities realize that the Appeals Tribunal strives to provide injured workers and employers with quality adjudication on a timely basis. It currently enjoys a national reputation as a quality appeal body producing quality decisions. Unfortunately, the budget freeze over the past two years has created a number of problems in the appeal process, problems which have been intensified by a burgeoning caseload at the end of 2011. The financial pressure also resulted in a significant decline in the number of adjudicators at the Appeals Tribunal; for example, the number of Vice-Chairs has declined from 54 to 43, a decline which also adversely affects the quality of the adjudication process, even if the Tribunal's caseload were to decline.

Knowledgeable members of the injured worker, employer and legal communities realize that the Tribunal has brought a businesslike approach to its appeal process, although not everyone appreciates this value-for-money approach and the millions of dollars which the fee-for-service arrangement with the majority of Vice-Chairs and Members has saved the Insurance Fund. While The Drummond Report has not focused on the administrative justice system, there is some concern that there is a limited appreciation for the specialized decisions emerging from the administrative justice system and the significant cost savings for parties and taxpayers compared to court proceedings. Because most Canadians are not aware of the extent to which the administrative justice system affects their daily lives, there is a limited appreciation of the quality of decisions which affect everything from the water we drink and the air we breathe to our energy costs, provision of health care services, tax assessments, transportation services, as well as workplace safety and insurance services.

Despite financial pressures, the Tribunal continues its attempts to attract quality adjudicators. The WSIAT requires adjudicators who possess a high degree of skill, knowledge and competence in the evaluation of medical evidence and the application of law, Board policy and Tribunal case law. Tribunal adjudicators must be capable of managing fair hearings and reaching reasoned decisions that fairly resolve factual issues, are consistent with workers' compensation law and Board policy and in keeping with Tribunal case law, conform to the principles of administrative justice, and are released in the time prescribed by statute.

The Tribunal's new adjudicator orientation program includes class time, hearing observations, drafting a mock decision and attending the Adjudicator Training Program, developed by the Society of Ontario Adjudicators and Regulators. The completed program requires four weeks of training.

The Tribunal's Members' Code is also designed to ensure quality adjudicating at the Appeals Tribunal. The *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, required adjudicative tribunals to develop a member accountability framework which includes a code of conduct.

The adoption of the WSIAT's (then WCAT's) *Members' Code of Professional and Ethical Responsibilities* is noted in the Annual Report for 1992 and 1993. The Code sets out the standards of conduct governing the professional and ethical responsibilities of Members of the Tribunal. The standards cover the primary areas of Member responsibility in the conduct of hearings and decision-making as well as the institutional responsibilities of Members to their colleagues, the Tribunal Chair, and the Tribunal itself. The Code

recognizes the fundamental and overriding responsibility of Tribunal Members to maintain and enhance the integrity, competence and effectiveness of the Tribunal. The Code is available on the Tribunal's website.

The member accountability framework also requires a description of the functions and skills required for the positions. In 2003, the Tribunal developed position descriptions for Vice-Chairs and Member Representatives for posting on the Tribunal's website. The position descriptions include the purpose of the position and the major responsibilities.

Tribunal staff participated in the development of OPS resource tools to assist agencies in developing or updating their governance documents to meet the requirements of the member accountability framework.

In 2011, the Tribunal's Code and the position descriptions were updated with reference to the resource tools. The updated documents were submitted to the Ministry of Labour to meet the Tribunal's obligations under the Act.

As 2012 begins to unfold and the appeal caseload climbs significantly, the Appeals Tribunal faces a year of significant challenges. Hopefully, it will also be a year in which all interested parties recognize the quality of the adjudication process and decisions and strive to ensure that Ontario has a quality administrative justice system in spite of certain financial pressures.

Highlights of the 2011 Cases

This section reviews some of the many legal, factual and medical issues which the Tribunal considered in 2011.

The Tribunal decides cases under four Acts. The *Workplace Safety and Insurance Act, 1997* (WSIA) came into force on January 1, 1998. It establishes a system of workplace insurance for accidents occurring after 1997, and continues the pre-1985, pre-1989 and pre-1997 *Workers' Compensation Acts* for prior injuries. The WSIA and the pre-1997 Act have been amended several times, including amendments contained in the *Government Efficiency Act, 2002* (GEA), effective November 26, 2002, and Schedule 41 of the *Budget Measures and Interim Appropriation Act*, 2007, effective July 1, 2007. In 2010, the Board adopted Interim Work Reintegration policies which apply to decisions made on or after December 1, 2010. These interim policies were replaced by the 2011 Work Reintegration Policies which apply to all decisions made on or after July 15, 2011. Since Tribunal decisions discussed in this review have not considered these new policies, this review uses the terms and concepts found in the policies in effect prior to December 1, 2010.

Appeals Under the WSIA

The WSIA provides for loss of earnings (LOE) benefits for workplace injuries, as well as non-economic loss (NEL) benefits for permanent impairment. LOE and NEL appeals represent a large portion of the Tribunal's caseload.

LOE benefits are reviewable on "material change of circumstances," or annually at the Board's discretion, for a period of 72 months from the accident date. The amount of LOE benefits depends on the extent to which the worker can return to the workplace and replace pre-injury earnings. If early and safe return to work (ESRTW) is not possible, the Board conducts a labour market re-entry (LMR) assessment and may offer an LMR plan to assist in identifying a suitable employment or business (SEB). The worker's LOE entitlement is assessed in light of this. When the WSIA was initially enacted, LOE benefits could not generally be reviewed after 72 months. Amendments to section 44 in 2002 provided for review after 72 months when a worker suffers "a significant deterioration in his or her condition" which results in redetermination of permanent impairment. Similar review provisions were also made applicable to future economic loss (FEL) benefits under the pre-1997 Act. Subsequent amendments in 2007 expanded the circumstances in which LOE and FEL benefits can be reviewed.

1129/10R
2383/09

The 2010 Annual Report discussed a number of decisions which have considered the term "significant deterioration" in the 2002 amendments to section 44. In 2011, *Decision No. 1129/10R*, 2011 ONWSIAT 2880, reviewed this caselaw and agreed with *Decision No. 2383/09*, 2010 ONWSIAT 2753, that section 44(2.1)(c) provides a "gateway" requirement that must be met before wage loss issues may be directly addressed; however, *Decision No. 1129/10R* also agreed with cases which have found that what constitutes a "significant deterioration" for the purposes of section 44 depends on the individual facts of the case. In accordance with Board policy, this must be evaluated based on evidence of a measurable change in objective clinical findings, along with other medical evidence. While "significant deterioration" has the same meaning in both section 47(9), with respect to referrals for NEL redeterminations, and section 44(2.1)(c), the evidence that is available for the purposes of each determination will differ. The determination under section 44(2.1)(c) is made when the results of the NEL redetermination and NEL reassessment report are available and there may be other new evidence. The fact that the NEL reassessment has resulted in a NEL increase of some small degree, such as 1%, is not conclusive of whether there has been a "significant deterioration." The analysis cannot be based solely on numbers. The determination must consider the context of section 44(2.1)(c) and the significance of the deterioration for wage loss issues.

1691/11

Decision No. 1691/11, 2011 ONWSIAT 2330, is one of the first appeals to consider the 2007 statutory amendments allowing review in a broader range of circumstances. The worker was employed at modified work at no wage loss until he was laid off due to a plant closure. The permanent lay-off occurred three months after the 72-month "locked in" date for LOE benefits. The Vice-Chair found that denial of LOE benefits was not justifiable in the circumstances. While LOE entitlement was deemed to be zero at 72 months, the worker's LOE entitlement could be reviewed, since under section 44(2.1)(g), the Board may review LOE benefits after 72 months if the worker and employer are co-operating in ESRTW.

153/11
195/11
3/11

As noted in previous Annual Reports, difficult adjudicative issues may arise where a worker's employment is terminated following a workplace accident, since the Tribunal must determine whether the resulting loss of earnings flows from the compensable injury or the termination. While a few cases have applied common law principles of employment law, several 2011 decisions affirmed the line of cases which hold that the central question is whether the compensable injury played a role in the termination in the worker's employment. Although this may involve an examination of the circumstances of the dismissal, common law principles of wrongful dismissal should not be incorporated. In *Decisions No. 153/11*, 2011 ONWSIAT 565, and *195/11*, 2011 ONWSIAT 1287, the worker's termination was found to be an intervening event that broke the chain of causation between the accident and the worker's loss of earnings after the termination. In *Decision No. 3/11*, 2011 ONWSIAT 51, on the other hand, a review of the circumstances surrounding the worker's termination indicated that his conduct was not so egregious as to warrant dismissal. While the employer stated that the worker's employment was terminated due to absenteeism, it was likely that the worker was fired for a combination of reasons, including his compensable injury. Accordingly, the compensable injury played a role in the termination and the worker was entitled to LOE benefits.

1789/10R

Turning to NEL awards, an issue which has arisen in some NEL appeals is whether the finding of the degree of permanent impairment must be based on the report of the NEL roster physician. *Decision No. 1789/10R*, 2011 ONWSIAT 428, clarified that while the report of the NEL assessor should be given considerable weight, other information on file should also be considered.

951/11

The WSIA introduced limits on entitlement for mental stress. Section 13(4) provides that a worker is not entitled to benefits from mental stress except as provided in subsection (5). Section 13(5) provides for entitlement for mental stress that is an acute reaction to a "sudden and unexpected traumatic event" arising out of and in the course of his or her employment; however, the worker is not entitled to benefits for mental stress caused by an employer's decisions relating to employment. The Board has also adopted policy on traumatic mental stress. During 2011, the Tribunal continued to consider mental stress claims under the WSIA and Board policy. For example, in *Decision No. 951/11*, 2011 ONWSIAT 1748, an electrician claimed for traumatic mental stress when he was exposed to smoke from a burning cable and dust from a fire extinguisher. The claim was denied as the electrical fire in question was not unexpected in the worker's line of work as an electrician. The event was also not objectively traumatic as it was a minor fire, the fire department was not called and the worker was not present during the fire. The examples of unexpected traumatic events in Board policy differ in nature and degree from the facts in this case.

964/11
88/10
959/11

Section 123(2) limits the Tribunal's jurisdiction with respect to certain matters. *Decision No. 964/11*, 2011 ONWSIAT 1317, found that under section 123(2) paragraph 4 and section 62(2) and (3), the Tribunal does not have jurisdiction to consider the worker's appeal regarding the payment of his LOE benefits as a lump sum. Similarly, the Tribunal does not have jurisdiction to hear appeals from Board decisions assigning benefit payments to the repayment of welfare benefits. *Decision No. 88/10*, 2011 ONWSIAT 827, found that this was explicitly excluded by section 123(2) paragraph 3 and

section 64. Under section 123(2) the Tribunal also does not have jurisdiction to consider overpayment issues in claims with injuries arising after 1997. *Decision No. 959/11*, 2011 ONWSIAT 1356, agreed with earlier decisions that the Tribunal retains jurisdiction to consider entitlement to benefits that have resulted in an overpayment and the mathematical calculation of an overpayment; however, concepts such as detrimental reliance, "merits and justice" and manifest unfairness, cannot be used to assume jurisdiction over a matter that has been excluded from the Tribunal's jurisdiction by legislation.

Board Policy Under the WSIA

While the Tribunal has always considered Board policy, the WSIA expressly states that, if there is an applicable Board policy, the Tribunal shall apply it when making a decision. Section 126 provides that the Board is to provide applicable policy and sets out a process for the Tribunal to refer a policy back to the Board if the Tribunal concludes that the policy is inapplicable, unauthorized or inconsistent with the Act. In 2011, there was one potential section 126 referral; however, the matter was resolved based on further information from the Board. Policy issues may also arise if the Board asks the Tribunal to reconsider a decision in light of a Board policy or if it is necessary for the Tribunal to interpret Board policy in order to resolve an appeal.

483/11I
483/11

Decision No. 483/11I, 2011 ONWSIAT 1231, identified a concern that the Board policy on traumatic mental stress might be interpreted in a manner which was inconsistent with the Act and asked the Board for submissions. While the worker met the requirements in section 13(5) of the WSIA, since she had developed depression as an acute reaction to a sudden and unexpected traumatic event, the Tribunal was concerned that aspects of the Board's mental stress policy appeared to require an actual or implied threat of physical harm. It was also not clear whether the policy authorized entitlement for psychological conditions other than post-traumatic stress disorder. The Board responded that traumatic mental stress claims will be compensable when they arise out of and in the course of employment and meet Board policy requirements that the event be clearly and precisely identifiable, objectively traumatic and unexpected in the normal or daily course of the worker's employment or work environment. Although generally there will be an actual or implied threat to a person's physical well-being or integrity, this is not a requirement. Board policy also does not place any restrictions on the nature of the psychological condition as long as there is an Axis I diagnosis in accordance with the DSM IV by a psychiatrist or a psychologist. *Decision No. 483/11*, 2011 ONWSIAT 2257, accepted the Board's interpretation of the policy, which was in accord with earlier Tribunal cases and the Act. Accordingly, the worker had entitlement as she met both the statutory and policy requirements for traumatic mental stress.

2384/09IR

The Tribunal received a Board request to reconsider *Decision No. 2384/09I*, 2011 ONWSIAT 1150, on the grounds that it directed a review of a final FEL award, contrary to the Act. After reviewing Tribunal caselaw and Board policy on how to offset CPP benefits from FEL awards, the Tribunal denied the request in *Decision No. 2384/09IR*, 2011 ONWSIAT 1884. The amended policy on the CPP offset states that it applies to all FEL benefits payable for periods "on or after January 1, 2004, for accidents from January 2, 1990 to December 31, 1997." Rather than being an unauthorized review of a final FEL award, the original disposition was an application of the amended Board policy with respect to the CPP offset.

676/09I

As noted in previous Annual Reports, Board policy often changes over time. The rights and obligations of parties may vary significantly depending on which version of a policy applies. Tribunal cases have previously found that section 126 policy is similar to legislation and the presumption against retroactivity applies. *Decision No. 676/09I*, 2011 ONWSIAT 903, provides a good example of this in the context of an employer appeal regarding whether short-term disability payments should be treated as

insurable earnings for the years 2000 to 2007. The employer's short-term disability plan was administered by an insurance company which paid the appropriate benefits and issued T4A slips to the workers. In 2000 to 2003, Board policy provided that taxable benefits are included in assessable payroll. The short-term disability benefits were taxable in the hands of the workers and, under this policy, were insurable earnings between 2000 and 2003. The policy applicable in 2004 to 2007 clearly excluded sick benefits paid directly by a private insurance company. While the Board auditor had concerns, there were legitimate business reasons for the insurance company to administer the plan. Based on the clear wording of the applicable policy, short-term disability payments were not insurable earnings between 2004 and 2007.

1926/11

In interpreting specific Board policy, the Tribunal will consider the governing statutory provisions. For example, the Board's policy on psychotraumatic disability states that a psychotraumatic disability is expected to be temporary. *Decision No. 1926/11*, 2011 ONWSIAT 2552, held that this statement must be read in the context of the Act. The Act only provides for a NEL award for permanent impairment, not for temporary impairment or impairments which are not at maximum medical recovery (MMR). The Tribunal recognized that it may be reasonable for the Board to pay a provisional NEL award to a worker who is at MMR and has a permanent impairment, when there remains a significant possibility of improvement and the Board wishes to reserve the right to review the NEL under its reconsideration powers. This was not the case in *Decision No. 1926/11*, however, and a provisional NEL could not be granted.

2506/10I

Finally, *Decision No. 2506/10I*, 2010 ONWSIAT 2981, considered the application of a Board Adjudicative Advice document on NEL ratings for a splenectomy. While Adjudicative Advice documents are not "policies" for the purposes of section 126, they provide useful guidance and may be considered.

Right to Sue Applications

The WSIA and earlier Acts are based on the "historic trade-off" in which workers gave up the right to sue in exchange for statutory no-fault benefits. The Tribunal has the exclusive jurisdiction to decide whether a worker's right to sue has been removed by the Act. Right to sue applications may raise complicated issues such as the interaction between the WSIA and other statutory schemes.

897/09

An issue which has arisen previously is whether the Tribunal has jurisdiction where a worker has received statutory accident benefits (SABs) under the *Insurance Act* but no court action has been commenced. *Decision No. 897/09*, 2011 ONWSIAT 1441, agreed with more recent cases that the Tribunal has jurisdiction. The worker had pleaded guilty to the criminal offence of dangerous driving causing death and was in receipt of SABs. The Tribunal granted the insurer's application that the worker was entitled to claim benefits under the WSIA since the worker was in the course of employment at the time of the accident.

2540/10

Tribunal cases have recognized that negligent medical treatment is a foreseeable consequence of a compensable injury. In *Decision No. 2450/10*, 2011 ONWSIAT 69, the worker sued a doctor for negligent treatment provided in a hospital. Since the doctor was not employed by the hospital, the right of action against the doctor was not removed. *Decision No. 2450/10* rejected an alternative argument by the doctor that the action should not proceed until the worker reimbursed the Board for any benefits received. The Tribunal does not have jurisdiction to make such an order under sections 123(2) and 30 of the WSIA. In any event, there was no justification for requiring reimbursement. This was a matter between the Board and the plaintiff.

1396/11

When a right to sue is removed, section 31(4) provides that the worker may file a claim for benefits within six months of the Tribunal's determination. In *Decision No. 1396/11*, 2011 ONWSIAT 1714, the parties asked the Tribunal to direct the Board to extend the six-month period if the worker was unable to file the claim within the six-month period; however, the Tribunal does not have jurisdiction to make such an order. The worker must apply to the Board for a time extension under section 31(5), with the usual right of appeal to the Tribunal from the Board decision.

Employer Issues

Appeals involving employer issues such as Second Injury and Enhancement Fund (SIEF) relief, classifications, transfers of cost, and adjustments of experience rating accounts, continue to form a significant part of the Tribunal's caseload.

The Tribunal frequently considers SIEF appeals. Board policy provides for mandatory 100% SIEF relief when a prior non-work-related condition is the cause of the accident, the wearing of an artificial appliance is the cause of the accident or the worker is injured during labour market re-entry (LMR). The SIEF policy also contains a chart which addresses more common situations where less than 100% relief may be granted based on the severity of the accident and the medical significance of the pre-existing condition.

2573/10

In *Decision No. 2573/10*, 2010 ONWSIAT 2982, the employer submitted that it was entitled to 100% SIEF relief because the worker's artificial appliance caused the accident. The Board had found that the knee condition, for which the worker wore the brace, contributed significantly to the compensable injury but did not "cause" the injury. This raised the question of causation under the SIEF policy. *Decision No. 526/08*, 2008 ONWSIAT 866, had previously found that "cause" under the SIEF policy meant the precipitating or triggering cause in the context of a prior non-work-related condition. *Decision No. 2573/10* found that this did not apply to artificial appliances since it was unlikely that the wearing of an artificial appliance would ever be a triggering event. Rather, SIEF relief is available if the artificial appliance is a prominent significant contributing factor to the accident. Since the medical evidence indicated that the knee brace was prominent in contributing to the compensable injury, the employer was entitled to 100% SIEF relief.

