

2009

WSIAT Annual Report

- fairness
- expertise
- quality decision-making



Ontario

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

Annual Report 2009



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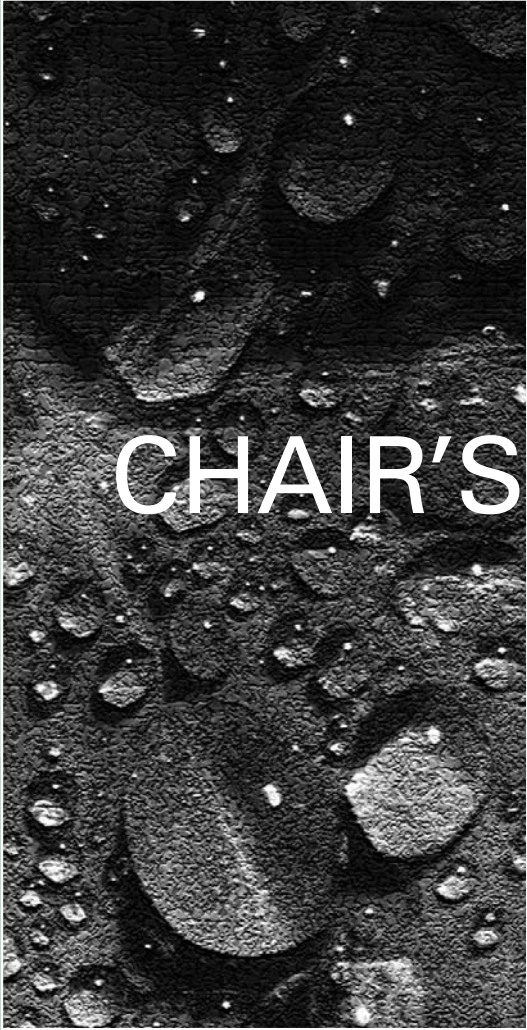
Introduction

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 2009 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

Chair's Message

"If the quality of administrative justice is to remain at a high level, ways must be found to ensure that qualified competent individuals remain in the administrative justice system."

THE QUEST FOR QUALITY

*"Oh, wad some Power the giftie gi'e us
To see oursel's as others see us!"*

While Robbie Burns was not a Tribunal decision-maker, his comment concerning self-awareness does resonate with the Appeals Tribunal. As the Tribunal strives to improve the quality of its process and decisions as part of an ongoing quest to improve the quality of Ontario's administrative justice system, we are always interested in how parties to appeals, their representatives, the Court system and the public, view the Tribunal. To date, that perception has generally been positive – a perception which can be attributed in large measure to the expertise of long-serving Vice-Chairs and Members as well as the skills of experienced staff. Ontario's workplace safety and insurance system is fortunate in having a number of long-serving, dedicated individuals who are committed to delivering quality adjudication. Unfortunately, one of the side effects of having a roster of long-service adjudicators is their eventual decision to scale back on their work activity or even retire. In 2009, the Appeals Tribunal lost a number of very skilled and experienced Vice-Chairs.

Rebuilding a quality team, whether in the sports arena or the administrative justice front, is not easy. After many candidates wrote the Tribunal exam, a number of the top candidates passed through the interview stage, and, ultimately, the Tribunal added 15 new adjudicators to its roster.

Once new candidates have reached this threshold, they undergo further training as part of the Appeals Tribunal's quest for quality adjudication. The training program involves attendance at the Adjudicator Training Course (ATC) presented by the Society of Ontario Adjudicators and Regulators (SOAR) as well as an intensive "in-house" training program which includes seminars, reviewing appeal records as though the candidate were going to

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hear the appeal, attending at the hearing, attending the panel caucus, and ultimately preparing a draft decision, which is also graded as part of the training program. The training program also includes a mentoring process and drafting decisions on a number of written appeals.

In addition to the initial training program, the Tribunal also conducts periodic training programs on medical and legal issues to ensure that Vice-Chairs and Members are up-to-date on current issues. While the training program is extensive, it is a requisite part of the Tribunal operation because many appeals involve complex medical and legal issues. This should not be surprising since, if these incidents did not occur in the workplace (or in the course of employment), the issues might well be decided in the Superior Court as part of complex personal injury litigation. The legal and medical analysis on medical causation is the same, and parties as well as the Court system have come to expect well-written, well-reasoned decisions from the Appeals Tribunal which resolve those legal and medical issues.

Towards the end of 2009, the Appeals Tribunal's quest for quality in the Ontario administrative justice system received significant assistance from the Ontario government when it introduced the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*. The Tribunal's 2001 Annual Report had noted: "If the quality of administrative justice is to remain at a high level, ways must be found to ensure that qualified competent individuals remain in the administrative justice system." That appointments theme was continued in

the Tribunal's 2002 Report which commented: "No skilled CEO devises a business plan which automatically terminates the employment of the most qualified, most competent and most experienced employees after six or nine years. Knowledgeable CEOs attempt to retain the ongoing services of those quality individuals through a variety of employment inducements." The 2004 Annual Report noted: "Since the quality of the adjudicative product obviously depends upon the quality of the people involved in decision-making, the need for a 'merit-based' system for appointing people to the administrative justice system was apparent." The focus on quality is crucial because Canada's administrative justice system is pervasive and touches the lives of Canadians in ways that many of us are unaware of, from the quality of the water we drink and air we breathe to the cost of energy, rents, social benefits, health services, police services and many other public interests.

The government's new legislation included a provision that adjudicative tribunal members be selected by a

The focus on quality is crucial because Canada's administrative justice system is pervasive and touches the lives of Canadians in ways that many of us are unaware of...

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competitive, merit-based process. Section 14 of the Act provides in part:

Adjudicative tribunal members to be selected by competitive, merit-based process

14(1) The selection process for the appointment of members to an adjudicative tribunal shall be a competitive, merit-based process and the criteria to be applied in assessing candidates shall include the following:

1. Experience, knowledge or training in the subject matter and legal issues dealt with by the tribunal.
2. Aptitude for impartial adjudication.
3. Aptitude for applying alternative adjudicative practices and procedures that may be set out in the tribunal's rules.

Tribunal-specific qualifications

14(2) If a member of an adjudicative tribunal is required by or under any other Act to possess specific qualifications,

a person shall not be appointed to the tribunal unless he or she possesses those qualifications.

...

Chair to recommend appointments, reappointments

14(4) No person shall be appointed or reappointed to an adjudicative tribunal unless the chair of the tribunal, after being consulted as to his or her assessment of the person's qualifications under subsections (1) and (2) and, in the case of a reappointment, of the member's performance of his or her duties on the tribunal, recommends that the person be appointed or reappointed.

This legislated, merit-based appointment process should ensure that, after 2009, all Ontario adjudicative tribunals will improve their performances by hiring and retaining only the most qualified and competent individuals. Hopefully, they will then see themselves as others see them, and it will be in a much more positive light.

Highlights of the 2009 Cases

This section reviews some of the many legal, factual and medical issues which the Tribunal considered in 2009.

The Tribunal decides cases under four Acts. The *Workplace Safety and Insurance Act, 1997* (WSIA) came into force on January 1, 1998. It establishes a system of workplace insurance for accidents occurring after 1997, and amends and continues the pre-1985, pre-1989 and pre-1997 *Workers' Compensation Acts* for prior injuries. The WSIA and pre-1997 Act have been amended several times, including amendments contained in the *Government Efficiency Act, 2002* (GEA), effective January 26, 2002, and Schedule 41 of the *Budget Measures and Interim Appropriation Act 2007*, effective July 1, 2007.

Appeals Under the WSIA

The WSIA provides loss of earnings (LOE) benefits for workplace injuries, as well as non-economic loss (NEL) benefits for permanent impairments. LOE benefits are reviewable for a period of 72 months from the accident date on “material change of circumstances” or annually at the Board’s discretion. The amount of LOE benefits depends on the extent to which the worker can return to the workplace and replace 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. Appeals in LOE and NEL cases form a large portion of the Tribunal’s caseload. This section will note a few of the issues considered in 2009 which affect entitlement to, or review of, LOE benefits.

Decision No. 1625/09, 2009 ONWSIAT 2623, considered how to assess loss of earnings where a worker has received LMR training in a new field but was not employed in the SEB at the final LOE review. The applicable Board

policy provided for use of the wages of a fully experienced worker; however, *Decision No. 1625/09* agreed with earlier decisions that this policy provision must be applied in a manner which allows consideration of the particular circumstances of the individual worker. *Decision No. 1625/09* noted that the newer version of this policy appears to reflect the approach taken by Tribunal cases as it provides for use of entry level wages where workers are entering a new field.

When the WSIA was initially enacted, LOE benefits could not generally be reviewed after 72 months. In 2009, *Decision No. 1211/08R*, 2009 ONWSIAT 1084, 89 W.S.I.A.T.R. (online), considered the GEA amendment which allows review of LOE benefits when the worker suffers “a significant deterioration in his or her condition” which results in a redetermination of the degree of permanent impairment. The worker had two NEL awards, one for the right knee and one for the left knee. The worker’s NEL awards were redetermined when her right knee condition worsened, requiring replacement surgery. On the reassessment, it was found that the left knee condition had improved somewhat so that the combined NEL for both conditions remained the same. *Decision No. 1211/08*, 2008 ONWSIAT 1759, 86 W.S.I.A.T.R. (online), had previously found that the significant

deterioration in the right knee condition allowed the Board to review the worker's LOE benefits after final review under the GEA amendment. This was affirmed on reconsideration. *Decision No. 1211/08R* agreed with the original Vice-Chair that the relevant "condition" is the condition which is under consideration for the purposes of LOE benefits. A review which addressed only the cumulative whole person NEL rating would be inadequate in cases where the deterioration and specific impairment affected the worker's loss of earnings. This did not preclude a review of LOE benefits when the relevant condition is the cumulative impairment for multiple injuries on a whole-person basis, as in *Decision No. 595/08*, 2008 ONWSIAT 2436, 86 W.S.I.A.T.R. (online). The word "condition" is broad enough to apply in both contexts.

Difficult adjudicative issues may arise where a worker is terminated following a workplace accident since the Tribunal must determine whether the resulting loss of earnings flows from the compensable injury or from the termination. *Decisions No. 567/09*, 2009 ONWSIAT 1829, *690/07*, 2009 ONWSIAT 2087, *2797/07*, 2009 ONWSIAT 207, and *1372/09*, 2009 ONWSIAT 2788, considered the Act, policy and case law in this area in some detail. A test frequently used in Tribunal decisions is whether the employer's reasons for terminating the worker are related to the workplace injury. *Decision No. 2797/07* noted that a worker may continue to be entitled to LOE benefits when he is terminated for unrelated reasons, but the termination is not made in good faith or for rational reasons.

Decision No. 1372/09 agreed with *Decision No. 690/07* that an employer's decision to terminate a worker cannot, in and of itself, result in the loss of LOE entitlement. These two cases asked whether the workplace injury continued to make a significant contribution to any continuing loss of earnings and, if so, to what extent the worker remained disadvantaged in his ability to match his pre-injury earnings. *Decision No. 1372/09* held that common law principles of employment law should be considered in answering these questions. It applied the Supreme Court of Canada decision in *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161, which approved a contextual approach to wrongful dismissal. The SCC held that misconduct (such as serious misconduct, habitual neglect of duty and conduct prejudicial to the employer's business) must be viewed in context, including length of service and discipline history, in deciding wrongful dismissal cases. *Decision No. 1372/09* found that a similar balancing exercise should be applied in determining whether the circumstances giving rise to the injured worker's termination severed the causal connection with the compensable injury.

The WSIA introduced limits on entitlement for mental stress claims. Section 13(4) provides that a worker is not entitled to benefits for mental stress except as provided in subsection (5). Section 13(5) provides for entitlement for mental stress that is an acute reaction to a "sudden and unexpected traumatic event arising out of and in the course of his or her employment". The section goes on to specify that a worker is not entitled to benefits for mental stress caused by an

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employer's decisions relating to employment. Tribunal decisions in 2009 continued to interpret these statutory provisions and related Board policy, particularly in the context of claims by workers, such as police officers, who are exposed to stressful situations frequently. For example, *Decision No. 933/07R*, 2009 ONWSIAT 117, 88 W.S.I.A.T.R. (online), considered a worker who was a communicator for a police department. She took 911 calls and co-ordinated responses to the calls and had direct contact to a number of traumatic events. The final triggering event occurred when she read the report of a hostage taking involving victims whom she knew. *Decision No. 933/07R* found that the worker fell within the Board's policy on cumulative effect and that the Board's policy on cumulative effect reflects the wording of section 13(5) of the WSIA. In contrast, *Decision No. 570/09*, 2009 ONWSIAT 829, 88 W.S.I.A.T.R. (online), found that a health care aide was not entitled to benefits for mental stress when she was telephoned at home and told that she was being suspended with pay for three days while her employer investigated allegations of fraud. Benefits for stress related to events caused by an employer's decisions or actions related to the employment function are specifically prohibited by section 13 and Board policy.

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 2009, there were no section 126 referrals. There were, however, a number of cases interpreting Board policy, as well as a few requests by the Board to reconsider a decision in light of Board policy. While the Tribunal does consider Board reconsideration requests, the usual high threshold test for granting reconsideration applies.

