

Workplace Safety and Insurance Appeals Tribunal

QUARTERLY REPORT

Production and Activity

For the Period

October 1 through December 31, 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, October 1st through December 31st, 2003. 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 fourth quarter of 2003.

- The active inventory totalled 4,637 (16% over the target of 4,000 cases).
- Incoming appeals numbered 1,269; of these, 1133 were appeals from WSIB decisions and 136 appellants advised they were ready to proceed to hearing following a time in inactive status.
 - This compares to 847 new appeals and 270 reactivated appeals recorded in the third quarter.
 - In 2002, the weekly average of hearing ready appellants was 44. For 2003, the weekly average of hearing ready appellants was 61.
- Dispositions numbered 1,180; this includes 541 dispositions in the pre-hearing areas resulting from dispute resolution efforts and 639 after hearing dispositions; of the after hearing dispositions, 627 followed from Tribunal decisions.
- The inactive inventory increased by 52 cases to 4,211 in comparison to the third quarter of 2003.
- Year end figures for 2003 indicate that 74% 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 4 months of the appellant confirming hearing readiness by filing a Confirmation of Appeal form.

The Tribunal's Production Plan for 2003 set targets and projections for caseload intake, production, and 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 after the two-year period parties are allowed to remain in the NOA stage. At the end of the fourth quarter of 2003, the NOA inventory included 1,792 dormant cases and 1,968 cases actively proceeding towards a hearing. The resolution inventory had 2,669 cases in a review, scheduling, decision writing or post-hearing stage.

Productivity in Relation to Case Management Objectives

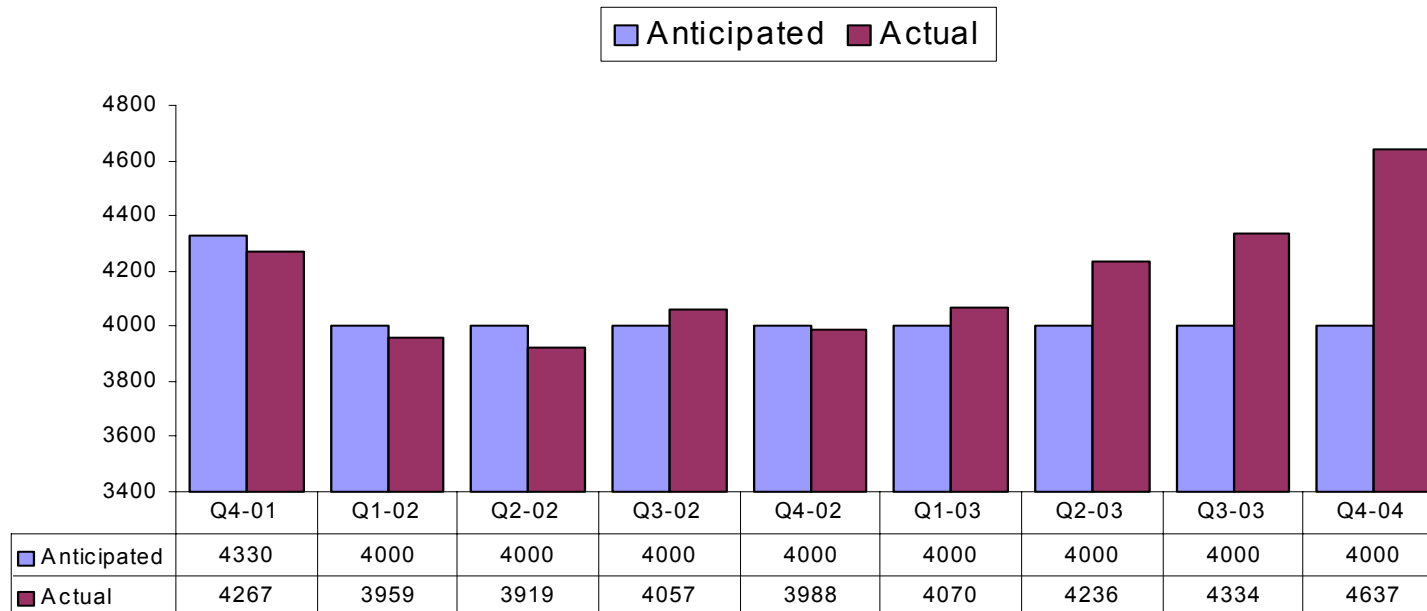


Figure 1. Appeals Inventory, Anticipated vs. Actual

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

In the fourth quarter of 2003, incoming appeals numbered 1269; of these, 1133 were new appeals from WSIB decisions and 136 appeals were reactivations from the inactive cases inventory. Of the 136 reactivated appeals, only 27 followed from the inactive inventory reduction project; the majority were brought forward to active processing by appellants.

In 2002, the weekly average number of appellants to certify their readiness to hearing was 44. For all of 2003, the weekly average was higher, at 61.