1568/11
1312/11
1404/11

Many SIEF appeals consider arguments about whether a pre-existing condition prolongs or enhances a work-related disability. *Decision No. 1568/11*, 2011 ONWSIAT 2102, held that evidence of degenerative changes typical of a worker's age does not, in and of itself, represent a pre-existing condition for the purposes of the SIEF policy. The evidence did not indicate that the worker's pre-existing degenerative disc disease prolonged or enhanced the work-related disability. Similarly, *Decision No. 1312/11*, 2011 ONWSIAT 1609, noted that some degenerative change is relatively common after age 20-25. The fact that minor degenerative changes were noted on the MRI of a 28-year-old did not mean that the worker was more vulnerable than a normal person. In *Decision No. 1404/11*, 2011 ONWSIAT 2419, on the other hand, there was documented evidence that the worker's pre-existing osteoporosis greatly increased the worker's risk of fracture and had led to a previous facture. The pre-existing condition was found to be major. Board policy defines the severity of accident in terms of the extent to which it is expected to be disabling. The Tribunal has generally interpreted "disability" to refer to a loss of earning capacity. Accordingly, *Decision No. 1404/11* interpreted "disabling injury" in the SIEF policy to refer to the extent to which an accident would be expected to make the worker unable to work or to perform other tasks of daily living. The question is whether the accident would be expected to cause disabling injury, rather than whether it would be expected to produce the precise injury sustained by the worker. Based on a moderate accident and a major pre-existing condition, the employer was entitled to 75% SIEF relief.

1428/08 The Tribunal applies a "best fit" test in deciding which classification should apply to an employer. *Decision No. 1428/08*, 2011 ONWSIAT 1803, rejected an argument that an employer supplying a supermarket with meat which it sliced and packaged should be classified as a supermarket. A plain reading of the rate group indicated that supermarket was not the best fit for the employer. Section 10 of Regulation 175/98, which applies when an employer contracts out an operation, also did not apply. That section exists to prevent employers, in certain situations, from outsourcing various parts of their operations by deeming that employers are carrying out that activity directly. It cannot be used in the reverse to bring a party within the classification of another employer. *Decision No. 1428/08* also rejected arguments that the employer was an agent of the supermarket or a dependent contractor, holding that it was not appropriate to import concepts of agency or tests used in determining whether an individual is a worker or an independent operator, into the employer classification system.

601/11I The question of how competitors are treated sometimes arises in classification appeals. *Decision No. 601/11I*, 2011 ONWSIAT 1090, considered an employer's request that the Tribunal obtain the classification of 10 competitors from the Board. While the Tribunal has the power to compel the production of documents in the same manner as a court, the framework for disclosure under the *Freedom of Information and Protection of Privacy Act* is relevant to consider in exercising the Tribunal's powers. The classification of competitors is potentially relevant, but the misclassification of a competitor does not override the determination of the best fit for an employer. A competitor's classification is not necessarily determinative or even persuasive, especially if the employer has not been audited and the classification is based on self-identification. Considering that the Board makes the classification of employers publicly available and that the Tribunal only wanted audited information, *Decision No. 601/11I* decided to obtain information about the employer's competitors from the Board.

1277/11 When an employer ceases operations, issues about whether experience rating credits should be transferred may arise. *Decision No. 1277/11*, 2010 ONWSIAT 1961, considered a complex succession planning transaction in which an employer ceased operations at the end of one year and the workers began working for a new employer the next year. The new employer had the same ownership but different managers. Board policy on closure of accounts provides that an employer's account will not be closed where two or more corporations amalgamate or merge, or where shares of an employer are sold or transferred to another employer. Neither of those events took place. The circumstances were similar to an asset purchase. in which case there is a new business entity and a new account. Accordingly, the experience rating credits could not be transferred.

Occupational Disease

Occupational disease cases, which involve workplace exposure to harmful processes or substances, raise some of the most complicated legal, medical and factual issues. Occupational diseases are compensable if they fall under the statutory definition of "occupational disease" or "disablement."

760/10I In occupational disease cases it may be difficult to identify which workplace exposures might have contributed to a worker's condition. This, in turn, may create jurisdictional problems if a party tries to add exposures which were not considered by the Board. As *Decision No. 760/10I*, 2011 ONWSIAT 600, explains, the Tribunal only has jurisdiction over final Board decisions. Where the Tribunal has jurisdiction, the appeal is *de novo* and the Tribunal can accept evidence that was not before the Board. While in some cases it might be fair to find that all workplace exposures were part of the injuring process that were subject to the appeal, the Tribunal could not infer that all possible exposures were implicitly before the Board in *Decision No. 760/10I*. The appeal was placed in inactive status to allow the parties to return to the Board to obtain a final decision on the additional chemical exposures.

1659/09 Occupational disease cases often require the Tribunal to analyze a variety of complicated medical, scientific and epidemiological evidence. For example, *Decision No. 1659/09*, 2011 ONWSIAT 615, considered a report from a Tribunal medical assessor with respect to the worker's bladder cancer and his exposure to organic solvents, paint aerosols and particulates in a manufacturer's paint shop. The assessor's report noted a growing body of literature concerning occupational exposure to paint and risk of bladder cancer. In assessing the roles played by smoking and the workplace exposure, the literature supported a role for each. The report also relied on a study that conducted a meta-analysis which concluded that occupational exposure as a painter was independently associated with the risk of bladder cancer. In granting entitlement, *Decision No. 1659/09* found the meta-analysis to be persuasive and based on sound epidemiological studies.

2531/08 In 2007, there were amendments to the WSIA regarding presumptions for firefighters. Ontario Regulation 253/07 provides that non-Hodgkin's lymphoma (NHL) is a prescribed disease for full-time firefighters who have worked as firefighters for at least 20 years before diagnosis. The Regulation has since been amended to include volunteer firefighters who have also served for at least 20 years. In *Decision No. 2531/08*, 2011 ONWSIAT 496, the worker died of NHL after working for 19 years as a volunteer firefighter. *Decision No. 2531/08* reviewed the literature and determined that the requirement of 20 years appeared to be based on elevated risks identified for firefighters with over 20 years of service. The major epidemiological studies regarding firefighting and lymphomas have identified several problems, as lymphomas are uncommon and contribute to a small number of deaths. Studies also do not generally distinguish between various types of lymphomas. On the particular facts of the case, including the facts that the worker had developed NHL at a young age and had also had exposure to wood products as a lumberman, the Tribunal was satisfied that the workplace exposures made a significant contribution to the NHL.

2360/08 Section 94 of the WSIA contains provisions dealing with entitlement for occupational disease that may have occurred as a result of employment by more than one Schedule 2 employer. Section 94(7) provides that a Schedule 2 employer is not liable to make payments if there is "insufficient information" concerning the worker's prior employers. *Decision No. 2360/08*, 2011 ONWSIAT 944, found that the reference to "insufficient information" does not refer to insufficient information about other employers but, rather, to insufficient information about other exposure. In this case, there was sufficient information about the workplace exposure to asbestos; it was likely that the worker was exposed to asbestos in all of his employment as a merchant seaman. Accordingly, section 94(7) was not applicable; section 94(6) applied. It requires the Board to determine the obligations of each employer and provides that employers are liable to make such payments as the Board considers just to the employer who is liable to pay. *Decision No. 2360/08* found that the Board's enforcement of an apportioned obligation is limited to Schedule 2 employers who are registered with the Board.

Paralegal Regulation

Since the 2007 amendments to the *Law Society Act*, which introduced paralegal regulation, the Tribunal has taken steps to ensure that paralegals who represent parties at the Tribunal meet the Law Society's requirements. Tribunal decisions continue to find that the Tribunal has jurisdiction to engage in an inquiry regarding the status of unlicensed paralegals who do not appear to be covered by one of the exceptions in the *Law Society Act* and By-Laws.

657/11I The By-Law provision which is considered most frequently at the Tribunal applies to relatives, neighbours and friends. *Decision No. 657/11I*, 2011 ONWSIAT 2077, considered this

provision in a case where the representative was a retired lawyer who had not held a licence to practice for over 15 years. Tribunal decisions have held that all four criteria in section 30(1) paragraph 5 of the By-Law must be met. The representative did not meet the requirement of providing the services only for a friend or neighbour. While the representative knew the worker for 35 years, their relationship was solely constituted by their prior lawyer-client relationship. There was no evidence of family or neighbourly friendship. Accordingly, the representative was not allowed to represent the worker on the appeal.

386/09I

The 2010 Annual Report discussed *Decision No. 1222/10I*, 2010 ONWSIAT 2155, which considered the provisions affecting Canadian Registered Safety Professionals (CRSPs) in section 30(1) paragraph 7 of the By-Law. *Decision No. 1222/10I* focused on the requirement that the CRSP provide legal services only "occasionally" and noted that the determination under section 30(1) paragraph 7 is time sensitive. If the facts change, the representative's status may be called into question again. In 2011, *Decision No. 386/09I*, 2011 ONWSIAT 2032, considered a similar situation but took a somewhat narrower interpretation of the By-Law.

Decision No. 386/09I considered information from the Law Society that there is a distinction between being exempt from the paralegal licensing requirement and being permitted to provide occasional advocacy services. Section 30(1) paragraph 7 permits representatives who are CRSPs to provide occasional advocacy services. The issue is not a question of the individual's status but relates to the specific occasional advocacy services. In *Decision No. 386/09I*, the representative provided safety services consistent with her role as a safety professional on other files, but did not do so for this employer. The file was transferred to her for the sole purposes of her advocacy work. One of the criteria in section 30(1) paragraph 7 is that the occasional legal services are provided as "ancillary" to the carrying on of a specified profession. *Decision No. 386/09I* found that the services were not supplementary or supportive of any duties that the CRSP was providing as a safety professional. Accordingly, the CRSP was not allowed to represent the employer. The By-Law is not intended to provide an avenue for safety professionals to become, in effect, unlicensed paralegals who provide only legal services on particular files.

Other Legal Issues

512/06

The application of the *Canadian Charter of Rights and Freedoms* and the Ontario *Human Rights Code* arose in several cases in 2011. *Decision No. 512/06*, 2011 ONWSIAT 2525, considered whether section 43(1)(c) of the WSIA contravenes section 15 of the Charter by limiting LOE entitlement to two years worth of benefits for workers who are over 63 years of age on the date of injury. In upholding the legislation, the majority applied a two-part analysis: whether the law creates a distinction based on an enumerated or analogous ground; if so, whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping. While the majority found that section 43(1)(c) creates a distinction on the enumerated ground of age, it did not create a disadvantage by creating prejudice or stereotyping. The two-year limit on benefits reflected an appreciation for and understanding of older workers who continue to work past the expected retirement age of 65. While there is no longer a mandatory retirement age, there was evidence that 90% of workers retire by age 65. This is an age when they become eligible for other sources of income such as CPP. Insurance schemes are premised on actuarial probabilities and these probabilities underpin the statutory limit on benefits after age 65. Section 43(1)(c) provides a not insubstantial bridge of two years that allows for a worker to reach MMR, make arrangements for retirement, or return to work. Viewed contextually, the two-year limit did not perpetuate prejudice or negatively stereotype the individual. In any event, the majority found that section 43(1)(c) constitutes a reasonable limit under section 1 of the Charter.

2157/09I2 The constitutionality of section 13 of the WSIA on traumatic mental stress and the Board's traumatic mental stress policy has arisen in several cases in 2011. While no case has yet determined whether there is a violation of the Charter or the Code, several interesting decisions issued on procedural issues. *Decision No. 2157/09I2*, 2011 ONWSIAT 1886, invited the Office of the Worker Adviser and the Office of the Employer Adviser to participate as intervenors due to the systemic and widespread implications of the proceedings, the lack of participation by an employer and the ability of the OWA and the OEA to provide the Tribunal with information and insight from a broad range of perspectives.

480/11I In *Decision No. 480/11I*, 2011 ONWSIAT 1032, the worker's representative provided notice to the Attorneys General of Canada and Ontario of challenges to section 13 of the WSIA and the Board's mental stress policy under the Charter and the Code, and indicated an intention to raise an alternative argument that the Tribunal's "average worker test" also violated the Charter and the Code. *Decision No. 480/11I* considered the preliminary issue of whether notice to the Attorneys General is required under section 109 of the *Courts of Justice Act* and the Tribunal's Practice Direction on *Procedure When Raising a Human Rights or Charter Question* for the challenge to the "average worker test." It was agreed that a Charter values argument does not require notice if the statutory provision is genuinely ambiguous and the submission does not challenge the validity of the legislation. *Decision No. 480/11I* found that the intention, depending on the Panel's later rulings, to challenge the disablement provision in the WSIA was sufficient to require notice to the Attorneys General. There is also an interrelationship between the challenge to the "average worker test" and section 13 of the WSIA. Section 109 of the *Courts of Justice Act* should be interpreted broadly and notice should be given when Charter values submissions require the Tribunal to address a serious and substantive issue about the constitutional applicability of the WSIA.

485/10R In *Decision No. 485/10R*, 2011 ONWSIAT 2223, a worker who had been denied entitlement for traumatic mental stress raised a number of arguments on reconsideration, including the original decision's failure to consider the Code provisions that prohibit harassment. The representative refused to give notice to the Ministry of the Attorney General. *Decision No. 485/10R* found that notice was not required as there was no harassment under the Code. Notice to the Attorney General is only required if the threshold test is met and the Code issue will be addressed. Since Tribunal decisions have found that a Code argument is not properly raised for the first time on reconsideration, such a finding will likely only be made in exceptional circumstances.

382/10 *Decision No. 382/10*, 2011 ONWSIAT 707, considered the scope of coverage under the WSIA where a worker is a resident of Ontario but works out of an American company's office in Michigan, and travels on business to a number of locations, including ones in Ontario. The WSIA is focused on the health and safety of Ontario workers and their compensation and rehabilitation in the event of injury. Board policy, which defines "employer" to include non-resident employers in specified circumstances, complies with the legislative purpose of the WSIA. The policy clearly provides the residence of a worker who works in a compulsorily covered operation in Ontario is determinative of whether the worker is subject to the WSIA, without regard to the employer's base of operations. In other cases the Board will look for a substantial connection to the province. With respect to the employer's argument that it provides workers' compensation insurance in its home jurisdiction, *Decision No. 382/10* commented that the WSIA only contemplates interjurisdictional agreements with Canadian jurisdictions. The employer's concerns were more in the nature of a legislative or policy initiative and not appropriate for change by Tribunal decisions.

1897/98R Under the WSIA, the Tribunal's decisions are final, although there is a statutory discretion to reconsider if the Tribunal determines that it is "advisable" to do so. Several 2011 decisions emphasized the need to apply a high threshold test to avoid undermining the finality of the Tribunal's

decisions and the integrity of the original hearing. In *Decision No. 1897/98R*, 2011 ONWSIAT 1877, for example, the original decision was based on a settlement proposed by the worker's representative and agreed to by the original Vice-Chair. *Decision No. 1897/98R* rejected an argument that the worker did not understand the settlement agreement. There would have to be compelling evidence to set aside a final decision on the basis of an alleged misunderstanding. The onus of proof is on the party seeking reconsideration to demonstrate that there is a fundamental error in the process.

Applications for Judicial Review and Other Proceedings

Judicial Review

Even by Tribunal standards, 2011 was a remarkable year for judicial review applications.

The Tribunal has compiled an impressive record on judicial review over its 26-year history. The Tribunal has released more than 57,000 decisions, but only once has a final decision of a court quashed a Tribunal decision. This record is a demonstration of the excellence of the Tribunal's decisions. This in turn is due to the outstanding work of the Tribunal's adjudicators and staff.

In this section, only judicial review applications where there was some significant activity during 2011 have been included. There are a number of other applications for judicial review not referred to here which have been adjourned for various reasons, and have not been finally concluded.

General Counsel and lawyers from the Tribunal Counsel Office represent the Tribunal in court in most instances and co-ordinate all responses to judicial review applications and other court applications where outside counsel are used.

1 *Decisions No. 832/04*, 2004 ONWSIAT 2385, and *832/04R*, 2007 ONWSIAT 936; *Binette c. Ontario (Tribunal d'appel de la sécurité professionelle et de l'assurance contre les accidents du travail)*, 2011 ONCS 2910, Ontario Divisional Court

The worker left work due to back pain. Two weeks later the worker alleged the pain was due to an injury at work. The Board denied entitlement on the grounds it was not shown that an accident occurred in the course of employment.

The worker's appeal to the Tribunal was denied. The Vice-Chair noted the worker had a pre-existing non-compensable back condition, and there was an absence of any medical evidence supporting the position that the back condition was caused by disablement from the nature of the work. The Vice-Chair found the worker's alternative explanation that there was an accident involving carrying a ladder was not supported by the evidence. A request for reconsideration was denied.

The worker commenced an application for judicial review. The worker included with his application an affidavit alleging that comments made by the Vice-Chair prior to the hearing raised an apprehension of bias.

This French language judicial review was heard in Ottawa in May 2011, by a Divisional Court Panel of Justices J. Wilson, Swinton and Linhares de Sousa. The Panel unanimously dismissed the application. The Court found there was no reasonable apprehension of bias because the Court found the Vice-Chair did not say the words that had been attributed to him. The Court also found that the Tribunal's reasoning was clear and the conclusions were based on evidence, and therefore the first decision and the reconsideration decision were reasonable.

2 *Decisions No. 1007/08*, 2008 ONWSIAT 1279, and *1007/08R*, 2008 ONWSIAT 2752; *Farion v. Ontario (Workplace Safety and Insurance Appeals Tribunal)* (February 17, 2011) unreported, Ontario Divisional Court

The worker, a police officer, was granted entitlement for a neck and back/shoulder injury in 1975. In 1979, he suffered injuries to his chest, neck, upper back and left shoulder, for which he was granted a 10% permanent

disability award. He injured his low back in 1986, for which he was granted two weeks of benefits. In 1999, an ARO granted the worker entitlement for a stomach ulcer caused by his pain medication, but denied ongoing entitlement for his low back from the 1986 injury. In a 2003 ARO decision, the worker was denied an increase to his 10% pension. In a 2006 ARO decision, the worker was denied ongoing entitlement for his shoulder and neck from the 1975 accident, a permanent disability award arising from that accident, and also denied a pension assessment for his ulcer.

The worker appealed to the Tribunal for: 1) ongoing entitlement and a pension assessment for the 1975 left shoulder and neck injury; 2) entitlement to a pension assessment for a stomach ulcer and stomach surgery from the 1979 injury; 3) a pension award for neck and shoulder injury under the 1979 injury; 4) an increase in the 10% pension award for his back and shoulder from the 1979 injury; 5) a pension assessment for a back condition from the 1986 injury.

The worker's appeal was denied. The Vice-Chair found that there was no ongoing entitlement for a shoulder and neck injury, and no entitlement for a pension assessment from the 1975 accident. The medical evidence indicated there were no ongoing problems that were related to this accident.

Similarly, the Vice-Chair found there was no entitlement to a pension for the worker's stomach ulcer or stomach surgery from the 1979 accident because there was no ongoing disability related to his stomach. There was no entitlement for a pension for his neck and left shoulder because there was no objective evidence of an organic impairment. The 10% award for the thoracic spine and intrascapular left shoulder remained appropriate as it reflected the worker's level of disability.

