



Workplace Safety and Insurance Appeals Tribunal
**Tribunal d'appel de la sécurité professionnelle
et de l'assurance contre les accidents du travail**

Plus de 20 ans
de qualité
décisionnelle

Over 20 years
of quality
decision-making

Annual Report
2006

Annual Report

2006

**Workplace Safety and
Insurance Appeals Tribunal**

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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 Labor 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 2006 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

Rounding the Curve

For the past five years, the Tribunal's performance has mirrored a Grand Prix race circuit. Five years ago, the Tribunal was speeding down the straightaway with a reduced caseload, relatively short timelines, and an experienced, productive adjudicative roster. Then it went into some tight turns at significantly reduced speed, with risks of spinning out and mechanical problems. The caseload increased as the Vice-Chair roster shrank dramatically, productivity slowed, timelines lengthened and the number of complex appeals increased. The Tribunal wound its way carefully through the tight curves carrying a heavy caseload. Now, with an expanding Vice-Chair roster, the Tribunal is rounding the last curve in the 2006 lap and is picking up speed as it approaches the 2007 straightaway.

Two thousand and six was the year in which the Tribunal approached this last curve with a growing adjudicative roster. It will begin 2007 with 55 Vice-Chairs, who, as they become more experienced and more productive, should shrink the active inventory and timelines while maintaining the Tribunal's reputation for quality decision-making.

New Government Directive on Appointments

The fuel for this improved performance came in part from the Ontario Government's new directive on appointments issued by the Public Appointments Secretariat in September 2006. The directive encouraged a merit-based appointment process and set out a series of staged appointments over a 10-year period. More importantly, it addressed the issue of eroding morale at the Tribunal resulting from a 17-year freeze on remuneration. This prolonged freeze meant that a Vice-Chair appointment was no longer a realistic alternative to practising law for many prospective qualified candidates. While the remuneration increase was not as significant for the Appeals Tribunal as it was for other tribunals (which had been subject to even lower remuneration rates), it did have a positive effect upon existing Tribunal Vice-Chairs and Members, and morale among these individuals improved in the latter part of 2006. The new appointment process and remuneration scale, hopefully, will encourage more qualified candidates to apply for OIC positions – a trend which should also assist in maintaining the Tribunal's reputation for quality adjudication. Unfortunately, there is a

potential inconvenient truth in that any such trend will be a gradual one because the “one-size-fits-all” level of remuneration for all Ontario tribunals means that there is no longer a remuneration premium for more sophisticated adjudicative work at some tribunals.

I.T. Portal Project

The number of new Vice-Chairs did place a strain on the Tribunal’s training resources and generated the need for new tools to enable appointees to become more productive. With a view to facilitating legal research and decision-writing, the Tribunal expanded work on its I.T. portal project, which will ultimately allow adjudicators to customize research tools and links to facilities, to assist in decision writing. While development of the portal project is time-consuming and expensive, it should prove to be a long-term effective tool for enhancing the quality of decision-writing. It should help to ensure that decisions are consistent, well-reasoned and up-to-date on changes in the law. Hopefully, further I.T. improvements and the portal project will be the equivalent of adding a super-charger to the race car engine for 2007.

The Quest for Quality

With limited financial resources, it is often difficult to strike a reasonable balance between the quality of the adjudicative service and the volume of production. While the Appeals Tribunal has constantly worked to maximize production, it has always attempted to do so while maintaining a high standard of decision-making. That approach has generally been well-received in the injured worker, employer and legal communities; however, it is a delicate balance to maintain. It helps to receive occasional reminders that the quest for quality should not be eroded by a large caseload or limited resources. The following excerpt from a representative’s recent letter illustrates one of those emotional reminders:

We genuinely appreciate your and your fellow WSIAT Team members’ expenditure of time, energy and resources, vis-à-vis [the] appeal. On behalf of...their dear family and..., we send our heartfelt appreciation to each and all of you...

[We have] no further submissions to make. The medical assessment, which you recently provided and the consequent medical report were excellent, thorough and clear. It’s wonderful news for [our client] to know with reasonable certainty that he doesn’t suffer from asbestosis.

In an enlightening book entitled *Reclaiming Higher Ground*, Lance Secretan, the author, wrote, “Grace is the North Star of all individuals and organizations ... Our souls are inspired by those with grace”. Please know that we feel truly thankful to you and to everyone at WSIAT and at the WSIB for inspiring us by your grace day-after-day.

Fortunately for the Appeals Tribunal, most members of the injured worker and employer communities have been understanding when considering the Tribunal's expanded appeal caseload and lengthened timelines. They obviously place a high value on well-reasoned decisions by competent adjudicators and, while they undoubtedly found the volume of appeals and timelines frustrating, they recognized that there was no effective "quick fix." If quality adjudication is to be maintained, the solution must start with the testing, appointment and training of qualified adjudicators and the gradual integration of those new appointees into the hearing schedule. Invariably, new Vice-Chairs find that the medical and legal issues involved in many appeals are more complex than they anticipated, and the burden of delivering a high volume of well-reasoned decisions is much more onerous than at some boards and agencies. As additional Vice-Chairs continue to be appointed, trained and integrated into the hearing schedule in 2007, the number of hearings will continue to increase and the active appeal inventory will begin to shrink. As the active appeal inventory shrinks through the additional hearings, the timelines will then begin to contract. This process should accelerate as additional Vice-Chairs are added to the OIC roster and as they become increasingly productive, with the assistance of new technology and workplace insurance experience.

Outlook for 2007

While it is to be hoped that the Tribunal's quest for quality will continue successfully through 2007, and that its adjudicative race car will speed to victory in the "Productivity Grand Prix," hopefully the 2007 Annual Report will note that the race car will soon be exchanged for a more sedate vehicle, which allows for a smoother, more controlled ride with ever-increasing quality features. With continued hard work and good fortune, the following year's event may even become the "Serenity Sweepstakes."

Highlights of the 2006 Cases

This section highlights some of the legal, factual and medical issues considered by the Tribunal in decisions summarized in 2006. The Tribunal decides cases under four Acts. The *Workplace Safety and Insurance Act, 1997* (WSIA) came into force on January 1998. It establishes a system of workplace insurance for accidents occurring after December 31, 1997, and amends and continues the pre-1985, pre-1989 and pre-1997 *Workers' Compensation Acts* for prior injuries. Effective November 26, 2002, the *Government Efficiency Act, 2002* (GEA) amended certain provisions in the WSIA and pre-1997 Act. In 2006, the Tribunal decided cases under all four Acts. For convenience, cases dealing with WSIA appeals are discussed first.

Appeals Under the WSIA

The WSIA continued non-economic loss (NEL) awards and introduced a single loss of earnings (LOE) benefit which is reviewable for a period of 72 months on “material change in circumstances” or annually at the Board’s discretion. The WSIA requires the workplace parties to co-operate in early and safe return to work (ESRTW). If ESRTW is not possible, the Board may offer the worker a Labor market re-entry (LMR) plan to assist in identifying a suitable employment or business (SEB). The worker’s LOE benefits are assessed in light of the SEB.

Decision No. 2436/05, 2006 ONWSIAT 738, 78 W.S.I.A.T.R. (online), is an interesting example of how LOE benefits must consider the worker’s individual circumstances. While the worker had the functional ability to return to modified work, his position as a member of a tactical team in an overcrowded maximum security prison meant that there was a health and safety risk. The modified job was found to be unsuitable since the worker would not be able to defend himself or others in the event of an emergency.

While both workplace parties must co-operate in ESRTW, the worker’s co-operation is more frequently in issue. For example, *Decision No. 1284/06*, 2006 ONWSIAT 1540, 79 W.S.I.A.T.R. (online), suspended benefits under section 43(7) because the worker did not give his doctor background information which was necessary for a functional abilities assessment. While Board

policy generally requires notice of non-co-operation before benefits are suspended, this can be waived where the worker's deliberate failure to co-operate prevents assessment of the loss of earnings. *Decision No. 750/06*, 2006 ONWSIAT 2128, is an example of an employer's failure to co-operate. The worker was entitled to LMR services and an LMR plan when the employer delayed for more than a year before responding to Board inquiries and making an offer of suitable modified work.

During 2006, the Tribunal considered how the LOE provisions apply in a variety of situations involving Labor relations issues. As noted in *Decision No. 1022/06*, 2006 ONWSIAT 1609, 79 W.S.I.A.T.R. (online), while LOE benefits are not generally payable during a strike, the focus is still on employability. If suitable work and permanent restrictions have not been identified before the strike begins, LOE benefits are payable since the worker would not be able to find work during the strike in any event.

Turning to non-economic loss (NEL) awards, the WSIA prescribes the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Third Edition (Revised) as the schedule for assessing NEL awards. Several cases have considered challenges to the Board's use of the Combined Values Chart (CVC) in the AMA Guides. The CVC is based on the "whole person concept." The general effect of combining values, rather than adding them, is to reduce the total value of the NEL benefits somewhat. *Decision No. 1119/04R*, 2005 ONWSIAT 2665, 76 W.S.I.A.T.R. (online), considered a Board request to reconsider a decision which had found that *Operational Policy Manual* (OPM) Document No. 18-05-05 does not require use of the Combined Values Chart when the worker receives NEL awards in different claims. While the Tribunal's threshold test for reconsideration was not met, *Decision No. 1119/04R* agreed with the Board's view that Document No. 18-05-05 requires the use of the CVC in such circumstances. More recently, *Decision No. 1357/05*, 2006 ONWSIAT 1694, 79 W.S.I.A.T.R. (online), also agreed that Document No. 18-05-05 requires use of the CVC. The Act and AMA Guides give the Board considerable discretion in this area; *Decision No. 1357/05* found that OPM Document No. 18-05-05 is a reasonable exercise of the Board's discretion.

Several cases have considered challenges to the Board's use of the Combined Values Chart (CVC) in the AMA Guides.

The AMA Guides are very technical and often focus on measurement of range of motion. *Decision No. 1630/05*, 2006 ONWSIAT 626, 77 W.S.I.A.T.R. (online), upheld the Board's practice in repetitive strain cases of considering the impact of the injury on the worker's activities of daily living when there is little or no reduction in the range of motion. If the activities of daily living are not considered, the NEL rating would be 0%. Where the worker does have an abnormal range of motion, however, *Decision No. 1456/06*, 2006 ONWSIAT 1672, 79 W.S.I.A.T.R. (online), held that the Board did not need to consider the activities of daily living. The AMA Guides provide specific ratings in such cases.

Turning to time limits, this year an increasing number of decisions considered the WSIA requirement that a claim be filed within six months. *Decision No. 2448/05*, 2006 ONWSIAT 286, 77

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W.S.I.A.T.R. (online), discussed the differences between the pre-1997 Act and WSIA requirements. Under the pre-1997 Act, the focus is on the justness of the claim itself, while under the WSIA, the question is the justness of the request for the time extension.