As noted in previous Annual Reports, Board policy often changes over time. The rights and obligations of parties may vary significantly depending on which version of the policy applies. Tribunal cases had previously found that section 126 policy is similar to legislation and the presumption against retroactivity applies. *Decision No. 396/08R*, 2009 ONWSIAT 479, 88 W.S.I.A.T.R. (online), considered a Board reconsideration request that the original decision had incorrectly applied an earlier version of the policy for rating NEL awards rather than the 2004 policy, which provides that the Combined Values Chart is used when a worker is rated for a permanent impairment and has a pre-existing NEL award for a different body area. *Decision No. 396/08R* contains a thorough discussion of the law regarding retrospective application, retroactive application, immediate application and interference with vested rights. While the application of Board

policy based on accident date may be appropriate in some circumstances, the question in this case did not turn on the accident date. *Decision No. 396/08R* found that the relevant fact for a NEL assessment is the date of maximum medical recovery (MMR). Since MMR was reached prior to 2004, the earlier policy applied. This policy had been interpreted in different ways. While *Decision No. 396/08R* preferred the interpretation which was consistent with the 2004 policy, the Tribunal has a high threshold for reconsideration. Since the original Vice-Chair had adopted a different interpretation which had been applied in other Tribunal decisions, the Board's application to reconsider was denied.

Decision No. 1672/04, 2009 ONWSIAT 150, 88 W.S.I.A.T.R. (online), considered the effect of Board policy on prior Tribunal case law regarding how the statutory definition of "accident" should be interpreted. The Tribunal is now required to apply Board policy. Current Board policy defines an accident in the nature of a "chance event" as an identifiable event which causes an injury and states that the injury itself is not a chance event. A "disablement" is defined as a condition that emerges gradually over time or is an unexpected result of work duties. Given these policy definitions, the view in some earlier cases that the injury itself can constitute the "accident" without identification of an external injuring process, is no longer open to the Tribunal. More recent Tribunal decisions have interpreted a "chance event" more broadly. In order to be consistent with the Act, *Decision No. 1672/04* reasoned that the "disablement" definition in Board policy must refer to an unexpected result of work duties that is not otherwise a chance event. "Disablement" may refer to injuries that occur over a short period of work duties, such as a shift, but in the absence of a discrete triggering event.

The interpretation and application of the Board's interest policy continued to be an issue in Tribunal cases. According to Board policy, the Board pays interest for claims registered prior to 1990 if the delayed benefits were granted at the appeal level. Where interest is payable, it is only payable from January 6, 1989. *Decision No. 15/09*, 2009 ONWSIAT 539, 88 W.S.I.A.T.R. (online), discussed the differences between claims for interest where an award was made at the operating level, rather than the appeal level, and claims for interest before January 6, 1989. Under the statutory merits and justice provision, Tribunal decisions have awarded interest where a very significant error and a significant injustice were corrected at the operating level. Regarding payment of interest prior to 1989, however, Board policy does not anticipate that any interest is payable. While the statutory direction to decide on the merits and justice still applies, it should not be used to circumvent Board policy. Particularly exceptional circumstances are required for a worker to receive interest which is not generally available. Tribunal decisions have found that particularly exceptional circumstances might exist in cases where a family lost significant income replacement benefits, as distinct from situations where an individual was deprived of a portion of benefits for a period of time. In *Decision No. 15/09*, the worker had lost a portion of his pension for a period of time. Interest should be paid retroactive to January 6, 1989 since a significant injustice had been corrected at the operating level; however, the error and injustice were not of such significance as to warrant payment of interest prior to January 1, 1989.

Decision No. 2157/08, 2009 ONWSIAT 912, 89 W.S.I.A.T.R. (online), considered amendments to the Board's interest policy which state that interest is not payable except on a list of specified benefits. It agreed with *Decision No. 230/06R2*, 2008 ONWSIAT 3135,

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87 W.S.I.A.T.R. (online), previously discussed in the 2008 Annual Report, that the amended Board policy provides for a closed list and that interest is only payable in other circumstances under the merits and justice provision of the Act. While LMR benefits were not on the list, the Vice-Chair found that there were exceptional circumstances. The worker had been denied any entitlement for approximately five years and was on his own to retrain and find alternative employment. He had also been diligent in pursuing his claim and was not responsible for any of the delays in adjudication.

Decision No. 652/09, 2009 ONWSIAT 820, 88 W.S.I.A.T.R. (online), considered an amendment to Board policy on how the 10% retirement contribution under section 44(1) of the pre-1997 Act should be calculated. The 2007 Annual Report noted that *Decision No. 1878/04R, 2007 ONWSIAT 2503, 83 W.S.I.A.T.R. (online)*, had denied the Board's request to reconsider *Decision No. 1878/04, 2006 ONWSIAT 2768, 83 W.S.I.A.T.R. (online)*, on the grounds that section 44(1) directed the Board to set aside 10% of FEL amounts actually paid to the worker rather than 10% of the amount prior to the CPP offset, as held in *Decision No. 1878/04*. The reconsideration Vice-Chair found that there was no Board policy specifically dealing with the issue and that the statute could be interpreted either way. The amended Board policy now specifically provides that 10% of every payment should be interpreted as 10% of FEL benefits after the CPP offset. The policy also states that it applies to all decisions made on or after August 1, 2003. *Decision No. 652/09* found that the amended policy was consistent with the pre-1997 Act. While there is a presumption against retroactivity, which applies to Board policy changes, the amendment was not a change in policy; rather it was a clarification by the Board in response to the inconsistency in interpretation found in *Decisions No. 1878/04* and *1878/04R*.

Right to Sue Applications

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

An issue which has arisen in previous years is whether the Tribunal has jurisdiction where the worker has received statutory accident benefits (SABs) under the *Insurance Act* but no court action has been commenced. The issue arises because section 31(1)(c) of the WSIA provides that an insurer can apply to the Tribunal to determine whether a “plaintiff” is entitled to claim benefits under the insurance plan. While some earlier cases found that there was no jurisdiction, two decisions considered more extensive submissions and found that the Tribunal has jurisdiction, but for somewhat different reasons. *Decision No. 1362/06I, 2006 ONWSIAT 2253, 80 W.S.I.A.T.R. (online)*, concluded that “plaintiff” should be interpreted broadly to include a person who has claimed statutory accident benefits from an insurer, while *Decision No. 14/06, 2007 ONWSIAT 339, 81 W.S.I.A.T.R. (online)* relied on section 31(1)(a) which enables an insurer to apply to the Tribunal to determine whether the right to commence an action is taken away. In 2009, *Decision No. 897/09I, 2009 ONWSIAT 2323*, considered an application by a SABs insurer in circumstances where only section 31(1)(c) could apply. *Decision No. 897/09I* agreed with *Decision No. 1362/06I* that there is jurisdiction under section 31(1)(c) and that interpreting “plaintiff” narrowly would lead to strange and anomalous results. The legislative drafters could not have intended that

disputes about compensation law should be decided by arbitrators at the Financial Services Commission (FSCO) rather than the Tribunal. *Decision No. 897/09I* also noted that this view is consistent with FSCO case law which indicates that the Tribunal has jurisdiction.

The WSIA contains restrictions on the Tribunal's jurisdiction over appeals from certain Board decisions, including a worker's election to claim benefits or sue. *Decision No. 1062/09*, 2009 ONWSIAT 1494, 89 W.S.I.A.T.R. (online), found that the Tribunal does not have the jurisdiction regarding the validity of a worker's original election to claim benefits or the Board's denial of a worker's request to withdraw the original election and sue instead. The worker's only remedy, if he wishes to challenge the Board's decision regarding his request to withdraw his election, is an application for judicial review.

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 caseload.

Second Injury and Enhancement Fund (SIEF) relief is an issue which is frequently appealed to the Tribunal. *Decision No. 464/09*, 2009 ONWSIAT 590, 88 W.S.I.A.T.R. (online), found that smoking is not, in itself, a prior disability or condition which can be used as a basis for claiming SIEF relief. While the worker's smoking habit may have contributed to her slow recovery from compensable surgery, the smoking was not a prior disability or condition under Board policy. In another interesting SIEF appeal, *Decision No. 1487/09*, 2009 ONWSIAT 1807, considered a claim for SIEF relief

where the worker suffered from psychological problems. It agreed with *Decision No. 431/89* (1989), 11 W.C.A.T.R. 355, that the evidentiary problems are greater in such cases and that Board policy provides a lower threshold for SIEF relief in cases involving non-organic conditions, thereby removing inequities that would result from the evidentiary problems. It is not necessary for there to have been diagnosis of a prior psychiatric illness. The question is whether there is evidence of prior psychic trauma which could be considered as evidence of vulnerability to psychological illness.

The WSIA and earlier Acts allow costs to be transferred from a Schedule 1 accident employer to another Schedule 1 accident employer where the accident is due to the second employer's negligence. Costs are apportioned based on the relative negligence of the employers and their workers. *Decision No. 808/09*, 2009 ONWSIAT 2397, considered whether there should be a cost transfer when the accident employer was an employment agency and its worker was injured when sent to a job with a recycling company. The recycling company was charged with five offences under the *Occupational Health and Safety Act* and pleaded guilty to one of the charges. *Decision No. 808/09* found that the majority of the negligence was attributable to the recycling company and transferred 90% of the costs to that company. The employment agency had some responsibility as it had failed to provide the worker with general knowledge of his rights and obligations with respect to health and safety matters. In another cost transfer case, *Decision No. 693/08*, 2009 ONWSIAT 2565, considered an argument that 100% of the costs should be removed from an accident employer's record where a worker was killed in a motor vehicle accident when he was not wearing a seat belt. The worker was not negligent in causing the accident; however, the extent of his injuries was at least partly related to his failure

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to wear a seat belt. *Decision No. 693/08* found that the worker would have suffered significant injuries even if he had been wearing a seat belt, given the severity of the impact which caused the van to roll on to its side and eventually catch fire. Since the worker was found to be liable for only 10% contributory negligence, 90% of the costs of the claim should be removed from the accident employer's record.

Decision No. 206/09, 2009 ONWSIAT 1368, 89 W.S.I.A.T.R. (online), is the first Tribunal decision to consider issues connected with registered deferred profit sharing plans (DPSPs). The employer had received an adjustment from the Board and was appealing for an increased period of retroactive adjustment because of negligent misrepresentation by the Board auditors that DPSPs should be included in insurable earnings. The Panel commented that the inclusion of DPSPs in insurable earnings was far from settled. There was, in any event, no negligent misrepresentation. The interpretation of the auditors was not unreasonable. All documents in existence at the time of the audits indicated that profit sharing plans were to be included in insurable earnings. There were no exceptional circumstances that would warrant a greater period of retroactivity.

Decision No. 1450/08, 2009 ONWSIAT 1865, considered a request for retroactive adjustment of a CAD-7 account to reflect SIEF relief. The employer had been switched from the CAD-7 Experience Rating Plan to the Merit Adjusted Premium Plan (MAPP) before the SIEF relief was granted. The Vice-Chair noted that changes to experience rating plans are not, in and of themselves, exceptional circumstances. Rather, they are part of the usual administration of the Accident Fund.

The effective closing date of the CAD-7 plan was applied to all affected employers. The conversion from one plan to another may cause an advantage or a disadvantage to a particular employer. In this case, there were no exceptional circumstances warranting retroactive adjustment. The employer had delayed more than three and a half years before applying for SIEF relief.

Classifications are also frequently appealed to the Tribunal. *Decision No. 2241/08, 2009 ONWSIAT 188*, is an interesting example of the interpretation and application of Ontario Regulation 175/98. The issue was whether the employer should be classified in the rate group for trucking, rather than freight forwarding brokers. The Regulation provides that an employer is deemed to be directly carrying out a business activity when it contracts for another person to carry out an operation that would be a business activity if the employer carried out the operation. *Decision No. 2241/08* interpreted this as intending to address the situation where an employer attempts to avoid paying premiums for a business activity by subcontracting it to others. The Board rate groups

Decision No. 206/09, 2009 ONWSIAT 1368, 89 W.S.I.A.T.R. (online), is the first Tribunal decision to consider issues connected with registered deferred profit sharing plans (DPSPs).

should be interpreted in a way that reflects this overall goal. To be classified in the trucking rate group, the broker must either use its own trucks and warehouses or use trucks and warehouses belonging to companies with which the employer has a standing association so

as to negate its purported function as a middleman. If the evidence shows that a broker truly operates as a middleman who arranges for an independent trucking company to provide trucking services to an independent customer, the broker is properly classified as a broker.

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 or practice. In 2009, for example, *Decision No. 484/06*, 2009 ONWSIAT 2785, considered the Board’s 2001 COPD (Chronic Obstructive Pulmonary Disease) Adjudicative Support Binder in upholding the Board’s decision to pay a NEL award for only a portion of a worker’s COPD on the grounds that only that portion was due to occupational dust exposure. The balance was due to smoking. The Panel reviewed previous decisions, including several more recent decisions such as *Decision No. 865/92R4*, 2006 ONWSIAT 569, 77 W.S.I.A.T.R. (online), which had found that apportionment is not appropriate in COPD cases because the non-compensable smoking and the workplace exposure interact to cause a single non-divisible injury. The Panel disagreed with *Decision No. 865/94R4*, noting that the decision did not have the benefit of the very thorough opinion from the Tribunal assessor. While the Supreme Court of Canada has established in cases such as *Athey v. Leonati*, [1996] 3 S.C.R. 458, that benefits cannot be apportioned in the case of indivisible injuries, the evidence established that the loss resulting

from the smoking could be separated from the loss from the occupational exposure. Epidemiological evidence and medical opinion, while imprecise, are currently the best available evidence, not only with respect to whether the dust exposure has contributed to a worker’s COPD, but also with respect to how to measure what percentage of the COPD impairment results from smoking and what results from dust exposure. The Board’s COPD binder is not policy; however, it is a significant collection of information which is relevant and of assistance in analyzing the appeal. *Decision No. 484/06* found that the formula in the COPD binder provides a fair and reasonable basis for measuring the relative contribution of the dust exposure and the smoking to the worker’s COPD.

