

**Workplace Safety and Insurance Appeals Tribunal**

**QUARTERLY REPORT**

**Production and Activity**

**For the Period**

**January 1 through March 31, 2004**

# Table of Contents

The Quarterly Report.....	1
Key Tribunal Activities.....	2
A) Tribunal Production .....	2
B) Communications.....	10
C) Judicial Review Activity .....	10
D) Highlights of Decided Cases .....	14

# 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, January 1<sup>st</sup> through March 31<sup>st</sup>, 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 production experience and achievements in the first quarter of 2004.

- The active inventory totalled 4,829 (21% over the target of 4,000 cases).
- Incoming appeals numbered 1,190; of these, 1,005 were appeals from WSIB decisions and 185 appellants advised they were ready to proceed to hearing following a time in inactive status.
  - This compares to 1,116 new appeals and 137 reactivated appeals recorded in the fourth quarter of 2003.
  - In 2003, the weekly average of hearing ready appellants was 60. For Q1 2004, the weekly average of hearing ready appellants was 80.
- Dispositions numbered 969; this includes 399 dispositions in the pre-hearing areas resulting from dispute resolution efforts and 570 after hearing dispositions; of the after hearing dispositions, 539 followed from Tribunal decisions.
- The inactive inventory decreased by 26 cases to 4,185.
- 75% 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 implemented its Notice of Appeal (NOA) process on March 15, 2001. The 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, and most are expected to close as abandoned after the two-year period parties are allowed to remain in the NOA stage. At the end of the first quarter of 2004, the NOA inventory included 1,819 dormant cases and 1,750 cases actively proceeding towards a hearing. The resolution inventory had 3,079 cases in a review, scheduling, decision writing or post-hearing stage.