It may be particularly difficult to decide when the six-month time limit begins to run in disablement cases. OPM Document No. 15-01-03 provides that in disablements, the time for filing a claim runs from the date the worker reports an injury as work-related. *Decision No. 2184/05I*, 2005 ONWSIAT 2587, 76 W.S.I.A.T.R. (online), noted that this policy statement is very broad and might require some limitation on the merits and justice; for example, where a worker is aware of all the relevant facts and could reasonably be expected to understand that the condition might be related to work. *Decision No. 2300/05*, 2006 ONWSIAT 1406, 79 W.S.I.A.T.R. (online), is also of interest. It discusses OPM Document No. 15-01-03 and the effect of a change in claim status on a worker's ability to file a claim for benefits. Under the policy, the Board may pay two weeks of benefits if proper documents are not filed. A claim for further benefits is suspended until documentation is filed. If this is not done within six months, no benefits are payable unless there is a change in claim status or exceptional circumstances.

Board Policy Under the WSIA

While the Tribunal previously considered Board policy, the WSIA expressly states that, if there is applicable Board policy, the Tribunal shall apply it when making decisions. Section 126 provides that the Board is to identify applicable policy and sets out a process for the Tribunal to refer policy back to the Board if the Tribunal concludes that the policy is inapplicable, unauthorized or inconsistent with the Act. During 2006, there were no section 126 referrals.

Decision No. 1119/04R, 2005 ONWSIAT 2665, 76 W.S.I.A.T.R. (online), held that the common law principles of statutory interpretation apply to the interpretation of Board policy. In applying Board policy, the Tribunal will consider the spirit of the policy as well as its specific wording. For example, OPM Document No. 05-06-06 (now 15-04-02) on psychological disability provides that the psychological condition should manifest itself within five years of the accident or the most recent surgery. Where a worker developed a psychological disability due to a severe deterioration in his compensable condition 11 years after the accident, and surgery was recommended but declined, *Decision No. 51/06*, 2006 ONWSIAT 882, 78 W.S.I.A.T.R. (online), found that the deterioration requiring surgery was similar to the policy requirement for surgery. The worker's claim fit within the intent of the policy.

Board policy often changes over time. The rights and obligations of the parties may vary quite significantly depending upon which version of a policy applies. For example, as of January 1, 2004, the Board changed its policy on offsetting Canada Pension Plan (CPP) disability benefits. Partial FEL awards are now offset by only that portion of CPP benefits that exceeds the amount of deemed post-injury earnings. While there have been several Tribunal decisions questioning the Board's original policy of setting off full CPP benefits against partial FEL awards, recent decisions such as *Decisions No. 2208/05*, 2006 ONWSIAT 974, and *1334/05*, 2006 ONWSIAT 1009, 78

W.S.I.A.T.R. (online), have generally found that the old policy continues to apply to CPP payments made before January 1, 2004.

Given the importance of policy, which policy applies is often an issue in dispute. A number of 2006 decisions addressed retroactivity questions. In the absence of clear authority, legislation does not have retroactive effect. The last Annual Report noted several decisions that held that since section 126 requires the Tribunal to apply policy, section 126 policy is similar to legislation and the presumption against retroactivity applies to it. While *Decision No. 1357/05*, 2006 ONWSIAT 1694, 79 W.S.I.A.T.R. (online), generally agreed with these cases, it held that the presumption against retroactivity did not prevent the Board from clarifying Board policy which had not been interpreted consistently at the Tribunal. Accordingly, the Board could clarify its approach to the Combined Values Chart in OPM Document No. 18-05-05 and make that change applicable to decisions under both the pre-1997 Act and WSIA.

Where more recent policy is adopted, the Tribunal may consider it even though the Tribunal is not required to apply it. See, for example, *Decision No. 1608/05*, 2006 ONWSIAT 850, 78 W.S.I.A.T.R. (online) which held that new policy which does not have the effect of changing prior policy, may be considered as a guideline. Similarly, *Decision No. 2498/05*, 2006 ONWSIAT 166, 77 W.S.I.A.T.R. (online), held that more recent Board policy could be considered as a guideline when the prior version of the policy was less detailed.

Care must be taken, however, in drawing analogies to policy which has been drafted to cover different issues. *Decision No. 971/06*, 2006 ONWSIAT 1228, 78 W.S.I.A.T.R. (online) found that a Board adjudicator had wrongly applied the definition of “severely impaired worker” in its policy on independent living allowances to a claim under its clothing allowance policy. The very narrow definition in the independent living policy required at least a 100% pension and was intended for a different purpose.

Finally, *Decisions No. 2105/01*, 2005 ONWSIAT 2442, 76 W.S.I.A.T.R. (online), and *1258/03R*, 2006 ONWSIAT 1430, 79 W.S.I.A.T.R. (online), have found that the Board’s authority to adopt policy does not include authority to adopt policy defining the Tribunal’s jurisdiction. The requirement in section 126(1) to apply Board policies on the “subject matter” of an appeal refers to policies on substantive issues, not jurisdiction. The Tribunal’s jurisdiction is set out in section 123 of the WSIA. The Tribunal defines its jurisdiction through the interpretation and application of section 123.

Appeals Under the Earlier Acts

During 2006, the Tribunal continued to hear appeals under the three previous Acts. The pre-1985 and pre-1989 Acts provide pensions for permanent disabilities and temporary benefits for short-term disabilities. The pre-1997 Act introduced a dual award system of non-economic loss (NEL) awards and future economic loss (FEL) awards for permanent impairment and retained temporary benefits for temporary disabilities. Determining benefit entitlement is particularly difficult where a

worker has suffered a number of compensable accidents over a period of time and the original legislative scheme has been amended or different legislative schemes apply

The FEL scheme has been amended several times since its enactment. As of January 1, 1998, discretionary annual reviews and reviews on material change in circumstances replaced the mandatory FEL review at the R1 and R2 dates. Several decisions considered what constitutes “a material change in circumstances” which a worker must report. According to Board policy, a material change is any change that affects entitlement to benefits and services under the Act. While this may be clear in some cases, *Decision No. 1476/05I2*, 2006 ONWSIAT 1542, 79 W.S.I.A.T.R. (online), noted that this is not always so. For example, recovery from a disability such as a psychiatric condition may be difficult to ascertain.

Decision No. 416/06, 2006 ONWSIAT 748, contains an interesting discussion of the differences between NEL awards, which consider permanent impairment, and FEL awards, which consider inability to work. It is possible to have a significant NEL award based on the worker’s level of permanent impairment but no FEL award if the worker is able to return to work without wage loss.

Right To Sue Applications

The WSIA and earlier workers’ compensation statutes are based on the “historic trade-off” in which workers gave up the right to sue in exchange for statutory no-fault benefits. Right to sue applications may raise complicated legal issues, often in tragic or difficult circumstances. *Decision No. 2282/05*, 2006 ONWSIAT 1093, 78 W.S.I.A.T.R. (online), for example, found that the Act did not remove a worker’s right to sue for an alleged sexual assault by an employer who was a partner in a business. The partner could not be considered to be acting as a Schedule 1 employer at the time of the alleged assault; however, the right of action was taken away against the other business partners.

The employer’s control over the worker is often an issue in dispute. *Decision No. 2165/04*, 2006 ONWSIAT 2083, found that workers returning from an out-of-province business meeting were not in the course of their employment when they were involved in a high-risk takedown by the police, who wrongly suspected them of being involved in a jewelry robbery. At the time of the takedown, the workers were not under the control of the employer but rather the police, who had stopped their vehicle when the accident occurred. In contrast, the worker in *Decision No. 1792/06*, 2006 ONWSIAT 2175, was exposed to gases when following her employer’s evacuation plan. Her right to sue was removed because she was acting under her employer’s direction.

Several cases considered the interaction between the workplace safety and insurance scheme and the motor vehicle insurance scheme. *Decision No. 742/04R*, 2005 ONWSIAT 2592, 76 W.S.I.A.T.R. (online), looked at section 10(15) of the pre-1997 Act which provides that no benefits are payable to workers who are entitled to statutory accident benefits (SABs) under the Insurance Act unless there is a confirmation of election to claim workplace benefits. A worker who has elected to receive benefits may not revoke an election which has been confirmed pursuant to section 10(16). While the Board has not developed a confirmation form, *Decision No. 742/04R* found that this is not

necessary. The Board still has a positive obligation to determine whether a worker wishes to confirm an election to receive workers' compensation benefits. In some cases the receipt of benefits may imply confirmation. There was no implicit confirmation, however, where the worker only received a FEL sustainability benefit and one month of supplementary benefits and had not been provided with an opportunity to object to these benefits.

Another issue which has arisen in several cases is whether the Tribunal has jurisdiction to determine a section 31 application where the worker has received SABs under the *Insurance Act* and there is no court action. *Decision No. 2035/05*, 2006 ONWSIAT 159, 76 W.S.I.A.T.R. (online), agreed with *Decision No. 465/05*, 2005 ONWSIAT 2102, 76 W.S.I.A.T.R. (online), that the Tribunal does not have jurisdiction. As of the end of this reporting period, this question continues to be litigated before the Tribunal.

Employer Issues

Appeals involving employer issues, such as classifications, penalties and adjustments of experience rating accounts, continue to form a significant part of the Tribunal's caseload. Often these cases involve retroactivity questions – how far back is the Board entitled to go in implementing a finding which affects an employer's costs? *Decision No. 1983/03*, 2005 ONWSIAT 2580, 76 W.S.I.A.T.R. (online), upheld OPM Document No. 14-02-06 which provides that there is no retroactivity issue where the Board applies a reclassification change to the beginning of the year of the date of the audit visit indicated on the audit notice. There was no reason not to apply the policy date as the Board had not delayed in notifying the employer of the results of the audit and there were no other exceptional circumstances. On the other hand, *Decision No. 105/06*, 2006 ONWSIAT 1118, 78 W.S.I.A.T.R. (online), granted a retroactivity reclassification appeal where there was a delay of approximately one and a half years between the audit and notification of the classification change, no reasonable explanation for the delay, and the delay had a detrimental effect on the employer's ability to pass on the cost to its clients.

Board policy did not originally contemplate retroactive adjustments to the CAD-7 formula, but in practice the Board has established certain exceptions (for example, long latency industrial diseases and third party claims). *Decision No. 1776/04*, 2005 ONWSIAT 2700, found that Board policy or practice did not authorize retroactive frequency adjustments due to NEL costs and allowed an appeal where the Board had made an adjustment on that basis.

Decision No. 1623/05, 2006 ONWSIAT 699, considered an appeal for retroactive interest on a successful reclassification appeal. The Tribunal upheld the Board's decision to pay interest from 1997 pursuant to its policy. While there is discretion to pay interest from an earlier date in exceptional circumstances, it is not sufficient to rely on the same Board error which resulted in the reclassification change. The employer has some responsibility to bring the error to the Board's attention.