Another 2009 case involving questions of apportionment was *Decision No. 1166/07*, 2009 ONWSIAT 430, 88 W.S.I.A.T.R. (online). The worker had died of mesothelioma and his estate claimed entitlement based on exposure to asbestos in Ontario. The worker was subsequently granted benefits for mesothelioma by Veterans Affairs Canada under the *Pension Act* based on exposure to asbestos while the worker was in the navy. Section 20(3) of the WSIA provides that if a worker is entitled to benefits under the WSIA relating to an accident and is also entitled to “compensation under the laws of another jurisdiction in respect of the accident,” the worker must elect to receive benefits under the insurance plan or to receive compensation under the laws of the other jurisdiction. *Decision No. 1166/07* considered the law on causation and apportionment and clarified that the section 20(3) election is only required when a worker is entitled under two regimes in respect of the same accident. Apportionment, or more properly, attribution of injuries to different accidents, does not apply where there are two different accidents, with the

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second one aggravating the earlier injury. The election is only required where there is duplicate entitlement for the same accident. In this case, it was likely that only one of the exposures caused the mesothelioma so there was only one accident. Once the worker had the mesothelioma, further exposure would not have worsened his degree of impairment. *Decision No. 1166/07* also found that the payments made under the *Pension Act* were, in substance, a form of workers' compensation benefits payable under the laws of another jurisdiction. Accordingly, the worker had to elect whether to receive benefits under the WSIA or the *Pension Act*.

In *Decision No. 1604/07*, 2009 ONWSIAT 1504, 89 W.S.I.A.T.R. (online), the worker claimed for symptoms related to aluminum exposure due to work on a machine that cut aluminum sheets. On the evidence, the worker's exposure was below the exposure levels set by the Ministry of Labour and, even if the worker had been exposed to more significant levels of aluminum dust, there was a lack of evidence demonstrating that the exposure was a significant contributing factor to the claimed neurological or other symptoms. The WSIA definition of "occupational disease," however, includes a medical condition that requires preventative removal from the workplace. In this case, the worker was entitled to a limited period of benefits for preventative removal from the workplace while the matter was investigated.

A number of cases have considered the effects of smoking and occupational exposure. For example, in *Decisions No. 1117/09*, 2009 ONWSIAT 2327, and *2615/06*, 2009 ONWSIAT 2154, the epidemiological evidence indicated that the relative risk of cancer from smoking was about 15, while that from exposure to diesel fumes was only 1.2 to 1.5. Entitlement was denied. In *Decision No. 565/04*, 2009 ONWSIAT 1253, 89 W.S.I.A.T.R. (online),

however, the worker was an underground miner for 30 years as well as a smoker. He was diagnosed with cancer of the larynx. In finding that the workplace exposure was a significant contributing factor to the laryngeal cancer, the Panel noted that the SRI for individuals with 25 years in underground mining is 174, which was suggestive of a link to occupational exposure. The worker had more exposure than the average worker over the course of his 30 years of employment and the location of the cancer was more commonly associated with asbestos exposure.

In 2009, the Tribunal released its final decisions in the appeals of three co-workers for breast cancer related to workplace exposure to electro-magnetic fields (ELFs). Previous interim decisions had made findings of fact about the physical characteristics of the workplace and about each worker's level of exposure to ELFs in the employer's systems department. After considering expert evidence from a doctor on behalf of the worker, a doctor on behalf of the employer and a Tribunal medical assessor, as well as epidemiological evidence and the assessments of various international research bodies, *Decisions No. 1778/03*, 2009 ONWSIAT 1464, 89 W.S.I.A.T.R. (online), *1779/03*, 2009 ONWSIAT 1465, and *1780/03*, 2009 ONWSIAT 1469, concluded that the workplace exposure of all three workers was below any association with cancer. The Panel noted that, while the fact of a cluster is sufficient to raise the question of whether there is an occupational cause, it is not sufficient to answer the question. All of the scientific and other evidence must be considered. The workplace had been studied intensively and the Panel was satisfied that the exposure levels were insufficient to suggest a causal relationship. The Panel also expressed concern about deciding that the opinion of a single expert is weightier than the opinion of international bodies that represented the best experts in the field, when those bodies had considered an issue and

expressed what was, in essence, a consensus view about the current state of epidemiology.

Paralegal Regulation

Since the 2007 amendments to the *Law Society Act*, which introduced paralegal regulation, the Tribunal has taken steps to ensure that paralegals who represent parties at the Tribunal meet the Law Society's requirements.

Tribunal decisions are consistent in finding that the Tribunal has 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. In 2009, three decisions did not allow unlicensed representatives to appear before the Tribunal. The most thorough discussion is contained in *Decision No. 2268/08I*, 2009 ONWSIAT 970, 89 W.S.I.A.T.R. (online), which considered the exemption for a "friend" under section 30(1) of By-law 4. To come within that exemption a person must meet four requirements: (1) the person's profession or occupation does not include provision of legal services in the practice of law; (2) the person provides legal services only occasionally; (3) the person provides the legal services for a relative, friend or neighbour; (4) the person does not receive any compensation including a fee, gain or reward, direct or indirect, for the provision of legal services.

Decision No. 2268/08I found that the representative did not meet at least the first two of these requirements. It was not necessary to make findings on the last two concerns since the exemption was only applicable if all four requirements were met; however,

the Vice-Chair also had concerns about the other two requirements. While there were some elements of friendship, the representative had been involved with the worker in various business dealings. In addition, there were concerns about possible indirect compensation.

Decision No. 1956/09I, 2009 ONWSIAT 2454, did not allow a representative claiming to be exempt as a "friend" to appear. The representative had formerly worked as a representative. While he claimed that he was only finishing a number of open cases and he was not receiving any remuneration, it appeared that he took on this appeal after the licensing requirements were introduced. Further, and most importantly, questioning revealed serious concerns as to the relationship and friendship with the worker. The Vice-Chair concluded that the representative was attempting to use the exemption for friends to circumvent the paralegal licensing requirements. The hearing was adjourned to allow the worker to obtain a new representative.

Tribunal decisions are consistent in finding that the Tribunal has 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.

In *Decision No. 633/09*, 2009 ONWSIAT 1118, 89 W.S.I.A.T.R. (online), the representative claimed to be exempt as an applicant to become a member of Canadian Registered Safety Professionals. While a member is

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exempt, the representative was only an applicant and had not yet taken her examinations. Accordingly, the representative was not allowed to appear.

In cases where concerns about a representative's status are less serious and the Tribunal is satisfied that allowing the representative to assist the party would not bring the administration of justice into disrepute, the representative has been allowed to appear and the representative's status has been referred to the Tribunal Chair for further investigation. See, for example, *Decisions No. 1614/08R*, 2009 ONWSIAT 2451, and *1694/08I*, 2009 ONWSIAT 513. In cases such as *Decision No. 644/09*, 2009 ONWSIAT 1623, 89 W.S.I.A.T.R. (online), where the Vice-Chair is satisfied that the representative meets the requirements for exemption, the hearing has been allowed to proceed with the unlicensed paralegal.

Miscellaneous

The WSIA and earlier Acts contain a statutory presumption that injuries occurring in the course of employment arise out of employment and vice-versa. The Tribunal's interpretation of the standard of proof required to rebut this presumption has recently been considered in light of the Supreme Court of Canada decision in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, which held that there is only one standard of proof in civil law and that is the balance of probabilities. See *Decisions No. 1672/04*, 2009 ONWSIAT 150, 88 W.S.I.A.T.R. (online), and *1225/09*, 2009 ONWSIAT 1964. *Decision No. 1225/09* noted that Tribunal decisions have not necessarily imposed a higher standard of proof to rebut the presumption; rather they have found that in reversing the question the nature of inquiry changes, so

that the evidence must demonstrate that it is probable that the accident did not arise out of employment.

The application of the *Canadian Charter of Rights and Freedoms* and the *Ontario Human Rights Code* arose in two cases in 2009. In *Decision No. 141/08I*, 2009 ONWSIAT 2648, the worker's representative challenged the validity of section 13(4) and (5) of the WSIA, which limits entitlement for mental stress. *Decision No. 141/08I*, concluded that the worker's claim for mental stress would have been allowed as an aggravation under the pre-1998 legislation but was not compensable under section 13(4) of the WSIA. The case will reconvene on the challenges raised under the Charter and Code, if the worker wishes to pursue these.

Decision No. 1657/07, 2009 ONWSIAT 2737, held that the reduction of the worker's NEL award through the use of the Combined Values Chart (CVC) of the AMA Guides does not contravene the Charter or the Code. The worker had argued that the use of the CVC violated section 15 of the Charter and the Code because it discriminated against workers who suffer more than one workplace injury and discriminated against this worker on the basis of his prior disability. The Panel agreed with previous Tribunal cases that the Tribunal has the jurisdiction to apply the Charter and the Code. *Decision No. 1657/07* reviewed case law from the Supreme Court of Canada on the test for determining whether there is a section 15 violation and concluded that the main focus is whether the discrimination perpetuates disadvantage and stereotyping. Given concerns expressed in recent Supreme Court of Canada cases about comparator groups, the Panel considered all comparator groups submitted by the parties. For the purposes of the analysis, the Panel accepted that there was differential treatment

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based on an enumerated ground. There was, however, no substantive discrimination. The Panel distinguished *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, where the chronic pain provisions of the Nova Scotia legislation did not correspond to the needs and circumstances of workers with chronic pain, and where workers suffering from chronic pain were excluded from benefits available to other workers. In *Decision No. 141/08I*, the prior NEL award simply led to a somewhat smaller award for future NELs and did not limit entitlement to other benefits. A NEL award is a personalized assessment of the worker's impairment under the AMA Guides and is rated on a holistic basis taking into account all permanent disabilities. The worker's individual circumstances are therefore considered. The Panel concluded that use of the CVC is not unfair and does not affect the worker's dignity. The AMA Guides' philosophy is that physical impairments affect the whole person and that ratings should be combined to express an impairment of the whole person. In reducing a NEL rating through the CVC, the Board is not perpetuating prejudicial or stereotypical concepts of disability, but is ascribing a rating that reflects the physical or functional abnormality or loss of the impaired person on a whole-person approach.

Finally, *Decision No. 2621/07*, 2009 ONWSIAT 2098, addressed the issue of whether a common-law partner qualified as a "spouse" under the WSIA definition, which includes a person living in a conjugal relationship outside marriage. The Panel considered the criteria in *Molodowich v. Penttinen* (1980), 2 R.F.L. 276, which include arrangements for shelter; arrangements for sexual and personal behaviour; arrangements for domestic services; social activities; attitude and conduct of the community toward the couple; financial arrangements; and attitude

and conduct of the couple concerning children. Court cases have also given considerable weight to the evidence of the parties' intentions. The Panel found that evidence that the parties were careful to avoid establishing a formal or legal spousal arrangement indicated that they were not in a conjugal relationship under the WSIA.

Applications for Judicial Review and Other Proceedings

There were a record number of applications for judicial review of Tribunal decisions in 2009. Given that over its 24-year history and more than 50, 000 released decisions there has never been a final decision of a court that quashed a Tribunal decision, the high number of judicial reviews is surprising.

Only judicial review applications where there was some significant activity during 2009 have been included below. There are a number of other applications for judicial review not referred to here which have been adjourned for various reasons, and have not been finally concluded.

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

Judicial Review

1 ***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; Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal), [2008] S.C.C.A. No. 541***

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. The Vice-Chair held that Board policy did not include benefit payments and pension plans in earnings basis. There was no direct relationship between the employer's contributions and the benefits the worker received. The Vice-Chair also held that the Legislature did not intend to include contributions from all employers in Ontario in the earnings of workers, or that some workers would receive non-taxable income.

The worker commenced an application for judicial review. The Workplace Safety and Insurance Board successfully brought a motion to intervene in the judicial review. The judicial review was heard by the Divisional Court on June 27, 2007.

The Divisional Court Panel of Justices 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, and was not a major

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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 the Tribunal's motion for leave to appeal (Winkler, Rosenberg and Lang JJ.A.). At the Court of Appeal the Board again intervened.

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

The worker applied for leave to appeal to the Supreme Court of Canada. On May 7, 2009 the application for leave to appeal was dismissed by Chief Justice McLachlin and Justices Abella and Rothstein.

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

The worker appealed for entitlement for a cardiac condition which he claimed was caused by stress at work. Board policy allows entitlement for a cardiac condition providing a causal relationship is shown between the cardiac condition and an accident at work. In the case of stress, the policy requires "acute emotional stress with no significant delay in the onset of symptoms."

After an exhaustive review of the facts, the Tribunal denied the worker's appeal. The Tribunal found the worker did not suffer from a heart attack at the relevant times, there were no acute emotional stress events caused by work, and the worker suffered from a large number of significant pre-existing risk factors that made any contribution from workplace stress an insignificant factor in his ongoing cardiac problems.

The worker commenced an application for judicial review, on which he represented himself. He alleged numerous errors and breaches of natural justice by the Panel. The judicial review was heard on February 9, 2009 before Justices Wilson, Reilly and Karakatsanis. The decision was released on February 20, and unanimously dismissed the judicial review. The Court found that contrary to the

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worker's allegation he was provided with the opportunity to make submissions, so there was no breach of natural justice. The Court also found that the Tribunal's factual findings were amply supported by the evidence, and its conclusions were reasonable.

3 **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 Justices Ferrier, 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's application for leave to appeal to the Court of Appeal was dismissed on March 15, 2009 for delay.

4 **Decision No. 556/03, 2008 ONWSIAT 1811; Topyurek v. Ontario (Workplace Safety and Insurance Appeals Tribunal), [2009] O. J. No. 2330, Ontario Divisional Court**

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 surveillance of the worker. The Board also reversed the worker's NEL award for the head injury and reduced the NEL award for the back to 5%.

The employer appealed to the Tribunal seeking termination 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 they 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

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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 judicial review was dismissed on May 14 by a Divisional Court Panel of Justices Jennings, Pardu and Low.