The Vice-Chair also held there was no ongoing entitlement for the 1986 accident, and hence no pension assessment was in order.

The worker's application for reconsideration was denied.

The worker commenced an application for judicial review, arguing all the above issues should have been granted except for issue #2. The respondent employer police department participated in the judicial review as a co-respondent with the Tribunal.

The judicial review was heard on February 17, 2011. The Panel of Justices Cunningham, Swinton and Herman unanimously dismissed the judicial review.

At the start of the hearing the applicant narrowed the issues in the case to ongoing entitlement for only the 1975 accident. The Court found the Tribunal had appropriately considered all of the evidence, including the medical evidence. The applicant's arguments that the Tribunal had misapprehended certain medical reports was not accepted.

A month after the release of this decision, counsel for the worker filed a notice of appeal to the Court of Appeal. The worker's counsel took the position that leave to appeal a decision of the Divisional Court (which is the normal avenue of appeal) was not required on a question of fact alone. His appeal was served and filed with the Court of Appeal.

The Tribunal disputed the applicant's interpretation of section 6(1) of the *Courts of Justice Act*. The Tribunal argued that leave to appeal was required. The Deputy Registrar of the Court of Appeal agreed with the Tribunal and stayed the appeal.

In May 2011, counsel for the worker agreed that the appeal be dismissed by the Registrar.

3 *Decision No. 701/10*, 2010 ONWSIAT 1474; *Wood v. Enbridge Gas Distribution Inc.*, 2011 ONSC 5494, Ontario Divisional Court

Over the course of 26 years, this is the only judicial review decision where the parties failed to give the Tribunal notice of the judicial review application.

In 2007, a gas fitter was performing a service call at a residence which required removing a decommissioned natural gas standpipe. A gas leak resulted in an explosion, killing the resident of the home and injuring the gas fitter (the applicant). The applicant commenced an action against a gas company, and the company which the gas company retained to provide service calls for the clients of the gas company. The gas company and service company brought an application seeking an order that the right to sue was taken away because the applicant was a worker under the *Workplace Safety and Insurance Act*.

The issue was whether at the time of the injury the applicant was a worker or an independent operator of the service company. After considering the appropriate tests and reviewing the evidence about the nature of the employment relationship, the Vice-Chair found the applicant was a worker. The Vice-Chair was persuaded by the evidence, which showed a degree of supervision and control over the applicant and the work that was done, the small chance of profit or loss, the absence of indicia of a business enterprise, the fact the applicant was not free to hire help, and that the applicant worked exclusively for one company on a full-time basis. Consequently, the applicant's right of action was taken away.

The applicant commenced an application for judicial review. Surprisingly, the applicant failed to serve the Tribunal with the notice of application. The Divisional Court decision was released on September 20, 2011. The Tribunal only discovered the judicial review had been filed with the Divisional Court after the Court had released its decision.

As it turned out, the judicial review was dismissed. The Divisional Court unanimously found the Vice-Chair's conclusions were grounded in, and supported by, the evidence. The Court held [at para. 20] that there was:

> …no error in law and no misapprehension of the facts in the tribunal's reasons. …the tribunal's review and analysis of the facts was transparent and intelligible, and the conclusions were consistent with the prevailing jurisprudence and the tribunal's policy as applied in "right to sue" situations. The decision falls within the range of possible and acceptable outcomes that are defensible with regard to the facts and the law.

General Counsel wrote to all parties to advise that the Tribunal is a party to a judicial review of one of its own decisions pursuant to the Judicial Review Procedure Act, and it was entitled to notice of this application for judicial review. He advised that the Tribunal is entitled to notice of any further proceedings that arise out of the judicial review, such as an application for leave to appeal.

4 *Decisions No. 756/89L* (December 11, 1989) and *756/89LR* (October 3, 1990)

In *Decision No. 756/89L*, the worker applied for leave to appeal a decision of the former WCB Appeal Board dated November 27, 1978. The Appeal Board decision denied the worker entitlement to benefits for a bilateral knee disability, which he claimed was related to a work accident in 1977. The Appeal Board did not accept that the worker had an accident as he alleged. The Appeal Board denied the worker's reconsideration requests on December 14, 1979, August 15, 1980, October 27, 1983, and September 5, 1984. Two reviews of the worker's file by the Ombudsman did not support that the worker's disability was related to a work accident.

In December 1989, the Tribunal Panel denied leave in *Decision No. 756/89L*, holding there was no substantial new evidence and no reason to doubt the correctness of the Appeal Board's decision.

The worker applied to reconsider *Decision No. 756/89L*. The same Panel released *Decision No. 756/89LR* on October 3, 1990, which denied the reconsideration.

Over the succeeding 20 years, the worker made a series of further requests for reconsideration. In October 2010, he commenced an application for judicial review, representing himself.

As some of the original appeal materials were missing, the Tribunal made strenuous efforts to re-create the file in order to compile a Record of Proceedings. After consulting numerous sources to obtain file documentation, the Tribunal filed as complete a Record of Proceedings as it could with the Divisional Court.

The Tribunal filed its factum. Although the worker filed a factum, he failed to perfect his application. The judicial review was dismissed for delay on December 1, 2011.

5 *Decisions No. 1110/06*, 2006 ONWSIAT 2463, *1565/08I*, 2008 ONWSIAT 2055, *1565/08*, 2008 ONWSIAT 1128, and *1565/08R*, 2011 ONWSIAT 323

The worker was injured in June 1990. He was granted an 18% NEL award. He was granted a FEL sustainability award at D1 in 1992. He was also granted a FEL supplement while he participated in a vocational rehabilitation program. He was undergoing a retraining program when he was involved in a non-compensable motor vehicle accident in 1993, forcing him to quit the program. The supplement ended when he withdrew from the program.

At R1 in 1994, the worker was granted a FEL award based on earnings which assumed he had been able to complete the training program.

In 1997, the Board ruled that the worker had recovered from the 1990 accident and his ongoing back problems were actually the result of a pre-existing condition. The worker's entitlement was revoked retroactive to September 1990.

The worker appealed to the Tribunal. He claimed he was entitled to a 100% FEL award as he was unable to earn anything in suitable and available employment as a result of the 1990 work accident.

In *Decision No. 1110/06*, the Tribunal determined the worker's pre-existing condition had been asymptomatic at the time of the 1990 injury, so the work injury was a significant factor contributing to the worker's ongoing impairment. The Panel held the worker had ongoing entitlement, that he had a permanent impairment, and that the entitlement to benefits he had at the time of the 1997 Board decision should be restored. The Board was directed to reinstate the worker's benefits and determine his past and ongoing benefits.

Following *Decision No. 1110/06*, in 2007, the Board made a new FEL determination. The Board found the worker was only partially disabled because of his work injury, and his inability to work was due to the non-compensable 1993 motor vehicle accident. The Board reinstated the NEL award, but did not grant a full FEL award. The Board awarded a smaller FEL award starting in 1993 as it determined he could work as a civil engineering technician. The worker appealed to the Tribunal again.

In *Decision No. 1565/08I*, the Panel spent the first day of hearing considering the role of a person who appeared at the hearing with the worker and who characterized herself as a "facilitator." Following a lengthy

discussion, it was decided that this person would characterize herself as a "friend" of the worker. As a friend she would qualify under the exemption for a representative as set out in By-Law 4 passed pursuant to the *Law Society Act*. However, the Panel brought the circumstances of the case to the attention of the Tribunal Chair.

When the hearing reconvened the Panel considered the worker's arguments that he was totally disabled before his motor vehicle accident and, hence, he was entitled to a higher FEL award.

In *Decision No. 1565/08*, the Panel found the worker was not totally permanently disabled before the motor vehicle accident. The Panel found that the worker's inability to earn beyond the level determined by the Board was because of the motor vehicle accident. As a result, the Panel upheld the worker's D1 and R1 FEL award as determined by the Board.

However, at the R2 date the Board had found the worker would have been able to earn more and, hence, have a lower FEL award. The Panel allowed the worker's appeal on that issue, finding his earning capacity would not have increased. Thus, the worker was entitled to a partial FEL award commencing in 1993. The Panel also confirmed the Board's NEL determination.

In *Decision No. 1565/08R*, a different Vice-Chair denied the worker's application to reconsider *Decision No. 1565/08*, finding the threshold to reconsider had not been met.

The worker commenced an application for judicial review of *Decisions No. 1565/08* and *1565/08R*. The worker is self-represented. The precise arguments which the worker intends to make are not yet apparent but the Notice of Application for Judicial Review contains a myriad of allegations of errors and breaches of natural justice. The Notice of Application also alleges that the second Panel was barred from making certain findings in light of the conclusions in *Decision No. 1110/06*.

In light of the allegations in the Notice of Application and pursuant to its usual practice, the Tribunal asked the worker to order the transcripts of the Tribunal hearings to be included in the Record of Proceedings. The worker refused. The Tribunal ordered the transcripts itself and filed a Record of Proceedings.

The worker brought a motion for an order to remove the transcripts and much of the materials pertaining to *Decision No. 1110/06* from the Record. The motion was heard in September 2011, by Madam Justice Swinton, who allowed the worker to have a friend present in the courtroom for assistance. However, Justice Swinton indicated that the worker should speak for himself.

Following oral argument by the worker and Tribunal Counsel, Justice Swinton dismissed the worker's motion, accepting the Tribunal's arguments that, in light of the allegations contained in the Notice of Application, the transcripts and materials from the prior appeal are properly included in the Record of Proceedings. Costs in the cause were awarded to the Tribunal.

At the end of the year, the Tribunal was waiting for the worker to serve his factum.

6 *Decisions No. 1791/07*, 2007 ONWSIAT 2212, *1791/07R*, 2008 ONWSIAT 634, and *1791/07R2*, 2009 ONWSIAT 2214; *Scaduto v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2010 ONSC 3580

The worker, a kitchen helper, injured his neck in November 2004. He was granted LOE benefits from May 9, 2005, until the end of 2010. Entitlement was extended to include his low back, shoulders, and chronic pain disability. The worker was also granted a 45% NEL award for chronic pain.

The worker appealed the denial of entitlement for carpal tunnel syndrome, entitlement for a psychotraumatic disability, and the amount of a NEL award for chronic pain. The Tribunal held that the worker had no entitlement for carpal tunnel syndrome, that he was not entitled to a psychotraumatic award, and that he was not entitled to an increase in his NEL award.

The worker commenced an application for judicial review. The Tribunal served and filed its Record, and was in the process of preparing its factum when it was noted that the worker's counsel had referred to evidence in his factum that was not before the Tribunal. After discussions with the worker's counsel, it was agreed that this judicial review would be put on hold while the worker pursued a further reconsideration.

The further reconsideration was denied by *Decision No. 1791/07R2*.

The worker revived his application for judicial review. The application was heard in June 2010, by a Divisional Court Panel comprised of Justices Herold, Jennings and Lederman. At the outset of the hearing, the applicant abandoned the application in respect of the psychotraumatic disability award. The Court unanimously dismissed the application in respect of entitlement to benefits for carpal tunnel syndrome.

Although the time to seek leave to appeal a decision of the Divisional Court is 15 days, over eight months later the worker brought a motion to extend the time to seek leave to appeal to the Court of Appeal. The Tribunal opposed the extension.

On March 30, 2011, Justice Karakatsanis denied the time extension. She noted there was no evidence the applicant had formed the intent to seek leave to appeal within 15 days, the delay here was significant, the applicant's allegations about illness and being unable to find counsel were unsubstantiated and not compelling, there would be prejudice to the Tribunal if an extension was granted, and in any event there was no merit to the appeal.

7 *Decision No. 62/11*, 2001 ONWSIAT 2006

In *Decision No. 62/11*, the Vice-Chair denied the worker's appeal for full LOE benefits subsequent to April 1, 2008. She also denied the employer's cross-appeal for SIEF relief.

Counsel for the worker served the Tribunal with a Notice of Appeal, which she filed in the London Divisional Court.

The Tribunal wrote to the worker's counsel to point out there is no appeal from a Tribunal decision by virtue of section 123(4) of the WSIA.

On December 1, 2011, the London Divisional Court dismissed the appeal for delay, with costs fixed at $750.

8 *Decisions No. 565/09*, 2009 ONWSIAT 2840, and *565/09R*, 2010 ONWSIAT 610

In this right to sue case, a husband and wife shared driving duties in a transport truck. The wife was involved in a single vehicle accident. She and her husband were both injured, her husband sustaining severe injuries. Two insurance companies both brought section 31 applications for declarations that the husband and wife had their right to sue taken away under the Act. The husband had died by the time of the Tribunal hearing and his estate was a respondent. His wife was the other respondent.

The Vice-Chair found the right of action of both husband and wife was taken away, as they were both workers employed by a Schedule 1 employer and in the course of employment at the time of the accident. The application for of the husband's estate reconsideration was denied.

The husband's estate commenced an application for judicial review of the Tribunal's decisions. The Tribunal and an insurance company were co-respondents. The judicial review was scheduled to be heard in Sudbury in March 2011.

Shortly before the scheduled court date, the Tribunal and the co-respondent insurance company consented to allow the applicant to abandon the judicial review.

9 *Decisions No. 717/08*, 2008 ONWSIAT 1188, and *717/08R*, 2008 ONWSIAT 2777

The worker appealed to the Tribunal for an increase to his long-term earnings basis from May 2000 to January 2003. He also appealed the Board's finding that a suitable employment or business (SEB) for the worker would be a mail and message distribution occupation, as this finding had resulted in a reduction to his loss of earnings benefits. The Panel allowed the worker's appeal. It directed the Board to recalculate the worker's long-term average earnings from May 2000 to January 2003, found the SEB was not appropriate, and found that the worker's loss of earnings benefits should be based on a higher hourly wage.

However, the worker requested a reconsideration of the Tribunal decision. He alleged the calculation of his long-term and short-term earnings should have been higher, the Panel should have made the actual calculations rather than referring this to the Board, and he took issue with some procedural rulings made by the Panel during his hearing.

In the reconsideration decision, the same Vice-Chair, sitting alone, denied the request for reconsideration. She found that the relevant law and policy had been applied to determine the time periods on which the calculation of long-term earnings should be based. She found no error in referring the calculation of earnings to the Board. Further, the Tribunal had no jurisdiction to make findings on short-term earnings because there was no final decision of the Board on that issue. She did not accept that the procedural allegations of the worker had any impact on the Panel's decision.

The worker, who was representing himself, first attempted to commence an appeal of the Tribunal's decision. Subsequently the worker retained counsel, who started an application for judicial review. The worker's counsel advised that she was revising the materials filed with the Court, but her application materials became muddled. The Ottawa Divisional Court had set a date to hear the judicial review for February 17, 2010, requiring the Tribunal to retain outside counsel in Ottawa to assist in bringing a motion for an order adjourning the judicial review and extending the time for filing a Record and factums. Justice Lalonde ordered that the matter not be set down for hearing without the order of the court.

Counsel for the worker failed to abide by times indicated in the consent order to serve and file her materials. Despite the order of Justice Lalonde, the Ottawa Divisional Court scheduled the judicial review to be heard during the week of November 8, 2010. The Tribunal was again required to retain outside counsel in Ottawa to resolve this matter. As a result of further representations to the Administrative Judge for the Ottawa Divisional Court, Justice Linhares de Sousa ordered that the judicial review not go ahead during the week of November 8, and that further materials could be filed on behalf of the worker only with the prior approval of the Divisional Court.

Despite the above orders and the applicant's failure to comply by the times in the consent order, the matter was again listed for hearing in March 2011. The Tribunal would not consent to a further extension for the applicant to file materials, which required the applicant to bring a motion to extend the time to file an amended factum. The Tribunal then filed its factum. The judicial review was scheduled to be heard on May 11, 2011.

On the day before the Divisional Court hearing, the worker abandoned the judicial review. Counsel for the worker had assessed the worker's wage loss from his alleged earnings basis, and concluded that even if the judicial review had been successful there would have been little net benefit to the worker.

10 *Decisions No. 1509/02*, 2004 ONWSIAT 196, and *1509/02R*, 2006 ONWSIAT 2179; *Decisions No. 2021/07E*, 2007 ONWSIAT 2548, and *2021/07ER*, 2009 ONWSIAT 1749

Two sisters were suspended at the same time for smoking in a non smoking area at work in 1999. Sister #1 reported an accident within a few hours of returning after her suspension. Sister #2 reported an accident later that day, before the suspension took effect.

Sister #1's claim was denied by the Board. Her appeal to the Tribunal was dismissed (*Decision No. 1384/03*, 2003 ONWSIAT 2895). She brought an application for judicial review. On April 6, 2005, the Divisional Court unanimously dismissed the application for judicial review. The Court stated [at para. 7]: "In our view, the Tribunal carefully reviewed the evidence and gave reasons for its decision. The decision it reached on the basis of the evidence was not patently unreasonable."

However, Sister #2's claim had been allowed by the Board. The employer appealed to the Tribunal. A Panel of the Tribunal allowed the employer's appeal, reversing initial entitlement for the worker (*Decision No. 1509/02*). Sister #2 commenced an application for judicial review in April 2004.

Following discussions with her former counsel, in November 2004 it was agreed that the judicial review application would be adjourned to allow the worker to pursue an application to reconsider *Decision No. 1509/02*.

In her reconsideration application the worker alleged the Panel had failed to consider that she had suffered a recurrence of a 1992 injury. *Decision No. 1509/02R* was released on September 27, 2006. In that decision the Tribunal found that although the worker had raised a cross-appeal in *Decision No. 1509/02*, the worker had not raised entitlement on the basis of a recurrence of the 1992 injury as an issue in that cross-appeal. Consequently, there was no error in *Decision No. 1509/02*, and the application for reconsideration was denied.

However, the Vice-Chair in *Decision No. 1509/02R* noted that it was still open to the worker to bring an appeal on the recurrence issue to the Tribunal, though it would be necessary to make an application to extend the time to appeal that issue.

The worker retained new counsel, and commenced an application to extend the time to appeal the Board decision. In *Decision No. 2021/07E*, the worker's application to extend the time to appeal the issue of recurrence in the June 4, 2001 ARO decision was denied.

The worker commenced an application to reconsider *Decision No. 2021/07E*. In *Decision No. 2021/07ER*, released July 22, 2009, the Tribunal allowed the reconsideration and granted an extension of time to appeal the recurrence aspect of the ARO Decision.

The Tribunal hearing on the recurrence was heard in October 2010. *Decision No. 2021/07I*, 2010 ONWSIAT 2827, was released on December 13, 2010. This decision granted the worker's appeal on the basis that her pain in 1999 was a recurrence of the 1992 injury. The worker was given four weeks to decide whether to also ask the Tribunal to address the period of entitlement for benefits for the recurrence.

The worker confirmed that she did not want to pursue this matter further.

On December 30, 2011, the worker filed a Notice of Abandonment of the judicial review with the Divisional Court.

