

Workplace Safety and Insurance Appeals Tribunal

QUARTERLY REPORT

Production and Activity

For the Period

July 1 through September 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 *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, July 1st through September 30th, 2003. It provides an update on caseload movement 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 third quarter of 2003, the NOA inventory included 2,003 dormant cases and 1,702 cases actively proceeding towards a hearing. The resolution inventory had 2,632 cases in a review, scheduling, decision writing or post-hearing stage.

The following points summarize the Tribunal production experience and achievements in the third quarter of 2003. This period includes the week during which the provincial government limited operations due to the black out and subsequent energy conservation period.

- The active inventory totalled 4,334 (8% over the target of 4,000 cases).
- Incoming appeals numbered 1,120; of these, 843 were appeals from WSIB decisions and 277 appellants advised they were ready to proceed to hearing following a time in inactive status.
 - This compares to 982 new appeals and 355 reactivated appeals recorded in the second quarter.
 - In 2002, the weekly average of hearing ready appellants was 44. For 2003, measured to the end of March, the weekly average of hearing ready appellants was 58.
- Dispositions numbered 890; this includes 502 dispositions following decisions from adjudicators, 361 dispositions in the pre-hearing areas, and 27 dispositions after hearing.
- Since the last report, the inactive inventory declined by 301 cases or 7% to 4,156.
- The median time to decision release from the end of the hearing or the completion of post-hearing work is 32 days.
- Year to date figures for 2003 indicate that 73% of final decisions are released within 120 days.
- 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