## Productivity in Relation to Case Management Objectives

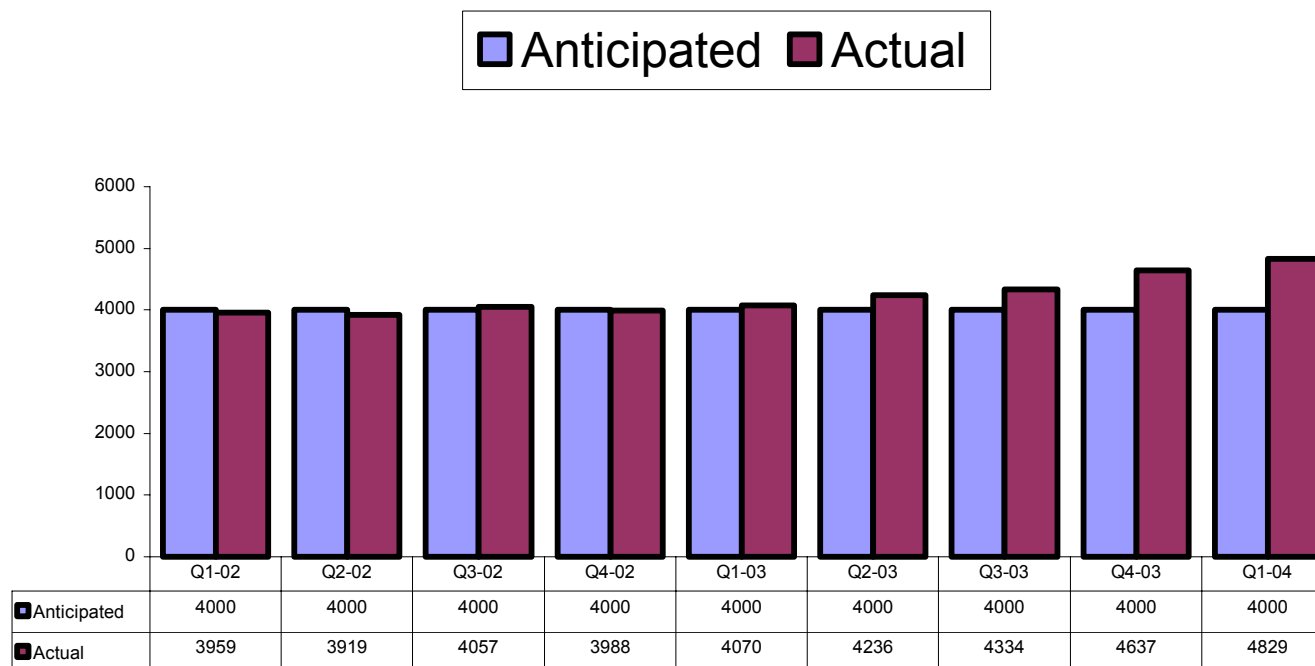


Figure 1. Appeals Inventory, Anticipated vs. Actual

Higher than projected active inventory figures are due to the unavailability of knowledgeable vice-chairs. Additionally, during 2003 the Tribunal experienced an increase in appellants confirming their readiness to proceed to hearing amounting to 690 appeals in excess of targets. This has led to a situation where appeals are waiting longer than the Tribunal targeted for a resolution. The active inventory has the potential to increase, as adjudicators have not been added to the roster as quickly as hoped and the Tribunal is relying heavily on a small number of adjudicators. The Tribunal is monitoring its caseload carefully and using available adjudicative resources as efficiently as possible to avoid adjournments or cancellations.

In the first quarter of 2004, incoming appeals numbered 1,190; of these, 1,005 were new appeals from WSIB decisions and 185 appeals were reactivations from the inactive cases inventory. Of the 185 reactivated appeals, only 20 followed from the inactive inventory reduction project; the majority were brought forward to active processing by appellants.

In 2003, the weekly average number of appellants to certify their readiness to hearing was 60. In the first quarter of 2004, the weekly average was higher, at 80. (This figure does not include re-activated appeals.)

