

Workplace Safety and Insurance Appeals Tribunal

QUARTERLY REPORT

Production and Activity

For the Period

July 1st through September 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, July 1st through September 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 third quarter of 2004.

- The active inventory totalled 5,152 (29% over the target of 4,000 cases).
- Incoming appeals numbered 1,059; of these, 864 were appeals from WSIB decisions and 195 appellants advised they were ready to proceed to hearing following a period of inactive status.
 - This compares to 970 new appeals and 190 reactivated appeals recorded in the second quarter of 2004.
 - In 2003, the weekly average of hearing ready appellants was 60. For Q3 2004, the weekly average of hearing ready appellants was 80. This figure excludes cases reactivated from the Inactive status.
- Dispositions numbered 984; this includes 426 dispositions in the pre-hearing areas resulting from dispute resolution efforts and 558 after hearing dispositions; of the after hearing dispositions, 536 followed from Tribunal decisions.
- The inactive inventory decreased by 3 cases to 4,192.
- 71% 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 close as abandoned appeals after a two-year period expires. At the end of the third quarter of 2004, the notice inventory included 1,568 dormant cases, the active inventory totalled 5152 cases, and the inactive inventory totalled 4192 cases.

Productivity in Relation to Case Management Objectives

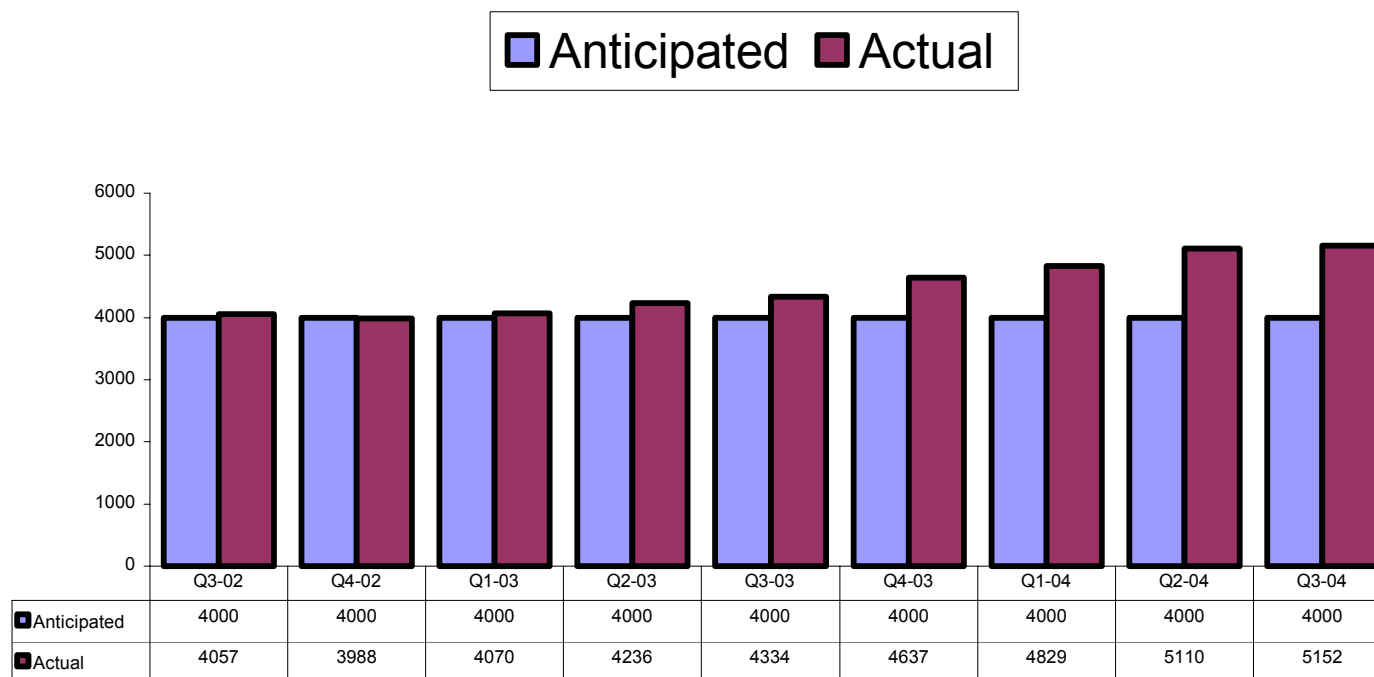


Figure 1. Appeals Inventory, Anticipated vs. Actual

The active inventory is likely to continue to at this level or increase over the next quarter, as adjudicators have not been added to the roster as quickly as hoped and therefore the Tribunal has been 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, in the second quarter the average was 65 and in the third quarter the average was 80. 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 third quarter of 2004, incoming appeals numbered 1,059; of these, 864 were new appeals from WSIB decisions and 195 appeals were reactivations from the inactive cases inventory.

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

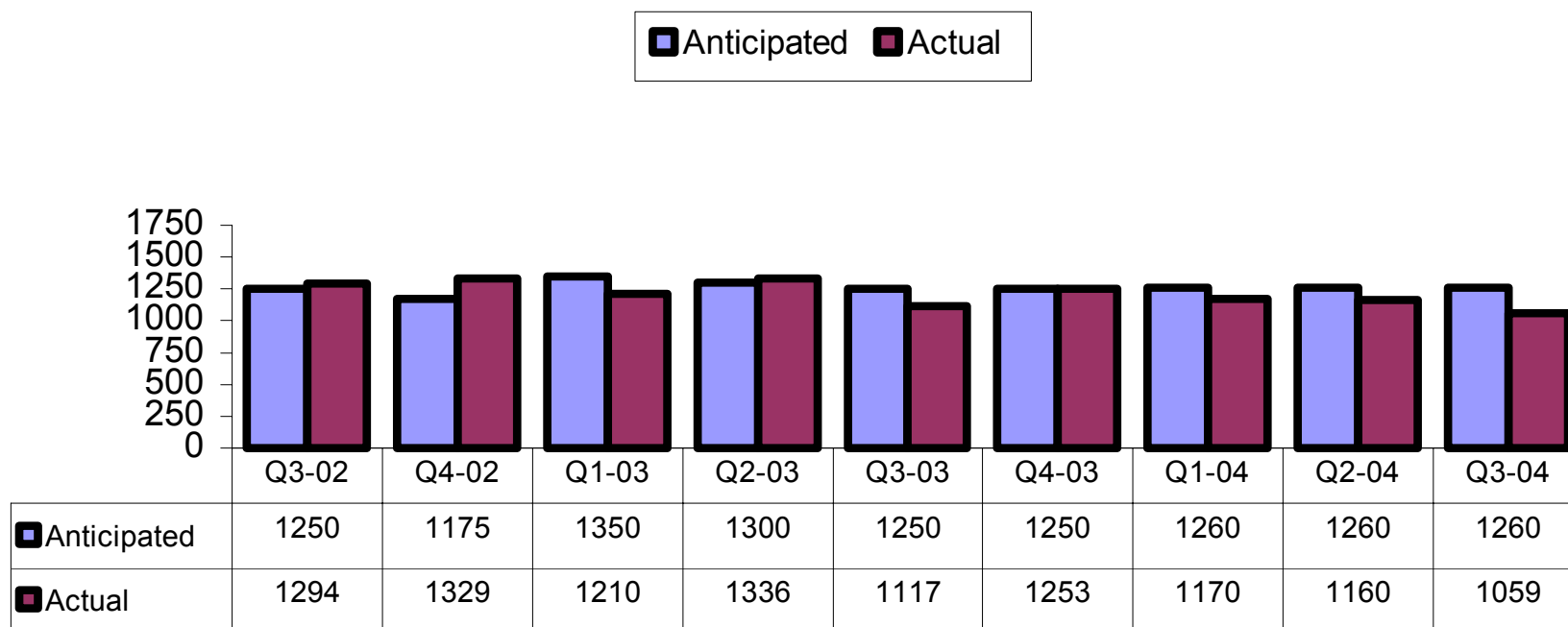


Figure 2. Incoming Appeals, Anticipated vs. Actual

During the third quarter of 2004, Tribunal dispositions totalled 984.