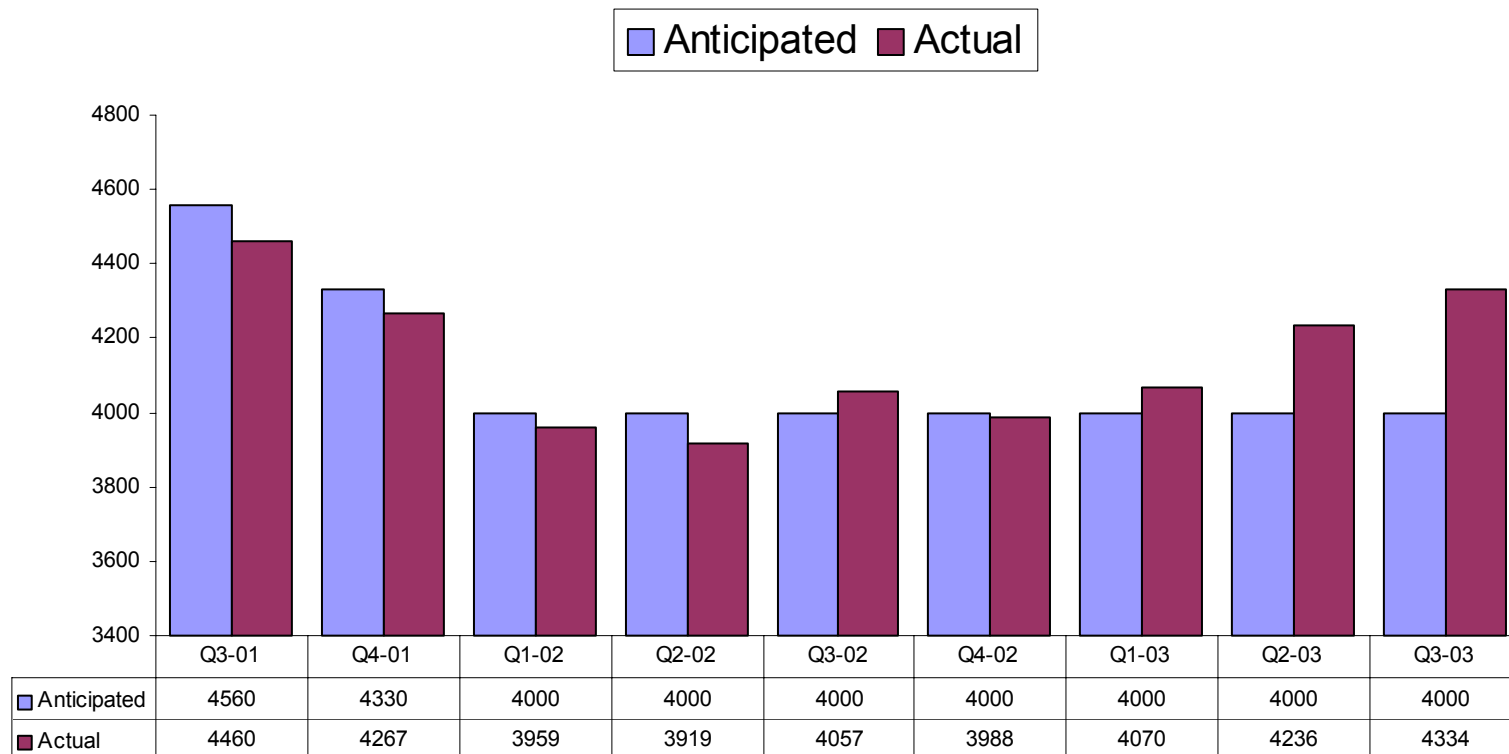


Figure 1. Appeals Inventory, Anticipated vs. Actual

Higher than projected active inventory figures are due to the unavailability of knowledgeable vice-chairs whose OIC appointments have expired and, to date, have not been renewed; and, an unexpected increase in appellants confirming their readiness to proceed to hearing.

The Tribunal received 843 appeals from the Board. Also, the Tribunal monitors appeals that return or “reactivate” from the inactive inventory; in this period, 277 appellants were ready to proceed after a time in inactive status including 112 from the inactive inventory reduction projects.

In 2002, the weekly average of hearing ready appellants was 41.5. For 2003, measured to the end of September, the weekly average of hearing ready appellants was 58.