Justice Pardu, writing for a unanimous Court, stated [at para. 3]:

There was ample evidence before the Tribunal which justified its decision. It conducted an exhaustive review of the extensive evidence before it and made decisions about credibility and the weight to be accorded to conflicting medical evidence before it. It is not the function of this Court to re-weigh that evidence.

5 ***Decisions No. 1132/02I, 2002 ONWSIAT 1975, 1132/02, 2004 ONWSIAT 1458, and 1132/02R, 2005 ONWSIAT 1349; Kamara v. Ontario (Workplace Safety and Insurance Appeals Tribunal), [2009] O.J. No. 2080, Ontario Divisional Court***

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 poor historian, and that his recollections of many events were in conflict with the case materials and were not consistent with the medical reporting or 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 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 rather than a result of the January 1997 accident.

The worker commenced an application for judicial review against the Tribunal and the employer. He alleged the Tribunal had erred in basing its decision on a Tribunal Medical Discussion Paper, that the Tribunal should have obtained an opinion from a Board doctor, and that the Tribunal's conclusion that the worker did not have an impairment was unreasonable.

The judicial review was heard on April 28, 2009, by the Divisional Court panel of Justices Wilson, Lederman and Low. The Court reserved, and released its decision on May 18, 2009.

The Court dismissed the application for judicial review. The Court found that it was clear that the Tribunal had based its decision on all the evidence, and not just on the Discussion Paper. The Court made the following statement about Discussion Papers [at para. 4]:

As part of its practice, WSIAT commissions medical discussion papers to provide general background information on medical issues which may be raised in appeals. They are intended to provide a broad and general overview of a topic and are written to be understood by lay individuals. The Tribunal is

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not bound by the information in a discussion paper in any particular case. Rather, the discussion papers provide a repository of medical knowledge in a variety of areas that both the Tribunal and parties may look to. As well, it is always open to parties to adduce their own medical evidence to challenge or to distinguish the information in a discussion paper. In the instant case, the discussion paper in question was provided to the applicant well in advance of the hearing in order to allow him to respond to it as he saw fit. However, no response or objection was forthcoming.

The worker argued the Tribunal should have obtained the opinion of a Board medical advisor pursuant to Board policy. The worker was apparently confused, as this policy did not apply to the Tribunal. The Court also found that the Tribunal did not need to exercise its discretion to refer questions to an assessor because it was able to reach its conclusion without seeking an assessor's assistance. Finally, the Court refused to re-weigh the evidence, as this is not the role of a Court on an application for judicial review. There was ample evidence for the Tribunal to conclude that the worker did not lose time from work because of the injury, that he could do the work offered to him by the employer, and he did not suffer a permanent impairment.

The employer had also argued that the application for judicial review should have been dismissed for delay. As the Court found the judicial review could be dismissed on its merits, it did not need to consider this argument.

6 Decisions No. 390/08, 2008 ONWSIAT 559, and 390/08R, 2008 ONWSIAT 1989; *Amin v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, [2009] O.J. No. 4715, Ontario Divisional Court

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, closing benefits on August 5, 2004. The worker appealed to the Tribunal for further benefits. The employer cross-appealed, alleging no entitlement should have been granted at all. The Vice-Chair denied both the worker's appeal and the employer's cross-appeal.

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

Although rejecting the worker's objections about procedural fairness, the Court held the Tribunal's decision to terminate benefits on August 5, 2004 was unreasonable. The Court disagreed with the Tribunal's factual determination that the worker's ongoing problems were not medically substantiated. The Court further opined that if the Tribunal was not satisfied with the evidence it could require the worker to undergo an examination by a medical health professional, which would apparently be able to shed light on the medical

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state of the worker at a particular point in time five years earlier. The Court directed that the matter should be referred to a differently constituted Tribunal panel to determine the date when the worker no longer had a work-related injury.

The Tribunal filed an application for leave to appeal to the Court of Appeal, on the grounds that in wading into the facts on a matter squarely within the Tribunal's exclusive jurisdiction, the Divisional Court failed to apply the reasonableness standard of review. At the end of the year the Tribunal was waiting to see if leave to appeal had been granted.

7 Decisions No. 565/08, 2008 ONWSIAT 1630, 86 W.S.I.A.T.R. (online), and 565/08R, 2009 ONWSIAT 210; Windsor Utilities Commission v. Skara, [2009] O.J. No. 5469, Ontario Divisional Court

The worker, a backhoe operator, was called in to repair a broken water main at night by his employer. After completing the repairs, the worker was injured in a motor vehicle accident when he fell asleep while driving home. The Board held the worker was not in the course of his employment. The worker appealed to the Tribunal.

The Vice-Chair reviewed Board policy and prior Tribunal decisions. The general rule is that a worker is not considered to be in the course of employment when driving home from work. However the Panel held the worker fell into a specific exception because he had responded to an emergency call from his employer, and so would be considered to be a worker under Board policy when he had his car accident.

The employer commenced an application for judicial review of the Tribunal's decision. Counsel for the employer alleged the Tribunal had no standing as a party in this judicial review application, and also that the

Tribunal should have no right to appeal if the judicial review application were granted.

The judicial review was heard on December 14, 2009 before the Divisional Court panel of Justices Lederman, Jennings and Swinton. The Court released its decision dismissing the judicial review on December 21, 2009.

The Court held the Tribunal gave clear reasons why the Board policy applied in these circumstances, and this conclusion was reasonable. Further, the Court rejected the employer's argument that the Tribunal should have found the Board policy was inconsistent with section 126(4) of the WSIA. This argument had not been made by the employer at the Tribunal hearing, and it was therefore not unreasonable for the Tribunal not to have dealt with it.

Since the judicial review application was dismissed, the Court did not have to decide whether the Tribunal would have had the right to appeal. However the Divisional Court noted that it would have ruled that it did not have the jurisdiction to determine this matter, as the Court of Appeal would have to determine if the Tribunal had standing to appeal to that Court.

8 Decisions No. 167/06, 2006 ONWSIAT 532, 167/06R, 2006 ONWSIAT 2930, 167/06R2, 2008 ONWSIAT 1943, 86 W.S.I.A.T.R. (online), and 167/06R3, 2008 ONWSIAT 2497

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

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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:

36(3) 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. The Vice-Chair directed that the appeal be heard again on the merits.

As a result of the reconsideration decision, in July 2009 counsel for the worker filed a notice of abandonment of the application for judicial review.

9 *Decisions No. 351/07, 2007 ONWSIAT 697, and 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 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. The same counsel has commenced judicial reviews with class actions in two other cases – *Decision No. 1387/07* and *Decision No. 1858/08*, as noted below.

Linking a class action with a judicial review is a novel remedy so far as the Tribunal is concerned. All parties agreed that the judicial review application would be heard first. At the end of the year the Tribunal had filed its factum. This judicial review, along with the judicial review of *Decisions No. 1387/07 and 1858/08*, will be heard together on February 3 and 4, 2010 in Toronto.

10 *Decision No. 1858/08, 2009 ONWSIAT 25*

The worker had a claim in 1978. He was granted a section 147(4) supplement. The worker subsequently passed away from non-work-related causes in 2004. The

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worker's estate appealed for a recalculation of section 147(4) benefits, alleging a supplement for a pre-1985 accident calculated under section 147(9) could exceed the Old Age Supplement. The appeal was denied.

The worker has commenced an application for judicial review and as in *Decision No. 351/07* (above), has joined it with a class proceeding. As with *Decision No. 351/07*, the judicial review application will be heard before the class action. It is scheduled to be heard on February 3 and 4, 2010.

11 Decisions No. 1387/07, 2008 ONWSIAT 1384, and 1387/07R, 2008 ONWSIAT 3174

The worker had an accident in 1988. She was awarded a supplement under section 147(4). Her appeal that her supplement should exceed the Old Age Supplement under section 147(10) because there is no limit for section 147(4) supplements for pre-89 injuries was denied.

As in *Decision No. 351/07* and *Decision No. 1858/08* (above) the worker has joined a judicial review application with a class proceeding. In all three cases the judicial review application will be heard first, on February 3 and 4, 2010.

12 Decisions No. 207/05, 2005 ONWSIAT 812, and 207/05R, 2006 ONWSIAT 40

The plaintiff was injured in a motor vehicle accident. The tractor-trailer 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 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.

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, 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. 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 judicial review was scheduled for January 2010. However the plaintiff and defendant reached an agreement and in October 2009 the judicial review was dismissed with the consent of all parties.

13 Decisions No. 397/05, 2006 ONWSIAT 2053, and 397/05R, 2007 ONWSIAT 452

The worker injured his thumbs in 1999. He was granted LOE benefits until December 17, 2001 and 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 for 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.

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The Panel held that the worker had non-organic entitlement, but no organic entitlement for his various complaints. Consequently the Panel found the worker had entitlement for chronic pain, which included entitlement for the dystonia. 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. Following discussion with the worker's representative, it was agreed that the judicial review would be adjourned while the Tribunal commenced a reconsideration on its own motion in conjunction with the worker commencing a reconsideration of another Tribunal decision. At the end of the year both reconsiderations were assigned to a new Tribunal Vice-Chair.

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

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

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

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

Following discussions with her former counsel, in November 2002 it was agreed that the judicial review application would be adjourned to allow the worker to pursue an application to reconsider *Decision No. 1509/02*.

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

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

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

The worker commenced an application to reconsider *Decision No. 2021/07E*. In *Decision No. 2021/07ER*,

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released July 22 2009, the Tribunal allowed the reconsideration and also granted an extension of time to appeal the recurrence aspect of the ARO decision. The judicial review remains adjourned pending the further Tribunal decision on entitlement for the recurrence.

15 Decisions No. 2191/05I, 2006 ONWSIAT 1671, and 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. 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. The worker failed to perfect and the judicial review was dismissed by the Registrar.

16 Decisions No. 893/06, 2006 ONWSIAT 2265, and 893/06R, 2007 ONWSIAT 2860

The worker's short-term earnings were calculated based on his earnings of \$25 an hour, with no deductions, at the time of the injury. His average earnings were 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 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 retained counsel and commenced an application for judicial review. The Tribunal filed its Record of Proceedings. The worker then discharged his lawyer. The worker filed his own factum and a certificate of perfection. The Tribunal has filed its responding factum. A date of June 14, 2010 has been set for the hearing of this judicial review before Divisional Court in Ottawa. This case will be heard in the French language.

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

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

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

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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 filed its Record of Proceedings. The worker refused to pay for the hearing transcripts he ordered, or to file a factum. As a result of telephone calls which the worker made to Tribunal staff, the Tribunal is not currently accepting further telephone calls from the worker.

The worker asked the Divisional Court for an extension of time in which to perfect his judicial review application. The Tribunal and the Tribunal's co-respondent took no position on the request. The Court granted the request and the worker had until the end of June to perfect the judicial review application. He failed to perfect in time and at the end of the year the Tribunal had received no further communication from him.

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

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

The Tribunal filed its factum. The applicant, who is self-represented with the assistance of her son, had originally demanded an early date for the judicial review. However at the end of the year the Tribunal was still waiting for the applicant to agree to a hearing date.

19 **Decisions No. 832/04, 2004 ONWSIAT 2385, and 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 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. As this case will be heard in French the Tribunal has retained outside counsel. The worker has filed an affidavit alleging that comments made by the Vice-Chair prior to the hearing constitute an apprehension of bias.

The Tribunal has served and filed its record, and both parties' factums have been served and filed. The judicial review will be heard in Ottawa. At the end of the year no date had yet been set for the hearing of the judicial review.

20 **Decisions No. 1921/06, 2008 ONWSIAT 650, and 1921/06R, 2009 ONWSIAT 1501**

Mr. K was driving four temporary workers from a personnel agency in his van. The van was struck by a GO train and Mr. K and all the passengers were killed. The family members of two of the deceased, Mr. B and Mr. L, commenced an action against the estate of Mr. K. The

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insurer of the estate of Mr. K applied for a determination that the right of action of the plaintiffs was taken away.

The Panel found the driver and passengers were all workers in the course of their employment at the time of the accident. The Panel also found that the family members of the two deceased passengers were not dependent on Mr. B or Mr. L, so their right of action was not taken away.

Following the release of *Decision No. 1921/06*, counsel for the insurer requested first a clarification, and then subsequently a reconsideration of the decision. He alleged that the Panel had failed to make a determination about whether the right of action of the estate of Mr. B and Mr. L was also taken away. The reconsideration was dismissed because it was opposed by counsel for Mr. B and Mr. L, and because it was made more than 40 days after the release of *Decision No. 1921/06* (contrary to the Practice Direction on Right to Sue Applications).

Counsel for the insurer then brought a motion to dismiss the outstanding actions. The plaintiffs opposed the dismissal. The Tribunal was not notified of the motion. In a judgment released on August 27, 2008, Justice Campbell noted the parties faced a dilemma in that they did not have a clear determination as to whether the right to sue by the deceased had been taken away. It was also clear that this matter could only be determined by the Tribunal. Justice Campbell stated:

I appreciate the need on the part of the Tribunal for procedural efficiency. However, this should not trump the rights of the parties to know where they stand.

This Court on this motion is not in a position to direct the Tribunal to do what perhaps should have been done before. If there is

such a right in the nature of *mandamus*, this can only be granted by the Divisional Court on a motion for judicial review of the Tribunal's decision.

Counsel were agreed that a judicial review might be the most expeditious method of moving this matter forward. As a result, the motion for summary judgment is adjourned to a date to be fixed at a 9:00 a.m. appointment, if necessary, to permit either side as advised to pursue judicial review on the nature of *mandamus*.

The insurer served the Tribunal with an application for judicial review. Following conversations with the parties, the Tribunal Chair commenced a reconsideration of *Decision No. 1921/06* on the Tribunal's own motion.

