

# 2008: ANNUAL REPORT



Workplace Safety and Insurance  
Appeals Tribunal

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

# Workplace Safety and Insurance Appeals Tribunal

## **2008 ANNUAL REPORT**



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Appeals Tribunal

505 University Avenue, 7th floor,  
Toronto, Ontario M5G 2P2  
[wsiat.on.ca](http://wsiat.on.ca)



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## Introduction

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

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

This volume contains the Tribunal's Annual Report to the Minister of Labour and to the Tribunal's various constituencies, together with a Report of the Tribunal Chair. It is primarily a report on the Tribunal's operations for fiscal year 2008 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

## The Sun Also Rises

As the sun set on the year 2008, it was also setting on the Workplace Safety and Insurance Appeals Tribunal's production plan to reduce the active appeal case inventory to approximately 4,000 appeals. The actual number on December 31, 2008 was 4,018. With an active inventory of approximately 4,000 appeals, the Tribunal can now concentrate on shortening timelines at all stages of the appeal process as part of the ongoing quest to improve the quality of service in the workplace safety and insurance system. Tribunal Vice-Chairs and Panel Members worked diligently throughout 2008 to increase the number of final decisions and, at year end, the Tribunal had released 3,000 final decisions. The overall picture for 2008 was a positive one.

While sunsets can be calming, the sun also rises. As it rose in the first month of 2009, the sun shone on a North American economy which was receding. Historically, a significant downturn in the economy has signaled a future increase in the number of appeals flowing through to the Tribunal as claims at the Workplace Safety and Insurance Board (WSIB) tend to increase. The average intake of new appeals at the Tribunal in 2007 was 272 per month. In the first quarter of 2008 it averaged 260 appeals per month; in the second quarter it dropped to 254 per month; and in the third quarter the intake dropped again to 239 per month. The trend was encouraging.

The scenario changed in the last quarter of 2008 and the monthly intake for the fourth quarter averaged 275 appeals. The intake increased in January of 2009 to 285. As mentioned in previous Annual Reports, the Tribunal attempts to build a significant degree of flexibility into its annual business plan and the adjudicative process. Spring training in 2009 should see a number of additions to the Tribunal's adjudicative line-up. The additions to the roster will not only replace the Vice-Chairs and Members who were lost during 2008, but also provide additional hearing/decision capacity in the last half of 2009 as they complete their training and gradually adjust to the

rigorous requirements relating to analysis of legal and medical issues, as well as a trend towards an increase in the number of more complex appeals.

Despite this trend, the Appeals Tribunal managed to preserve its unblemished record in judicial reviews during 2008. While the Supreme Court of Canada decision in *Dunsmuir* appeared to trigger an increase in judicial review applications, the Appeals Tribunal has now dealt with 77 judicial reviews and has remained successful in all of them. I believe that it is evidence of the quality of the Tribunal Vice-Chairs and Members, as well as the quality of our Tribunal Counsel. Hopefully, the streak will continue throughout 2009.

The year 2008 also saw the Appeals Tribunal expend significant resources in connection with the attempt by the Law Society of Upper Canada to regulate paralegals appearing in certain courts, boards and tribunals. The Tribunal's pre-hearing process includes the screening of representatives to ascertain their status with the Law Society. Quality of representation is a key factor in providing the Canadian public with a quality administrative justice system. Unfortunately, the Workplace Safety and Insurance system periodically encounters representatives who

## The Sun Also Rises



*"Quality of representation is a key factor in providing the Canadian public with a quality administrative justice system."*

## The Sun Also Rises

behave in an unprofessional way and cause significant problems for injured workers and employers. For example, a police investigation led to the charge and conviction of a representative who had appeared at the Board and Tribunal representing a significant number of injured workers. He was convicted of fraud in his first trial and, when the police laid additional charges after a further investigation, the Tribunal was asked to provide testimony regarding the representative's conduct. The Tribunal has a Code of Conduct for representatives and this individual had been permanently suspended under the terms of the Tribunal's Code in 2005. Nevertheless, significant Tribunal resources were expended in dealing with the appeals where this individual was the representative of record and had misled clients concerning the status of appeals and the Tribunal process. Fortunately, experienced Tribunal Vice-Chairs and Members were able to deal with these appeals despite the problems resulting from the unprofessional representation.

On a brighter note, 2008 was a year in which the Appeals Tribunal continued to benefit from support in the Injured Worker and Employer communities. Through its Advisory Group (composed of organizations involved with Ontario employers and injured workers) and through its Outreach program, the Tribunal attempts to keep the communities informed about the Tribunal's operation. These organizations are also committed to a quality administrative justice system in Ontario and constantly encourage the Tribunal's quest for quality.

Although the Tribunal achieved most of its goals in 2008, there are some uncertainties on the horizon for 2009. While the deteriorating economy may ultimately lead to an increase in the Tribunal's caseload, it is not yet clear how the Board's new service delivery model will impact on the WSIB Appeals Branch and, ultimately, the Appeals Tribunal. A declining economy also usually results in limitations on financial resources which, in turn, may require increased production creativity in the event the number of appeals increases. While the sun continues to shine on the Appeals Tribunal at the moment, there are some indications of storm clouds on the appeals horizon.

## Highlights of the 2008 Cases

This section reviews some of the many interesting legal, factual and medical issues considered by the Tribunal in 2008.

The Tribunal decides cases under four different Acts. The *Workplace Safety and Insurance Act, 1997* (WSIA) came into force on January 1, 1998. It establishes a system of workplace insurance for accidents occurring after 1997, and 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 2007, the WSIA and pre-1997 Act were amended by Schedule 41 of the *Budget Measures and Interim Appropriation Act, 2007*, effective July 1, 2007. The *Workplace Safety and Insurance Amendment Act (Presumptions for Firefighters), 2007*, also came into effect in 2007. Finally, the *Workplace Safety and Insurance Amendment Act, 2008*, regarding mandatory coverage in the construction industry, received Royal Assent in November 2008.

### Appeals Under the WSIA

The WSIA provides for a single loss of earnings (LOE) benefit which is reviewable for a period of 72 months on "material change of circumstances" or annually at the Board's discretion. The amount of a worker's LOE benefits depends on the extent to which the worker can return to the work force and replace his pre-injury earnings. The WSIA emphasizes the need for co-operation by the workplace parties in facilitating the worker's early and safe return to work (ESRTW). If ESRTW is not possible, the Board conducts a labour market re-entry (LMR) assessment and may offer an LMR plan to assist in identifying a suitable employment or business (SEB). The worker's LOE benefits are assessed in light of this SEB. The WSIA also provides for non-economic loss (NEL) awards for workers with permanent impairment.

Since LOE benefits are tied to the loss of earnings resulting from a compensable accident, LOE benefits are generally not payable to workers after they have retired. There is an exception where the worker has not withdrawn from the work force but intends to keep working despite his retirement. Two cases in 2008 raised the question of how the LOE benefit scheme applied to workers who develop long-latency occupational diseases after they retired.

In *Decision No. 1581/06*, 2008 ONWSIAT 932, 85 W.S.I.A.T.R. (online), the worker was a carpenter who was exposed to asbestos for approximately 20 years. At the age of 81, he was diagnosed with mesothelioma. He died a year later. The employer appealed an award of full LOE benefits, based on the earnings of a fully qualified worker at the time of diagnosis, for the year prior to the worker's death. The Tribunal requested submissions from the Board, who advised that there was no applicable policy and that Board practice in the area was under review. The Tribunal found that there was no statutory basis to pay benefits to workers who had retired and withdrawn from the work force even in cases where they subsequently developed an occupational disease. The worker's widow, however, was entitled to survivor benefits at the minimum rate since there was no statutory requirement that the deceased worker be entitled to loss of earning benefits.

*Decision No. 884/08*, 2008 ONWSIAT 3375, agreed with *Decision No. 1581/06*. While under the prior compensation schemes a retired worker could be entitled to benefits in certain circumstances, there was no basis in the WSIA for paying LOE benefits to a retired worker who did not have a loss of earnings as a result of the compensable injury. *Decision No. 884/08* also denied a request from

## Highlights of the 2008 Cases

the worker's representative that the decision be held in abeyance pending a resolution of an alleged inconsistency between *Decision No. 1581/06* and Board practice. The absence of Board policy on a specific legal issue is not generally a reason to hold a Tribunal decision in abeyance, particularly given the 120-day time limit on decision-making in the WSIA. In this case, the issue appears to require statutory amendment, rather than policy development, and there is no ongoing Board policy consultation process.

*Decision 495/06R*, 2008 ONWSIAT 1292, 85 W.S.I.A.T.R. (online), is an example of the type of issue which may arise in the course of deciding entitlement to LOE benefits. The worker was working 36 hours a week when he was injured. Should his LOE benefits be based on a 36-hour or 40-hour week? The Tribunal accepted a Board policy analyst's view that a worker's SEB should match as closely as possible the number of hours worked prior to the accident. LOE benefits should not be reduced based on an expectation that the worker would increase the number of hours worked post-injury in the identified SEB in order to mitigate wage loss.

When the WSIA was initially enacted, LOE benefits could not generally be reviewed after 72 months. Several 2008 decisions considered subsequent statutory amendments which permit review of final LOE awards in certain circumstances. *Decision No. 1641/08*, 2008 ONWSIAT 2412, 86 W.S.I.A.T.R. (online), considered the GEA amendment which allows review of a worker's LOE benefits after 72 months if the worker suffers a significant deterioration that results in a NEL redetermination. The Tribunal disagreed with the Board that benefits could only be reviewed once under this provision. The only statutory limitation is that the review must be conducted within 24 months of the NEL redetermination. *Decision No. 908/07R*, 2007 ONWSIAT 2475, 83 W.S.I.A.T.R. (online), considered the GEA amendment allowing review of LOE benefits where a worker was provided with an LMR plan and the plan was not completed before the 72 months

expired. The Tribunal rejected the Board's reconsideration request that benefits could only be reviewed within the 30 days following completion of the plan. The Board may review LOE benefits at any time until 30 days after completion of the plan and was not limited to only reviewing benefits after the plan was completed.

### Board Policy Under the WSIA

While the Tribunal has always considered Board policy, the WSIA expressly states that, if there is an applicable Board policy, the Tribunal shall apply it when making a decision. Section 126 provides that the Board is to provide applicable policy and sets out a process for the Tribunal to refer policy back to the Board if the Tribunal concludes that the policy is inapplicable, unauthorized or inconsistent with the Act. During 2008, there were no section 126 referrals. There were, however, a number of cases interpreting Board policy, as well as several requests by the Board to reconsider a decision in light of Board policy. While the Tribunal does consider Board reconsideration requests, the usual threshold test for granting reconsideration applies.

As noted in previous Annual Reports, Board policy often changes over time. The rights and obligations of the parties may vary significantly depending upon which version of a policy applies. Tribunal cases have previously found that section 126 policy is similar to legislation and the presumption against retroactivity applies. The 2007 Annual Report noted that *Decision No. 1170/07*, 2007 ONWSIAT 1936, 83 W.S.I.A.T.R. (online), had considered arguments that the Board should have given an earlier start date to its new policy on offsetting CPP disability benefits from partial future economic loss (FEL) awards under the pre-1997 Act. The new policy's effective date is January 1, 2004. *Decision No. 1170/07* noted that there were two lines of Tribunal decisions on the Board's prior 1996 policy; however, no decisions had found that the

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1996 policy was inconsistent with or not authorized by the Act. The Board was acting within its discretion in adopting the new policy and in setting the start date. The effective date of the board's new CPP offset policy continued to be the subject of dispute in 2008. *Decisions No. 1261/08*, 2008 ONWSIAT 2116, and *1800/07*, 2008 ONWSIAT 786, agreed with the analysis in *Decision No. 1170/07*. There is now a consistent line of Tribunal decisions that the Board's original policy to offset CPP benefits against partial FEL awards is consistent with the pre-1997 Act and that the new policy's effective date of the January 1, 2004 is within the Board's discretion.

In *Decision No. 2694/07*, 2008 ONWSIAT 13, 84 W.S.I.A.T.R. (online), the Tribunal considered an argument that the Combined Values Chart should not apply to workers with psychotraumatic disabilities. It was submitted that the American Medical Association (AMA) Guides, which are the prescribed rating schedule, do not include a rating schedule for psychotraumatic disability and the reference in Board policy to body areas or symptoms should not be read to extend to psychotraumatic disability. The AMA Guides provide for five classes of impairment for psychotraumatic disability but, unlike other impairments, there are no specific numerical readings. The Guides, however, contemplate that it may be necessary for persons using the Guides to determine the numerical ratings. The Board has done this in its policy. There is nothing in the wording of the Guides to suggest that the Combined Values Chart should apply differently if numerical ratings are set. The Regulations require that the Board carry out ratings for impairments that are not addressed in the AMA Guides in a manner that is most consistent with the criteria in the listings that are most analogous. *Decision No. 2694/07* found that the Board's policy assigning numerical ratings to the five AMA classes of psychotraumatic disability and its practice of applying the Combined Values Chart

to determine whole-body ratings, even when one of the awards is for psychotraumatic disability, results in the most analogous ratings.

*Decision No. 230/06R2*, 2008 ONWSIAT 3135, considered a Board reconsideration request that the new interest policy does not authorize payment of interest on health care benefits. While the Board's request was granted based on the wording of the new policy, *Decision No. 230/06R2* commented that, in its view, there was no

*The only statutory limitation is that the review must be conducted within 24 months of the NEL redetermination.*

substantive difference between the old and new interest policies. The decision held that interest could be payable under the new policy in exceptional circum-

stances but took a narrower approach to "exceptional circumstances" than prior Tribunal decisions on interest. Exceptional circumstances might exist where the worker paid for the health care, and delay in obtaining the health care might adversely affect the worker's health. In this case the dispute involved home renovations and there were no exceptional circumstances. *Decision No. 230/06R2* is also interesting for its discussion of the distinction between retroactive, retrospective and immediate application of Board policy.

The Board has adopted policy under the WSIA provisions which recognize entitlement for mental stress where there is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment. The Board's policy includes the concept of the cumulative effect of traumatic incidents for workers who may be exposed to traumatic situations due to the nature of the employment. *Decision No. 1839/07*, 2008 ONWSIAT 176, 84 W.S.I.A.T.R. (online), considered this policy in the context of an appeal by a worker who was a telecommunications officer for a police force. She took incoming emergency calls and

## Highlights of the 2008 Cases

dispatched police and other emergency service workers as required. The Panel determined that, in deciding whether an incident is traumatic, the average worker test applied. The fact that an emergency worker experiences traumatic events on a regular basis does not make those events less traumatic, but does have a bearing on the question of whether the events are sudden and expected. The policy on “cumulative” trauma should be interpreted so as to grant entitlement to workers who, because of the nature of their work, experience traumatic events which are not entirely unexpected. If the provision were read so as to require each discrete event to be sudden and unexpected, there would be little use for the provision, as each event would be compensable in and of itself.

