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February 11, 2014

Honourable Jackson Lafferty
NWT Minister Responsible for the WSCC

Honourable Keith Peterson
NU Minister Responsible for the WSCC

Dear Honourable Ministers:

In accordance with the *Workers' Compensation Act*, I am pleased to present the Northwest Territories & Nunavut Workers' Compensation Appeal Tribunal's 2013 Annual Report.

Sincerely,

Colin Baile
Chairperson

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Overview

The Northwest Territories & Nunavut Workers' Compensation Appeals Tribunal is an independent quasi-judicial tribunal, which hears appeals of decisions made by the Workers' Safety and Compensation Commission's ("WSCC" or "the Commission") Review Committee. Both Workers and Employers may file an appeal. The Tribunal may only hear matters for which the Review Committee has made a decision. Appeals are heard by one Tribunal Member, however a panel of three may be struck to hear an appeal. The Tribunal may confirm, vary or reverse any decision of the WSCC's Review Committee. While the Tribunal may make its own procedural rules, it must follow and apply the *Workers' Compensation Act* (the Act) of both the Northwest Territories and Nunavut.

The workers' compensation system provides compulsory, no-fault mutual insurance for workers and employers. One of the corner stones of this system is the immunity from action. This means employers and workers cannot be sued as a result of a workplace accident. There are however very specific circumstances where such immunity may be challenged. Applications from any party to a court action may apply to the Tribunal for a determination of whether a person is immune from action under the Act.

The Ministers from both the Northwest Territories and Nunavut, responsible for Workers' Safety & Compensation Commission, appoint Tribunal Members.

Tribunal Members and Staff – 2013

Colin Baile – Chairperson (Yellowknife)

Michael Chandler (Iqaluit)

Louis Sebert (Fort Smith)

Cayley Thomas (Yellowknife)

Joan Mercredi (Fort Smith)

Maria Jobse – Registrar/General Manager

Operations

In 2013, sixteen appeals were received. This is more than double the number of appeals filed in 2012 and is the greatest number in the previous 6 years. In addition to the appeals received, two Section 63 applications were filed.

Of the hearings held in 2013, more than 50% were documentary with less than half of all hearings being conducted in person or by videoconference. Over the past several years, there is a trend towards documentary hearings.

The majority of appeals continue to be made by Workers with only 11% filed by Employers.

77% of appeals are NWT matters with the remaining 23% originating from Nunavut matters.

The length of time from filing to decision was an average of 131 days. Since 2008, the time for appeals has been reduced by 65%. Some of the appeal time can be attributed to regulatory requirements for such matters as notice of hearing and time for service. The Tribunal attempts to conduct hearings in the least possible time, while ensuring the principals of fairness are applied. The Tribunal is responsible for specific amounts of time in each appeal such as preparing the Appeal Package, setting of a hearing date, and decision writing. Appellants are responsible for the time between receiving the Appeal Package and filing the Certificate of Readiness, which is required in order to schedule a hearing. Up to 69% of the overall time required for an appeal may be contributed to Appellants failing to return required forms in a timely manner.

Outcomes for appeals have remained the same from last year. The reversal rate (appeals allowed or allowed in part) is 50%. Over the past six years, the reversal rate has been between 36% and 55% with the average being 46%.

For the sixth year, no judicial review applications of Tribunal decisions proceeded through the Courts.

Key Initiatives for the Coming Year

- A review will be undertaken next year to examine procedure models from other jurisdictions, which may further reduce the time for appeals to proceed.
- The need to publish Tribunal decisions must be weighted against statutory and privacy requirements. The Tribunal will finalize the redaction requirements in order to allow decisions to be published.

Financial Operations

In 2013, the Tribunal's total expenditures were within 79% of the original authority of \$471,284.

Tribunal Mandate and Procedural Authorities

Both the Commission and the Appeals Tribunal are governed by the *Workers' Compensation Act* of each Territory. The Tribunal is ordinarily not bound by Commission decisions or opinions. The Tribunal must apply Commission policies where the Tribunal determines the policy applies to the circumstances of an appeal.

The Appeals Tribunal is guided by the principles of administrative law, legislation, and court decisions. Within this framework, the Tribunal endeavors to maintain the balance between fairness and efficiency.

