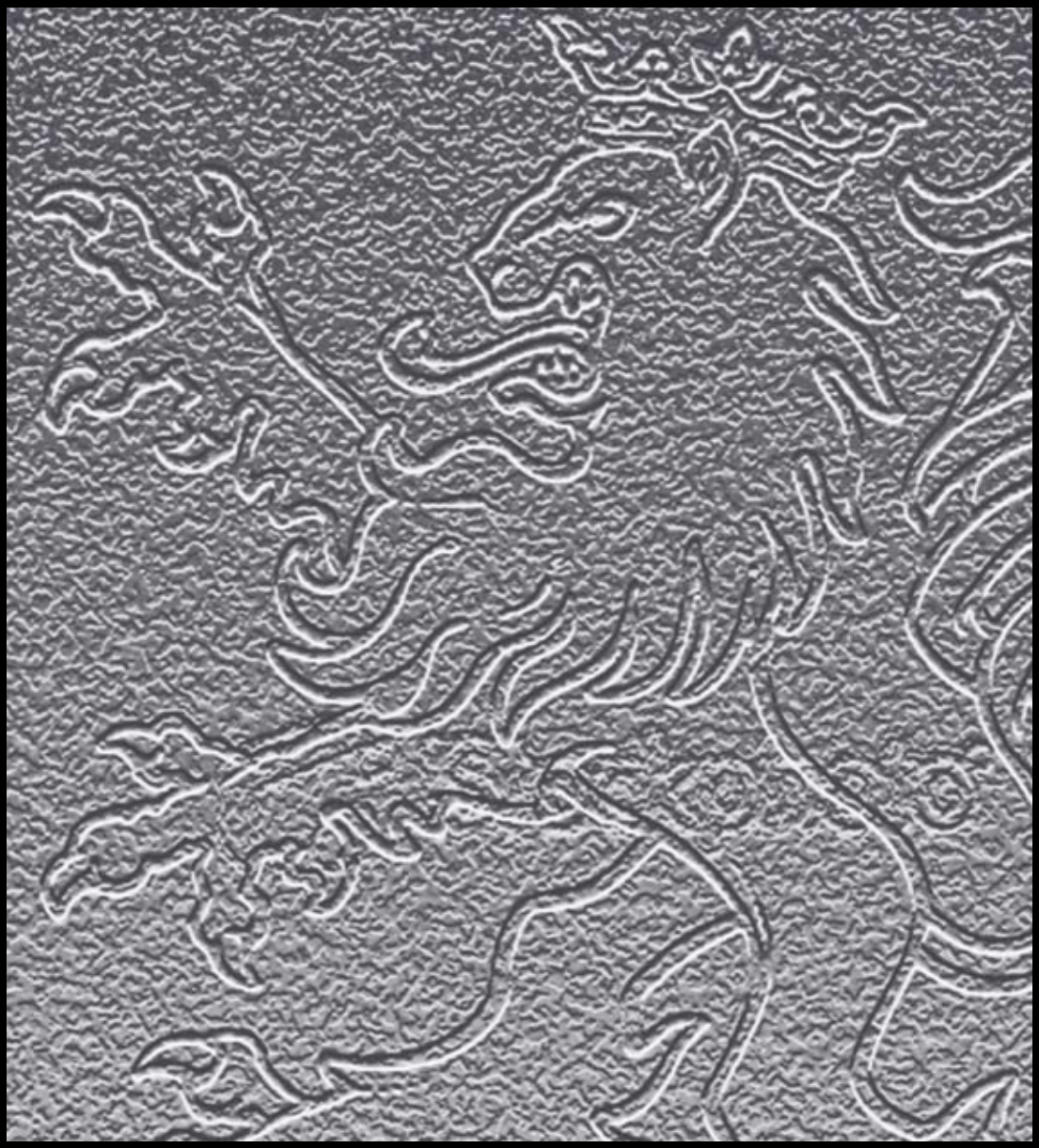
Annual Report 2010

1985-**2010**

WSIAT



Ontario

Workplace Safety and Insurance Appeals Tribunal

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

Annual Report **2010**

WSIAT

Workplace Safety and Insurance Appeals Tribunal
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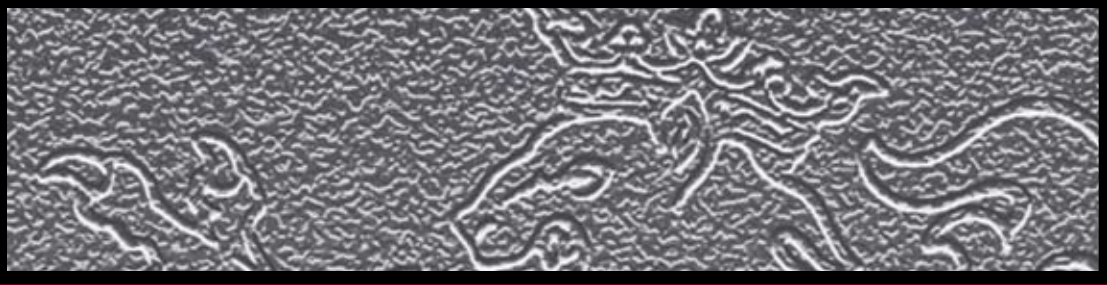

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INTRODUCTION

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 2010 and comments on some matters which may be of special interest or concern to the Minister or the Tribunal's constituencies.

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

CHAIR'S REPORT

"The Tribunal's focus on quality adjudication and its judicial review record has allowed the Appeals Tribunal to gain a reputation as an 'experienced and expert' adjudicative tribunal."

MESSAGE FROM THE CHAIR

THE FIRST QUARTER CENTURY

The end of 2010 also marked the end of the first quarter century of the Appeals Tribunal's existence. When the government implemented Professor Paul Weiler's recommendation and created the Appeals Tribunal in October 1985, it marked the beginning of a long and winding road for the new appeals body. As it evolved over the quarter century, the Tribunal encountered many bumps and potholes along the adjudication road; however, the dedicated members of the Tribunal team, along with knowledgeable supporters from the injured worker, employer and legal communities, ensured that the Appeals Tribunal would continue to improve and grow from an adjudicative caterpillar into an appeals monarch butterfly whose wingspan would attract attention in Canada's administrative justice system.

In 1986, the Tribunal's first full year of operation, it received approximately 2,000 appeals and released 463 final decisions, with an OIC adjudicative roster composed of 57 Vice-Chairs, Worker and Employer Members. Twenty-five years later, the Appeals Tribunal received approximately 4,000 appeals and released over 2,600 decisions, with an OIC adjudicative roster of 77 adjudicators. By the end of 2010, the Appeals Tribunal had released over 54,000 decisions during its first 25 years. At the Tribunal's 25th Anniversary Symposium, a number of the guest speakers, including Justices John Laskin and John Murray and Professor Emeritus David Mullan, noted the Tribunal's efforts to provide quality adjudication in the administrative justice system, and how that was reflected in the Tribunal's record on judicial reviews. To date, the Tribunal has received 115 judicial review applications to quash a tribunal decision; at the end of 2010, only one of those applications had been successful.

The Tribunal's focus on quality adjudication and its judicial review record has allowed the Appeals Tribunal to gain a reputation as an "experienced and expert" adjudicative tribunal. The Ontario Divisional Court decision in *Toronto (City) Police Service v. Phipps,* 2010 ONSC 3884, confirmed that reputation. In considering the judicial review of a Human Rights Tribunal decision, the Panel reviewed the standard of review analysis and in paragraph 38 commented:

> It is obvious that when the Legislature enacted that standard in December 2006, the intent was to have the courts accord the same high degree of deference to the Tribunal that they accorded to other experienced and expert administrative tribunals, such as the Ontario Labour Relations Board (for example, in *Ajax (Town) v. CAW – Canada (Local 222)*, [2000] 1 S.C.R. 538), the Workplace Safety and Insurance Appeals Tribunal (*Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)* (2008), 92 O.R.

(3d) 757 (C.A.) at para. 16) and labour arbitrators interpreting and applying collective agreements (*Lakeport Beverages v. Teamsters Local Union 938*(2005), 77 O.R. (3d) 543 (C.A.) at paras. 30-31).

Similarly, in the case of *Chaudhari v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2010 ONSC 1032, the Divisional Court commented at paragraph 25: "This Court is required to afford substantial deference to the Tribunal's decisions. The law demands non-interference unless the decision under review is manifestly unreasonable and unsupportable by any line of reasoning."

The Court in the case of *Boroumandi v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2010 ONSC 2391, commented at paragraph 13 of the decision: "In *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)* [2008] O.J. No. 2150 at paras. 14 and 24, the Court of Appeal applied *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190 and confirmed that 'the jurisprudence has established that the highest level of deference applies to Tribunal decisions.' "

Interestingly, in the one judicial review application in which the Tribunal was unsuccessful, despite the approach in other Divisional Court and Court of Appeal decisions involving Tribunal appeals, the Court in *Amin v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2009 O.J. No. 4715, disagreed with the Tribunal's factual determination relating to the medical causation issue. Although part of the medical causation issue was the temporal relationship, the Divisional Court offered the opinion that [at para. 32], if the Tribunal were not satisfied with the evidence, "the Tribunal can require the applicant to submit to a health examination." Apparently, the Court concluded that this process would shed light on the worker's medical state and the causation issue approximately five years earlier. The Court then directed the matter be referred to a differently constituted Tribunal Panel and sent the case back to the Tribunal.

As mentioned earlier, the Tribunal has encountered some significant obstacles and adversaries in the long and winding road during its first quarter century. The avalanche of incoming appeals in 1998 (almost 11,000) certainly put a strain on the Tribunal resources; however, the Tribunal team responded to the challenge and dealt with a dramatically increased appeal caseload and related problems. While the employer and worker communities have generally been very supportive of the Appeals Tribunal, not everyone wanted the Appeals Tribunal to survive; but, once again, the Tribunal team and the community supporters fought to ensure the Tribunal's survival as an independent appeal body and, in the end, they were successful. The fight to survive and overcome the challenges, in some ways, is a reflection of the sentiment in the poem "No Enemies?", by Charles Mackay:

'the jurisprudence has established that the highest level of deference applies to Tribunal decisions'

No Enemies?

You have no enemies, you say?
Alas, my friend, the boast is poor;
He who has mingled in the fray
Of duty, that the brave endure,
Must have made foes! If you have none,
Small is the work that you have done.
You've hit no traitor on the hip,
You've dashed no cup from perjured lip,
You've never turned the wrong to right,
You've been a coward in the fight.

Charles Mackay (1814-1889)

Fortunately, the Tribunal team and its supporters were prepared to mingle in the fray, and they continue to attempt to turn "the wrong to right." The quest for quality in our administrative justice system, referred to in last year's Annual Report, is a reflection of their efforts and, hopefully, their commitment will endure for another quarter century.

The Tribunal's 2005 Annual Report noted that "[s]ometimes the best way to predict the future is to create it," and over the next quarter century it will be up to WSIB and WSIAT to create a positive future for the workplace safety and insurance system by continuing to improve the WSI process. The government's introduction of ATAGAA (*Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*) and its merit-based appointment process represents a significant step in that direction, and new technology should allow for more effective tools, such as online filings and processing, online alternative dispute resolution, tracking of injury types and occupational disease patterns in specific industries and work locations and, perhaps, online retraining, all of which should enhance the quality of the workplace safety and insurance system in the future and help to set the tone for the next 25 years.

HIGHLIGHTS OF THE 2010 CASES

This section reviews some of the many legal, factual and medical issues which the Tribunal considered in 2010.

The Tribunal decides cases under four Acts. The *Workplace Safety and Insurance Act, 1997* (WSIA) came into force on January 1, 1998. It establishes a system of workplace insurance for accidents occurring after 1997, and continues the pre-1985, pre-1989 and pre-1997 *Workers' Compensation Acts* for prior injuries. The WSIA and the pre-1997 Act have been amended several times, including amendments contained in the *Government Efficiency Act, 2002* (GEA), effective January 26, 2002, and Schedule 41 of the *Budget Measures and Interim Appropriation Act, 2007*, effective July 1, 2007. In 2010, the Board adopted new Interim Work Reintegration policies which apply to all decisions made on or after December 1, 2010. These interim policies contain a number of new concepts, for example, suitable occupation (SO) replaces suitable employment or business (SEB). Since no Tribunal decisions have considered these new policies, this review uses the terms and concepts found in the policies in effect prior to December 1, 2010.

Appeals Under the WSIA

The WSIA provides for loss of earnings (LOE) benefits for workplace injuries, as well as non-economic loss (NEL) benefits for permanent impairment. 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 2010 which affect entitlement to, or review of, LOE and NEL benefits.

LOE benefits are reviewable on "material change in circumstances," or annually at the Board's discretion, for a period of 72 months from the accident date. The amount of LOE benefits depends on the extent to which the worker can return to the workplace and replace pre-injury earnings. If early and safe return to work (ESRTW) is not possible, the Board conducts a labour market re-entry (LMR) assessment and may offer an LMR plan to assist in identifying a suitable employment or business (SEB). The worker's LOE benefits are assessed in light of this.

1129/10
267/10

When the WSIA was initially enacted, LOE benefits could not generally be reviewed after 72 months. Amendments to section 44 in 2002 provided for review after 72 months when a worker suffers "a significant deterioration in his or her condition" which results in redetermination of the degree of permanent impairment. Similar review provisions were also made applicable to future economic loss (FEL) benefits under the pre-1997 Act. During 2010, several decisions considered what constitutes a "significant deterioration" for the purposes of this amendment. *Decisions No. 1129/10,* 2010 ONWSIAT 1982, and *267/10*, 2010 ONWSIAT 1775, indicate that each case must be determined on its own facts. In some cases, a 1% NEL award, combined with other evidence, might establish a "significant deterioration."