*Decision No. 94/04*, 2008 ONWSIAT 1797, 86 W.S.I.A.T.R. (online), considered the Board’s policy on deducting CPP benefits from section 147(2) supplementary benefits which are available to workers receiving pensions under the earlier Acts. An earlier Board Minute and the Board’s policy provide for the deduction of CPP benefits prior to the application of the statutory cap on supplementary benefits; however, the Board submitted that the wording of the document was in error. The worker argued that the policy should be applied. *Decision No. 94/04* allowed the appeal as the method of calculation set out by the Minute and policy was not absurd or otherwise inconsistent with the Act.

### Right to Sue Applications

The WSIA and earlier *Workers’ Compensation Acts* are based on the “historic trade-off” in which workers gave up the right to sue in exchange for statutory no-fault benefits. The Tribunal has the exclusive jurisdiction to decide whether a worker’s right to sue has been removed by the Act. Right to sue applications may raise complicated legal

issues, such as the interaction between the WSIA and other statutory schemes.

*Decision No. 2126/07*, 2007 ONWSIAT 2689, 84 W.S.I.A.T.R. (online), illustrates the type of disputes which the Tribunal may be called on to resolve under section 31

*...areas of injury were remote from the original injury and that the hospital was negligent in failing to warn the worker...*

of the WSIA. While receiving treatment in hospital for a compensable condition, a worker fainted and sustained injuries to different parts of his

body. Tribunal decisions have generally found that, where further injury results from negligent medical treatment, the additional injury is generally foreseeable; the worker is entitled to compensation and the right of action is removed. *Decision No. 2126/07* held that the arguments that the new areas of injury were remote from the original injury and that the hospital was negligent in failing to warn the worker and supervise him following treatment, did not distinguish the case from prior Tribunal cases.

An issue which has arisen in previous years is whether the Tribunal has jurisdiction to determine a section 31 application where the worker has received statutory accident benefits (SABs) under the *Insurance Act* but no court action has been commenced. While early cases found there was no jurisdiction, two decisions in 2007 considered more extensive submissions and found that the Tribunal has jurisdiction. *Decision No. 1288/08*, 2008 ONWSIAT 2572, agreed with the more recent cases that the Tribunal has jurisdiction to consider a SABs insurer’s section 31 application. *Decision No. 1288/08* applied the reasoning in *Decision No. 14/06*, 2007 ONWSIAT 339, 81 W.S.I.A.T.R. (online), in finding that the insurer had standing to bring an application under section 31(1)(a). The phrase in section 31(1)(a) “right to commence an action”, includes situations in which the right has been conferred but has not been acted upon or triggered.

## Highlights of the 2008 Cases

*Decision No. 1988/08/*, 2008 ONWSIAT 3231, is another case which considered the Tribunal's jurisdiction, this time whether it continues to have jurisdiction under the pre-1989 Act to consider whether the Board is entitled to offset the surplus received in a subrogated court action against a subsequent increase in the worker's pension.

*Decision No. 1988/08/* agreed with prior Tribunal caselaw that the relevant provisions in the pre-1989 Act are continued by the WSIA. Accordingly, the Tribunal has jurisdiction; however, there was no reason to reverse the Board's decision. The pre-1989 Act did not limit the Board to deducting only future payments. The statutory provision was also broad enough to encompass an offset for administrative costs. The Board had used a 10% figure to estimate the cost of administering claims and this was reasonable and not inconsistent with the Act.

### Employer Issues

Appeals involving employer issues, such as classifications, transfers of costs and adjustments of experience rating accounts, continue to form a significant part of the Tribunal's case load.

*Decision No. 1203/08*, 2008 ONWSIAT 2517, illustrates a fundamental difference between requirements contained in Board policy and those in Regulation. "Exceptional circumstances" or "manifest unfairness" may justify variation in the application of Board policy; however, they cannot be used to avoid requirements in a Regulation. Since payroll segregation and multiple rate group rules are prescribed by Regulation, *Decision No. 1203/08* held that they could not be varied by an agreement with the Board staff.

Second Injury and Enhancement Fund (SIEF) relief is an issue frequently appealed to the Tribunal. *Decision No. 526/08*, 2008 ONWSIAT 866, 85 W.S.I.A.T.R. (online), considered when 100% SIEF relief is available. Board policy

provides that 100% SIEF relief is available when a prior non-work-related condition is the "cause" of the accident. It was found that "cause" refers to the precipitating or triggering cause; for example, when a worker falls at work because he has an epileptic seizure at work. In other circumstances, SIEF relief is based on the Board's table for rating the medical significance of pre-existing conditions and the severity of the accident. In this case, the worker aggravated a pre-existing knee condition when he stepped on an air hose at work. The Board had granted 90% SIEF relief. Since the pre-existing condition did not precipitate or trigger the injury, the employer was not entitled to 100% SIEF. Under the rating table, there is a range of possible awards in the upper category. It is not practicable or reasonable to attempt to distinguish between very minor differences, such as between 93% and 94%. This was a case, however, in which it was appropriate to award SIEF relief in the middle of the range; SIEF relief was increased to 95%. The worker had had two prior failed reconstructive knee surgeries and a more recent arthroscopy. The 5% cost impact to the employer was sufficient, if not more than sufficient, to reflect the contribution of the workplace triggering event to the worker's injury.

Previous Annual Reports have noted that the Tribunal has found that the Board is entitled to consider updated information when implementing retroactive adjustments ordered by the Tribunal. *Decision No. 635/02*, 2008 ONWSIAT 1427, 86 W.S.I.A.T.R. (online), applies this caselaw to implementation of a retroactive adjustment ordered at the Board level. Before the ARO, the employer succeeded in increasing its SIEF relief from 50% to 75% but, when the decision was implemented the CAD-7 surcharge increased by about \$30,000 to \$38,000. After reviewing the formulae used in the calculations, *Decision No. 635/02* determined that the increase was due to a change in the employer's frequency index which is used to calculate the performance index. While it might seem counter-intuitive for an increase in SIEF relief to result

## Highlights of the 2008 Cases

in an increased surcharge, the CAD-7 rating scheme is updated prior to the application of SIEF relief. In this case, the frequency index had changed due to the payment of further benefits in a different claim.

Finally, a novel issue arose in *Decision No. 800/07*, 2008 ONWSIAT 1993, 86 W.S.I.A.T.R. (online), respecting the effect of provisions in the NEER plan when an employer closes its manufacturing operations in Ontario. The employer argued a NEER surcharge was unfair because the employer was no longer in a position to re-employ injured workers or improve health and safety. The Tribunal found that, while the text of the NEER plan is not official Board policy, it may be used as a reference. The text of the plan indicates that discretion is to be exercised when an employer's business is reorganized or discontinued. On the facts, however, there was no reason to adjust the surcharge until the last quarter of the final year. There was only minimal impact on the return of injured workers prior to that date.

### Occupational Disease

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

Occupational disease cases often involve an analysis of epidemiological evidence and Board policy. *Decision No. 400/08*, 2008 ONWSIAT 2508, is a good example of this type of appeal. The worker was an underground miner for more than 30 years in Manitoba and Ontario. He was diagnosed with chronic obstructive lung disease and lung cancer at the age of 62 and died shortly thereafter. Starting in 1957, he had had 14 years of gold mining



in Manitoba, followed by uranium mining in Ontario. *Decision No. 400/08* contains a thorough review of the scientific research and development of the 1999 Board policy on uranium mining and cancer. The worker's radiation exposure was 31.12 WLMs (working level months), well below 40 WLMs required by Board policy; however, the Tribunal found that the prior out-of-province gold mining exposure constituted a pre-existing vulnerability. There was also sound epidemiological evidence that the mixture of gold and uranium mining increases chances of individuals developing lung cancer. Factoring in even a relatively minor amount for the out-of-province gold mining would bring the worker within the accepted relative risk for entitlement.

In cases where there is no Board policy and limited epidemiological evidence, medical evidence specific to the worker may establish that the worker's occupational disease is attributable to the workplace. The Tribunal maintains a roster of independent medical assessors and a Panel or Vice-Chair hearing a case may commission an expert opinion from a medical assessor or a review of the medical literature. *Decisions No. 2417/06*, 2008 ONWSIAT 1138, and *2442/06*, 2008 ONWSIAT 2320, are examples of such cases. *Decision No. 2417/06* allowed a worker's claim for initial entitlement for tonsillar cancer due to asbestos exposure. There is no Board policy on tonsillar

## Highlights of the 2008 Cases

cancer, although there is Board policy dealing with laryngeal cancer arising from asbestos exposure. *Decision No. 2417/06* accepted the evidence of a medical assessor that there was a likely causal relationship between the worker's occupational exposure to asbestos and the development of his tonsillar cancer. While the assessor acknowledged that the connection between the exposure and the cancer had not been conclusively established in the literature, the law does not require causation to be established with scientific certainty but on the balance of probabilities. In *Decision No. 2442/06*, the Tribunal denied a claim for entitlement for liver disease (non-cirrhotic portal hypertension) due to exposure to hexachloroethane. A medical assessor's report did not support a workplace contribution. An inference of causation cannot be made by simply demonstrating that there is a possibility of some causal connection, nor can the statutory benefit of the doubt provision be used as a substitute for evidence.

In 2007 the WSIA was amended to include a presumption for certain heart injuries and occupational diseases sustained by firefighters. *Decision No. 1194/07*, 2008 ONWSIAT 131, 84 W.S.I.A.T.R. (online), is the first decision to consider these amendments and, in particular, the presumption in favour of a worker who suffers a heart injury while, or within 24 hours of, attending a fire scene or actively participating in a training exercise that includes a simulated fire emergency. *Decision No. 1194/07* found that the Legislature intended that claims covered by the new presumption should be referred back to the Board. In this case, however, the Tribunal should decide the appeal as the presumption did not apply. Although the worker suffered a heart attack while attending an in-class training session, he had not worked for four days prior to the training session and the session itself did not involve a simulated fire emergency. The evidence in *Decision No. 1194/07* included a report from the Industrial Disease Standards Panel on cardiovascular disease among firefighters. *Decision No. 1194/07* agreed with prior Tribunal deci-

sions that IDSP reports are intended for use in developing Board policy and not as evidence in deciding individual cases. The report raised no more than a possibility of a causal connection between cardiovascular disease and firefighting. The Tribunal found that the worker had not suffered a disablement due workplace exposure to smoke and fumes. The worker had not attended hospital, sought medical attention, become ill or lost time as a result of any exposures. He also had a number of recognized risk factors, specifically smoking, age, gender, cholesterol level and weight.

## Paralegal Regulation

Following the 2007 amendments to the *Law Society Act* which introduced paralegal regulation, the Tribunal has taken steps to ensure that paralegals who represent parties at the Tribunal meet the Law Society's requirements. The Tribunal notified representatives of their obligations under the *Law Society Act*, facilitated the licensing process by developing a reference procedure, and monitored its caseload closely to ensure that hearings were not lost as a result of a representative's failure to take appropriate action. In 2008, paralegal regulation arose as an issue in a number of Tribunal decisions.

*Decisions No. 598/08*, 2008 ONWSIAT 1839, 86 W.S.I.A.T.R. (online), and *2508/07*, 2008 ONWSIAT 1873, 86 W.S.I.A.T.R. (online), were the first two decisions to consider the Tribunal's jurisdiction to engage in an inquiry regarding the status of an unlicensed paralegal who does not appear to be covered by one of the exemptions in the *Law Society Act* and By-laws. Both decisions found that the Tribunal has jurisdiction to undertake an inquiry directed to whether the representative appears to be entitled to act in the circumstances of the particular case. A final decision on the representative's actual status must be made by the Law Society.

## Highlights of the 2008 Cases

In *Decision No. 598/08*, the Tribunal decided as a preliminary matter that the representative appeared to be covered by the exemption for representation by a friend, and the hearing proceeded. The status issue was more complicated in *Decision No. 2508/071* and various options were reviewed. In situations where it is clear that the representative is not registered and not exempt, the Tribunal may decide that the hearing should not proceed as the *Law Society Act* makes such representation unlawful. Where the representative's status is unclear, the Tribunal may decide that the hearing should proceed and that the representative's status should be referred to the Tribunal Chair. In deciding whether the matter should proceed, the potential to bring the administration of justice into dispute if the representative is found to be unauthorized should be balanced against the parties' right to a hearing without undue delay.

Subsequent decisions have taken a similar approach. In *Decision No. 1489/081*, 2008 ONWSIAT 2414, 86 W.S.I.A.T.R. (online), for example, the Tribunal was satisfied that it appeared that the representative, a certified general accountant (CGA), was covered by the exemption for persons acting in the normal course of carrying on a profession or occupation governed by another Act. It emphasized, however, that the ruling was limited to the facts before it and should not be taken as authority for the proposition that all CGAs are exempt. There was also an issue about whether the representative had the insurance required to act as a CGA. *Decision No. 1489/081* held that implicit in the requirement to act "in the normal course of carrying on" another regulated profession is the requirement to have any necessary insurance. The representative was put on notice that if he continued to act in the proceedings, the question of whether he had obtained any necessary insurance would be referred to the Tribunal Chair. On the other hand, in decisions where the Tribunal has been satisfied that the unlicensed representative appears to fall under an exemption, the hearing has been allowed to proceed.

## Other Legal Issues

Legal principles governing causation are of fundamental importance to Tribunal decision-making. In determining causation, the Tribunal applies the "significant contribution" and makes decisions on the balance of probabilities. *Decision No. 776/06*, 2008 ONWSIAT 2939, discussed the recent decisions on causation in *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, and *Monks v. ING Insurance Co. of Canada*, [2008] ONCA 269, 90 O.R. (3rd) 689. While *Resurface* held that the "but for" test is the usual causation test and that the "material contribution" test applies in special circumstances, the more recent Court of Appeal decision in *Monks* held that *Resurface* did not alter the basic causation principles set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458. *Athey* has been applied in numerous Tribunal decisions. *Decision No. 776/06* found that it would require very detailed submissions to depart from the Tribunal's longstanding approach to causation. It also did not appear that the "but for" test would lead to a different result on the facts.