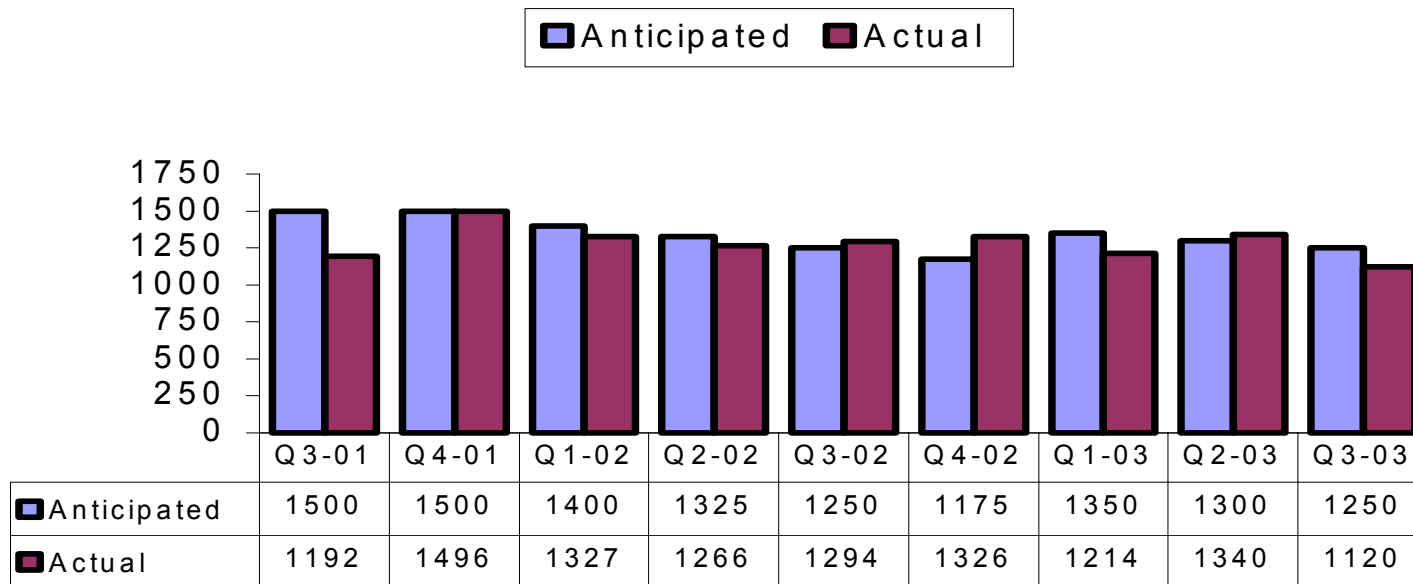


Figure 2. Incoming Appeals, Anticipated vs. Actual

During the third quarter of 2003, Tribunal dispositions totalled 890. This represents an increase of 8% over the same period last year, and an increase of 13% when comparing the first nine months of 2002 to the first nine months of 2003.

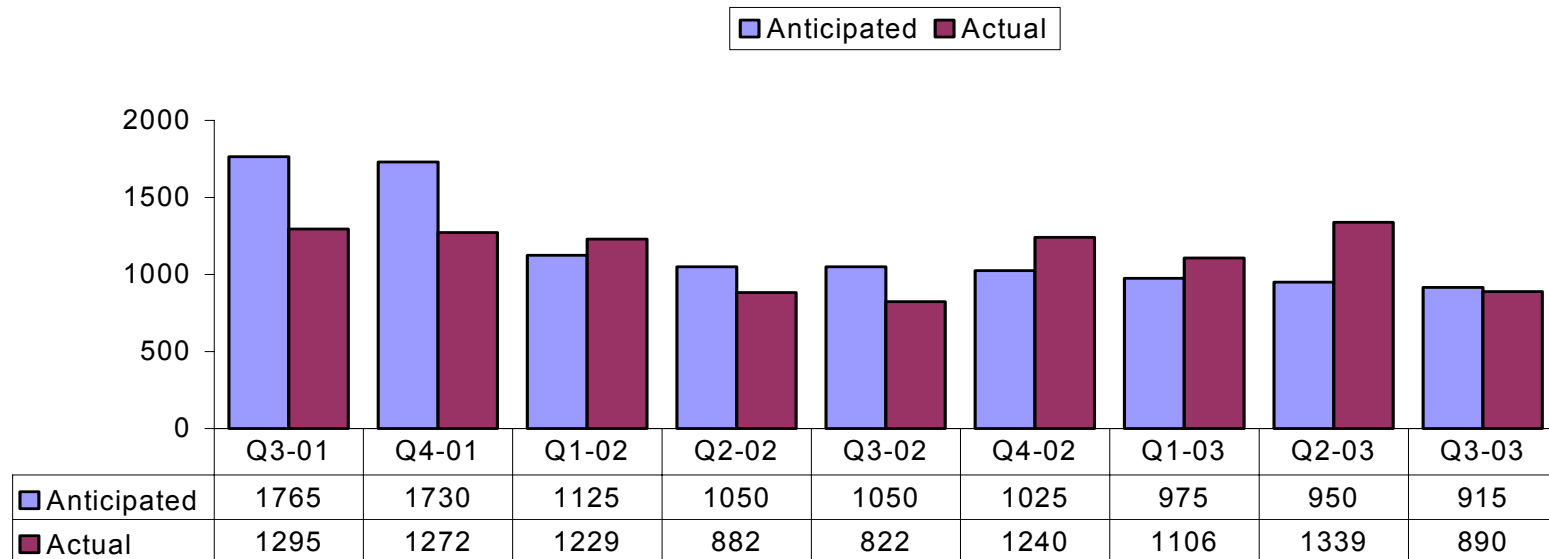


Figure 3. Dispositions, Anticipated vs. Actual

During July through September 2003, the Tribunal disposed of 361 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.

