

**Workplace Safety and Insurance Appeals Tribunal**

**QUARTERLY REPORT**

**Production and Activity**

**For the Period**

**April 1 through June 30, 2003**

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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 *Worker’s 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 1<sup>st</sup> through June 30<sup>th</sup>, 2003. It provides an update on caseload movement, recent activities with the Workplace Safety & Insurance Board, 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 Tribunal's Production Plan for 2003 set targets and projections for caseload intake, production, and remaining caseload inventory.

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 also 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 during the two-year period parties are allowed to remain in the NOA stage. At the end of the second quarter of 2003, the NOA inventory included 1,848 dormant cases and 1,797 cases actively proceeding towards a hearing. The resolution inventory had 2,439 cases in a review, a scheduling, a decision writing or a post-hearing stage.

The following points summarize the Tribunal production experience and achievements in the second quarter of 2003.

- The active inventory totalled 4,236 (5.9% over the target of 4,000 cases).
  - More appeals were received from the WSIB than in the previous quarter;
  - Reactivations were higher in comparison to last quarter;
  - The weekly number of hearing ready cases has increased; and
  - The number of dormant cases has declined.
  
- Incoming appeals numbered 1,340; of these, 979 were appeals from WSIB decisions and 361 appellants advised they were ready to proceed to hearing following a time in inactive status.
  - This is an increase from 958 new appeals received in the first quarter; and an increase in comparison to 946 new appeals received in the second quarter of 2002.
  - This is an increase from 256 reactivations in the first quarter; and an increase in comparison to 318 reactivations received in the second quarter of 2002. The number of reactivations should decrease as specific inactive inventory project(s) come to a close.

- In 2002, the weekly average of hearing ready appellants was 41.5. For 2003, measured to the end of March, the weekly average of hearing ready appellants was 54.0.
- Dispositions numbered 1,339; this includes 667 dispositions following decisions from adjudicators, 627 dispositions in the pre-hearing areas, and 45 dispositions after hearing.
  - This represents an increase of 51% over the same period last year, and an increase of 15% when comparing the first half of 2002 to the first half of 2003.
- Since the last report, the inactive inventory declined by 741 cases or 14% to 4,451.
- The median time to decision release from the end of the hearing or the completion of post-hearing work is 29 days. This is consistent with the experience in the first quarter of 2003.
- The Tribunal continues to offer hearing dates within 4 months of the appellant confirming hearing readiness by filing a Confirmation of Appeal form.

