

Workplace Safety and Insurance Appeals Tribunal

QUARTERLY REPORT

Production and Activity

**For the Period
April 1st through June 30th, 2004**

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The Quarterly Report

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”) pursuant to the *Workplace Safety and Insurance Act, 1997* (“the Act”). The Act, 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 Act.

This Report provides a summary of the Tribunal’s activities and achievements of the past quarter, April 1st through June 30th, 2004. It provides an update on caseload inventory and the Tribunal’s community involvement. Also provided is a summary of judicial review activity and recent decisions.

Key Tribunal Activities

A) Tribunal Production

The following points summarize the Tribunal's production achievements in the second quarter of 2004.

- The active inventory totalled 5,110 (28% over the target of 4,000 cases).
- Incoming appeals numbered 1,169; of these, 978 were appeals from WSIB decisions and 194 appellants advised they were ready to proceed to hearing following a period of inactive status.
 - This compares to 986 new appeals and 184 reactivated appeals recorded in the first quarter of 2004.
 - In 2003, the weekly average of hearing ready appellants was 60. For Q2 2004, the weekly average of hearing ready appellants was 65.
- Dispositions numbered 1,146; this includes 523 dispositions in the pre-hearing areas resulting from dispute resolution efforts and 623 after hearing dispositions; of the after hearing dispositions, 596 followed from Tribunal decisions.
- The inactive inventory increased by 7 cases to 4,194.
- 70% of final decisions were released within 120 days.
- Due to a lack of adjudicative resources, the Appeals Tribunal is currently unable to offer hearing dates within four months of the appellant confirming hearing readiness by filing a Confirmation of Appeal form.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are currently being tracked as part of the Tribunal's case management. Most are expected to be closed as abandoned appeals after a two-year period expires. At the end of the second quarter of 2004, the NOA inventory included 1,543 dormant cases and 1,918 cases actively proceeding towards a hearing. The resolution inventory had 3,192 cases in either a review, scheduling, decision writing or post-hearing stage.