727/10
2383/09

Decision No. 727/10, 2009 ONWSIAT 1009, held that the words "significant deterioration" should be given the same meaning in both section 44(2.1) and in section 47(9) regarding NEL redeterminations. If a worker has a significant deterioration warranting a redetermination of his NEL award, the worker must also be found to have a significant deterioration warranting a reassessment of the LOE award (or FEL award under the pre-1997 Act), regardless of the minimal nature of the NEL increase. The fact that the NEL increased only slightly may be taken into consideration in determining the merits of the LOE review. *Decision No. 2383/09*, 2010 ONWSIAT 2753, generally agreed with this approach and set out a two-step analysis. The first step is to determine whether a statutory precondition for review of an otherwise final LOE decision has been met. This might be viewed as a "gateway test" to opening an LOE award after the final review date. This in turn raises two sub-issues: whether the worker has suffered a "significant deterioration" in his or her condition that resulted in a redetermination of the degree of permanent impairment and, if so, whether this occurred on or after November 26, 2002. If these questions are answered affirmatively, then the second step is to evaluate the evidence to determine whether the LOE award ought to be changed. The quantum of the NEL increase is one piece of evidence to consider in deciding whether the LOE award should be changed.

2203/09
1021/09I

For the purposes of the 2002 amendments, an initial determination of a NEL award after the LOE lock-in date is not sufficient to authorize an LOE review. Only redetermination of a NEL award after 72 months can trigger an LOE review. See *Decisions No. 2203/09*, 2010 ONWSIAT 542, and *1021/09I*, 2010 ONWSIAT 6. Both these decisions noted that subsequent legislative amendments might have addressed the facts of those cases. The subsequent amendments did not apply, however, since the facts in both cases occurred before the amendments came into force in July 2007.

734/10

Decision No. 734/10, 2010 ONWSIAT 1187, is one of the first appeals to consider the 2007 amendments. Section 44(2.1)(g) allows the Board to review LOE benefits if the worker and employer are co-operating in early and safe return to work when the 72 months expires. The LOE benefits can then be reviewed "up to" 24 months after the 72 months expires. *Decision No. 734/10* applied Board policy that parties are co-operating in ESRTW if the employment relationship between the parties has been maintained and they are actively attempting to identify suitable employment. In considering whether to conduct a review after the 72-month period, consideration is given to factors such as whether job suitability or sustainability concerns existed prior to the 72-month period and whether the job was highly accommodated. *Decision No. 734/10* agreed with *Decision No. 1641/08*, 2008 ONWSIAT 2412, that the words "up to" 24 months mean that benefits can be reviewed at any time during the 24-month period and on more than one occasion.

2158/08

Other interesting 2010 decisions considered provisions in the WSIA which deal with various limitations or unusual circumstances. An issue that has arisen previously is whether contributions of a worker's employer to a union's health and welfare and pension multi-employer benefit plans should be included in a worker's earnings basis for the purposes of calculating an LOE award. *Decisions No. 855/03*, 2005 ONWSIAT 2490, *2118/01*, 2002 ONWSIAT 475, and *2118/01R*, 2003 ONWSIAT 1325, previously found that employer contributions to such plans were not earnings. While *Decision No. 855/03* was upheld by the Court of Appeal in 2008 ONCA 719 (leave to appeal refused [2008] S.C.C.A. No. 541), the earlier

decisions did not consider the legislative history of section 25 of the WSIA, which deals with multi-employer benefit plans. The legislative history was argued in *Decision No. 2158/08*, 2010 ONWSIAT 398, but the Tribunal concluded that it did not support the worker's submission. Further, the legislation itself overrides any other publications. *Decision No. 2158/08* agreed with the analysis in *Decisions No. 855/03, 2118/01* and *2118/01R* and noted that there had been ample time to amend the legislation if the Legislature disagreed with this interpretation.

1418/10

The WSIA contains limitations on benefits for older workers. A worker who is 63 years of age or older on the date of injury is entitled to LOE benefits from when the loss of earnings begins until two years after the date of the injury. Applying section 43(1)(c), *Decision No. 1418/10*, 2010 ONWSIAT 1840, found that an older worker who suffers a compensable injury but does not suffer any loss of earnings until over two years after the date of injury, is not entitled to benefits. Since section 43(1)(c) is unambiguous, the statutory merits and justice provision does not permit a departure from the legislation, nor can the worker rely on a mistaken statement by a Board claims adjudicator to create a right to benefits outside the parameters of the WSIA.

The WSIA also 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 worker is not entitled to benefits for mental stress caused by an employer's decisions relating to employment. The Board has also adopted policy which includes the concept of the "cumulative effect" of traumatic incidents for workers who may be exposed to traumatic situations due to the nature of the employment.

1848/10
293/10
728/10

Decision No. 1848/10, 2010 ONWSIAT 2471, held that "harassment" under Board policy includes physical violence or a threat of physical violence. A worker's subjective belief that a traumatic event occurred is not sufficient. See *Decision No. 293/10,* 2010 ONWSIAT 524. A worker will be entitled to benefits for mental stress, however, when it is reasonable for him or her to interpret statements made by a co-worker and subcontractor as being threats of physical violence. See *Decision No. 728/10*, 2010 ONWSIAT 2310. *Decision No. 728/10* is also an example of entitlement for delayed acute reaction, which is recognized in Board policy.

2363/09
218/10

An issue which has arisen a number of times at the Tribunal is how section 13(5) and Board policy apply to workers who, because of the nature of their employment, are frequently exposed to situations which an average worker would find stressful. Several 2010 decisions have emphasized that the cumulative effect provisions of the policy do not eliminate the requirement in section 13(5) that the triggering event be unexpected. See *Decisions No. 2363/09*, 2010 ONWSIAT 1365, and *218/10*, 2010 ONWSIAT 387. Board policy also does not contemplate that the term "cumulative" means that a number of events, which are not objectively traumatic on an individual basis, can be considered cumulatively traumatic.

665/10I

Decision No. 665/10I, 2010 ONWSIAT 1283, held that the two requirements – that an event be both objectively traumatic and unexpected in the normal of course of a worker's employment – had to be considered in concert. The "average worker test" for stress should be considered in the context of the particular job which the worker is performing; otherwise, what is expected or unexpected in a particular workplace will lose its significance. At the end of 2010, *Decision No. 665/10I* was adjourned to enable the worker to bring a Charter challenge.

672/10

Turning to NEL awards, *Decision No. 672/10*, 2010 ONWSIAT 1818, is the first Tribunal decision to consider section 47(13), which provides that a worker is deemed not to have a permanent impairment if the degree of permanent impairment is determined to be zero. In *Decision No. 672/10*, the worker received a 0% NEL award after a prior pension award was deducted. This resulted in the worker being deemed not to have a permanent impairment pursuant to section 47(13). Accordingly, the worker was no longer entitled to LOE benefits. *Decision No. 672/10* distinguished *Decision No. 1881/99*, 2000 ONWSIAT 187, which found that a worker with a 0% NEL award still had a permanent impairment. *Decision No. 1881/99* was decided under the pre-1997 Act which did not have a provision similar to section 47(13) of the WSIA.

2023/10

Finally, *Decision No. 2023/10*, 2010 ONWSIAT 2677, held that the Tribunal does not have jurisdiction to hear an appeal from a Board request that a worker undergo a second NEL assessment pursuant to section 47(8) of the WSIA. Section 123(1) gives the Tribunal jurisdiction over "final decisions" over benefits. While the second NEL assessment could ultimately affect the NEL award, it is not a final decision on that benefit.

Board Policy Under the WSIA

While the Tribunal has always considered Board policy, the WSIA expressly states that, if there is an applicable Board policy, the Tribunal shall apply it when making a decision. Section 126 provides that the Board is to provide applicable policy and sets out a process for the Tribunal to refer a policy back to the Board if the Tribunal concludes that the policy is inapplicable, unauthorized or inconsistent with the Act. During 2010, there were no section 126 referrals. There were also no requests by the Board that the Tribunal reconsider a decision in light of a Board policy. There were, however, a number of Tribunal cases interpreting Board policy.

2023/10

Decision No. 2023/10, 2010 ONWSIAT 2677, rejected a request for a section 126 referral of the Board's policy that a Board request for a second NEL assessment is not appealable. While *Decision No. 2023/10* agreed with earlier decisions that the Board cannot limit the Tribunal's jurisdiction by policy, the Tribunal found that it did not have jurisdiction over the matter since the request did not constitute a final decision with respect to benefits for the purposes of section 123(1) of the WSIA.

As noted in previous Annual Reports, Board policy often changes over time. The rights and obligations of parties may vary significantly depending on which version of a policy applies. Tribunal cases in 2010 continued to hold that section 126 policy is similar to legislation and the presumption against retroactivity

2424/09I

applies. In *Decision No. 2424/09I*, 2010 ONWISAT 418, the Panel agreed with *Decision No. 1647/04*, 2005 ONWSIAT 2178, that OPM Document No. 15-02-02, which states that it applies to claims for stress covered by the pre-1997 Act, as well as the WSIA, should not be applied retroactively to pre-1997 Act injuries. The policy was implemented on April 25, 2002. Prior to this, there was no Board policy on gradual onset stress injuries under the pre-1997 legislation. The policy appears to amend, retroactively, the pre-1997 Act by adopting limitations on entitlement only found in the WSIA. There is nothing in the WSIA explicitly authorizing the retroactive application of Board policy to the pre-1997 Act and no compelling reason why Board policy should be given retroactive effect by necessary implication.

301/10
1229/10

In interpreting Board policy, the Tribunal will consider the intent of the policy as well as the relevant statutory provisions. For example, *Decision No. 301/10*, 2010 ONWSIAT 1918, upheld the Board's policy under section 48(7) of the WSIA governing dependency benefits to spouses. While the statutory provision does not specifically require financial dependency, Board policy does. The statutory provision needs to be read as a logical whole. The requirement of financial dependence in Board policy reflects the manner in which the Board has interpreted the statutory discretion and is in harmony with the WSIA. And see *Decision No. 1229/10*, 2010 ONWSIAT 1615, where the Tribunal considered provisions in the *Interpretation Act* that, unless the context otherwise requires, a month means a calendar month and a year means a calendar year, in interpreting Board policy on long-term average earnings.

665/10I

Finally, the Tribunal may be called on to consider challenges to Board policy under the Ontario *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*. As recorded in the 2009 Annual Report, the WSIA provisions on stress and the Board's mental stress policy are subject to a challenge under the *Human Rights Code* and the Charter in *Decision No. 141/08I*, 2009 ONWSIAT 2648. Proceedings in *Decision No. 141/08I* were ongoing at the end of 2010. Another Charter challenge to those provisions is being pursued in *Decision No. 665/10I*, 2010 ONWSIAT 1283, as discussed above.

1529/04

The 2009 Annual Report recorded that *Decision No. 1657/07*, 2009 ONWSIAT 2737, rejected a challenge under the Charter and the Code to *Operational Policy Manual* Document No. 18-05-05, which provides that a worker's NEL award will be reduced in accordance with the Combined Values Chart in the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3rd edition, revised) (AMA Guides) when the worker has a prior NEL award. In 2010, *Decision No. 1529/04*, 2010 ONWSIAT 1526, reached a similar conclusion, although for somewhat different reasons.

After reviewing relevant Supreme Court of Canada decisions, *Decision No. 1529/04* found that, to establish a violation of the Charter, a party must show that the policy creates a distinction based upon an enumerated or analogous ground and that the distinction is discriminatory in that it perpetuates disadvantage or stereotyping. The relevant broader, social, political and legal context should be considered in analyzing these issues.

After discussing how to select an appropriate comparator group, *Decision No. 1529/04* accepted the comparator group suggested by the worker, which consisted of workers eligible for a NEL award with no

prior disability. *Decision No. 1529/04* concluded that the distinction in Board policy was not based on the enumerated ground of "disability" but, rather, on a neutral and rationally defensible policy goal of assessing permanent impairment in accordance with the AMA Guides, which are the prescribed rating schedule. One of the principles of the AMA Guides is that each person begins from a whole of 100% and a person cannot be found to have an impairment of greater than 100%. *Decision No. 1529/04* concluded that the distinction was also not discriminatory as it did not perpetuate prejudice or stereotyping.

Decision No. 1529/04 also found that there was no violation of the *Human Rights Code*. The test under the Code is whether the complainant has established a *prima facie* case demonstrating that the service creates a distinction based on a prohibited ground and, if so, whether the respondent has established that the distinction does not create a disadvantage perpetuating prejudice or stereotyping. Since the Code definition of "disability" includes workplace injuries, the appropriate comparator group for the Code analysis was workers eligible for a NEL award with prior non-work-related disabilities. Board policy does not reduce NEL awards for workers with prior non-work-related disabilities. While there was a *prima facie* case demonstrating a distinction based on a prohibited ground, the policy did not create a disadvantage by perpetuating prejudice or stereotyping. Rather, the distinction reflects the limits of the Board's authority and jurisdiction over workplace injuries and the workplace insurance scheme as a whole.

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.

107/10

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, more recent decisions have found that the Tribunal has jurisdiction, but for somewhat different reasons. *Decision No. 107/10*, 2010 ONWSIAT 1073, is consistent with the more recent cases in holding that the Tribunal has jurisdiction. After reviewing the caselaw, *Decision No. 107/10* agreed with *Decision No. 1362/06I*, 2006 ONWSIAT 2253, that "plaintiff" in section 31(1)(c) includes a claimant for statutory accident benefits.