Appeals may be heard by documentary submissions, teleconference, videoconference, or in-person. Tribunal decisions are written. The Act requires decisions to be made within 90 days of receiving all the evidence.

Tribunal decisions are final and conclusive. The Act provides for the Commission's Governance Council to direct the Tribunal to rehear an appeal should the Governance Council determine the Tribunal has not properly applied Commission policy or failed to comply with the Act/Regulations. The Tribunal may reconsider a decision on the basis of new evidence. Appeals may be dismissed for delay of proceeding where the Tribunal determines procedural deadlines have not been met.

Procedural Framework



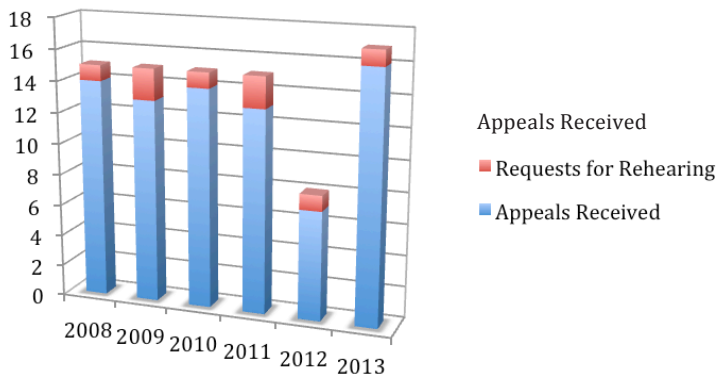
Statistics

Please refer to the Appendix for specific data.

Two Section 63 applications were received in 2013. One was withdrawn and the other had not been concluded.

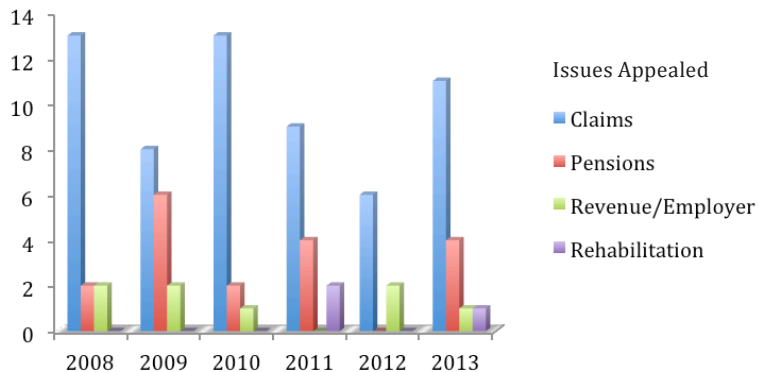
Appeals and Requests for Reviews Received

This year saw an increase in the number of appeals over last year and has been the greatest number in the past six years.



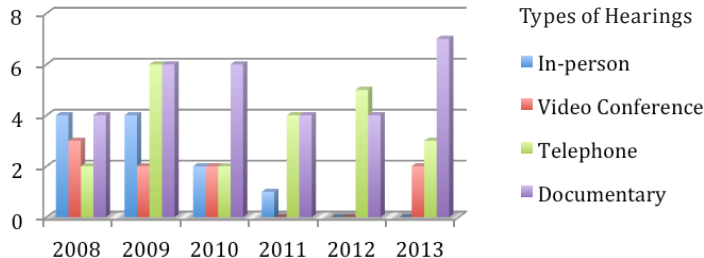
Issues Appealed

Consistent with previous years, claims issues continue to form the majority of appeals, followed by pension issues.



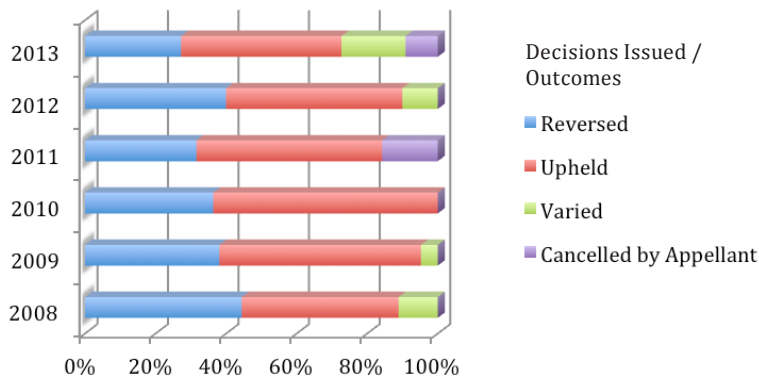
Types of Hearings

The majority of hearings were documentary. For the second year, no in-person hearings were conducted.