Productivity in Relation to Case Management Objectives

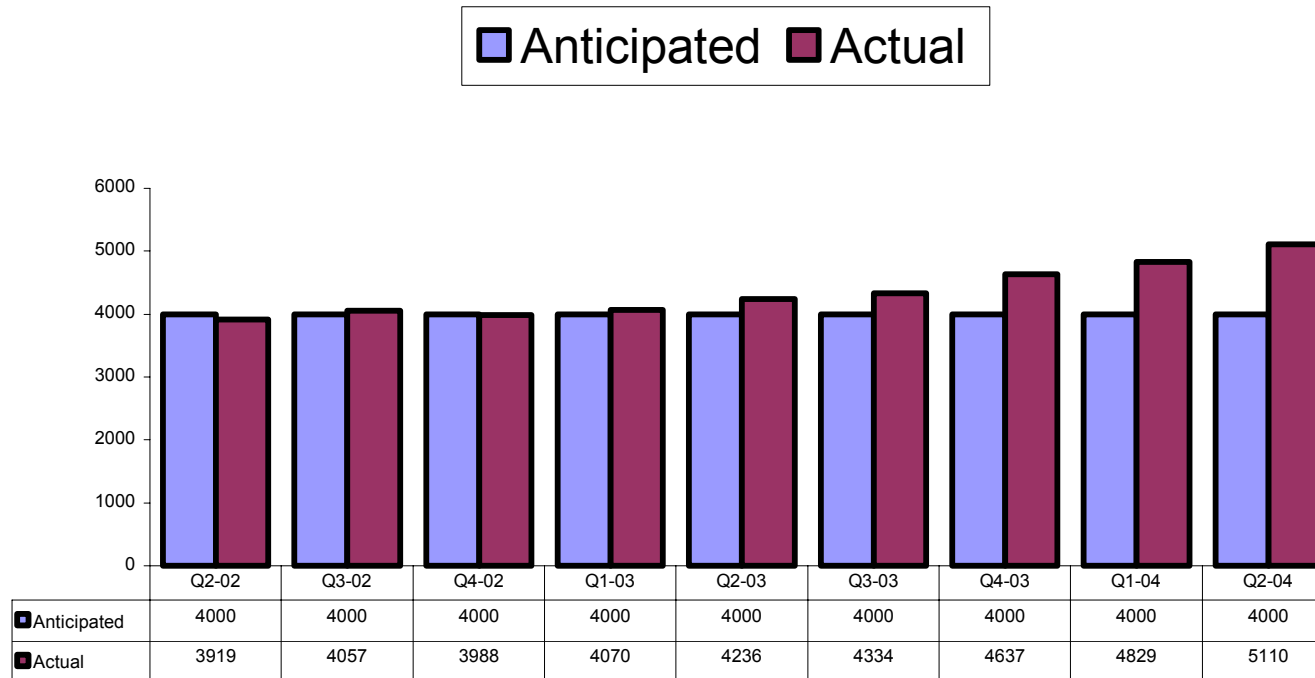


Figure 1. Appeals Inventory, Anticipated vs. Actual

The active inventory is likely to continue to increase over the next quarter, as adjudicators have not been added to the roster as quickly as hoped and therefore the Tribunal is relying heavily on a small number of adjudicators to release decisions. During 2003 the Tribunal experienced an increase in appellants confirming their readiness to proceed to hearing amounting to 690 appeals in excess of targets. In 2004, the weekly average of hearing ready appellants continues to exceed the 2003 level of 60 per week; in the first quarter of 2004, the average was 80 and in the second quarter the average was 65. These factors combine to create a situation where appeals are waiting longer than the Tribunal has targeted for resolution. The Tribunal is monitoring its caseload carefully and using available adjudicative resources as efficiently as possible to avoid adjournments or cancellations. Over the long term, the Tribunal is targeting an active inventory closer to 4,000 cases.

In the second quarter of 2004, incoming appeals numbered 1,169; of these, 978 were new appeals from WSIB decisions and 194 appeals were reactivations from the inactive cases inventory. Of the 194 reactivated appeals, the majority were brought forward to active processing by appellants, with only 39 following from contact related to an inactive inventory reduction project.

In 2003, the weekly average number of appellants to certify their readiness to hearing was 60. In the second quarter of 2004, the weekly average was higher, at 65 (this figure does not include re-activated appeals).

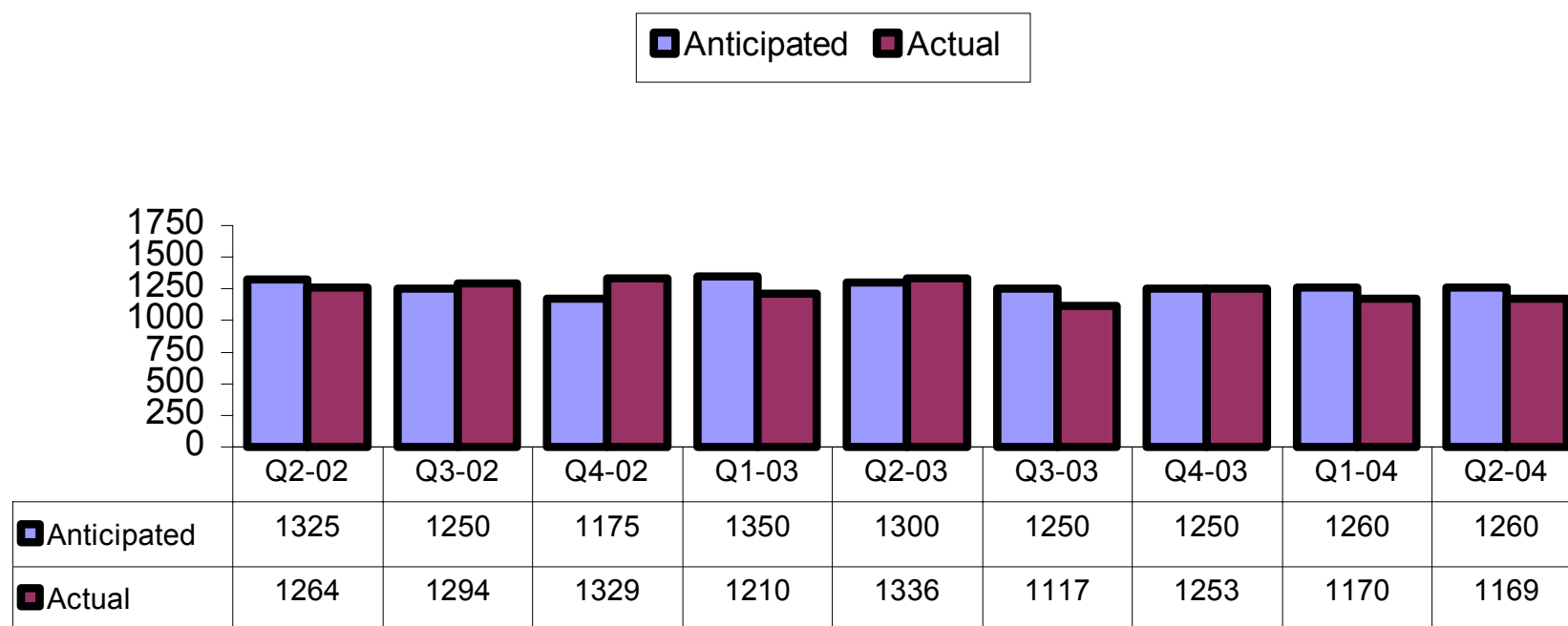


Figure 2. Incoming Appeals, Anticipated vs. Actual

During the second quarter of 2004, Tribunal dispositions totalled 1,146. Both the pre-hearing areas and the adjudicators achieved more dispositions in comparison to the first quarter of 2004.