392/10
518/10

Decisions No. 392/10, 2010 ONWSIAT 1469, and *518/10*, 2010 ONWSIAT 2254, considered the interaction between workplace insurance and other types of insurance. Tribunal decisions have recognized that there may be causes of action that are inter-related with the facts of a workplace insurance claim but which are not actions with respect to the parties' fault as it relates to the accident giving rise to the claim for workplace insurance. Applying this distinction, *Decision No. 518/10* found that the WSIA did not remove the Attorney General's right to sue a building owner for breach of a contractual obligation to include the

Attorney General as a name insured in the insurance policy with respect to the premises. Damages from this breach would not arise because of any negligent acts of the building owner which led to the workplace accident. Rather, they would arise because of the owner's failure to maintain the required insurance.

Decision No. 392/10 considered the interaction between benefits under the WSIA and long-term disability benefits under a group insurance plan. The worker sought to sue his employer for long-term disability benefits under his employer's group insurance plan after entitlement to LOE benefits was denied. The Tribunal concluded that the claim against the employer was, fundamentally, for or by reason of a compensable accident. In assessing a claim by a worker against an employer, it is not appropriate to become embroiled in issues of characterization of the claim. The claim against the employer was essentially for damages in connection with injuries sustained in the compensable accident. Treating the matter as a claim for enforcement of contractual rights under a policy of insurance would defeat the purpose of the WSIA and expose an employer to action whenever a worker wanted to pursue additional benefits after workplace insurance benefits were terminated.

1806/09

The Tribunal also considered how the right to sue provisions applied to complicated fact situations. In *Decision No. 1806/09*, 2010 ONWSIAT 1752, the issue was whether a worker could sue a hospital resident for negligent treatment received for a compensable injury. *Decision No. 1806/09* found that negligent medical treatment is a foreseeable consequence of a workplace injury. Accordingly, the WSIA barred the action against the resident provided the resident was a worker in the course of her employment with a Schedule 1 employer. The resident's status as a worker required careful analysis because the resident was a medical student at a university who had been assigned to the hospital. Funding for the position was provided by the Ministry of Health. The terms of remuneration were governed by an agreement between the Professional Association of Interns and Residents of Ontario and the Counsel of Academic Hospitals of Ontario. The remuneration was paid through the Toronto Hospitals Post-Graduate Payroll Association. *Decision No. 1806/09* found that the arrangement fell within the statutory provisions of the WSIA regarding training agencies. The medical school was a training agency for the purposes of section 69 and the hospital was the placement host. Section 69 reflected a clear intention that the placement host be a deemed employer of a trainee participating in a training program. Accordingly, the right to sue was removed against the resident.

2258/08

Decision No. 2258/08, 2010 ONWSIAT 703, considered whether the WSIA removed a plaintiff's right of action against a restaurant for negligently serving alcohol to a co-worker. The plaintiff was subsequently injured when the co-worker was involved in a car accident while driving under the influence. *Decision No. 2258/08* distinguished Tribunal cases where the defendants who had allegedly been improperly served alcohol were not in the course of their employment. In this case, the plaintiff's injuries were attributable to the co-worker, who was in the course of employment at the time he was served the alcohol and at the time of the accident. The workers of the restaurant were also in the course of their employment at the relevant time. Accordingly, the WSIA applied to remove the right of action against the restaurant.

2501/09

Decision No. 2501/09, 2010 ONWSIAT 972, considered whether a worker could sue a co-worker who drove into her in the employer's parking lot. The co-worker was convicted of assault causing bodily harm. The Tribunal has ruled on several occasions

that it is required to give full effect to a criminal conviction. The conviction meant that the co-worker intended to assault the plaintiff when he drove the truck into her. The Tribunal has also consistently ruled in recent years that a worker who commits a criminal offence is not acting in the course of employment. Accordingly, while WSIA removed the right of action against the employer, the worker could sue her co-worker.

Employer Issues

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

2574/07

Decision No. 2574/07, 2010 ONWSIAT 2079, addressed the question of whether a charity which provides support services to mentally disabled clients is exempt from mandatory coverage under section 5 of Ontario Regulation 175/98. Section 5 provides an exemption for business activities otherwise subject to mandatory coverage which are not done as a "business or trade or for profit or gain." *Decision No. 2574/07* contains a comprehensive review of the Board's practice, Tribunal decisions and statutory amendments. Prior to 1978, the Board consistently applied section 5 to exempt all not-for-profit organizations from coverage. From 1975, the Board began to look more closely at the specific activities carried out by the not-for-profit organizations. In 1993, the classification system was revised from an "end use" system to a system based on the concept of "business activity." A new definition of "business activity" was introduced and is currently found in section 1 of Ontario Regulation 175/98. It defines business activity broadly as an operation that relates to the production of a product or the provision of a service. There is nothing in the definition indicating that not-for-profit activities are excluded. The broad interpretation of the term "business" which has been adopted in more recent Tribunal decisions should be adopted. The charity was not exempt under section 5 since it was providing services.

177/10
1637/10

The Board has adopted a policy providing for a departure fee when an employer who is not compulsorily covered decides to give up voluntary coverage. Two decisions considered appeals by employers that they should be exempted from paying the departure fee. *Decision No. 177/10*, 2010 ONWSIAT 256, noted that it is well established that the Board has the authority to develop policy that establishes the principles that govern the maintenance of the insurance fund and, more specifically, that imposes departure fees on employers that terminate their coverage by application. *Decision No. 1637/10*, 2010 ONWSIAT 2301, noted that the merits and justice provision in the Act and Board policy is not to be applied so as to circumvent Board policy; rather, it is to be applied where circumstances are so exceptional that the strict application of the policy would lead to manifest unfairness or injustice. In neither *Decision No. 1637/10* nor *Decision No. 177/10* were there exceptional circumstances which would require that the employers be relieved of their obligation to pay the departure fees.

1075/10

Decision No. 1075/10, 2010 ONWSIAT 1649, considered whether settlement of a number of provincial offences regarding certain workplace accidents affected the Board's ability to make experience rating adjustments under section 83 of the

WSIA. In an Agreed Statement of Facts, the employer admitted to committing 10 offences and agreed to a fine of $400,000 and a victim fine surcharge of $100,000. Subsequently the Board recalculated the employer's CAD-7 adjustments to include the accidents subject to the Agreed Statement of Facts, resulting in an additional payment of $235,000. The Tribunal rejected the employer's argument that the settlement was intended to resolve all issues pertaining to the claims. The Agreed Statement of Facts related to offences under section 152 of the WSIA. There was nothing in the agreement relating to experience rating adjustments under section 83. Further, it was reasonable for the Board to adjust the CAD-7 assessment to take into account accidents which had previously been concealed by the employer.

2338/09

In *Decision No. 2338/09*, 2010 ONWSIAT 1064, the Tribunal allowed an employer's appeal that it be relieved of retroactive payments. While the Tribunal accepted that the Board's letters to the employer had been clear about having to contact the Board as soon as workers were hired, the employer had availed itself of an amnesty in 2002. According to the amnesty, employers contacting the Board voluntarily would only have to pay premiums to January 1 of the year of contact. The employer was entitled to the protection of the amnesty.

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 diseases may be covered by Board policy or statutory presumptions in the WSIA. If there is no statutory presumption, the usual civil standard of proof on the balance of probabilities applies. Under the WSIA, the benefit of doubt goes to the worker where the evidence on both sides is relatively equally balanced. Decisions released during 2010 illustrated the different approaches to adjudicating occupational disease claims, depending on whether there were applicable policies or statutory presumptions.

668/07

Decision No. 668/07, 2010 ONWSIAT 226, is an example of the application of Board policy. The worker worked in a nickel smelter from 1970 until he was diagnosed with laryngeal cancer 1993. He died in 2004. The Board has a 1989 policy on cancer in Ontario nickel workers and a newer 1999 policy. The policy was interpreted as requiring more than some exposure to nickel aerosol. Under the policy, the exposure must be associated with a process that produces nickel in aerosol dispersion similar to the processes of roasting and smelting. In this case there was very little evidence of exposure to nickel aerosol. While the worker also had exposure to airborne asbestos for a period between 1970 and 1974, he also did not meet the exposure requirement for asbestos.

108/10
2178/05

Decisions No. 108/10, 2010 ONWSIAT 1236, and *2178/05*, 2010 ONWSIAT 1106, are examples of cases governed by presumptions. Before a presumption can apply, the criteria which trigger the presumption must be established on the usual standard of proof. In *Decision No. 108/10* the worker was a firefighter who died shortly after being diagnosed with cancer of the colon and pancreas at age 61. Ontario Regulation

253/07 deals with cancer risk in firefighters. It provides for a rebuttable presumption for certain cancer diagnoses. There is no presumption for cancer of the pancreas. For colon cancer, there is a presumption of work-relatedness if the worker was diagnosed before reaching 60 years and was employed as a full-time firefighter for a total of at least 10 years before being diagnosed. The presumption for colon cancer did not apply because the worker was already 61 when he was diagnosed. Accordingly, entitlement for both cancers had to be decided on their individual merits. The Regulation addresses situations that the Board has identified as most likely to reflect cases that result from excess risk identified with colon cancer. There was no evidence of any special risk to suggest that the worker's colon cancer was a result of excess workplace risk even though he did not meet the requirements of the presumption. There was also no epidemiological evidence of a relationship between pancreatic cancer and firefighting.

Decision No. 2178/05 considered the presumption created for Schedule 4 diseases and processes. The worker was exposed to asbestos in a repair and maintenance process in Ontario and there may also have been minimal exposure in Alberta. While the cause of death was listed as idiopathic pulmonary fibrosis, medical evidence indicated that the worker was also suffering from asbestosis and that asbestosis was a significant contributing factor to his death. Asbestosis is listed in Schedule 4; accordingly, there was an irrebuttable presumption that asbestosis was due to the nature of the worker's employment as it was within one of the processes listed in Schedule 4.

772/09

Decision No. 772/09, 2010 ONWSIAT 1919, is a good example of a case where there is no applicable Board policy or statutory presumption. It considered an appeal for ocular histoplasmosis arising from exposure to pigeon droppings in the course of employment. There was evidence that 51% of the male population in the area would have tested positive for histoplasmosis by age 40, even absent workplace exposure; however, the worker's job increased the risk of exposure. If there was a 51% chance that exposure would have happened in any event, there was a 49% chance that he would not have been exposed without the workplace exposure. While this would be insufficient for entitlement in civil litigation, the statutory benefit of doubt applied in workers' compensation matters when the evidence was approximately equal in weight. There was also evidence of the possible effect of cumulative exposure, even if the worker had been exposed earlier.

Paralegal Regulation

Since the 2007 amendments to the *Law Society Act*, which introduced paralegal regulation, the Tribunal has taken steps to ensure that paralegals who represent parties at the Tribunal meet the Law Society's requirements. Tribunal decisions continue to find that the Tribunal has jurisdiction to engage in an inquiry regarding the status of an unlicensed paralegal who does not appear to be covered by one of the exceptions in the *Law Society Act* and By-Laws. In 2010, two decisions did not allow unlicensed representatives to appear before the Tribunal.

2437/08I

The exemption which is relied on most frequently at the Tribunal is that for relatives, neighbours and friends. *Decision No. 2437/08I*, 2010 ONWSIAT 1246, illustrates how such a claim is analyzed. The exemption in By-Law 4, section 30(1) paragraph 5 lists four criteria; one requirement is that the individual's occupation not include the provision of legal services. All four criteria must be established for the exemption to apply. *Decision No. 2437/08I*

rejected the representative's argument that he was exempt because he was only providing advocacy services. Advocacy services constitute legal services within section 1(5) and (6) of the *Law Society Act*.

1222/10I

Decision No. 1222/10I, 2010 ONWSIAT 2155, considered the exemption for Canadian Registered Safety Professionals. Section 30(1) paragraph 7 of By-Law 4 exempts an individual i) whose profession or occupation is not the provision of legal services or the practice of law, ii) who provides legal services only occasionally, iii) who provides the legal services as ancillary to the carrying on of the person's profession or occupation and iv) who is a CRSP. The word "occasionally" is not defined in the By-Law; however, the exemption for relatives, neighbours and friends in section 30(1) paragraph 5 was recently amended from "occasionally" to provide legal services in "not more than three matters per year." After considering other sections in the By-Laws that refer to the occasional practice of law, *Decision No. 1222/10I* concluded that the representative was exempt since she had only acted in 12 matters over the past four years. The decision noted that each case must be considered on its own merits. The determination under section 30(1) paragraph 7 is time sensitive. If the facts change, the representative's status may be called into question again.

Other Legal Issues

772/10

Decision No. 772/10, 2010 ONWSIAT 1344, considered the interaction between the employer's obligation to re-employ a worker under section 41 of the WSIA and the settlement of a grievance which provided for financial incentives if the worker took early retirement. After accepting the settlement, the worker requested renegotiation of the settlement to permit him to return to work. When the employer refused to re-open the agreement, the worker argued that he had a right to withdraw his resignation under section 41(2) of the *Public Service of Ontario Act*, *2006*, and that the obligation to re-employ should be reinstated. *Decision No. 772/10* noted that the settlement was governed by the *Labour Relations Act*, not the *Public Service of Ontario Act*. In any event, the employer did not terminate the worker's employment. Rather, the worker chose to retire after settlement of a lengthy grievance procedure. The fact that the worker may have had second thoughts about the settlement under a different Act should not impose a fresh obligation on the employer to re-employ under the WSIA.