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The issue has arisen whether the Board is entitled to use current data in implementing a Tribunal decision awarding a retroactive adjustment, or whether only the changes identified in the appeal should be implemented. *Decision No. 1096/05*, 2006 ONWSIAT 1826, 79 W.S.I.A.T.R. (online), noted that OPM Document No. 13-02-05 provides that when the Board adjusts prior refunds or surcharges it uses up-to-date costs or frequencies. While this policy was not in effect at the time, it could still be considered as a guideline; it was not sensible to use stale data. In considering the merits and justice of an appeal, the interests of other employers and the systemic implications of the viability of the insurance fund should be considered. Once an employer voluntarily opens the door to a retroactive adjustment, it is fair to include retroactive debits as well as credits.

Turning to other employer issues, there were several Workwell appeals in 2006. The Board applies a penalty where the grade on a Workwell audit is less than 75%. *Decision No. 1270/06*, 2006 ONWSIAT 1799, 79 W.S.I.A.T.R. (online), found no reason to treat 68.5% as a passing grade if the Board required 75% since safety is a paramount and overarching obligation in the workplace. The date of the Workwell penalty was adjusted, however, since the employer had relied on the date initially indicated by the Board, and applying the penalty to a different time period magnified the penalty out of proportion. In *Decision No. 2266/05*, 2006 ONWSIAT 1077, 78 W.S.I.A.T.R. (online), a Workwell audit had wrongly required joint health and safety committees for a temporary personnel company with nine satellite offices which had only one or two employees each. The Tribunal found that the six-month period for correcting deficiencies should run from the date the employer received proper notification of what had to be corrected.

Occupational Disease

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

Decision No. 1746/05, 2006 ONWSIAT 2050, is one of the first appeals to consider the effects of second-hand smoke. While the worker’s claim for chronic obstructive lung disease was not established, she had entitlement for chronic bronchitis and asthma. The Tribunal accepted a medical assessor’s opinion that the worker’s bronchitis was related to her exposure to second-hand smoke at work. There was also reliable epidemiological evidence of a link between second-hand smoke and the risk of adult-onset asthma and there was no evidence of any other risk factors.

Epidemiology often plays an important role in occupational disease cases. *Decision No. 574/05*, 2006 ONWSIAT 1623, 79 W.S.I.A.T.R. (online), contains an excellent discussion of the use of epidemiological evidence. While the medical evidence indicated that there was an increased risk of bladder cancer due to occupational exposures in a mine and sinter plant, the level of excess risk identified in the epidemiological studies established that there was only a possibility of work-relatedness in an individual case. It was necessary to consider whether the degree of excess risk made

it likely that work exposure was a significant factor. OPM Document No. 04-04-08 on gold mining, although not directly applicable, was useful as it set out factors to consider in assessing lower levels of risk.

As mentioned in previous Annual Reports, the Board has adopted an Adjudicative Advice Document on dust exposure and chronic obstructive pulmonary disease (COPD), also called chronic obstructive lung disease (COLD). *Decision No. 865/92R4*, 2006 ONWSIAT 569, 77 W.S.I.A.T.R. (online), considered this document in rating a pension for COLD. *Decision No. 865/92R4* noted that the Supreme Court of Canada has confirmed in *Athey v. Leonati*, [1996] 3 S.C.R. 458, that while there should not be apportionment where there are multiple causes of a single injury, apportionment is possible where the evidence establishes multiple divisible injuries, symptomatic prior disability or medically distinguishable co-existing injury. The Board's general policy in OPM Document No. 08-01-05 is consistent with the principles in *Athey*.

On the evidence in *Decision No. 865/92R*, 2003 ONWSIAT 2568, smoking and dust exposure were two co-existing factors causing simultaneous and indistinguishable injury to the lungs. Each aggravated and worsened the other. Since COPD could not be seen as a product of two medically distinguishable injuries, the worker's pension could not be apportioned. While the Board had applied the Adjudicative Advice Document in apportioning benefits, the Tribunal was not required to apply it since it is not Board policy under section 126.

Miscellaneous

In light of the recent Supreme Court of Canada decision in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513, the Tribunal has jurisdiction to consider the *Ontario Human Rights Code Decision No. 2452/05I*, 2006 ONWSIAT 667, 77 W.S.I.A.T.R. (online), found that section 43(1)(c) of the WSIA, which limits workers 63 years or older to two years of benefits, did not violate the Code since "services" as defined in the Code excludes periodic payments imposed by law. The hearing will reconvene on the *Charter of Rights* argument after notice is given to the Attorneys General of Canada and Ontario. The worker in *Decision No. 2122/04*, 2006 ONWSIAT 1192, 78 W.S.I.A.T.R. (online), argued that there was a violation of the Code due to family status because she was not entitled to claim child-care expenses while attending an LMR program. The Tribunal dismissed the appeal as there were no specific submissions on jurisdiction or the exclusion of periodic payments from the definition of "services" in the Code.

Where parties are involved in multiple proceedings the Tribunal may have to assess findings by other courts or tribunals. *Decision No. 1544/06*, 2006 ONWSIAT 2034, applied the Supreme Court of Canada decision in *Toronto (City) v. Canadian Union of Public Employees, Local 79* (2003), 232 D.L.R. (4th) 385, which found that administrative tribunals should give effect to criminal convictions. This reasoning also applied to convictions under the WSIA. The situation is different where a party is acquitted because the courts apply a higher standard of proof in criminal matters. *Decision No. 1476/05I2*, 2006 ONWSIAT 1542, 79 W.S.I.A.T.R. (online), noted that *Toronto (City) v.*

CHAIR'S REPORT Highlights of the 2006 Cases

CUPE, Local 79 also indicates that the doctrine of abuse of process may apply to prevent re-litigation, if there would otherwise be a violation of the principles of judicial economy, consistency, finality and integrity of administrative justice. While the findings in the criminal acquittal were not binding on the Tribunal, the Tribunal should have compelling reasons to reach different conclusions.

Other interesting 2006 decisions include: *Decision No. 1390/98*, 2006 ONWSIAT 28, 76 W.S.I.A.T.R. (online), (which analyzed principles of legal causation where there was an initial workplace accident, followed by a non-compensable motor vehicle accident); *Decision No. 2456/05I*, 2006 ONWSIAT 89, 77 W.S.I.A.T.R. (online), (which found that the Tribunal has jurisdiction to hear an appeal from an ARO decision based on an agreement between the parties); *Decision No. 512/99R2*, 2006 ONWSIAT 90, 77 W.S.I.A.T.R. (online), (which discussed the Tribunal Chair's authority under the WSIA to assign tripartite panels); *Decision No. 101/06*, 2006 ONWSIAT 341, (which considered a claim for post-traumatic stress in a correctional institution where there were stressful workplace events, including a prison riot, and Labor relations issues); *Decision No. 1624/04R*, 2005 ONWSIAT 2763, 76 W.S.I.A.T.R. (online), (which outlined the very limited jurisdiction to consider downside risk issues); and *Decision No. 282/05*, 2005 ONWSIAT 2716, (which rejected a claim for SIEF based on an argument that a worker was more prone to develop carpal tunnel syndrome due to smoking).

Applications for Judicial Review and Other Proceedings

As of the Tribunal's 21st anniversary in October of 2006, no decision of the Tribunal had been successfully quashed on judicial review. Since the Tribunal has released over 35,000 decisions, this remarkable record reflects the excellence of the Tribunal's decisions, and the dedication of the Tribunal's adjudicators and staff.

As noted below, a Divisional Court decision released in November 2006 did quash a Tribunal decision. A Notice of Motion for Leave to Appeal has been filed with the Court of Appeal.

The matters outlined in this section demonstrate that there was a fair amount of judicial review activity over this past year. General Counsel and lawyers from the Tribunal Counsel Office co-ordinate all responses to judicial review applications and other court applications, and represent the Tribunal in court in most instances. Only judicial reviews where there was some significant activity during 2006 have been included.

Judicial Review

1. **Decision No. 433/99 (June 24, 1999) and Decision No. 433/99R, 2000 ONWSIAT 1439 (May 30, 2000); Mills v. Workplace Safety and Insurance Appeals Tribunal (November 15, 2006) Divisional Court**

A worker had a back injury in April 1979. From 1979 until 1990, there were no records of any back complaints in the applicant's medical charts. In late 1991 he suffered from an episode of back pain. In 1993 he alleged to the Board that his back problems were related to the 1979 accident 14 years earlier. A report from the worker's specialist supported a link between the accident and the problems. The issue for the Vice-Chair was one of medical continuity, compatibility and causation. The Vice-Chair concluded that the 1979 accident did not cause or contribute to the symptoms after 1990, and denied entitlement.

The judicial review was heard in Sudbury on October 5. A Divisional Court panel of Smith, Kent and Pierce reserved its decision. On November 15 the Divisional Court released its decision granting the application for judicial review and quashing *Decision No. 433/99* and *Decision No. 433/99R*.

The Court held that there were several errors in the Tribunal's fact finding which, although taken individually were small, the cumulative effect of the errors was at odds with the Tribunal's conclusion. While acknowledging the standard of review was patent unreasonableness, the Court held that the Tribunal's findings of fact were erroneous, and a rational conclusion cannot be based on erroneous fact finding.

A Notice of Motion for Leave to Appeal the Divisional Court decision was served on November 30, 2006.

2. Decision No. 855/03, 2005 ONWSIAT 2490, 76 W.S.I.A.T.R. (online); Rodrigues v. Workplace Safety and Insurance Appeals Tribunal

The worker was a member of a union. Pursuant to the collective agreement, the employer made contributions on the worker's behalf to a benefit plan that provided health and dental care coverage, as well as pension plan coverage. The employer's contributions were based on the hours worked by the worker. Under the terms of the plan, part of the contributions were used to continue the worker's benefits and pension contributions for up to a year after an injury.

The worker was injured. He alleged that the employer's contribution to his benefits should be included in the calculation of his earnings for the purposes of workplace safety and insurance benefits. The worker's appeal was dismissed. The Vice-Chair held that Board policy did not include benefit payments and pension plans in earnings basis. There was no direct relationship between the employer's contributions and the benefits the worker received. The Vice-Chair also held that the Legislature did not intend to include contributions from all employers in Ontario in the earnings of workers, or that some workers would receive non-taxable income.

The worker commenced an application for judicial review. The Tribunal has filed its factum. The Board successfully brought a motion to intervene. It is anticipated this case will be heard in January 2007.

3. Decision No. 653/99 (November 15, 1999) and Decision No. 653/99R, 2002 ONWSIAT 156 (January 21, 2002); Gaultieri v. Workplace Safety and Insurance Appeals Tribunal

The Tribunal denied the worker's appeal for increased future economic loss and non-economic loss, on the grounds that the worker's medical condition was caused by non-compensable factors. The worker delayed more than three years before bringing an application for judicial review.