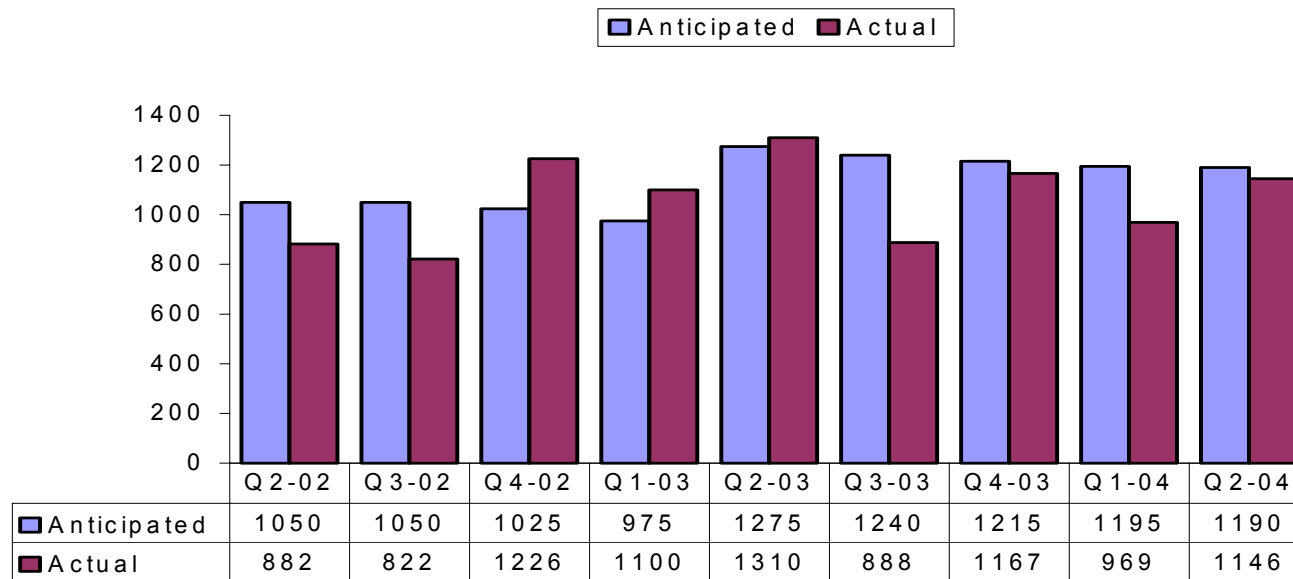


Figure 3. Dispositions, Anticipated vs. Actual

During April through June 2004, the Tribunal disposed of 523 appeals prior to hearing. This figure consists of appeals resolved through alternative dispute resolution, including mediation, early intervention and File Status review to confirm hearing-ready status. Appeals that undergo File Status review are referred to the Vice-Chair Registrar who may issue a decision to close the appeal or place it in the Inactive status. Beginning in the third quarter of 2003, appeals residing in the Notice Stage Dormant status for more than two years were targeted for File Status review.