Decision No. 1921/06R, released on June 19, 2009, held that neither B or L or their estates were authorized to commence an action against the estate of K. The Panel reaffirmed that it had no jurisdiction to take away the rights of action of the non-dependent family members.

Following the release of *Decision No. 1921/06R*, the applicant and Tribunal agreed that the judicial review would be dismissed by the Divisional Court registrar.

21 *Decisions No. 1971/00, 2001 ONWSIAT 153, 1971/00R, 2001 ONWSIAT 3777, and 1971/00R2, 2007 ONWSIAT 1119; Decisions No. 1357/03I, 2003 ONWSIAT 2133, 1357/03, 2004 ONWSIAT 2391, and 1357/03R, 2007 ONWSIAT 1092*

In this application for judicial review, involving six decisions for the same worker, the worker was denied entitlement for his neck, right shoulder and carpal tunnel

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syndrome. The worker first appealed for entitlement based on two specific incidents allegedly occurring at work in 1994. The appeal was denied by Vice-Chair Loewen in *Decision No. 1971/00*. An application for reconsideration was also denied by Vice-Chair Loewen in *Decision No. 1971/00R*.

The applicant, now represented by new counsel, brought a new appeal for entitlement based on disablement. This appeal was heard by Vice-Chair Carroll. After obtaining the opinion of an Assessor, Vice-Chair Carroll denied this appeal in *Decision No. 1357/03*.

The applicant then brought an application to reconsider *Decisions No. 1971/00, 1971/00R and 1357/03*. He alleged there had been a misinterpretation of the Assessor's report in *Decision No. 1357/03*, and that if there had been a whole person approach taken the applicant's appeals would have been allowed.

In *Decisions No. 1357/03R and 1971/00R2*, Vice-Chair Moore denied the application for reconsideration. Vice-Chair Moore obtained a clarification from the Assessor, which confirmed that his report had not been misinterpreted by Vice-Chair Carroll. Vice-Chair Moore held there was no error in the Tribunal's decisions to attribute the worker's ongoing upper back/neck and right shoulder complaints to the progression of his degenerative condition of the cervical spine and not to the workplace incidents or disablement.

Counsel for the applicant commenced an application for judicial review of *Decisions No. 1971/00, 1971/00R, 1971/00R2, 1357/03 and 1357/03R*. At the end of the year the Tribunal was still waiting for a date to be scheduled for the judicial review in Ottawa. The most recent information was that it would be heard in Ottawa in the summer or fall of 2010.

22 *Decisions No. 1233/08, 2008 ONWSIAT 1604, and 1233/08R, 2009 ONWSIAT 1314*

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

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings and the worker filed his factum. The Tribunal then determined that it should reconsider its decisions on its own motion. The worker's counsel agreed to place the judicial review on hold pending the outcome of the Tribunal's reconsideration. At the end of the year the Tribunal's reconsideration decision had not been released.

23 *Decisions No. 1791/07, 2007 ONWSIAT 2212, 1791/07R, 2008 ONWSIAT 634, and 1791/07R2, 2009 ONWSIAT 2214*

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 held the worker had no entitlement for carpal tunnel syndrome, he was not entitled to a psychotraumatic award, and he was not entitled to an increase in his NEL.

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The worker commenced an application for judicial review. The Tribunal served and filed its Record, and was in the process of preparing its factum when it was noted that the worker's counsel had referred to evidence in his factum that was not before the Tribunal. After discussions with the worker's counsel, it was agreed that this judicial review would be put on hold while the worker pursued a further reconsideration. The further reconsideration was denied by way of *Decision No. 1791/07R2* (September 21, 2009). The worker revived his application for judicial review before the end of the year. The Tribunal will be filing its factum in January 2010 and the application is scheduled to be heard in March 2010.

24 Decisions No. 2835/07, 2007 ONWSIAT 3238, and 2835/07R, 2008 ONWSIAT 1446

The worker fell at work and injured his wrist. He was paid benefits for almost a year. The worker's appeal for ongoing entitlement for organic and psychological disability was denied by the Tribunal. He filed an application for judicial review challenging the Tribunal's finding that he was not entitled to benefits for a psychological disability.

In reaching its decision the Tribunal applied the Board policy on Psychotraumatic Disability. After assessing the evidence the Tribunal found the worker failed to establish on the balance of probabilities that the injury was a significant factor in the development of the disability. There was no medical diagnosis that the worker suffered from post-traumatic stress disorder. Although the worker did suffer from depression, the Tribunal found this was caused by a number of non-work-related factors.

The judicial review is scheduled to be heard in Toronto on February 25, 2010.

25 Decisions No. 717/08, 2008 ONWSIAT 1186, and 717/08R, 2008 ONWSIAT 2777

The worker appealed to the Tribunal for an increase to his long-term earnings basis from May 2000 to January 2003, and for a change to the Board's finding of a suitable employment or business (SEB) which had resulted in a reduction to his 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. He alleged the calculation of his long-term earnings should have been higher, the Panel should have made the actual calculations rather than referring it to the Board, and his short-term earnings should have been higher. He also took issue with some procedural rulings made by the Panel during his hearing.

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

The worker attempted to file an appeal of the Tribunal's decision. Subsequently the worker retained counsel, who commenced an application for judicial review. The worker's counsel advised that she was revising the

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materials filed with the Court, but at the end of the year the problems had not been resolved. Tribunal counsel was following up to require the appropriate documents be filed prior to the judicial review proceeding.

26 Decision No. 985/05, 2008 ONWSIAT 2137

In this French language appeal, the worker was a nurse's aide at a long-term care facility. The worker appealed a decision of the Appeals Resolution Officer denying entitlement for fibromyalgia.

The worker claimed entitlement on a disablement basis, alleging her condition resulted from hard work. The Vice-Chair noted that hard work is not a medical condition and that there is no presumption that hard work causes injury, unlike occupational diseases where exposure to certain elements or conditions is recognized as causing injury. There was no objective evidence that the worker developed her fibromyalgia as a result of her employment. The rheumatologist who first diagnosed the worker's fibromyalgia indicated that that condition was not caused by employment-related physical stress.

The worker, who is self-represented, commenced an application for judicial review. At the end of the year the worker had not taken any steps to proceed with the judicial review.

27 Decision No. 1766/09, 2009 ONWSIAT 2268

The worker was denied entitlement for chronic pain and LOE benefits after July 2001 by the Board. Her appeal to the Tribunal was granted, the Vice-Chair holding that the worker has entitlement to chronic pain, entitlement to wage loss benefits from April 2001 to June 27, 2002, and full LOE benefits from June, 27 2004 to August 23,

2002. The Board was directed to determine if there was an ongoing LOE entitlement after August 23, 2004.

The employer served an application for judicial review in December 2009. At the end of the year the Tribunal was preparing its Record of Proceedings.

28 Decisions No. 1110/07I, 2007 ONWSIAT 1299, 1110/07, 2008 ONWSIAT 2419, and 1110/07R, 2009 ONWSIAT 605

The worker appealed for entitlement for interstitial lung disease and for polymyocitis, which she alleged were conditions that resulted from her workplace exposure as a nurse. The Tribunal Vice-Chair sought the opinion of a Tribunal assessor, a respirologist with expertise in interstitial lung disease. The Vice-Chair reviewed the medical evidence and concluded that while an association with work was possible, on the balance of probabilities it was not likely that her condition arose from work and more likely it was idiopathic in origin.

The worker commenced an application for judicial review. The Tribunal is contesting the admissibility of some of the worker's materials. At the end of the year the Tribunal had served its Record of Proceedings and was waiting for the worker's factum.

29 Decision Nos. 1976/99I (November 30, 1999), 1976/99, 2002 ONWSIAT 2631, and 1976/99R, 2005 ONWSIAT 1950

The worker was granted entitlement on an aggravation basis for benefits from March 1991 until February 1992. The worker did not seek medical treatment from November 1991 until September 2004. The hearing Panel found the worker was suffering from regional myofascial pain, rather than fibromyalgia.

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

The worker has commenced an application for judicial review. However she was represented by a paralegal from Quebec, who does not have the status to represent her at Divisional Court. At the end of the year the Tribunal was preparing its Record of Proceedings.

Other Litigation Matters

Human Rights Complaint

A worker appealed to WSIAT for entitlement for a stress-related disability on the grounds it arose out

of harassment at work. 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 alleged 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. In effect she was attempting to change the result of *Decision No. 624/07* through her complaint to the Human Rights Tribunal.

WSIAT took the position that the Human Rights Tribunal has no jurisdiction to hear an appeal from, or judicially review, an adjudicative decision of WSIAT. The Human Rights Tribunal agreed with WSIAT's submission, and held it had no jurisdiction to hear the complaint.



Ombudsman Reviews

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

When the Ombudsman's Office receives a complaint about a Tribunal decision, the Office considers whether the decision is authorized by the legislation, whether the decision is reasonable in light of the evidence and whether the process was fair. If the Ombudsman 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 2009 and 2008, however, the Tribunal did not receive any notifications to this effect. At the end of 2009, there were no outstanding intent to investigate files.

At the end of 2009, there were no outstanding intent to investigate files.



TRIBUNAL REPORT

Tribunal Organization

Vice-Chairs, Members and Staff

Lists of the Vice-Chairs and Members, senior staff and Medical Counsellors who were active at the end of the reporting period, as well as a list of 2009 reappointments and newly appointed Vice-Chairs and Members, can be found in Appendix A

Office of the Counsel to the Chair

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

Professional development continued to be important in 2009, given the four different legislative schemes, statutory amendments, extensive Board policy and policy amendments. OCC developed and delivered orientation training sessions on workplace safety and insurance law and related legal issues to a number of new adjudicators. OCC was also active in developing and delivering ongoing professional development sessions to adjudicators and staff.

During 2009, OCC assisted in the development of knowledge management resources aimed at facilitating

the access of Vice-Chairs and Side Members to information on the law, policy and procedure through electronic means.

Office of the Vice-Chair Registrar

The staff of the Office of the Vice-Chair Registrar (OVCR) is 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 OVCR. Upon receipt of an appeal, the Tribunal gives notice to the parties. When the appellant is ready to proceed, the OVCR requests the claim or firm file from the Board. The OVCR's pre-hearing staff then review the appeal record to ensure that it is complete and confirm that the appeal is ready to be heard.

OVCR staff also use a variety of Alternative Dispute Resolution (ADR) techniques to resolve appeals prior to hearing. In such cases, 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

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referred to her by Tribunal staff, such as admissible evidence, jurisdiction and issue agenda. The process may be oral or written and results in a written decision with reasons. Requests to have a matter put to the Vice-Chair Registrar are dealt with by the OVCR staff.

The OVCR is divided into a number of areas.

The Early Review Department

The Early Review Department is responsible for the initial processing of all Tribunal appeals and applications. Staff review all Notices and Confirmations of Appeal 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 then 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 as the parties pursue more appropriate alternatives.

Vice-Chair Registrar Teams

After passing through Early Review, appeals 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, insufficient evidence, or outstanding issues at the Board. Staff in the Vice-Chair Registrar Teams also respond to party correspondence and queries, as well as Vice-Chair or Panel instructions, until the appeal is heard.

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 the law and 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 – Two Party Appeals

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 to 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, or if the

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respondent does not want to participate in a mediation, 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.

Mediation Services – 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 is 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 discussion with the parties may result in expeditious resolution of the batched appeals, via recommendations or early decisions by the Vice-Chair Registrar.

Tribunal Counsel Office

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

Hearing Work

Under the Tribunal's case processing model, TCO processes appeals which raise the most complex medical, legal or policy issues. These appeals are streamed to TCO from the Early Review Department,

or are assigned to TCO for post-hearing work at the direction of a Panel or Vice-Chair. TCO also handles applications for reconsideration of Tribunal decisions.

Pre-hearing Work

When a complex appeal is received by TCO prior to a hearing, the case is assigned to a lawyer. The case is carried by that lawyer until the final decision is released. The lawyer resolves legal, policy and evidentiary issues that arise prior to the hearing, provides assistance to the parties if there are procedural questions concerning the appeal, and attends at the hearing to question witnesses and make submissions on points of law, policy, procedure and evidence.

Post-hearing Work

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

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

Tribunal Organization

TCO Lawyers

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

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

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

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

TCO Legal Workers

TCO legal workers handle exclusively post-hearing appeal work and reconsiderations. They are a small, highly trained group who work diligently to ensure Panel and Vice-Chair directions on complex appeals are completed quickly, thoroughly and efficiently. The TCO Post-Hearing Manager directs and assigns work to the TCO legal workers. The Post-Hearing

Manager also reviews and analyzes the types of post-hearing requests, the reasons for adjournments, and monitors the progression of the post-hearing and reconsideration caseload.

Medical Liaison Office

The Tribunal must frequently decide appeals that raise complex medical issues, or require further medical investigation. The Tribunal thus has an interest in ensuring that Panels and Vice-Chairs have sufficient medical evidence on which to base their decisions. The Medical Liaison Office (MLO) plays a major role in identifying and investigating medical issues, and obtaining medical evidence and information to assist the decision-making process.

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

MLO Staff

In late 2009 after fourteen years of dedicated service, MLO Manager Ellen Schoffer left the Tribunal to accept a position in Hamilton closer to her home. Immensely popular with Tribunal staff and the medical community, Ellen's broad medical knowledge and keen sense of humour will be missed.

Tribunal Organization

Anne Greig RN, BScN has been named Acting Manager of MLO. Drawing on her many years of experience handling Tribunal medical issues, Anne immediately assumed leadership of MLO and will be carrying on MLO's tradition of providing the Tribunal with medical expertise.