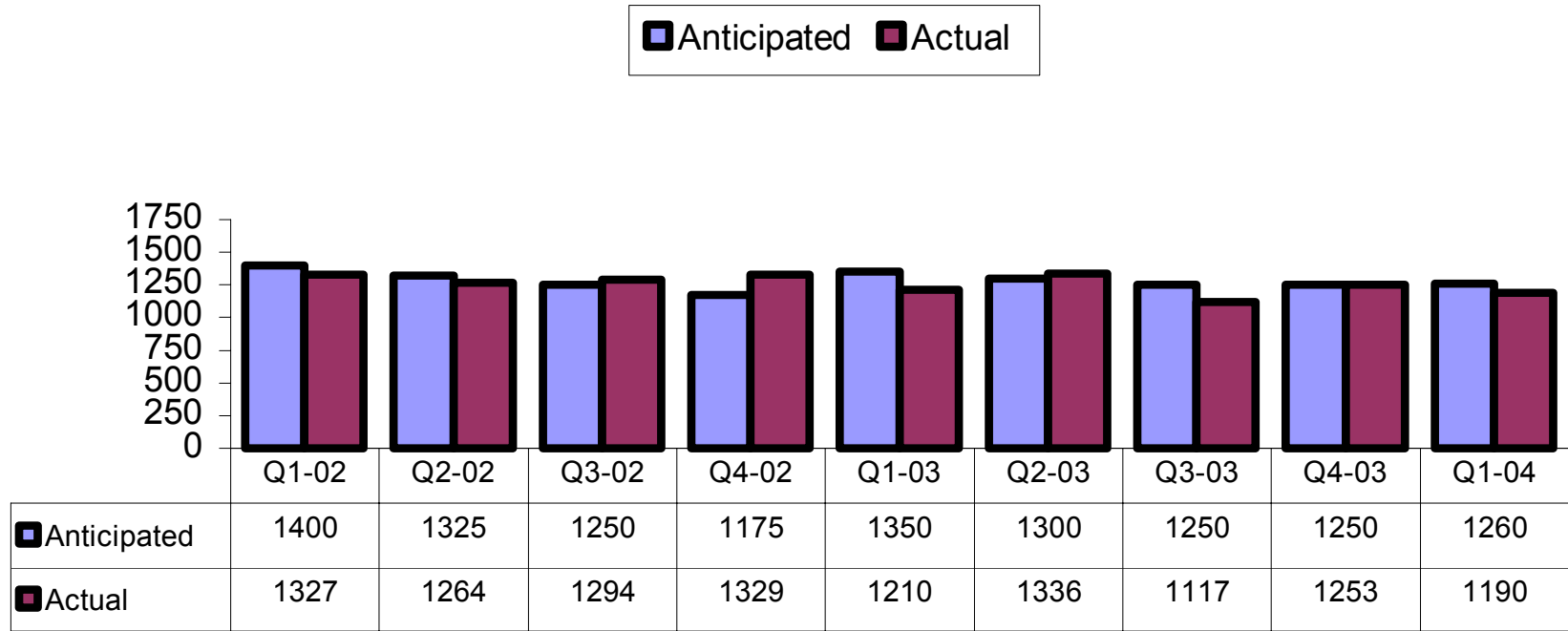


Figure 2. Incoming Appeals, Anticipated vs. Actual

During the first quarter of 2004, Tribunal dispositions totalled 969. This represents a decrease of 12% compared to the same period last year.

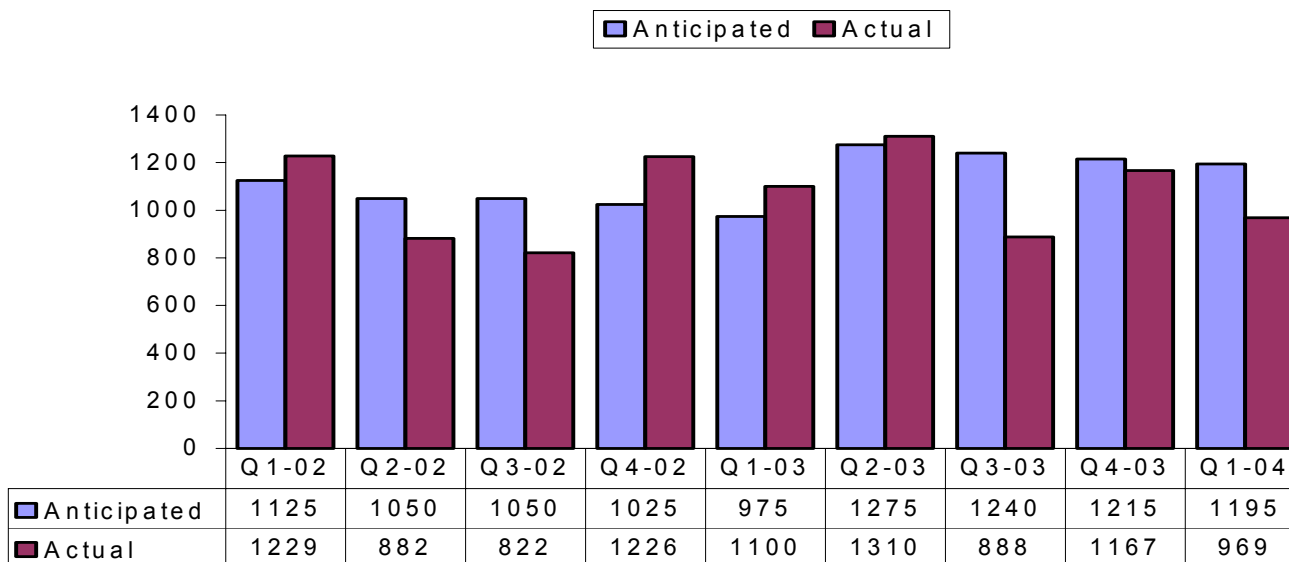


Figure 3. Dispositions, Anticipated vs. Actual

During January through March 2004, the Tribunal disposed of 399 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.