775/09I
775/09I2

Decisions No. 775/09I, 2010 ONWSIAT 413, and *775/09I2*, 2010 ONWSIAT 2517, considered whether a former common-law spouse was entitled to death benefits under section 48 and whether she could represent the estate. Section 48 death benefits are payable where a "spouse" is cohabitating with the worker at the time of death. The former common-law spouse qualified as a "spouse" under the WSIA since she had adopted a child with the deceased and they had been living in a conjugal relationship for 13 years. In deciding whether the spouses where cohabiting at the time of death, the Panel applied *Decision No. 2621/07*, 2009 ONWSIAT 2098, and *McEachern v. Fry Estate,* [1993] O.J. No. 1731 (Gen. Div.). The parties' intention should be given great weight. A common-law relationship ends when either party regards it as being ended and, by his or her conduct, demonstrates in a convincing matter that this is a settled intention. The evidence indicated that both parties intended that their relationship be at an end. Accordingly, the claimant was not entitled to a section 48 death benefits. The Panel next considered who should represent the estate in the ongoing proceedings. The worker had died without a will and, according

to section 47 of the *Ontario Succession Law Reform Act*, the worker's estate would go to the son. The son, however, was a minor and could not consent to the common-law spouse continuing the proceeding on behalf of the estate. *Decision No. 775/09I* directed that the Office of the Children's Lawyer be asked whether it wished to participate in the hearing and/or whether it consented to the common law spouse continuing to represent the estate. *Decision No. 775/09I2* confirmed that the Office of the Children's Lawyer did not wish to participate and had no objection to the former common-law spouse continuing to represent the estate. The Children's Lawyer indicated, however, that she might reconsider her involvement if the Tribunal determined that benefits are payable.

442/07
2330/09

Decisions No. 442/07, 2010 ONWSIAT 436, and *2330/09,* 2010 ONWSIAT 2575, gave further consideration to the effect of issue estoppel, a legal doctrine which has been discussed in previous Annual Reports. It prevents a litigant from continuing to dispute an issue once it has been finally decided. The three prerequisites to issue estoppel are that the same question or issue has been previously decided, the decision was judicial and the parties to the decision or their privies are the same.

Prior Tribunal cases have applied the Supreme Court of Canada's analysis in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, which recognizes that there is a discretion to allow a matter to proceed even though the prerequisites to estoppel have been met. Discretion is exercised to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in a particular case.

As the Tribunal's inventory of decisions grows, there is an increasing potential for questions of issue estoppel to arise when a party appearing before the Tribunal has received a prior Tribunal decision. *Decision No. 442/07* indicates the importance of carefully identifying which issues were previously decided. The appeal was allowed to proceed on all but one issue, which met the criteria for issue estoppel. With respect to the discretion to reopen a case, *Decision No. 442/07* found that the Tribunal's Practice Direction on *Reconsiderations* has the effect of structuring the discretion in which the estoppel rules apply with respect to a prior Tribunal decision. When the Tribunal reopens a matter, it does so under the reconsideration power and the threshold test must be met.

Finally, *Decision No. 2330/09* is an example of how issue estoppel applies when there is a prior criminal conviction. It also contains a good discussion of when a worker's actions will be sufficient to break the chain of causation between a workplace injury and loss of earnings subsequent to termination of employment. *Decision No. 2330/09* applied previous Tribunal decisions which have held that it is not open to the Tribunal to go behind a criminal conviction. The worker had pleaded guilty to fraud for unauthorized use of the company calling card. This offence went to the root of the employment relationship and was a fundamental breach of trust. As such, the offence was an intervening event which broke the chain of causation between the workplace injury and loss of earnings after the worker was terminated from employment.

APPLICATIONS FOR JUDICIAL REVIEW AND OTHER PROCEEDINGS

The Tribunal has enjoyed a remarkable record on judicial review during its 25-year history. Only once in 25 years and more than 50,000 released decisions has a final decision of a court quashed a Tribunal decision. As it happened, the one decision which was quashed occurred in 2010, as is noted below. The Tribunal's record is a demonstration of the excellence of the decisions it releases. This in turn is due to the outstanding work of the Tribunal's adjudicators and staff since 1985.

In this section, only judicial review applications where there was some significant activity during 2010 have been included. There are a number of other applications for judicial review not referred to here which have been adjourned for various reasons, and have not been finally concluded.

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

Judicial Review

1 *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; leave to appeal dismissed February 3, 2010, Ontario Court of Appeal; leave to appeal dismissed [2010] S.C.C.A. No. 107

The worker made a claim for a repetitive strain injury to his hand and arm 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's request for reconsideration on the issue of ongoing benefits was denied.

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 application 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 found that the undisputed medical reports substantiated an ongoing injury but were unable to pinpoint a cause. 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 the Divisional Court failed to apply the reasonableness standard of review. On February 3, 2010, the Court of Appeal Panel of Justices Doherty, Laskin and Lang dismissed the Tribunal's motion for leave to appeal.

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

At the end of 2010 the Tribunal had taken steps to reconvene the hearing in accordance with the decision of the Divisional Court. After a pre-hearing conference with the new Tribunal Panel, a hearing date was set for March 2011.

2 *Decisions No. 351/07*, 2007 ONWSIAT 697, and *351/07R*, 2008 ONWSIAT 662; *Chaudhari v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2010 ONSC 1032

The worker was paid temporary partial disability benefits at the rate of 50% based on his self-directed vocational rehabilitation plan. He appealed for total disability benefits for a 10-year period. The appeal was denied by the Tribunal. The worker commenced an application for judicial review of the Tribunal's two decisions.

In addition, the worker sought 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 worker argued that a self-directed vocational rehabilitation program was not authorized by the WSIA or by Board policy. The same counsel represented workers who 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 was a novel remedy so far as the Tribunal is concerned. All parties agreed that the judicial review application would be heard first.

This judicial review, along with the judicial review of *Decisions No. 1387/07* and *1858/08*, were heard consecutively on February 3 and 4, 2010, in Toronto. The Divisional Court Panel of Justices Cunningham, Ferrier and McCombs reserved its decision.

On February 12, 2010, the Court released its decision, unanimously dismissing this judicial review. Although the worker argued that the standard of review was correctness, the Court affirmed that the standard of review was reasonableness. The Court held that the Tribunal's decision, which upheld Board policy that required an effort to return to work in a self-directed plan to be eligible for full benefits, was reasonable. As the Court stated [at para. 25]: "An interpretation designed to encourage partially disabled workers to return to the workforce or face the risk of a reduction in their compensation entitlements can hardly be characterized as unreasonable."

3 *Decision No. 1858/08*, 2009 ONWSIAT 25; *Rustum Estate v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2010 ONSC 1033

The worker made a claim to the Board in 1978. He was granted a s. 147(4) supplement that did not exceed the amount of the Old Age Supplement. The worker passed away due to non-work-related causes in 2004. The worker's estate appealed for a recalculation of s. 147(4) benefits, alleging a supplement for a "pre-1985" accident calculated under s. 147(9) could exceed the Old Age Supplement. The Tribunal denied the worker's appeal.

The worker commenced an application for judicial review and, as in *Decision No. 351/07* above, joined it with a class proceeding. As with *Decision No. 351/07*, it was agreed that the judicial review application would be heard before the class action.

This judicial review, along with the judicial review of *Decisions No. 1387/07* and *351/07*, were heard consecutively on February 3 and 4, 2010, in Toronto. The Panel of Justices Cunningham, Ferrier and McCombs reserved its decision.

On February 12, 2010, the Court released its decision, which dealt with both *Decisions No. 1387/07* and *1858/08* in the same judgement. The Court unanimously dismissed both applications for judicial review.

The Court confirmed the standard of review was reasonableness for the reasons set out in the judgement regarding *Decision No. 351/07*. The Court found the Tribunal's decision was reasonable. The Board's interpretation of s. 147, which the Tribunal upheld, was that s. 147(8) capped supplements at the worker's Old Age Supplement level. The Court stated [at para. 10]:

> We do not agree that there is any ambiguity or uncertainty in the relevant provisions under s. 147 of the Act. It is an axiom of statutory interpretation that a statute should be read harmoniously in accordance with its plain language and in a manner that gives meaning to all of its provisions. On the Applicants' interpretation, ss. (8) would be superfluous – if the formulas contained in ss. (9) and (10) were to prevail in all cases, there would be no need to provide for a maximum supplement equal to the worker's OAS amount. The Board policy gives s. 147(8) its plain meaning: that permanent supplements under s. 147(4) are to be capped at the worker's OAS level. It certainly cannot be said that such an interpretation is unreasonable.

4 *Decisions No. 1387/07*, 2008 ONWSIAT 1384, and *1387/07R*, 2008 ONWSIAT 3174; *Martin v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2010 ONSC 1033

The worker had an accident in 1988. She was awarded a supplement under s. 147(4). Her appeal that her supplement should exceed the Old Age Supplement under s. 147(10) because she alleged there is no limit for s. 147(4) supplements for "pre-1989 injuries" was denied.

As in *Decision No. 351/07* and *Decision No. 1858/08* (above) the worker joined the judicial review application with a class proceeding. This judicial review, along with the judicial review of *Decisions No. 1858/08* and *351/07*, were heard consecutively on February 3 and 4, 2010, in Toronto. The Panel of Justices Cunningham, Ferrier and McCombs reserved its decision.

On February 12, 2010, the Court released its decision, which dealt with both *Decisions No. 1387/07* and *1858/08* in the same judgement. For the reasons set out above under *Decision No.1858/08*, the Court unanimously dismissed both applications for judicial review.

5 *Decisions No. 565/08*, 2008 ONWSIAT 1630, and *565/08R*, 2009 ONWSIAT 210; *Windsor Utilities Commission v. Skara*, [2009] O.J. No. 5469, Ontario Divisional Court; leave to appeal dismissed April 13, 2010, Ontario Court of Appeal

The worker, a backhoe operator, was called in to repair a broken water main at night during his vacation time 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.

Counsel for the employer withdrew the allegation that the Tribunal had no standing before the judicial review application was heard.

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 worker's argument that the Tribunal should have found the Board policy was inconsistent with s. 126(4) of the WSIA. This argument had not been made by the worker 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.

On January 5, 2010, the employer filed a motion for leave to appeal to the Court of Appeal. The Tribunal and the worker filed responding factums. On April 13, 2010, the Court of Appeal (Justices Lang, Gillese and Rouleau) dismissed the application for leave to appeal with costs.

6 *Decisions No. 2835/07*, 2007 ONWSIAT 3238, and *2835/07R*, 2008 ONWSIAT 1446; *Boroumandi v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2010 ONSC 2391

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 was scheduled to be heard in Toronto on February 25, 2010, but was adjourned by the worker's counsel on the day of the hearing. It was rescheduled, and heard on April 22, 2010, before the Divisional Court Panel of Justices Swinton, Sachs and Wilton-Siegel. The Court dismissed the judicial review.

Justice Sachs, who read the unanimous reasons of the Court, stated that there was ample evidence to support the conclusions of the Tribunal.

The worker had raised a number of allegations that the Tribunal had breached the principles of natural justice. One of the allegations was that the Tribunal had admitted hearsay evidence. The Court stated [at para. 9]:

> The strict rules of evidence do not apply to the Tribunal. The Tribunal may admit hearsay evidence. There was no requirement that the author of the letter be sworn as a witness before the letter could be made use of by the Tribunal. The *Workplace Safety and Insurance Act, 1997*, R.S.O. 1997, c.16 contemplates the use of the Board's file on an appeal – a file that is inevitably replete with hearsay.

The Court's conclusion also adopted the Tribunal's significant contribution analysis, noting [at para. 13]:

There was ample evidence before the Tribunal to support its conclusion that while the accident may have been a factor that contributed to the Applicant's depression, it did not make a significant contribution, and that other non work-related factors outweighed the contribution of the work-related injury to such an extent that this injury could not be seen as a factor that made a significant contribution to the development of the Applicant's depression.

7 *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; *Jaik v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2010 ONSC 3544

In this application for judicial review, involving six decisions for the same worker, the worker was denied entitlement by the Board for his neck, right shoulder and carpal tunnel 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, represented by new counsel, brought a new appeal for entitlement based not on specific accidents but on disablement. This appeal was heard by Vice-Chair Carroll. After obtaining the opinion of a Tribunal Medical 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 same Assessor. The clarification confirmed that the Assessor's 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*. The judicial review was heard in Ottawa on June 17, 2010, before a Divisional Court Panel of Justices Reilly, Swinton and Heeney. The Court released its decision on June 18, 2010, unanimously dismissing the application for judicial review.

The Court noted that it was not its function on judicial review to substitute its opinion when the standard of review is reasonableness. The Court held that there was ample evidence to support the Tribunal's findings on the disputed points, and although there was some ambiguity in the Assessor's opinion it was clarified by Vice-Chair Moore. The Court stated [at paras. 9-10]:

> Where the applicant's claim for benefits failed was on the causation test. The Tribunal Vice-Chairs carefully weighed the evidence before them, each concluding that neither the 1994 incidents nor the general work duties made a significant contribution to the applicant's disability. They concluded that he had a deteriorating, underlying condition which became symptomatic when he worked. However, the work did not cause the underlying condition.
>
> It was the task of the Tribunal to weigh the evidence and to determine whether entitlement was established. The Tribunal's conclusions were intelligible, and they fall within a range of acceptable outcomes given the evidence before it.