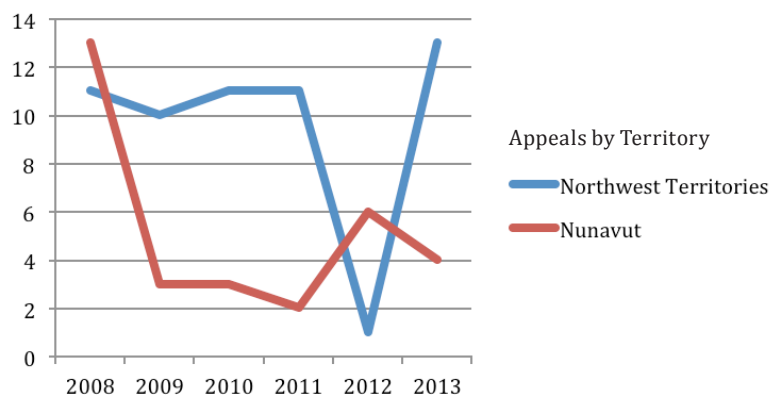
Decisions Issued / Outcomes

Half of the Tribunal decisions upheld the WSCC decision under appeal while the remaining Tribunal decisions overturned or varied the WSCC decision under appeal.



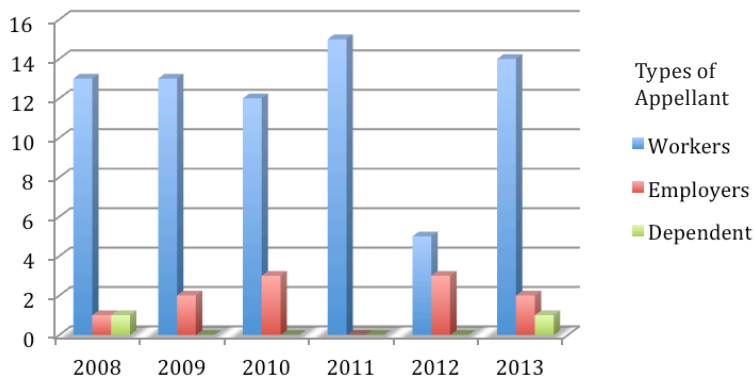
Appeals by Territory

By far the majority of appeals resulted from NWT claims. Apart from 2012, this has been the norm.



Types of Appellant

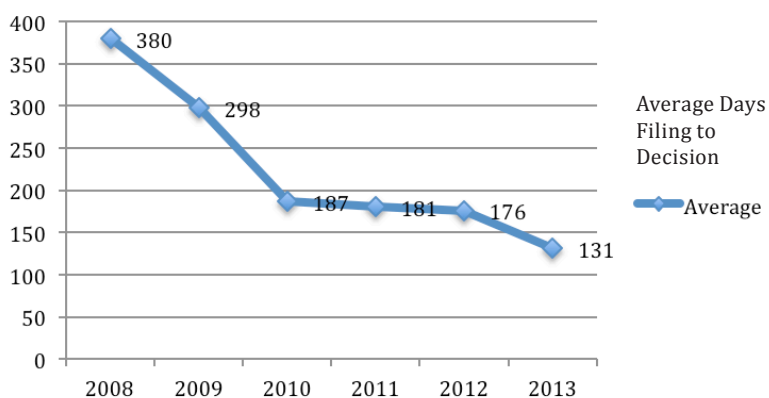
2013 was historically consistent in that the majority of appeals were filed by Workers.



Time from Filing to Decision

The past six years has seen a steady reduction in the time needed to complete appeals.

Note: this time includes that attributed to the activities of Appellants and WSCC, as well as the Tribunal.