## Productivity in Relation to Case Management Objectives

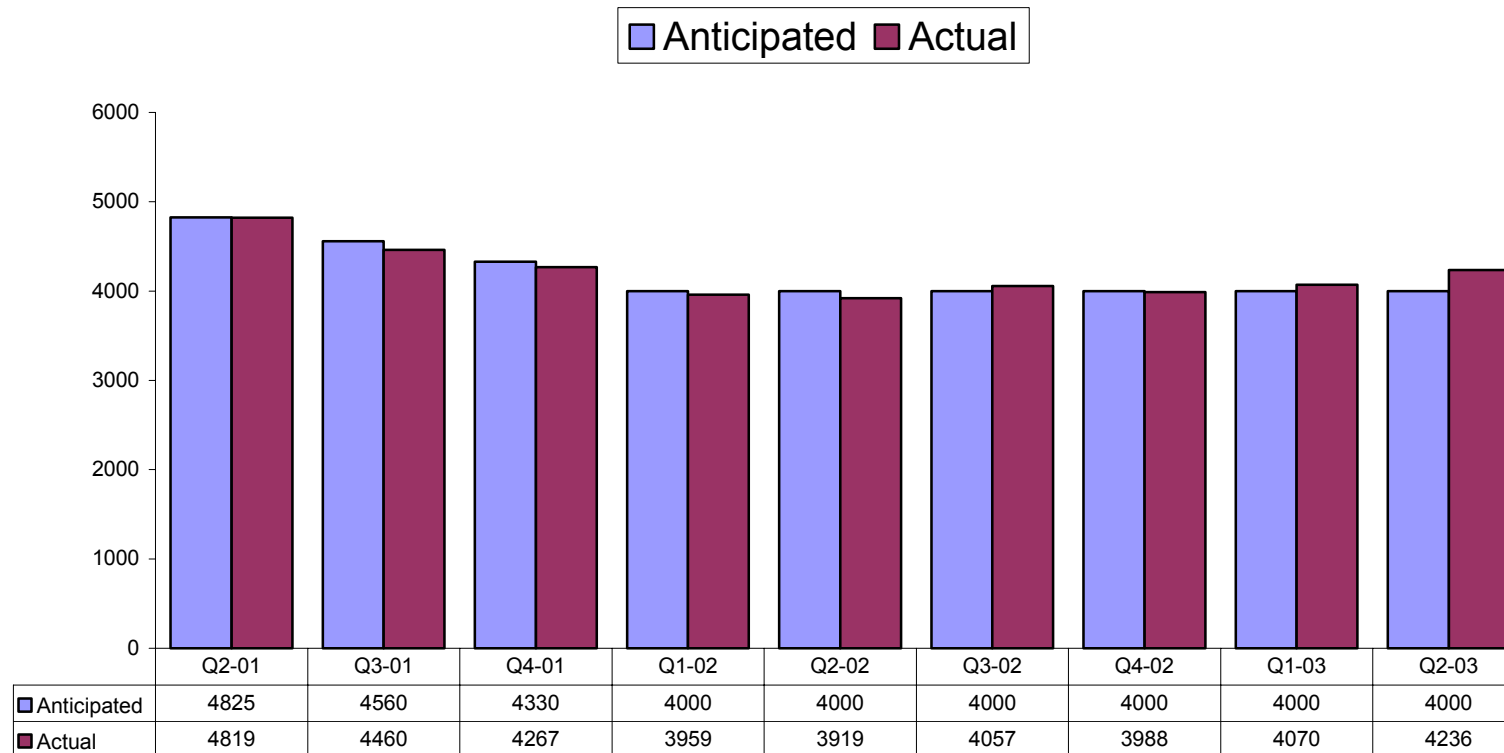


Figure 1. Appeals Inventory, Anticipated vs. Actual

The Tribunal received 979 appeals from Board. Also, the Tribunal monitors appeals that return or “reactivate” from the inactive inventory; in this period, 361 appellants were ready to proceed after a time in inactive status including 193 from the inactive inventory reduction projects. This experience is 5% higher than the same period last year.

In 2002, the weekly average of hearing ready appellants was 41.5. For 2003, measured to the end of March, the weekly average of hearing ready appellants was 54.0.

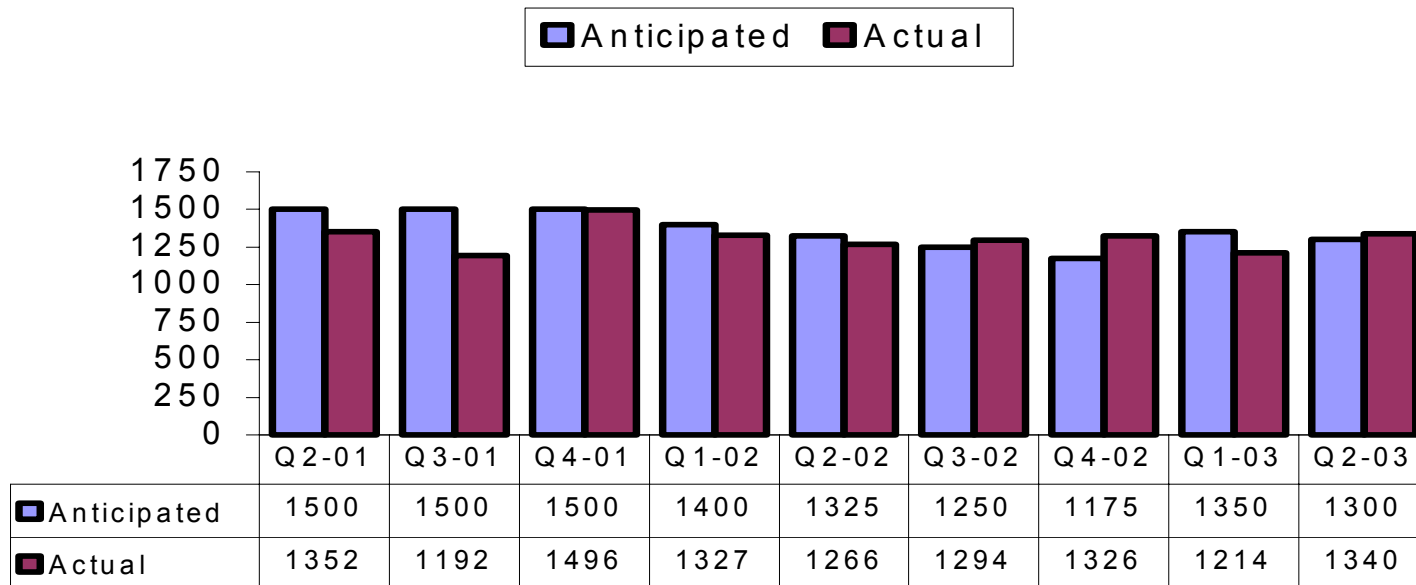


Figure 2. Incoming Appeals, Anticipated vs. Actual

During the second quarter of 2003, Tribunal dispositions totalled 1,339. This represents an increase of 51% over the same period last year, and an increase of 15% when comparing the first six months of 2002 to the first six months of 2003.