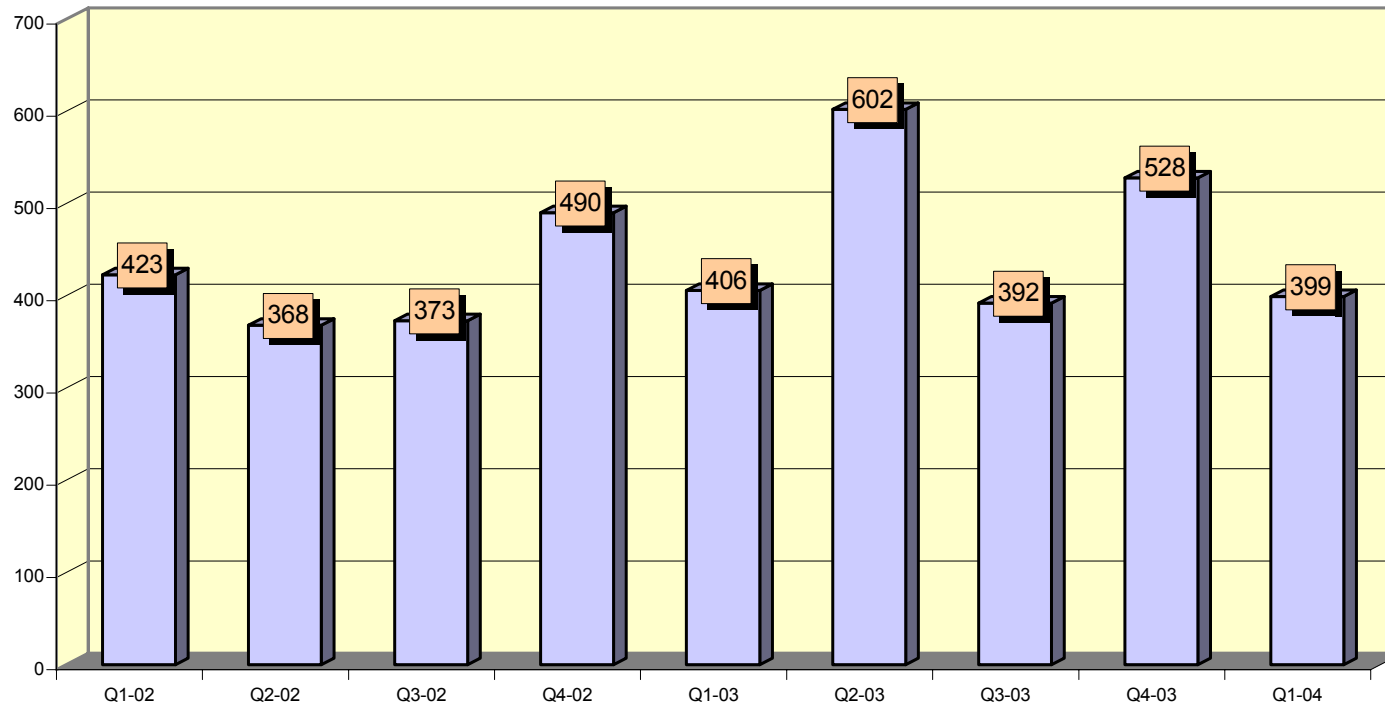


Figure 4. Dispositions from Pre-Hearing processes

After hearing dispositions totalled 570 and included 539 dispositions from final decisions of Vice-Chairs and Panels, and 31 other dispositions typically achieved by making the appeals Inactive pursuant to interim decisions.

Included in the 539 dispositions were 506 decisions released in the first quarter of 2004. The Tribunal is relying heavily on a small number of available vice-chairs to hear and decide appeals.