Counsel for the employer moved to quash the judicial review for delay. The Tribunal filed a factum supporting the motion. The motion was scheduled to be heard in Ottawa in October. Shortly before the motion, counsel for the worker proposed that the judicial review be dismissed on consent. All parties consented to dismiss the judicial review without costs.

4. Decision No. 1402/03, 2004 ONWSIAT 92, 67 W.S.I.A.T.R. 163, and Decision No. 1402/03R, 2005 ONWSIAT 1864 (August 19, 2005); Jovic v. Workplace Safety and Insurance Appeals Tribunal

An injured worker had his benefits based upon the actual wages his employer paid him. The worker alleged that the wages that were paid were too low, and that under the collective agreement he should have been paid by the employer at a higher rate. The Tribunal held that it did not have the jurisdiction to interpret a collective agreement, and whether the correct wages were paid was a Labor relations matter. The worker had not sought a remedy under the collective agreement. The Tribunal found that the amount the worker was paid was the amount to be used in the calculation of benefits, and the Tribunal did not have the jurisdiction to consider what should have been paid.

The worker commenced an application for judicial review of the Tribunal's decisions. At the end of 2006 the Tribunal was preparing a responding factum.

5. Decision No. 172/02I, 2002 ONWSIAT 523 (February 28, 2002), Decision No. 172/02, 2003 ONWSIAT 2088 (September 22, 2003) and Decision No. 172/02R, 2004 ONWSIAT 1388 (June 30, 2004); Singh v. Workplace Safety and Insurance Appeals Tribunal

In January 1995 a worker injured his elbow and back. He received total disability benefits from the date of the accident until early 1996, when his benefits were terminated for failing to accept suitable work. The Board reinstated his wage loss benefits effective December 2001, and awarded a 100% future economic loss award in April 2003.

The worker appealed to the Tribunal for entitlement for a psychotraumatic disability and for wage loss benefits from February 1996 to December 2001. In *Decision No. 172/02* the Vice-Chair granted entitlement for a psychotraumatic disability, but found the worker was not totally disabled until July 1999. The worker's application to reconsider was granted in part in *Decision No. 172/02R*, allowing the temporary total disability benefits to be further backdated to September 9, 1998. A further request to reconsider for the period prior to September 1998 was dismissed.

The worker commenced an application for judicial review. The Tribunal has filed its record and is waiting for the worker's factum.

6. Decision No. 2282/05, 2006 ONWSIAT 1093, 78 W.S.I.A.T.R. (online), and Decision No. 2282/05R, 2006 ONWSIAT 1928 (August 29, 2006); Kranc v. Workplace Safety and Insurance Appeals Tribunal

A chambermaid at a motel claimed that she was sexually assaulted by K, one of the owners of the motel. The motel was owned by a partnership. She brought an action against the owners. The defendants applied to determine whether the plaintiff's right of action was taken away.

Although the defendants denied the allegations, they agreed for the purposes of the Tribunal application that the allegations were true.

The Panel found the right of action was taken away against all the defendants, except K. The plaintiff was a worker of a Schedule 1 employer, and the sexual assaults were accidents within the meaning of the Act. However the assaults by K were outside the scope of employment, and he could not be considered to be an employer at the time of the assaults. The Act did not intend to protect employers from actions for deliberate assaults against workers.

A request for reconsideration was denied. The defendants have brought an application for judicial review. At the end of 2006 the Tribunal was waiting for the applicant's factum.

7. Decision No. 1509/02, 2004 ONWSIAT 196 (February 2, 2004) and Decision No. 1509/02R, 2006 ONWSIAT 2179 (September 27, 2006); Gallina v. Workplace Safety and Insurance Appeals Tribunal

Two sisters were suspended at the same time for smoking in a non-smoking area at work. 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: "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 also brought an application for judicial review.

Following the release of the Divisional Court decision for Sister #1, Sister #2 decided to adjourn the judicial review, to permit her counsel to file an application for reconsideration with the Tribunal. The Tribunal consented to the adjournment.

The reconsideration application was denied. The worker has recently retained new counsel. At the end of 2006 the judicial review application was still pending.

8. Decision No. 2454/03, 2004 ONWSIAT 117 (January 20, 2004) and Decision No. 2454/03R, 2004 ONWSIAT 1916 (September 15, 2004); Vina v. Workplace Safety and Insurance Appeals Tribunal

The Tribunal found that the workers' job did not play a significant role in the development of his bilateral carpal tunnel syndrome, and denied him entitlement for benefits. After an unsuccessful reconsideration application, the applicant commenced an application for judicial review.

As the Tribunal was preparing its factum, it was noticed that the applicant had included a reference to evidence in his factum that was not part of the Record of Proceedings. The applicant elected to adjourn the judicial review in order to bring a further application for reconsideration of the Tribunal's decision. At the end of 2006 the Tribunal was waiting to receive the applicant's reconsideration materials.

Other Proceedings

Kamara v. Workplace Safety and Insurance Appeals Tribunal

In *Decision No. 1132/02R*, 2005 ONWSIAT 1349, an injured worker's appeal was denied by a Tribunal Panel consisting of a Vice-Chair, a Member Representative of Workers, and a Member Representative of Employers. The worker, who is self-represented, commenced an action to sue the Vice-Chair for a million dollars. The grounds for the action were not clear.

The Tribunal brought a motion to strike the worker's action. The motion was heard on October 11. Justice Sachs granted the motion on the grounds the Vice-Chair was acting within his jurisdiction under the Act, and hence was protected by the statutory immunity in section 179(1).

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, it conducts a thorough investigation and considers the reasonableness of the Tribunal's analysis. If the Ombudsman requires information from the Tribunal, or if issues arise 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. For example, in 2005, 2004 and 2003, there were six, 12 and three notifications respectively. As of the end of 2005, all of these matters had been closed without any recommendation for further action by the Ombudsman. In 2006, no new notifications were received. This is a significant achievement, given the number of hearings held and number of decisions released during 2006.

As reported in prior Annual Reports, the Ombudsman is continuing to monitor production issues which have arisen due to an insufficient number of Vice-Chairs, and the Tribunal Chair has undertaken to keep the Ombudsman informed about progress in this area. As of the end of 2006, the Tribunal Chair advised the Ombudsman that recent appointments will bring the roster of Vice-Chairs to 55 and that there has been a small reduction in the active caseload. Assuming the Tribunal's budget permits, there will be further appointments in 2007. It is anticipated that an increased roster of knowledgeable and competent Vice-Chairs will increase the Tribunal's productivity. The Tribunal Chair will continue to advise the Ombudsman about this during 2007.

TRIBUNAL REPORT

Tribunal Organization

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 2006 reappointments and newly appointed Vice-Chairs and Members, can be found in Appendix A.

Office of Counsel to the Chair

The Office of Counsel to the Chair (OCC) has existed since the creation of the Tribunal in 1985. It is a separate legal department 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.

OCC provides advice to the Chair and Chair's Office, particularly with respect to complicated reconsideration requests, post-decision inquiries, Ombudsman inquiries and other complaints. OCC is also responsible for facilitating compliance with the *Freedom of Information and Protection of Privacy Act* (FIPPA), responding to FIPPA complaints and appeals, and providing advice and support to other Tribunal departments on privacy matters.

Professional development continued to be important in 2006, given the four different legislative schemes, recent statutory amendments and extensive Board policy and policy amendments. In addition to delivering orientation training to a number of new Vice-Chairs who joined the Tribunal in 2006, OCC participated in the Tribunal's review and restructuring of its orientation program. OCC lawyers also conducted research, prepared current awareness materials, and developed and delivered professional development sessions.

There has been an increasing focus on knowledge management during 2006. OCC has been active in this area as well, assisting with various knowledge management initiatives aimed at

facilitating 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 is ready, the Tribunal requests the Appeal Record from the Board. The Tribunal then prepares the appeal for hearing, ensuring that the appeal record is complete and that the case is ready for hearing.

The Tribunal's pre-hearing staff also utilize 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. She may make rulings on preliminary and pre-hearing matters such as admissible evidence, jurisdiction and issue agenda, on referral by Tribunal staff and the parties to the appeal. 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 review all Notices and Confirmations of Appeals (COA) to ensure that they are complete and meet legislative requirements. They also identify appeals that can be heard by way of an expedited written process.

Early Review staff also review 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 and the parties pursue more appropriate 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 result in adjournments and post-hearing investigations due to incomplete issue agenda, outstanding issues at the Board or

incomplete evidence. Staff respond to party correspondence and queries up to the hearing, including Vice-Chair or Panel instructions.

Alternate Dispute Resolution Services

ADR services are offered to parties to resolve appeals without proceeding to a formal hearing. If the parties reach 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. If an appeal is not resolved through the ADR process, it is prepared for hearing.

Mediation Services

More specialized ADR services are provided by the Tribunal's mediators. If an appellant requests mediation, the Tribunal reviews the appeal to determine its suitability for mediation and contacts the responding party to determine if the respondent is willing to explore a mediated resolution of the appeal. Where both parties are amenable to mediation and the appeal is suitable for the process, the appeal is assigned to a mediator for substantive review. 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. 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.

If the Tribunal's review indicates that credibility may be at issue or that oral testimony is required, the appeal is deemed unsuitable for the ADR process. In such instances, the appeal is re-streamed for pre-hearing preparation and referred to a hearing in the ordinary course. If a respondent does not want to participate in a mediation, the appeal is scheduled for a hearing.

Single Party Appeals

Where the appellant has indicated an interest in the ADR process, but the respondent is not participating in the appeal, the appeal may be referred to ADR staff 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, groups of single party appeals (with the same representative) are referred to ADR staff. This is done where it is believed that a discussion with the parties may result in an expeditious resolution of the appeal, a recommendation or an early decision by the Vice-Chair Registrar.

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 processes 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 and is carried by that lawyer until the final decision is released. The pre-hearing work that a lawyer may do includes resolving legal, policy and evidentiary issues that arise prior to the hearing, providing assistance to the parties if there are questions concerning the appeal, and attending 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 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 raising 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, human resource issues, security, 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 Panel and Vice-Chair directions on complex appeals 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, 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 works constantly to ensure that it is able to provide access to the Tribunal of the very best impartial and independent outside 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.

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. There was one change to the roster of counsellors in 2006. Dr. Ross Fleming, the counsellor in Neurosurgery, retired and was replaced by Dr. David Rowed. A list of the current Medical Counsellors is provided in Appendix A.

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 case identified by MLO to verify that the medical evidence is complete and that the record contains any necessary 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 a Panel or Vice-Chair consider obtaining a Medical Assessor's opinion if the diagnosis of the worker's condition is unclear, or 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 requiring further medical investigation may request the assistance of MLO in preparing specific questions for Medical Assessors that may be helpful in resolving medical issues. Medical Counsellors assist MLO in providing questions for the consideration of the Panels or Vice-Chairs, and by recommending the most suitable Medical Assessor.