Medical Counsellors

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

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

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

At the post-hearing stage, Panels or Vice-Chairs may need further medical information to decide an appeal. These adjudicators may request the assistance of MLO in preparing specific questions for Medical Assessors.

Medical Counsellors assist MLO by providing questions for the approval of the Panels or Vice-Chairs, and by recommending the most suitable Medical Assessor.

Medical Assessors

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

Tribunal Organization

Although the report of a Medical Assessor will be cited in the Tribunal decision, the Medical Assessor does not make the decision on appeal. The actual decision to allow or deny an appeal is the sole preserve of the Tribunal Panel or Vice-Chair.

The Appointment Process for Medical Assessors

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

MLO Resources Available to the Public

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

- Information management and privacy
- Web development and design
- Library Services
- Publishing (print and web)
- Translation
- Co-ordination of Staff Training and Development

Tribunal Organization

These services support the Tribunal's goal of delivering timely, well reasoned decisions. Information Services staff work collaboratively to deliver high quality information products and services.

Information Management and Privacy

A major initiative in 2009 was to schedule the Tribunal's corporate records and to establish a file plan for those records. This work makes information easier to access and was done in accordance with Ontario's Archives and Recordkeeping Act. At the same time, staff received training on how to manage information more effectively to ensure that the Tribunal's files are complete and up-to-date.

Staff in Information Services also co-ordinate the Tribunal's Privacy program by recording privacy incidents and working with staff to ensure that private information is not disclosed.

Web and Content Development

Information Services staff maintain the content for the Tribunal's public website, the Ontario Workplace Tribunals Library website and the Tribunal's portals. 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 2009, our webmaster reviewed the Tribunal's public website to ensure that the information presented on the site meets the province's new accessibility standards. In this period more resources were added for "Representatives" on the public site. The addition of new content will continue in 2010.

Library Services

The Ontario Workplace Tribunal Library (OWTL) is an information centre 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, employment law, administrative law and other related subjects. The library also provides services to the staff of the Ontario Labour Relations Board, the Human Rights Tribunal of Ontario, and the Pay Equity Hearings Tribunal.

In 2009 the library, like many libraries across the country, embarked on digitization projects to make information more accessible for library users. This involved scanning decisions and public documents from the various Tribunals. This work will continue in 2010. During this period a number of "pathfinders" were developed to help clients use library materials more effectively. Library staff also participated on a number of Tribunal Committees, including the Accessibility Committee. This Committee developed the Tribunal's policy on Accessibility. Library staff also arrange for the weekly transfer of selected Tribunal decisions to databases such as CanLII and Lexis Nexis, formerly Quicklaw.

The OWTL's Head Librarian participated in several Outreach programs and seminars including a legal research seminar for the Legal Clinics of Ontario and a presentation on finding Tribunal decisions for representatives who appear before the Workplace Safety and Insurance Appeals Tribunal.

In 2009, the library also provided three Seneca library technician students with the opportunity to work in the library as part of their co-op experience. In the summer of 2009 the WSIAT recruited a new Head Librarian who started in September 2009.

Publishing

All Tribunal decisions (over 51,000) are published and available for free through the Tribunal's searchable database on the Tribunal's website. Tribunal decision-makers consistently rely on their own body of jurisprudence, as well as decisions of the courts.

During 2009, the Information Services Department processed 3,166 decisions with keywords or with keywords and summaries. The Tribunal released 3,036 decisions. Thus, the inventory of decisions waiting to be processed was reduced by 130 decisions, so that, by the end of 2009, the interval between release and addition to the database was only about six weeks.

After 18 years as a subscription print publication, the WSIAT Reporter became a free electronic online publication in 2006. By the end of 2009, fourteen 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. In addition, Information Services publishes informational pamphlets and other materials as needed. Current and back issues of these publications can be found on the Tribunal's website at wsiat.on.ca.

Translation

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 Tribunal orientation that includes an introduction to the Tribunal's goals and objectives. Information Services is also responsible for coordinating Tribunal-wide training opportunities such as the popular skills exchange afternoons. In 2009 all Tribunal staff received mandatory WHMIS training and Accessibility training.

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. The department operates five program areas:

- planning for production and systems infrastructure;
- procuring, maintaining and supporting systems technologies;
- developing and implementing policies pertaining to information systems and information technology usage;
- designing and delivering training to ensure that technologies are well understood and well utilized; and

Tribunal Organization

- evaluating caseload production and providing individual and unit feedback regarding productivity.

In 2009 the department responded to 5,535 IT help service requests from OICs and WSIAT staff.

The systems department kept the servers and peripherals running near-continuously and kept pace with all software updates by utilizing regular hours of business supplemented by six pre-scheduled “server maintenance” weekends.

The case management team provided workflow process and technology training for all new incoming staff and OICs and the team delivered management information and caseload processing reports according to established weekly and monthly schedules.

In addition to these regular activities, other highlights included:

- the development of a five year caseload management plan;
 - the development of a five year IT infrastructure expenditure forecast;
 - the creation of (approximately 35) new features and modules for the Tribunal’s workflow automation software applications;
 - the development and deployment of a new remote access gateway for home office users (primarily for OIC home offices);
 - the creation of new file directories to reflect the requirements of the Tribunal’s new file plan; the managing and retaining e-mail in a manner consistent with the new file plan;
- the development of a new process and the implementation of a new technology for electronic management of digital hearing recordings;
 - the replacement of all of the printing devices throughout the Tribunal;
 - the replacement of all of the server equipment;
 - the migration of several physical servers to the virtual server environment;
 - the procurement and installation of new network-attached mailing equipment;
 - the renewal of the Tribunal’s computer room equipment protection service contract; and
 - the development and delivery of staff and OIC group training seminars (including topics relating to effective use of the e-mail system, selecting an ISP and setting up a home office with secure remote access to the WSIAT computer network).

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 2009, there were 3,835 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 2009, these factors combined to produce a 4.6% overall decrease in the active inventory as compared to the 2008 year-end figure.

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

CHART 1:

Inventory of Active Cases on December 31, 2009

Notice Process

Cases active in Notice stage processing	1,015
	<u>1,015</u>

Resolution Process

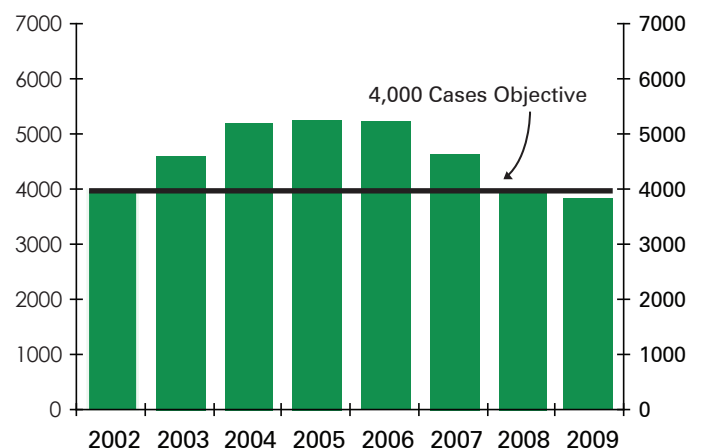
Early Review stage	75
Substantive Review	629
Hearing Ready	81
Scheduling and Post-hearing	1,738
WSIAT Decision Writing	<u>297</u>
	2,820

Total Active Cases

3,835

CHART 2:

Active Caseload



Caseload Processing

Incoming Appeals

The incoming caseload trend is shown in Chart 3. In 2009 the Tribunal's overall intake from new appeals and reactivations totaled 3,900 and this represented a total increase of 6.8% as compared with the 2008 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.

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, primarily where two parties are participating, staff mediation.

As shown in Chart 4, the Tribunal disposed of 4,084 cases in 2009. This included 1,392 "Pre-Hearing" and 2,692 "Hearing" dispositions.

CHART 3:
Incoming Appeals

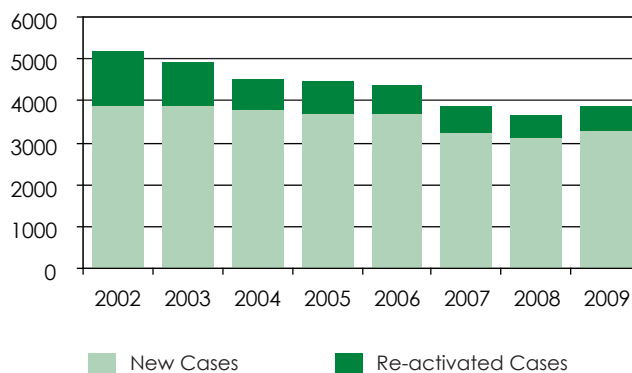


CHART 4:
Cases Disposed of in 2009

Pre-Hearing Dispositions

Without Tribunal Final Decisions	
Made Inactive	544
Withdrawn	788
With Tribunal Final Decisions (declared Abandoned)	60
	1392

Hearing Dispositions

Without Tribunal Final Decisions	
Made Inactive	85
Withdrawn	2
With Tribunal Final Decisions	2605
	2692

TOTAL (Pre-Hearing and Hearing)

Without Tribunal Final Decisions	1419
With Tribunal Final Decisions	2665
	4084

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 2009, 56% of cases were resolved within nine months, an increase of 15% from 2008.

The Tribunal also measures the median interval of the first offered hearing date. This interval is measured from the date on which cases are confirmed ready to proceed to the future hearing date first offered to the parties. Chart 6 shows that the typical length of time for this stage in the appeals process was again significantly reduced. (The processing time was lowered by 1.6 months in 2009.)

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 2009, this target was achieved 85% of the time.

CHART 5:

Percent Disposed of Within 9 Months

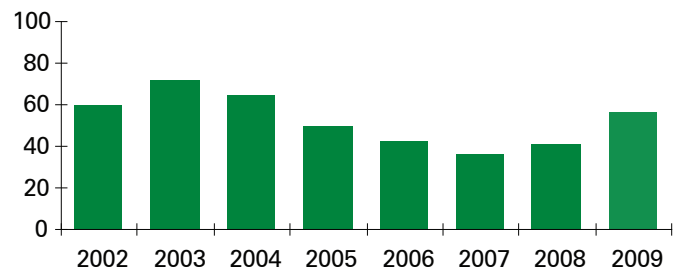


CHART 6:

Time to First Offered Hearing (Months)

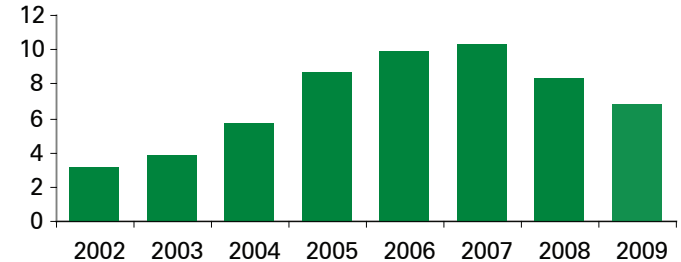
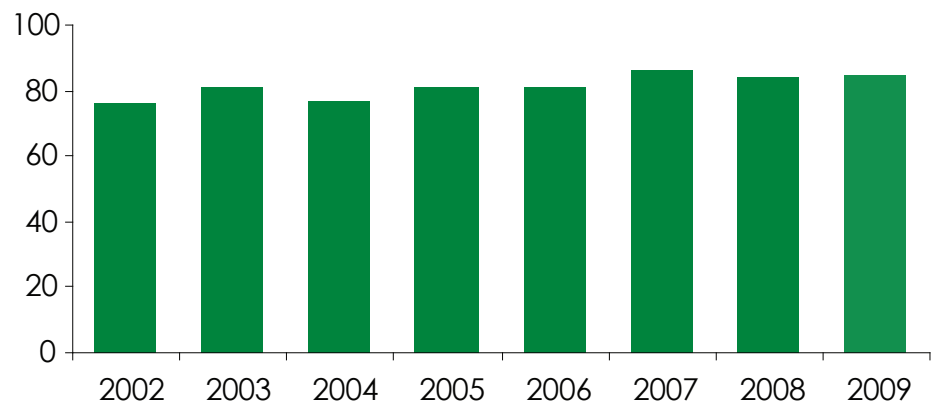


CHART 7:

Final Decisions (% Released Within 120 Days)

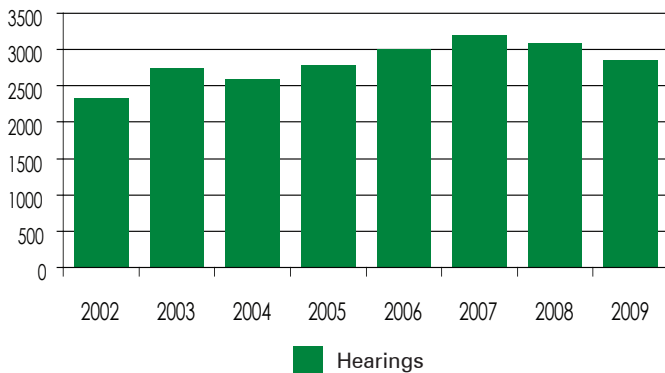


Caseload Processing

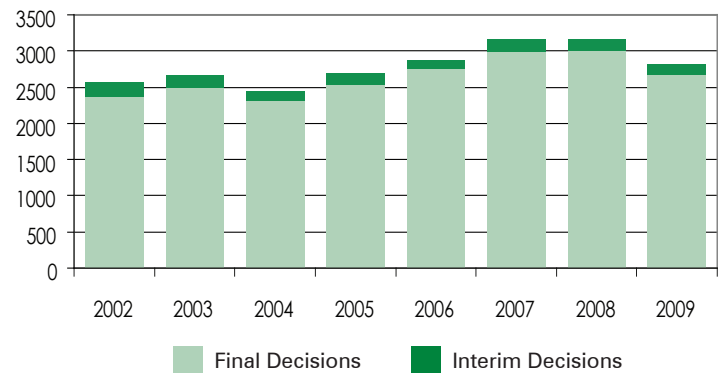
Hearing and Decision Activity

Chart 8 depicts the Tribunal's Hearing and Decision production. In 2009 the Tribunal conducted 2,851 hearings and issued 2,830 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:
Hearings Trend



Decisions Trend



Hearing Type

In 2009 the percentage breakdown of hearing types was as follows: Oral hearings continued to be the most common hearing type at nearly 84%, followed by written hearings at 16%. The remaining hearings (less than 1%) in 2009 included teleconferences, Vice-Chair Registrar and Motions Day case reviews. The percentage of single adjudicator hearings decreased in 2009 to 64% (from 66% in 2008); tripartite panels increased to 36% of cases heard. Chart 9 presents these hearing characteristics.