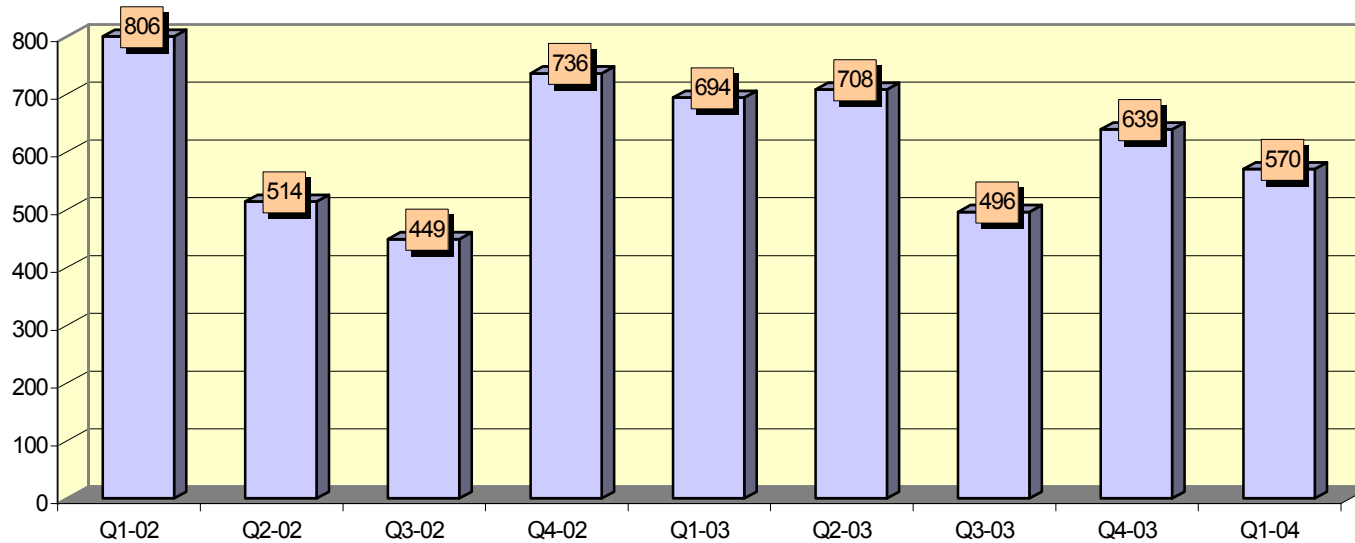


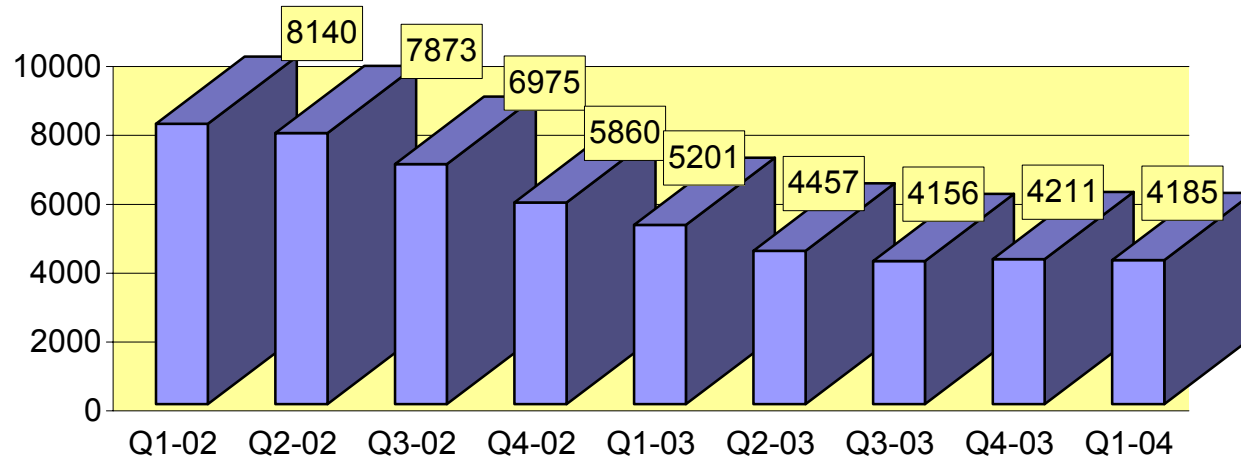
Figure 5. Dispositions from After Hearing processes.