*Decision No. 1529/0412*, 2008 ONWSIAT 547, 85 W.S.I.A.T.R. (online), considered whether the Tribunal has jurisdiction to apply the Ontario *Human Rights Code* and, if so, whether the Code applies to benefits payable under the WSIA. Applying *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513, *Decision No. 1529/0412* held that the Tribunal has jurisdiction to consider the Code. *Decision No. 1529/0412* distinguished previous Tribunal decisions which have found that benefits are not "services" under the Code, due to the exclusion for "periodic payments imposed by law". The earlier decisions did not have the benefit of detailed submissions and also relied on a Tribunal decision which had been released prior to the Supreme Court of Canada's decision in *Berg v. University of British Columbia*, [1993] 2 S.C.R. 353, which highlighted the privileged status of Human Rights legislation. The hearing will reconvene

## Highlights of the 2008 Cases

to hear arguments on whether the application of the Combined Values Chart to reduce NEL awards of workers with prior NEL awards, but not to awards for workers with prior non-compensable impairments or impairments subject to a pension award, violates the *Human Rights Code* or the *Charter of Rights*.

A series of 2008 cases considered the effect of issue estoppel. This is a legal doctrine which applies to administrative tribunals as well as courts. It prevents a litigant from continuing to dispute an issue once it has been finally decided. The three prerequisites for issue estoppel are: (1) that the same question or issue has been decided, (2) that the decision was judicial and final and, (3) that the parties to the decision or their privies are the same. Prior Tribunal cases have applied the Supreme Court of Canada's analysis in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, which recognizes that there is a discretion to allow a matter to proceed, even though the prerequisites for issue estoppel have been met. Discretion is exercised to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in a particular case. The 2008 decisions indicate the care that must be taken in deciding whether the same issue has been decided in prior Tribunal decisions and also provide more guidance on when the discretion is exercised.

*Decision No. 1/07I*, 2008 ONWSIAT 873, 85 W.S.I.A.T.R. (online), is an example of a case where issue estoppel did not apply as the issues in the current appeal were distinct from those decided in the prior Tribunal decision. In *Decision No. 792/08I*, 2008 ONWSIAT 1131, 85 W.S.I.A.T.R. (online), the Tribunal identified some overlap between the issue on appeal and issues decided in a prior Tribunal decision; however, deciding the current appeal did not necessarily require reopening the prior decision. While issue estoppel did not apply to the new issues, the Tribunal

was bound by findings made in the prior decision and would not consider submissions on issues decided in that prior decision. In *Decisions No. 2796/07*, 2008 ONWSIAT 760, 85 W.S.I.A.T.R. (online), *1062/08*, 2008 ONWSIAT

1770, and *1877/06*, 2008 ONWSIAT 1458, the Tribunal found that the issues had been previously decided in prior Tribunal decisions and the preconditions for issue estoppel applied.

### *Legal principles governing causation are of fundamental importance to Tribunal decision-making.*

In those cases, it was also found that there was no reason to exercise the discretion not to apply issue estoppel. Any concerns about unfairness or injustice due to the prior decision could be raised in a request to reconsider the prior decision.

*Decision No. 2621/07I*, 2008 ONWSIAT 2842, considered whether the appellant was estopped from arguing that she was a common law spouse by a finding that she was not a common law spouse by a Canada Pension Plan adjudicator. The legal issue was the same; however, the CPP adjudicator applied specific policy criteria which were not found in Board policy. *Decision No. 2621/07I* held that issue estoppel did not apply. The Tribunal will have to weigh the evidence and consider what factors are important. Also, the Tribunal did not consider the parties to be the same. The worker's children from a previous marriage had raised the issue under WSIA but had not participated in the CPP proceedings. Even if the prerequisites for issue estoppel had been met, *Decision No. 2621/07I* would have exercised the discretion to allow the matter to proceed. There was no abuse of process by the appellant; it was the worker's children who raised the issue under the WSIA.

Finally, *Decision No. 167/06R2*, 2008 ONWSIAT 1943, 86 W.S.I.A.T.R. (online), is of interest for its consideration of the interaction between proceedings under the *Regulated*

## Highlights of the 2008 Cases

*Health Professions Act* and Tribunal proceedings. It held that Tribunal hearings are “civil proceedings” under the *Regulated Health Professions Act*. Since that Act prohibits use of evidence submitted to the College in “civil proceedings”, the Tribunal could not consider evidence submitted to the College, even though the same evidence had also been sent by the doctor to the Board and arguably had a dual purpose.

# Applications for Judicial Review and Other Proceedings

## Judicial Review

As noted in the 2007 Annual Report, WSIAT appealed two Divisional Court decisions which had quashed Tribunal decisions to the Ontario Court of Appeal. The Court of Appeal granted both appeals in 2008.

Thus, at the end of 2008, after 23 years and over 48,000 decisions, not one of the decisions released by the Tribunal has ever been ultimately quashed by the courts. This is a remarkable record.

The matters outlined in this section demonstrate that there was a considerable amount of judicial review activity in 2008. 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 review applications where there was some significant activity during 2008 have been included below. There are a number of other applications for judicial review which have been adjourned for various reasons, and have not been finally concluded.

**1** *Decision No. 433/99* (June 24, 1999) and *Decision No. 433/99R, 2000 ONWSIAT 1439; Mills v. Workplace Safety and Insurance Appeals Tribunal* (November 15, 2006) Ontario Divisional Court; *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, Ontario Court of Appeal

A worker injured his 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, 2006. On November 15, 2006 the Divisional Court panel of Smith, Kent and Pierce released its decision granting the application for judicial review and quashing *Decisions No. 433/99* and *433/99R*.

The Divisional Court held that there were several errors in the Tribunal's fact finding which, although individually 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.

The Tribunal filed a Notice of Motion for Leave to Appeal. The Court of Appeal granted Leave to Appeal on May 31, 2007 (Rosenberg, Rouleau and Killeen). The appeal was heard by the Court of Appeal on February 1, 2008 (Rouleau, Weiler and Watt). The Court reserved its decision.

Following the release of the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Court of Appeal invited the parties to make further submissions relating to the standard of review pursuant to *Dunsmuir*.

The Court of Appeal released its decision on June 3, 2008 unanimously allowing the Tribunal's appeal. Justice Rouleau, writing for the Court, affirmed that the standard

## Applications for Judicial Review and Other Proceedings

of review of decisions of the Tribunal was now reasonable. Citing the Supreme Court's decision in *Dunsmuir*, he stated that the existing jurisprudence has established that the highest level of deference applies to Tribunal decisions. The issues on appeal related to findings of fact made by the Tribunal. "These findings fall squarely within the Tribunal's area of experience and expertise and the basis for the findings is articulated in the Tribunal's reasons."

The Court of Appeal held that Divisional Court erred in its analysis of the evidence. There was a sufficient evidentiary basis and a rational basis for the Tribunal's conclusion that the worker's back problems were not causally connected to the 1979 injury: "Neither the reasoning nor the conclusion is unreasonable."

**2** *Decision No. 855/03*, 2005 ONWSIAT 2490, 76 W.S.I.A.T.R. (online) ; *Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)* (2007), 87 O.R. (3d) 71, Ontario Divisional Court; *Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 719, 92 O.R. (3d) 757, Ontario Court of Appeal

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 denied by *Tribunal Decision No. 855/03*. The Vice-Chair held that Board policy did not include benefit payments

and pension plans in calculating earnings. 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 WSIB successfully brought a motion to intervene in the judicial review.

The Divisional Court Panel of Jennings, Swinton and Lederman released its decision on September 10, 2007. The majority of the Panel, consisting of Justices Jennings and Lederman, held the Tribunal's decision was patently unreasonable because it failed to consider the evidence of legislative history contained in submissions made to the Tribunal Vice-Chair. They ruled the decision should be referred back to the Tribunal for a re-hearing in accordance with the findings of the majority.

In her dissenting reasons, Justice Swinton held that a failure to refer to legislative history did not render the Tribunal's decision patently unreasonable. She noted this had not been raised before the Board, was not a major issue referred to in other submissions, and moreover a failure to refer to certain evidence is not necessarily fatal to the decision of an administrative tribunal. Justice Swinton also observed that legislative history plays a limited role in the interpretation of legislation because of concern about its reliability. She held that the Tribunal's conclusion in this case was within its specialized expertise.

The Court of Appeal granted leave to appeal (Winkler, Rosenberg and Lang). The WSIB again intervened.

The Court of Appeal Panel of Borins, Rosenberg and Gillese heard the appeal on September 11, 2008. The decision was released on October 21, 2008. In a majority decision (Gillese dissenting), the Court allowed the Tribunal's

## Applications for Judicial Review and Other Proceedings

appeal. The majority agreed with Justice Swinton that the Tribunal's decision was not unreasonable. The Tribunal fulfilled its task to determine the meaning of earnings according to the Act and Board policy. The Tribunal's failure to refer to legislative history did not render its decision patently unreasonable. The majority held the Tribunal considered the proper evidence, and applied Board policy in finding the employer's contributions for employment benefits should not be included when calculating pre-accident earnings.

The majority also noted that the privative clause in the legislation is the "toughest" known to Ontario law. Although the standard of review after *Dunsmuir* is reasonableness, existing jurisprudence demonstrates that reviewing courts can only interfere if they find there are no lines of reasoning supporting the decision that could have reasonably led the Tribunal to reach the decision that it did.

In her minority reasons, Justice Gillese would have dismissed the appeal on the grounds that the Tribunal had not specifically referred to relevant evidence in its decision.

The worker has served the Tribunal with an application for leave to appeal to the Supreme Court of Canada.

**3** *Decision No. 172/02I, 2002 ONWSIAT 523, Decision No. 172/02, 2003 ONWSIAT 2088, and Decision No. 172/02R, 2004 ONWSIAT 1388; Singh v. Ontario (Workplace Safety and Insurance Appeals Tribunal), [2008] O.J. No. 292, Ontario Divisional Court*

In January 1995 the 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 reconsideration request to reconsider for benefits as of 1996 was dismissed.

The worker commenced an application for judicial review. On January 24 2008 the Divisional Court Panel of Swinton, Lane and Kitley released its decision, unanimously dismissing the application for judicial review. The Court rejected the applicant's argument that the Tribunal was required to specifically refer to the Board policies which it applied in its decision. The Tribunal's findings of fact were "well reasoned and comprehensive" and not patently unreasonable. A Charter argument raised for the first time on judicial review was dismissed, as the applicant did not satisfy the onus of demonstrating the Divisional Court should deal with the constitutional arguments.

After considering written submissions, the Court accepted the Tribunal's submission for an order of costs in the amount of \$2,000.

**4** *Decision No. 1118/07, 2007 ONWSIAT 1557, 83 W.S.I.A.T.R. (online); Dionne v. Ontario Hydro (2008), 93 O.R. (3d) 61, Ontario Divisional Court*

The plaintiff was allegedly injured while employed at a nuclear generating station. He brought an action against his employer. The employer's application to the Tribunal for an order taking away the plaintiff's right to sue was granted. The Vice-Chair found that although the employer was a federal undertaking, this did not take away the Tribunal's jurisdiction. He found that the *Nuclear Liability Act* (NLA) did not limit the right to claim compensation.

The plaintiff's application for judicial review was unanimously dismissed by the Divisional Court Panel of Ferrier,

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Wilson and Lederman on October 29, 2008. Although the Tribunal argued the standard of review was reasonableness, the Court found the Tribunal's decision was correct so it was not necessary to decide whether the reasonableness standard applied. The Court agreed with the Tribunal's conclusion that NLA did not create a new statutory tort, that federal jurisdiction over nuclear power did not oust the provincial jurisdiction over employee compensation, and that section 12 of the NLA preserved the rights under the provincial *Workers' Compensation Act*.

The worker has filed an application for leave to appeal to the Court of Appeal.

**5** *Decision No. 167/06*, 2006 ONWSIAT 523, *Decision No. 167/06R*, 2006 ONWSIAT 2930, and *Decision No. 167/06R2*, 2008 ONWSIAT 1943, 86 W.S.I.A.T.R. (online)

The worker's appeal for chronic pain entitlement and/or for permanent impairment of the low back on an organic basis was denied by the Tribunal. The worker's family doctor had submitted a letter suggesting the worker was a malingerer. The letter was addressed to the College of Physicians and Surgeons of Ontario, apparently in response to a complaint filed against the doctor on behalf of the worker. The Vice-Chair relied on the letter as part of the evidence he considered in denying the worker's appeal. An application to reconsider was dismissed by the same Vice-Chair.

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings with the Court. Following conversations between the worker's counsel and Tribunal counsel, General Counsel recommended to the Chair of the Tribunal that the Tribunal undertake a further reconsideration of *Decisions No. 167/06* and *167/06R* on its own initiative. The Chair of the Tribunal assigned the reconsideration to a different Vice-Chair.

In *Decision No. 167/06R2*, the new Vice-Chair found the threshold test to reconsider had been met. She held that the doctor's letter was not admissible as evidence at a Tribunal hearing by virtue of section 36(3) of the *Regulated Health Professions Act*. Section 36(3) states:

No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act*.

The Vice-Chair directed that the doctor's letter and references to the content of the letter were to be removed from the Tribunal Record for the purpose of the reconvened appeal. She also directed that *Decisions No. 167/06* and *167/06R* were to be amended to delete the portions of those decisions that incorporate portions of the doctor's letter. Vice-Chair Smith directed that the appeal be heard again on the merits.

As a result of the reconsideration decision, counsel for the worker filed a notice of abandonment of the application for judicial review.

**6** *Decision No. 207/05*, 2005 ONWSIAT 812, and *Decision No. 207/05R*, 2006 ONWSIAT 40

The plaintiff was injured in a motor vehicle accident while a passenger in a tractor-trailer. The truck was driven by the defendant driver, and owned by the defendant trucking company. The defendants applied to the Tribunal for an order that the plaintiff's right of action against them was taken away.

The Vice-Chair found both the plaintiff and the defendant driver were workers of the defendant Schedule 1 trucking company, and that they were in the course of employment at the time of the accident. The Vice-Chair held the plaintiff's right of action was taken away.

## Applications for Judicial Review and Other Proceedings

The plaintiff commenced an application for judicial review more than two years after the Tribunal's reconsideration decision was released.

The Tribunal filed its Record of Proceedings. The defendant trucking company, which is the Tribunal's co-respondent in the judicial review, brought a motion to strike the judicial review for delay. As the plaintiff had not provided an explanation for the delay, the Tribunal supported the motion. The motion was heard on August 15, 2008. Justice Low dismissed the motion, without prejudice to the respondents renewing their request to dismiss for delay to the Divisional Court Panel hearing the judicial review.

The Tribunal's co-respondent is in the process of retaining new counsel. The Tribunal has filed its factum for the judicial review application and is waiting for a hearing date.