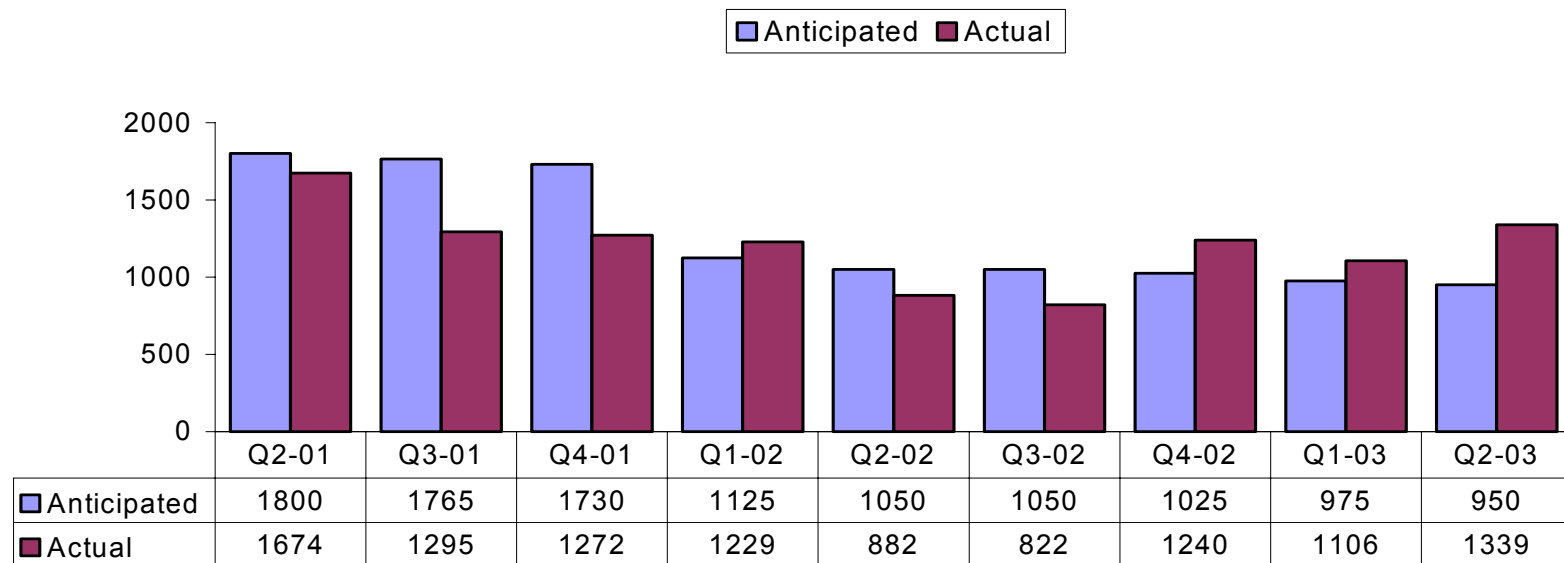


Figure 3. Dispositions, Anticipated vs. Actual

During April through June 2003, the Tribunal disposed of 627 appeals prior to hearing. This figure consists of appeals resolved through alternative dispute resolution, including mediation, early intervention and file review to confirm hearing-ready status.