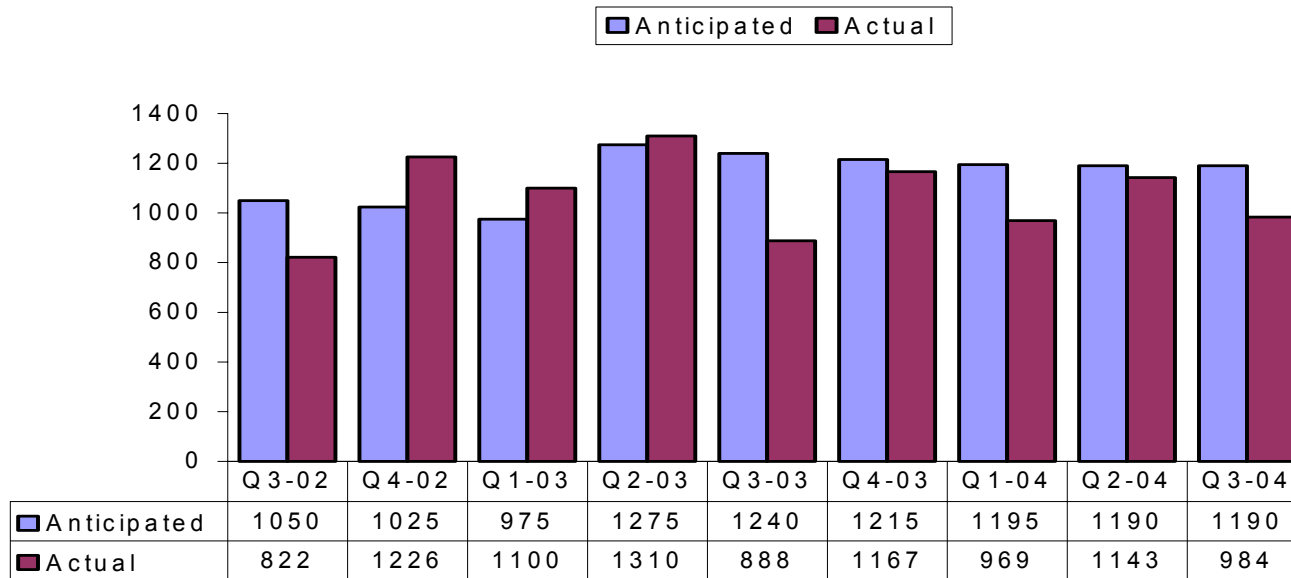


Figure 3. Dispositions, Anticipated vs. Actual

Dispositions from pre-hearing processes 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.