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

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

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

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

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

The worker revived his application for judicial review. The application was heard in June 2010 by a Divisional Court Panel comprised of Justices Herold, Jennings and Lederman. At the outset of the hearing, the applicant abandoned the application in respect of the psychotraumatic disability award. The Court unanimously dismissed the application in respect of entitlement to benefits for carpal tunnel syndrome. The Court stated [at para. 7]:

> The Tribunal also made findings of credibility with respect to the evidence before it and made decisions with respect to the weight to be attributed to the medical opinions it considered, as it was not only entitled to but also required to do. It cannot be said that the Tribunal's decision to deny a benefit for carpal tunnel syndrome was unreasonable in light of the ample evidence before it to support this conclusion.

9 *Decisions No. 893/06*, 2006 ONWSIAT 2265, and *893/06R*, 2007 ONWSIAT 2860; *Duquette v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2010 ONSC 6190

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 "nonpermanent 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 judicial review was originally scheduled to be heard in June 2010, but due to a scheduling issue at the Ottawa Divisional Court the proposed date was changed to November 9, 2010.

The judicial review was heard before Justices Beaudoin, Annis and Swinton. This was the first WSIAT judicial review ever conducted in French. The Court released its decision on November 12, 2010, unanimously dismissing the judicial review. The Court noted the reasonableness standard of review, and confirmed that it was reasonable for the Tribunal to rely on the information from Revenue Canada in coming to its conclusion.

10 *Decisions No. 1110/07I*, 2007 ONWSIAT 1299, *1110/07*, 2008 ONWSIAT 2419, and *1110/07R*, 2009 ONWSIAT 605; *Hary v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2010 ONSC 6795

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, who was 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 served its Record of Proceedings. Over five months after the judicial review was commenced, the worker served the Tribunal with her Record and Factum. Given the delay in serving the Tribunal, the worker requested the Tribunal's consent to an order allowing an extension of time to file her Record and Factum with the Divisional Court. The Tribunal consented to the order. The Tribunal also agreed to file its factum within 30 days of the order.

The worker included two new affidavits in her materials that were not part of the Tribunal's Record. The Tribunal brought a motion to have the affidavits struck at the same time the judicial review was scheduled to be heard on December 8, 2010. Shortly before December 8, the worker's counsel consented to an order to remove the affidavits.

The judicial review was heard by the Divisional Court Panel of Justices Molloy, Jennings and Daley. On December 10, 2010, the Court unanimously dismissed the judicial review on the grounds that the Tribunal's decision was reasonable. The Court held that the Tribunal Vice-Chair provided clear and compelling reasons for her assessment of the medical evidence. The Court also did not agree with the worker's argument that the Vice-Chair had abdicated her decision-making responsibility to the assessor, as the assessor's report was only one piece of evidence which the Vice-Chair considered, and the Vice-Chair was not bound to accept the assessor's opinion.

11 *Decision No. 1766/09*, 2009 ONWSIAT 2268

The Board denied the worker entitlement for chronic pain and LOE benefits after July 2001. Her appeal to the Tribunal was granted. The Vice-Chair held that the worker had entitlement for chronic pain, entitlement to partial wage loss benefits from April 2001 to June 27, 2002, and full LOE benefits from June 27, 2004 to August 23, 2004. The Board was directed to determine if there was ongoing LOE entitlement after August 23, 2004.

The employer served an application for judicial review in December 2009. The Tribunal noted that the worker had not been named as a party in the application. Following discussions, the applicant's counsel took steps to add the worker as a party. The Tribunal then filed its Record. The worker was a co-respondent with the Tribunal.

All parties filed their factums. The judicial review was scheduled to be heard in Toronto on November 17, 2010. However two weeks prior to the hearing date the employer sought to abandon the judicial review. Given the late date on which the employer sought to abandon the application, the Tribunal agreed to consent to the abandonment providing the employer paid costs. The judicial review has now been abandoned.

12 *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 was self-represented, failed to take steps to perfect her judicial review despite receiving a notice from the Ottawa Divisional Court. The judicial review was dismissed in April 2010.

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, and 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.

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 the current 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.

Both reconsiderations were assigned to a new Tribunal Vice-Chair, who scheduled a pre-hearing conference call to discuss the issues. Following the pre-hearing conference call the worker withdrew his reconsideration and agreed to the judicial review being dismissed as abandoned on a without costs basis.

14 *Decisions No. 1007/08*, 2008 ONWSIAT 1279, and *1007/08R*, 2008 ONWSIAT 2752

The worker, a police officer, was granted entitlement for a neck and back/shoulder injury in 1975. In 1979 he suffered injuries to his chest, neck, upper back and left shoulder, for which he was granted a 10% permanent disability award. He injured his low back in 1986, for which he was granted two weeks of benefits. In 1999 an ARO granted the worker entitlement for a stomach ulcer caused by his pain medication, but denied ongoing entitlement for his low back from the 1986 injury. In a 2003 ARO decision the worker was denied an increase to his 10% pension. In a 2006 ARO decision the worker was denied ongoing entitlement for his shoulder and neck from the 1975 accident, a permanent disability award arising from that accident, and also denied a pension assessment for his ulcer.

The worker appealed to the Tribunal for: 1) ongoing entitlement and a pension assessment for the 1975 left shoulder and neck injury; 2) entitlement to a pension assessment for a stomach ulcer and stomach surgery from the 1979 injury; 3) a pension award for neck and shoulder injury under the 1979 injury; 4) an increase

in the 10% pension award for his back and shoulder from the 1979 injury; 5) a pension assessment for a back condition from the 1986 injury.

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

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

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

The worker's application for reconsideration was denied.

The worker commenced an application for judicial review, arguing all above issues except for issue #2. The respondent employer police department is participating as a co-respondent with the Tribunal.

All parties have filed their materials. The employer has also requested that the Court dismiss the judicial review on the grounds of delay. The judicial review will be heard in February 2011.

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

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

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

The husband's estate commenced an application for judicial review of the Tribunal's decisions. The Tribunal and one insurance company are co-respondents. There is some uncertainty about whether the wife and the other insurance company will be parties in the judicial review. The Tribunal and the insurance company have filed responding factums. The judicial review will be heard in Sudbury in March 2011.

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

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

This French language judicial review was scheduled to be heard in Ottawa during the week of November 8, 2010, but was adjourned due to an illness in the family of counsel for the applicant. A new date has not yet been set.

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

The plaintiff was the resident manager of a residential apartment building. His regular hours were 8am to 5pm, Monday to Friday, but he was on call outside of those hours. As a result of a flood in the parking garage, a plumber was called. The following day (a Saturday), the plumber returned. While checking to see if the flooding problem was over, the plaintiff fell and injured himself.

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

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

The plaintiff commenced an application for judicial review. Plaintiff's counsel originally filed an affidavit with their materials. Following negotiations between counsel, it was agreed to remove the affidavit. At the end of the year the Tribunal was preparing a responding factum.

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

This is another French language judicial review to be heard in Ottawa.

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

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

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

The worker, who is representing himself, first attempted to commence an appeal of the Tribunal's decision. Subsequently the worker retained counsel, who started an application for judicial review. The worker's counsel advised that she was revising the materials filed with the Court, but her application materials became muddled. The Ottawa Divisional Court had set a date for February 17, 2010. This required the Tribunal to retain outside counsel in Ottawa to assist in bringing a motion for an order adjourning the judicial review and extending the time for filing a Record and factums.

Counsel for the worker failed to abide by times indicated in the consent order to serve and file her materials. Through another apparent error, the Ottawa Divisional Court scheduled the judicial review to be heard during the week of November 8, 2010. The Tribunal was again required to retain outside counsel in Ottawa to resolve this matter. As a result of further representations to the Administrative Judge for the Ottawa Divisional Court, it was ordered that the judicial review not go ahead during the week of November 8, 2010, and that further materials can be filed on behalf of the worker only with the prior approval of the Divisional Court. At the end of the year no further materials had been filed on behalf of the worker.

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

The worker appealed for entitlement to benefits for his injuries to his head, eyes, spine, chest and ribs that the worker related to an accident in March 1993. The worker also sought payment of temporary total disability

benefits after June 25, 1993. The hearing took place over four days, starting in August 1998 and concluding in July 2003.

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

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

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

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

The Divisional Court is scheduled to dismiss the application administratively in March 2011 if it is not perfected by that time.

20 *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 nonsmoking area at work in 1999. Sister #1 reported an accident within a few hours of returning after her suspension. Sister #2 reported an accident later that day, before the suspension took effect.

Sister #1's claim was denied by the Board. Her appeal to the Tribunal was dismissed (*Decision No. 1384/03*, 2003 ONWSIAT 2895). She brought an application for judicial review. On April 6, 2005, the Divisional Court unanimously dismissed her 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*, the Tribunal allowed the reconsideration and granted an extension of time to appeal the recurrence aspect of the ARO Decision.

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

The judicial review remains adjourned pending the final resolution of the Tribunal appeal.

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

The worker was granted entitlement on an aggravation basis for benefits from March 1991 until February 1992. 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.

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 commenced an application for judicial review. However she was represented by a paralegal from Quebec, who would not have the status to represent her at Divisional Court. The Tribunal served its Record of Proceedings. The worker served her factum. However her factum is improper and in the Tribunal's view should not have been accepted by the Ottawa Divisional Court. On October 12, 2010, Justice Linhares deSousa directed that the worker's factum be returned to the worker, with instructions that the worker must seek authorization before a single justice of Divisional Court to file such a factum. At the end of the year the Tribunal had not received a revised factum or any indication that the worker had made an appointment with the Court.

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

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

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

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

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

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

23 *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 worker commenced a judicial review alleging that the interpreter at the hearing did not properly interpret the proceedings for the applicant.

The Tribunal filed its factum. The worker, who is self-represented, had originally demanded an early date for the judicial review. However, a considerable period of time has now gone by without the worker confirming that she is available for a hearing. In the final quarter of 2010, the Tribunal was contacted by a lawyer who is now representing the worker in regards to commencing a reconsideration application. The Tribunal is waiting for the lawyer to advise on the worker's intention in regards to the judicial review application.

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

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

Applying the statutory tests, in its December 1989 decision the Tribunal Panel denied leave, holding there was no substantial new evidence, and there was no reason to doubt the correctness of the Appeal Board's decision.

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

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

The Tribunal is attempting to file a complete Record of Proceedings with the Divisional Court. At the end of 2010 the Tribunal was making its best efforts to obtain missing documentation for the Record.

Other Litigation Matters

Decisions No. 610/05, 2005 ONWSIAT 2103, and *610/05R*, 2006 ONWSIAT 1257

The worker appealed for entitlement for a cardiac condition which he claimed was caused by stress at work. 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, 2009, and unanimously dismissed the judicial review. The Court found that contrary to the 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.

The worker was not pleased with the Divisional Court's decision. He sent a considerable amount of correspondence to the Tribunal in which he attempted to reargue his appeal, and made allegations of misconduct against the Panel, the Tribunal Chair and General Counsel.

In April 2010, the worker commenced a civil action against the Tribunal and the Board. The worker represented himself in these actions.

The Tribunal brought a motion to dismiss the action on the grounds that it was frivolous, vexatious and/or an abuse of process or in the alternative that it disclosed no reasonable cause of action. The motion was heard on June 18, 2010, by Justice Richetti. His decision, dated June 22, 2010, dismissed both actions.

In regards to the action against the Tribunal, Justice Richetti found that there were not sufficient facts to support claims of bad faith, and the worker's action was an attempt to re-litigate the issues in his compensation claim. Justice Richetti held that in any case the torts alleged made no sense or were improper, and the claim should be struck as failing to disclose a cause of action.

OMBUDSMAN REVIEWS

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

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

The Tribunal typically receives a few notifications of the Ombudsman's intent to investigate each year. In 2009 and 2008, the Tribunal did not receive any notifications to this effect. In 2010, one intent to investigate letter was received. This matter was resolved during 2010. At the end of 2010, 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 2010 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 and training on access and privacy issues under the *Freedom of Information and Protection of Privacy Act* (FIPPA) and handles FIPPA requests and appeals. Assistance is also provided with respect to records management issues.

Professional development continued to be important in 2010, 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 new adjudicators. OCC was also active in developing and delivering ongoing professional development sessions to adjudicators and staff.

During 2010, OCC continued to work on various knowledge management resources which facilitate the access of Vice-Chairs and Side Members to information on law, policy and procedure through electronic means.

Office of the Vice-Chair Registrar

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

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

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

The Vice-Chair Registrar

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

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

The Early Review Department

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

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

Vice-Chair Registrar Teams

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

Alternate Dispute Resolution Services

ADR services are offered to parties to resolve appeals without proceeding to a formal hearing. If the parties reach a resolution, an agreement is formalized in writing and submitted to the parties for their signatures. The executed agreement is then submitted to a Vice-Chair for review. If the Vice-Chair is satisfied that the resolution is consistent with law, Board policy and is reasonable based on the facts of the case, the Vice-Chair will issue a written decision incorporating the terms of the agreement. If an appeal is not resolved through the ADR process, it is prepared for hearing.

Mediation Services

More specialized ADR services are provided by the Tribunal's mediators. If an appellant requests mediation, the Tribunal reviews the appeal to determine its suitability for mediation and contacts the responding party

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

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

Single Party Appeals

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

On occasion, groups of single party appeals (with the same representative) are referred to ADR staff. This is done where it is believed that a discussion with the parties may result in an expeditious resolution of the appeal, a recommendation or an early decision by the Vice-Chair Registrar.

Tribunal Counsel Office

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

Hearing Work

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

Pre-hearing Work

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

Post-hearing Work

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

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

TCO Lawyers

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

Examples of appeals handled by TCO lawyers include complex occupational disease appeals, employer assessment appeals, appeals involving difficult procedural issues, and appeals 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 Tribunalrelated 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

At the end of 2010, after many years of dedicated service, Acting MLO Manager Anne Greig retired. Anne was well respected for her knowledge and expertise by WSIAT staff, Vice-Chairs and Side Members, and members of the medical community. Her kind nature and willingness to share her knowledge was appreciated by everyone.