11 *Decisions No. 1248/98*, 2003 ONWSIAT 2470, and *1248/98R*, 2007 ONWSIAT 2528

The worker appealed for entitlement to benefits for his injuries to his head, eyes, spine, chest and ribs that the worker related to an accident in March 1993. The worker also sought payment of temporary total disability benefits after June 25, 1993. The hearing took place over four days, starting in August 1998 and concluding in July 2003.

The Panel had concerns about the worker's credibility. The Panel did not accept the worker's version of the accident, or that he suffered the injuries he alleged were caused by the accident. The Panel also found that any injuries suffered by the worker had resolved by June 25, 1993.

The worker commenced an application for judicial review. He was self represented. The Tribunal filed its Record of Proceedings. The worker refused to pay for the hearing transcripts he ordered, or to file a factum. As a result of telephone calls which the worker made to Tribunal staff, the Tribunal would not accept further telephone calls from the worker.

The worker asked the Divisional Court for an extension of time in which to perfect his judicial review application. The Tribunal and the employer (the Tribunal's co-respondent) took no position on the request. The Court granted the request and the worker had until the end of June 2009 to perfect the judicial review application. He failed to perfect in time. In March 2010, the worker served the Tribunal with a Notice of Abandonment.

The next day the Tribunal was advised by the Divisional Court Office that the worker had changed his name, and filed a new judicial review application. The new application was the same as the one he had just abandoned, except that the worker now identified himself as a different person under his new name.

The employer indicated that it would bring a motion to strike the worker's new judicial review application. The Tribunal advised it would support that motion. As the worker indicated he was not available until November 2010, the motion was scheduled to be heard on November 10, 2010. In July 2010, the worker served a hand-written Notice of Abandonment of his latest judicial review, but despite repeated requests by both respondents he has failed to file it with the Divisional Court. In early November 2010, the employer withdrew its motion, to give the worker more time to file his Notice of Abandonment. In late November 2010, the employer wrote to the worker to request that he file his Notice of Abandonment immediately or provide his availability over the next three months to have the motion heard. The worker did not respond.

The Divisional Court sent a notice to the worker that it would dismiss the judicial review application administratively on April 14, 2011, if it was not perfected by that time. The worker did not respond. On April 15, 2011, the Divisional Court Registrar dismissed the judicial review.

12 *Decision No. 2305/08*, 2008 ONWSIAT 3007

The worker appealed to the Tribunal for entitlement on the grounds she sustained a new injury or aggravated a pre-existing condition at work. Her appeal was denied. The worker commenced a judicial review alleging that the interpreter at the hearing did not properly interpret the proceedings for the applicant.

The Tribunal filed its factum. The worker, who was self-represented, had originally demanded an early date for the judicial review. However a considerable period of time went by without the worker confirming that she was available for a hearing. Late last year the Tribunal was contacted by a lawyer who was now representing the worker, and who inquired about commencing a reconsideration application at the Tribunal.

Following discussion with the worker's new counsel, the worker agreed to abandon the judicial review and pay costs to the Tribunal. In May 2011, the worker filed a Notice of Abandonment with the Divisional Court.

13 *Decisions No. 390/08*, 2008 ONWSIAT 559, *390/08R*, 2008 ONWSIAT 1989, and *390/08R2*, 2011 ONWSIAT 1283; *Amin v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, [2009] O.J. No. 4715, Ontario Divisional Court; leave to appeal dismissed February 3, 2010, Ontario Court of Appeal; leave to appeal dismissed [2010] S.C.C.A. No. 107

This is the only instance in the Tribunal's history where the courts have quashed a Tribunal decision. The circumstances of this case, which the Tribunal appealed to the Supreme Court of Canada, were reported in the 2010 Annual Report. It is included this year to show the final resolution of the case after it was referred back to the Tribunal.

The worker made a claim for an organic injury to his hand, arm and back after he had been terminated by his employer. The Board allowed benefits for two months in 2004. The worker appealed to the Tribunal for further benefits. The employer cross-appealed, alleging no entitlement should have been granted at all. The Vice-Chair denied both the worker's appeal and the employer's cross-appeal.

The worker commenced an application for judicial review. He alleged that there were breaches of natural justice during the hearing in the questioning of witnesses. The worker also contested the conclusions reached by the Tribunal on medical evidence and the assessment of competing facts. The judicial review was heard on September 24, 2009, and the Divisional Court Panel of Justices Jennings, J. Wilson and Corbett reserved its decision. The Court released its decision on October 27, 2009, quashing the Tribunal's decision.

Although rejecting the worker's objections about procedural fairness, the Divisional Court held the Tribunal's decision to terminate benefits in August 2004 was unreasonable. The Court disagreed with the Tribunal's factual determination that the worker's ongoing problems were not medically substantiated. The Court further opined that if the Tribunal was not satisfied with the evidence it could require the worker to undergo an examination by a medical health professional, who would apparently be able to shed light on the medical state of the worker at a particular point in time five years earlier. The Court directed that the matter should be referred to a differently constituted Tribunal panel to determine the date when the worker no longer had a work-related injury.

The Tribunal filed an application for leave to appeal to the Court of Appeal, on the grounds that in wading into the facts on a matter squarely within the Tribunal's exclusive jurisdiction the Divisional Court failed to apply the reasonableness standard of review. On February 3, 2010, the Court of Appeal Panel of Justices Laskin, Lang and Doherty dismissed the Tribunal's motion for leave to appeal.

As this decision posed some potentially significant issues for the Tribunal, including the degree of deference to be granted to Tribunal factual determinations following the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Tribunal sought leave to appeal to the Supreme Court of Canada. On June 3, 2010, the Supreme Court dismissed the application for leave to appeal, per LeBel, Deschamps and Charron JJ, without written reasons.

The Tribunal took steps to reconvene the hearing in accordance with the decision of the Divisional Court. A pre-hearing conference before the new Tribunal Panel was scheduled. Prior to the pre-hearing conference, the Panel itself identified a potential chronic pain (CPD) entitlement issue, and asked the worker's representative to be prepared to address whether the Panel had jurisdiction over that issue. At the pre-hearing conference the worker's representative decided to go back to the Board to obtain a final decision from the Board on CPD. The Board denied CPD, so this issue was added to the Panel's agenda at the reconvened hearing in March 2011.

At the reconvened hearing the Panel heard oral evidence from the worker and submissions from the worker's representative. The Panel released *Decision No. 390/08R2* on May 20, 2011. It held that the worker had entitlement for CPD, and that the worker had a permanent impairment. The Panel referred the NEL assessment for CPD to the Board, along with the determination of the LOE issues and an LMR assessment.

14 *Decisions No. 774/09*, 2009 ONWSIAT 1004, and *774/09R*, 2009 ONWSIAT 1960

The plaintiff was the manager of an apartment building. His regular hours were 8 a.m. to 5 p.m., Monday to Friday, but he was on call outside of those hours. As a result of a flood in the parking garage, a plumber was called. The following day, while checking to see if the flooding problem was over, the plaintiff fell and injured himself.

Although the plaintiff at first claimed benefits from the Board, he subsequently decided to bring an action. The defendant commenced a section 31 application to determine whether the right of action was taken away under the Act.

The Vice-Chair held the right of action was taken away. Although the plaintiff was not scheduled to be on duty at the time of the accident, he was a worker in the course of his employment when the accident occurred. He fell within the requirements for "time, place and activity" in Board policy. When the worker checked the flooding situation this was consistent with his workplace practices, which involved coming back on duty whenever there was a situation requiring him to perform his job duties.

The plaintiff commenced an application for judicial review. Plaintiff's counsel originally filed an affidavit with their materials. Following negotiations between counsel, it was agreed to remove the affidavit. The Tribunal has filed its factum. It is expected that this case will be heard in Ottawa in January or February 2012.

15 *Decisions No. 1976/99I* (November 30, 1999), *1976/99*, 2002 ONWSIAT 2631, and *1976/99R*, 2005 ONWSIAT 1950

The worker was granted entitlement on an aggravation basis for benefits from March 1991 until February 1992 for fibromyalgia. The worker did not seek medical treatment for over two years, from November 1991 until September 1994. She then sought additional benefits for the period after 1992. The hearing Panel found the worker was suffering from regional myofascial pain, rather than fibromyalgia, and denied the appeal.

A different Vice-Chair in the reconsideration decision held the hearing Panel may have been mistaken in making this determination, and also that this distinction in diagnosis was not sufficient to disqualify the worker from entitlement. However, he also held that even if the worker suffered from fibromyalgia, she would still not be entitled to benefits because it was not clear the worker continued to suffer from a work injury, the medical reporting did not relate her ongoing condition to work, there was significant discrepancy in the medical reporting, and her allegation of significant worsening from 1991 to 1994 suggested another intervening cause of her disability.

The worker commenced an application for judicial review. However, she was represented by an unlicensed paralegal from Quebec who did not have the status to represent her at Divisional Court. The Tribunal served its Record of Proceedings. The worker served her factum. The Tribunal took the position that her factum was improper. On October 12, 2010, Justice Linhares de Sousa directed that the worker's factum be returned to the worker, with instructions that the worker must seek authorization before a single justice of Divisional Court to file her factum.

On March 4, 2011, the worker's motion to be allowed to file a 55-page factum was heard by Justice Smith in Ottawa. The worker's request was not granted, but the Court granted her 60 days in which to file a 45-page factum. The Tribunal was granted the right to file a 45-page factum in reply.

Both the worker and the Tribunal have served and filed their factums. The Tribunal is currently waiting for the judicial review to be scheduled. This judicial review will be heard in Ottawa.

16 *Decisions No. 834/09*, 2010 ONWSIAT 1816, and *834/09R*, 2011 ONWSIAT 902

In this right to sue application, the applicants sought determinations as to whether the rights of action of Ms. M and Ms. R were taken away by the Act. Both Ms. M and Ms. R suffered serious injuries in a motor vehicle accident that occurred on November 18, 2005, when their van, driven by Ms. M, spun out while they were travelling on a highway. After the van came to a rest, both Ms. M and Ms. R exited the van. While they were at the rear of the van, another driver, Mr. K, lost control of his van near the same location as where Ms. M had lost control of the van she was driving. Both Ms. M and Ms. R were struck by Mr. K's van, and suffered severe injuries including the amputation of one leg each.

Ms. M was scheduled to work the morning of the accident. She attended the offices of A (the company) and delivered flowers to a synagogue. She loaded up the van with items to be delivered to a banquet hall for the next day's event.

Ms. R was not scheduled to work the day of the accident. She attended at A, the company's office, in the morning to collect her pay cheque. She intended to then meet her mother for lunch. Ms. M offered to drive

Ms. R to the restaurant. They left the company's offices together in the van. After leaving the office, they stopped at the company's storage facility, where they loaded additional items for an upcoming event. The accident happened some time after leaving the storage facility.

Ms. M, Ms. R and their family members brought actions against various individuals and entities. The right to sue application was brought by the sole proprietor of the company, and the company from whom the van was leased, with a co-application brought by Mr. K and his company and the owner of his van, and the company which maintained the highway.

A was not registered with the Board at the time of the accident.

At issue in the application was: whether A was a Schedule 1 employer; whether Ms. M and Ms. R were workers or independent contractors and whether they were in the course of their employment at the time of the accident; whether Mr. K was acting in the course of his employment at the time of the accident; and whether, if the actions of Ms. M and/or Ms. R were taken away, the *Family Law Act* (FLA) claims were also taken away by the WSIA.

The Vice-Chair found that it was not necessary to decide A's classification but, rather, whether A, a party décor business, was a Schedule 1 employer at the time of the accident. She found that while the words "party décor" are not specifically included in Schedule 1, the various components that make up party décor are found in Schedule 1. She found that A was compulsorily covered under Schedule 1.

The Vice-Chair found that both Ms. M and Ms. R were workers of A at the time of the accident. However, she found that Ms. M was in the course of her employment at the time of the accident, while Ms. R was not. She further found that Mr. K was in the course of his employment at the time of the accident.

The Vice-Chair concluded that Ms. R's action, and that of her FLA claimants, was not taken away by the WSIA. However, she found that Ms. M's action against the sole proprietor, Mr. K, Mr. K's employer, and the company which maintained the highway was taken away by the WSIA. The right of action of the FLA claimants in Ms. M's action was not taken away by the WSIA.

The Vice-Chair made no determination with respect to rights of action against the highway and the Ontario Ministry, as they did not participate in the application.

Both Ms. M and the applicants made requests for reconsideration of the decision. The reconsideration requests were denied.

Ms. M then commenced an application for judicial review, seeking a declaration that, at the time of the accident: 1) A was not a Schedule 1 employer; 2) Ms. M was not a "worker" as defined by the *Workplace Safety and Insurance Act*; and 3) Ms. M was not in the course of her employment.

The Tribunal filed a Notice of Appearance. The other respondents have also filed Notices of Appearance. At the end of the year the Tribunal was waiting for the applicant's counsel to provide transcripts so that the Tribunal can prepare and file a Record of Proceedings.

17 *Decisions No. 512/06I*, 2007 ONWSIAT 164, and *512/06*, 2011 ONWSIAT 2525

The worker injured his back in 2001, when he was 63 years of age. The Board paid the worker LOE until May 31, 2002, when the worker turned 65, which was also the mandatory retirement date for the employer.

The worker appealed to the Tribunal for LOE benefits after May 31, 2002, for his back, and also for benefits for a right shoulder injury. In *Decision No. 512/06I*, a single Vice-Chair denied the appeal for the worker's right shoulder, but granted the worker entitlement to LOE benefits from May 31, 2002 until February 5, 2003 (which was two years after the injury), pursuant to section 43(1)(c) of the WSIA.

The worker then alleged that limiting entitlement to LOE to two years post-injury for those workers over age 63 contravened section 15(1) of the *Canadian Charter of Rights and Freedoms*.

The Ontario Attorney General participated in the Tribunal hearing. The Office of the Worker Adviser (OWA) and the Office of the Employer Adviser (OEA) were invited to participate as interveners. The OWA accepted, and became co counsel with the worker's representative. The OEA withdrew from the appeal.

The hearing reconvened with a full Panel to consider the Charter issue. The majority of the Panel found there was no breach of the Charter. The Vice-Chair dissented and found there was a breach of section 15 the Charter.

The majority considered the historical context of workers' compensation law, the background to the dual award scheme, and the evidence of expert witnesses. It found the workplace insurance plan operates primarily as an insurance scheme, rather than a social benefits program.

The majority characterized the test for whether the Act violates section 15 of the Charter to be (a) if the Act creates a distinction based on an enumerated ground, and (b) if there is a distinction, whether it is discriminatory in that it perpetuates disadvantage or stereotyping. The worker alleged there was a discriminatory distinction based on age. The majority agreed that there was a distinction on an enumerated ground, but did not agree that the distinction perpetuated disadvantage or stereotyping.

The majority noted there had been no decision in a Canadian court which had successfully challenged the termination of benefits at age 65 on the basis of the Charter, that age 65 is still when most people retire, and that it was reasonable for an insurance plan to rely on actuarial probabilities and terminate benefits at age 65 rather than continuing payments for life. The worker himself had not demonstrated that he would have worked after age 65 or had any expectation of being employed after age 65, and in fact did not work after age 65.

Although the worker was not disadvantaged himself based on age, the majority went on to consider the comparator group as a whole. It noted that almost all workers injured after age 61 return to work, meaning most are not disadvantaged by the two-year statutory limit. Further, a two-year limit takes into account the life circumstances of those persons in their sixties, as opposed to those in their twenties. Workers at age 65 are eligible for other sources of income, such as CPP. Viewed contextually, the majority found the two-year limit does not perpetuate prejudice of workers aged 63 and older. Even if section 43(1)(c) did violate section 15 of the Charter, it constituted a reasonable limit under section 1 of the Charter.

In his dissent, the Vice-Chair found that the workplace insurance scheme was both an insurance scheme for employers and a social benefits program for workers. He found that section 43(1)(c) was discriminatory as it failed to consider the disadvantaged position of older workers, and limited their entitlement to benefits they might be entitled to if they had been younger. The Vice-Chair found that section 43(1)(c) was not saved under section 1 of the Charter. The Vice-Chair would have allowed the worker LOE benefits until age 71.

The worker commenced an application for judicial review. At the end of the year the Tribunal was preparing its Record.

18 *Decisions No. 3164/00*, 2000 ONWSIAT 3599, and *3164/00R*, 2001 ONWSIAT 1067

The worker was a baker. She injured her back in 1994. She was paid total benefits for about a month until she returned to work, and then for a recurrence for a further seven months. In 1997, she was granted entitlement for a right elbow disability arising out of her job duties.

She appealed for entitlement for a FEL award and further vocational rehabilitation arising out of the back injury. She also appealed ongoing entitlement for the right elbow condition. Finally, she appealed for entitlement for fibromyalgia, which she alleged arose out of either the back or the elbow injury.

The Vice-Chair granted entitlement to a FEL award and vocational rehabilitation assistance for the back injury. He denied entitlement for fibromyalgia and the right arm/elbow.

On reconsideration the worker submitted additional medical documentation in support of her claim for fibromyalgia, but the Vice-Chair found it was insufficient to warrant reopening the appeal. The worker made a number of subsequent reconsideration requests which did not meet the threshold to be assigned for review by another Panel or Vice-Chair.

In January 2011, the worker retained new counsel and commenced an application for judicial review. A concern about the timeliness of this application has been raised with counsel for the worker. In May 2011, the worker's counsel asked if the Tribunal would consent to adjourn the judicial review while the worker pursued a further reconsideration. The Tribunal agreed. In May 2011, the worker submitted a new reconsideration application. At the end of the year the reconsideration was being processed.

19 *Decisions No. 1233/08*, 2008 ONWSIAT 1604, *1233/08R*, 2009 ONWSIAT 1314, and *1233/08R2*, 2010 ONWSIAT 831

The worker brought an appeal for initial entitlement for respiratory irritation from workplace exposure to paint odours. He was granted initial entitlement and loss of earnings benefits for a few weeks. His appeals for permanent impairment and for psychological entitlement for stress were denied. The worker made a request for reconsideration which was denied.

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings and the worker filed his factum.

The Tribunal then determined that it should reconsider its decisions on its own motion. The worker's counsel agreed to place the judicial review on hold pending the outcome of the Tribunal's reconsideration.

The Tribunal released its reconsideration decision, *Decision No. 1233/08R2*. That decision found that the worker had not been given a full opportunity at the Tribunal to make submissions on the duration of benefits. The Tribunal's decisions were varied to have the matter of the duration of benefits remitted to the Board, subject to the parties' usual appeal rights.

A decision of the Board then confirmed the same few weeks of benefits. The worker's lawyer wrote to the Tribunal and suggested that he might revive the judicial review, but the Tribunal pointed out that that would be premature. It is expected that the worker will appeal the Board's decision. The judicial review is on hold pending the worker's appeal.

Other Legal Matters

Ontario Human Rights Tribunal

A worker was unhappy with her WSIAT decision. She brought an application to the Ontario Human Rights Tribunal, alleging discrimination on the basis of disability, sex and family status. When advised that the OHRT had no jurisdiction to contest an adjudicative decision of WSIAT, the worker then characterized her application as being about services, rather than the WSIAT decision itself.