Decisions of 2013

Appeals Tribunal hearings are conducted in camera. Because Tribunal decisions contain personal information such as medical and financial information, they are not made public. The Tribunal is finalizing the procedural and practice directives to allow for the publication of redacted decisions. The redacted decisions would contain no identifying information about the Worker or Employer. Redacted versions of decisions will be available in 2014 on the Canadian Legal Information Institute's free public website.

The following are summaries of the Tribunal's decisions made in 2013 by category.

Noteworthy Decisions

- Decision 11-009R Rehearing – Impairment v. Disability**
WSCC decision reversed
 Worker appeal – Via Written Submissions
 The Employer did not participate
 The WSCC did participate

The Appeals Tribunal originally heard this appeal in 2012. As provided for by section 131(1) of the *Workers' Compensation Act*, the WSCC Governance Council directed the Appeals Tribunal to rehear this appeal.

The Appeals Tribunal, in its original decision of this matter (11-009), considered the WSCC's decision to reduce the Worker's pension award by 50% due to pre-existing degenerative changes. The Appeals Tribunal found there to be a distinction between "disability" and "impairment". While section 42(1) of the Act states "disability" is to be determined using an impairment rating guide, the WSCC determined the Worker's pension based upon impairment rather than disability. The Appeals Tribunal considered Commission Policies 03.12, 06.03, and its Impairment Rating Guide. Upon being directed to rehear the matter, the Appeals Tribunal struck a panel of three and reheard the appeal. The Panel considered two issues:

1. *Is there a difference between "impairment" and "disability" and its relevance; and*
2. *Did the Appellant Worker have a pre-existing disability.*

The Panel found “disability” and “impairment” to be distinct and the WSCC used these two words interchangeably in its policies, correspondence, and even its submissions to the Appeals Tribunal. The Act provides for pensions to be determined based upon “disability”, however the WSCC’s pension calculations used only “impairment”. The Panel also found the Worker may have had a pre-existing impairment but did not have a pre-existing disability. The WSCC decision was again reversed.

2 **Decision 12-006 Entitlement – Test for Causation**
WSCC decision reversed
Worker appeal – Documentary
The Employer did not participate
The WSCC did not participate

The Appellant Worker injured his back when he fell off a ladder. His claim was denied.

The issue before the Appeal Tribunal was:

Is the Appellant entitled to compensation for a personal injury arising out of and during the course of employment?

Section 13(2) of the *Workers’ Compensation Act* (“the Act”) directs when a disease appears to have more than one cause, the disease is compensable if the cause(s) that arose out of and during the course of employment contributed in a material way.

The Act defines disease as: **“disease” means an unhealthy condition of the body or mind; “disease” means an unhealthy condition of the body or mind;**

Commission Policy 03.03 elaborates by stating that employment circumstances must make “*a significant contribution to the occurrence of the injury*” and “*the link should be direct and/or objectively verifiable*”. The Appeals Tribunal found the use of the phrase “contributed in a material way” in section 13(2) of the Act establishes the causation test as “materially contributed” rather than “but for”. Cases considered were the Supreme Court of Canada case of *Athey v. Leonati*, [1996] 3 S.C.R. 458 in which the Court stated: **“ A contributing factor is material if it falls outside the de minimis range.”** Other cases also considered were:

Workers’ Compensation Appeal Board v. Penney (1980), 38 N.S.R. (2d) 623 (S.C.A.D.),
Ferneyhough v. Workers’ Compensation Board (N.S.) et al., 2000 NSCA 121(CanLII)
W.S.I.A.T. Decision No. 549/9512 (1998), CanLII 18125

Causation can be established if the ‘cause’ was more than a negligible contributing factor to the disease.

*Other Decisions***3 Decision 13-004 Recovery of Overpayment
Both WSCC decisions were upheld**

Worker Appeal - Via Teleconference
The Employer did not participate
The WSCC did not participate

Two Review Committee decisions were addressed at this hearing. The Appellant was injured when he slipped on ice-covered stairs. Compensation benefits were paid on the basis the Appellant was a permanent, full-time employee. Some time later, the Commission adjusted the Appellant's entitlement calculations. The Commission changed the status of the Appellant's entitlement criterion from "permanent, full-time" to "seasonal, full time". This change resulted in the Commission's determination the Appellant received monetary compensation benefits in excess of his entitlement. The Commission sought the repayment of benefits from the Appellant in excess of \$48,000. The issues before the Appeals Tribunal were:

Was the Commission's decision to recover an overpayment made to the Appellant appropriate? And, Was the Appellant a permanent or non-permanent employee of the Employer?