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

In addition Shelley Quinlan, a new MLO Officer, joined the Tribunal in 2010. An RN, Shelley has a baccalaureate in nursing from Ryerson University. She worked in critical care nursing for a number of years, and then at WSIB, first as a nurse case manager and then a NEL clinical specialist.

Medical Counsellors

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

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

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

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

Medical Assessors

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

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

The Appointment Process for Medical Assessors

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

MLO Resources Available to the Public

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

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

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

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

TCO Support Staff

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

Information Services

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

- Information management and privacy
- Web development and design
- Library services
- Publishing (web and print)
- Translation
- Staff training and development
- Emergency management and security (EMS)

Information Management and Privacy

The year 2010 marked the beginning of the Tribunal's electronic case record as the official record. This transition from paper to electronic has created efficiencies in record keeping. In 2010, the Tribunal continued to work with the Archives of Ontario to schedule its records and to implement its signed schedules.

Staff in Information Services also co-ordinate the Tribunal's Privacy program by recording privacy incidents and working with staff to ensure that personal information is protected.

Web Development and Design

The new public website was launched in January 2010. Part of the launch involved profiling our Tribunal decisions on the main page of the site. Each week selected decisions on a range of subjects are highlighted.

In 2010, the Tribunal's forms were updated to address stakeholder comments, to continue to apply Ontario's visual identity, privacy and accessibility standards, and to improve technical functionality. New software was used in the development of the forms which will make future changes faster and more efficient.

Information Services staff are also responsible for the maintenance of the internal staff Intranets and portals.

Library Services

The Ontario Workplace Tribunals Library (OWTL) is an information resource open to members of the public. Library staff assist workers, employers and their representatives by collecting and organizing materials related to workplace health and safety, human rights/discrimination, pay equity, labour relations

and employment law, administrative law and other issues. The library also provides services to the staff of the Ontario Labour Relations Board, the Human Rights Tribunal of Ontario, the Pay Equity Hearings Tribunal and the Workplace Safety and Insurance Appeals Tribunal.

In 2010, the OWTL released a redesigned and re-architectured internet site (owtlibrary.on.ca), providing a more user activity-focused model to accessing information. In line with the development of a new internet site, the Library developed an Information Products model to ensure the continuous release of new content, resources and digital services to meet the increased demand for online access to our specialized collection. Two of OWTL's major information product releases in 2010 include *Workers' Compensation Law: A Documentary History in Ontario* and the *Provincial Agency Bargaining Designations*.

The Library also developed and launched a dedicated workshop program, delivering workshops to adjudicators and staff at our client tribunals, covering topics such as legislative research, Google and Web 2.0 services, as well as workshops in labour research and medical resources. Research and reference services unveiled a new Reference Desk Services model, providing a dedicated space for servicing walk-in clients and centralized client access to all our services.

Research and reference services continue to be well-used with an average of 200 plus questions per month, highlighting the uniqueness of our collection and services. Library staff continue to explore more relevant and efficient ways to serve our stakeholders and connect them to the information they need, with an emphasis on online instruction and the development of our digital services.

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

Publishing

All Tribunal decisions (over 54,000) are published and available free through the Tribunal's searchable database on the Tribunal's website. There is a database record for each decision. Many of the records include a summary of the decision. All records include at least keywords to identify the issues. The database can be searched on various fields, including the keywords, summary, sections of the Act and regulations, Tribunal decisions considered and Board policies considered.

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

During 2010, the Tribunal released about 3,000 decisions, and the Information Services Department processed about 2,900 decisions. However, the interval between decision release and addition to the database remains at about six weeks.

Information Services also publishes the *Annual Report* and the Tribunal newsletter *WSIAT In Focus*. Current and back issues of these publications can be found on the Tribunal's website 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. The Tribunal's translator is responsible for the translation of materials for our public website, as well as print materials published by the Tribunal.

Staff Training and Development

The Tribunal has a strong commitment to staff learning and development. New staff receive a formal Tribunal orientation that includes an introduction to the Tribunal's goals and objectives. Information Services is also responsible for co-ordinating Tribunal wide training such as staff training on workplace violence prevention, customer service training and specialized training sessions for our legal workers.

Emergency Management and Security (EMS)

In 2010, Information Services staff played a central role in emergency management and security and the development of the Tribunal's Workplace Violence Prevention (WVP) program. They also participated on the WVP Steering Committee and were part of the WVP information gathering and risk analysis. The objective of the Tribunal's WVP Program is to ensure the safety and security of our staff and stakeholders.

Case Management and Systems

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

- procuring, maintaining and supporting systems technologies;
- developing and implementing policies pertaining to information systems and information technology usage;
- supporting computer users and delivering training to ensure that technologies are robust, well understood and well utilized;
- planning for production and systems infrastructure; and
- evaluating caseload production and providing individual and unit feedback regarding productivity.

Systems Technology Procurement and Upgrades

In 2010, the main technology upgrade was to the computer desktop environment. In February, the department completed the procurement process for new desktop equipment that had begun in the fourth quarter of 2009. After being awarded the tender and signing the contract, the external supplier partnered with WSIAT to deliver and install new desktop computers. The installation process began in April and was completed at the end of June. The new desktops are imaged with the Microsoft Windows 7 and Office 2007 operating and office productivity software systems in addition to the Tribunal's own customized applications.

During the course of the year, a number of major enhancements were made to the customized applications, and among these, the enhancements to the Tribunal's case management application (tracIT) stand out as most significant. All of the tracIT screens were re-designed to fit the dynamic sizing protocol and the new 16:9 screen aspect ratio. In addition, a new colour scheme was deployed, a user announcement feature was introduced, a single sign-on protocol was implemented and the reporting modules were significantly improved.

Other technology aspects included development of new modules for tracIT and for the customized SharePoint portals as well as for the Tribunal's other customized applications. There were also regular updates to the software and operating systems both at the server and workstation levels.

Policy Development and Implementation

In 2010, the Tribunal's IT Usage and OIC Computer Support policies were reviewed and minor revisions were made. In both cases, the changes were made to ensure that technology references and equipment lists were current and relevant.

User Support and Technology Training

In 2010, the Case Management and Systems Department led and organized the software orientation program for the rollout of the new computer desktop systems. This effort began in the fall of 2009 with the issuance of the tendering opportunity. The contract was awarded in February, and the department then partnered with the service provider during the curriculum development phase. The department then scheduled all of the Tribunal's OICs and employees into full-day, small group orientation seminars. The seminars were delivered by the external service provider during the months of April, May and June.

The Case Management and Systems Department was also responsible for conducting routine maintenance of the IT environment. Throughout 2010, the 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. Case Management and Systems staff made IT resources and services available to new OICs and employees, revoked access privileges of departing employees, created and managed permissions profiles for applications and shared folders, and managed the Tribunal's information backup protocols. The staff also conducted new user orientation and topical seminars during the course of the year. They partnered with private firms (service providers) to ensure that internet sites were

effectively hosted, incoming email was effectively routed and filtered, and that the Tribunal's computer room protection equipment was continually monitored and serviced at the regular quarterly and annual service intervals.

To assist in the management of the user support portfolio, the department maintains a comprehensive "IT Help Request" service. This service is accessed electronically by staff and by OICs from any computer workstation at the Tribunal and from any remote connection. In 2010, through this service, the Department handled 5% more support requests as compared with 2009. The distribution of types of support services was similar to the distribution in previous years. The greatest number of support requests (4,351, or 75%) was for software application support. This was followed by requests for equipment servicing (686, or 12%), connection assistance (368, or 6%) and user setup and authentication services (256, or 4%). Equipment booking and topical training requests accounted for the remainder (150, or 3%).

Production and Systems Infrastructure Planning

In the fourth quarter the department produced its caseload movement plan for 2011. Included in this plan is a forecast for incoming new appeals and corresponding targets for individual and team performance as necessary to ensure effective caseload management throughout the course of the year.

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

Caseload and Production Reporting

In 2010, the department provided regular feedback to individuals, teams and to the senior management team regarding caseload intake, caseload movement and productivity. As in previous years, the department's statistician compiled, distributed and posted these reports according to weekly, monthly and quarterly schedules.

Other Collaborative Achievements

In 2010, the department also contributed to a number of Tribunal-wide initiatives. The department's Case Management Co-ordinator served as Project Manager for the development and implementation of the Tribunal's new Workplace Violence Prevention policy. The department administered the procurement process for the new HR and Payroll service, and the department collaborated with the Ontario Pension Board in order to implement an efficient electronic process for the transfer of pension contribution information.

CASELOAD PROCESSING

Introduction

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

Caseload

At the end of Year 2010, there were 3,869 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 2010, these factors combined to produce a 1% overall increase in the active inventory as compared to the 2009 year-end figure. Chart 2 shows the active inventory in comparison to previous years.

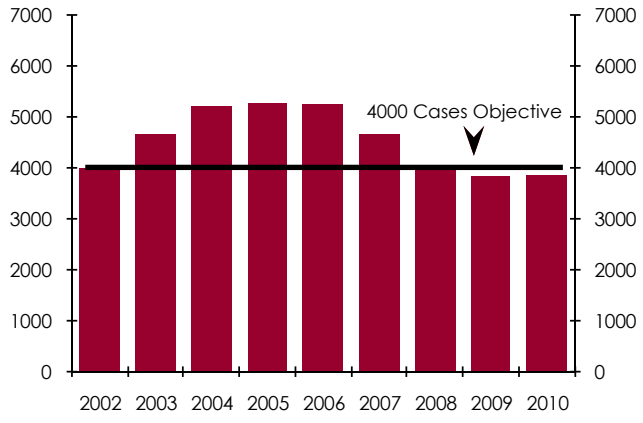
CHART 1

INVENTORY OF ACTIVE CASES ON DECEMBER 31, 2010

NOTICE PROCESS	
Cases active in Notice stage processing	1,212
	1,212
RESOLUTION PROCESS	
Early Review stage	108
Substantive Review	514
Hearing Ready	80
Scheduling and Post-hearing	1,464
WSIAT Decision Writing	491
	2,657
TOTAL ACTIVE CASES	**3,869**

CHART 2

ACTIVE CASELOAD

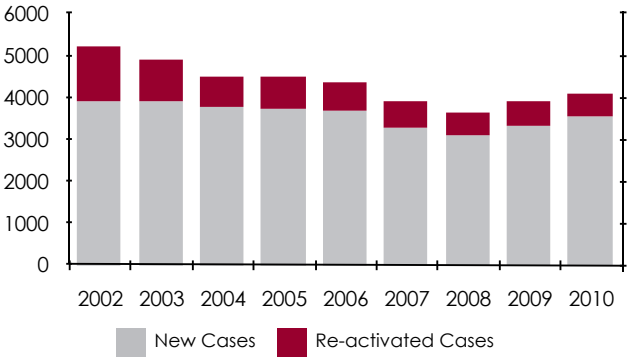


Incoming Appeals

The incoming caseload trend is shown in Chart 3. In 2010, the Tribunal's overall intake from new appeals and reactivations totaled 4,063 and this represented a total increase of 4.3% as compared with the 2009 intake total. "Reactivations" are appeals in which the appellant has indicated a readiness to proceed with an appeal following an inactive period during which the appellant may have acquired new medical evidence, received another final decision from the Board or sought new representation. New appeals to the Tribunal are appeals of final decisions at the Board's Appeals Branch.

CHART 3

INCOMING APPEALS



Case Resolutions

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

As shown in Chart 4, the Tribunal disposed of 3,909 cases in 2010. This included 1,282 "Pre-Hearing" and 2,627 "Hearing" dispositions.

CHART 4

CASES DISPOSED OF IN 2010

PRE-HEARING DISPOSITIONS

Without Tribunal Final Decisions	
Made Inactive	551
Withdrawn	659
With Tribunal Final Decisions (declared Abandoned)	72
	1282

HEARING DISPOSITIONS

Without Tribunal Final Decisions	
Made Inactive	81
Withdrawn	6
With Tribunal Final Decisions	2540
	2627

TOTAL (PRE-HEARING AND HEARING)

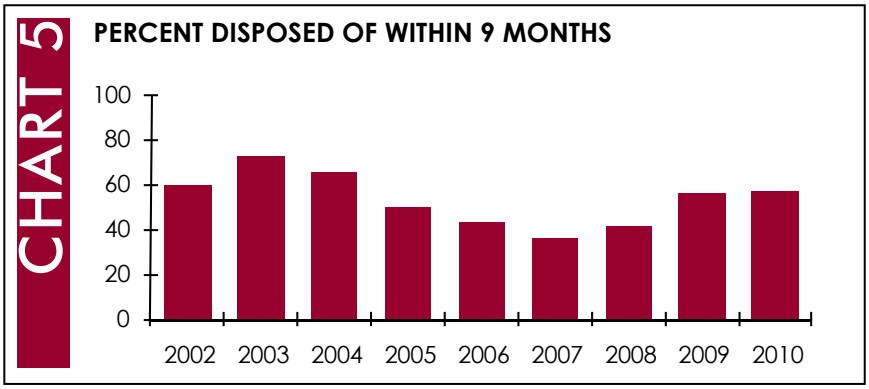
Without Tribunal Final Decisions	1297
With Tribunal Final Decisions	2612
	3909

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.