WSIAT took the position that the worker's application had nothing to do with services, that it was in fact an attack on the merits of the WSIAT decision, and that the OHRT had no jurisdiction to consider an appeal of WSIAT's decision.

The OHRT Vice-Chair agreed that most of the worker's submissions appeared to relate to the results of the WSIAT decision and WSIAT's adjudicative process. However the OHRT Vice-Chair was unable to conclude that it was plain and obvious that the application did not fall within the OHRT's jurisdiction. She directed the worker to file a more detailed statement of the alleged discrimination, which was to be provided to WSIAT.

WSIAT refused to file a complete response to the application. It filed a Request for an Order During Proceedings to dismiss the application on the grounds that the OHRT had no jurisdiction to consider the subject matter of the allegations. In the alternative WSIAT requested the application be deferred until the worker's request for reconsideration of the WSIAT decision had been completed.

On March 8, 2011, the OHRT Vice-Chair granted WSIAT's request and dismissed the application on the basis that the OHRT had no jurisdiction to consider any of the allegations except for one, and for that allegation she agreed that it should be deferred until after the WSIAT reconsideration.

As of the end of the year, the worker had not yet completed her application to reconsider her WSIAT decision.

Ombudsman Reviews

The Ombudsman's Office has the authority to investigate complaints about the Ontario government and its agencies, including the Tribunal.

When the Ombudsman's Office receives a complaint about a Tribunal decision, the Office considers whether the decision is authorized by the legislation, whether the decision is reasonable in light of the evidence and whether the process was fair. If the Ombudsman's Office identifies issues which indicate the need for a formal investigation, the Tribunal will be notified of the Ombudsman's intent to investigate. While an Ombudsman investigation may result in a recommendation to reconsider, this is unusual. Generally, the Ombudsman concludes that there is no reason to question the Tribunal's decision.

The Tribunal typically receives a few notifications of the Ombudsman's intent to investigate each year. In 2009 and 2008, the Tribunal did not receive any notifications to this effect. In 2010, one intent to investigate letter was received and resolved. In 2011, one intent to investigate letter was received. This matter was still outstanding at the end of 2011.

Tribunal Report

Vice-Chairs, Members and Staff

Lists of the Vice-Chairs and Members, senior staff and Medical Counsellors who were active at the end of the reporting period, as well as a list of 2011 reappointments and newly appointed Vice-Chairs and Members, can be found in Appendix A.

Executive Offices

The Chair, the Executive Director and their small group of dedicated staff comprise the Executive Offices of the Tribunal.

The Chair is responsible for the overall strategic direction and performance of the Tribunal. The Chair provides leadership to the Tribunal to ensure that it operates in keeping with its mandate, as defined in the *Workplace Safety and Insurance Act*, and within approved governance and accountability requirements of the government.

The Chair's Office manages the appointment and re-appointment process for Order in Council (OIC) appointees to WSIAT, and works with the Public Appointments Secretariat and the Ministry of Labour in this regard. The Office also responds to correspondence from parties and stakeholders. The Chair works closely with the Appeals Administrator, Counsel to the Chair and General Counsel on case-related matters.

The Executive Director is responsible for: the administration of the Tribunal operations according to the strategic direction and approval of the Chair; managing the Tribunal's quality control processes; developing policies and procedures for effective administration and appeal processing in compliance with statutory obligations; support of the educational needs of OIC appointees; and overseeing the preparation of the Tribunal's Business and Case Management plans and quarterly reports. The Human Resources and the Finance Departments report to the Executive Director.

The Executive Director co-ordinates Tribunal operations through a dedicated and talented Senior Management team.

The Adjudication Support Group reports into the Executive Offices to the Executive Assistant to the Chair and the Executive Director. This group releases all decisions prepared by Tribunal Panels and Vice-Chairs. In 2011, the group released 2,607 final decisions, plus interim and reconsideration decisions.

Office of the Counsel to the Chair

The Office of the Counsel to the Chair (OCC) has existed since the creation of the Tribunal in 1985. It is a small, expert legal department which is separate from the Tribunal Counsel Office (TCO) and is not involved in making submissions in hearings. Draft review, which has been described in prior Annual Reports, is the responsibility of OCC Lawyers. OCC also provides advice to the Chair and Chair's Office, particularly with respect to accountability documents, complicated reconsideration requests, post-decision inquiries, Ombudsman inquiries, conduct matters and other complaints. In addition, OCC provides advice on access and privacy issues under the *Freedom of Information and Protection of Privacy Act* (FIPPA) and handles FIPPA requests and appeals. Assistance is also provided with respect to records management issues.

Professional development continued to be important in 2011, given the four different legislative schemes, statutory amendments, extensive Board policy and policy amendments. OCC developed and delivered a new training module on workplace safety and insurance law for adjudicators with some experience. OCC was also active in developing and delivering ongoing professional development sessions to adjudicators and staff and providing privacy training to staff.

During 2011, OCC continued to work on various knowledge management resources which facilitate the access of Vice-Chairs and Side Members to information on law, policy and procedure through electronic means.

Office of the Vice-Chair Registrar

The staff of the Office of the Vice-Chair Registrar (OVCR) are the primary point of contact for appellants, respondents and representatives with an appeal or application at the Tribunal.

All initial processing of appeals is completed by the Tribunal's OVCR. On receipt of an appeal, the Tribunal gives notice to the parties. When the appellant advises of being ready to proceed to a hearing, the Tribunal requests the claim or firm files from the Board. The Tribunal then prepares the appeal for hearing, ensuring that the appeal documents are complete and that the case is ready for hearing.

The Tribunal's pre-hearing staff also utilizes a variety of Alternative Dispute Resolution (ADR) techniques to resolve appeals prior to the hearing. Staff trained in communication and conflict resolution work with both represented and unrepresented parties.

The Vice-Chair Registrar

The Tribunal's Vice-Chair Registrar is Martha Keil. On referral by Tribunal staff and the parties to the appeal, the Vice-Chair Registrar may make rulings on preliminary and pre-hearing matters such as admissible evidence, jurisdiction and issue agenda. The process may be oral or written, and results in a written decision with reasons. Requests to have a matter put to the Vice-Chair Registrar are raised with OVCR staff.

The Registrar's Office is divided into a number of areas.

The Early Review Department

The Early Review Department is responsible for the initial processing of all Tribunal appeals. Staff reviews all Notices and Confirmations of Appeals to ensure that they are complete and meet legislative requirements, and also identifies appeals that can be heard by way of an expedited written process.

Early Review staff reviews appeals to determine whether there are any jurisdictional or evidentiary issues that would prevent the Tribunal from deciding an appeal. On occasion, appeals may be withdrawn by the appellant, and the parties pursue other alternatives.

Vice-Chair Registrar Teams

All files are assigned to pre-hearing staff for substantive review to ensure that they are ready for hearing. This step is instrumental in reducing the number of cases that are adjourned or require post-hearing investigations due to an incomplete issue agenda, outstanding issues at the Board or incomplete evidence. Staff responds to party correspondence and queries and to Vice-Chair or Panel instructions up to the hearing date.

Mediation Services

Mediation services are offered to parties to resolve appeals without proceeding to a formal hearing. If an appellant requests mediation, the Tribunal reviews the appeal to determine whether it is suitable for mediation and contacts the responding party to determine if the respondent is willing to explore a mediated resolution. If the appeal is not suitable for mediation (e.g., credibility is an issue or a respondent does not want to participate), the appeal is re-streamed and prepared for a hearing.

Where both parties are amenable and the appeal is suitable for mediation, the appeal is assigned to a mediator for substantive review. The mediator may contact the parties in advance of the mediation date to discuss options for resolving the appeal, to clarify issues or to identify outstanding information. At the mediation, the mediator works with the parties in a neutral and confidential setting to arrive at a jointly acceptable resolution to an appeal. Mediations are typically conducted as face-to-face meetings but teleconferences are used where appropriate.

If the mediation results in the parties reaching a resolution, an agreement is formalized in writing and submitted to the parties for their signatures. The executed agreement is then submitted to a Vice-Chair for review. If the Vice-Chair is satisfied that the resolution is consistent with law, Board policy and is reasonable based on the facts of the case, the Vice-Chair will issue a written decision incorporating the terms of the agreement. Where an appeal is not resolved through mediation efforts, it is prepared for hearing.

Single Party Appeals

If the appellant has indicated an interest in mediation, but the respondent is not participating in the appeal, the appeal may be referred to a Tribunal mediator to determine whether an early resolution is possible. Discussions with the appellant's representative may result in a resolution of the appeal at this stage.

On occasion, a group of single party appeals involving the same representative may be referred to a Tribunal mediator. This is done where it is believed that discussion may result in some appeals being resolved quickly, or where recommendations or early decisions by the Vice-Chair Registrar appear to be possible.

Tribunal Counsel Office

The Tribunal Counsel Office (TCO) is a centre of legal and medical expertise at the Tribunal. In addition to administrative support staff, TCO consists of three sections which work closely together, each reporting to the General Counsel: the TCO lawyers, the TCO legal workers and the Medical Liaison Office.

Hearing Work

Under the Tribunal's case processing model, TCO oversees appeals which raise the most complex medical, legal or policy issues. These appeals are streamed to TCO from the Early Review Department, or are assigned to TCO for post-hearing work at the direction of a Panel or Vice-Chair. TCO also handles applications for reconsideration of Tribunal decisions.

Pre-hearing Work

When a complex appeal is received by TCO prior to a hearing, the case is assigned to a lawyer. The case is carried by that lawyer until the final decision is released. The lawyer resolves legal, policy and evidentiary

issues that arise prior to the hearing, provides assistance to the parties if there are procedural questions concerning the appeal, and attends at the hearing to question witnesses and make submissions on points of law, policy, procedure and evidence.

Post-hearing Work

After a hearing a Tribunal Vice-Chair or Panel may conclude that additional information or submissions are required before a decision can be made. In those circumstances, the Vice-Chair or Panel sends a written request for assistance to the Post-hearing Manager in Tribunal Counsel Office. The request is then assigned to a TCO legal worker or lawyer, depending on the complexity of the matters involved. The legal worker or lawyer carries out the directions of the Panel or Vice-Chair, and co-ordinates any necessary input from the parties to the appeal.

Typical post-hearing directions would include instructions to obtain important evidence (usually medical) found to be missing at the appeal, to request a report from a Tribunal medical assessor, or to arrange for written submissions from the parties and TCO lawyers.

TCO Lawyers

TCO has a small group of lawyers with considerable expertise in workplace safety and insurance law, and administrative law. As noted above, lawyers in TCO handle the most complex appeals involving legal and medical issues. TCO lawyers also provide technical case-related advice to legal workers in TCO and the Office of the Vice-Chair Registrar.

Examples of appeals handled by TCO lawyers include complex occupational disease appeals, employer assessment appeals, appeals involving difficult procedural issues, and appeals which raise constitutional and *Charter of Rights and Freedoms* issues. A bilingual TCO lawyer is available to assist with French language appeals.

A large component of TCO lawyer work involves providing non-appeal related advice to other departments of the Tribunal. Matters such as negotiating contracts, security, human resource issues, training and liaison with organizations outside the Tribunal all require input from TCO lawyers.

General Counsel and TCO lawyers represent the Tribunal on applications for judicial review of Tribunal decisions, and on other Tribunal related court matters.

TCO Legal Workers

TCO legal workers handle exclusively post-hearing appeal work and reconsiderations. They are a small, highly trained group who work diligently to ensure the directions of Panels and Vice-Chairs are completed quickly, thoroughly and efficiently. The TCO Post-hearing Manager directs and assigns work to the TCO legal workers. The Post-hearing Manager also reviews and analyzes the types of post-hearing requests, the reasons for adjournments of hearings, and monitors the progression of the post-hearing and reconsideration caseload.

Medical Liaison Office

The Tribunal must frequently decide appeals that raise complex medical issues, or require further medical investigation. The Tribunal thus has an interest in ensuring that Panels and Vice-Chairs have sufficient

medical evidence on which to base their decisions. The Medical Liaison Office (MLO) plays a major role in identifying and investigating medical issues, and obtaining medical evidence and information to assist the decision-making process.

To carry out its mandate, MLO seeks out impartial and independent expert medical expertise and resources. The Tribunal's relationship with the medical community is viewed as particularly important, since ultimately, the quality of the Tribunal's decisions on medical issues will be dependent on that relationship. MLO co-ordinates and oversees all the Tribunal's interactions with the medical community. MLO's success in maintaining a positive relationship with the medical community is demonstrated by the Tribunal's continuing ability to readily enlist leading members of the medical profession to provide advice and assistance.

MLO Staff

Jennifer Iaboni, RN, is the Manager of MLO. Jennifer has an outstanding clinical nursing background, having worked in surgical nursing at Toronto Western Hospital, Centenary Health Centre and York Central Hospital. In addition to 11 years experience in critical care, Jennifer gained valuable experience while working as a Nurse Case Manager at the WSIB.

In addition Shelley Quinlan is the MLO Officer and has a baccalaureate in nursing from Ryerson University. She worked in critical care nursing for a number of years, and then at WSIB, first as a nurse case manager and then a NEL clinical specialist.

Medical Counsellors

The Medical Counsellors are a group of eminent medical specialists who serve as consultants to WSIAT. They play a critical role in assisting MLO to carry out its mandate of ensuring the overall medical quality of Tribunal decision-making.

The Chair of the Medical Counsellors is Dr. John Duff. A list of the current Medical Counsellors is provided in Appendix A. The Tribunal is pleased to note that one of its Counsellors, Dr Marvin Tile, was appointed a member of the Order of Canada in 2010 for his contributions as a clinical orthopedic surgeon, teacher, and groundbreaking researcher.

Prior to a hearing, MLO identifies those appeals where the medical issues are particularly complex or novel. Once the issues are identified, MLO may refer the appeal materials to a Medical Counsellor. The Medical Counsellor reviews the materials to verify whether the medical evidence is complete and that the record contains opinions from appropriate experts. The Counsellor also ensures that questions or concerns about the medical issues that may need clarification for the Panel or Vice-Chair are identified. Medical Counsellors may recommend that a Panel or Vice-Chair consider obtaining a Medical Assessor's opinion if the diagnosis of the worker's condition is unclear, if there is a complex medical problem that requires explanation, or if there is an obvious difference of opinion between qualified experts.

At the post-hearing stage, Panels or Vice-Chairs may need further medical information to decide an appeal. These adjudicators may request the assistance of MLO in preparing specific questions for Medical Assessors. Medical Counsellors assist MLO by providing questions for the approval of the Panels or Vice-Chairs, and by recommending the most suitable Medical Assessor.

Medical Assessors

As the Courts have recognized, the Tribunal has the discretion to initiate medical investigations if it believes it necessary, in order to determine any medical question on an appeal (*Roach v. Ontario (Workplace Safety and Insurance Appeals Tribunal*), [2005] O.J. No. 1295 (ONCA)). Section 134 of the *Workplace Safety and Insurance Act* allows for "health professionals" to assist the Tribunal in determining matters of fact. The Tribunal's authorized list of health professionals is known as the Tribunal's roster of "Medical Assessors."

Medical Assessors on the roster may be asked to assist the Tribunal in a number of ways. Most often, they are asked to give their opinion on some specific medical question, which may involve examining a worker and/or studying the medical reports on file. They may be asked for an opinion on the validity of a particular theory which a Hearing Panel or Vice-Chair has been asked to accept. They may be asked to comment on the nature, quality or relevancy of medical literature. Medical Assessors also assist in educating Tribunal staff and adjudicators in a general way about a medical issue or procedure coming within their area of expertise.

The opinion of a Medical Assessor is normally sought in the form of a written report. A copy of the report is made available to the worker, employer, the Panel or Vice-Chair, and (after the appeal) the Board. On occasion, a Hearing Panel or Vice-Chair will want the opportunity to question the Medical Assessor at the hearing to clarify the Assessor's opinion. In those cases, the Medical Assessor will be asked to appear at the hearing and give oral evidence. The parties participating in the appeal, as well as the Panel or Vice-Chair, have the opportunity to question and discuss the opinion of the Medical Assessor.

Although the report of a Medical Assessor will be considered by the Tribunal Panel or Vice-Chair, the Courts have recognized that the Medical Assessor does not make the decision on appeal (*Hary v. Ontario* (*Workplace Safety and Insurance Appeals Tribunal*), 2010 ONSC 6795 (Div. Ct.)). The actual decision to allow or deny an appeal is the sole preserve of the Tribunal Panel or Vice-Chair.

The Appointment Process for Medical Assessors

The Medical Counsellors identify highly qualified health care professionals eligible to be appointed to the Tribunal's roster of Medical Assessors. Those health care professionals who agree to be nominated as candidates have their qualifications circulated to all the Medical Counsellors, and to members of the WSIAT Advisory Group. The Tribunal has the benefit of the views of the Medical Counsellors and the Advisory Group when it determines the selection for the roster from the available candidates. Medical Assessor appointments are for a three-year term, and may be renewed.

MLO Resources Available to the Public

MLO places medical articles, medical discussion papers, and anonymized medical reports on generic medical or scientific issues in the Ontario Workplace Tribunals Library. This publicly-accessible collection of medical information specific to issues that arise in the workers' compensation field is unique within the Ontario WSIB system. New medical information is announced as it becomes available through the WSIAT publication *WSIAT In Focus*. This publication is available to the public on the WSIAT website.

Of all the medical information made available by MLO, WSIAT Medical Discussion Papers are the most frequently requested. The Tribunal commissions Medical Discussion Papers to provide general information on medical issues which may be raised in Tribunal appeals. Each Medical Discussion Paper is written by a recognized expert in the field selected by the Tribunal, and each expert is asked to present a balanced view of the current medical knowledge on the topic.

Medical Discussion Papers are intended to provide a broad and general overview of a topic, and are written to be understood by lay individuals. Medical Discussion Papers are not peer reviewed and do not necessarily represent the views of the Tribunal. A Vice-Chair or Panel may consider and rely on the medical information provided in the discussion paper, but the Tribunal is not bound by a Medical Discussion Paper in any particular case. It is always open to parties to an appeal to rely on or distinguish a Medical Discussion Paper, or to challenge it with alternative evidence.

Medical Discussion Papers are available to the public through the WSIAT Website.

TCO Support Staff

TCO and MLO share a small group of dedicated support staff. Working under the direction of the Supervisor of Administrative Services, TCO support staff assist the lawyers, nurses and legal workers with case-tracking input, file management, preparation and filing of court documents, and general support duties.

Scheduling Department

The Tribunal's Scheduling Department is led by the Appeals Administrator. Once an appeal is hearing ready, the department receives a request to schedule a hearing date from the Tribunal Counsel Office or the Office of the Vice-Chair Registrar. The department co-ordinates the hearing schedule for all appeals, oral and written, heard by the Tribunal. The Tribunal conducts hearings in Hamilton, Kitchener, London, Oshawa, Ottawa, Sault Ste. Marie, Sudbury, Thunder Bay, Timmins, Toronto and Windsor. The department uses a longstanding scheduling model that allows for consultation with parties in the setting of hearing dates. As well, the department arranges for interpreters, regional boardrooms, service of summonses and the scheduling of pre-hearing conferences, and determines the amount of time designated for a hearing and the hearing location. Pre-hearing adjournment requests are decided by the Appeals Administrator.