Medical Assessors

The Tribunal has the power to initiate medical investigations if it believes it necessary, in order to determine any medical question on an appeal. 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. Typically, they are asked to give their opinion on some specific medical question, which may involve examining a worker and/or studying the medical reports of other practitioners. Medical Assessors specializing in a particular field may be requested to assist in educating Tribunal staff in a general way about some medical theory or procedure. 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 also be asked to comment on the nature, quality or relevancy of medical literature.

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 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 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 cited in the Tribunal decision, the Medical Assessor does not make the decision on appeal. 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 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.

Resources by MLO Available to the Public

MLO places medical articles, medical discussion papers, and anonymized appeal transcripts of expert evidence on medical or scientific issues in the Ontario Workplace Tribunals Library. This collection of medical information specific to issues that arise in the workers' compensation field is unique within the Ontario workplace safety and insurance system and is accessible to the public. New medical information is announced to the public as it becomes available through the Tribunal publication *WSIAT In Focus*. This publication is also 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 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.

The 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, the preparation and filing of court documents, and general support duties.

Information Services (IS)

Information Services provides library, web development, communication, publishing, training, and translation services to support the Tribunal's goal of delivering timely, well-reasoned decisions. Information Services creates a number of information resources used by Tribunal staff and stakeholders alike. Probably our most popular, and most used, information resource is the decision summaries that are posted regularly on our website.

Web services

In April 2006 the Information Services group launched a new website **www.wsiat.on.ca** that features improved navigation and search capabilities. The website took advantage of Web 2.0 technology to deliver Tribunal information to interested users via RSS. Users can now have information about the Tribunal "pushed" to them electronically on request. Our staff are working on more web-based information resources for our stakeholders, to be made available in the second half of 2007.

In 2006, the *WSIAT Reporter* became an electronic publication. The *WSIAT Reporter* began in January 1988 as the first reporting series in Ontario dedicated exclusively to workers' compensation. It was published quarterly and was offered to users on a paid subscription basis. In 2006, beginning with Volume 75, the Reporter became a free electronic publication on the Tribunal's website. Decisions can be accessed through the subject matter index or keyword index. A cumulative table of contents for all materials in the Reporter with electronic links to online decisions is also included. Further planned improvements include consolidations of the subject matter index and keyword index.

Information Services also maintains an intranet that is used to communicate Tribunal information to staff and OIC appointees. In 2006, web developers added a "search" function to the WSIAT Intranet and made navigational changes. As well, staff reviewed content for currency and a new "research page" was added. As a result of these enhancements, use of the Intranet doubled in 2006.

Outreach Services

Information Services kept stakeholders up-to-date through two issues of *WSIAT In Focus* ? the Tribunal's newsletter. As well, staff delivered two Outreach sessions: one in Toronto and one in Sault St Marie. Our librarians provide valuable services to Tribunal stakeholders through the library website, **www.owtlibrary.on.ca**. Also, as a service to the public, Tribunal decisions are posted on the CanLII site.

Staff Training

The Tribunal has a strong commitment to staff learning and development. Information Services is responsible for the development and delivery of staff orientation and training programs. In 2006 the Tribunal established the position of Co-ordinator, Staff Development and Training. In this period the

Co-ordinator, along with our web developers, created orientation modules for new staff. These orientation modules are delivered to staff in their first week of work.

Information Services was also involved in the professional development of our adjudicators. A professional development day was devoted to technology training and developments in Web 2.0, and Information Services staff gave a series of workshops. This training was so successful that some of the modules were repeated for WSIAT staff later in the year.

Translation Services

The Tribunal offers services in French to its Francophone stakeholders in accordance with the *French Language Services Act* of Ontario. Information Services is responsible for the translation of written material. In 2006, our translator handled a wide variety of case related documentation, such as correspondence and decisions. She was also responsible for the French language version of documents for the Tribunal's public website, the newsletter *WSIAT In Focus*, quarterly production reports, discussion papers and the *Annual Report 2005*.

In this period, the Tribunal moved towards the use of gender neutral written French while taking into account the style existing in the documentation. Finally, the translator continued to manage the French language terminology used in written documents produced by the Tribunal.

Library Services

The Ontario Workplace Tribunals Library delivers library services to internal users and the public on behalf of the Workplace Safety and Insurance Appeals Tribunal, the Ontario Labor Relations Board, the Human Rights Tribunal of Ontario and the Pay Equity Hearings Tribunal.

This year library staff worked on two planning documents. The first was a "collection development policy" that outlines how materials are selected for the library. The second document was a discussion paper on how the library will continue to meet the needs of the Tribunals and the public in the age of Web 2.0.

Training sessions were held to teach adjudicators and staff how to search the WSIAT database. One librarian gave a presentation to the Toronto Association of Law Libraries (TALL) about the library and the services it offers. The presentation was then published in the association's newsletter.

Our web developers added RSS functionality to the Ontario Workplace Tribunals Library website so that users will receive alerts when new content is added to the site.

This year the library mentored students from the University of Toronto, Faculty of Information Studies and from Seneca College. They worked on special projects ranging from cataloguing to providing a project plan for the digitization of archival documents. Students bring with them new skills, particularly in the area of technology. Library staff learn from them and they, in turn, learn from the experienced library staff.

Case Management Systems

The Case Management Systems Department (CMS) is responsible for the case management functions of the Tribunal as well as the management of information technology systems. This department in fiscal year 2006 enhanced information security and accountability initiatives; undertook information technology (IT) infrastructure upgrades, introduced case management system enhancements and collaborated with Information Services on Tribunal-wide information management initiatives.

With respect to IT infrastructure projects, the Tribunal replaced 16 physical servers at the end of their lease cycles with three physical servers and nine dual-CPU blades running virtual server platforms. This enabled the Tribunal to expand its overall server capacity while at the same time reducing the number of physical servers installed on the LAN. In another infrastructure project, the department expanded the capacity for electronic data storage by means of an enhancement to the existing Storage Area Network device. Additional projects included the implementation of Active Directory services, installation and configuration of SharePoint 2003 Portal Server and Services, upgrade to the Windows XP Professional operating system with MS Office 2003 desktop software, and implementation of an enterprise-wide anti-spyware solution.

The Tribunal also undertook several enhancements to its customized case management system, including the development of more flexible document templates for the Tribunal's legal workers. The department has also been active in supporting the Tribunal's information management projects and in delivering a number of technology awareness seminars.

Finally, the department developed a set of IT-based recommendations to enhance the Tribunal's capacity to recover from significant business continuity interruptions.

Caseload Processing

Introduction

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 2006, there were 5,228 active cases within these two process stages. Chart 1 shows the distribution in more detail.

Chart 1: Inventory of Active Cases on December 31, 2006

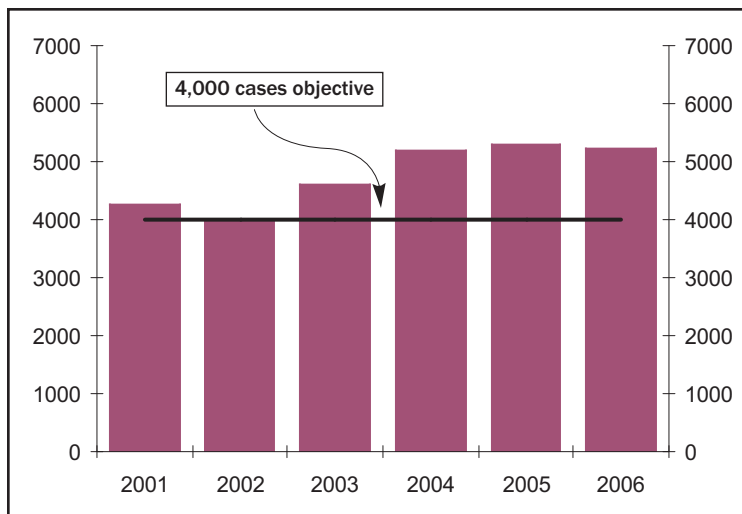
Notice Process	
Cases active in Notice stage processing	<u>1384</u>
	1384
Resolution Process	
Early Review stage	118
Substantive Review	516
Hearing Ready	112
Scheduling and Post-hearing	2612
WSIAT Decision Writing	<u>486</u>
	3844
Total Active Cases	5228

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 2006, these factors combined to produce a 1% overall decrease in active inventory.

Examining the distribution of cases, one notes the significant backlog at the "scheduling and post-hearing" stage. In 2006 the active caseload increased through the first part of the year before tapering off and then decreasing in the latter months. The Tribunal has continued to increase its roster of adjudicators throughout 2006, with a resulting increase in decision output beginning in the second half of the year. The Tribunal expects to continue with this higher level of decision output throughout 2007 and 2008, leading to the elimination of the existing backlog of appeals. By the end of the year, the active inventory stood at 5,228 cases. This represented a decrease of 1.4% as compared to the 2005 year-end figure. Chart 2 shows the active inventory in comparison to previous years.

Chart 2: Active Caseload

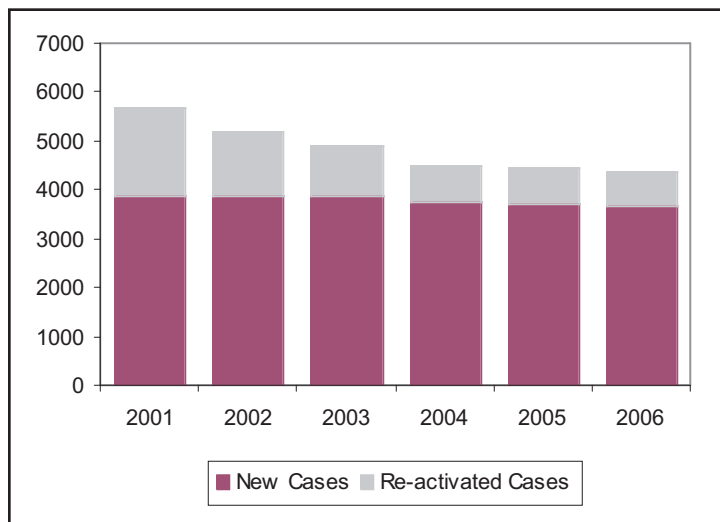


Incoming Appeals

The incoming caseload trend is shown in Chart 3. In 2006 the Tribunal's overall intake from new appeals and reactivations totaled 4,363 and this represented a total reduction of 2.5% as compared with the 2005 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 4,522 cases in 2006. This included 1,701 “Pre-Hearing” and 2,821 “Hearing” dispositions.