**7** *Decision No. 2191/05I*, 2006 ONWSIAT 1671, and *Decision No. 2191/05*, 2007 ONWSIAT 2764

The worker appealed to the Tribunal for entitlement for multiple myeloma, which he alleged was caused by benzene exposure. After obtaining the opinion of an independent occupational hygienist, the Panel denied the appeal on the grounds that the worker's exposure to benzene in the workplace was insignificant.

The worker commenced an application for judicial review in late 2007. The Tribunal was then informed by the worker's former counsel that the application would not in fact be proceeding. Several months later the worker advised the Tribunal that he was in remission and that he had discharged his counsel and was now representing himself.

The Tribunal filed its Record of Proceedings. The Tribunal is waiting for the worker to serve his factum. Late in 2008 the Divisional Court Registrar sent the worker a notice requiring him to perfect within 10 days or the judicial review application would be dismissed.

**8** *Decision No. 610/05*, 2005 ONWSIAT 2103, and *Decision No. 610/05R*, 2006 ONWSIAT 1257, 78 W.S.I.A.T.R. (online)

The worker, who was self-represented, was denied entitlement for a cardiac condition by a Tribunal decision. The worker commenced an application for judicial review, on which he is also representing himself. The worker is alleging numerous errors and breaches of natural justice by the Panel. It is anticipated this judicial review will be heard during the first quarter of 2009.

**9** *Decision No. 893/06*, 2006 ONWSIAT 2265, and *Decision No. 893/06R*, 2007 ONWSIAT 2860

The worker appealed the amount of his benefits as based on his earnings. His short-term earnings were calculated based on his earnings of \$25 an hour, with no deductions, at the time of the injury. The average earnings were considered to have been reduced after 13 weeks, at which point they were based on the worker's earnings over the prior 24 months as reported to the Canada Revenue Agency through his income tax returns. The worker appealed to the Tribunal, alleging that his earnings should continue to be based on \$25 an hour.

The Vice-Chair denied the appeal. He found the worker to be a "non-permanent employee" within the meaning of Board policy, and it was appropriate to apply Board policy to recalculate the earnings after 13 weeks to reflect average earnings. The earnings should be based on the net average earnings, not the actual gross earnings. The Vice-Chair held that the income tax records of the worker identified the true nature of the earnings of the worker. The same Vice-Chair denied the worker's application for reconsideration.

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings. The worker then discharged his counsel and is now representing

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himself. The Tribunal is currently waiting to receive the worker's factum.

10

*Decision No. 351/07, 2007 ONWSIAT 697 and  
Decision No. 351/07R, 2008 ONWSIAT 662*

The worker's appeal for total disability benefits for a 10-year period on the basis of his self-directed vocational rehabilitation plan was denied by the Tribunal. The worker has commenced an application for judicial review of the Tribunal's decisions.

In addition the worker seeks an interlocutory order certifying the judicial review as a class proceeding on behalf of all persons who have had benefits under the *Workers' Compensation Act* or *Workplace Safety and Insurance Act* denied solely on the basis of an adverse finding on their self-directed vocational rehabilitation plan.

Linking a class action with a judicial review is a novel remedy so far as the Tribunal is concerned. At the end of the quarter the Tribunal was preparing its Record of Proceedings.

11

*Decision No. 1509/02, 2004 ONWSIAT 196, and  
Decision No. 1509/02R, 2006 ONWSIAT 2179;  
Decision No. 2021/07E, 2007 ONWSIAT 2548*

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.

Sister #2 then 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 basis of the reconsideration application was that the Panel had failed to consider the worker's alternative argument that entitlement could have been granted on the basis of a recurrence. The Vice-Chair denied the reconsideration on the grounds that the worker had failed to explicitly appeal the recurrence issue to the Tribunal. However, the Vice-Chair also noted that there was a final decision of the Board on the recurrence issue, and it was open to the worker to bring a time extension application should she still wish to pursue that issue at the Tribunal.

Following the release of *Decision No. 1509/02R*, the worker retained new counsel. Her new counsel filed a time extension application. In *Decision No. 2021/07E*, a different Vice-Chair denied the request for a time extension.

The worker's counsel has commenced an application to reconsider the denial of the time extension.

The judicial review application is still pending.

## Applications for Judicial Review and Other Proceedings

### 12 *Decision No. 1248/98, 2003 ONWSIAT 2470, and Decision No. 1248/98R, 2007 ONWSIAT 2528*

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

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

The worker commenced an application for judicial review. He is self-represented. The Tribunal served and filed its Record. The worker has refused to pay for the transcripts of the hearing or to file a factum. The Tribunal is waiting to receive the worker's factum.

### 13 *Decision No. 832/04, 2004 ONWSIAT 2385, and Decision No. 832/04R, 2007 ONWSIAT 936*

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

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

The worker commenced an application for judicial review. The worker has filed an affidavit alleging that comments made by the Vice-Chair prior to the hearing constitute an apprehension of bias. Tribunal is waiting to receive the worker's factum. This case will be heard in French.

### 14 *Decision No. 390/08, 2008 ONWSIAT 559, and Decision No. 390/08R, 2008 ONWSIAT 1989*

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

The worker commenced an application for judicial review. The Tribunal is waiting for the worker to provide a copy of the transcript, so the Tribunal can file its Record of Proceedings with the Divisional Court.

### 15 *Decision No. 1132/02I, 2002 ONWSIAT 1975, Decision No. 1132/02, 2004 ONWSIAT 1458, and Decision No. 1132/02R, 2005 ONWSIAT 1349*

The worker appealed to the Tribunal for initial entitlement for a low back injury, which he alleged was caused by work incidents in 1996 and 1997. The Tribunal hearing took place over two days in 2003 and 2004.

The Panel found the worker to be a very poor historian, and that his recollections of many events were in conflict with the case materials and inconsistent with the medical reporting and the Board's extensive investigation report. The Panel found that there was insufficient evidence to support that the worker sustained a work-related low back problem in November 1996. The Panel found that the worker had initial entitlement on an aggravation basis

## Applications for Judicial Review and Other Proceedings

for an accident on January 18, 1997, but was entitled to health care benefits only as he did not lose any time off work or suffer any permanent impairment. The Panel found that the worker had long-standing ongoing back problems since at least 1998 and that any ongoing problems were more likely a result of the natural aging processes of the worker's back, than as a result of the January 1997 accident.

The worker brought an action in damages against the Vice-Chair, which was dismissed in October 2006.

The worker has now commenced an application for judicial review. The employer is a co-respondent in the application. The Tribunal has served its Record of Proceedings and will file it with the Court in January 2009.

### **16** *Decision No. 397/05, 2006 ONWSIAT 2053, and Decision No. 397/05R, 2007 ONWSIAT 452*

The worker injured his thumbs in 1999. He was granted LOE benefits until December 17, 2001, and awarded a 25% NEL for the right thumb. He appealed to the Tribunal for LOE benefits after December 17, 2001, a NEL for his left thumb, or benefits for chronic pain or psychotraumatic disability. The worker also appealed for entitlement for benefits his shoulders, neck, low back, or dystonia, which he alleged arose out of the same injury.

The worker had a non-compensable injury in 1998. There were indications the worker had a pre-existing psychological problem which arose from the 1998 injury.

The Panel held that the worker had non-organic entitlement, but no organic entitlement for his various complaints. However, the Panel found the worker had entitlement for chronic pain, which included entitlement for the dystonia and for a NEL for the right thumb, and would replace the 25% NEL award for the left thumb. The Panel also found the worker was entitled to full LOE benefits from December

17, 2001 and continuing to date. Further, the worker was found entitled to an LMR assessment.

The worker commenced an application for judicial review. There were problems with the worker's materials. Counsel for the worker amended his materials as demanded by the Tribunal. Once the Tribunal receives the transcript from the worker, the Tribunal will file its Record of Proceedings.

### **17** *Decision No. 1791/07, 2007 ONWSIAT 2212, and Decision No. 1791/07R, 2008 ONWSIAT 634*

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

The worker appealed the denial of entitlement for carpal tunnel syndrome, entitlement for a psychotraumatic disability, and the amount of a NEL for chronic pain. The Panel found the worker had no entitlement for any of these conditions.

The worker commenced an application for judicial review. Counsel for the worker mistakenly named the Board as the respondent instead of the Tribunal. The Tribunal consented to allow counsel to amend his materials, subject to conditions that protected the Tribunal's interests. At the end of the year the Tribunal had served its Record of Proceedings.

### **18** *Decision No. 556/03, 2008 ONWSIAT 1811*

In September 1997 the worker suffered a workplace injury and initially received benefits for his low back and head, including a non-economic loss award of 57%. He also received loss of earnings benefits until the fall of 1999, when the Board ended benefits following videotape

## Applications for Judicial Review and Other Proceedings

surveillance. The Board also reversed the NEL award as it related to the head injury, and reduced the NEL award for the back to 5%. In related court proceedings, the worker was prosecuted for failure to report a material change in circumstances and pled guilty.

The employer appealed to the Tribunal seeking cessation of loss of earnings benefits after September 3, 1997 and revocation of the 5% NEL award for the low back. The worker cross-appealed, seeking to reinstate benefits for his head and neck, ongoing wage loss benefits beyond April 21, 1998 and entitlement for chronic pain disability and/or psychotraumatic disability.

In *Decision No. 556/03* the Panel allowed the employer's appeal and denied the worker's appeal. The Panel referred to the surveillance videotapes, which showed the worker, among other things, moving 50-pound flagstones and using a pick to remove a tree from his property. The Panel found that this was heavy work that a person would be unable to do if he had any serious back injury.

The worker had been in four car accidents before the workplace accident. The Panel noted that the Board had not had all the medical reports relating to those accidents when it made its decisions. The Panel also noted that, prior to the workplace accident, the worker had complained to his insurance companies of headaches, dizziness, cognitive disturbances, depression, neck pain, and low back pain. When he saw his specialists after the 1997 injury he did not tell them about his car accidents. The Panel also found that, based on the evidence as a whole, it was unlikely that the worker lost consciousness or suffered a skull fracture in the workplace injury. The Panel found that the worker was entitled only to four weeks of loss of earnings benefits for the low back, and no benefits for the head and neck.

The worker commenced an application for judicial review. The Tribunal was awaiting transcripts from the

applicant's counsel in order to prepare and file the Record of Proceedings.

19

*Decision No. 2835/07*, 2007 ONWSIAT 3238, and *Decision No. 2835/07R*, 2008 ONWSIAT 1446

The worker's appeal for ongoing entitlement for organic and psychological disability was denied. The worker commenced an application for judicial review. The nature of the worker's judicial review application is not clear. The Tribunal is preparing its Record of Proceedings.

20

*Decision No. 717/08*, 2008 ONWSIAT 1186, and *Decision No. 717/08R*, 2008 ONWSIAT 2777

The worker appealed to the Tribunal for an increase to his long-term earnings basis from May 2000 to January 2003, and for a change to the Board's finding of a suitable employment or business (SEB) which had resulted in a reduction to the worker's loss of earnings benefits. The Panel allowed the worker's appeal, directing the Board to recalculate the worker's long-term average earnings from May 2000 to January 2003, finding the SEB was not appropriate, and that his loss of earnings benefits should be based on a higher hourly wage.

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

In the reconsideration decision, the same Vice-Chair, sitting alone, denied the request for reconsideration. She found that the relevant law and policy had been applied to determine the time periods on which the calculation of long-term earnings should be based. She found no error in

## Applications for Judicial Review and Other Proceedings

referring the calculation of earnings to the Board. Further, the Tribunal had no jurisdiction to make findings on short-term earnings because there was no final decision of the Board on that issue. She did not accept that the procedural allegations of the worker had any impact on the Panel's decision.

The worker has commenced an application for judicial review. The nature of the worker's allegations are unclear. The worker had retained counsel to represent him on the judicial review, and the Tribunal was attempting to clarify the nature of the worker's application.

### Other Litigation Matters

#### Human Rights Complaint

An injured worker appealed to WSIAT for entitlement for mental stress on the grounds it arose out of an employment injury. In *Decision No. 624/07*, 2008 ONWSIAT 2605, the Panel found that the evidence did not support that the worker's disability was related to harassment at work. The Panel agreed with the Board's finding that the applicant's disability was related to non-work-related factors.

The worker filed a complaint with the Human Rights Tribunal. She alleges that WSIAT failed to adjudicate in compliance with the *Human Rights Code* pursuant to the decision of the Supreme Court of Canada in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513. She is attempting to change the result of *Decision No. 624/07* through her complaint to the Human Rights Tribunal.

It is WSIAT's position that while the worker has alternative remedies she may pursue if she is dissatisfied with a WSIAT decision, the Human Rights Tribunal has no jurisdiction to hear an appeal from, or judicially review, an adjudicative decision of WSIAT.



*"...the Appeals Tribunal has now dealt with 77  
judicial reviews and has remained successful in all of them."*

## Ombudsman Reviews

The Ombudsman's Office has the authority to investigate complaints about the Ontario government and its agencies, including the Tribunal. When the Ombudsman's Office receives a complaint about a Tribunal decision, the Office considers whether the decision is authorized by the legislation, whether the decision is reasonable in that the Tribunal had evidence upon which to base its decision, and whether the process was fair. 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. In 2007, 2006 and 2005 there were eight, zero and six notifications respectively. In 2008, the Tribunal did not receive any notifications, although two intent to investigate files

remained opened from the preceding year. These were closed by letter from the Ombudsman's Office during 2008. No intent to investigate file was outstanding at the end of 2008.



# TRIBUNAL REPORT

### Vice-Chairs, Members and Staff

Lists of the Vice-Chairs and Members, senior staff and Medical Counsellors who were active at the end of the reporting period, as well as a list of 2008 reappointments and newly appointed Vice-Chairs and Members, can be found in Appendix A.

### Office of the 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 small, expert legal department which is separate from the Tribunal Counsel Office (TCO) and is not involved in making submissions in hearings. Draft review, which has been described in prior Annual Reports, is the responsibility of OCC.

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. In addition, OCC provides advice on access and privacy issues under the *Freedom of Information and Protection of Privacy Act* (FIPPA) and responds to FIPPA requests and appeals.

Professional development continued to be important in 2008, given the four different legislative schemes, statutory amendments, extensive Board policy and policy amendments. OCC developed and delivered training sessions on workplace safety and insurance law and related legal issues to a number of newer adjudicators and was active in staff professional development.

During 2008, OCC also assisted in the development of knowledge management resources aimed at facilitating the access of Vice-Chairs and Side Members to information on law, policy and procedure through electronic means.