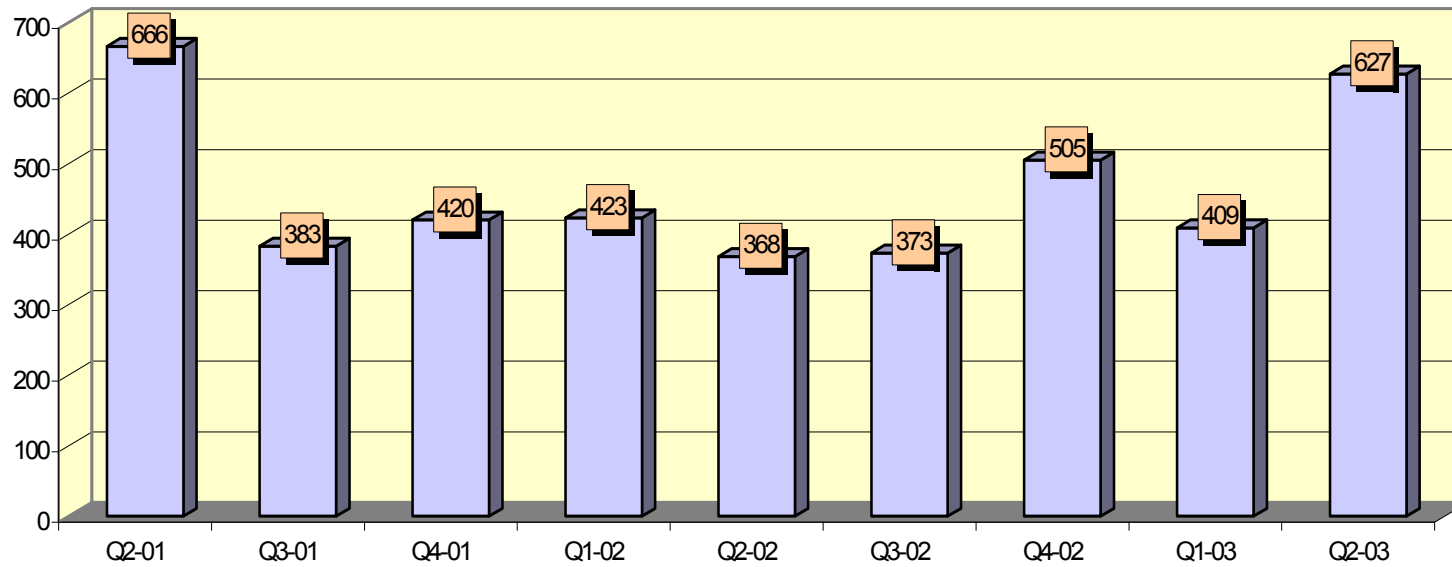


Figure 4. Dispositions from Pre-Hearing processes, including ADR

After hearing dispositions included 667 final decisions from Vice-Chairs and Panels, and 45 other dispositions, typically achieved from Inactive status pursuant to interim decisions. The number of final decisions was consistent with 656 achieved during the first quarter of 2003. As with last quarter, the median time to decision release was 29 days.