Information Services (IS)

The Information Services Department provides the following services in support of the Tribunal's objectives:

- information management and privacy
- web and content development
- library services
- publishing (web-based and print)
- translation
- staff training and development
- emergency management and security (EMS).

Information Management and Privacy

The Tribunal continued to work with the Archives of Ontario to schedule its records and to implement its signed schedules. In this period the Tribunal's *Recorded Information Management Policy* was updated. As well, IS staff co-ordinated the Tribunal's privacy program by recording privacy incidents and answering questions from Tribunal staff on privacy matters. More complex privacy matters are referred to counsel in the Office of the Counsel to the Chair.

Web and Content Development

This year was about content and content updating. In 2011, IS staff collaborated with Tribunal groups including OICs, Emergency Management, the Ontario Workplace Tribunal's Library and the Tribunal's Office of the Vice-Chair Registrar to update Intranet content. The Tribunal's forms on the public site were also updated to make them easier to use.

During 2011, IS staff was trained on how to create accessible documents in order to meet the new provincial accessibility requirements. The Tribunal's public websites have been reviewed for accessibility.

Library Services

The Ontario Workplace Tribunals Library (OWTL) is an information resource open to members of the public. Library staff assists workers, employers and their representatives by collecting and organizing materials related to workplace health and safety, human rights/discrimination, pay equity, labour relations and employment law, administrative law and other related subjects. The library also provides services to the Ontario Labour Relations Board, the Human Rights Tribunal of Ontario, the Pay Equity Hearings Tribunal and the Workplace Safety and Insurance Appeals Tribunal.

In 2011, the central library reference line, reference desk and reference database were fully operational. This new workflow streamlined the flow of reference questions and increased the visibility of library staff to library users. With the anonymized reference database, the library staff can identify repeat questions and reuse that knowledge. As would be expected, most questions for the library now come via phone or email (75%). The library continues to add public documents to the Ontario Workplace Tribunals Library website so that users can look for, and find, information themselves.

As well in 2011, the following projects were undertaken:

- prioritizing Tribunal hard copy publications for scanning
- indexing of labour certificates for easier access
- preparing and presenting six training modules for WSIAT
- a current awareness service for WSIAT managers
- the screen reader JAWS was installed on a library PC for library clients.

The library continues to train library technician students from community colleges. The students get practical hands-on training in library work under the supervision of a professional librarian.

Publishing

Since the inception of the Tribunal in 1985 until the end of 2011, the Tribunal has released 57,500 decisions. All these Tribunal decisions are published and available free of charge through the Tribunal's searchable database on the Tribunal's website at wsiat.on.ca. There is a database record for each decision. Many of the records include a summary of the decision. All records include at least keywords to identify the issues, and a link to the full text. The database can be searched on various fields, including the keywords, summary, sections of the Act and regulations, Tribunal decisions considered and Board policies considered. The full text of Tribunal decisions is also available free of charge on the website of the Canadian Legal Information Institute (CanLII) and on a paid basis on the website of LexisNexis (Quicklaw).

In 2011, the Information Services Department continued the practice that was started in 2010 of adding highlights of selected noteworthy decisions to the home page of the Tribunal's website. From the highlights, there are links to the summaries of those decisions, other noteworthy decisions and the full text of the decisions. The highlighted decisions may be of particular interest, including novel issues, different approaches to an issue or procedural points. This service brings information about these decisions to our users in a timely and easily accessible manner.

During 2011, the Tribunal released, and Information Services processed, over 3,000 decisions. The interval between decision release and addition to the database remains at about six weeks.

Information Services also publishes the *Annual Report* and the Tribunal newsletter, *WSIAT In Focus*. Current and back issues of these publications can be found on the Tribunal's website.

Translation

The Tribunal offers services in French to its Francophone stakeholders in accordance with the *French Language Services Act of Ontario*. The Tribunal's translator is responsible for the translation of materials for our public website, as well as print materials published by the Tribunal.

Staff Training and Development

The Tribunal has a strong commitment to staff learning. New staff receives a formal orientation that includes an introduction to the Tribunal's goals and objectives, the case management system and desktop tools. This year a renewed Human Resources orientation module was introduced and plans are underway to add a module on Privacy.

In January, all Tribunal staff were oriented to the legislation regarding workplace violence and prevention. As well Information Services co-ordinated the Legal Worker Professional Development day.

Emergency Management and Security

The Tribunal is committed to providing a safe and accessible environment for its staff and clients. During 2011, the Tribunal's emergency processes were reviewed and refined. In this period, the Tribunal re-organized and published its emergency management processes on the Intranet.

Case Management and Systems

The Case Management and Systems Department (CMS) provides the information technology (IT) infrastructure and supports the case management functions of the Tribunal. The department's mandate is to design, develop and implement Information Technology and workflow solutions to support Tribunal administration and to promote effective caseload management and knowledge sharing. The department operates services in five program areas:

- procuring, maintaining and supporting systems technologies;
- developing and implementing policies pertaining to information systems and information technology usage;
- supporting computer users and delivering training to ensure that technologies are robust, well understood and well utilized;

- planning for production and systems infrastructure; and,
- evaluating caseload production and providing individual and unit feedback regarding productivity.

Systems Technology Procurement and Upgrades

In 2011, the main technology upgrade was to the computer network switching systems. In July, the department completed the tendering process, and by November, the old core switch and floor switches that provided 100 megabit per second connections to the desktops had been removed and completely replaced with new equipment connecting at 1 gigabit per second to the desktops. In order to enhance network security and fail-over capacity, as part of the upgrade, the Tribunal introduced and configured a second core switch.

Also in 2011, the Tribunal tendered for and obtained new contracts for seven new mid-sized multifunction print and copy devices, and for maintenance and servicing of the computer room cooling and protection systems. Other equipment acquisitions in 2011 included new scanners (one high volume and seven flatbed) and a new backup library system.

New software innovations were introduced in 2011. A new routine was implemented that automatically issues the Tribunal's decisions to external web publishers including CanLII and Quicklaw. A new help request tracking system was implemented to assist in the management of service requests in the Tribunal's office administration unit, and several enhancements were made to the Tribunal's case management system, including a new module that facilitates workgroup sharing and follow up of adjudication support case work activities.

Other technology upgrades included modifications to the customized SharePoint portals and to the staff entry and exit profile management systems. There were also regular updates to the software and operating systems both at the server and workstation levels.

Policy Development and Implementation

In 2011, the Tribunal reviewed and revised key policy and procedure documents in light of changes mandated through OPS-wide directives. The policy changes were made by the Tribunal's Information Management Subcommittee, acting under the direction of the Tribunal's Senior Management team. The revised documents (which include the IT Usage Policy, the Records and Information Management Policy, Privacy Breach Guidelines and Fax Security Guidelines) have been tabled with the Tribunal's Senior Management team in anticipation of implementation early in year 2012.

User Support and Technology Training

In order to facilitate implementation of the new customer service accessibility standards, the Case Management and Systems Department acquired and implemented new software tools for assessing website accessibility. Members of the department also undertook training to learn best practices for creating and publishing accessible digital documents. In 2012, they will assist in the development and delivery of Tribunal-wide training on this topic.

Addressing the core aspects of its mandate, the department kept the servers and peripherals running near-continuously throughout the year. The technicians kept the servers and network environment current with respect to all software updates. The department's regular hours of business were supplemented by five pre-scheduled weekend shut-downs when software patches and updates were applied. Case Management

and Systems staff made IT resources and services available to new OICs and employees, revoked access privileges of departing employees, created and managed permissions profiles for applications and shared folders, and managed the Tribunal's information backup protocols. The staff also updated the Computer System Support Guide for Tribunal adjudicators, and they conducted new user orientation and topical seminars for adjudicators and for staff throughout the course of the year. They partnered with private firms (service providers) to ensure that internet sites were effectively hosted, incoming email was effectively routed and filtered, and that the Tribunal's computer room protection equipment was continually monitored and serviced at the regular quarterly and annual service intervals.

To assist in the management of the user support portfolio, the department maintains a comprehensive IT Help Request service. This service is accessed electronically by staff and by OICs from any computer workstation at the Tribunal and from any remote connection. In 2011, through this service, the Department handled over 5,114 requests. The distribution of types of support services was similar to the distribution in previous years. The greatest number of support requests (3,844, or 75%) was for software application support. This was followed by requests for equipment servicing (495, or 10%), user setup and authentication services (336, or 7%), and connection assistance (323, or 6%). Equipment booking and topical training requests accounted for the remainder (116, or 2%).

Production and Systems Infrastructure Planning

In the fourth quarter the department produced its caseload movement plan for 2012. Included in this plan is a forecast for incoming new appeals and corresponding targets for individual and team performance as necessary to ensure effective caseload management throughout the course of the year.

Also in the fourth quarter, the department prepared its annual five-year IT infrastructure plan. This plan includes budgeting and cost estimates for IT equipment and services.

Caseload and Production Reporting

In 2011, the department provided regular feedback to individuals, teams and to the Senior Management team regarding caseload intake, caseload movement and productivity. As in previous years, the department's statistician compiled, distributed and posted these reports according to weekly, monthly and quarterly schedules.

Caseload Processing

Introduction

The Workplace Safety and Insurance Appeals Tribunal is the final level of appeal to which workers and employers may bring disputes concerning workplace safety and insurance matters in Ontario. At the Tribunal, appeals proceed through a two-part application process. To start an appeal and meet the time limits in the legislation, an appellant files a Notice of Appeal form (NOA). Appeals remain at this "notice" stage while preliminary information is gathered and until the appellant indicates readiness to proceed toward an appeal hearing. The appellant indicates readiness by filing the Confirmation of Appeal form (COA). Once the COA is received at the Tribunal, the appeal enters the second, or "resolution" processing stage.

Caseload

At the end of Year 2011, there were 4,440 active cases within these two process stages. Chart 1 shows the distribution in more detail.

Active Inventory

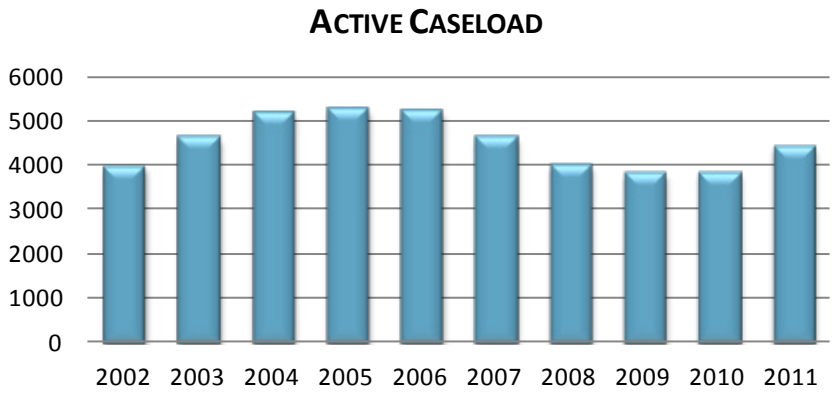
The level of the Tribunal's active inventory is affected by three factors: the number of incoming appeals in a year, the number of appeals that are confirmed as ready to proceed in that year, and the number of hearings and other appeal dispositions that are achieved in the year. In 2011, these factors combined to produce a 14.8% overall increase in the active inventory as compared to the 2010 year-end figure. Chart 2 shows the active inventory in comparison to previous years.

Chart 1

Inventory of Active Cases on December 31, 2011

Notice Process	
Cases active in Notice stage processing	1334
	1334
Resolution Process	
Early Review stage	55
Substantive Review	719
Hearing Ready	72
Scheduling and Post-hearing	1725
WSIAT Decision Writing	535
	3106
Total Active Cases	**4440**

Chart 2

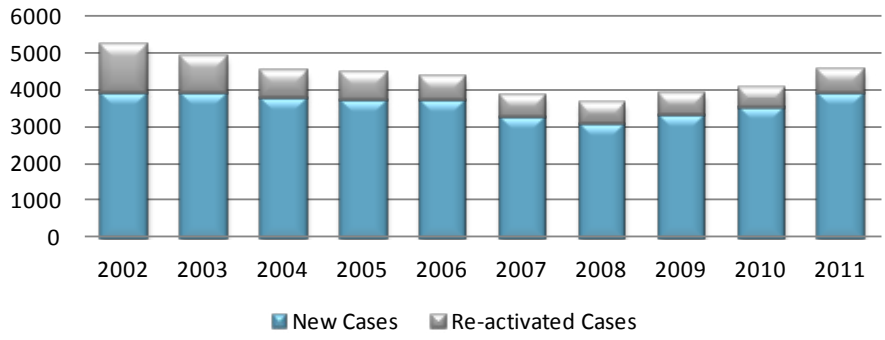


Incoming Appeals

The incoming caseload trend is shown in Chart 3. In 2011, the Tribunal's overall intake from new appeals and reactivations totaled 4,571 and this represented a total increase of 12.5% as compared with the 2010 intake total. "Reactivations" are appeals in which the appellant has indicated a readiness to proceed with an appeal following an inactive period during which the appellant may have acquired new medical evidence, received another final decision from the Board or sought new representation. New appeals to the Tribunal are appeals of final decisions at the Board's Appeals Branch.

Chart 3

Incoming Appeals



Case Resolutions

The Tribunal achieves case resolutions (also known as case dispositions) in a number of different ways. The most frequent source of case resolution is through a written Tribunal decision following an oral or written hearing process. The WSIA requires written reasons. Also, the Board requires written reasons to implement a decision. Other methods of dispute resolution, used primarily in the pre-hearing areas, are: telephone discussions regarding issue agendas and evidence; file reviews for jurisdiction issues or compliance with time limits; and, where two parties are participating, staff mediation.

As shown in Chart 4, the Tribunal disposed of 3,830 cases in 2011. This included 1,210 "Pre-hearing" and 2,620 "Hearing" dispositions.

Chart 4

Cases Disposed of in 2011

Pre-hearing Dispositions	
Without Tribunal Final Decisions	
Made Inactive	501
Withdrawn	629
With Tribunal Final Decisions (declared Abandoned)	80
	1210
Hearing Dispositions	
Without Tribunal Final Decisions	
Made Inactive	89
Withdrawn	4
With Tribunal Final Decisions	2527
	2620
TOTAL (Pre-hearing and Hearing)	
Without Tribunal Final Decisions	1223
With Tribunal Final Decisions	2607
	3830

NOTE: This chart excludes post-decision figures. The post-decision components of the workload (Reconsideration requests, Ombudsman investigations and Applications for judicial review) are summarized in Charts 13, 14 and 15.

Chart 5

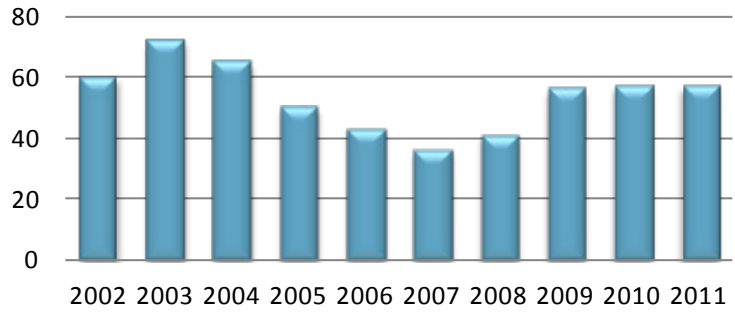


Chart 6

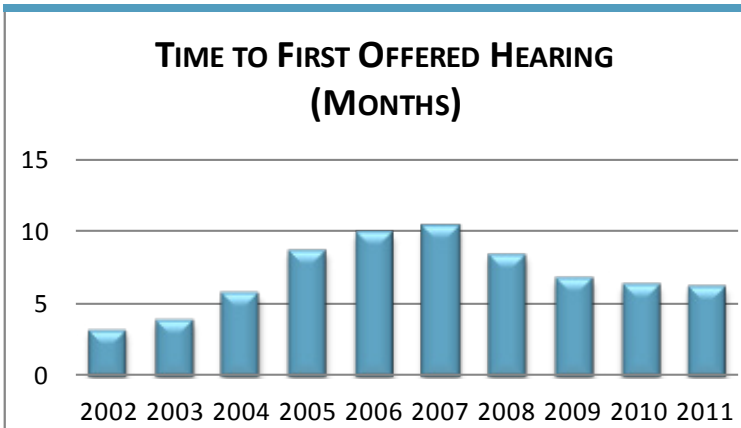
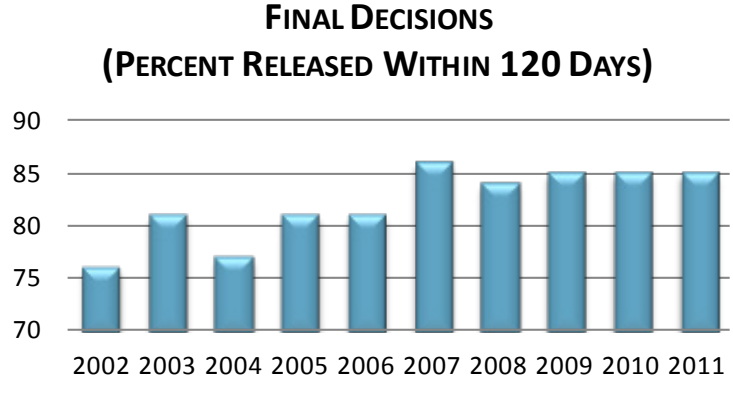


Chart 7



Timeliness of Appeal Processing

Chart 5 illustrates performance in terms of time frame for completing cases. The time frame begins when the appellant confirms readiness to proceed to a hearing and ends when the case is disposed. In 2011, 57% of cases were resolved within nine months. (This represented no change from the 2010 figure.)

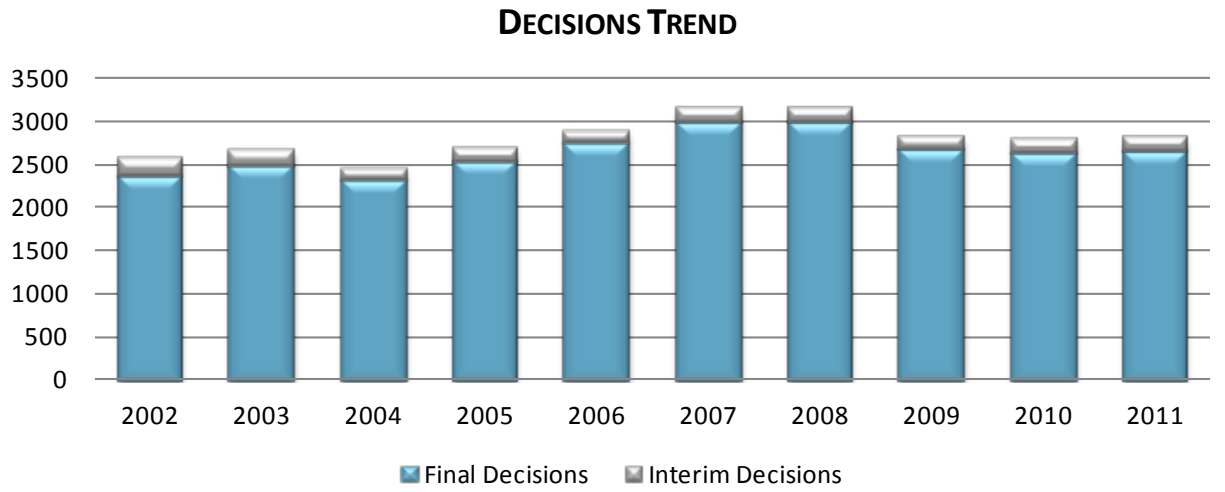
The Tribunal also measures the median interval of the first offered hearing date. This interval is measured from the date on which cases are confirmed ready to proceed to the future hearing date first offered to the parties. Chart 6 shows that the typical length of time for this stage in the appeals process was approximately the same as in year 2010 (6.2 months).