### Office of the Vice-Chair Registrar

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

All initial processing of appeals is completed by the Tribunal's OVCR. On receipt of an appeal, the Tribunal gives notice to the parties. When the appellant 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.

## Tribunal Organization

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

*The Early Review Department*

*Vice-Chair Registrar Teams*

*Alternate Dispute Resolution Services*

*Mediation Services*

*Single Party Appeals*

### 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 respon-

## Tribunal Organization

dent 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. TCO consists of three distinct areas, all of which work closely together, each reporting to the General Counsel. These areas are the TCO lawyers, the TCO legal workers and the Medical Liaison Office. TCO administrative assistants provide support to all three areas.

### Hearing Work

The appeals in TCO are those which raise the most complex medical, legal and policy issues. These appeals are streamed to TCO before the hearing by the Early Review Department, or after the hearing ("post-hearing") at the direction of a Panel or Vice-Chair. TCO also supervises all right to sue applications, and all applications for reconsideration of Tribunal decisions.

Appeal-related communications between TCO staff and Tribunal Vice-Chairs and Panels are either made on the record in the presence of the parties at the hearing, or in writing outside the hearing. Written communications between TCO and Tribunal adjudicators are provided to the parties and become part of the exhibits to the file.

TCO lawyers and legal workers have a neutral role. TCO staff does not take a position on which party should win on the merits of any appeal. TCO lawyers assist the Tribunal Panel or Vice-Chair by making submissions explaining the relevant law and policy on complex matters. While TCO submissions are often of considerable assistance to Vice-Chairs and Panels, Tribunal adjudicators are not required to adopt TCO submissions on any point.

### Pre-hearing Work

Pre-hearing appeals in TCO are assigned to a lawyer. The appeal is carried by that lawyer until the final decision is released. The lawyer resolves any legal or procedural issues that arise prior to the hearing, and attends at the hearing to question witnesses and make submissions on points of law, policy, 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 the 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.

## Tribunal Organization

Typical post-hearing directions would include instructions to obtain important evidence (usually medical) found to be missing at the appeal, to request an independent medical opinion from a Tribunal-appointed 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, Human Rights Code 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 most 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 seeks out impartial and independent expert medical expertise and resources. The Tribunal's relationship with the medical community is viewed as particularly important, since ultimately, the quality of the Tribunal's decisions on medical issues will be dependent on that relationship. MLO co-ordinates and oversees all the Tribunal's interactions with the medical community. MLO's success in maintaining a positive relationship with the medical community is demonstrated by the Tribunal's continuing ability to readily enlist leading members of the medical profession to provide advice and assistance.

### Medical Counsellors

The Medical Counsellors are a group of eminent medical specialists who serve as consultants to WSIAT. They play

## Tribunal Organization

a critical role in assisting MLO to carry out its mandate of ensuring the overall medical quality of Tribunal decision-making.

The Chair of the Medical Counsellors is Dr. John Duff. A list of the current Medical Counsellors is provided in Appendix A.

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

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

### Medical Assessors

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

The opinion of a Medical Assessors is normally sought in the form of a written report. A copy of the report is made available to the worker, employer, the Panel or Vice-Chair, and (after the appeal) the Board. On occasion, a Hearing Panel or Vice-Chair will want the opportunity to question the Medical Assessor at the hearing to clarify the 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

## Tribunal Organization

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.

### MLO Resources 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 publicly accessible collection of medical information specific to issues that arise in the workers' compensation field is unique within the Ontario WSIB system. New medical information is announced as it becomes available through the Tribunal publication *WSIAT In Focus*. This publication is available to the public on the WSIAT website.

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

Medical Discussion Papers are intended to provide a broad and general overview of a topic, and are written to be understood by lay individuals. Medical Discussion Papers are not peer reviewed and do not necessarily represent the views of the Tribunal. A Vice-Chair or Panel may consider and rely on the medical information provided in the discussion paper, but the Tribunal is not bound by a

Medical Discussion Paper in any particular case. It is always open to parties to an appeal to rely on or distinguish a Medical Discussion Paper, or to challenge it with alternative evidence.

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

### TCO Support Staff

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

## Information Services

The Information Services department provides the following services to the Tribunal:

*information management and privacy*

*content management*

*web development and design*

*library services*

*publishing (print and web)*

*decision summarization*

*translation*

*co-ordination of staff training and development.*

These services support the Tribunal's goal of delivering timely, well reasoned decisions. Information Services

## Tribunal Organization

staff work collaboratively to deliver high quality information products.

### Library Services

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

In 2008, the library undertook a redesign of current awareness services and moved from a paper-based to an electronic-based model. This has improved the coverage and currency of information received by clients, and has been successful to date. Library staff also presented several training sessions to adjudicators and staff at our client tribunals, covering topics from Web 2.0 and basic legal research, as well as training in specific research tools. Research and reference services continue to be well-used, despite the increasing availability of information online. Library staff serve as an important bridge between stakeholders and information, helping them learn to use online tools and navigate the range of information sources available to them.

Library staff also arrange for the weekly transfer of selected Tribunal decisions to databases such as CanLII and Quicklaw.

### Web Services

Information Services maintains the content for the Tribunal's public website and information portals, and the Ontario Workplace Tribunals Library website. The emphasis is on keeping the content current and relevant. The Tribunal's decision summary database continues to be an important source of information for our stakeholders.

In November 2008 a new staff portal was launched which allows staff to keep up-to-date with Tribunal information and helps staff to deliver Tribunal objectives more effectively. With its launch several paper-based services were replaced by electronic services, such as the library's current awareness service to Tribunal staff. As well a page of "green tips" was added to the portal as one of the Tribunal's stated objectives is to look at our processes with an eye to making them environmentally friendly.

This year the Tribunal worked with the organization CanLII to have Tribunal decisions from 1986 to the present available full text to the public at [www.canlii.org](http://www.canlii.org). CanLII is a not-for-profit organization that receives funding from the federated law societies across Canada and is dedicated to making primary legal resources available to the legal community and the public. CanLII has made it a priority to increase the number of decisions from Canadian administrative tribunals.

### Publishing Services

During 2008, Information Services processed 3,795 decisions with keywords or with keywords and summaries. The Tribunal released 3,396 decisions. Thus, the inventory of decisions waiting to be processed was reduced by 400 decisions, so that, by the end of 2008, the interval between release and addition to the database was only about one and one-half months.

## Tribunal Organization

All Tribunal decisions (over 48,000) are published and available for free through the Tribunal's searchable database on the Tribunal's website. Tribunal decisions consistently rely on decisions of the courts and the Tribunal's own body of jurisprudence.

After 18 years as a subscription print publication, the WSIAT Reporter became a free electronic online publication in 2006. By the end of 2008, eleven volumes of the online Reporter have been published. The Reporter site also includes a cumulative table of contents for all materials in the Reporter, with electronic links to decisions and practice directions published in the online volumes.

Information Services also publishes the Annual Report and the Tribunal newsletter, *WSIAT In Focus*. This newsletter covers events and people at the Tribunal, as well as pamphlets and other materials as needed. Current and back issues these publications can be found on the WSIAT website at [wsiat.on.ca](http://wsiat.on.ca).

### Translation Services

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

### Staff Training and Development

The Tribunal has a strong commitment to staff learning and development. All new staff receive a formal orientation and understanding of the Tribunal's objectives. Information Services is also responsible for arranging Tribunal-wide training opportunities such as the popular skills exchange afternoons that occur twice yearly. This

year all Tribunal staff had Workplace Discrimination and Harassment Training and many staff received training on information management.

## Case Management Systems

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

In Year 2008 the department undertook computer system upgrades; introduced case management system enhancements; and collaborated with Information Services on Tribunal-wide information management initiatives.

In the area of user support, the department introduced a new, automated IT Help Desk software system. With this new system, users have immediate computer-based access to IT Help services. The system automatically routes help support requests to the technicians who are best placed to resolve the issues. This automatic routing helps the department meet its service support objective and most requests (65%) are resolved within four hours. Approximately 450 requests are routed through this system each month (5,400 annually).

With respect to computer equipment, the main upgrades in 2008 included those pertaining to scanners and server backup system. In terms of case management support, the application development team modified several modules in the electronic case management systems and introduced several new components that automate the document retention and destruction processes for

## Tribunal Organization

the Tribunal's new electronic document records series. Application developers also introduced new templates that streamline the party correspondence processes, and introduced new search tools that make procedure guide assistance easier to find within the tracIT case management system.

In other aspects of workflow improvement and caseload management support, the department provided research and technical leadership for the electronic decision review pilot project. The department also centralized the statistical reporting systems for managers and moved key caseload performance indicators into the staff and OIC SharePoint portals.

# 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 2008, there were 4,018 active cases within these two process stages. Chart 1 shows the distribution in more detail.

### Active Inventory

The level of the Tribunal’s active inventory is affected by three factors: the number of incoming appeals in a year, the number of appeals that are confirmed as ready to proceed in that year, and the number of hearings and other appeal dispositions that are achieved in the year. In 2008, these factors combined to produce a 14% overall decrease in the active inventory as compared to the 2007 year-end figure.

In 2008 the active caseload declined in each quarter due to lower than expected incoming cases from the WSIB and continued high levels of final decision output.

Chart 2 shows the active inventory in comparison to previous years.

**CHART 1**

### Inventory of Active Cases on December 31, 2008

#### Notice Process

|                                         |              |
|-----------------------------------------|--------------|
| Cases active in Notice stage processing | 1,177        |
|                                         | <u>1,177</u> |

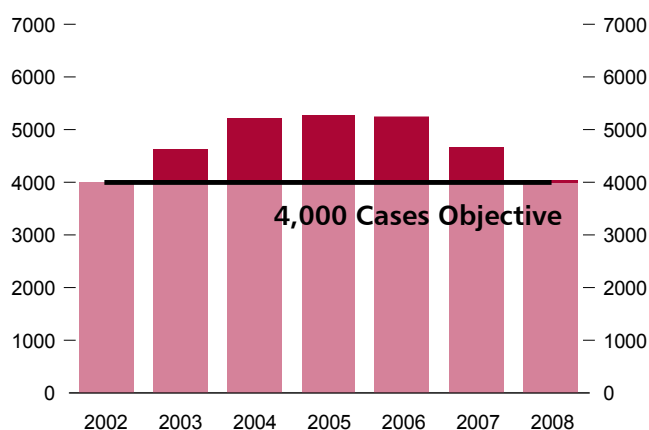
#### Resolution Process

|                             |              |
|-----------------------------|--------------|
| Early Review stage          | 102          |
| Substantive Review          | 632          |
| Hearing Ready               | 95           |
| Scheduling and Post-hearing | 1,527        |
| WSIAT Decision Writing      | 485          |
|                             | <u>2,841</u> |

|                           |              |
|---------------------------|--------------|
| <b>Total Active Cases</b> | <b>4,018</b> |
|---------------------------|--------------|

**CHART 2**

### Active Caseload



## Caseload Processing

### Incoming Appeals

The incoming caseload trend is shown in Chart 3. In 2008 the Tribunal's overall intake from new appeals and reactivations totaled 3,662 and this represented a total reduction of 6% as compared with the 2007 intake total. "Reactivations" are appeals in which the appellant has indicated a readiness to proceed with an appeal following an inactive period during which the appellant may have acquired new medical evidence, received another final decision from the Board or sought new representation. New appeals to the Tribunal are appeals of final decisions at the Board's Appeals Branch. New appeals to the Tribunal are appeals of final decisions at the Board's Appeals Branch.

### 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 4,441 cases in 2008. This included 1,329 "Pre-Hearing" and 3,112 "Hearing" dispositions.

CHART 3

#### Incoming Appeals

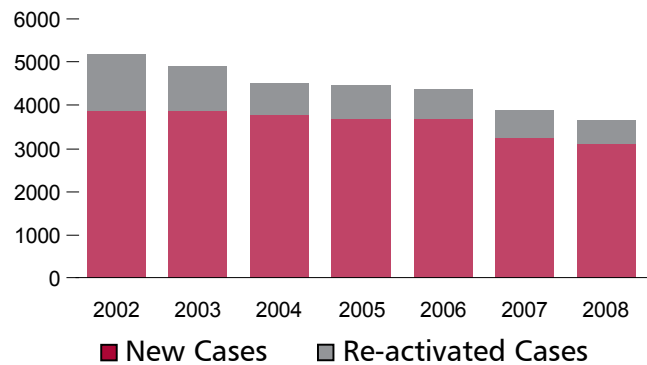


CHART 4

#### Cases Disposed of in 2008

##### Pre-hearing Dispositions

|                                                    |              |
|----------------------------------------------------|--------------|
| Without Tribunal Final Decisions                   |              |
| Made Inactive                                      | 563          |
| Withdrawn                                          | 735          |
| With Tribunal Final Decisions (declared abandoned) | 31           |
|                                                    | <b>1,329</b> |

##### Hearing Dispositions

|                                  |              |
|----------------------------------|--------------|
| Without Tribunal Final Decisions |              |
| Made Inactive                    | 101          |
| Withdrawn                        | 20           |
| With Tribunal Final Decisions    | 2,991        |
|                                  | <b>3,112</b> |

##### TOTAL (Pre-hearing and Hearing)

|                                  |              |
|----------------------------------|--------------|
| Without Tribunal Final Decisions | 1,419        |
| With Tribunal Final Decisions    | 3,022        |
|                                  | <b>4,441</b> |

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

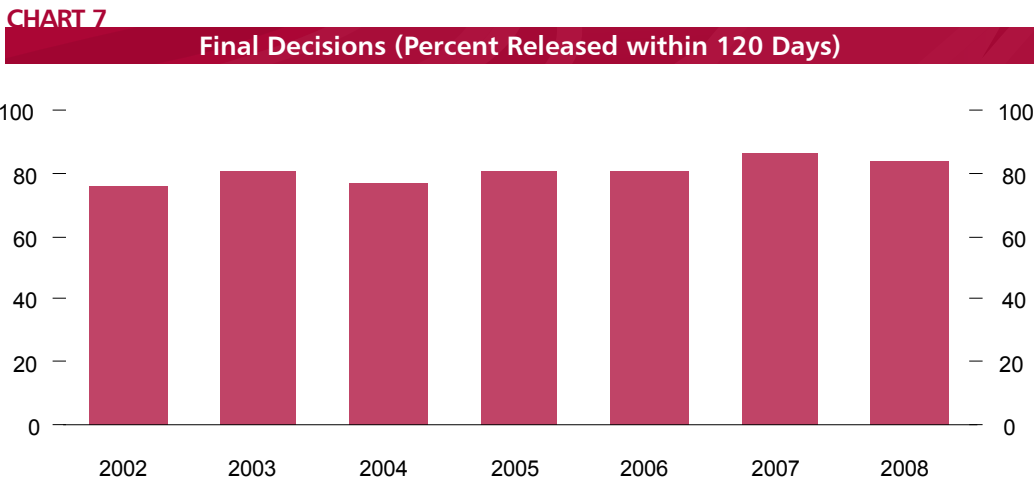
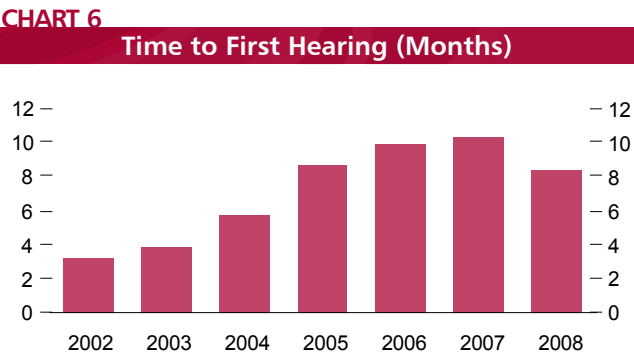
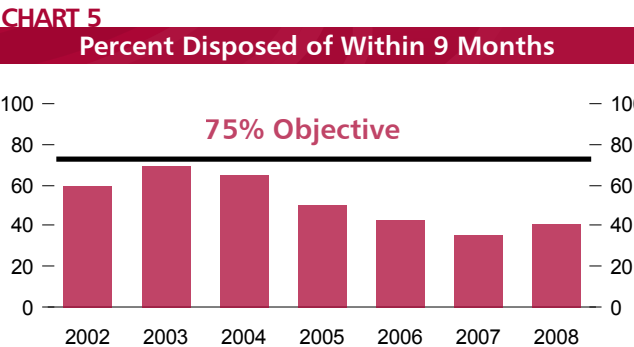
# Caseload Processing

## 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 2008, 41% of cases were resolved within nine months, an increase of 5% from 2007. The Tribunal has an objective of completing 75% of cases within nine 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 decreased from 10.3 months in 2007 to 8.4 months in 2008.