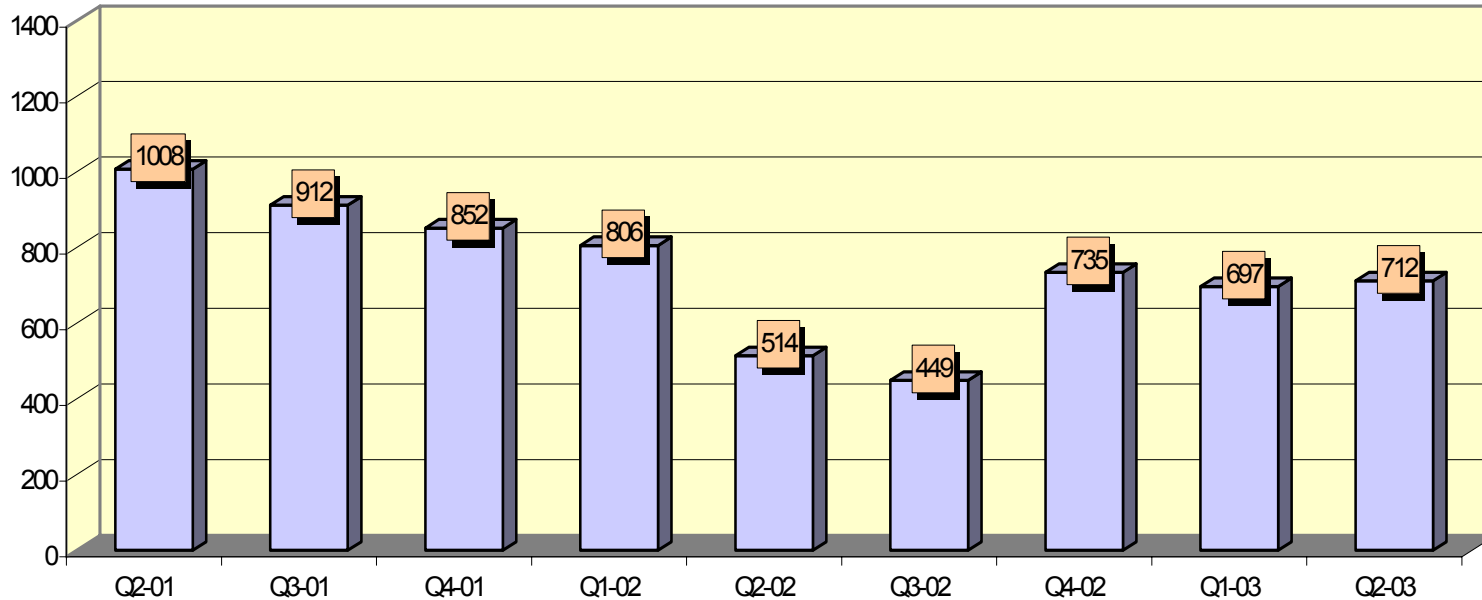
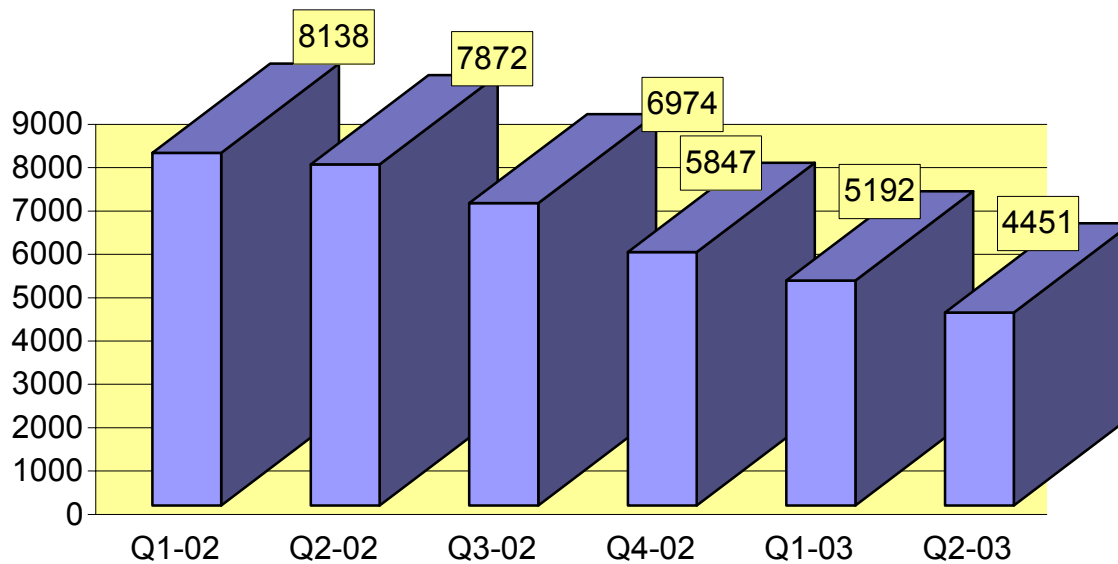


Figure 5. Dispositions from After Hearing processes.

**Inactive Inventory:** At the close of the second quarter 2003, the Tribunal's inactive inventory numbered 4,451, a reduction of 741 or 14% from the previous quarter.

During the 2nd quarter, 361 appellants contacted the Tribunal to continue or re-activate their appeal, representing 7% of the previous quarter's inactive inventory of 5,192. During this quarter, 193 of the 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. In the second quarter of 2003 deactivations numbered 231 cases.

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. This is the 8<sup>th</sup> quarter where the inactive inventory has decreased. Over 74% of the inactive cases are over 2 years old. At the end of 2002, the Tribunal reported that 66% of cases in inactive status were over 2 years old. It is unlikely that these appellants are planning to proceed with their appeal.



Inactive Inventory Q1 2002 to Q2 2003

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, 3,143 cases have been closed. Further reductions in the inactive inventory were achieved through re-activations; however, the number of reactivations is expected to decline as projects are concluded.

## B) Communications

**Public Information Sessions** – During the second quarter of 2003, the Tribunal conducted Public Information Sessions in Ottawa, April 9<sup>th</sup>, Windsor, May 7<sup>th</sup> and Sudbury, June 17<sup>th</sup>. These sessions are organized in co-ordination with the Tribunal's regional hearing schedule and attended by Tribunal staff, a Vice-Chair, a Member representative of workers, and a Member representative of employers. Topics included process developments, the Notice of Appeal process and e-services, notably the publicly available decision search feature.

The Tribunal recently posted a "Notice Regarding The Hearing Process", which is included in the Resource Material section of the web site. Appeals amenable to a written process will be selected as early as possible in the appeal process. Appeals are considered suitable when one or more of the following apply: there is a discrete issue under appeal; the facts are generally not in dispute; and the medical evidence is complete. For more information, please see the complete notice on the web site at [www.wsiat.on.ca](http://www.wsiat.on.ca).