An additional performance target for the Tribunal is to release final decisions within 120 days of completing the hearing process. As shown in Chart 7, in 2011, this target was achieved 85% of the time.

Hearing and Decision Activity

Chart 8 depicts the Tribunal's Hearing and Decision production. In 2011, the Tribunal conducted 2,922 hearings and issued 2,823 decisions. The Tribunal strives to achieve decision-readiness following completion of the first hearing. Some cases require post-hearing work following the first hearing, and some hearings are adjourned requiring a subsequent hearing before the same or a different Vice-Chair or Panel. Most cases require only a single hearing.

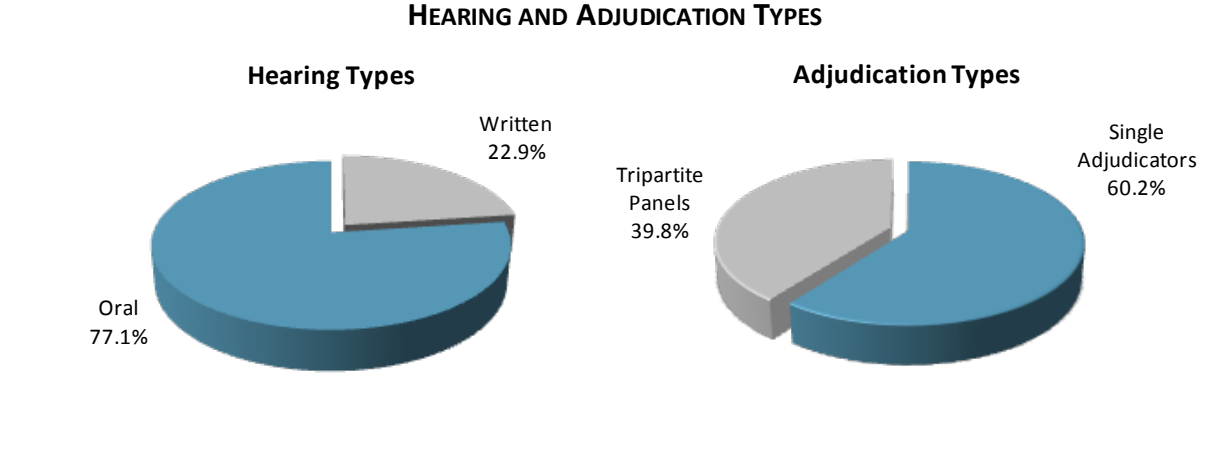
Chart 8



Hearing Type

In 2011, the percentage breakdown of hearing types was as follows: Oral hearings continued to be the most common hearing type at 77%, followed by written hearings at 23%. The percentage of single adjudicator hearings increased in 2011 to 60% (from 56% in 2010); tripartite panels decreased to 40% of cases heard. Chart 9 presents these hearing characteristics.

Chart 9



Representation at Hearing

Tribunal statistics show that for injured workers, 33% were represented by paralegals and consultants; 25% by lawyers and legal aid; 17% by the Office of the Worker Adviser; and, 12% by union representatives. The remaining 13% is allocated among various non-categorized representation, for instance, family friend, family member or MPP office. Employers were represented before the Tribunal as follows: 42% were represented by paralegals and consultants; 31% were represented by lawyers; 10% by the Office of the Employer Adviser; and 1% by firm personnel. The remaining 15% are non-categorized. These statistics are presented in Chart 10.

Chart 10

Hearing Representation

Worker Representation

A) In Worker Appeals		B) In Employer Appeals	
None Recorded	12%	None Recorded*	57%
Subtotal	**12%**	**Subtotal**	**57%**
Consultant	1%	Consultant	1%
Lawyer/Legal	25%	Lawyer	14%
OWA	17%	OWA	6%
Others*	1%	Others*	2%
Paralegal	32%	Paralegal	10%
Union	12%	Union	11%
Subtotal	**88%**	**Subtotal**	**43%**

Employer Representation

A) In Worker Appeals		B) In Employer Appeals	
None Recorded*	70%	None Recorded	15%
Subtotal	**70%**	**Subtotal**	**15%**
Firm personnel	12%	Firm personnel	1%
Consultant	1%	Consultant	3%
Lawyer	8%	Lawyer	31%
OEA	3%	OEA	10%
Others*	1%	Others*	0%
Paralegal	6%	Paralegal	39%
Subtotal	**30%**	**Subtotal**	**85%**

* Note: In employer appeals, workers and their representatives are often not present because in many of these cases the issues do not concern the worker. Similarly, there are many worker appeals where employers and their representatives do not attend.

Caseload by General Appeal Issue Type

The appeal type categorization of incoming cases and dispositions has been consistent over the years and 2011 was no exception. In 2011, Entitlement-related cases constituted the majority of cases (96%). Special Section cases (Right to Sue and Access) comprised typically small portions (4%). Charts 11 and 12 provide historical comparisons of incoming cases and cases disposed in 2011.

Chart 11

Breakdown of Incoming Cases by Appeal Type for the years 2005 - 2011

	2005		2006		2007		2008		2009		2010		2011	
Type	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Leave	2	0.0%	0	0.0%	1	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Right to Sue	63	1.4%	51	1.2%	37	1.0%	61	1.7%	67	1.7%	65	1.6%	63	1.4%
Medical Exam	0	0.0%	1	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Access	233	5.2%	232	5.3%	164	4.2%	137	3.8%	185	4.7%	197	4.8%	108	2.4%
Total Special Section	**298**	**6.7%**	**284**	**6.5%**	**202**	**5.2%**	**198**	**5.4%**	**252**	**6.5%**	**262**	**6.4%**	**171**	**3.7%**
Preliminary (not yet specified)	12	0.3%	4	0.1%	5	0.1%	3	0.1%	5	0.1%	0	0.0%	1	0.0%
Pension	6	0.1%	14	0.3%	7	0.2%	5	0.1%	3	0.1%	1	0.0%	2	0.0%
N.E.L./F.E.L. *	52	1.2%	43	1.0%	47	1.2%	37	1.0%	21	0.5%	11	0.3%	5	0.1%
Commutation	0	0.0%	0	0.0%	1	0.0%	0	0.0%	0	0.0%	1	0.0%	0	0.0%
Employer Assessment	160	3.6%	134	3.1%	132	3.4%	146	4.0%	106	2.7%	165	4.1%	340	7.4%
Entitlement	3618	80.9%	3580	82.1%	3253	83.6%	3055	83.7%	3331	85.4%	3465	85.3%	3889	85.1%
Ext post WSIB dec. deadline	287	6.4%	256	5.9%	195	5.0%	163	4.5%	143	3.7%	137	3.4%	154	3.4%
Jurisdiction Time Limit	6	0.1%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Reinstatement	0	0.0%	0	0.0%	0	0.0%	1	0.0%	0	0.0%	0	0.0%	0	0.0%
Vocational Rehabilitation **	4	0.1%	2	0.0%	2	0.1%	6	0.2%	6	0.2%	2	0.0%	1	0.0%
Classification	28	0.6%	39	0.9%	39	1.0%	35	1.0%	20	0.5%	11	0.3%	2	0.0%
Interest NEER	0	0.0%	1	0.0%	0	0.0%	0	0.0%	1	0.0%	0	0.0%	0	0.0%
Total Entitlement-related	**4173**	**93.3%**	**4073**	**93.4%**	**3681**	**94.6%**	**3451**	**94.5%**	**3636**	**93.2%**	**3793**	**93.4%**	**4394**	**96.1%**
Jurisdiction	2	0.0%	5	0.1%	10	0.3%	2	0.1%	12	0.3%	8	0.2%	6	0.1%
	4473		**4362**		**3893**		**3651**		**3900**		**4063**		**4571**	

NOTES: This chart excludes post-decision figures. The post-decision components of workload (requests for Reconsiderations, Ombudsman investigations and Judicial reviews) are summarized in Charts 13, 14 and 15. The NEL/FEL category represents appeals related to the non-economic and future economic loss pension criteria introduced by Bill 162. The Vocational Rehabilitation category represents appeals related to the increased Vocational Rehabilitation requirements introduced by Bill 162.

Chart 12

Breakdown of Case Dispositions by Appeal Type for the years 2005 - 2011

	2005		2006		2007		2008		2009		2010		2011	
Type	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Leave	0	0.0%	0	0.0%	2	0.0%	0	0.0%	0	0.0%	1	0.0%	0	0.0%
Right to Sue	44	1.0%	48	1.1%	67	1.5%	45	1.0%	60	1.5%	73	1.9%	62	1.6%
Medical Exam	0	0.0%	1	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Access	241	5.5%	239	5.3%	136	3.0%	178	4.0%	189	4.6%	182	4.7%	117	3.1%
Total Special Section	**285**	**6.5%**	**288**	**6.4%**	**205**	**4.5%**	**233**	**5.0%**	**249**	**6.1%**	**256**	**6.5%**	**179**	**4.7%**
Preliminary (not yet specified)	18	0.4%	19	0.4%	8	0.2%	5	0.1%	2	0.0%	0	0.0%	0	0.0%
Pension	22	0.5%	9	0.2%	11	0.2%	5	0.1%	10	0.2%	4	0.1%	4	0.1%
N.E.L./F.E.L. *	194	4.4%	92	2.0%	56	1.2%	49	1.1%	46	1.1%	35	0.9%	11	0.3%
Commutation	2	0.0%	1	0.0%	0	0.0%	1	0.0%	0	0.0%	0	0.0%	0	0.0%
Employer Assessment	241	5.5%	170	3.8%	152	3.4%	170	3.8%	121	3.0%	131	3.4%	198	5.2%
Entitlement	3293	75.0%	3609	79.8%	3862	85.2%	3705	83.5%	3437	84.2%	3287	84.1%	3225	84.2%
Ext post WSIB dec. deadline	270	6.2%	278	6.1%	180	4.0%	225	5.1%	166	4.1%	153	3.9%	186	4.9%
Jurisdiction Time Limit	9	0.2%	7	0.2%	1	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Reinstatement	2	0.0%	1	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Vocational Rehabilitation **	2	0.0%	3	0.1%	1	0.0%	4	0.1%	4	0.1%	13	0.3%	3	0.1%
Classification	33	0.8%	35	0.8%	44	1.0%	50	1.1%	37	0.9%	21	0.5%	18	0.5%
Interest NEER	17	0.4%	4	0.1%	1	0.0%	0	0.0%	0	0.0%	1	0.0%	0	0.0%
Total Entitlement-related	**4103**	**93.5%**	**4228**	**93.5%**	**4316**	**95.3%**	**4214**	**94.9%**	**3823**	**93.6%**	**3645**	**93.2%**	**3645**	**95.2%**
Jurisdiction	2	0.0%	5	0.1%	10	0.2%	2	0.0%	12	0.3%	8	0.2%	6	0.2%
	4390		**4521**		**4531**		**4439**		**4084**		**3909**		**3830**	

NOTES: This chart excludes post-decision figures. The post-decision components of workload (requests for Reconsiderations, Ombudsman investigations and Judicial reviews) are summarized in Charts 13, 14 and 15. The NEL/FEL category represents appeals related to the non-economic and future economic loss pension criteria introduced by Bill 162. The Vocational Rehabilitation category represents appeals related to the increased Vocational Rehabilitation requirements introduced by Bill 162.

Dormant and Inactive Cases

The Tribunal's overall caseload includes some that are not active. This includes cases at the preliminary "notification" (or Notice of Appeal) stage, specifically those cases which have not been moved into resolution processing because the appellants have not completed the necessary filing requirements. These cases are referred to as "dormant at the notice of appeal stage." Cases that are dormant will be moved again into active processing when appellants resume active participation. When this does not occur within the overall maximum time frame for the notice stage, the Tribunal will close the case (typically by means of an abandonment decision).

The second category of "not active" cases is used to describe appeals that were made "inactive" after the notice process had been completed (i.e., after the cases had been "confirmed" ready to proceed and after they had been moved into the Tribunal's resolution processing stage). Cases are placed in this inactive category by request of the appellant or by a Tribunal Vice-Chair. The most common reasons for placing a file in the inactive category are to allow an appellant to pursue additional medical reports, obtain a representative or/and obtain a final ruling from the Workplace Safety and Insurance Board pertaining to an issue raised at the Tribunal hearing.

In 2011, the number of "dormant" cases increased to 1,477 from 1,317 at the end of 2010 and the number of "inactive" cases decreased to 2,705 from 3,158. Taken as a whole, this meant that the number of not active cases decreased by 6.5% in 2011.

Post-decision Workload

The Post-decision workload is derived from three sources: Ombudsman follow-ups (Chart 13), Reconsideration requests (Chart 14) and Judicial Reviews (Chart 15). The post-decision workload is predominantly driven by Reconsideration requests. In year 2011, 229 Reconsideration requests were received.

Chart 13

Ombudsman Complaints, Activity and Inventory Summary

New Complaint Notifications Received	1
Complaints Resolved	0
Complaints Remaining	1

Chart 14

Reconsideration Requests, Activity and Inventory Summary

Inquiries (Pre-reconsideration) Remaining	67
Reconsideration Requests Received	229
Reconsideration Requests Resolved	230
Reconsiderations Remaining	97

Chart 15

Judicial Reviews, Activity and Inventory Summary

Judicial Reviews at January 1st	19
Judicial Reviews Received	6
Judicial Reviews Resolved	12
Judicial Reviews Remaining	13

A Statement of Expenditures and Variances for the year ended December 31, 2011 (Chart 16) is included in this report.

The accounting firm of Deloitte & Touche has completed a financial audit on the Tribunal's financial statements for the period ending December 31, 2011. The Auditor's Report is included as Appendix B.

CHART 16

STATEMENT OF EXPENDITURES AND VARIANCES
YEAR ENDED DECEMBER 31, 2011 (IN $000S)

	2011 BUDGET	2011 ACTUAL	2011 VARIANCE $	2011 VARIANCE %
OPERATING EXPENSES				
Salaries & Wages	11,107	11,081	26	0.2
Employee Benefits	2,194	2,215	(21)	(1.0)
Transportation & Communication	1,043	990	53	5.1
Services	6,775	7,024	(249)	(3.7)
Supplies & Equipment	344	360	(16)	(4.7)
TOTAL - W.S.I.A.T.	21,463	21,670	(207)	(1.0)
Services - W.S.I.B.	500	563	(63)	(12.6)
Interest Revenue	-	(10)	10	-
TOTAL OPERATING EXPENSES	**21,963**	**22,223**	**(260)**	**(1.2)**
ONE TIME EXPENSES				
Severance Payments	100	88	12	12.0
Timeline Reduction Strategy	100	-	100	100.0
Computer Equipment Purchases	180	180	-	-
TOTAL EXPENDITURES	**22,343**	**22,491**	**(148)**	**(0.7)**

Note: The above 2011 actuals are presented on the same basis as the approved budget and differ from the year-end audited Financial Statements presentation (see note 2 to the Financial Statements). The difference of $18 is comprised of:

Capital Fund		
Amortization	96	
Fixed assets acquired	(188)	(92)
Operating Fund		
Accrued severance & vacation benefits	115	
Prepaid expenses	(5)	110
		$ 18

Appendix A

Vice-Chairs and Members in 2011

This is a list of Vice-Chairs and Members whose Order-in-Council appointments were active at the end of the reporting period.

Full-time	Initial appointment
Chair	
Strachan, Ian J.	July 2, 1997
Vice-Chairs	
Baker, Andrew	June 28, 2006
Crystal, Melvin	May 3, 2000
Kalvin, Bernard	October 20, 2004
Keil, Martha	February 16, 1994
Martel, Sophie	October 6, 1999
McClellan, Ross	September 4, 2002
McCutcheon, Rosemarie	October 6, 1999
Noble, Julia	October 20, 2004
Patterson, Angus	June 13, 2007
Ryan, Sean	October 6, 1999
Smith, Eleanor	January 7, 2000
Members representative of employers	
Christie, Mary	May 2, 2001
Wheeler, Brian	April 19, 2000
Members representative of workers	
Grande, Angela	January 7, 2000
Hoskin, Kelly	June 13, 2007

Part-time	Initial appointment
Vice-Chairs	
Alexander, Bruce	May 3, 2000
Bigras, Jean Guy	May 14, 1986
Butler, Michael	May 6, 1999
Carroll, Tom	May 27, 1998
Clement, Shirley	September 1, 2005
Cohen, Marvin	June 22, 2006
Cooper, Keith	December 16, 2009
Darvish, Sherry	August 12, 2009
Dee, Garth	June 17, 2009
Dempsey, Colleen L.	November 10, 2005
Dhaliwal, Paul	May 27, 2009

Part-time	Initial appointment
Vice Chairs (continued)	
Dimovski, Jim	July 1, 2003
Doherty, Barbara	June 22, 2006
Doyle, Maureen	October 20, 2004
Faubert, Marsha	December 10, 1987
Ferdinand, Urich	April 29, 1999
Gale, Robert	October 20, 2004
Goldberg, Bonnie	May 27, 2009
Goldman, Jeanette	June 22, 2006
Hartman, Ruth	October 6, 1999
Hodis, Sonja	July 15, 2009
Josefo, Jay	January 13, 1999
Kelly, Kathleen	June 17, 2009
Lang, John B.	July 15, 2005
MacAdam, Colin	May 4, 2005
Marafioti, Victor	March 11, 1987
McKenzie, Mary E.	June 22, 2006
Mitchinson, Tom	November 10, 2005
Moore, John	July 16, 1986
Morris, Anne	June 22, 2006
Mullan, David	July 5, 2004
Nairn, Rob	April 29, 1999
Netten, Shirley	June 13, 2007
Parmar, Jasbir	November 10, 2005
Peckover, Susan	October 20, 2004
Shime, Sandra	July 15, 2009
Silipo, Tony	December 2, 1999
Smith, Marilyn	February 18, 2004
Sutherland, Sara	September 6, 1991
Sutton, Wendy	May 27, 2009
Welton, Ian	June 22, 2006
Members representative of employers	
Davis, Bill	May 27, 2009
Donaldson, Joseph	October 20, 2004
Lust, Arthur	April 16, 2008
Phillips, Victor	November 15, 2006
Purdy, David	December 16, 2009
Sahay, Sonya	November 29, 2008
Tracey, Elaine	December 7, 2005
Trudeau, Marcel	April 16, 2008
Young, Barbara	February 17, 1995

Part-time	Initial appointment
Members representative of workers	
Besner, Diane	January 13, 1995
Briggs, Richard	August 21, 2001
Broadbent, Dave	April 18, 2001
Crocker, James	August 1, 1991
Felice, Douglas	May 14, 1986
Ferrari, Mary	July 15, 2005
Gillies, David	October 30, 2002
Jackson, Faith	December 11, 1985
Lebert, Ray	June 1, 1988
Signoroni, Antonio	October 1, 1985

Vice-Chairs and Members – Reappointments Effective 2011

	Effective
Keith Cooper	December 16, 2011
James Crocker	November 1, 2011
Sherry Darvish	August 12, 2011
Bill Davis	May 27, 2011
Garth Dee	June 17, 2011
Paul Dhaliwal	May 27, 2011
Bonnie Goldberg	May 27, 2011
Sonja Hodis	July 15, 2011
Kelly Hoskin	June 13 (part-time) and October 1 (full-time), 2011[1]
Faith Jackson	November 1, 2011
Bernard Kalvin	June 1, 2011 (full-time)[2]
Kathleen Kelly	June 17, 2011
Shirley Netten	June 13, 2011
Angus Patterson	April 1, 2011
David Purdy	December 16, 2011
Sonya Sahay	November 29, 2011
Sandra Shime	July 15, 2011
Sara Sutherland	September 6, 2011
Wendy Sutton	May 27, 2011

New Appointments during 2011

There were no new appointments during 2011.