**Inactive Inventory:** At the close of the first quarter 2004, the Tribunal's inactive inventory numbered 4,185, a decrease of 26 cases from the previous quarter.

During the first quarter, 185 appellants contacted the Tribunal to continue or re-activate their appeal, representing 4% of the previous quarter's inactive inventory of 4,211. In the first quarter of 2004 deactivations numbered 175 cases. These figures, in addition to file closures through the inactive inventory reduction project, resulted in a net inactive inventory decrease of 26 cases.

During this quarter, 20 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 Q1 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 in April 1, 2002, 3,443 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 74% 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 conducted three information sessions during the first quarter of 2004. In January, Tribunal adjudicators and staff spoke to dedicated attendees who traveled to Mississauga in the middle of a blizzard; in February, the Tribunal presented a session in Oshawa; and in March, the Tribunal conducted the first of two central Toronto sessions held at Macdonald Block. Community attendance at these sessions continues to be strong. Starting in 2004, the Tribunal will organize information sessions on a two year schedule.

In February, Tribunal staff and adjudicators organized and attended a mandatory training session. This quarter, the topics included the Canadian Charter of Rights and Freedoms, reconsideration requests and time extension applications.

## C) Judicial Review Activity

Tribunal Counsel Office had a busy first quarter handling a number of applications for judicial review. Lawyers from the Tribunal Counsel Office continue to co-ordinate all responses to judicial review applications, and represent the Tribunal in most instances.

Developments in judicial review applications as of the end of March 2004 are set out below. There are a number of other active judicial reviews not listed, as there was no action on them during this particular 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 decision was received in January. The Divisional Court unanimously dismissed the application for judicial review. The judgment, written by Justice Ratushny, is quite strongly supportive of the Tribunal's decision. The 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 Tribunal filed a responding factum. At the end of the quarter the Tribunal was waiting to see if the Court of Appeal had granted leave.

## **2. Decision Nos. 1095/01 (April 30, 2001) and 1095/01R (April 19, 2002)**

*Decision Nos. 1095/01* and *1095/01R* upheld the Board's denial of a worker's appeal for entitlement for bilateral carpal tunnel syndrome. The worker brought an application for judicial review alleging the Tribunal has not properly considered the medical evidence.

The worker's application for judicial review was heard on April 4, 2003. The Divisional Court unanimously dismissed the application. Justices Lane, Cameron and Brockenshire held that the Tribunal correctly assessed the issues and the relevant sections of the *WSIA*, and the Tribunal's decision was not patently unreasonable.

After obtaining an order to extend the time for leave to appeal, counsel for the worker filed an application for leave to appeal the Divisional Court decision. The Court of Appeal granted leave to appeal. Justices McMurtry, Catzman and Abella heard the appeal on February 12, 2004. The Court reserved.

The Judgement, released February 16, unanimously dismissed the appeal. The Court of Appeal agreed with the Divisional Court that the Tribunal's decision was not patently unreasonable.

## **3. Decision Nos. 255/02 (August 30, 2002) and 255/02R (February 29, 2003)**

In *Decision No. 255/02* both the worker and employer appealed issues relating to entitlement. The employer's appeals of the worker's entitlement for a NEL award, and for wage loss benefits after March 1994, were dismissed. The worker's appeal for a further period of supplement was granted for six months. However, the worker was not allowed a FEL award at the final review, based on the Vice-Chair's finding that the applicable wage loss should be calculated on what the average worker could have made, rather than the worker's actual wage loss.

The worker's request for reconsideration was dismissed by the same Vice-Chair in *Decision No. 255/02R*.

The worker brought an application for judicial review of the Tribunal's decisions. The Tribunal brought a motion, heard at the same time as the judicial review, to strike affidavit material filed by the worker. The judicial review was heard in Hamilton before Justices Cunningham, Stayshyn and Thomson on January 29, 2004.