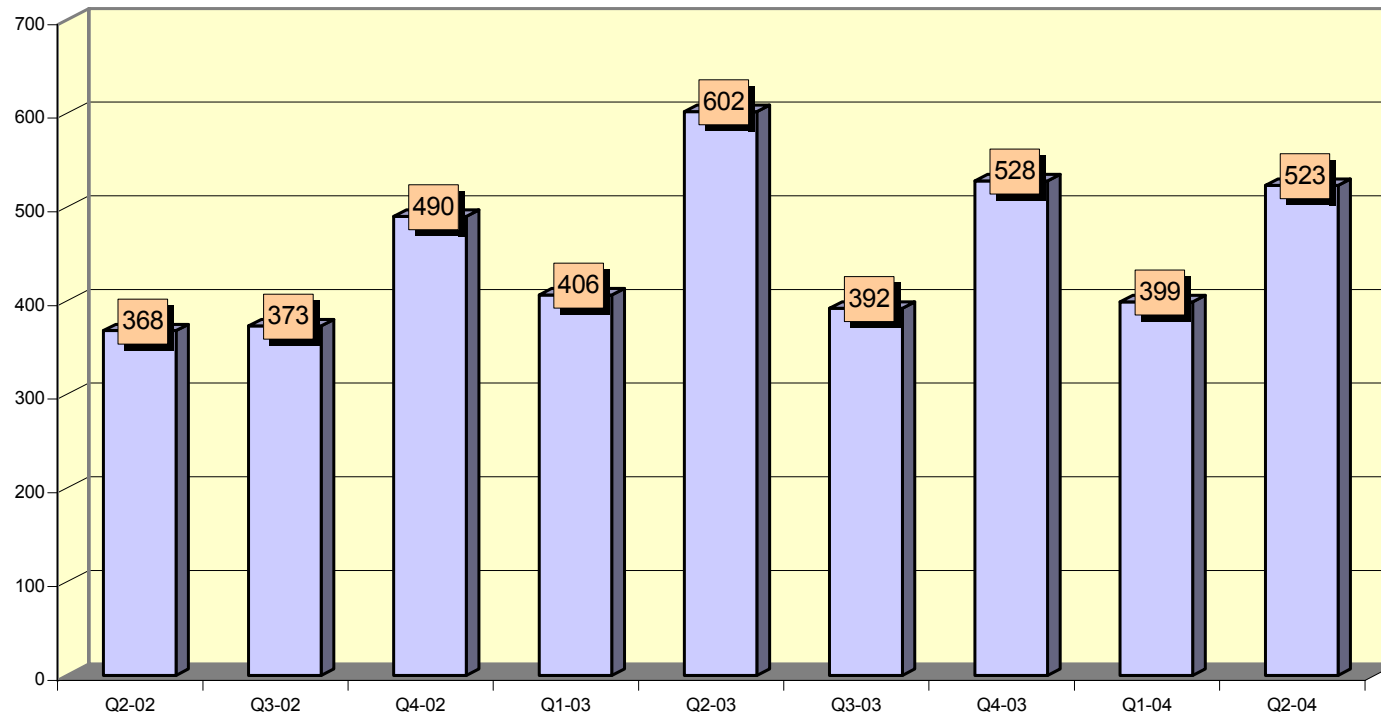


Figure 4. Dispositions from Pre-Hearing processes

After hearing dispositions totalled 623 and included 596 dispositions from final decisions of Vice-Chairs and Panels, and 27 other dispositions typically achieved by making the appeals Inactive pursuant to interim decisions. During the second quarter, 70% of decisions were released in 120 days. This is a decline in timeliness in comparison to previous quarters (75% in the first quarter of 2004 and 74% in the fourth quarter of 2003). Fewer hearings are planned for July and August 2004 to accommodate the lack of Vice-Chair availability and to provide writing time to Vice-Chairs.