[1]Kelly Hoskin's Order in Council as a part-time Member representative of workers was revoked by the Order effective October 1, 2011, which also appointed him a full-time Member representative of workers.

[2]Bernard Kalvin's Order in Council as a part-time Vice-Chair was revoked by this Order, which also appointed him a full-time Vice-Chair.

Senior Staff

Susan Adams	Tribunal Executive Director
David Bestvater	Director, Case Management Systems
Alison Colvin	Director of Information Services
Debra Dileo	Director, Appeal Services
Noel Fernandes	Finance Manager
Martha Keil	Vice-Chair Registrar, Office of the Vice-Chair Registrar
Janet Oulton	Appeals Administrator
Carole Prest	Counsel to the Tribunal Chair
Dan Revington	Tribunal General Counsel
Lynn Telalidis	Human Resources Manager

Medical Counsellors

Dr. John Duff, Chair of Medical Counsellors	General Surgery
Dr. Emmanuel Persad	Psychiatry
Dr. David Rowed	Neurosurgery
Dr. Marvin Tile	Orthopaedic Surgery
Dr. Anthony Weinberg	Internal Medicine

Appendix B

Deloitte.

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Independent Auditor's Report

To the Chair of Workplace Safety and Insurance Appeals Tribunal

We have audited the accompanying financial statements of the Workplace Safety and Insurance Appeals Tribunal, which comprise the balance sheet as at December 31, 2011, the statements of operations and changes in fund balances and cash flows for the year then ended, and a summary of significant accounting policies and other explanatory information.

Management's Responsibility for the Financial Statements

Management is responsible for the preparation and fair presentation of these financial statements in accordance with Canadian generally accepted accounting principles, and for such internal control as management determines is necessary to enable the preparation of financial statements that are free from material misstatement, whether due to fraud or error.

Auditor's Responsibility

Our responsibility is to express an opinion on these financial statements based on our audit. We conducted our audit in accordance with Canadian generally accepted auditing standards. Those standards require that we comply with ethical requirements and plan and perform the audit to obtain reasonable assurance about whether the financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Opinion

In our opinion, the financial statements present fairly, in all material respects, the financial position of the Workplace Safety and Insurance Appeals Tribunal as at December 31, 2011, and the results of its operations and its cash flows for the year then ended in accordance with Canadian generally accepted accounting principles.

Deloitte & Touche LLP

Chartered Accountants
Licensed Public Accountants
March 12, 2012

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
Balance Sheet
December 31, 2011

	2011	2010
ASSETS		
CURRENT		
Cash	**$ 1,266,533**	$ 1,266,156
Receivable from Workplace Safety and Insurance Board	**2,438,369**	1,508,432
Prepaid expenses and advances	**321,492**	316,997
Recoverable expenses (Note 5)	**197,161**	216,476
	4,223,555	3,308,061
CAPITAL ASSETS (Note 6)	**198,442**	106,432
	$ 4,421,997	$ 3,414,493
LIABILITIES		
CURRENT		
Accounts payable and accrued liabilities	**$ 2,503,763**	$ 1,593,041
Accrued severance benefits and vacation credits	**2,945,812**	2,831,367
Operating advance from Workplace Safety and Insurance Board (Note 7)	**1,400,000**	1,400,000
	6,849,575	5,824,408
FUND BALANCES		
OPERATING FUND (Note 8)	**(2,626,020)**	(2,516,347)
CAPITAL FUND	**198,442**	106,432
	(2,427,578)	(2,409,915)
	$ 4,421,997	$ 3,414,493

APPROVED ON BEHALF OF WORKPLACE
SAFETY AND INSURANCE APPEALS TRIBUNAL

..... Chair

Appendix B

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
Statement of Operations
Year ended December 31, 2011

	2011	2010
OPERATING EXPENSES		
Salaries and wages	**$ 11,080,684**	$ 10,968,968
Employee benefits (Note 9)	**2,417,605**	2,460,918
Transportation and communication	**989,931**	915,360
Services and supplies	**7,371,005**	7,168,542
Amortization	**96,479**	53,416
	21,955,704	21,567,204
Services - Workplace Safety and Insurance Board (Note 10)	**562,913**	571,799
TOTAL OPERATING EXPENSES	**22,518,617**	22,139,003
BANK INTEREST INCOME	**(10,235)**	(2,466)
NET OPERATING EXPENSES	**22,508,382**	22,136,537
FUNDS RECEIVED AND RECEIVABLE FROM WSIB	**(22,490,719)**	(21,962,810)
NET UNFUNDED OPERATING EXPENSES	**$ 17,663**	$ 173,727
ALLOCATED TO		
CAPITAL FUND	**$ 92,010**	$ 41,734
OPERATING FUND	**(109,673)**	(215,461)
	$ (17,663)	$ (173,727)

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
Statement of Changes in Fund Balances
Year ended December 31, 2011

	Capital	Operating	Total
BALANCE - JANUARY 1, 2010	$ 64,698	$ (2,300,886)	$ (2,236,188)
Additions to capital assets	95,150	-	95,150
Amortization of capital assets	(53,416)	-	(53,416)
Severance benefits and vacation credits (Note a)	-	(172,573)	(172,573)
Prepaid expenses (Note b)	-	(42,888)	(42,888)
Net funded (unfunded) expenses - 2010	41,734	(215,461)	(173,727)
BALANCE - DECEMBER 31, 2010	106,432	(2,516,347)	(2,409,915)
Additions to capital assets	188,489	-	188,489
Amortization of capital assets	(96,479)	-	(96,479)
Severance benefits and vacation credits (Note a)	-	(114,445)	(114,445)
Prepaid expenses (Note b)	-	4,772	4,772
Net funded (unfunded) expenses - 2011	92,010	(109,673)	(17,663)
BALANCE - DECEMBER 31, 2011	**$ 198,442**	**$ (2,626,020)**	**$ (2,427,578)**

Note a) Severance benefits and vacation credits are not funded by WSIB until they are paid.
Note b) Prepaid expenses are funded by WSIB when paid and not when expensed.

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
Statement of Cash Flows
Year ended December 31, 2011

	2011	2010
NET INFLOW (OUTFLOW) OF CASH RELATED TO THE FOLLOWING ACTIVITIES		
OPERATING		
Funding revenue received from Workplace Safety and Insurance Board	**$ 21,560,782**	$ 21,661,599
Cash receipts for recoverable expenses	**937,755**	665,068
Bank interest received	**10,235**	2,466
Expenses, recoverable expenses net of amortization of $96,479 (2010 - $53,416)	**(22,319,906)**	(22,263,327)
	188,866	65,806
INVESTING		
Acquisition of capital assets	**(188,489)**	(95,150)
NET INCREASE (DECREASE) IN CASH	**377**	(29,344)
CASH, BEGINNING OF YEAR	**1,266,156**	1,295,500
CASH, END OF YEAR	**$ 1,266,533**	$ 1,266,156

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
Notes to the Financial Statements
December 31, 2011

1. GENERAL

Workplace Safety and Insurance Appeals Tribunal (the "Tribunal") was originally created by the Workers' Compensation Amendment Act S.O. 1984, Chapter 58 - Section 32, which came into force on October 1, 1985. The Workplace Safety and Insurance Act replaced the Workers' Compensation Act in 1997 and came into force January 1, 1998. The Workplace Safety and Insurance Board (WSIB), (formerly, Workers' Compensation Board) is required to fund the cost of the Tribunal from the Insurance Fund. These reimbursements and funding amounts are determined and approved by the Ontario Minister of Labour.

The purpose of the Tribunal is to hear, determine and dispose of in a fair, impartial and independent manner, appeals by workers and employers in connection with decisions, orders or rulings of the WSIB and any matters or issues expressly conferred upon the Tribunal by the Act.

2. SIGNIFICANT ACCOUNTING POLICIES

The following summarizes the significant accounting policies used in preparing the accompanying financial statements:

Basis of presentation

The financial statements have been prepared in accordance with the accounting standards for Not-for-Profit organizations published by the Canadian Institute of Chartered Accountants using the restricted fund method of reporting revenue.

Revenue recognition

WSIB funds expenses as incurred, except for severance benefits and vacation credits, which are funded when paid, and prepaid expenses which are funded when paid and not when expensed.

Financial instruments

The Tribunal has classified each of its financial instruments into the following accounting categories. The category for an item determines its subsequent accounting.

Asset/Liability	Category
Cash	Held for trading
Receivable from WSIB	Loans and receivables
Recoverable expenses	Loans and receivables
Accounts payable and accrued liabilities	Other liabilities
Accrued severance benefits and vacation credits	Other liabilities
Operating advance from WSIB	Other liabilities

2. SIGNIFICANT ACCOUNTING POLICIES (continued)

"Held-for-trading" items are carried at fair value, with changes in their fair value recognized in the Statement of Operations in the current period. "Loans and receivables" are carried at amortized cost, using the effective interest method, net of any impairment. "Other liabilities" are carried at amortized cost, using the effective interest method. The carrying values of all financial instruments approximate their cost due to their short term nature.

As allowed under Section 3855 "Financial Instruments – Recognition and Measurement", the Tribunal has elected not to account for non-financial contracts as derivatives, and not to account for embedded derivatives in non-financial contracts, leases and insurance contracts as embedded derivatives.

The Tribunal has elected to follow the disclosure requirements of Section 3861 "Financial Instruments – Disclosure and Presentation" of the CICA Handbook.

Capital assets

Capital assets are recorded at cost and are amortized on a straight-line basis over their estimated useful life of 4 years.

Funding for capital assets provided by the WSIB is reported in the Capital Fund. The Fund is reduced each year by an amount equal to the amortization of capital assets and increased by the additions to capital assets.

Employee benefits

(a) Pension benefits

The Tribunal provides pension benefits for all of its permanent employees (and to non-permanent employees who elect to participate) through the Public Service Pension Fund (PSPF) and the Ontario Public Service Employees' Union Pension Fund (OPSEU Pension Fund) which are both multi-employer plans established by the Province of Ontario. The plans are defined-benefit plans, which specify the amount of retirement benefit to be received by employees based on their length of service and rates of pay.

(b) Severance benefits

Severance benefits are recognized and accrued over the years in which employees earn the benefits. The severance benefit is recorded once an employee has worked for the Tribunal for a minimum term (of five years). The maximum amount payable to an employee shall not exceed one-half of the annual full-time salary. A unionized employee who voluntarily resigns is only entitled to severance benefits for service accrued up to June 30, 2010. All non-union employees who voluntarily resign are only entitled to severance benefits for service accrued up to December 31, 2011.

2. SIGNIFICANT ACCOUNTING POLICIES (continued)

(c) Vacation credits

Vacation entitlements are accrued in the year when vacation credits are earned. Employees may accumulate vacation credits to a maximum of one year's vacation entitlement at December 31 of each year. Senior Management Group is also eligible to time bank up to ten vacation days per year. Employees are paid for any earned and unused vacation credits at the date they cease to be an employee.

(d) Non-pension future benefits

The Tribunal also provides for dental, basic life insurance, supplementary health and hospital benefits to retired employees through a self-insured, unfunded defined benefit plan established by the Province of Ontario.

The Tribunal does not accrue for non-pension future benefits liability since the information is not readily available from the Province of Ontario.

3. FUTURE ACCOUNTING CHANGES

In September 2010, the Public Sector Accounting (PSA) Standards Board approved PSA standards as the financial reporting framework applicable to Government Not-for-Profit Organizations (GNFPOs). Effective for fiscal years beginning on or after January 1, 2012, GNFPOs must adopt PSA standards and will have to choose between adopting specific Not-for-Profit standards (PS 4200 to 4270) or not. Upon adoption of PSA standards, GNFPOs are required to apply the PSA standards retroactively with restatement of comparative figures. The Tribunal currently plans to adopt PSA standards as its new financial reporting framework with application of specific Not-for-Profit standards for its fiscal year beginning on January 1, 2012. The impact on the financial statements is not expected to be significant.

4. ACCOUNTING ESTIMATES

The preparation of financial statements requires management to make estimates and assumptions that affect the reported amounts in the financial statements and in the accompanying notes. Due to the inherent uncertainty in making estimates, actual results could differ from these estimates. Accounts requiring estimates and assumptions are included in accrued severance benefits and vacation credits.

5. RECOVERABLE EXPENSES

Recoverable expenses consist of amounts recoverable for shared services, secondments and other miscellaneous receivables.

	2011	2010
Shared services		
Ontario Labour Relations Board	**$ 63,247**	$ 81,091
Pay Equity Hearings Tribunal	**5,166**	4,874
Human Rights Tribunal of Ontario	**4,823**	6,196
Secondments		
Ministry of Government Services	**25,375**	5,759
Ministry of Finance	**6,058**	-
Ministry of Community and Social Services	**-**	11,218
Others		
Canada Revenue Agency HST rebate receivable	**60,652**	66,889
Employee amounts receivable	**31,840**	38,470
Ontario Public Service Employees Union	**-**	1,979
Total	**$ 197,161**	$ 216,476

6. CAPITAL ASSETS

	2011			2010
	Cost	**Accumulated Amortization**	**Net Book Value**	Net Book Value
Leasehold improvements	**$ 3,011,600**	**$ 3,008,534**	**$ 3,066**	$ 7,509
Furniture and equipment	**747,758**	**738,254**	**9,504**	23,428
Computer equipment and software	**490,740**	**304,868**	**185,872**	75,495
	$ 4,250,098	**$ 4,051,656**	**$ 198,442**	$ 106,432

7. OPERATING ADVANCE FROM WSIB

The operating advance is interest-free with no specific terms of repayment.

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8. OPERATING FUND

The Operating Fund deficit of $2,626,020 as of December 31, 2011 (2010 - $2,516,347) represents future obligations to employees for severance and vacation credits, less prepaid expenses. Funding for these future obligations will be provided by WSIB in the year the actual payment is made.

9. EMPLOYEE BENEFITS OBLIGATIONS

a) Pension plan costs

Contributions by the Tribunal on account of pension costs amounted to $895,206 (2010 - $868,522) and are included in employee benefits in the Statement of Operations.

b) Severance benefits

Severance benefits are recognized and accrued over the years in which employees earn the benefits. The net severance benefits accrued in 2011 amounted to an increase of $88,642 (2010 - $154,458) over the prior year amount and is included in employee benefits in the Statement of Operations.

c) Vacation credit entitlement

Vacation entitlements are accrued in the year when vacation credits are earned. The net vacation credits accrued in 2011 amounted to an increase in the accrual of $25,803 (2010 - $18,115) over the prior year amount and is included in employee benefits in the Statement of Operations.

d) Non-pension future benefits

The Tribunal does not accrue for non-pension future benefits, since the information is not readily available, from the Province of Ontario.

10. SERVICES – WSIB

The expense represents administrative costs for processing claim files of the WSIB, which are under appeal at the Tribunal, pursuant to section 125 (4) of The Workplace Safety and Insurance Act, 1997.

11. LEASE COMMITMENTS

The Tribunal has several operating lease contracts for computer and office equipment and software license fees, with terms from 1-5 years. The last of these leases expire on November 1, 2014. The minimum payments under these leases are as follows:

2012	$ 263,627
2013	62,787
2014	28,585
Minimum operating lease payments	$ 354,999

The Tribunal is committed to lease payments for premises, including building operating costs. The lease expires on October 31, 2015. The minimum lease payments are as follows:

2012	$ 1,534,950
2013	1,534,950
2014	1,534,950
2015	1,279,125
Minimum operating lease payments	$ 5,883,975

The Tribunal has exercised its option to renew the lease for the premises for a five year term which expires on October 31, 2015.

12. CONTINGENT LIABILITIES

A claim from the Canada Revenue Agency has been made against the Tribunal for withholding taxes on individuals (Part-time Order in Council appointees) who the Tribunal consider as "fee- for-service" contractors. The Tribunal believes that its classification is correct and has filed a notice of appeal. The outcome of this claim is not determinable as at December 31, 2011, and accordingly, no provision has been made in these financial statements for any liability that may result. Any loss resulting from these claims will be recognized in the year when it becomes known.

13. GUARANTEES

In the normal course of business, the Tribunal enters into agreements that meet the definition of a guarantee. The Tribunal's primary guarantees subject to the disclosure requirements of AcG-14 are as follows:

a) Indemnities have been provided under a lease agreement for the use of premises. Under the terms of the agreement, the landlord is to be indemnified for various items including, but not limited to, all liabilities, losses, suits, and damages arising during the term of the agreement. The maximum amount of any potential future payment cannot be reasonably estimated.

13. GUARANTEES (continued)

b) In the normal course of business, the Tribunal has entered into agreements that include indemnities in favour of third parties, such as confidentiality agreements, engagement letters with advisors and consultants, outsourcing agreements, leasing contracts, information technology agreements and service agreements. These indemnification agreements may require the Tribunal to compensate counterparties for losses incurred by the counterparties as a result of breaches in representation and regulations or as a result of litigation claims or statutory sanctions that may be suffered by the counterparty as a consequence of the transaction. The terms of these indemnities are not explicitly defined and the maximum amount of any potential reimbursement cannot be reasonably estimated.

The nature of these indemnifications prevents the Tribunal from making a reasonable estimate of the maximum exposure due to the difficulties in assessing the amount of liability that stems from the unpredictability of future events and the coverage offered to counterparties. Historically, the Tribunal has not been obligated to make any significant payment under these indemnification clauses.

The Tribunal also follows the policy of self-insurance for its leased computer/office equipment as well as the leasehold premises. Any costs incurred as a result of self-insurance are recorded as expenses in the year in which the costs are incurred.