At the commencement of the judicial review, the Court unanimously granted the Tribunal's motion to strike the materials in question. The Court then heard argument on the judicial review. The Court reserved.

The Divisional Court decision was released on March 5, 2004. The Divisional Court unanimously dismissed the judicial review. The Court carefully reviewed the merits of the Tribunal's decisions and concluded that the Vice-Chair's decision on wage loss was not patently unreasonable. The Court also held that having a Vice-Chair reconsider her own decision was not a breach of natural justice. This latter point had not been considered by a court before, and affirms the Tribunal's practice to assign reconsiderations in many instances to the original vice-chair or panel is not inappropriate.

**4. Decision No. 770/98IR (February 5, 2002)**

*Decision No. 770/98IR* denied a worker entitlement for traumatic vertebrobasilar ischemia. The Applicant and the Tribunal have exchanged factums. The judicial review is scheduled to be heard on April 19, 2004, in Toronto.

**5. Decisions Nos. 18/88I (March 22, 1988) and 18/88 (October 27, 1988)**

In 2003, the worker brought an application for judicial review to quash *Tribunal Decision Nos. 18/88I* and *18/88*. Both these decisions were released in 1988. 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. Fifteen years later, the applicant commenced his judicial review application.

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. At the end of the quarter it was not clear if the Attorney General or the WSIB will participate.

**6. Decisions Nos. 28/02 (February 11, 2002) and 28/02R (July 22, 2003)**

*Decision No. 28/02* found that a hospital worker had entitlement to compensation for a disc herniation, on the basis that it arose as a disablement from the work. 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 employer and the Tribunal have exchanged factums. The judicial review is scheduled to be heard on June 10th in Ottawa.

**7. 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. Counsel for the worker has indicated he will be adding two employers as respondents. At the end of the first quarter, the Tribunal was waiting for counsel for the applicant to add the other parties.

**8. 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 recently advised that he will issue amended materials, and that this judicial review application will be moving forward.

**9. 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 decision were denied.

The worker has now commenced an application for judicial review. The Tribunal has filed its record, and at the end of the quarter was waiting for the worker to file her factum.

## D) Highlights of Decided Cases

### **Decision No. 1925/03 (J. Moore) February 12, 2004**

The issue on appeal was initial entitlement for plantar fasciitis. Neither the worker's family physician nor his orthopaedic surgeon had given any opinion regarding to causation between the work and the worker's condition.

The worker related his condition to his employment. The worker relied upon a medical paper prepared for the Ontario Health Clinics for Ontario Workers; decisions of Quebec's *Commission des Lésions Professionnelles*; and a Tribunal decision (Decision No. 1416/00). The employer's position was that the employment was not a cause of the worker's condition but might have inhibited recovery from it. The employer relied upon two Tribunal Discussion Papers and Tribunal Decision No. 740/03.

The Vice-Chair noted that the worker's research paper did not address a point made in the Discussion Papers: that development of the condition is evidence of an underlying condition and not proof of a causal connection. The Vice-Chair agreed with Decision No. 740/03 in preferring the conclusions of the Discussion Papers.

In relation to the Commission's decisions, the Vice-Chair noted that the distinction between a condition accelerated by workplace activity and a one made evident by it, was not observed in that body of caselaw. He added that those decisions reflect an "alternative interpretation of a medical question that is, admittedly, one on which there are varying medical views," he was not convinced that those decisions had any precedential value in a Workplace Safety and Insurance Appeals Tribunal appeal.

Finally, the Vice-Chair distinguished Decision No. 1416/00 on the facts noting, among other distinctions, that in this case there had been no workplace "trigger" for the onset of the condition and that the worker's weight was over two hundred pounds. The appeal was therefore denied.

### **Decision No. 2341/03 (J. Josefo, B. Young, D. Broadbent) February 3, 2004**

The issue on appeal was whether a departure fee applied to an employer that left, and then re-entered Schedule I, should be cancelled.