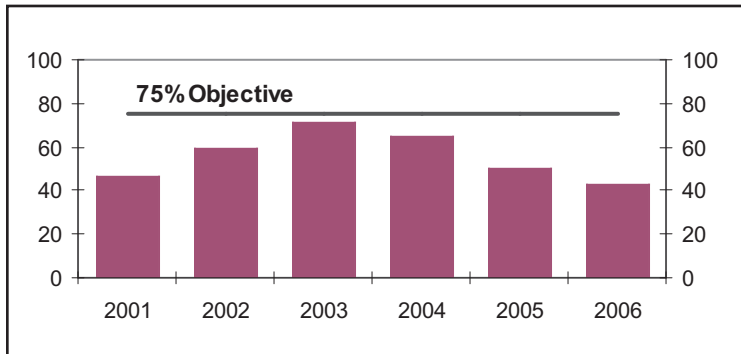
Chart 4: Cases Disposed of in 2006

Resolved through Pre-Hearing Processes	
Failure to confirm readiness	511
Withdrawn or Abandoned	437
Made Inactive or No Reply	<u>753</u>
Subtotal	1701
Resolved through Hearing Processes	
Made Inactive or No Reply	66
Disposed following Tribunal Decision*	2752
Withdrawn or Settled	<u>3</u>
Subtotal	2821
TOTAL	4522
* 30 cases were disposed by interim decision that made the file "inactive".	
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	

Timeliness of Appeal Processing

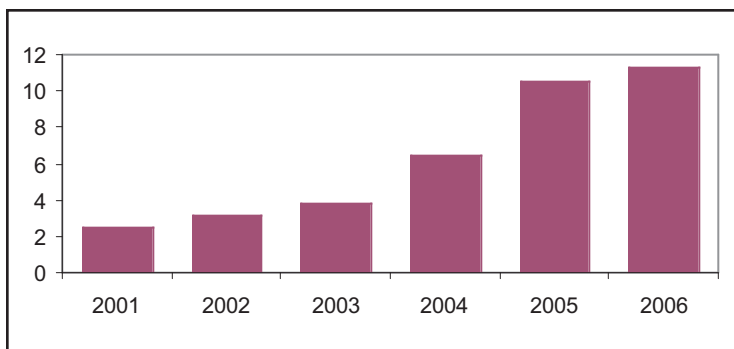
Chart 5 illustrates performance in terms of time frame for completing cases. The time frame begins when the appellant confirms readiness to proceed to a hearing and ends when the case is disposed. In 2006, only 43% of cases were resolved within nine months, a decline of 7% from 2005. The Tribunal has an objective of completing 75% of cases within nine months. However, a significant portion of the caseload was held in the growing backlog of cases awaiting assignment to adjudicators throughout 2006.

Chart 5: Percent Disposed of Within 9 Months



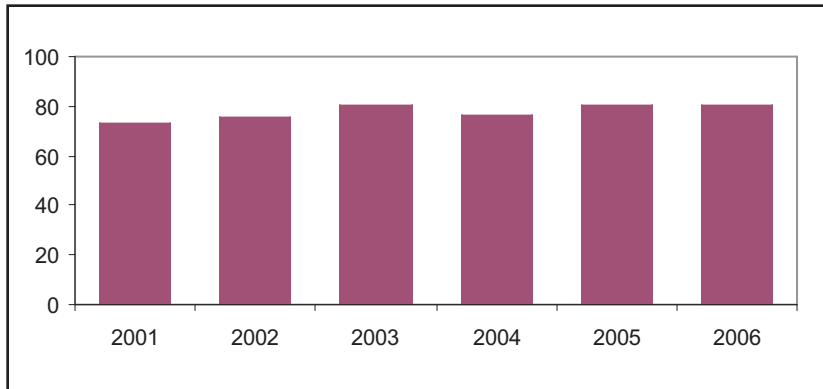
The Tribunal also measures the median interval of the first offered hearing date. This interval is measured from the date on which cases are confirmed ready to proceed to the future hearing date first offered to the parties. Chart 6 shows that the median time interval of these proposed hearing dates increased slightly in 2006 over 2005. As noted above, the increased interval is a result of requiring parties to wait for adjudicators to hear their appeals.

Chart 6: Time to First Offered Hearing (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 2006 once again, this target was achieved 81% of the time.

Chart 7: Final Decisions (Percent Released within 120 Days)



Hearing and Decision Activity

Chart 8 depicts the Tribunal's Hearing and Decision production. In 2006 the Tribunal conducted 3,005 hearings (for 2,856 cases) and in this same period, issued 2,849 decisions. Overall levels of hearing and decision activity were 8-10% higher as compared with Year 2005. 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 (approximately 95%) require only a single hearing.

Chart 8: Hearings and Decision Production Figures for the Years 2001-2006

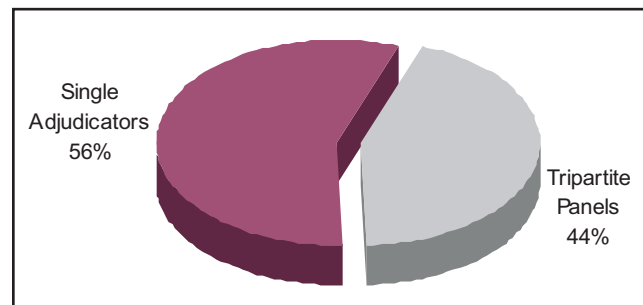
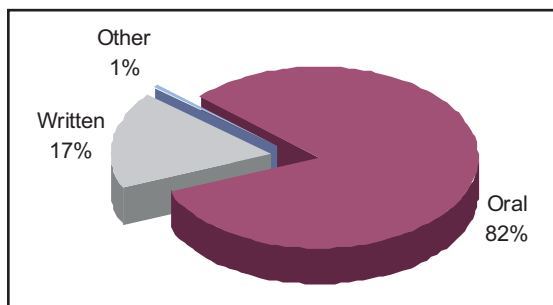
Year	Hearings Conducted		Cases Heard		Decisions Issued		Cases Disposed of by Decision	
	No.	% Change from Previous	No.	% Change from Previous	No.	% Change from Previous	No.	% Change from Previous
2001	3979	-3%	3530	-9%	3768	2%	3499	-5%
2002	2322	-42%	2149	-39%	2571	-32%	2373	-32%
2003	2760	19%	2617	22%	2675	4%	2408	1%
2004	2589	6%	2442	-7%	2391	-11%	2320	-4%
2005	2785	8%	2639	8%	2621	10%	2505	8%
2006	3005	8%	2856	8%	2849	9%	2752	10%

Note: This chart excludes decisions for Reconsideration cases (203 in total for 2006), and it excludes decisions issued by the Vice Chair Registrar (41 in total for 2006) during Notice Stage processing.

Hearing Type

In 2006 the percentage breakdown of hearing types was as follows: Oral hearings continued to be the most common hearing type at 82%, followed by Written hearings at 17%. The remaining 1% of all hearings in 2006 was comprised of Teleconferences, Vice-Chair Registrar and Motions Day case reviews. The percentage of single adjudicators increased slightly in 2006 to 56% (from 55% in 2005); tri-partite panels decreased to 44% of cases heard. Chart 9 presents these hearing characteristics.

Chart 9: Percentage Breakdown of Hearing Types



Representation at Hearing

Tribunal statistics show that for injured workers, 42% were represented by consultants, 21% by lawyers, 13% by the Office of the Worker Adviser and 13% by union representatives. The remaining 11% is allocated among various non-categorized representation, for instance, family friend, family member or MPP office. Employers were represented before the Tribunal as follows: 43% were represented by consultants, 38% by lawyers, 6% by the Office of the Employer Adviser and 10% by employer personnel. The remaining 3% are non-categorized.

Chart 10: Percentage Breakdown of Representation at Hearing

Worker Representation			
A) In Worker Appeals		B) In Employer Appeals	
None Recorded	<u>10%</u>	None Recorded*	<u>64%</u>
Subtotal	10%	Subtotal	64%
Consultant	42%	Consultant	10%
Lawyer/Legal	21%	Lawyer	14%
OWA	13%	OWA	3%
Union	13%	Union	7%
Others*	<u>1%</u>	Others*	<u>2%</u>
Subtotal	90%	Subtotal	36%
Employer Representation			
A) In Worker Appeals		B) In Employer Appeals	
None Recorded*	<u>68%</u>	None Recorded	<u>1%</u>
Subtotal	68%	Subtotal	1%
Firm personnel	10%	Firm personnel	10%
Consultant	9%	Consultant	43%
Lawyer	9%	Lawyer	38%
OEA	3%	OEA	6%
Others*	<u>1%</u>	Others*	<u>2%</u>
Subtotal	32%	Subtotal	99%
* 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 2006 was no exception. In 2006, as in past years, Entitlement-related cases constituted the majority of cases (94%). Special Section cases (Right to Sue and Access) comprised typically small portions (6%). Charts 11 and 12 provide historical comparisons of intake and dispositions.

Chart 11: Breakdown of Incoming Cases by Appeal Type for the years 2001-2006

INPUT BY TYPE	2001 (%)	2002 (%)	2003 (%)	2004 (%)	2005 (%)	2006 (%)
Leave	0.1%	0.0%	0.0%	0.0%	0.0%	0.0%
Right to Sue	0.9%	1.0%	1.2%	1.4%	1.4%	1.2%
Medical Exam	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Access	3.5%	5.6%	4.1%	4.7%	5.2%	5.3%
Total Special Section	4.4%	6.6%	5.4%	6.1%	6.6%	6.5%
Preliminary (not yet specified)	7.2%	0.8%	2.1%	0.6%	0.4%	0.1%
Pension	0.7%	0.5%	0.6%	0.2%	0.1%	0.2%
N.E.L./F.E.L.*	4.4%	5.8%	7.2%	1.6%	0.8%	0.8%
Commutation	0.2%	0.2%	0.1%	0.1%	0.0%	0.0%
Employer Assessment	9.3%	7.8%	6.9%	4.3%	3.4%	2.9%
Entitlement	65.5%	69.2%	68.2%	79.3%	82.7%	83.2%
Ext post WSIB decision deadline	5.4%	6.7%	7.8%	6.4%	5.1%	4.8%
Jurisdiction Time Limit	2.5%	1.1%	0.3%	0.1%	0.2%	0.1%
Reinstatement	0.1%	0.1%	0.0%	0.0%	0.0%	0.0%
Vocational Rehabilitation **	0.2%	0.2%	0.1%	0.0%	0.1%	0.0%
Classification	0.0%	0.8%	0.8%	1.0%	0.6%	1.2%
Interest NEER	0.0%	0.2%	0.5%	0.2%	0.0%	0.0%
Total Entitlement-related	95.5%	93.3%	94.6%	93.8%	93.4%	93.5%
Jurisdiction	0.0%	0.1%	0.0%	0.1%	0.0%	0.0%
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 2001-2006

INPUT BY TYPE	2001 (%)	2002 (%)	2003 (%)	2004 (%)	2005 (%)	2006 (%)
Leave	0.1%	0.1%	0.0%	0.1%	0.0%	0.0%
Right to Sue	0.6%	0.9%	1.4%	1.5%	1.0%	1.1%
Medical Exam	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Access	3.0%	6.0%	5.2%	5.0%	5.5%	5.3%
Total Special Section	3.7%	7.0%	6.6%	6.5%	6.5%	6.4%
Preliminary (not yet specified)	4.0%	2.1%	2.2%	1.6%	0.4%	0.4%
Pension	0.9%	0.8%	0.6%	0.5%	0.5%	0.2%
N.E.L./F.E.L.*	5.2%	5.3%	5.7%	6.4%	4.4%	2.1%
Commutation	0.1%	0.3%	0.1%	0.1%	0.0%	0.0%
Employer Assessment	8.4%	8.5%	11.0%	5.5%	5.5%	3.7%
Entitlement	68.0%	63.8%	62.4%	69.7%	75.0%	79.9%
Ext post WSIB decision deadline	7.9%	8.5%	9.6%	8.2%	6.2%	6.1%
Jurisdiction Time Limit	1.3%	2.7%	0.5%	0.1%	0.2%	0.2%
Reinstatement	0.1%	0.2%	0.1%	0.0%	0.0%	0.0%
Vocational Rehabilitation **	0.5%	0.4%	0.3%	0.0%	0.0%	0.1%
Classification	0.0%	0.0%	0.4%	1.1%	0.8%	0.8%
Interest NEER	0.0%	0.0%	0.4%	0.1%	0.4%	0.1%
Total Entitlement-related	96.3%	92.8%	93.3%	93.3%	93.5%	93.5%
Jurisdiction	0.0%	0.2%	0.1%	0.1%	0.0%	0.1%
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.						