## C) WSIAT/WSIB Activities

Representatives from the Board's Appeals Branch and Legal Branch met with Tribunal staff in May 2003 for a Quality Loop Meeting. The Tribunal provided an update of feedback received at Public Information sessions and the Group discussed appeal time limit cases.

In early April, the Quality Loop – Decision Implementation Committee met at Simcoe Place. The committee is comprised of Tribunal representatives and Board Business Unit Managers. Twice per year, the Business Unit Managers canvass the adjudicators in their group for Tribunal decisions that raise questions or were difficult to implement. The Group discusses these cases to learn and suggest ways to facilitate implementation.

## D) Judicial Review Activity

In the second quarter of 2003 there was a considerable amount of judicial review activity. The current status of judicial review applications at the end of June 2003 is set out below.

1. A paralegal consultant who represents injured workers at the Tribunal was suspended from representing clients on any new appeals at the Tribunal. The decision to suspend was made by the Tribunal Chair, pursuant to the *Act*, the Tribunal's Code of Conduct for Representatives, and a related practice direction. Counsel for the consultant brought an application for judicial review of the decision to suspend. The Workplace Safety and Insurance Board, which has also suspended this consultant from representing parties in its appeal process, is a co-respondent in the application. It was expected this application would be heard in March, in Sudbury. However the application was postponed, and will likely be heard in the fall.
2. The application for judicial review of *Decisions 1095/01* and *1095/01R* was heard on April 4, 2003. These Decisions denied a worker's appeal for entitlement for bilateral carpal tunnel syndrome. Counsel for the applicant argued that the decisions were patently unreasonable in the conclusion reached, and in particular on their reliance on a Tribunal medical discussion paper on carpal tunnel syndrome.

The judicial review application was unanimously dismissed by the Divisional Court. 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.

Counsel for the applicant prepared an appeal of the Divisional Court decision to the Court of Appeal. When he discovered that he should have filed an application for leave to appeal, he had by then exceeded the time limit for filing the application under the Rules of Practice. He brought a motion to extend the time to file the application for leave. At the end of the quarter the Tribunal was awaiting service of his materials for the application for leave to appeal.

3. In 2001 the Tribunal was served with an application for judicial review of the Tribunal *Decision 1105/99*. The worker was a co-owner of a trucking company, who had taken out personal coverage with the WSIB. The Vice-Chair denied the worker's appeal for a FEL award, as he found the worker's earning potential was such that he could have earned at least as much as the total coverage he had taken out with the WSIB.

Counsel for the Applicant and the Tribunal exchanged factums. The Divisional Court was scheduled to hear the application in London on May 5th, 2003. On May 3<sup>rd</sup>, 2003 the worker abandoned the Application.

4. An application for judicial review was filed for Tribunal *Decision 2185/01* and *2185/01R*. These decisions denied an employer's appeal that its operations were controlled by and ancillary to another firm, and should be classified in the same Board rate group as that other firm.

The parties have exchanged factums, and the application was scheduled to be heard on May 26, 2003. On consent, counsel adjourned the hearing until November 10, 2003.

5. *Decision 28/02* found that a worker had entitlement to compensation for a disc herniation on the grounds 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. A decision on the reconsideration was still outstanding at the end of the quarter.
6. Tribunal *Decision 1504/01* allowed an appeal of the employer's classification of its business activity. When the Board did not immediately implement the Tribunal decision, the employer brought an application for mandamus to compel the Board to implement the Tribunal's decision. Although the Tribunal was not a party, it was served with the application. The employer's application for mandamus was adjourned pending the Board's application to reconsider *Decision 1504/01*, and the implementation of the result of *Decision 1504/01R*.
7. The Tribunal has been served with an application for judicial review of *Decision 2476/01*. This decision denied the worker entitlement for chest wall pain. Initially the worker's counsel had erroneously served a Notice of Appeal, which was subsequently withdrawn. The Tribunal is waiting for counsel for the applicant to amend his materials, before filing its record.
8. The same counsel as noted above filed an application for judicial review of *Decision 398/02*. In that Decision the Vice-Chair found a worker's compensable accident was not a significant causal factor in subsequent periods of alleged disability. As in the above case, when counsel for the applicant amends the materials, the Tribunal will deliver its record.
9. An application for judicial review of *Decisions 201/02* and *201/02R* has been received. These Decisions denied entitlement for chronic pain. Once counsel for the Applicant orders the transcript, the Tribunal will file its record.
10. The Tribunal has received an Application for Judicial Review of *Decisions 466/01* and *466/01R*. The worker withdrew her appeal on the advice of her former representative at the hearing. She retained new counsel, and when her application to reconsider the withdrawal was denied, she brought a judicial review application. The Tribunal has filed its record and is awaiting the applicant's factum.
11. Tribunal *Decision 866/97* denied a Schedule 2 employer's appeal of a Board decision to pay a worker benefits for a specified period of time. However, the Panel also found that in the circumstances it was unfair for the employer to be fully liable for the cost of the benefits. The Panel directed the Board to credit the employer for the cost of some of the benefits.