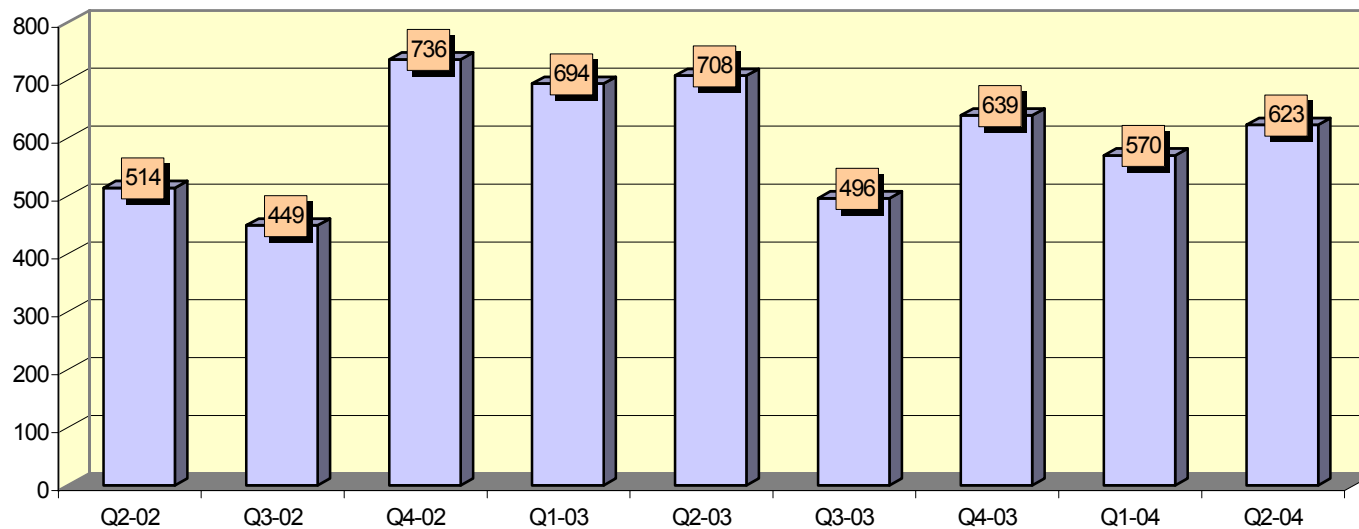


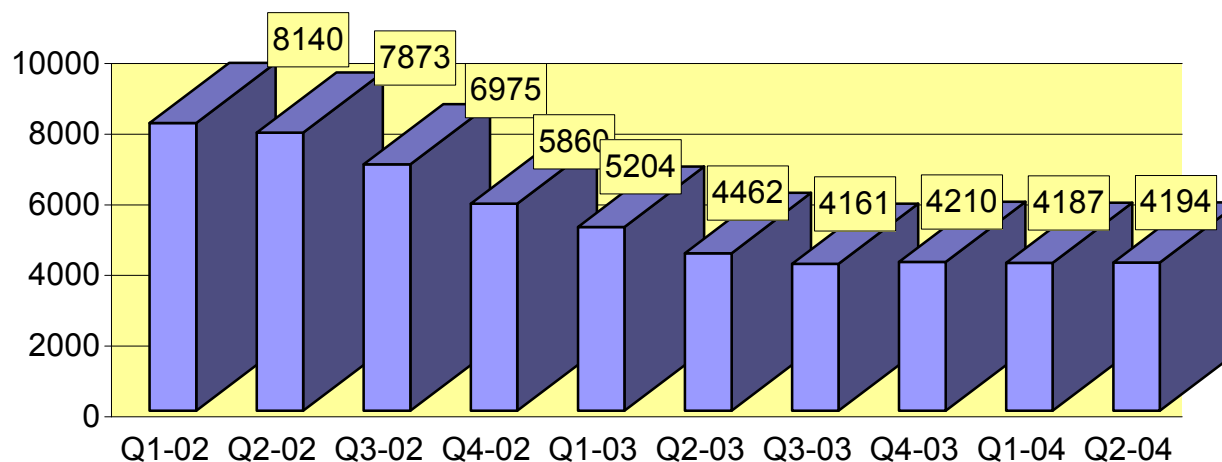
Figure 5. Dispositions from After Hearing processes.

Inactive Inventory: At the close of the second quarter 2004, the Tribunal's inactive inventory numbered 4,194, an increase of 7 cases from the previous quarter.

During the second quarter, 194 appellants contacted the Tribunal to continue or re-activate their appeal, representing just 4% of the previous quarter's inactive inventory of 4,187. In the second quarter of 2004 deactivations numbered 213 cases. These figures, in addition to file closures through the inactive inventory reduction project, resulted in a net inactive inventory increase of 7 cases.

During this quarter, 39 of the above-noted reactivations involved cases in the inactive inventory reduction project. Reactivations are taken into account in the Tribunal's business planning, and expected reactivations are included in projections as incoming appeals.

Inactive status was created in 1997 as a case management approach to provide appellants with time to prepare their appeal prior to hearing. This process is subject to the Tribunal's Practice Direction on Inactive Files.



Inactive Inventory Q1 2002 to Q2 2004

Inactive Inventory Reduction Project: The Tribunal determined that it was necessary to adopt an active approach to the management of these appeals, in order to ensure that they are resolved in a timely fashion. Since commencing the project to reduce the inactive inventory on April 1, 2002, 3,454 cases have been closed. Further reductions in the inactive inventory were achieved through reactivations, which are declining in number as the pace of the reduction project decreases.

Over 72% of the inactive cases are over two years old. At the end of 2002, the Tribunal reported that 66% of cases in inactive status were over two years old. It is unlikely that these appellants are planning to proceed with their appeal.

B) Communications

Public Information Sessions: The Tribunal's Public Information sessions will continue in the Fall. Currently, sessions are planned in Windsor on September 28th, 2004 and in Kingston on November 23rd, 2004. As further details are confirmed, information will be available on the Tribunal's web site and in the August 2004 issue of the WSIAT newsletter, In Focus.

Professional Development: In April, the Tribunal conducted an in-house training session for adjudicators focusing on non-economic and future economic loss awards. In May, Tribunal staff and OICs attended a mandatory training day, focusing on chronic pain issues. In June, Tribunal adjudicators attended an in-house training session featuring presentations by Tribunal Counsel. Counsel presented papers on Retroactive Application of Board Policy and Pre-hearing Preparation of Industrial Disease claims.

Inter-Agency Relations: During the second quarter of 2004, the Tribunal and the Board organized opportunities for the Quality Loop Groups to meet. In early April, Tribunal staff met with representatives from the Board's Appeals Branch, Legal Branch and Records Department. Topics on the agenda included employer status requests, requests for information from the Regulatory Services Division, final decision requests to the Appeals Branch and claim file updates. Later in April, Tribunal staff met with the Operating Managers from the Board's Business Units. This group focuses on facilitating implementation of Tribunal decisions through a review of released decisions. At this meeting the Group also discussed where the Tribunal's materials are filed in the Board file. Also this quarter, the Tribunal Director, Marsha J. Faubert, attended an annual meeting of the Office of the Worker Advisor to participate in a discussion regarding professional responsibility.

Forms: Tribunal staff recently reviewed the Response Form to add a signature section regarding confidentiality of claim file information. In addition, in response to feedback received at Information Sessions, the Tribunal has developed a Notice of Appeal – Employer Appeal form. This form is currently being translated and will be available on the web site, at www.wsiat.on.ca.

Advisory Group: In May, the Tribunal's Advisory Group to discuss current issues. This Group meets at least once per year and is comprised of representatives from the employer and injured worker communities. A representative from the Board's Appeals Branch is also invited to attend.

C) Judicial Review Activity

The status of applications for judicial review as of the end of June 2004 are set out below. Only those judicial reviews where there was activity during the quarter are listed. There are a number of other pending judicial reviews in which there was no action during this particular quarter.