Inactive Inventory

In 2006, the Inactive cases inventory decreased slightly to 4,235 from 4,284 at the end of 2005, a decrease of 1%. Cases are placed in the Inactive category by request of the appellant, or by a Tribunal Vice-Chair, without prejudice to the Tribunal appeal. The most common reasons for placing a file in the Inactive status are to allow an appellant to pursue additional medical reports, obtain a representative or obtain a final ruling from the Workplace Safety and Insurance Board pertaining to an issue raised at the Tribunal hearing.

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 2006, the number of Reconsideration requests decreased from 218 in 2005 to 212 in 2006.

Chart 13: Ombudsman Complaints, Activity and Inventory Summary

New Complaint Notifications Received	0
Complaints Resolved	0
Complaints Remaining	0

Chart 14: Reconsideration Requests, Activity and Inventory Summary

Inquiries (Pre-reconsideration) Remaining	81
Reconsideration Requests Received	212
Reconsideration Requests Resolved	200
Reconsiderations Remaining	148

Chart 15: Judicial Reviews, Activity and Inventory Summary

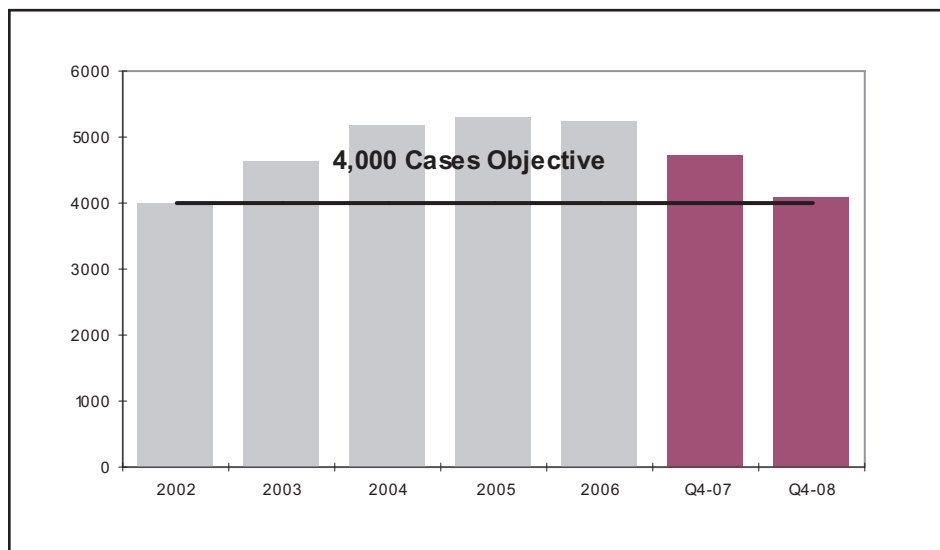
Judicial Reviews Received	6
Judicial Reviews Resolved	6
Judicial Reviews Remaining	12

Looking Ahead — Planning for 2007 and Beyond

Between 2003 and 2005, the Tribunal experienced significant growth in its active inventory, with corresponding increases in the time before hearings could be scheduled, due to a shortage of adjudicators. However, beginning in the fourth quarter of 2006, the productivity increased and by the end of 2006 the Tribunal had registered a modest overall decrease in active caseload.

The process of appointment and training of new Vice-Chairs that began in 2004 continued in 2006, and this was the determining factor in halting the growth of the inventory accrual. In 2007 and beyond, the Tribunal anticipates that new adjudicators will be added to the roster in frequency and measure as necessary to ensure the Tribunal will be able to eliminate the excess accrued inventory. As noted in this report, the Tribunal was able to achieve a significant increase in decision-writing in 2006. In 2007 and 2008 the Tribunal targets further productivity increases from the adjudication stream (the Tribunal anticipates on average 3,200 hearing dispositions in 2007 and 2008). With these conditions in place, the Tribunal's active inventory is projected to follow the pattern as charted below.

Chart 16: Projections for 2007 and 2008 of Tribunal Active Inventory



Financial Matters

A Statement of Expenditures and Variances for the year ended December 31, 2006, (Chart 17) 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, 2006. The auditors' report is included as Appendix B.

Chart 17: Statement of Expenditure and Variances
Year ended December 31, 2006 (in \$000s)

	2006 BUDGET	2006 ACTUAL	2006 VARIANCE	
			\$	%
OPERATING EXPENSES				
Salaries & Wages	9,637	9,588	49	0.5
Employee Benefits	1,809	1,751	58	3.2
Transportation & Communication	1,070	1,024	46	4.3
Services	5,487	5,577	(90)	(1.6)
Supplies & Equipment	454	488	(34)	(7.5)
TOTAL – W.S.I.A.T.	18,457	18,428	29	0.2
Services – W.S.I.B.	450	496	(46)	(10.2)
Interest Revenue	(20)	(39)	19	(95.0)
TOTAL OPERATING EXPENSES	18,887	18,885	2	0.0
ONE TIME EXPENSES				
Severance Payments	100	22	78	78.0
Active Caseload Resources - Per Diem Cost	200	200	–	–
Training & Quality Control Initiatives	284	220	64	22.5
TOTAL EXPENDITURES	19,471	19,327	144	0.7
Note: The above 2006 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 \$316 is comprised of:				
Capital Fund				
Amortization	153			
Fixed assets acquired	(81)	72		
Operating Fund				
Accrued severance & vacation benefits	\$ 215			
Prepaid expenses	29	244		
		<u>\$ 316</u>		

Appendix A

VICE-CHAIRS AND MEMBERS IN 2006

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

Crystal, Melvin

May 3, 2000

Gehrke, Linda

May 27, 1998

Keil, Martha

February 16, 1994

Martel, Sophie

October 6, 1999

McClellan, Ross

September 4, 2002

McCutcheon, Rosemarie

October 6, 1999

Moore, John

July 16, 1986

Noble, Julia

October 20, 2004

Peckover, Susan

October 20, 2004

Ryan, Sean

October 6, 1999

Smith, Eleanor

January 7, 2000

APPENDIX A Vice-Chairs, Members, Senior Staff and Medical Counsellors

Full-time

Members representative of workers

Crocker, James
Grande, Angela

Initial appointment

August 1, 1991
January 7, 2000

Members representative of employers

Wheeler, Brian

April 19, 2000

Part-time

Vice-Chairs

Alexander, Bruce
Baker, Andrew
Bigras, Jean Guy
Bortolussi, Lorraine
Butler, Michael
Carroll, Tom
Clement, Shirley
Cohen, Marvin
Cook, Brian
Dempsey, Colleen
Dimovski, Jim
Doherty, Barbara
Doyle, Maureen
Faubert, Marsha
Ferdinand, Ulrich
Flanagan, William
Gale, Robert
Gannage, Mark
Goldman, Jeanette
Hartman, Ruth
Josefo, Jay
Jugnundan, Nalini
Kalvin, Bernard
Kenny, Maureen
Lang, John B.
Levy, Alan

Initial Appointment

May 3, 2000
June 28, 2006
May 14, 1986
March 21, 2001
May 6, 1999
May 27, 1998
September 1, 2005
June 22, 2006
September 6, 1991
November 10, 2005
July 1, 2003
June 22, 2006
October 20, 2004
December 10, 1987
April 29, 1999
July 5, 2004
October 20, 2004
November 10, 2005
June 22, 2006
October 6, 1999
January 13, 1999
November 15, 2006
October 20, 2004
July 29, 1987
July 15, 2005
October 20, 2004

Part-time

Initial Appointment

Vice-Chairs (continued)

MacAdam, Colin	May 4, 2005
Marafioti, Victor	March 11, 1987
McKenzie, Mary	June 22, 2006
Mitchinson, Tom	November 10, 2005
Morris, Anne	June 22, 2006
Mullan, David	July 5, 2004
Nairn, Rob	April 29, 1999
Parmar, Jasbir	November 10, 2005
Robeson, Virginia	March 15, 1990
Sahay, Sonya	November 29, 2006
Sehdev, Surinder	November 15, 2006
Signoroni, Antonio	October 1, 1985
Silipo, Tony	December 2, 1999
Smith, Marilyn	February 18, 2004
Suissa, Albert	October 20, 2004
Sutherland, Sara	September 6, 1991
Welton, Ian	June 22, 2006
Wyman, Kenneth	July 15, 2005

Members representative of workers

Beattie, David	December 11, 1985
Besner, Diane	January 13, 1995
Briggs, Richard	August 21, 2001
Broadbent, Dave	April 18, 2001
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
Rao, Fortunato	February 11, 1988

Members representative of employers

Christie, Mary	May 2, 2001
Donaldson, Joseph	October 20, 2004
Jago, Douglas	October 1, 1985

Part-time

Initial Appointment

Members representative of employers (continued)

McLachlan, Dennis	March 5, 2001
Meslin, Martin	December 11, 1985
Phillips, Victor	November 15, 2006
Robb, C. James	June 2, 1993
Séguin, Jacques	July 1, 1986
Sherwood, Robert	May 3, 2000
Stewart, Gordon	March 5, 2001
Tracey, Elaine	December 7, 2005
Young, Barbara	February 17, 1995