Timeliness of Appeal Processing

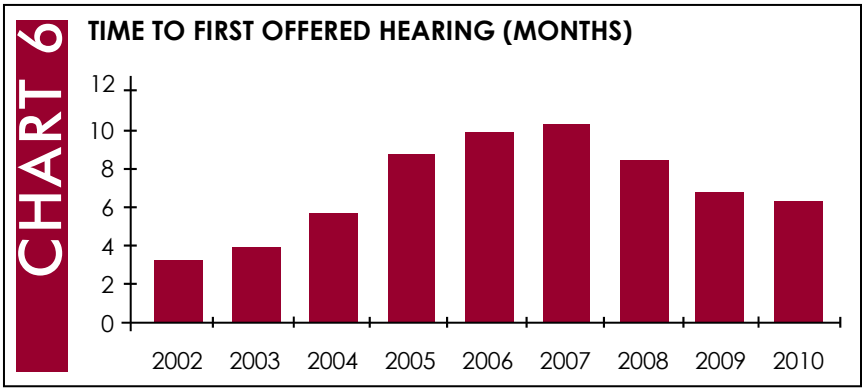
Chart 5 illustrates performance in terms of time frame for completing cases. The time frame begins when the appellant confirms readiness to proceed to a hearing and ends when the case is disposed. In 2010, 57% of cases were resolved within nine months. (This represented an increase from 56% in 2009.)

CHART 5



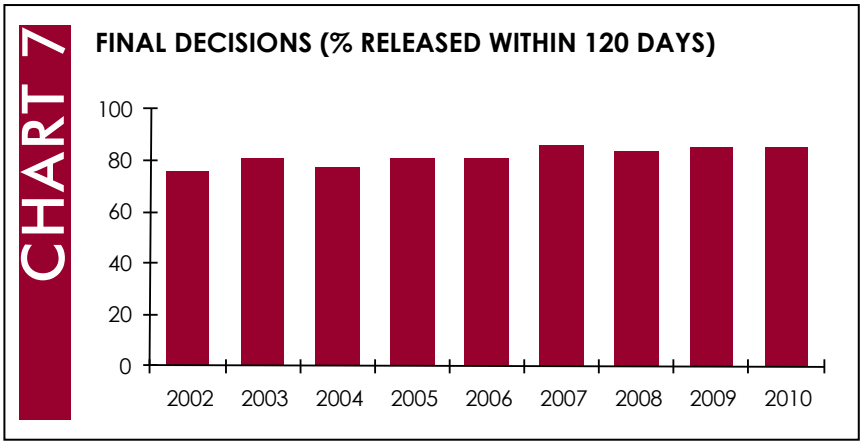
The Tribunal also measures the median interval of the first offered hearing date. This interval is measured from the date on which cases are confirmed ready to proceed to the future hearing date first offered to the parties. Chart 6 shows that the typical length of time for this stage in the appeals process was again reduced. (The time was lowered by 0.5 months in 2010.)

CHART 6



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 2010, this target was achieved 85% of the time.

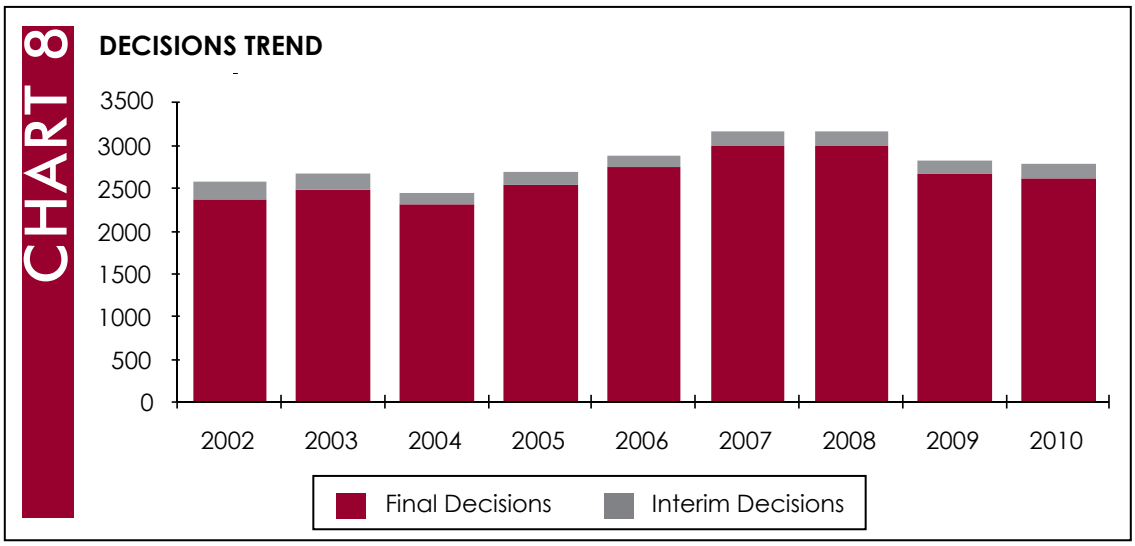
CHART 7



Hearing and Decision Activity

Chart 8 depicts the Tribunal's Hearing and Decision production. In 2010, the Tribunal conducted 2,873 hearings and issued 2,785 decisions. The Tribunal strives to achieve decision-readiness following completion of the first hearing. Some cases require post-hearing work following the first hearing, and some hearings are adjourned requiring a subsequent hearing before the same or a different Vice-Chair or Panel. Most cases require only a single hearing.

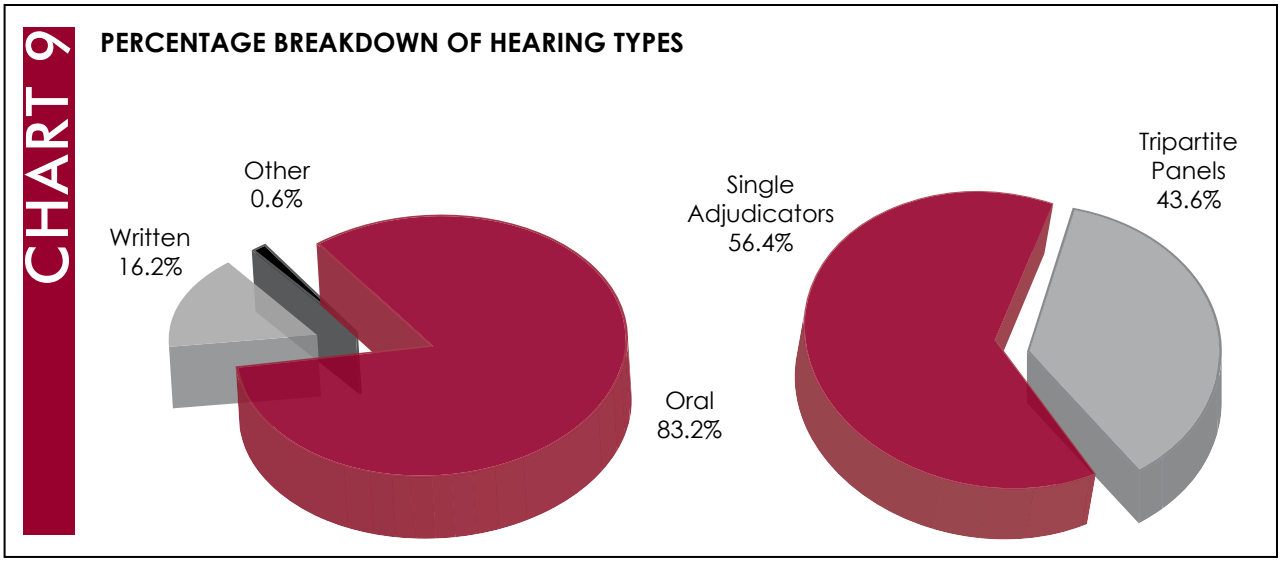
CHART 8



Hearing Type

In 2010, the percentage breakdown of hearing types was as follows: Oral hearings continued to be the most common hearing type at 83%, followed by written hearings at 16%. The remaining hearings (less than 1%) in 2010 included teleconferences, Vice-Chair Registrar and Motions Day case reviews. The percentage of single adjudicator hearings decreased in 2010 to 56% (from 64% in 2009); tripartite panels increased to 44% of cases heard. Chart 9 presents these hearing characteristics.

CHART 9



Representation at Hearing

Tribunal statistics show that for injured workers, 36% were represented by paralegals and consultants; 21% by lawyers and legal aid; 18% by the Office of the Worker Adviser; and 13% 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: 34% were represented by lawyers; 31% were represented by paralegals and consultants; 10% by the Office of the Employer Adviser; and 2% by firm personnel. The remaining 23% are non-categorized. These statistics are presented in Chart 10.

CHART 10

PERCENTAGE BREAKDOWN OF HEARING REPRESENTATION

WORKER REPRESENTATION

A) In Worker Appeals		B) In Employer Appeals	
None Recorded	11%	None Recorded*	47%
Subtotal	**11%**	**Subtotal**	**47%**
Consultant	1%	Consultant	0%
Lawyer/Legal	21%	Lawyer	27%
OWA	18%	OWA	8%
Others*	1%	Others*	1%
Paralegal	35%	Paralegal	6%
Union	13%	Union	10%
Subtotal	**89%**	**Subtotal**	**53%**

EMPLOYER REPRESENTATION

A) In Worker Appeals		B) In Employer Appeals	
None Recorded*	70%	None Recorded	23%
Subtotal	**70%**	**Subtotal**	**23%**
Firm personnel	10%	Firm personnel	2%
Consultant	1%	Consultant	5%
Lawyer	9%	Lawyer	34%
OEA	3%	OEA	10%
Others*	0%	Others*	0%
Paralegal	7%	Paralegal	26%
Subtotal	**30%**	**Subtotal**	**77%**

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

Caseload by General Appeal Issue Type

The appeal type categorization of incoming cases and dispositions has been consistent over the years and 2010 was no exception. In 2010, Entitlement-related cases constituted the majority of cases (93%). Special Section cases (Right to Sue and Access) comprised typically small portions (6%). Charts 11 and 12 provide historical comparisons of incoming cases and cases disposed in 2010.

CHART 11

BREAKDOWN OF INCOMING CASES BY APPEAL TYPE FOR THE YEAR 2005-2010

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

NOTES: This chart excludes post-decision figures. The post-decision components of workload (requests for Reconsiderations, Ombudsman investigations and Judicial reviews) are summarized in Charts 13, 14 and 15.

* The NEL/FEL category represents appeals related to the non-economic and future economic loss pension criteria introduced by Bill 162.

** The Vocational Rehabilitation category represents appeals related to the increased Vocational Rehabilitation requirements introduced by Bill 162.

CHART 12

BREAKDOWN OF CASE DISPOSITIONS BY APPEAL TYPE FOR THE YEARS 2005-2010

	2005		2006		2007		2008		2009		2010	
TYPE	**No.**	**(%)**	**No.**	**(%)**	**No.**	**(%)**	**No.**	**(%)**	**No.**	**(%)**	**No.**	**(%)**
Leave	0	0.0%	0	0.0%	2	0.0%	0	0.0%	0	0.0%	1	0.0%
Right to Sue	44	1.0%	48	1.1%	67	1.5%	45	1.0%	60	1.5%	73	1.9%
Medical Exam	0	0.0%	1	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Access	241	5.5%	239	5.3%	136	3.0%	178	4.0%	189	4.6%	182	4.7%
Total Special Section	**285**	**6.5%**	**288**	**6.4%**	**205**	**4.5%**	**223**	**5.0%**	**249**	**6.1%**	**256**	**6.5%**
Preliminary (not yet specified)	18	0.4%	19	0.4%	8	0.2%	5	0.1%	2	0.0%	0	0.0%
Pension	22	0.5%	9	0.2%	11	0.2%	5	0.1%	10	0.2%	4	0.1%
N.E.L./F.E.L.*	194	4.4%	92	2.0%	56	1.2%	49	1.1%	46	1.1%	35	0.9%
Commutation	2	0.0%	1	0.0%	0	0.0%	1	0.0%	0	0.0%	0	0.0%
Employer Assessment	241	5.5%	170	3.8%	152	3.4%	170	3.8%	121	3.0%	131	3.4%
Entitlement	3293	75.0%	3609	79.8%	3862	85.2%	3705	83.5%	3437	84.2%	3287	84.1%
Ext. post WSIB dec. deadline	270	6.2%	278	6.1%	180	4.0%	225	5.1%	166	4.1%	153	3.9%
Jurisdiction Time Limit	9	0.2%	7	0.2%	1	0.0%	0	0.0%	0	0.0%	0	0.0%
Reinstatement	2	0.0%	1	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Vocational Rehabilitation **	2	0.0%	3	0.1%	1	0.0%	4	0.1%	4	0.1%	13	0.3%
Classification	33	0.8%	35	0.8%	44	1.0%	50	1.1%	37	0.9%	21	0.5%
Interest NEER	17	0.4%	4	0.1%	1	0.0%	0	0.0%	0	0.0%	1	0.0%
Total Entitlement-related	**4103**	**93.5%**	**4228**	**93.5%**	**4316**	**95.3%**	**4214**	**94.9%**	**3823**	**93.6%**	**3645**	**93.2%**
Jurisdiction	2	0.0%	5	0.1%	10	0.2%	2	0.0%	12	0.3%	8	0.2%
	4390		**4521**		**4531**		**4439**		**4084**		**3909**	

NOTES: This chart excludes post-decision figures. The post-decision components of workload (requests for Reconsiderations, Ombudsman investigations and Judicial reviews) are summarized in Charts 13, 14 and 15.

*The NEL/FEL category represents appeals related to the non-economic and future economic-loss pension criteria introduced by Bill 162.

**The Vocational Rehabilitation category represents appeals related to the increased Vocational Rehabilitation requirements introduced by Bill 162.