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 2008, this target was achieved 84% of the time.

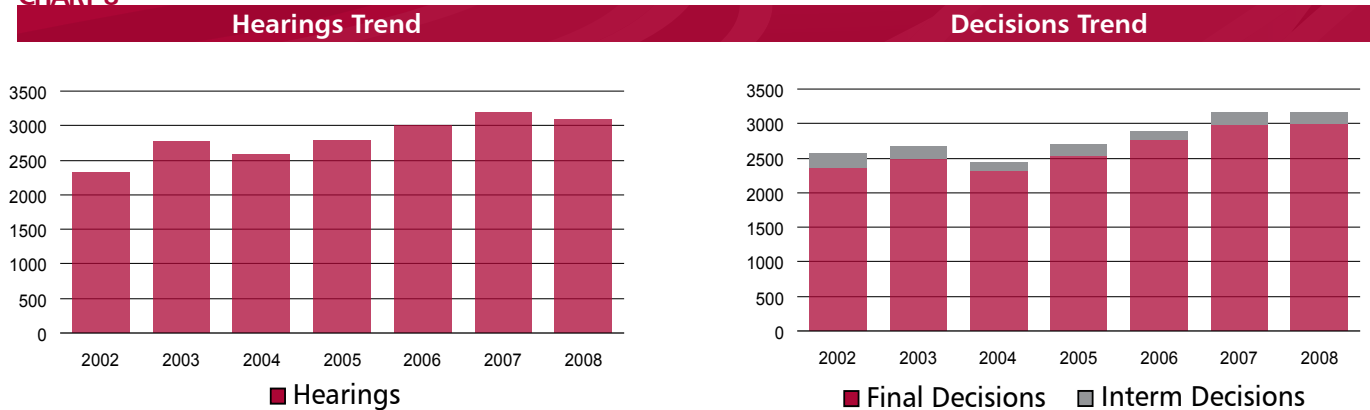


## Caseload Processing

### Hearing and Decision Activity

Chart 8 depicts the Tribunal's Hearing and Decision production. In 2008 the Tribunal conducted 3,086 hearings and issued 3,169 decisions. The Tribunal strives to achieve decision-readiness following completion of the first hearing. Some cases require post-hearing work following the first hearing, and some hearings are adjourned requiring a subsequent hearing before the same or a different Vice-Chair or Panel. Most cases require only a single hearing.

**CHART 8**

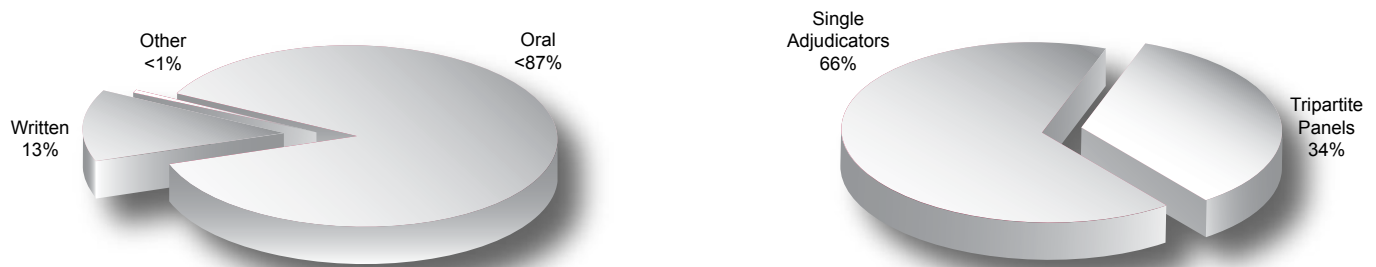


### Hearing Type

In 2008 the percentage breakdown of hearing types was as follows: Oral hearings continued to be the most common hearing type at nearly 87%, followed by written hearings at 13%. The remaining (less than 1%) hearings in 2008 were comprised of teleconferences, Vice-Chair Registrar and Motions Day case reviews. The percentage of single adjudicator hearings increased in 2008 to 66% (from 63% in 2007); tripartite panels decreased to 34% of cases heard. Chart 9 presents these hearing characteristics.

**CHART 9**

**Percentage Breakdown of Hearing Types**



## Caseload Processing

### Representation at Hearing

Tribunal statistics show that for injured workers, 38% were represented by paralegals and consultants; 22% by lawyers and legal aid; 15% by the Office of the Worker Adviser; and, 14% 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: 40% were represented by lawyers; 26% were represented by paralegals and consultants; 6% by the Office of the Employer Adviser; and, 2% by firm personnel. The remaining 26% are non-categorized. Hearing representation is presented in Chart 10.

**CHART 10**

| Percentage Breakdown of Hearing Representation |            |                        |            |
|------------------------------------------------|------------|------------------------|------------|
| Worker Representation                          |            |                        |            |
| A) In Worker Appeals                           |            | B) In Employer Appeals |            |
| None Recorded                                  | <u>10%</u> | None Recorded*         | <u>51%</u> |
| <b>Subtotal</b>                                | <b>10%</b> | <b>Subtotal</b>        | <b>51%</b> |
| Consultant                                     | 3%         | Consultant             | 1%         |
| Lawyer/Legal                                   | 22%        | Lawyer                 | 21%        |
| OWA                                            | 15%        | OWA                    | 6%         |
| Others*                                        | 1%         | Others*                | 2%         |
| Paralegal                                      | 35%        | Paralegal              | 7%         |
| Union                                          | <u>14%</u> | Union                  | <u>11%</u> |
| <b>Subtotal</b>                                | <b>90%</b> | <b>Subtotal</b>        | <b>49%</b> |
| Employer Representation                        |            |                        |            |
| A) In Worker Appeals                           |            | B) In Employer Appeals |            |
| None Recorded*                                 | <u>70%</u> | None Recorded          | <u>26%</u> |
| <b>Subtotal</b>                                | <b>70%</b> | <b>Subtotal</b>        | <b>26%</b> |
| Firm personnel                                 | 11%        | Firm personnel         | 2%         |
| Consultant                                     | 1%         | Consultant             | 2%         |
| Lawyer                                         | 9%         | Lawyer                 | 40%        |
| OEA                                            | 3%         | OEA                    | 6%         |
| Others*                                        | 1%         | Others*                | 0%         |
| Paralegal                                      | <u>6%</u>  | Paralegal              | <u>24%</u> |
| <b>Subtotal</b>                                | <b>30%</b> | <b>Subtotal</b>        | <b>74%</b> |

\*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 Processing

### Caseload by General Appeal Issue Type

The appeal type categorization of incoming cases and dispositions has been consistent over the years and 2008 was no exception. In 2008, as in past years, Entitlement-related cases constituted the majority of cases (95%). Special Section cases (Right to Sue and Access) comprised typically small portions (5%). Charts 11 and 12 provide historical comparisons of incoming cases and cases disposed in 2008.

**CHART 11**

**Breakdown of Incoming Cases by Appeal Type for the Years 2003-2008**

| TYPE                             | No.         | 2003 (%)     | No.         | 2004 (%)     | No.         | 2005 (%)     | No.         | 2006 (%)     | No.         | 2007 (%)     | No.         | 2008 (%)     |
|----------------------------------|-------------|--------------|-------------|--------------|-------------|--------------|-------------|--------------|-------------|--------------|-------------|--------------|
| Leave                            | 1           | 0.0%         | 1           | 0.0%         | 1           | 0.0%         | 0           | 0.0%         | 1           | 0.0%         | 0           | 0.0%         |
| Right to Sue                     | 61          | 1.2%         | 63          | 1.4%         | 63          | 1.4%         | 51          | 1.2%         | 37          | 1.0%         | 61          | 1.7%         |
| Medical Exam                     | 0           | 0.0%         | 0           | 0.0%         | 0           | 0.0%         | 1           | 0.0%         | 0           | 0.0%         | 0           | 0.0%         |
| Access                           | 202         | 4.1%         | 212         | 4.7%         | 233         | 5.2%         | 232         | 5.3%         | 164         | 4.2%         | 137         | 3.7%         |
| <b>Total Special Section</b>     | <b>264</b>  | <b>5.4%</b>  | <b>276</b>  | <b>6.1%</b>  | <b>297</b>  | <b>6.6%</b>  | <b>284</b>  | <b>6.5%</b>  | <b>202</b>  | <b>5.2%</b>  | <b>198</b>  | <b>5.4%</b>  |
| Preliminary (not yet specified)  | 102         | 2.1%         | 27          | 0.6%         | 10          | 0.2%         | 4           | 0.1%         | 8           | 0.2%         | 7           | 0.2%         |
| Pension                          | 32          | 0.6%         | 9           | 0.2%         | 5           | 0.1%         | 10          | 0.2%         | 4           | 0.1%         | 4           | 0.1%         |
| N.E.L./F.E.L. *                  | 353         | 7.2%         | 72          | 1.6%         | 38          | 0.8%         | 37          | 0.8%         | 30          | 0.8%         | 28          | 0.8%         |
| Commutation                      | 6           | 0.1%         | 3           | 0.1%         | 0           | 0.0%         | 0           | 0.0%         | 1           | 0.0%         | 0           | 0.0%         |
| Employer Assessment              | 341         | 6.9%         | 194         | 4.3%         | 152         | 3.4%         | 125         | 2.9%         | 122         | 3.1%         | 114         | 3.1%         |
| Entitlement                      | 3365        | 68.2%        | 3579        | 79.3%        | 3702        | 82.7%        | 3630        | 83.2%        | 3307        | 84.9%        | 3086        | 84.3%        |
| Ext post WSIB dec deadline       | 385         | 7.8%         | 288         | 6.4%         | 230         | 5.1%         | 210         | 4.8%         | 159         | 4.1%         | 148         | 4.0%         |
| Jurisdiction Time Limit          | 13          | 0.3%         | 5           | 0.1%         | 7           | 0.2%         | 5           | 0.1%         | 10          | 0.3%         | 0           | 0.0%         |
| Reinstatement                    | 1           | 0.0%         | 1           | 0.0%         | 0           | 0.0%         | 0           | 0.0%         | 0           | 0.0%         | 0           | 0.0%         |
| Vocational Rehabilitation **     | 4           | 0.1%         | 1           | 0.0%         | 4           | 0.1%         | 2           | 0.0%         | 1           | 0.0%         | 2           | 0.1%         |
| Classification                   | 41          | 0.8%         | 45          | 1.0%         | 29          | 0.6%         | 54          | 1.2%         | 50          | 1.3%         | 73          | 2.0%         |
| Interest NEER                    | 24          | 0.5%         | 7           | 0.2%         | 0           | 0.0%         | 2           | 0.0%         | 0           | 0.0%         | 0           | 0.0%         |
| <b>Total Entitlement-related</b> | <b>4667</b> | <b>94.6%</b> | <b>4231</b> | <b>93.8%</b> | <b>4177</b> | <b>93.4%</b> | <b>4079</b> | <b>93.5%</b> | <b>3692</b> | <b>94.8%</b> | <b>3462</b> | <b>94.5%</b> |
| <b>Jurisdiction</b>              | <b>2</b>    | <b>0.0%</b>  | <b>4</b>    | <b>0.1%</b>  | <b>0</b>    | <b>0.0%</b>  | <b>0</b>    | <b>0.0%</b>  | <b>0</b>    | <b>0.0%</b>  | <b>2</b>    | <b>0.1%</b>  |
|                                  | <b>4933</b> |              | <b>4511</b> |              | <b>4474</b> |              | <b>4363</b> |              | <b>3894</b> |              | <b>3662</b> |              |

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.