As indicated below, in an unusual development a Tribunal decision was quashed by the Divisional Court on judicial review. This marks the first time in nineteen years that a Tribunal decision has been quashed. A notice of motion for leave to appeal the Divisional Court decision was filed before the end of this quarter.

1. Decision Nos. 1480/98I (July 27, 2001) and 1480/98 (September 25, 2002)

The WSIB granted entitlement to a letter carrier for a rare form of skin cancer, which resulted from exposure to sunlight during the course of her employment. An appeal by the employer was denied in *Decision No. 1480/98I* as the Tribunal found that the worker's skin cancer was a "disablement" under the *Act*. The employer then argued that the worker was not entitled to benefits because she was a federal worker, and this type of accident or industrial disease was not covered by the *Government Employee's Compensation Act (GECA)*. In *Decision No. 1480/98* the Tribunal held that this "disablement" was an accident under the Ontario *Act*, and was incorporated under the *GECA*.

The employer brought an application for judicial review. The employer did not challenge the finding that the cancer was work-related, only that this type of accident was not incorporated by *GECA*. The application was heard on November 28, in Ottawa by a Divisional Court panel of McWilliam, McCartney and Ratushny. The Court reserved.

The Divisional Court unanimously dismissed the application for judicial review. The judgment, written by Justice Ratushny, was strongly supportive of the Tribunal's decision. The Divisional Court held that the decision that *GECA* incorporated this disablement type of accident was not only not patently unreasonable, it was correct.

The employer brought a notice of motion for leave to appeal the decision of the Divisional Court to the Court of Appeal. The Court of Appeal (Abella, Cronk and Juriensz JJA) denied leave on May 26 2004.

2. Decision Nos. 770/98I (October 27, 1999) and 770/98IR (February 5, 2002)

This case marked the first time a Tribunal decision was successfully reviewed.

A worker was granted chronic pain entitlement by the Board, but was awarded no future economic loss. She appealed this to the Tribunal, alleging she did not have chronic pain, but instead had an organic condition known as traumatic vertebrobasilar ischemia (TVBI).

The Tribunal dismissed the appeal, and confirmed the worker had chronic pain. In coming to this finding, the Panel concluded the worker had hit her head once at the time of her accident.

The worker then requested the Tribunal reconsider the finding in *Decision 770/98I* that she had an organic condition. She also argued in the alternative, as a new issue, that she had a somatoform disorder. In support of her reconsideration the worker submitted an affidavit from a co-worker. The affidavit said the co-worker could now recall that in 1991 the worker had struck her head twice at the time of the accident. In *Decision 770/98IR*, the Panel denied the reconsideration, and confirmed the worker did not have TVBI. However, the Panel found that the worker had a somatoform disorder, rather than chronic pain.

The worker applied for judicial review of the decision that she did not have an organic condition.

The judicial review was heard in Divisional Court on April 19. The Court found the Tribunal's decision was patently unreasonable. The Divisional Court's decision, which is not long, focused on two paragraphs of the reconsideration decision. The Court was not satisfied with the way the Panel had dealt with the co-worker's affidavit on the reconsideration in regards to the number of times the worker had struck her head. The Divisional Court decision also stated that the Tribunal had also not satisfactorily dealt with the conflict in the medical evidence.

The Tribunal filed a notice of motion for leave to appeal the Divisional Court decision. At the end of the quarter, the Tribunal was awaiting service of the worker's responding leave factum.

3. Decision Nos. 28/02 (February 11, 2002) and 28/02R (July 22, 2003)

Decision No. 28/02 found, applying the statutory benefit of doubt in favour of the worker, that a hospital worker had entitlement to compensation. The worker had a disc herniation, and the Panel found on the evidence that it arose as a disablement from his work as a sonographer. The employer's application for judicial review of the decision was adjourned on consent of the parties, to permit the employer to pursue a reconsideration application at the Tribunal.

Decision No. 28/02R denied the application for reconsideration. The employer then elected to proceed with the judicial review. The judicial review was heard on June 10 in Ottawa.

The Divisional Court unanimously dismissed the application for judicial review. The Court found that the Tribunal had the authority to weigh evidence and apply the benefit of doubt. The Tribunal is entitled to deference in its decisions, and the Tribunal's decision was not patently unreasonable.

4. Decision Nos. 18/88I (March 22, 1988) and 18/88 (October 27, 1988)

Decisions Nos. 18/88I and *18/88* were released in 1988. Fifteen years later, in 2003, the worker brought an application for judicial review to quash these decisions.

The worker alleged the WSIB had improperly released his claim file to the employer. The worker argued that because of the WSIB's action, the Tribunal had lost jurisdiction to hear his appeal. The Tribunal did not agree, and held it had jurisdiction.

The worker brought a motion to add the WSIB and the employer as parties to the application, which the Tribunal did not oppose. The worker also alleged the Tribunal was refusing to disclose information in his case, and this part of the motion was dismissed.