CHART 9:
Percentage Breakdown of Hearing Types

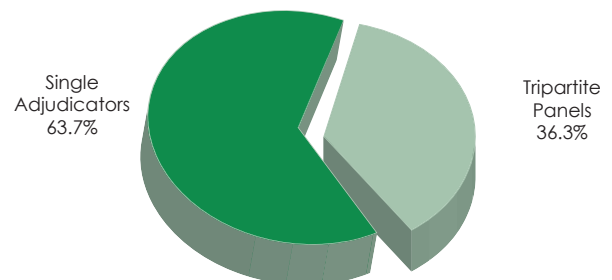
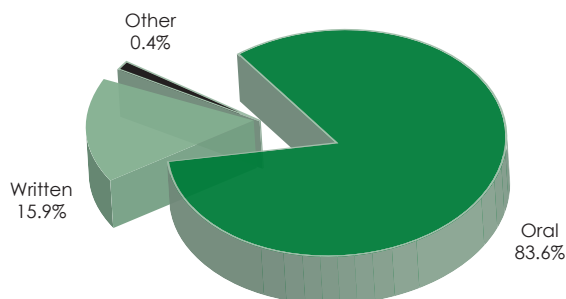


CHART 10:
Percentage Breakdown of Hearing Representation

Worker Representation

A) In Worker Appeals		B) In Employer Appeals	
None Recorded	<u>11%</u>	None Recorded*	<u>46%</u>
Subtotal	11%	Subtotal	46%
Consultant	2%	Consultant	2%
Lawyer/Legal	20%	Lawyer	17%
OWA	14%	OWA	9%
Others*	1%	Others*	1%
Paralegal	42%	Paralegal	12%
Union	<u>12%</u>	Union	<u>13%</u>
Subtotal	89%	Subtotal	54%

Employer Representation

A) In Worker Appeals		B) In Employer Appeals	
None Recorded*	71%	None Recorded	17%
Subtotal	71%	Subtotal	17%
Firm personnel	10%	Firm personnel	2%
Consultant	1%	Consultant	3%
Lawyer	9%	Lawyer	42%
OEA	3%	OEA	7%
Others*	1%	Others*	0%
Paralegal	<u>6%</u>	Paralegal	<u>28%</u>
Subtotal	29%	Subtotal	83%

*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.

Representation at Hearing

Tribunal statistics show that for injured workers, 44% were represented by paralegals and consultants; 20% by lawyers and legal aid; 14% by the Office of the Worker Adviser; and 12% by union representatives. The remaining 12% is allocated among various non-categorized representation, for instance, family friend, family member or MPP office. Employers were represented before the Tribunal as follows: 42% were represented by lawyers; 31% were represented by paralegals and consultants; 7% by the Office of the Employer Adviser; and 2% by firm personnel. The remaining 17% are non-categorized.

Caseload Processing

Caseload by General Appeal Issue Type

The appeal type categorization of incoming cases and dispositions has been consistent over the years and 2009 was no exception. In 2009, as in past years, Entitlement-related cases constituted the majority of cases small portions (7%). Charts 11 and 12 provide historical comparisons of incoming cases and cases disposed in 2009.

CHART 11:

Breakdown of Incoming Cases by Appeal Type for the years 2004-2009

TYPE	2004		2005		2006		2007		2008		2009	
	No.	(%)	No.	(%)	No.	(%)	No.	(%)	No.	(%)	No.	(%)
Leave	1	0.0%	2	0.0%	0	0.0%	1	0.0%	0	0.0%	0	0.0%
Right to Sue	63	1.4%	63	1.4%	51	1.2%	37	1.0%	61	1.7%	67	1.7%
Medical Exam	0	0.0%	0	0.0%	1	0.0%	0	0.0%	0	0.0%	0	0.0%
Access	212	4.7%	233	5.2%	232	5.3%	164	4.2%	137	3.8%	185	4.7%
Total Special Section	276	6.1%	298	6.7%	284	6.5%	202	5.2%	198	5.4%	252	6.5%
Preliminary (not yet specified)	20	0.4%	12	0.3%	4	0.1%	5	0.1%	3	0.1%	5	0.1%
Pension	9	0.2%	6	0.1%	14	0.3%	7	0.2%	5	0.1%	3	0.1%
N.E.L./F.E.L. *	75	1.7%	52	1.2%	43	1.0%	47	1.2%	37	1.0%	21	0.5%
Commutation	3	0.1%	0	0.0%	0	0.0%	1	0.0%	0	0.0%	0	0.0%
Employer Assessment	207	4.6%	160	3.6%	134	3.1%	132	3.4%	146	4.0%	106	2.7%
Entitlement	3537	78.5%	3618	80.9%	3580	82.1%	3253	83.6%	3055	83.7%	3331	85.4%
Ext post WSIB dec deadline	314	7.0%	287	6.4%	256	5.9%	195	5.0%	163	4.5%	143	3.7%
Jurisdiction Time Limit	5	0.1%	6	0.1%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Reinstatement	1	0.0%	0	0.0%	0	0.0%	0	0.0%	1	0.0%	0	0.0%
Vocational Rehabilitation **	1	0.0%	4	0.1%	2	0.0%	2	0.1%	6	0.2%	6	0.2%
Classification	44	1.0%	28	0.6%	39	0.9%	39	1.0%	35	1.0%	20	0.5%
Interest NEER	8	0.2%	0	0.0%	1	0.0%	0	0.0%	0	0.0%	1	0.0%
Total Entitlement-related	4224	93.8%	4173	93.3%	4073	93.4%	3681	94.6%	3451	94.5%	3636	93.2%
Jurisdiction	4	0.1%	2	0.0%	5	0.1%	10	0.3%	2	0.1%	12	0.3%
	4504		4473		4362		3893		3651		3900	

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 Case Dispositions by Appeal Type for the years 2004-2009

TYPE	2004		2005		2006		2007		2008		2009	
	No.	(%)	No.	(%)	No.	(%)	No.	(%)	No.	(%)	No.	(%)
Leave	3	0.1%	0	0.0%	0	0.0%	2	0.0%	0	0.0%	0	0.0%
Right to Sue	62	1.5%	44	1.0%	48	1.1%	67	1.5%	45	1.0%	60	1.5%
Medical Exam	0	0.0%	0	0.0%	1	0.0%	0	0.0%	0	0.0%	0	0.0%
Access	209	5.0%	241	5.5%	239	5.3%	136	3.0%	178	4.0%	189	4.6%
Total Special Section	274	6.5%	285	6.5%	288	6.4%	205	4.5%	223	5.0%	249	6.1%
Preliminary (not yet specified)	66	1.6%	18	0.4%	19	0.4%	8	0.2%	5	0.1%	2	0.0%
Pension	23	0.5%	22	0.5%	9	0.2%	11	0.2%	5	0.1%	10	0.2%
N.E.L./F.E.L. *	269	6.4%	194	4.4%	92	2.0%	56	1.2%	49	1.1%	46	1.1%
Commutation	5	0.1%	2	0.0%	1	0.0%	0	0.0%	1	0.0%	0	0.0%
Employer Assessment	230	5.5%	241	5.5%	170	3.8%	152	3.4%	170	3.8%	121	3.0%
Entitlement	2934	69.7%	3293	75.0%	3609	79.8%	3862	85.2%	3705	83.5%	3437	84.2%
Ext post WSIB dec. deadline	345	8.2%	270	6.2%	278	6.1%	180	4.0%	225	5.1%	166	4.1%
Jurisdiction Time Limit	6	0.1%	9	0.2%	7	0.2%	1	0.0%	0	0.0%	0	0.0%
Reinstatement	1	0.0%	2	0.0%	1	0.0%	0	0.0%	0	0.0%	0	0.0%
Vocational Rehabilitation **	0	0.0%	2	0.0%	3	0.1%	1	0.0%	4	0.1%	4	0.1%
Classification	46	1.1%	33	0.8%	35	0.8%	44	1.0%	50	1.1%	37	0.9%
Interest NEER	4	0.1%	17	0.4%	4	0.1%	1	0.0%	0	0.0%	0	0.0%
Total Entitlement-related	3929	93.3%	4103	93.5%	4228	93.5%	4316	95.3%	4214	94.9%	3823	93.6%
Jurisdiction	6	0.1%	2	0.0%	5	0.1%	10	0.2%	2	0.0%	12	0.3%
	4209		4390		4521		4531		4439		4084	

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 2009, the Inactive cases inventory decreased to 3,388 from 3,817 at the end of 2008, a decrease of 11%. Cases are placed in the Inactive category by request of the appellant, or by a Tribunal Vice-Chair, without prejudice to their 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 2009, 227 Reconsideration requests were received, and this number is similar to the number received in the past two years. (There were 213 reconsideration requests in 2007 and 228 in 2008.)

Looking Ahead: The Caseload Management Plan for Year 2010

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

CHART 13:

Ombudsman Complaints, Activity and Inventory Summary

New Complaint Notifications Received	0
Complaints Resolved	0
Complaints Remaining	0

CHART 14:

Reconsideration Requests, Activity and Inventory Summary

Inquiries (Pre-reconsideration) Remaining	77
Reconsideration Requests Received	227
Reconsideration Requests Resolved	229
Reconsiderations Remaining	100

CHART 15:

Judicial Reviews, Activity and Inventory Summary

Judicial Reviews at January 1st	26
Judicial Reviews Received	13
Judicial Reviews Resolved	14
Judicial Reviews Remaining	25

reached 4,018. In 2009 the Tribunal achieved a further active caseload inventory reduction. By year end, the Tribunal's active inventory total rested at 3,835 cases (which means it had been reduced to 165 cases below the 4,000 targeted steady-state level).

In 2010 the Tribunal anticipates an incoming case volume similar to the volume received in 2009. For 2010, the Tribunal's disposition targets are set to match this anticipated level of intake. The Tribunal's overall caseload planning objective is to keep the active inventory stable within the targeted range of 4,000 cases (+/- 5%).

Financial Matters

A Statement of Expenditures and Variances for the year ended December 31, 2009 (Chart 16) is included in this report.

The accounting firm of Deloitte & Touche has completed a financial audit on the Tribunal's financial statements for the period ending December 31, 2009. The Auditor's Report is included as Appendix B.

CHART 16:

Statement of Expenditures and Variances Year ended December 31, 2009 (in \$000s)

	2009 BUDGET	2009 ACTUAL	2009 VARIANCE	
			\$	%
OPERATING EXPENSES				
Salaries & Wages	11,061	10,852	209	1.9
Employee Benefits	2,079	2,019	60	2.9
Transportation & Communication	1,070	965	105	9.8
Services	6,720	6,533	187	2.8
Supplies & Equipment	424	462	(38)	(9.0)
TOTAL - W.S.I.A.T.	21,354	20,831	523	2.4
Services - W.S.I.B.	500	544	(44)	(8.8)
Interest Revenue	(40)	(3)	(37)	92.5
TOTAL OPERATING EXPENSES	21,814	21,372	442	2.0
ONE TIME EXPENSES				
Severance Payments	100	167	(67)	(67.0)
Caseload Reduction Strategy funding	427	165	262	61.4
TOTAL EXPENDITURES	22,341	21,704	637	2.9

Note: The above 2009 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 \$146 is comprised of:

Capital Fund

Amortization	50	
Fixed assets acquired	(38)	12

Operating Fund

Accrued severance & vacation benefits	107	
Prepaid expenses	27	134
		<u>\$146</u>

Appendix A

Vice-Chairs and Members in 2009

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

Full-time

Initial appointment

Chair

Strachan, Ian J..... July 2, 1997

Vice-Chairs

Baker, Andrew June 28, 2006
Crystal, Melvin May 3, 2000
Keil, Martha February 16, 1994
Martel, Sophie October 6, 1999
McClellan, Ross September 4, 2002
Noble, Julia October 20, 2004
Patterson, Angus June 13, 2007
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

Part-time Vice-Chairs

Initial appointment

Alexander, Bruce May 3, 2000
Bigras, Jean Guy May 14, 1986

Appendix A

Part-time Vice-Chairs

Initial appointment

Butler, Michael	May 6, 1999
Cameron, John	May 27, 2009
Carroll, Tom	May 27, 1998
Cheng, Siu Mee	July 15, 2009
Clement, Shirley.....	September 1, 2005
Cohen, Marvin	June 22, 2006
Cooper, Keith	December 16, 2009
Darvish, Sherry.....	August 12, 2009
Dee, Garth.....	June 17, 2009
Dempsey, Colleen L.....	November 10, 2005
Dhaliwal, Paul	May 27, 2009
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
Goldberg, Bonnie.....	May 27, 2009
Goldman, Jeanette.....	June 22, 2006
Hartman, Ruth	October 6, 1999
Hodis, Sonja	July 15, 2009
Josefo, Jay.....	January 13, 1999
Jugnundan, Nalini	November 15, 2006
Kalvin, Bernard	October 20, 2004
Karimjee, Kumail.....	June 13, 2007
Kelly, Kathleen	June 17, 2009
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
Moore, John.....	July 16, 1986
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