## Caseload Processing

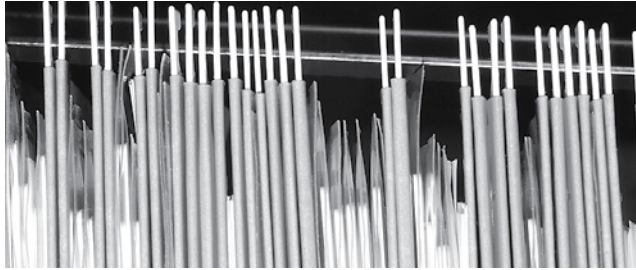


**CHART 12**

### Breakdown of Dispositions by Appeal Type for the Years 2003-2008

| TYPE                             | No.         | 2003<br>(%)  | No.         | 2004<br>(%)  | No.         | 2005<br>(%)  | No.         | 2006<br>(%)  | No.         | 2007<br>(%)  | No.         | 2008<br>(%)  |
|----------------------------------|-------------|--------------|-------------|--------------|-------------|--------------|-------------|--------------|-------------|--------------|-------------|--------------|
| Leave                            | 0           | 0.0%         | 3           | 0.1%         | 0           | 0.0%         | 0           | 0.0%         | 2           | 0.0%         | 0           | 0.0%         |
| Right to Sue                     | 61          | 1.4%         | 62          | 1.5%         | 44          | 1.0%         | 48          | 1.1%         | 67          | 1.5%         | 45          | 1.0%         |
| Medical Exam                     | 0           | 0.0%         | 0           | 0.0%         | 0           | 0.0%         | 1           | 0.0%         | 0           | 0.0%         | 0           | 0.0%         |
| Access                           | 234         | 5.2%         | 209         | 5.0%         | 241         | 5.5%         | 239         | 5.3%         | 136         | 3.0%         | 178         | 4.0%         |
| <b>Total Special Section</b>     | <b>295</b>  | <b>6.6%</b>  | <b>274</b>  | <b>6.5%</b>  | <b>285</b>  | <b>6.5%</b>  | <b>288</b>  | <b>6.4%</b>  | <b>205</b>  | <b>4.5%</b>  | <b>223</b>  | <b>5.0%</b>  |
| Preliminary (not yet specified)  | 100         | 2.2%         | 66          | 1.6%         | 18          | 0.4%         | 19          | 0.4%         | 8           | 0.2%         | 5           | 0.1%         |
| Pension                          | 26          | 0.6%         | 23          | 0.5%         | 22          | 0.5%         | 9           | 0.2%         | 11          | 0.2%         | 5           | 0.1%         |
| N.E.L./F.E.L. *                  | 254         | 5.7%         | 269         | 6.4%         | 194         | 4.4%         | 93          | 2.1%         | 56          | 1.2%         | 49          | 1.1%         |
| Commutation                      | 6           | 0.1%         | 5           | 0.1%         | 2           | 0.0%         | 1           | 0.0%         | 0           | 0.0%         | 1           | 0.0%         |
| Employer Assessment              | 494         | 11.0%        | 230         | 5.5%         | 241         | 5.5%         | 169         | 3.7%         | 152         | 3.4%         | 170         | 3.8%         |
| Entitlement                      | 2793        | 62.4%        | 2934        | 69.7%        | 3291        | 75.0%        | 3611        | 79.9%        | 3863        | 85.2%        | 3706        | 83.4%        |
| Ext post WSIB dec deadline       | 431         | 9.6%         | 345         | 8.2%         | 271         | 6.2%         | 277         | 6.1%         | 180         | 4.0%         | 226         | 5.1%         |
| Jurisdiction Time Limit          | 22          | 0.5%         | 6           | 0.1%         | 9           | 0.2%         | 7           | 0.2%         | 1           | 0.0%         | 0           | 0.0%         |
| Reinstatement                    | 3           | 0.1%         | 1           | 0.0%         | 2           | 0.0%         | 1           | 0.0%         | 0           | 0.0%         | 0           | 0.0%         |
| Vocational Rehabilitation **     | 13          | 0.3%         | 0           | 0.0%         | 2           | 0.0%         | 3           | 0.1%         | 1           | 0.0%         | 4           | 0.1%         |
| Classification                   | 19          | 0.4%         | 46          | 1.1%         | 33          | 0.8%         | 35          | 0.8%         | 44          | 1.0%         | 50          | 1.1%         |
| Interest NEER                    | 19          | 0.4%         | 4           | 0.1%         | 17          | 0.4%         | 4           | 0.1%         | 1           | 0.0%         | 0           | 0.0%         |
| <b>Total Entitlement-related</b> | <b>4180</b> | <b>93.3%</b> | <b>3929</b> | <b>93.3%</b> | <b>4102</b> | <b>93.5%</b> | <b>4229</b> | <b>93.5%</b> | <b>4317</b> | <b>95.3%</b> | <b>4216</b> | <b>94.9%</b> |
| <b>Jurisdiction</b>              | <b>3</b>    | <b>0.1%</b>  | <b>6</b>    | <b>0.1%</b>  | <b>2</b>    | <b>0.0%</b>  | <b>5</b>    | <b>0.1%</b>  | <b>10</b>   | <b>0.2%</b>  | <b>2</b>    | <b>0.0%</b>  |
|                                  | <b>4478</b> |              | <b>4209</b> |              | <b>4389</b> |              | <b>4522</b> |              | <b>4532</b> |              | <b>4441</b> |              |

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.

## Caseload Processing

### Inactive Inventory

In 2008, the Inactive cases inventory decreased to 3,817 from 4,066 at the end of 2007, a decrease of 6%. 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 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 2008, 228 Reconsideration requests were received, and this number is similar to the number received in the past two years. (There were 212 reconsideration requests in 2006 and 213 in 2007.)

**CHART 13**

#### Ombudsman Complaints, Activity and Inventory Summary

|                                      |   |
|--------------------------------------|---|
| New Complaint notifications Received | 0 |
| Complaints Resolved                  | 2 |
| Complaints Remaining                 | 0 |

**CHART 14**

#### Reconsideration Requests, Activity and Inventory Summary

|                                           |     |
|-------------------------------------------|-----|
| Inquiries (Pre-reconsideration) Remaining | 67  |
| Reconsideration Requests Received         | 228 |
| Reconsideration Requests Resolved         | 240 |
| Reconsideration Remaining                 | 101 |

**CHART 15**

#### Judicial Reviews, Activity and Inventory Summary

|                            |    |
|----------------------------|----|
| Judicial Reviews Received  | 13 |
| Judicial Reviews Resolved  | 4  |
| Judicial Reviews Remaining | 25 |

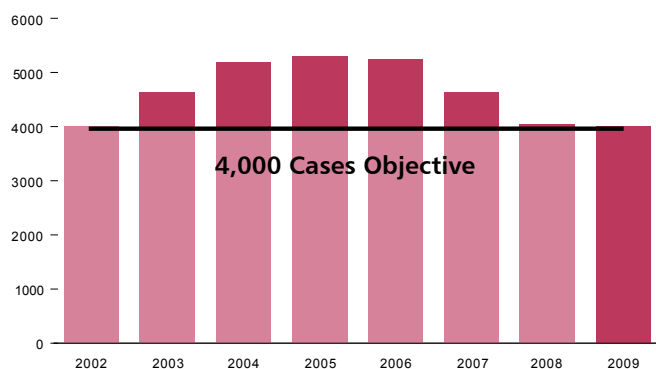
## Caseload Processing

### Looking Ahead – Planning for 2009 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. However, beginning in the fourth quarter of 2006, the productivity increased as a result of the increased adjudicator roster and the Tribunal began to reduce the backlog.

In 2007 the number of incoming cases declined from the previous year and that coupled with the increase in decision-making capacity from the adjudicator roster enabled the Tribunal to reduce its backlog. This trend continued throughout 2008, to the extent that by year end the active inventory caseload had reached 4,018. In 2009 the Tribunal will continue its backlog reduction efforts and expects to reduce the active inventory to (or below) its targeted steady-state level of 4,000 cases. This is depicted in Chart 16.

**CHART 16**  
**Active Inventory and Projection for 2009**



## Financial Matters

A Statement of Expenditures and Variances for the year ended December 31, 2008 (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, 2008. The Auditor's Report is included as Appendix B.

### CHART 17

#### Statement of Expenditures and Variances Year ended – December 31, 2008 (in \$000s)

|                                                                                                                                                                                                                                               | 2008<br>BUDGET | 2008<br>ACTUAL | 2008<br>\$   | VARIANCE<br>% |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|--------------|---------------|
| <b>OPERATING EXPENSES</b>                                                                                                                                                                                                                     |                |                |              |               |
| Salaries & Wages                                                                                                                                                                                                                              | 10,833         | 10,646         | (187)        | (1.7)         |
| Employee Benefits                                                                                                                                                                                                                             | 2,035          | 2,106          | 71           | 3.5           |
| Transportation & Communication                                                                                                                                                                                                                | 1,070          | 1,150          | 80           | 7.5           |
| Services                                                                                                                                                                                                                                      | 6,582          | 6,712          | 130          | 2.0           |
| Supplies & Equipment                                                                                                                                                                                                                          | 454            | 429            | (25)         | (5.5)         |
| <b>TOTAL - W.S.I.A.T.</b>                                                                                                                                                                                                                     | <b>20,974</b>  | <b>21,043</b>  | <b>69</b>    | <b>0.3</b>    |
| Services - W.S.I.B.                                                                                                                                                                                                                           | 500            | 525            | 25           | 5.0           |
| Interest Revenue                                                                                                                                                                                                                              | (40)           | (36)           | 4            | (10.0)        |
| <b>TOTAL OPERATING EXPENSES</b>                                                                                                                                                                                                               | <b>21,434</b>  | <b>21,532</b>  | <b>98</b>    | <b>0.5</b>    |
| <b>ONE-TIME COSTS</b>                                                                                                                                                                                                                         |                |                |              |               |
| Severance Payments                                                                                                                                                                                                                            | 100            | 19             | (81)         | (81.0)        |
| Caseload Reduction Strategy funding                                                                                                                                                                                                           | 675            | 401            | (274)        | (40.6)        |
| Temporary Salaries and Benefits                                                                                                                                                                                                               | 120            | 90             | (30)         | (25.0)        |
| <b>TOTAL EXPENDITURES</b>                                                                                                                                                                                                                     | <b>22,329</b>  | <b>22,042</b>  | <b>(287)</b> | <b>(1.3)</b>  |
| Note: The above 2008 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 \$121 is comprised of: |                |                |              |               |
| <b>Capital Fund</b>                                                                                                                                                                                                                           |                |                |              |               |
| Amortization                                                                                                                                                                                                                                  | 59             |                |              |               |
| Fixed assets acquired                                                                                                                                                                                                                         | (64)           | (5)            |              |               |
| <b>Operating Fund</b>                                                                                                                                                                                                                         |                |                |              |               |
| Accrued severance & vacation benefits                                                                                                                                                                                                         | \$167          |                |              |               |
| Prepaid expenses                                                                                                                                                                                                                              | (41)           | 126            |              |               |
|                                                                                                                                                                                                                                               |                | <u>\$121</u>   |              |               |



## APPENDICES

## Vice-Chairs and Members In 2008

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

#### Chair

Strachan, Ian J.

#### Initial appointment

July 2, 1997

#### Vice-Chairs

|                 |                   |
|-----------------|-------------------|
| Baker, Andrew   | June 28, 2006     |
| Crystal, Melvin | May 3, 2000       |
| Keil, Martha    | February 16, 1994 |
| Martel, Sophie  | October 6, 1999   |
| McClellan, Ross | September 4, 2002 |
| 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   |

#### Members representative of workers

|                |                 |
|----------------|-----------------|
| Crocker, James | August 1, 1991  |
| Grande, Angela | January 7, 2000 |

#### Members representative of employers

|                |                |
|----------------|----------------|
| Christie, Mary | May 2, 2001    |
| Wheeler, Brian | April 19, 2000 |



## Appendix A

## Part-time

| Vice-Chairs           | Initial appointment |
|-----------------------|---------------------|
| Alexander, Bruce      | May 3, 2000         |
| Bigras, Jean Guy      | May 14, 1986        |
| Butler, Michael       | May 6, 1999         |
| Carroll, Tom          | May 27, 1998        |
| Clement, Shirley      | September 1, 2005   |
| Cohen, Marvin         | June 22, 2006       |
| Dempsey, Colleen L.   | November 10, 2005   |
| Dimovski, Jim         | July 1, 2003        |
| Doherty, Barbara      | June 22, 2006       |
| Doyle, Maureen        | October 20, 2004    |
| Faubert, Marsha       | December 10, 1987   |
| Ferdinand, Ulrich     | April 29, 1999      |
| Gale, Robert          | October 20, 2004    |
| Goldman, Jeanette     | June 22, 2006       |
| Hartman, Ruth         | October 6, 1999     |
| Josefo, Jay           | January 13, 1999    |
| Jugnundan, Nalini     | November 15, 2006   |
| Kalvin, Bernard       | October 20, 2004    |
| Karimjee, Kumail      | June 13, 2007       |
| Kenny, Maureen        | July 29, 1987       |
| Lang, John B.         | July 15, 2005       |
| MacAdam, Colin        | May 4, 2005         |
| Marafioti, Victor     | March 11, 1987      |
| McCutcheon, Rosemarie | October 6, 1999     |
| McKenzie, Mary E.     | June 22, 2006       |
| Mitchinson, Tom       | November 10, 2005   |
| Morris, Anne          | June 22, 2006       |
| Mullan, David         | July 5, 2004        |
| Muzzi, Rosemary       | June 13, 2007       |
| Nairn, Rob            | April 29, 1999      |
| Netten, Shirley       | June 13, 2007       |
| Parmar, Jasbir        | November 10, 2005   |
| Patterson, Angus      | June 13, 2007       |
| Robeson, Virginia     | March 15, 1990      |

| <b>Vice-Chairs (cont)</b> | <b>Initial appointment</b> |
|---------------------------|----------------------------|
| Signoroni, Antonio        | October 1, 1985            |
| Silipo, Tony              | December 2, 1999           |
| Smith, Marilyn            | February 18, 2004          |
| Sutherland, Sara          | September 6, 1991          |
| Welton, Ian               | June 22, 2006              |

### 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  |
| Hoskin, Kelly   | June 13, 2007     |
| Jackson, Faith  | December 11, 1985 |
| Lebert, Ray     | June 1, 1988      |

### Members representative of employers

|                   |                   |
|-------------------|-------------------|
| Donaldson, Joseph | October 20, 2004  |
| Lust, Arthur      | April 16, 2008    |
| Phillips, Victor  | November 15, 2006 |
| Sahay, Sonya      | November 29, 2008 |
| Séguin, Jacques   | July 1, 1986      |
| Tracey, Elaine    | December 7, 2005  |
| Trudeau, Marcel   | April 16, 2008    |
| Young, Barbara    | February 17, 1995 |

*The Tribunal grieves the passing of C. James Robb and Robert Sherwood, Members representative of employers.* 🌹

### Vice-Chairs and Members — Reappointments Effective 2008

|                      | Effective         |
|----------------------|-------------------|
| Michael Butler       | May 6, 2008       |
| Shirley Clement      | September 1, 2008 |
| Colleen L. Dempsey   | November 10, 2008 |
| Urich Ferdinand      | April 29, 2008    |
| Mary Ferrari         | July 15, 2008     |
| David Gillies        | October 30, 2008  |
| Ruth Hartman         | October 6, 2008   |
| Kelly Hoskin         | June 13, 2008     |
| Nalini Jugnundan     | November 15, 2008 |
| Kumail Karimjee      | June 13, 2008     |
| John B. Lang         | July 15, 2008     |
| Colin MacAdam        | May 4, 2008       |
| Sophie Martel        | October 6, 2008   |
| Ross McClellan       | September 4, 2008 |
| Rosemarie McCutcheon | October 6, 2008   |
| Tom Mitchinson       | November 10, 2008 |
| Rosemary Muzzi       | June 13, 2008     |
| Rob Nairn            | April 29, 2008    |
| Shirley Netten       | June 13, 2008     |
| Jasbir Parmar        | November 10, 2008 |
| Angus Patterson      | June 13, 2008     |
| Victor Phillips      | November 15, 2008 |
| Sean Ryan            | October 6, 2008   |
| Sonya Sahay          | November 29, 2008 |
| Tony Silipo          | December 2, 2008  |
| Elaine Tracey        | December 7, 2008  |

### New Appointments During 2008

|                                                              | Effective      |
|--------------------------------------------------------------|----------------|
| Arthur Lust, part-time Member representative of employers    | April 16, 2008 |
| Marcel Trudeau, part-time Member representative of employers | April 16, 2008 |

## Appendix A

### Senior Staff

|                 |                                                          |
|-----------------|----------------------------------------------------------|
| David Bestvater | Director, Case Management Systems                        |
| Alison Colvin   | Director, Information Services                           |
| Jim Curren      | Director, Finance and Administration                     |
| 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 |
| Janet Oulton    | Appeals Administrator                                    |
| Carole Prest    | Counsel to the Tribunal Chair                            |
| Dan Revington   | Tribunal General Counsel                                 |
| Paul Turkki     | Human Resources Manager <sup>1</sup>                     |

### Medical Counsellors

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

<sup>1</sup> Paul Turkki is replacing Lynn Telalidis, who in September 2008 began a year secondment to the Centre for Employee Relations at the Ministry of Government and Consumer Services.