The WSIB requested the Tribunal reconsider *Decision 866/97*. In *Decision 866/97R* a differently constituted Panel found the Tribunal had no jurisdiction to direct the Board to provide the Schedule 2 employer with relief from the costs of the claim.

The employer has brought an application for judicial review of *Decision 866/97R*. The Tribunal has filed an appearance, and when the employer obtains a copy of the transcript, the Tribunal will file its record with the Court.

12. The Tribunal has been served with an application for judicial review of *Decision 770/98IR*, which denied the worker entitlement for traumatic vertebrobasilar ischemia (TVBI). The Tribunal has filed its record, and at the end of the quarter was awaiting the Applicant's factum.
13. 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 1480/98I*, the Tribunal finding that the worker's skin cancer was a "disablement" under the WSIA. 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 1480/98* the Tribunal held that this "disablement" was an accident under the Ontario Act, and was incorporated under the GECA.

The employer has brought an Application for Judicial Review. The employer is not challenging the finding that the cancer was work-related, only that this type of accident is not incorporated by GECA. The Tribunal has filed its factum, and at the end of the quarter was awaiting a date.

14. Tribunal *Decision 1858/98* denied a worker entitlement for a s.147(4) supplement. The worker has served an application for judicial review, and the Tribunal filed its record. Following receipt of the record, counsel for the worker requested the judicial review be held in abeyance pending a reconsideration of *Decision 1858/98*. At the end of the quarter the Tribunal was awaiting receipt of the reconsideration application.
15. In *Decision 255/02* both the worker and employer appealed issues relating to entitlement. The employer appeal of the worker's entitlement for a NEL award, and 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 on 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 in *Decision 255/02R*.

The worker has brought an application for judicial review of the Tribunal's decisions. The worker had to amend his application, and has now served his amended materials. At the end of the quarter the Tribunal was preparing its Record.

16. The Tribunal was served with an application for judicial review of *Decisions 18/88I* and *18/88*.

*Decision 18/88I* was in effect an adjournment of the worker's appeal. Although the Tribunal had jurisdiction over issues relating to organic entitlement, it was not clear that there had been a final Board decision on non-organic entitlement. The worker was provided with the opportunity to return to the Board for a decision on non-organic entitlement.

In *Decision 18/88*, the worker alleged the WSIB had wrongfully released his claim documents to his employer. Somewhat puzzlingly, the worker's position appeared to be that, because the WSIB had improperly released his documents to the employer, the Tribunal could not hear the worker's appeal. The Tribunal held that it did have jurisdiction to hear the appeal.

Fifteen years later, the worker brought an application for judicial review of these two decisions. The worker has filed a Record and factum. At the end of the second quarter, the Tribunal was preparing its materials.

## E) Highlights of Decided Cases

**Departure fees:** *Decision No. 3198/001* concerned an employer wishing to terminate Schedule 1 coverage who was informed that a departure fee would be levied. The departure fee is a supplementary premium for the final year of coverage that ensures that all the remaining financial obligations of the employer are met. The employer is appealing the decision that confirmed the departure fee. The Panel considered the issue of the Tribunal's jurisdiction in relation to that decision: on the one hand the departure fee could be interpreted as a premium or penalty, appealable under s. 123(1)(b); on the other hand it could be viewed as a Board action to maintain the insurance fund, not appealable pursuant to s. 123(3). The Panel adopted the former view noting that the provision granting jurisdiction to the Tribunal in s. 123(1) should be interpreted broadly and that the provision limiting jurisdiction, s. 123(2), should be interpreted narrowly. The Panel also observed that Board policy refers to the departure fee as a supplementary premium. The Panel noted that the intent of s. 123(2) is to restrict the Tribunal's ability to question the establishment and substance of plans in the excluded sections but not prohibit appeal to how the terms of the plans are applied to individual employers. In accordance with that intent the Panel determined that the Tribunal does not have jurisdiction to consider the departure fee system as a whole but does have jurisdiction over the application of the system in specific instances.