The worker has added nine "Constitutional Questions" which he wants the Divisional Court to address. The WSIB has retained counsel, who has stated an intention to bring a motion to quash the application for judicial review. At the end of the quarter the WSIB was attempting to set a date for the motion convenient to all parties.

5. Decision No. 606/95 (June 23, 1997)

This application for judicial review of *Decision No. 606/95* was served on the Tribunal late in 2003. It appears to involve a number of complex factual issues involving entitlement for a worker. Just prior to the end of the quarter, counsel for the worker added two employers as respondents. The Tribunal will now be preparing its record.

6. Decision Nos. 433/99 (June 24, 1999) and 433/99R (May 30, 2000)

Counsel for the worker served the Tribunal with an application for judicial review of *Decision Nos. 433/99* and *433/99R*. These decisions found that a worker's low back disability was not caused by a 1979 work injury. There had been no further activity on the judicial review for some time. However, counsel for the worker has ordered transcripts of the Tribunal hearing, and it now appears that this judicial review application will be moving forward.

7. Decision Nos. 3536/00E (January 8, 2001), 3536/00ER (August 14, 2001), and 3536/00ER2 (May 5, 2003)

The worker's former representative failed to file an appeal to the Tribunal within the time set out in the *WSIA*. The worker's application to extend the time limit to appeal was denied. Two applications to reconsider the original time limit decision were denied.

The worker commenced an application for judicial review. Both the worker and Tribunal have filed their factums. At the end of the quarter both parties were awaiting a date to be set for the judicial review.

8. Decision No. 1384/03 (December 30, 2003)

This application for judicial review, and the one immediately below, were both served on the Tribunal during this quarter. In *Decision 1384/03* the Panel denied initial entitlement to the worker. As the worker failed to name the employer as a respondent in the application, at the end of the quarter her counsel was taking steps to amend her materials.

9. Decision No. 1509/02 (February 2, 2004)

This judicial review was received at the same time as the one for *Decision No. 1384/03*, above. The two applicants are sisters, and were employed by the same employer. They are represented by the same law firm. In this instance the Panel allowed an employer appeal and reversed initial entitlement for the worker.

As in *Decision No. 1384/03*, at the end of the quarter, counsel for the worker is amending her materials to add the employer as a party.

10. *Kohlhammer v. Workplace Safety & Insurance Appeals Tribunal et al*

Although it is not an application for judicial review, the Tribunal was served with a statement of claim. The plaintiff, who is self-represented, is also suing the Ministry of Labour and the WSIB. It is not clear what the grounds for the suit are. The Tribunal has filed a Notice of Intent to Defend. To keep costs to a minimum, it has been agreed that the Attorney General will be representing both the Tribunal and the Ministry in this matter.

D) Highlights of Decided Cases

The Tribunal's Charter Jurisdiction: *Decision No.794/97* is the first Tribunal decision to consider the Supreme Court of Canada's recent decision, *Nova Scotia (Workers' Compensation Board) v. Martin*, which held that the Workers' Compensation Appeals Tribunal of Nova Scotia had jurisdiction to decide a Charter challenge. In *Decision No.794/97* the worker unsuccessfully appealed the denial of a commutation of his 15% pension. He then argued that s.45 (4) of the pre-1989 *Workers' Compensation Act* violated the Charter because it discriminated between workers on the basis of disability. Under s.45 (4), pensions of 10% or less are commuted unless this would not be to the advantage of the worker, which the Board interprets as meaning where the worker's permanent disability is likely to deteriorate. Under s.26, the Board has the discretion to commute pensions of greater than 10% and has developed policy requiring a rehabilitative purpose.

Applying *Martin*, the Panel concluded that the Tribunal had implied jurisdiction over questions of law and therefore was presumed to have concomitant jurisdiction to decide the constitutional validity of its enabling legislation. There was nothing in the pre-1989 Act to rebut this presumption. The Panel observed in obiter that even if s.126 of WSIA had applied to the appeal, s. 126 would not rebut the presumption as the requirement to refer policy issues to the Board does not preclude the Tribunal from deciding questions of law, including Charter issues. The Panel further held that policy was included within the scope of the word "law" in s. 52 of the *Constitution Act* and that the Tribunal has jurisdiction to determine the constitutionality of policy.

The Panel then considered the merits of the Charter challenge by applying the approach in *Martin*. *Martin* relied on an earlier decision, *Law v. Canada (Minister of Employment and Immigration)* in stipulating a three-part inquiry: (1) was there differential treatment, (2) on enumerated or analogous grounds, (3) resulting in substantive discrimination.

The Panel concluded that neither the legislation nor the policy was inconsistent with s.15. They were persuaded that s.45 (4) resulted in differential treatment between injured workers with pensions of more or less than 10%. For the sake of argument, the Panel accepted that the differential treatment was based on an enumerated ground in s. 15 of the Charter. The Panel then considered whether there was substantive discrimination that demeaned essential human dignity. The worker argued s.45 (4) resulted in a stereotypical assessment of disabled workers as being unable to manage their own financial affairs. The worker was in essence challenging the underlying principle that workers' compensation benefits are to be paid on a periodic basis.