Deloitte & Touche LLP  
5140 Yonge Street  
Suite 1700  
Toronto ON M2N 6L7  
Canada

Tel: 416-601-6150  
Fax: 416-601-6151  
[www.deloitte.ca](http://www.deloitte.ca)

### 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, 2008 and the statement 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, 2008 and the results of its operations and its cash flows for the year then ended in accordance with Canadian generally accepted accounting principles.

A handwritten signature in black ink that reads "Deloitte &amp; Touche LLP". The signature is written in a cursive, flowing style.

Chartered Accountants  
Licensed Public Accountants  
February 13, 2009

## Appendix B

### WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

#### Balance Sheet

December 31, 2008

|                                                                         | 2008                | 2007                |
|-------------------------------------------------------------------------|---------------------|---------------------|
| <b>ASSETS</b>                                                           |                     |                     |
| <b>CURRENT</b>                                                          |                     |                     |
| Cash                                                                    | \$ 1,140,146        | \$ 1,042,684        |
| Receivable from Workplace Safety and Insurance Board                    | 1,338,596           | 1,251,447           |
| Prepaid expenses and advances                                           | 391,066             | 352,093             |
| Recoverable expenses (Note 5)                                           | 123,969             | 134,618             |
|                                                                         | <b>2,993,777</b>    | <b>2,780,842</b>    |
| CAPITAL ASSETS (Note 6)                                                 | <b>76,396</b>       | <b>71,180</b>       |
|                                                                         | <b>\$ 3,070,173</b> | <b>\$ 2,852,022</b> |
| <b>LIABILITIES</b>                                                      |                     |                     |
| <b>CURRENT</b>                                                          |                     |                     |
| Accounts payable and accrued liabilities                                | \$ 1,208,909        | \$ 1,036,852        |
| Accrued severance benefits and vacation credits                         | 2,551,392           | 2,384,818           |
| Operating advance from Workplace<br>Safety and Insurance Board (Note 7) | 1,400,000           | 1,400,000           |
|                                                                         | <b>5,160,301</b>    | <b>4,821,670</b>    |
| <b>FUND BALANCES</b>                                                    |                     |                     |
| OPERATING FUND (Note 8)                                                 | <b>(2,166,524)</b>  | <b>(2,040,828)</b>  |
| CAPITAL FUND                                                            | <b>76,396</b>       | <b>71,180</b>       |
|                                                                         | <b>(2,090,128)</b>  | <b>(1,969,648)</b>  |
|                                                                         | <b>\$ 3,070,173</b> | <b>\$ 2,852,022</b> |

APPROVED ON BEHALF OF WORKPLACE  
SAFETY AND INSURANCE APPEALS TRIBUNAL

 Chair

# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## Statement of Operations

Year ended December 31, 2008

|                                                           | 2008          | 2007          |
|-----------------------------------------------------------|---------------|---------------|
| OPERATING EXPENSES                                        |               |               |
| Salaries and wages                                        | \$ 10,721,686 | \$ 10,504,130 |
| Employee benefits (Note 9)                                | 2,305,786     | 2,146,427     |
| Transportation and communication                          | 1,149,728     | 1,122,270     |
| Services and supplies                                     | 7,437,114     | 7,803,612     |
| Amortization                                              | 59,044        | 60,632        |
|                                                           | 21,673,358    | 21,637,071    |
| Services - Workplace Safety and Insurance Board (Note 10) | 524,871       | 514,990       |
| TOTAL OPERATING EXPENSES                                  | 22,198,229    | 22,152,061    |
| BANK INTEREST INCOME                                      | (35,582)      | (51,183)      |
| NET OPERATING EXPENSES                                    | 22,162,647    | 22,100,878    |
| FUNDS RECEIVED AND RECEIVABLE<br>FROM WSIB                | (22,042,167)  | (21,890,475)  |
| NET UNFUNDED OPERATING EXPENSES                           | \$ 120,480    | \$ 210,403    |
| ALLOCATED TO                                              |               |               |
| CAPITAL FUND                                              | \$ 5,216      | \$ (44,391)   |
| OPERATING FUND                                            | (125,696)     | (166,012)     |
|                                                           | \$ (120,480)  | \$ (210,403)  |

## Appendix B

### WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

#### Statement of Changes in Fund Balances

Year ended December 31, 2008

|                                                     | Capital          | Operating             | Total                 |
|-----------------------------------------------------|------------------|-----------------------|-----------------------|
| BALANCE - JANUARY 1, 2007                           | \$ 115,571       | \$ (1,874,816)        | \$ (1,759,245)        |
| Additions to capital assets                         | 16,241           | -                     | 16,241                |
| Amortization of capital assets                      | (60,632)         | -                     | (60,632)              |
| Severance benefits and<br>vacation credits (Note a) | -                | (185,062)             | (185,062)             |
| Prepaid expenses (Note b)                           | -                | 19,050                | 19,050                |
| Net unfunded expenses - 2007                        | (44,391)         | (166,012)             | (210,403)             |
| BALANCE - DECEMBER 31, 2007                         | 71,180           | (2,040,828)           | (1,969,648)           |
| Additions to capital assets                         | 64,260           | -                     | 64,260                |
| Amortization of capital assets                      | (59,044)         | -                     | (59,044)              |
| Severance benefits and<br>vacation credits (Note a) | -                | (166,574)             | (166,574)             |
| Prepaid expenses (Note b)                           | -                | 40,878                | 40,878                |
| Net funded (unfunded) expenses - 2008               | 5,216            | (125,696)             | (120,480)             |
| <b>BALANCE - DECEMBER 31, 2008</b>                  | <b>\$ 76,396</b> | <b>\$ (2,166,524)</b> | <b>\$ (2,090,128)</b> |

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, 2008

|                                                                                                    | <u>2008</u>   | <u>2007</u>   |
|----------------------------------------------------------------------------------------------------|---------------|---------------|
| <b>NET INFLOW (OUTFLOW) OF CASH RELATED<br/>TO THE FOLLOWING ACTIVITIES</b>                        |               |               |
| <b>OPERATING</b>                                                                                   |               |               |
| Funding revenue received from Workplace Safety<br>and Insurance Board                              | \$ 21,955,018 | \$ 21,928,998 |
| Cash receipts for recoverable expenses                                                             | 569,106       | 529,298       |
| Bank interest received                                                                             | 35,582        | 51,183        |
| Expenses, recoverable expenses and advances,<br>net of amortization of \$59,044 (2007 - \$60,632 ) | (22,397,984)  | (22,781,581)  |
|                                                                                                    | 161,722       | (272,102)     |
| <b>INVESTING</b>                                                                                   |               |               |
| Acquisition of capital assets                                                                      | (64,260)      | (16,241)      |
| <b>NET INCREASE (DECREASE) IN CASH</b>                                                             | 97,462        | (288,343)     |
| <b>CASH, BEGINNING OF YEAR</b>                                                                     | 1,042,684     | 1,331,027     |
| <b>CASH, END OF YEAR</b>                                                                           | \$ 1,140,146  | \$ 1,042,684  |

# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## Notes to the Financial Statements

December 31, 2008

---

### 1. GENERAL

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

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

### 2. SIGNIFICANT ACCOUNTING POLICIES

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

#### *Basis of presentation*

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

#### *Revenue recognition*

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

#### *Financial instruments*

The Tribunal has classified each of its financial instruments into the following accounting categories effective January 1, 2007. The category for an item determines its subsequent accounting under the revised standards.

#### Asset/Liability

Cash  
Receivable from WSIB  
Recoverable Expenses  
Accounts payable & accrued liabilities  
Accrued severance benefits & vacation credits  
Operating advance from WSIB

#### Category

Held for trading  
Loans and receivables  
Loans and receivables  
Other liabilities  
Other liabilities  
Other liabilities

# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## Notes to the Financial Statements

December 31, 2008

---

### 2. SIGNIFICANT ACCOUNTING POLICIES (continued)

“Held-for-trading” items are carried at fair value, with changes in their fair value recognized in the Statement of Operations in the current period. “Loans and receivables” are carried at amortized cost, using the effective interest method, net of any impairment. “Other liabilities” are carried at amortized cost, using the effective interest method.

Other accounts noted on the Balance Sheet, such as prepaid expenses and advances and capital assets are not within the scope of the accounting standards, as they are not financial instruments.

Based on a review of the Tribunal’s financial instruments as at January 1, 2008, there were no embedded derivatives at that date that were required to be accounted for separately as derivatives.

#### *Capital assets*

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

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

#### *Employee benefits*

##### (a) Pension benefits

The Tribunal provides pension benefits for all 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.

# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## Notes to the Financial Statements

December 31, 2008

---

### 2. SIGNIFICANT ACCOUNTING POLICIES (continued)

#### *Employee benefits (continued)*

##### (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 CHANGES

#### *Future accounting changes*

Not-For-Profit Organizations may defer adoption of section 3862 and 3863 until fiscal years beginning on or after October 1, 2008. In the meantime they would continue to apply Section 3861. The Tribunal has decided to defer application of these standards.

In September 2008, the CICA issued amendments to several of the existing sections in the 4400 series – Financial Statements by Not-For-Profit Organizations. Changes apply to annual financial statements relating to fiscal years beginning on or after January 1, 2009. Accordingly, the Tribunal will have to adopt the amended standards for its fiscal year beginning January 1, 2009. The amendments include a) additional guidance in the applicability of Section 1100, Generally Accepted Accounting Principles; b) removal of the requirement to report separately net assets invested in capital assets; c) requirement to disclose revenues and expenses in accordance with EIC 123, Reporting Revenue Gross as a Principal Versus Net as an Agent; d) requirement to include a statement of cash flows in accordance with Section 1540, Cash Flow Statements; e) requirement to apply Section 1751, Interim Financial Statements, when preparing interim financial statements in accordance with GAAP; f) requirement for non-for-profit organizations that recognize capital assets to depreciate and assess these capital assets for impairment in the same manner as other entities reporting on a GAAP basis; g) requirement to disclose related party transactions in accordance with Section 3840; Related Party Transactions; and h) new disclosure requirements regarding the allocation of fundraising and general support costs.

### 4. ACCOUNTING ESTIMATES

The preparation of financial statements requires management to make estimates and assumptions that affect the reported amounts in the financial statements and in the accompanying notes. Due to the inherent uncertainty in making estimates, actual results could differ from these estimates.

# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## Notes to the Financial Statements

December 31, 2008

### 5. RECOVERABLE EXPENSES

Recoverable expenses consist of amounts recoverable from Pay Equity Hearing Tribunal, Ontario Labour 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.

### 6. CAPITAL ASSETS

|                                    | 2008                |                             |                   | 2007              |
|------------------------------------|---------------------|-----------------------------|-------------------|-------------------|
|                                    | Cost                | Accumulated<br>Amortization | Net Book<br>Value | Net Book<br>Value |
| Leasehold improvements             | \$ 3,007,511        | \$ 2,984,983                | \$ 22,528         | \$ -              |
| Furniture and equipment            | 880,068             | 859,800                     | 20,268            | 22,654            |
| Computer equipment<br>and software | 252,980             | 219,380                     | 33,600            | 48,526            |
|                                    | <b>\$ 4,140,559</b> | <b>\$ 4,064,163</b>         | <b>\$ 76,396</b>  | <b>\$ 71,180</b>  |

### 7. OPERATING ADVANCE FROM WSIB

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

### 8. OPERATING FUND

The Operating Fund deficit of \$2,166,524 as of December 31, 2008 (\$2,040,828 as of December 31, 2007) 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.

### WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

#### Notes to the Financial Statements

December 31, 2008

---

#### 9. EMPLOYEE BENEFITS OBLIGATIONS

a) Pension plan costs

Contributions by the Tribunal on account of pension costs amounted to \$770,073 (2007 - \$685,389) 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 2008 amounted to an increase of \$151,551 (2007 - \$197,940) 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 2008 amounted to an increase in the accrual of \$15,023 (2007 - reduction of \$12,878) 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.

#### 10. SERVICES – WSIB

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

#### 11. LEASE COMMITMENTS

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

|                                  |                   |
|----------------------------------|-------------------|
| 2009                             | \$ 367,868        |
| 2010                             | 87,905            |
| 2011                             | 56,334            |
| 2012                             | 414               |
| Minimum operating lease payments | <u>\$ 512,521</u> |

## WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

### Notes to the Financial Statements

December 31, 2008

---

#### 11. LEASE COMMITMENTS (continued)

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

|                                  |                     |
|----------------------------------|---------------------|
| 2009                             | \$ 1,055,532        |
| 2010*                            | 879,610             |
| Minimum operating lease payments | <u>\$ 1,935,142</u> |

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

#### 12. 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.