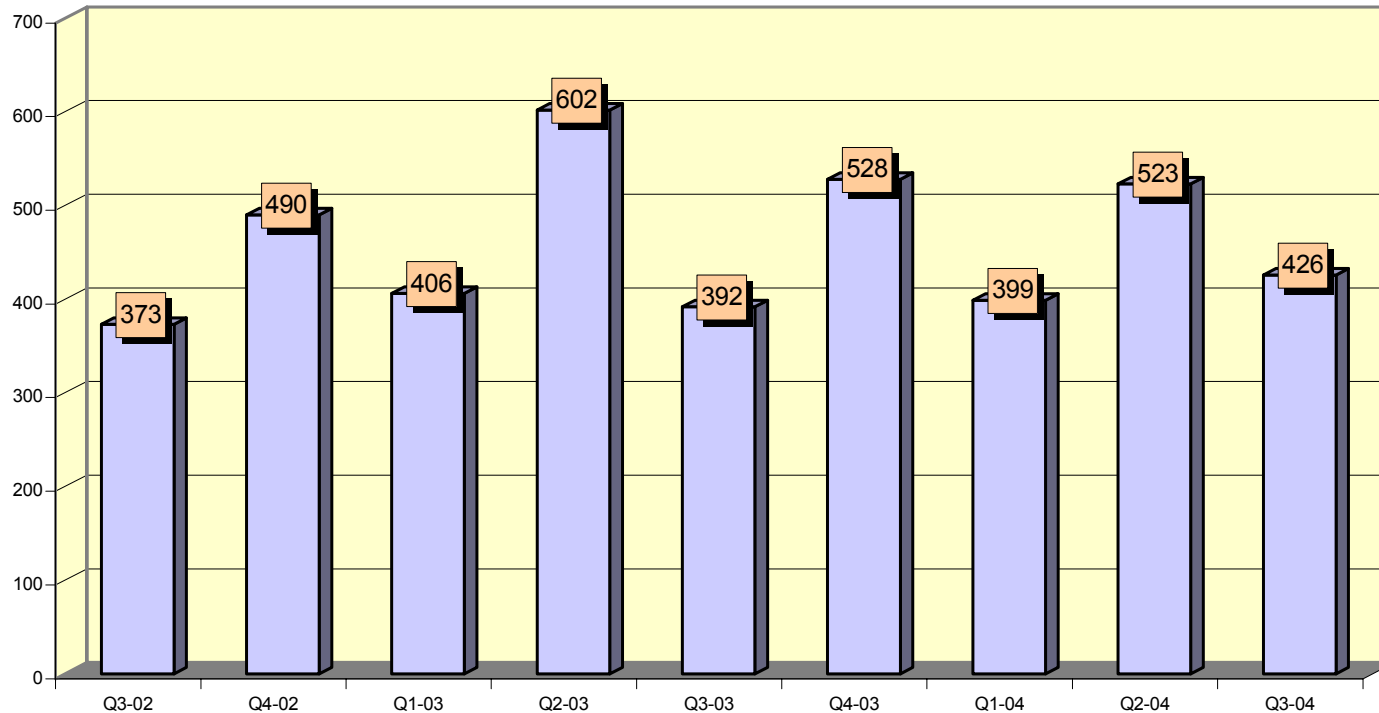


Figure 4. Dispositions from Pre-Hearing processes

After hearing dispositions included 536 dispositions from final decisions of Vice-Chairs and Panels, and 22 other dispositions typically achieved by making the appeals Inactive pursuant to interim decisions.

During the third quarter, 71% of decisions were released in 120 days.