First, the Panel noted that the Tribunal does not have jurisdiction to consider the appropriateness of the departure fee scheme. Nevertheless, the Panel observed, that the Tribunal does have jurisdiction to consider how the scheme was applied.

Second, the Panel agreed that in most cases, the Board should publish its policies prior to their application, but it found that it was justifiable in the case of the departure scheme not to do so. The absence of "pre-publication" of the policy created, in the Panel's view, exceptional circumstances which the employer could address.

Third, the Panel found that the Appeals Resolution Officer (ARO) could have applied the merits and justice provision to fashion a remedy.

Finally, the Panel adopted the reasoning of Decision No. 2351/00R and determined that, rather than returning the issue to the Board for a new adjudication, a determination of the issues should be made forthwith. The Panel therefore applied the justice and merits provision in this instance and, noting that the employer had been outside the Board system for two years, ordered the cancellation of half, rather than the full amount of the departure fee.

#### **Decision No. 320/02R (E. Smith) January 14, 2004**

This Reconsideration Request was initiated by the accident employer, which had not participated in the original hearing.

The employer advanced several arguments for a reconsideration of the initial decision. The employer decided not to participate in the original hearing because the Board had provided the employer with incorrect information regarding the cost consequences of a successful appeal. The employer submitted that the original Panel's decision was at odds with the assessor's report, and that the evidence before that Panel was "too speculative" to form the basis of the Panel's decision. The employer proposed to adduce further medical evidence and submissions, and also requested access to all case materials.

The Vice-Chair first noted that, because it had not been a party to the original hearing, the employer could not request a reconsideration as of right; however, following Decision No. 900/97R, she noted that the manner in which the Tribunal becomes aware of a decision that might merit reconsideration is of secondary importance, and decided to exercise the discretion to consider the reconsideration request.

In relation to the incorrect information provided by the Board which the employer had relied upon when deciding not to participate in the original appeal, the Vice-Chair noted that the error was not one that constituted a defect in the administrative process or content of the original decision, rather, it was a consideration that affected the employer's decision to participate in the appeal process. She noted the importance, for the worker, of the finality of the appeal process.

The Vice-Chair reviewed the original decision and determined that there was, in fact, sufficient evidence to support the conclusions made, and that the decision was not incompatible with the assessor's report.

With respect to the new medical evidence that the employer proposed to obtain, the Vice-Chair referred to Decision No. 762/91R1 which distinguishes between different types of evidence and their admissibility within the reconsideration process. The Vice-Chair noted that the evidence proposed was in the nature of reply evidence as it would be commissioned for the purpose of refuting some aspect of the original decision, she therefore declared it inappropriate to give that proposal any weight before the threshold test was met.

In conclusion, because the arguments put forward by the employer did not meet the threshold test, the Vice-Chair denied the reconsideration request and concluded that there was no basis to provide the full record of the original hearing to the employer.

**Decision No. 1501/03 (G. Weir, M. Meslin, D. Broadbent) January 5, 2004**

This appeal was initiated by an employer seeking Secondary Injury and Enhancement Fund (SIEF) relief. The worker had been granted benefits for carpal tunnel syndrome (CTS).

The employer's position was that the worker had previously performed repetitive work with a different employer and had complained of pain within a month of work with the accident employer. In addition, the employer noted that the worker was overweight and it provided medical studies supporting a "causal relationship" between obesity and CTS.

The Panel reviewed the medical information on file and made several observations regarding to CTS. First, the Panel noted that CTS does not require a lengthy period of time before developing, therefore, evidence of prior appearance of the condition is necessary to support a request for SIEF relief. Second, the Panel noted that while obesity was a risk factor in the development of CTS, it could not be said to be an underlying condition that directly causes CTS.

The Panel further noted, however, that the SIEF policy would allow the employer relief, if the worker's obesity had enhanced or prolonged the CTS condition. In the absence of evidence that the worker's obesity had increased the degree of residual disability from CTS, or evidence that it prolonged recovery from CTS, the Panel was unable to allow the employer's appeal for SIEF relief.