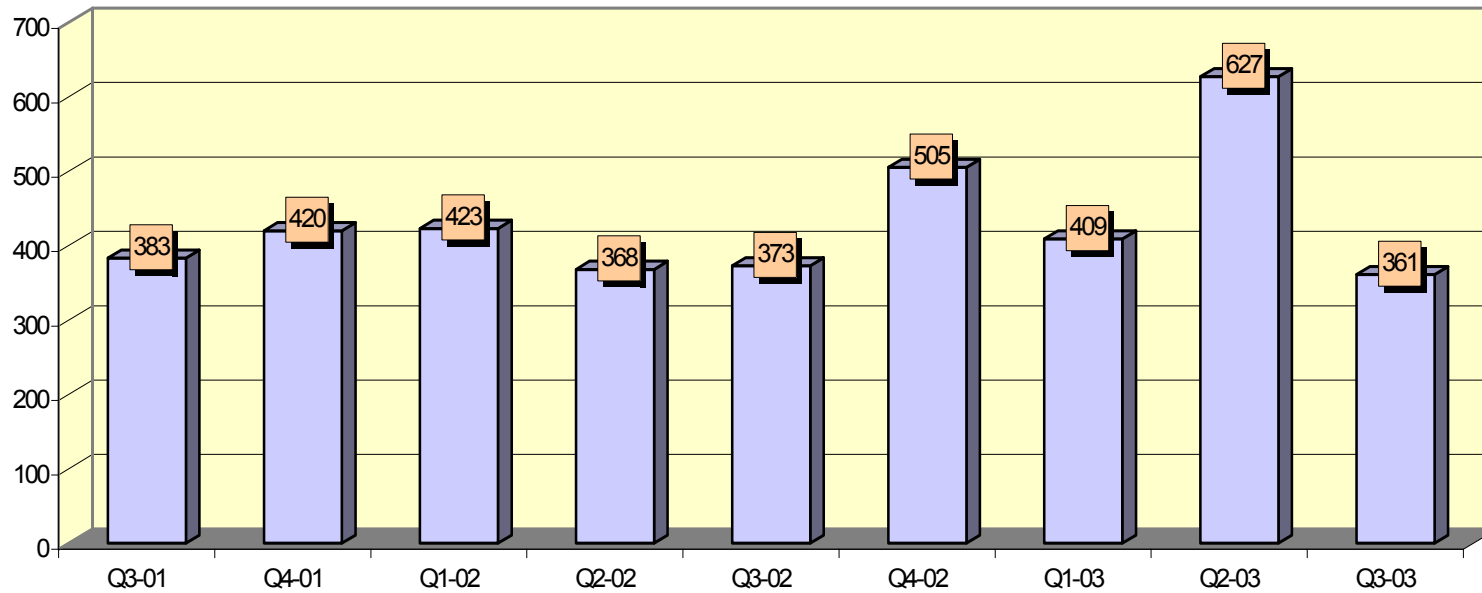


Figure 4. Dispositions from Pre-Hearing processes, including ADR

After hearing dispositions included 502 final decisions from Vice-Chairs and Panels, and 27 other dispositions, typically achieved from Inactive status pursuant to interim decisions. The number of final decisions was lower than the 667 achieved during the second quarter of 2003. This is due to a number of factors, including the Tribunal's loss of a number of experienced and productive adjudicators over the past 12-month period and service interruptions caused by the August blackout and subsequent energy conservation period.