It was determined several errors were made by the Commission, the Employer, and the Appellant during the management of this claim. The Employer, a large national construction company, did not inform the Appellant of the exact terms of employment. The Commission failed to determine the terms of the Appellant's employment at the commencement of this claim. The Commission also erred at least twice in the calculations of the alleged over-payment. The Act provides for no remedy where the Commission makes such errors.

The Appellant was found to have been employed on a non-permanent, full time basis. The Commission's ability to recover overpayments is discretionary and the Commission acted within its authority under section 142(3) of the Act and Commission Policy 04.01.

**4 Decision 12-001 Modified Duties
WSCC decision was upheld**

Employer Appeal - Documentary
The Worker did not participate
The WSCC did not participate

The Appellant Employer did not inform the Appeals Tribunal of its readiness to proceed with the hearing for 12 months after receiving the Appeals Package.

The Worker injured his finger while employed at a remote camp. He required medical attention and was transported to Yellowknife. While in Yellowknife, the Worker was offered modified duties by the Employer. The Worker declined and returned to his home in southern Canada. He required additional medical care and was cleared for work about two weeks later.

The issue before the Appeal Tribunal:

Was the Worker entitled to Temporary Total Disability benefits in relation to his injury in light of declining modified duties offered by the Employer?

The Employer offered the Worker "modified duties" consisting of watching training and safety videos at its local office. It was found Commission Policy 04.14 does not address short-term modified duties. Using the Policy as a framework, any modified duties must be "meaningful" and not interfere with recuperation.

**5 Decision 13-003 Harvester - Entitlement
WSCC decision reversed**

Worker appeal – Documentary
The Employer did not participate
The WSCC did not participate

The Worker, was a Harvester who suffered a heart attack while tending to his trap line. The Worker met the criteria under Section 5 (1) of the Act and was deemed to be a worker within the meaning of the Act. The issue before the Appeals Tribunal was:

Whether the Worker at the time of his death was working as a harvester within the meaning of the Act and Policies 03.03 and 03.05.

The Worker was a traditional harvester and the issue under Policy 3.03 was whether the death of the Worker occurred at a time and place consistent with his employment. Policy 03.05 which deals with claims of harvesters, contemplates claims arising outside of actual trapping as it specifically includes travel to and from the area where the hunting, fishing, trapping or gathering are done. The Appeals Tribunal found the Worker's location and circumstances at the time of his death did not remove him from coverage.

**6 Decision 12-002 Suspension of Benefits
WSCC decision reversed in part**

Worker appeal – Via Teleconference
The Employer did not participate
The WSCC did not participate

The Appellant Worker was injured when machinery struck the truck he was in. The Worker later developed a pain disorder. The Worker's health care provider asked WSCC for further investigations into the Worker's continuing neck pain. The WSCC then suspended the Worker's treatment and monetary benefits.

The issues before the Tribunal were:

- 1) TTD compensation:
 - a. Was it appropriate to refuse to authorize an MRI?
 - b. Was it appropriate to suspend the Appellant's TTD compensation?
- 2) Calculation of TTD compensation:
 - a. Was the Appellant's compensation calculated correctly?

The Appeals Tribunal found the request for an MRI should have been granted, as it fell squarely within the provisions of Commission Policy 04.09. Also noted was the failure to authorize the test likely did prolong the worker's treatment for his pain disorder. The Commission's decision on this issue was reversed.

At some point in the management of this claim, the WSCC focused only on the physical aspect of the Worker's condition, with no acknowledgement that he was being treated for a pain disorder. This action was found to be inconsistent with the WSCC policy on Claims Management, which states, "*In all cases, the WSCC makes all possible efforts to consult with the worker's treating health care providers to clarify*

the diagnosis, treatment plan and recovery period... . The termination of benefits and lack of communication were inconsistent with the Worker's doctors' assessments and the earlier recommendations of a Medical Advisor who each felt "a strong psychological intervention approach in one final attempt to reverse the disorder" was the best treatment for the Worker. The Commission's decision to suspend benefits was reversed.