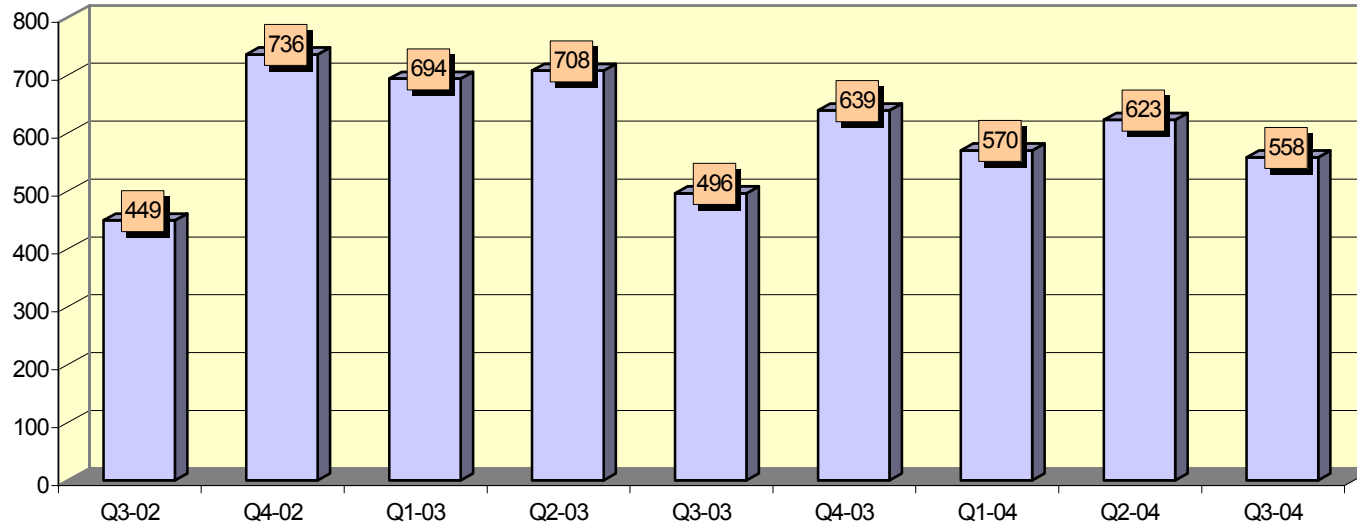


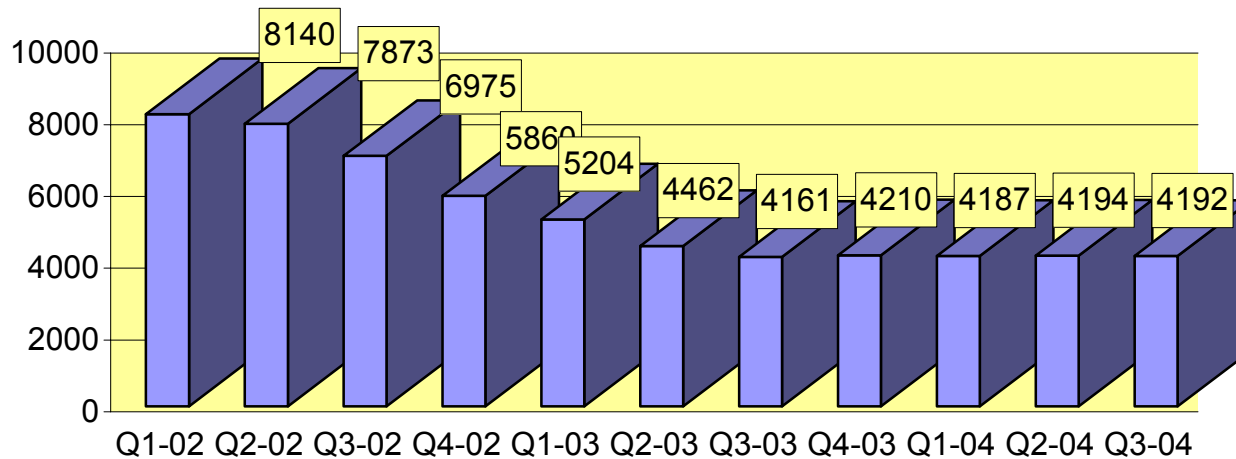
Figure 5. Dispositions from After Hearing processes.

Inactive Inventory: At the close of the third quarter 2004, the Tribunal's inactive inventory numbered 4,192, a decrease of 3 cases from the previous quarter.

During the third quarter, 195 appellants contacted the Tribunal to continue or re-activate their appeal, representing just 4% of the previous quarter's inactive inventory of 4,195. In the third quarter of 2004 deactivations numbered 210 cases. These figures, in addition to file closures through the inactive inventory reduction project, resulted in a net inactive inventory decrease of 3 cases.

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 Q3 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, 3,473 cases have been closed. Further reductions in the inactive inventory are 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 provided an information session in Windsor on September 28th. The next session is scheduled to take place in Kingston on November 23rd. The program underwent a substantial revision during the summer. While it still provides a brief overview of the Tribunal's role, statistics and pre-hearing procedures, the focus is to provide stakeholders with view into the adjudicator's end of the process.

C) Judicial Review Activity

The status of applications for judicial review as of the end of September 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.

In the last quarterly report it was noted that, for the first time in nineteen years, a Tribunal decision had been quashed by the Divisional Court on judicial review. The Tribunal filed a notice of motion for leave to appeal the Divisional Court decision to the Court of Appeal. During this quarter, the Court of Appeal *granted leave to appeal*, as noted below.

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

This case marked the first time a decision of the Tribunal had been quashed on judicial review.

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 about the way the Panel had dealt with the co-worker's affidavit on the reconsideration regarding the number of times the worker had struck her head. The Divisional Court decision also stated that the Tribunal had 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 to the Court of Appeal. On September 29, the Court of Appeal granted leave to appeal.

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

Decision 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 filed considerable new material, including nine "Constitutional Questions" which he wants the Divisional Court to address. The WSIB has retained outside counsel, who brought a motion to quash the application for judicial review. The motion is scheduled to be heard on October 18.

3. 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. Due to the enormous size of the case materials, counsel for the Tribunal is attempting to come to an agreement with other counsel regarding the contents of the Record.

4. 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 *Decisions 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, recently counsel for the worker ordered transcripts of the Tribunal hearing, and the Tribunal filed its Record. At the end of the quarter the Tribunal was awaiting service of the worker's factum.