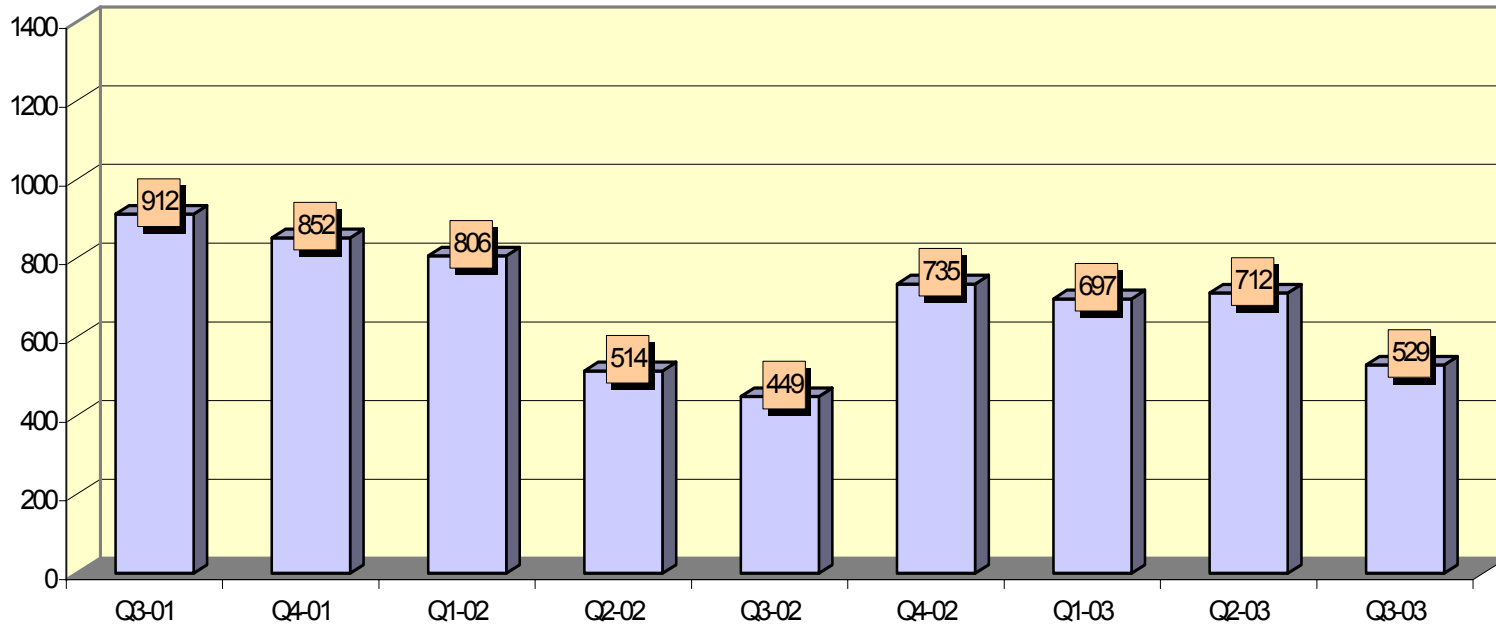


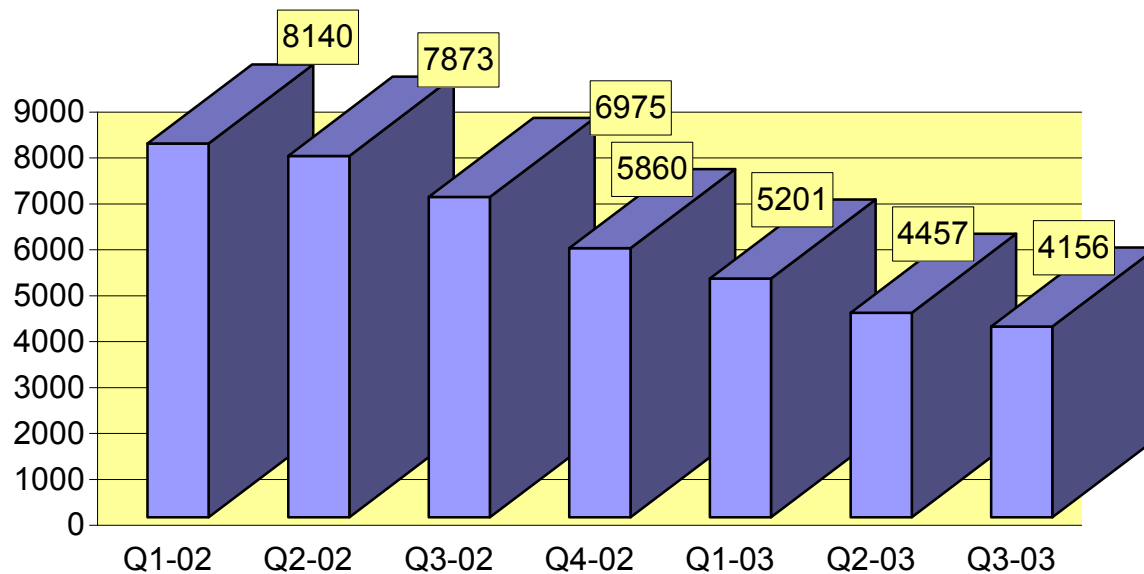
Figure 5. Dispositions from After Hearing processes.