On the issue of the Worker's benefit calculations, the Appeals Tribunal found the benefits had been properly calculated.

7 **Decision 11-012 Termination of Benefits**
WSCC decision was confirmed
Worker appeal – Via Teleconference
The Employer did not participate
The WSCC did not participate

The Appellant Worker suffered lower back pain while unloading an appliance. The Worker was diagnosed with acute low back pain. There was a history of chronic back pain. The WSCC arranged for the Worker to be seen by an orthopedic specialist. The Worker did not attend the medical appointment because he was going on vacation despite his painful back. The WSCC terminated the Worker's benefits in keeping with Commission Policy 04.01 which requires an injured Worker to "...cooperate fully in their recovery by taking measures to minimize their disability and enhance recovery, by cooperating with prescribed medical treatment...". This requirement was found to be reasonable in assisting claimants to return to work in a safe and timely manner.
The WSCC's decision was upheld.

8 **Decision 13-002 Termination of Benefits**
WSCC decision was confirmed
Worker appeal – Documentary
The Employer did not participate
The WSCC did not participate

The Appellant Worker suffered a lumbar strain in the workplace. The Worker continued to suffer pain after the estimated 2 to 6 week recovery period. Benefits were terminated as there was no evidence to show the Worker was unable to return to his pre-incident duties. The Worker had degenerative disc disease that was a pre-existing condition. The Appeals Tribunal found the WSCC applied its Policy 03.12 correctly. There was no evidence, despite several diagnostic tests, to show the Worker's continuing symptoms were other than complications from the Worker's pre-existing condition.

9 **Decision 09-002R Reconsideration**
Request for reconsideration was denied

The Appellant Worker sought a reconsideration of his 2010 appeal based upon new evidence. This was the Appellant's second reconsideration request. A health care provider's letter was submitted as new evidence. The Appeals Tribunal may reconsider a decision under Regulation 57(2)(d). The information provided by the Appellant was found to be submitted outside the requisite time period as well as failing to conceivably having affect on the outcome of the previous two decisions. The reconsideration request was denied.

Appendix

ISSUES APPEALED

	2008	2009	2010	2011	2012	2013
Claims	13	8	13	9	6	11
Pensions	2	6	2	4	0	4
Revenue/Employer	2	2	1	0	2	1
Rehabilitation	0	0	0	2	0	1
Total Received	17	16	16	15	8	17

APPEALS RECEIVED

	2008	2009	2010	2011	2012	2013
Appeals Received	14	13	14	13	7	16
Requests for Rehearing	1	2	1	2	1	1
Total Received	15	15	15	15	8	17

TYPES OF HEARINGS

	2008	2009	2010	2011	2012	2013
In-person	4	4	2	1	0	0
Video Conference	3	2	2	0	0	2
Telephone	2	6	2	4	5	3
Documentary	4	6	6	4	4	7
Total Hearings	13	18	12	9	9	12

APPEALS BY TERRITORY

	2008	2009	2010	2011	2012	2013
Northwest Territories	11	10	11	11	1	13
Nunavut	13	3	3	2	6	4

TYPES OF APPELLANT

	2008	2009	2010	2011	2012	2013
Workers	13	13	12	15	5	14
Employers	1	2	3	0	3	2
Dependent	1	0	0	0	0	1

AVERAGE DAYS FROM FILING TO DECISION

	2008	2009	2010	2011	2012	2013
Average	380	298	187	181	176	131

Note: this time includes both that attributed to the activities of Appellants as well as the Tribunal

SECTION 63 APPLICATIONS

	2008	2009	2010	2011	2012	2013
Count	2	0	0	1	0	2

OUTSTANDING APPEALS AT YEAR END

	2008	2009	2010	2011	2012	2013
Count	14	12	15	10	8	14

DECISIONS ISSUES / OUTCOME

	2008	2009	2010	2011	2012	2013
Reversed	4	8	4	6	4	3
Upheld	4	12	7	10	5	5
Varied	1	1	0	0	1	2
Cancelled by Appellant	0	0	0	3	0	1
Total	9	21	11	19	10	11