5. 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. However, following discussion with counsel for the worker, it was agreed that the judicial review application should be adjourned so a further reconsideration could be brought at the Tribunal.

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

This application for judicial review, and the one immediately below, were both served on the Tribunal earlier this year. In *Decision 1384/03* the Panel denied initial entitlement to the worker. Following an amendment to their pleadings, the Tribunal filed its Record. At the end of the quarter the Tribunal was awaiting service of the worker's factum.

6. 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 the Tribunal was awaiting receipt of the worker's factum.

7. Decision Nos. 1584/02 (July 15, 2003) and 1584/02R (June 16, 2004)

An application for judicial review was commenced by the worker in this quarter. The worker suffered an injury in 1991. His appeal for entitlement for seizures occurring two years after the injury was denied by the Tribunal. At the end of the quarter the Tribunal was preparing its Record.

8. Decisions No. 1022/021 (August 30, 2002), 1022/02 (December 9, 2003), and 1022/02R (August 18, 2004)

In these decisions the Tribunal found the worker did not have entitlement for a bilateral left shoulder or left elbow condition. The worker has retained new counsel and commenced an application for judicial review. At the end of the quarter the Tribunal was preparing its Record.

9. *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 by an injured worker. 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 was agreed that the Attorney General will be representing both the Tribunal and the Ministry in this matter.

A motion to strike the suit for failing to disclose a reasonable cause of action was scheduled for September 7th. It was adjourned at the plaintiff's request so that he could retain counsel.

D) Highlights of Decided Cases

Decision No. 941/04 (B. Cook) 24 June, 2004

The worker suffered a compensable injury in 1989 which resulted in a permanent disability. The employer provided modified work until its closure a decade later in 1999. The worker's request for labour market re-entry (LMR) assistance was denied by the Board, on the basis that LMR was not cost-effective. The worker's claim for psychotraumatic disability was denied because the disability did not become manifest within five years of the injury ("the five year rule").

The Vice-Chair noted that while there were other factors than the worker's inability to maintain employment that led to depression, the medical evidence indicated a clear connection between the two and it suggested that the worker might recover from his depression if he was provided with LMR services. The Vice-Chair opined that LMR services would likely have been considered cost effective in 1989, but that, by 2001, they no longer were due to the worker's age. The Vice-Chair further noted that but for the "five year rule" the worker would likely have been entitled to benefits under the psychotraumatic disability policy. The Vice-Chair noted that the "five year rule" is a "General rule" that cannot be applied blindly. The circumstances of a particular case must be examined to determine whether the general rule

applies or whether an exception to the general rule exists. In this case the Vice-Chair found that the primary cause of the worker's psychotraumatic disability was his work-related injury, which rendered him unemployable, and that this was disguised by the fact that the employer was able to provide him with modified work. Once the employer was not longer available to provide him such work, the work-related injury precluded him from finding sustainable new work, in turn giving rise to the psychological disability. Entitlement to benefits for psychotraumatic disability was granted.

Decision No. 901/04 (S. Martel) 16 June, 2004

The issue central to this decision was whether the accident employer was entitled to a transfer of costs to a temporary personnel agency ("the temp agency"). A worker was injured on his third day at work when he prematurely pulled slabs of granite off a forklift driven by a worker sourced from a temp agency. The accident employer argued that the forklift driver was negligent and that the costs relating to the accident should be transferred to the temp agency pursuant to s. 84 of the Workplace Safety and Insurance Act.

In determining the appeal the Vice-Chair had regard to *Decision No. 2137/99* and decided that the general common law principles of negligence are applicable to s.84. The Vice-Chair noted that it appeared that the worker's on-the-job safety training was inadequate. It was noted that the responsibility for such training was not borne solely by the forklift driver but also by two of the accident employer's workers. Furthermore, while the forklift driver was technically an employee of the temp agency, he had been working with the accident employer for over a year and was supervised and assigned duties by the accident employer. It was the accident employer's responsibility to ensure that the forklift driver train the new worker properly and it could not absolve itself of the costs of the claim simply because one of the three workers assigned to train the new worker was a temporary employee technically employed by the temp agency.