Inactive Inventory: At the close of the third quarter 2003, the Tribunal's inactive inventory numbered 4,156, a reduction of 301 or 7% from the previous quarter.

During the 3rd quarter, 277 appellants contacted the Tribunal to continue or re-activate their appeal, representing 6% of the previous quarter's inactive inventory of 4,457. In the third quarter of 2003 deactivations numbered 167 cases. These figures, in addition to file closures through the inactive project, resulted in a net inventory decrease of 301 cases.

During this quarter, 112 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. This is the 9th 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 Q3 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, 3,334 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 London, August 26th and Timmins, September 17th. 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.

In October a mandatory training day was organized for Tribunal adjudicators and staff. The morning session involved a presentation from the Board's Occupational Disease and Survivors' Benefits Section, including an explanatory talk regarding occupational disease policy development. This presentation was followed by a session provided by an epidemiologist on reading exposure reports. The afternoon session included a panel discussion.

A meeting of the Tribunal's Advisory Group was held in early July 2003. The Tribunal prepared an application to participate in the Public Sector Quality Fair (PSQF) and was accepted as an exhibitor. The Fair takes place October 30th at the Toronto Convention Centre. The Tribunal's topic is the two-part appeal application process, also referred to as the Notice of Appeal process.

C) Judicial Review Activity

The third quarter of 2003 was a busy one in regards to judicial review activity. Developments in pending judicial review applications at the end of September 2003 are set out below. There are a number of other judicial reviews not listed as there was no action on them during this quarter.

1. 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 application is scheduled to be heard on November 10, 2003.
2. 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 1480/981, 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 application is scheduled to be heard on November 28, in Ottawa.

3. 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.

However, the Court of Appeal has granted leave to appeal the decision. Counsel for the applicant has requested an expedited hearing before the Court of Appeal. At the end of the quarter the Tribunal was awaiting service of the applicant's materials.

4. 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. After a considerable delay, the applicant perfected her application. It is expected that this will be heard early next year.
5. The same counsel as in *Decision 2476/01* 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, the application has been perfected and will likely be heard next year.
6. *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. The reconsideration application was denied. The employer is expected to proceed with the judicial review application.
7. 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 implementation of *Decision 1504/01R*. The employer is satisfied with the result and has now abandoned the application.

8. An application for judicial review of *Decisions 201/02* and *201/02R* has been received. These Decisions denied entitlement for chronic pain. Counsel for the applicant filed a factum. Following discussion with counsel, the application was adjourned so the applicant could pursue an application for reconsideration at the Tribunal.

9. 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. It was agreed between counsel that the application would be adjourned pending a request for further reconsideration at the Tribunal.

10. 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 the applicable wage loss should be calculated based 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. At the end of the quarter the Tribunal was preparing its factum.

11. 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 Tribunal has filed its factum and is currently awaiting a hearing date.

12. The Tribunal was served with an application for judicial review of Decisions 433/99 and 433/99R. The nature of the application, and whether it will proceed, is unclear. Discussions were ongoing with counsel for the applicant at the end of the quarter.