Appendix A

Part-time Vice-Chairs

Initial appointment

Shime, Sandra	July 15, 2009
Signoroni, Antonio.....	October 1, 1985
Silipo, Tony.....	December 2, 1999
Smith, Marilyn	February 18, 2004
Sutherland, Sara	September 6, 1991
Sutton, Wendy	May 27, 2009
Welton, Ian	June 22, 2006

Members representative of 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

Davis, Bill	May 27, 2009
Donaldson, Joseph	October 20, 2004
Lust, Arthur	April 16, 2008
Phillips, Victor	November 15, 2006
Purdy, David	December 16, 2009
Sahay, Sonya	November 29, 2008
Séguin, Jacques	July 1, 1986
Tracey, Elaine	December 7, 2005
Trudeau, Marcel	April 16, 2008
Young, Barbara	February 17, 1995

Vice-Chairs and Members — Reappointments effective 2009

	Effective
Bruce Alexander	May 3, 2009
Andrew Baker	May 17, 2009
Mary Christie	May 17, 2009
Marvin Cohen	June 22, 2009
Melvin Crystal	May 3, 2009
Jim Dimovski	July 1, 2009
Barbara Doherty	June 22, 2009
Marsha Faubert	July 1, 2009
Jeanette Goldman.....	June 22, 2009
Mary E. McKenzie	June 22, 2009
John Moore.....	May 1, 2009
Anne Morris.....	June 22, 2009
Angus Patterson ¹	April 1, 2009
Jacques Séguin	July 1, 2009
Eleanor Smith	February 1, 2009
Ian J. Strachan	July 1, 2009
Ian Welton.....	June 22, 2009
Brian Wheeler	January 7, 2009

New Appointments During 2009

	Effective
John Cameron, part-time Vice-Chair	May 27, 2009
Siu Mee Cheng, part-time Vice-Chair	July 15, 2009
Keith Cooper, part-time Vice-Chair	December 16, 2009
Sherry Darvish, part-time Vice-Chair	August 12, 2009
Bill Davis, part-time Member representative of employers	May 27, 2009
Garth Dee, part-time Vice-Chair	June 17, 2009

¹ Angus Patterson's Order in Council as a part-time Vice-Chair was rescinded as of the end of March 31, 2009, by an Order which also appointed him a full-time Vice-Chair, effective April 1, 2009.

Appendix A

Paul Dhaliwal, part-time Vice-Chair	May 27, 2009
Bonnie Goldberg, part-time Vice-Chair	May 27, 2009
Kathleen Kelly, part-time Vice-Chair	June 17, 2009
Sonja Hodis, part-time Vice-Chair	July 15, 2009
David Purdy, part-time Member representative of employers	December 16, 2009
Sandra Shime, part-time Vice-Chair	July 15, 2009
Wendy Sutton, part-time Vice-Chair	May 27, 2009

Senior Staff

Susan Adams ²	Tribunal Executive Director (Acting)
David Bestvater.....	Director, Case Management Systems
Alison Colvin.....	Director, Information Services
Jim Curren.....	Director, Finance and Administration
Debra Dileo.....	Director, Appeal Services
Noel Fernandes	Finance Manager
Martha Keil	Vice-Chair Registrar, Office of the Vice-Chair Registrar
Janet Oulton	Appeals Administrator
Carole Prest.....	Counsel to the Tribunal Chair
Dan Revington	Tribunal General Counsel
Lynn Telalidis	Human Resources Manager

Medical Counsellors

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

² Marsha Faubert left the position of Tribunal Executive Director on July 9, 2009.



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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, 2009 and the statements of operations, changes in fund balances and cash flows for the year then ended. These financial statements are the responsibility of the Tribunal's management. Our responsibility is to express an opinion on these financial statements based on our audit.

We conducted our audit in accordance with Canadian generally accepted auditing standards. Those standards require that we plan and perform an audit to obtain reasonable assurance whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation.

In our opinion, these financial statements present fairly, in all material respects, the financial position of the Tribunal as at December 31, 2009 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 & Touche LLP". The signature is written in a cursive, flowing style.

Chartered Accountants
Licensed Public Accountants
February 12, 2010

Appendix B

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Balance Sheet

December 31, 2009

	2009	2008
ASSETS		
CURRENT		
Cash	\$ 1,295,500	\$ 1,140,146
Receivable from Workplace Safety and Insurance Board	1,207,221	1,338,596
Prepaid expenses and advances	359,974	391,066
Recoverable expenses (Note 5)	150,369	123,969
	3,013,064	2,993,777
CAPITAL ASSETS (Note 6)	64,698	76,396
	\$ 3,077,762	\$ 3,070,173
LIABILITIES		
CURRENT		
Accounts payable and accrued liabilities	\$ 1,255,156	\$ 1,208,909
Accrued severance benefits and vacation credits	2,658,794	2,551,392
Operating advance from Workplace Safety and Insurance Board (Note 7)	1,400,000	1,400,000
	5,313,950	5,160,301
FUND BALANCES		
OPERATING FUND (Note 8)	(2,300,886)	(2,166,524)
CAPITAL FUND	64,698	76,396
	(2,236,188)	(2,090,128)
	\$ 3,077,762	\$ 3,070,173

APPROVED ON BEHALF OF WORKPLACE
SAFETY AND INSURANCE APPEALS TRIBUNAL



Chair

**WORKPLACE SAFETY AND INSURANCE
APPEALS TRIBUNAL
Statement of Operations
Year ended December 31, 2009**

	<u>2009</u>	<u>2008</u>
OPERATING EXPENSES		
Salaries and wages	\$ 10,851,477	\$ 10,721,686
Employee benefits (Note 9)	2,293,555	2,305,786
Transportation and communication	964,604	1,149,728
Services and supplies	7,149,914	7,437,114
Amortization	49,712	59,044
	<u>21,309,262</u>	<u>21,673,358</u>
Services - Workplace Safety and Insurance Board (Note 10)	543,549	524,871
TOTAL OPERATING EXPENSES	<u>21,852,811</u>	<u>22,198,229</u>
BANK INTEREST INCOME	<u>(2,861)</u>	<u>(35,582)</u>
NET OPERATING EXPENSES	<u>21,849,950</u>	<u>22,162,647</u>
FUNDS RECEIVED AND RECEIVABLE		
FROM WSIB	<u>(21,703,890)</u>	<u>(22,042,167)</u>
NET UNFUNDED OPERATING EXPENSES	<u>\$ 146,060</u>	<u>\$ 120,480</u>
ALLOCATED TO		
CAPITAL FUND	\$ (11,698)	\$ 5,216
OPERATING FUND	<u>(134,362)</u>	<u>(125,696)</u>
	<u>\$ (146,060)</u>	<u>\$ (120,480)</u>

Appendix B

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Statement of Changes in Fund Balances

Year ended December 31, 2009

	Capital	Operating	Total
BALANCE - JANUARY 1, 2008	\$ 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 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)
BALANCE - DECEMBER 31, 2008	76,396	(2,166,524)	(2,090,128)
Additions to capital assets	38,014	-	38,014
Amortization of capital assets	(49,712)	-	(49,712)
Severance benefits and vacation credits (Note a)	-	(107,402)	(107,402)
Prepaid expenses (Note b)	-	(26,960)	(26,960)
Net funded (unfunded) expenses - 2009	(11,698)	(134,362)	(146,060)
BALANCE - DECEMBER 31, 2009	\$ 64,698	\$ (2,300,886)	\$ (2,236,188)

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, 2009**

	<u>2009</u>	<u>2008</u>
NET INFLOW (OUTFLOW) OF CASH RELATED TO THE FOLLOWING ACTIVITIES		
OPERATING		
Funding revenue received from Workplace Safety and Insurance Board	\$ 21,835,265	\$ 21,955,018
Cash receipts for recoverable expenses	643,508	569,106
Bank interest received	2,861	35,582
Expenses, recoverable expenses and advances, net of amortization of \$49,712 (2008 - \$59,044)	(22,288,266)	(22,397,984)
	193,368	161,722
INVESTING		
Acquisition of capital assets	(38,014)	(64,260)
NET INCREASE (DECREASE) IN CASH	155,354	97,462
CASH, BEGINNING OF YEAR	1,140,146	1,042,684
CASH, END OF YEAR	\$ 1,295,500	\$ 1,140,146

Appendix B

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Notes to the Financial Statements

December 31, 2009

1. GENERAL

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

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

2. SIGNIFICANT ACCOUNTING POLICIES

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

Basis of presentation

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

Revenue recognition

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

Financial instruments

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

Asset/Liability

Category

Cash

Held for trading

Receivable from WSIB

Loans and receivables

Recoverable Expenses

Loans and receivables

Accounts payable & accrued liabilities

Other liabilities

Accrued severance benefits & vacation credits

Other liabilities

Operating advance from WSIB

Other liabilities

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Notes to the Financial Statements

December 31, 2009

2. SIGNIFICANT ACCOUNTING POLICIES (continued)

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

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.

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

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

Capital assets

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

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

Employee benefits

(a) Pension benefits

The Tribunal provides pension benefits for all 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.

Appendix B

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Notes to the Financial Statements

December 31, 2009

2. SIGNIFICANT ACCOUNTING POLICIES (continued)

Employee benefits (continued)

(b) Severance benefits

Severance benefits are recognized and accrued over the years in which employees earn the benefits. The severance benefit is recorded once an employee has worked for the Tribunal for a minimum term (of five years), at which time the severance benefit vests. The maximum amount payable to an employee shall not exceed one-half of the annual full-time salary.

(c) Vacation credits

Vacation entitlements are accrued in the year when vacation credits are earned. Employees may accumulate vacation credits to a maximum of one year's vacation entitlement at December 31 of each year. Employees are paid for any earned and unused vacation credits at the date they cease to be an employee.

(d) Non-pension future benefits

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

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

3. CHANGE IN ACCOUNTING POLICIES

Series of Sections 4400 – Not-for-profit organizations

In September 2008, the Canadian Institute of Chartered Accountants ("CICA") issued amendments to several of the existing sections on accounting, measurement and financial reporting by Not-for-profit organizations contained in the 4400 series of Sections of the CICA Handbook. The adoption of these amendments has not resulted in any change in how the Tribunal accounts for its transactions.

Section 1000 – Financial statement concepts

On January 1, 2009, the Tribunal adopted the amendments made to Section 1000 "Financial statements concepts". The amended section requires an entity to demonstrate that any expenditure that it wishes to present as an asset meets the conceptual definition of an asset or is permitted to be recorded an asset under specific CICA Handbook section, and any revenue that it wishes to present as a liability must meet the definition of a restricted contribution under Section 4410. The adoption of these amendments has not resulted in any change in how the Tribunal accounts for its transactions.

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Notes to the Financial Statements

December 31, 2009

3. CHANGE IN ACCOUNTING POLICIES (continued)

EIC-173 – Credit risk and the fair value of financial assets and financial liabilities

In January 2009, the Emerging Issues Committee issued the EIC-173 “Credit risk and the fair value of financial liabilities”. This abstract requires that an entity’s own credit risk (for financial liabilities) and the credit risk of the counterparty (for financial assets) should be taken into account in determining the fair value of financial assets and financial liabilities, including derivative instruments. The new guidance did not have any impact on the valuation of the Tribunal’s financial assets and liabilities, or its net assets.

4. ACCOUNTING ESTIMATES

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

5. RECOVERABLE EXPENSES

Recoverable expenses consist of amounts recoverable for shared services, secondments and employee amounts receivable.

	2009	2008
Shared services		
Ontario Labour Relations Board	\$ 68,131	\$ 80,307
Pay Equity Hearings Tribunal	3,937	4,634
Human Rights Tribunal of Ontario	5,126	6,143
Human Rights Legal Support Centre	(5,751)	-
Secondments		
Ministry of the Attorney General	12,269	18,164
Ministry of Government Services	5,751	14,721
Ministry of Community and Social Services	10,646	-
Employee amounts receivable	50,260	-
Total	\$ 150,369	\$ 123,969

Appendix B

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL Notes to the Financial Statements December 31, 2009

6. CAPITAL ASSETS

	2009			2008
	Cost	Accumulated Amortization	Net Book Value	Net Book Value
Leasehold improvements	\$ 3,007,511	\$ 2,992,493	\$ 15,018	\$ 22,528
Furniture and equipment	834,878	797,012	37,866	20,268
Computer equipment and software	252,980	241,166	11,814	33,600
	\$ 4,095,369	\$ 4,030,671	\$ 64,698	\$ 76,396

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 \$2,300,886 as of December 31, 2009 (\$2,166,524 as of December 31, 2008) represents future obligations to employees for severance and vacation credits, less prepaid expenses. Funding for these future obligations will be provided by WSIB in the year the actual payment is made.

9. EMPLOYEE BENEFITS OBLIGATIONS

a) Pension plan costs

Contributions by the Tribunal on account of pension costs amounted to \$744,113 (2008 -\$770,073) 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 2009 amounted to an increase of \$70,517 (2008 - \$151,551) and is included in employee benefits in the Statement of operations.

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9. EMPLOYEE BENEFITS OBLIGATIONS (continued)

c) Vacation credit entitlement

Vacation entitlements are accrued in the year when vacation credits are earned. The net vacation credits accrued in 2009 amounted to an increase in the accrual of \$36,885 (2008 - \$15,023) 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:

2010	\$ 242,956
2011	210,854
2012	45,232
2013	20,110
<u>2014 and thereafter</u>	<u>12,908</u>
<u>Minimum operating lease payments</u>	<u>\$ 532,060</u>

The Tribunal is committed to minimum lease payments of \$879,610 for premises, including building operating costs, over the next year. The lease expires on October 31, 2010, with the option for a further renewal of five years.

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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.