Inactive Inventory

In 2010, the Inactive cases inventory decreased to 3,158 from 3,390 at the end of 2009, a decrease of 7%. Cases are placed in the Inactive category by request of the appellant, or by a Tribunal Vice-Chair, without prejudice to the Tribunal appeal. The most common reasons for placing a file in the Inactive status are to allow an appellant to pursue additional medical reports; obtain a representative or a final ruling from the Workplace Safety and Insurance Board pertaining to an issue raised at the Tribunal hearing.

Post-decision Workload

The Post-decision workload is derived from three sources: Ombudsman follow-ups (Chart 13), Reconsideration requests (Chart 14) and Judicial Reviews (Chart 15). The post-decision workload is predominantly driven by Reconsideration requests. In year 2010, 194 Reconsideration requests were received.

CHART 13

OMBUDSMAN COMPLAINTS, ACTIVITY AND INVENTORY SUMMARY

New Complaint Notifications Received	1
Complaints Resolved	1
Complaints Remaining	0

CHART 14

RECONSIDERATION REQUESTS, ACTIVITY AND INVENTORY SUMMARY

Inquiries (Pre-reconsideration) Remaining	81
Reconsideration Requests Received	194
Reconsideration Requests Resolved	198
Reconsiderations Remaining	97

CHART 15

JUDICIAL REVIEWS, ACTIVITY AND INVENTORY SUMMARY

Judicial Reviews at January 1st	25
Judicial Reviews Received	6
Judicial Reviews Resolved	10
Judicial Reviews Remaining	21

FINANCIAL MATTERS

A Statement of Expenditures and Variances for the year ended December 31, 2010 (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, 2010. The Auditor's Report is included as Appendix B.

CHART 16

STATEMENT OF EXPENDITURES AND VARIANCES YEAR ENDED DECEMBER 31, 2010 (IN $000s)

	2010 BUDGET	2010 ACTUAL	2010 VARIANCE $	2010 VARIANCE %
OPERATING EXPENSES				
Salaries & Wages	11,106	10,969	137	1.2
Employee Benefits	2,088	2,212	(124)	(5.9)
Transportation & Communication	1,070	915	155	14.5
Services	6,775	6,659	116	1.7
Supplies & Equipment	424	462	(38)	(9.0)
TOTAL – W.S.I.A.T.	21,463	21,217	246	1.1
Services – W.S.I.B.	500	572	(72)	(14.4)
Interest Revenue	-	(2)	2	-
TOTAL OPERATING EXPENSES	**21,963**	**21,787**	**176**	**0.8**
ONE TIME EXPENSES				
Severance Payments	100	76	24	24.0
Caseload Reduction Strategy funding	100	100	-	-
TOTAL EXPENDITURES	**22,163**	**21,963**	**200**	**0.9**

Note: The above 2010 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 $174 is comprised of:

Capital Fund		
Amortization	53	
Fixed assets acquired	(95)	(42)
Operating Fund		
Accrued severance & vacation benefits	173	
Prepaid expenses	43	216
		$ 174

APPENDIX A

Vice-Chairs and Members in 2010

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
McCutcheon, Rosemarie	October 6, 1999
Noble, Julia	October 20, 2004
Patterson, Angus	June 13, 2007
Ryan, Sean	October 6, 1999
Smith, Eleanor	January 7, 2000
Members representative of 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	Initial appointment
Vice-Chairs	
Alexander, Bruce	May 3, 2000
Bigras, Jean Guy	May 14, 1986
Butler, Michael	May 6, 1999

Part-time	Initial appointment

Vice-Chairs (continued)

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, Urich	April 29, 1999
Gale, Robert	October 20, 2004
Goldberg, Bonnie	May 27, 2009
Goldman, Jeanette	June 22, 2006
Hartman, Ruth	October 6, 1999
Hodis, Sonja	July 15, 2009
Josefo, Jay	January 13, 1999
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
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
Peckover, Susan	October 20, 2004
Shime, Sandra	July 15, 2009
Silipo, Tony	December 2, 1999
Smith, Marilyn	February 18, 2004
Sutherland, Sara	September 6, 1991
Sutton, Wendy	May 27, 2009
Welton, Ian	June 22, 2006

Part-time	Initial appointment

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
Signoroni, Antonio	October 1, 1985

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 2010

	Effective
Melvin Crystal	May 3, 2010
Arthur Lust	April 16, 2010
Rosemarie McCutcheon[1]	April 14, 2010
Julia Noble	October 20, 2010
Susan Peckover	October 20, 2010
Antonio Signoroni[2]	September 29, 2010
Marcel Trudeau	April 16, 2010

1 Rosemarie McCutcheon's part-time Vice-Chair reappointment Order in Council, made September 24, 2008, was converted to full-time by this Order.

2 Antonio Signoroni's Order in Council as a part-time Vice-Chair was revoked by this Order, which also reappointed him as a part-time Member representative of workers.

New Appointments during 2010

There were no new appointments during 2010.

Senior Staff

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

Medical Counsellors

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

Deloitte.

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Independent Auditor's Report

To the Chair of
Workplace Safety and Insurance Appeals Tribunal

We have audited the accompanying financial statements of the Workplace Safety and Insurance Appeals Tribunal, which comprise the balance sheet as at December 31, 2010, the statements of operations and changes in fund balances and cash flows for the year then ended, and a summary of significant accounting policies and other explanatory information.

Management's Responsibility for the Financial Statements

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

Auditor's Responsibility

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

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

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

Opinion

In our opinion, the financial statements present fairly, in all material respects, the financial position of the Workplace Safety and Insurance Appeals Tribunal as at December 31, 2010, and the results of its operations and its cash flows for the year then ended in accordance with Canadian generally accepted accounting principles.

Deloitte & Touche LLP

Chartered Accountants
Licensed Public Accountants
Toronto, Ontario
March 14, 2011

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
Balance Sheet
December 31, 2010

	2010	2009
ASSETS		
CURRENT		
Cash	**$ 1,266,156**	$ 1,295,500
Receivable from Workplace Safety and Insurance Board	**1,508,432**	1,207,221
Prepaid expenses and advances	**316,997**	359,974
Recoverable expenses (Note 5)	**216,476**	150,369
	3,308,061	3,013,064
CAPITAL ASSETS (Note 6)	**106,432**	64,698
	$ 3,414,493	$ 3,077,762
LIABILITIES		
CURRENT		
Accounts payable and accrued liabilities	**$ 1,593,041**	$ 1,255,156
Accrued severance benefits and vacation credits	**2,831,367**	2,658,794
Operating advance from Workplace Safety and Insurance Board (Note 7)	**1,400,000**	1,400,000
	5,824,408	5,313,950
FUND BALANCES		
OPERATING FUND (Note 8)	**(2,516,347)**	(2,300,886)
CAPITAL FUND	**106,432**	64,698
	(2,409,915)	(2,236,188)
	$ 3,414,493	$ 3,077,762

APPROVED ON BEHALF OF WORKPLACE
SAFETY AND INSURANCE APPEALS TRIBUNAL

..... Chair

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
Statement of Operations
Year ended December 31, 2010

	2010	2009
OPERATING EXPENSES		
Salaries and wages	**$ 10,968,968**	$ 10,851,477
Employee benefits (Note 9)	**2,460,918**	2,293,555
Transportation and communication	**915,360**	964,604
Services and supplies	**7,168,542**	7,149,914
Amortization	**53,416**	49,712
	21,567,204	21,309,262
Services - Workplace Safety and Insurance Board (Note 10)	**571,799**	543,549
TOTAL OPERATING EXPENSES	**22,139,003**	21,852,811
BANK INTEREST INCOME	**(2,466)**	(2,861)
NET OPERATING EXPENSES	**22,136,537**	21,849,950
FUNDS RECEIVED AND RECEIVABLE FROM WSIB	**(21,962,810)**	(21,703,890)
NET UNFUNDED OPERATING EXPENSES	**$ 173,727**	$ 146,060
ALLOCATED TO		
CAPITAL FUND	**$ 41,734**	$ (11,698)
OPERATING FUND	**(215,461)**	(134,362)
	$ (173,727)	$ (146,060)

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
Statement of Changes in Fund Balances
Year ended December 31, 2010

	Capital	Operating	Total
BALANCE - JANUARY 1, 2009	$ 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)
Additions to capital assets	95,150	-	95,150
Amortization of capital assets	(53,416)	-	(53,416)
Severance benefits and vacation credits (Note a)	-	(172,573)	(172,573)
Prepaid expenses (Note b)	-	(42,888)	(42,888)
Net funded (unfunded) expenses - 2010	41,734	(215,461)	(173,727)
BALANCE - DECEMBER 31, 2010	**$ 106,432**	**$ (2,516,347)**	**$ (2,409,915)**

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, 2010

	2010	2009
NET INFLOW (OUTFLOW) OF CASH RELATED TO THE FOLLOWING ACTIVITIES		
OPERATING		
Funding revenue received from Workplace Safety and Insurance Board	**$ 21,661,599**	$ 21,835,265
Cash receipts for recoverable expenses	**665,068**	643,508
Bank interest received	**2,466**	2,861
Expenses, recoverable expenses and advances, net of amortization of $53,416 (2009 - $49,712)	**(22,263,327)**	(22,288,266)
	65,806	193,368
INVESTING		
Acquisition of capital assets	**(95,150)**	(38,014)
NET INCREASE (DECREASE) IN CASH	**(29,344)**	155,354
CASH, BEGINNING OF YEAR	**1,295,500**	1,140,146
CASH, END OF YEAR	**$ 1,266,156**	$ 1,295,500

Appendix B

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
Notes to the Financial Statements
December 31, 2010

1. GENERAL

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

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

2. SIGNIFICANT ACCOUNTING POLICIES

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

Basis of presentation

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

Revenue recognition

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

Financial instruments

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

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

2. SIGNIFICANT ACCOUNTING POLICIES (continued)

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

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

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

Capital assets

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

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

Employee benefits

(a) Pension benefits

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

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

(b) Severance benefits

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

2. SIGNIFICANT ACCOUNTING POLICIES (continued)

(c) Vacation credits

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

(d) Non-pension future benefits

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

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

3. FUTURE ACCOUNTING CHANGES

The CICA has issued new accounting frameworks applicable to Not-for-Profit Organizations and Government Not-for-Profit Organizations. Entities that are controlled by the Government are directed to follow Public Sector Accounting Standards, while private Not-for-Profit Organizations will have a choice between International Financial Reporting Standards (IFRS) and Canadian accounting standards for Not-for-Profit Organizations. The Tribunal is in the process of determining which accounting framework is most appropriate. The transition to one of these frameworks will be effective for fiscal years beginning on January 1, 2012. Early adoption of these standards is permitted.

4. ACCOUNTING ESTIMATES

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

5. RECOVERABLE EXPENSES

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

	2010	2009
Shared services		
Ontario Labour Relations Board	**$ 81,091**	$ 68,131
Pay Equity Hearings Tribunal	**4,874**	3,937
Human Rights Tribunal of Ontario	**6,196**	5,126
Human Rights Legal Support Centre	**-**	(5,751)
Secondments		
Ministry of the Attorney General	**-**	12,269
Ministry of Government Services	**5,759**	5,751
Ministry of Community and Social Services	**11,218**	10,646
Others		
Canada Revenue Agency HST rebate receivable	**66,889**	-
Employee amounts receivable	**38,470**	50,260
Ontario Public Service Employees Union	**1,979**	-
Total	**$ 216,476**	$ 150,369

6. CAPITAL ASSETS

	2010			2009
	Cost	**Accumulated Amortization**	**Net Book Value**	Net Book Value
Leasehold improvements	**$ 3,007,511**	**$ 3,000,002**	**$ 7,509**	$ 15,018
Furniture and equipment	**802,946**	**779,518**	**23,428**	37,866
Computer equipment and software	**342,849**	**267,354**	**75,495**	11,814
	$ 4,153,306	**$ 4,046,874**	**$ 106,432**	$ 64,698

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 $2,516,347 as of December 31, 2010 (2009 - $2,300,886) 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 $868,522 (2009 - $774,113) 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 2010 amounted to an increase of $154,458 (2009 - $70,517) over the prior year amount and is included in employee benefits in the Statement of operations.

c) Vacation credit entitlement

Vacation entitlements are accrued in the year when vacation credits are earned. The net vacation credits accrued in 2010 amounted to an increase in the accrual of $18,115 (2009 - $36,885) over the prior year amount and is included in employee benefits in the statement of operations.

d) Non-pension future benefits

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

10. SERVICES – WSIB

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

11. LEASE COMMITMENTS

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

2011	$ 369,720
2012	214,851
2013	18,618
2014	13,964
2015	-
Minimum operating lease payments	$ 617,153

The lease for the office premises expired on October 31, 2010 and the Tribunal exercised its option to renew the lease for a further five year term. A condition of the renewal option is that the annual rent is to be determined by mutual agreement with the landlord or, failing such agreement, by arbitration. Negotiations for a fair lease rate were unsuccessful and the arbitration process is underway. The Tribunal is still occupying the premises pending the outcome of arbitration.

12. CONTINGENT LIABILITIES

A claim from the Canada Revenue Agency has been made against the Tribunal for withholding taxes on individuals (Part-time Order in Council appointees) who the Tribunal consider as "fee- for-service" contractors. The Tribunal believes that their classification is correct and has filed a notice of appeal. The outcome of this claim is not determinable as at December 31, 2010, and accordingly, no provision has been made in these financial statements for any liability that may result. Any loss resulting from these claims will be recognized in the year when it becomes known.

13. GUARANTEES

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

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

13. GUARANTEES (continued)

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

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

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