The Panel found these arguments unpersuasive due to the significant historical and widespread support in Canada for the importance of periodic wage replacement in compensation and other benefit systems. Section 45(4) does not impose restrictions on account of unjustly presumed characteristics. Instead, it accommodates and protects the interests of disabled workers as it is based on the reasonable premise that the compensation scheme should mirror the income system it replaces. Lifetime access to periodic benefits is a reliable source of income and a valuable economic right. Section 45(4) does not limit the right to benefits, but only directs the manner in which they are to be paid. Section 26 is a further indication that the legislation meets the needs of permanently disabled workers because it gives the Board the discretion to commute benefits, thus recognizing that there may be individual circumstances when periodic benefits are not appropriate. The Panel concluded that s.45 (4) does not demean permanently disabled workers and does not indicate that they are not equally valued as members of Canadian society. The Panel also concluded that the Board policy on commutations, which requires a rehabilitative purpose, was entirely consistent with the purpose of the compensation scheme and not discriminatory. Finally, the Panel held that s.45 (4)'s allowance of commutations of pensions of 10% or less virtually as a right indicated that the Legislature recognized that it would be more efficient administratively to pay minimal pensions in a lump sum.

Effect of Policy Changes: Decision No. 1928/03 addresses whether a party can relitigate a matter already litigated at the Tribunal if the Board subsequently releases a new policy with a new interpretation of the Act concerning the subject matter in issue. The case involved a stress claim that the worker had previously appealed to the Tribunal. After releasing a number of decisions considering evidentiary issues, the Tribunal permitted the worker to withdraw her original appeal with prejudice. When she later attempted to reactivate that appeal at the Tribunal, the Tribunal held she could bring her appeal anew, subject to the time limits. A time limit extension was not granted in all the circumstances. Subsequently, the Board approved a new policy for stress claims, and the worker brought a new claim under the new policy. The Board's Appeals Resolution Officer held that the Board had jurisdiction to hear the appeal as there was no decision under the new policy, but ultimately denied the case. When the worker appealed the Board decision under the new policy to the Tribunal, the Tribunal held that a final decision had already been made, the concepts of *res judicata* and *functus officio* applied, and that the Board erred in concluding it had jurisdiction to consider this as a fresh appeal. In reaching its decision, the Tribunal relied on a Supreme Court of Canada case that held that a new legal argument or a change in circumstances cannot be grounds for reopening a prior decision. However, the worker was not barred from bringing a reconsideration request concerning the Tribunal's earlier decisions.

Employer Issues: In Decision No.2341/03, when the employer cancelled its voluntary coverage under Schedule 1, the Board assessed a departure fee. This is a supplementary premium for the final year of coverage that is intended to ensure that all remaining financial obligations of the employer are met, including the employer's share of the unfunded liability for the class. The employer later restored its voluntary coverage and appealed the assessment of the departure fee. Prior decisions have held that while the Tribunal does not have jurisdiction to consider the appropriateness of the departure fee scheme, it has jurisdiction to consider how the scheme was applied to a particular employer, and whether there were exceptional circumstances warranting a variation in the Board's usual approach. The Panel found exceptional circumstances existed

because, despite the employer's later return to voluntary coverage, it was not given consideration for the previously paid departure fee, and essentially had a double burden. The Panel concluded that it would be fair and just to refund half the fee.

Decision No.320/02R: The Tribunal considered whether an employer that did not participate in the original Tribunal hearing could request a reconsideration. In these circumstances an employer cannot request a reconsideration as a right, but the Tribunal had jurisdiction to consider the employer's application because the Tribunal can reconsider a decision on its own motion. The focus must be on whether the test for a reconsideration has been met, not on the means by which the Tribunal is made aware of the matter. The application for reconsideration was denied. The employer argued that it did not participate at the Tribunal because the Board incorrectly advised that the costs of the appeal would not be attributed to its account even if the appeal were successful. The Vice-Chair found that this was not a ground for a reconsideration because the employer should have been aware that it was in Schedule 2 and therefore essentially self-insured. In addition, this error was not a defect in the Tribunal's process or decision. The evidence that the employer would have tendered if it had participated in the decision was not the type of evidence that would warrant reconsideration. The original decision considered the evidence and came to a reasonable conclusion based on the evidence.

Occupational Disease: Decision No. 2825/01 considered the appeal of a worker's estate concerning his entitlement for lung cancer. Since 1952 the worker had worked in uranium mines and as a diamond driller both in and out of Ontario. Because the worker did not meet the exposure conditions in Board policy, the Panel considered the merits and justice of the case. His exposure was found to be a significant contributing factor to his lung cancer. When his Ontario exposure was combined with his out of province exposure, his risk increased to a statistically significant level. There was also a possibility that diamond drillers had more significant exposure because they worked in poorly ventilated areas. The worker may also have worked in mines with high arsenic and drill lubricant levels.