**Exposure to 2<sup>nd</sup> hand smoke:** A bartender was granted benefits for one week for aggravation of pre-existing asthma as a result of exposure to second-hand smoke, further temporary benefits and an award for permanent impairment were denied. The worker had been a heavy smoker (two pack a day habit) for 21 years but had stopped smoking in 1976. In *Decision No. 189/03* the Panel found that the worker's permanent impairment was caused by the worker's personal history of smoking and pre-existing asthma condition, but that his pre-existing condition was aggravated by the ongoing exposure to second hand smoke. The worker's condition improved upon removal from the smoky environment, but he was unable to return to that position, though he did find other work elsewhere. The Panel therefore concluded that the worker was entitled to further temporary benefits but not to an award for his permanent impairment.

**Attendance at hearing:** In *Decision No. 497/031*, an appeal for entitlement for chronic pain, the Vice-Chair found that medical reports from a specialist in physical medicine and rehabilitation stating that the worker was unable to testify in a court-like setting were insufficient to support a finding that the worker should not testify in the appeal. The Vice-Chair noted that the reports were not prepared by a treating psychiatrist or psychologist, nor did they indicate that the worker was unable to attend the hearing. The reports did indicate, however, that the worker required several days to prepare before going to the bank about once a month; the Vice-Chair inferred that the same could be done for the Tribunal hearing. The Vice-Chair further noted that the Tribunal setting and procedures are not like a courtroom. Finally, the Vice-Chair concluded that the hearing should proceed orally but that the scheduling should provide flexibility to the worker.

In *Decision No. 3091/00*, a stress-related disability appeal the Vice-Chair turned down a request to proceed by means of a telephone conference call. The Vice-Chair noted that attendance is particularly important where factual issues about the worker's emotional reactions or credibility must

be assessed. The Vice-Chair suggested that Tribunal Counsel Office could arrange for an examination of the worker by a Tribunal assessor qualified in psychiatry in order to obtain an opinion about the worker's ability to attend the hearing. The worker indicated a wish to withdraw the appeal. The Vice-Chair accepted the withdrawal.

**Pregnancy:** *Decision No. 2371/00* related to a denial of s. 147(2) of the pre-1997 Act supplementary benefits for a period of six months during which the worker was unable to participate in a vocational rehabilitation (VR) program due to complications from pregnancy and childbirth. The Vice-Chair noted that *Decision No. 758/98* found that pregnant workers unavailable for vocational rehabilitation should be treated in the same way as any other worker unavailable for VR due to a non-work-related condition. The Vice-Chair considered the worker's co-operation in the VR program and noted that the nature and length of the program and the full context of the worker's participation were all factors to be taken into account. The Vice-Chair noted that the worker had cooperated fully and had suggested ways in which she might mitigate the effects of her condition but was limited by the inflexibility of the school term. The Vice-Chair determined that the circumstances of the appeal were unique and that the worker was entitled to the supplementary benefits. The Vice-Chair also noted that the worker had made "passing references" to the Human Rights Code, arguing that the worker was being discriminated on the basis of her family status. The Vice-Chair found that the passing references did not provide sufficient arguments as to the application of the Human Rights Code for the Vice-Chair to give further consideration to the issue.

In *Decision No. 314/03* the Panel allowed in part the worker's appeal for full temporary disability benefits for a period of time related to the worker's pregnancy. The ARO had determined that the worker had withdrawn from the workforce for a period of 35 weeks following the date of the birth. The Panel determined that the worker likely would not have been available for work for eight weeks prior to birth of her baby and that she did not recommence her job search for eight weeks after the birth for a total of 16 weeks during which the worker was not entitled to full temporary benefits.

**Retroactive FEL supplements:** In *Decision No. 800/03* the worker submitted that, with regards to retroactive FEL supplements, *Decision No. 2637/00* should be followed. In that latter decision the Panel determined that if the worker was receiving supplementary benefits at the time of termination of VR services then the worker should not have to re-apply and demonstrate self-directed VR activity. The Vice-Chair preferred *Decision No. 918/97* which reviewed and disagreed with *Decision No. 2637/00*'s "follow through" approach. The Panel in *Decision No. 918/97* found that Board error in closing VR services was relevant to the extent that a worker may be reasonably expected to pursue self-directed VR taking into account the usual factors of educational level etc... and in the context of the worker's disability. The worker must still engage in reasonable self-directed VR in order to receive retroactive benefits, which do not benefit from an automatic follow through. The Vice-Chair found that the worker had not engaged in reasonable self-directed VR activity and the appeal was dismissed.