D) Highlights of Decided Cases

Confirmation of Appeals and Deemed Withdrawals (NOA/COA Process)

In March 2001 the Tribunal introduced its new two-part appeal notice: a Notice of Appeal Form (NOA) and a separate Confirmation of Appeal Form (COA). Under the NOA/COA appeal procedures, appellants have two years from the date of filing a NOA to file a Confirmation of Appeal Form. In the third quarter of 2003, the Tribunal issued its first decisions dealing with appeals in which appellants had not confirmed their readiness to proceed within the two year period. A number of decisions (twenty-five) found that no valid reason had been given for failing to file the COA, and the appeals were deemed withdrawn. Attempts to reinstate the appeal would be subject to the time limits set out in the WSIA (see, e.g., *Decision 1234/03*; *Decision 1237/03*; *1229/03*). In five other cases the Vice-Chair found there were valid reasons why the appeal had not been confirmed as ready to proceed, and the appeal was allowed to remain in Inactive Status (see, e.g., *Decision 1233/03 I*).

Mental Stress

Decision 708/02 dealt with a claim by a worker for benefits for a heart attack which he claimed was brought on by workplace stress. Section 13(4) of the WSIA precludes entitlement to benefits for mental stress. The Vice-Chair found that section 13(4) does not preclude entitlement for a physical condition which is precipitated by workplace stress. However, on the facts it was found that there was insufficient evidence to find that chronic workplace stress contributed to the heart attack.

Employer Issues: Departure Fees

Decision 1132/03 considered the issue of a departure fee charged to an employer. A departure fee is charged to employers who request voluntary coverage and then terminate the coverage, thus leaving the compensation system. It is intended to cover the departing employer's share of the unfunded liability. The employer was covered under Rate Group 851, Nursing Home Operations, which is subject to mandatory coverage under Schedule 1; in 1998, the employer requested a change in classification to Rate Group 852, a non-mandatory coverage group. The employer further indicated that it did not want coverage. A December 1998 audit confirmed that the employer properly fell under Rate Group 852. The Board also deemed the employer to have elected coverage under the voluntary Rate Group 852 for the year 1998 and charged the employer a departure fee for canceling its deemed coverage in the voluntary rate group. The Vice-Chair found that the employer, having never elected coverage under the voluntary Rate Group, was never subject to coverage under that Group. The fact that the employer had paid premiums and been subject to coverage under a compulsory group, Rate Group 852, did not mean that the employer could be inferred to have elected voluntary coverage once it was determined that the voluntary Rate Group more accurately described the employer. The departure fee was ordered refunded. In addition, under the exceptional circumstances, given that the employer had in fact had coverage up to the end of 1998, the employer was charged for coverage under the prior Rate Group, Rate Group 851, to the end of 1998. Thus, in effect, there was to be no period of retroactivity of the reclassification.

NEL awards for pre-1997 Act claims: Subsequent Recovery

Decision 1440/03 followed several prior Tribunal cases in holding that Non-Economic Loss ("NEL") award for permanent impairment could not be revoked on the basis of subsequent recovery by the worker.

Right to Sue and Worker status: Remuneration other than Wages

In *Decision 1210/03* the respondent was in a motor vehicle accident and the insurer applied for a determination that the right to claim Statutory Accident Benefits was taken away because the respondent was a worker in the course of employment at the time of the accident. The issue was whether or not the respondent was a domestic worker for the purposes of the Act, and if so whether she was full-time, and therefore subject to compulsory coverage. The respondent was a caregiver for three children and was the godmother to the oldest of three children. The father of the children had entered into an arrangement with the respondent in which the father paid the respondent's rent, provided a car and insurance for the car, and paid for some meals. The respondent received no wages. The respondent would take the children out for outings and other activities. The family also employed a full time live-out nanny during the day. The father's evidence was that the respondent's activities were consistent with her position as a friend of the family and godmother, and that there was no employment relationship. He also gave evidence that the benefits were provided on compassionate grounds as the respondent had suffered financial misfortune. The Vice-Chair held that an employer-employee relationship existed between the father and the respondent. A formal arrangement had been established. Remuneration did not have to be in the form of wages order for there to be an employment relationship, and the benefits provided were "remuneration capable of being estimated in terms of money" and constituted "earnings" or "wages" under the definitions in the Act. Further, it was found that the respondent provided more than 24 hours of service most weeks, and was therefore a full-time domestic worker subject to mandatory coverage. The respondent was a worker and entitled to claim benefits.