VICE-CHAIRS AND MEMBERS – REAPPOINTMENTS EFFECTIVE 2006

	Effective
Bruce Alexander	May 3, 2006
David Beattie	October 31, 2006
Brian Cook	September 6, 2006
James Crocker	November 1, 2006
Melvin Crystal	May 3, 2006
Jim Dimovski	July 1, 2006
Marsha Faubert	July 1, 2006
Linda Gehrke	June 1, 2006
Faith Jackson	November 1, 2006
Douglas Jago	January 7, 2006
Maureen Kenny	July 1, 2006
Martin Meslin	November 1, 2006
John Moore	May 1, 2006
Julia Noble	September 6, 2006 ¹
Susan Peckover	September 6, 2006 ²
C. James Robb	July 1, 2006
Virginia Robeson	July 1, 2006

1 Part-time Vice-Chair Order made October 20, 2004, converted to full-time.

2 Part-time Vice-Chair Order made October 20, 2004, converted to full-time.

APPENDIX A Vice-Chairs, Members, Senior Staff and Medical Counsellors

	Effective
Jacques Séguin	July 1, 2006
Robert Sherwood	May 3, 2006
Antonio Signoroni	October 1, 2006
Eleanor Smith	February 1, 2006
Ian Strachan	July 1, 2006
Sara Sutherland	September 6, 2006
Brian Wheeler	January 7, 2006

NEW APPOINTMENTS DURING 2006

	Effective
Andrew Baker, part-time Vice-Chair	June 28, 2006
Marvin Cohen, part-time Vice-Chair	June 22, 2006
Barbara Doherty, part-time Vice-Chair	June 22, 2006
Jeanette Goldman, part-time Vice-Chair	June 22, 2006
Nalini Jugnundan, part-time Vice-Chair	November 15, 2006
Mary McKenzie, part-time Vice-Chair	June 22, 2006
Anne Morris, part-time Vice-Chair	June 22, 2006
Victor Phillips, part-time Member representative of employers	November 15, 2006
Sonya Sahay, part-time Vice-Chair	November 29, 2006
Surinder Sehdev, part-time Vice-Chair	November 15, 2006
Ian Welton, part-time Vice-Chair	June 22, 2006

SENIOR STAFF

David Bestvater	Director, Case Management Systems
Alison Colvin	Director, Information Services
Debra Dileo	Director, Appeal Services
Marsha Faubert	Tribunal Executive Director
Noel Fernandes	Finance Manager
Martha Keil	Vice-Chair Registrar, Office of the Vice-Chair Registrar

APPENDIX A Vice-Chairs, Members, Senior Staff and Medical Counsellors

Janet Oulton
Carole Prest
Dan Revington
Bob Rowe
Lynn Telalidis

Appeals Administrator
Counsel to the Tribunal Chair
Tribunal General Counsel
Director of Finance and Administration
Human Resources Manager

MEDICAL COUNSELLORS

Dr. John Duff
Dr. Emmanuel Persad
Dr. David Rowed
Dr. Marvin Tile
Dr. Anthony Weinberg

General Surgery, Chair of Medical Counsellors
Psychiatry
Neurology and Neurosurgery
Orthopaedic Surgery
Internal Medicine

Appendix B

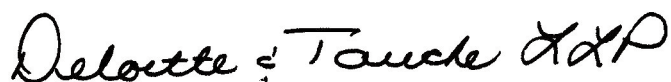
Auditors' Report

To the Chair of
Workplace Safety and Insurance Appeals Tribunal

We have audited the balance sheet of Workplace Safety and Insurance Appeals Tribunal (the "Tribunal") as at December 31, 2006 and the statements of operations, changes in fund balances and cash flows for the year then ended. These financial statements are the responsibility of the Tribunal's management. 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 plan and perform an audit to obtain reasonable assurance whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation.

In our opinion, these financial statements present fairly, in all material respects, the financial position of the Tribunal as at December 31, 2006 and the results of its operations and its cash flows for the year then ended in accordance with Canadian generally accepted accounting principles.



Chartered Accountants

Toronto, Ontario
February 16, 2007

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Balance Sheet

December 31, 2006

	<u>2006</u>	<u>2005</u>
ASSETS		
CURRENT		
Cash	\$ 1,331,027	\$ 1,288,321
Receivable from Workplace Safety and Insurance Board	1,289,970	1,369,321
Prepaid expenses and advances	330,567	361,239
Recoverable expenses (Note 4)	117,470	127,458
	<u>3,069,034</u>	<u>3,146,339</u>
CAPITAL ASSETS (Note 5)	<u>115,571</u>	<u>188,264</u>
	<u>\$ 3,184,605</u>	<u>\$ 3,334,603</u>
LIABILITIES		
CURRENT		
Accounts payable and accrued liabilities	\$ 1,344,094	\$ 1,392,602
Accrued severance benefits and vacation credits	2,199,756	1,984,954
Operating advance from Workplace Safety and Insurance Board (Note 6)	1,400,000	1,400,000
	<u>4,943,850</u>	<u>4,777,556</u>
FUND BALANCES (DEFICIT)		
OPERATING FUND (Note 7)	(1,874,816)	(1,631,217)
CAPITAL FUND	<u>115,571</u>	<u>188,264</u>
	<u>(1,759,245)</u>	<u>(1,442,953)</u>
	<u>\$ 3,184,605</u>	<u>\$ 3,334,603</u>

APPROVED ON BEHALF OF WORKPLACE
SAFETY AND INSURANCE APPEALS TRIBUNAL



Ian J. Strachan, Chair

WORKPLACE SAFETY AND INSURANCE

APPEALS TRIBUNAL

Statement of Operations

Year ended December 31, 2006

	<u>2006</u>	<u>2005</u>
OPERATING EXPENSES		
Salaries and wages	\$ 9,773,266	\$ 9,052,560
Employee benefits	2,022,789	2,165,350
Transportation and communication	1,024,342	935,200
Services and supplies	6,212,648	5,873,985
Amortization	153,024	363,070
	<u>19,186,069</u>	<u>18,390,165</u>
Services – Workplace Safety and Insurance Board (Note 9)	496,230	477,078
TOTAL OPERATING EXPENSES	<u>19,682,299</u>	<u>18,867,243</u>
BANK INTEREST INCOME	(38,511)	(24,456)
NET OPERATING EXPENSES	<u>19,643,788</u>	<u>18,842,787</u>
FUNDS RECEIVED AND RECEIVABLE		
FROM WSIB	(19,327,496)	(18,406,076)
NET UNFUNDED OPERATING EXPENSES	<u>\$ 316,292</u>	<u>\$ 436,711</u>
ALLOCATED TO		
CAPITAL FUND	\$ (72,693)	\$ (287,729)
OPERATING FUND	(243,599)	(148,982)
	<u>\$ (316,292)</u>	<u>\$ (436,711)</u>

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Statement of Changes in Fund Balances

Year ended December 31, 2006

	<u>Capital</u>	<u>Operating</u>	<u>Total</u>
BALANCE (DEFICIT) - JANUARY 1, 2005	\$ 475,993	\$ (1,482,235)	\$(1,006,242)
Additions to capital assets	75,341	—	75,341
Amortization of capital assets	(363,070)	—	(363,070)
Severance benefits and vacation credits (Note a)	—	(175,847)	(175,847)
Prepaid expenses (Note b)	—	26,865	26,865
Net unfunded expenses - 2005	(287,729)	(148,982)	(436,711)
BALANCE (DEFICIT) - DECEMBER 31, 2005	188,264	(1,631,217)	(1,442,953)
Additions to capital assets	80,331	—	80,331
Amortization of capital assets	(153,024)	—	(153,024)
Severance benefits and vacation credits (Note a)	—	(214,802)	(214,802)
Prepaid expenses (Note b)	—	(28,797)	(28,797)
Net unfunded expenses – 2006	(72,693)	(243,599)	(316,292)
BALANCE (DEFICIT) - DECEMBER 31, 2006	\$ 115,571	\$ (1,874,816)	\$(1,759,245)

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, 2006

	<u>2006</u>	<u>2005</u>
NET INFLOW (OUTFLOW) OF CASH RELATED TO THE FOLLOWING ACTIVITIES		
OPERATING		
Funding revenue received from Workplace Safety and Insurance Board	\$ 19,406,847	\$ 18,112,062
Cash receipts for recovery of shared services	506,082	507,826
Bank interest received	38,511	24,456
Expenses, recoverable expenses and advances, net of amortization of \$153,024 (2005 - \$363,070)	(19,828,403)	(18,607,662)
	123,037	36,682
INVESTING		
Acquisition of capital assets	(80,331)	(75,341)
NET INCREASE (DECREASE) IN CASH AND CASH EQUIVALENTS	42,706	(38,659)
CASH AND CASH EQUIVALENTS, BEGINNING OF YEAR	1,288,321	1,326,980
CASH AND CASH EQUIVALENTS, END OF YEAR	\$ 1,331,027	\$ 1,288,321

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Notes to the Financial Statements

December 31, 2006

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 Labor.

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 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 not when expensed.

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.

Employee benefits

(a) Pension benefits

The Tribunal provides pension benefits for all 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.

The Tribunal, however, accounts for these plans as defined contributions plans since the Tribunal is not provided with sufficient information to apply defined benefit plan accounting rules.

(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), at which time the severance benefit vests. The maximum amount payable to an employee shall not exceed one-half of the annual full-time salary.

(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. 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.

3. 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.

4. RECOVERABLE EXPENSES

Recoverable expenses consist of amounts recoverable from Pay Equity Hearing Tribunal, Ontario Labor Relations Board and Human Rights Tribunal of Ontario for shared services such as reception, library, mailing and courier and photocopy expenses. Also included in recoverable expenses are recoveries for salaries and benefits of employees on secondment to other organizations.

5. CAPITAL ASSETS

	2006			2005
	Cost	Accumulated Amortization	Net Book Value	Net Book Value
Leasehold improvements	\$ 2,977,473	\$2,977,473	\$ –	\$35,499
Furniture and equipment	979,174	927,225	51,949	78,760
Computer equipment and software	553,656	490,034	63,622	74,005
	\$ 4,510,303	\$4,394,732	\$115,571	\$188,264

6. OPERATING ADVANCE FROM WSIB

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

7. OPERATING FUND

The operating fund deficit of \$1,874,816 as of December 31, 2006 (\$1,631,217 as of December 31, 2005) 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.

8. EMPLOYEE BENEFITS OBLIGATIONS

a) Pension plan costs

Contributions by the Tribunal on account of pension costs amounted to \$646,389 (2005 - \$584,002) 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 2006 amounted to an increase of \$222,039 (2005 - \$155,962) 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 2006 amounted to a reduction of \$7,237 (2005—increase of \$19,885) 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.

9. 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.

10. 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 minimum payments under these leases are as follows:

2007	\$241,151
2008	235,694
2009	64,719
Minimum operating lease payments	<u>\$541,564</u>

The Tribunal is committed to minimum lease payments for premises, including building operating costs, as follows:

2007	\$1,055,532
2008	1,055,532
2009	1,055,532
2010	879,610
Minimum operating lease payments	<u>\$4,046,206</u>

The lease expires on October 31, 2010, with the option for a further renewal of five years.

11. 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.

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.