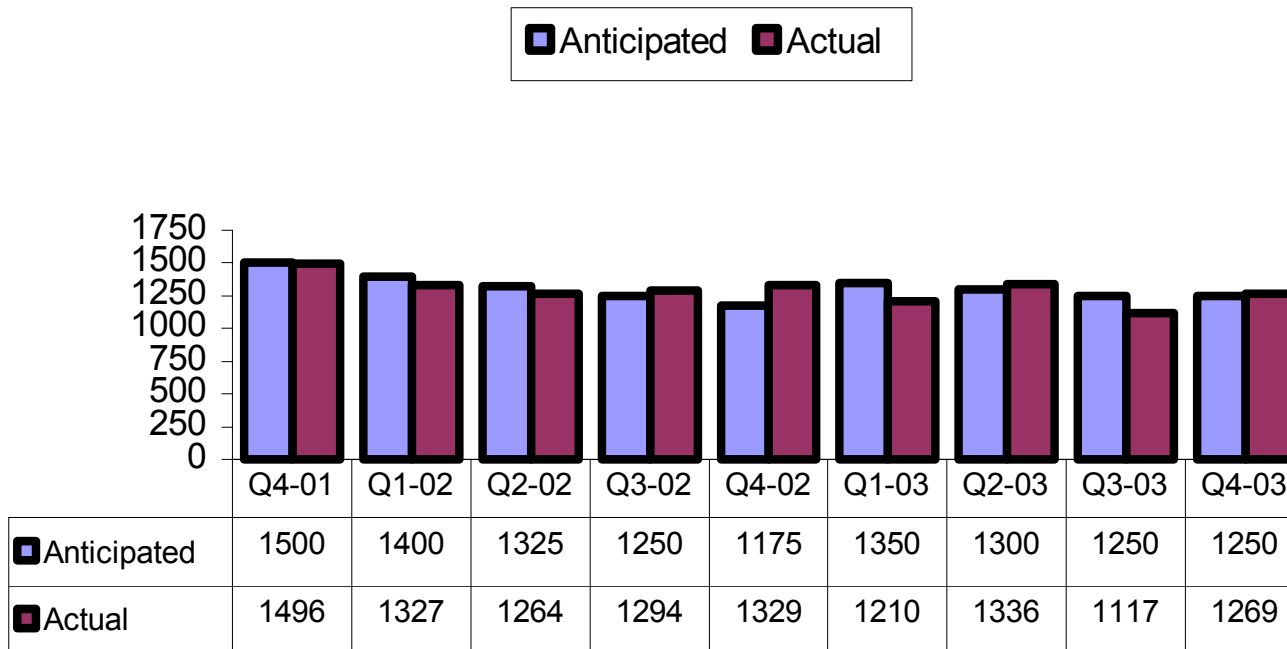


Figure 2. Incoming Appeals, Anticipated vs. Actual

During the fourth quarter of 2003, Tribunal dispositions totalled 1,180. This represents a decrease of 4% compared to the same period last year; however, the total number of dispositions in 2003 was 8% higher than in 2002.

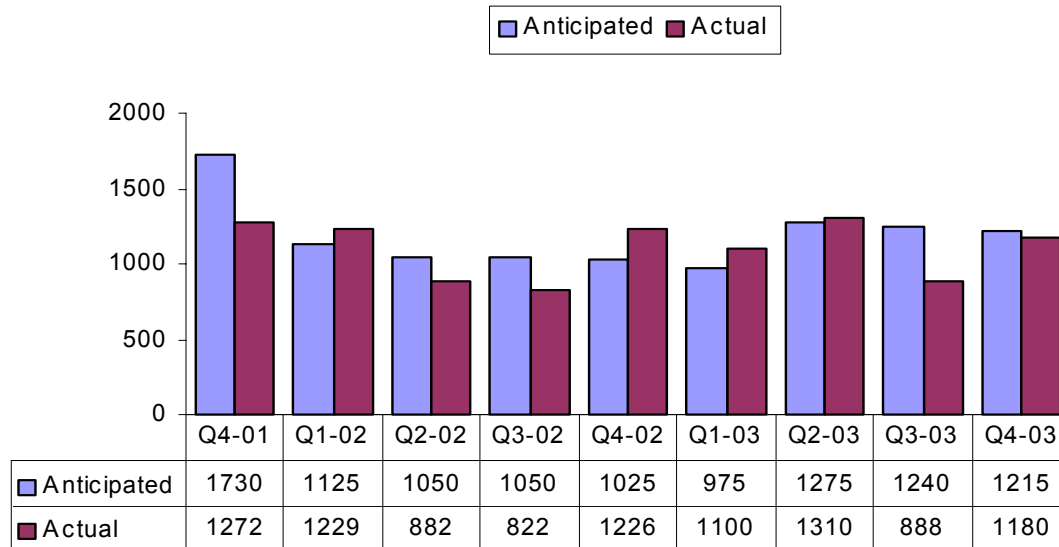


Figure 3. Dispositions, Anticipated vs. Actual

During October through December 2003, the Tribunal disposed of 541 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 2 years were targeted for File Status review.

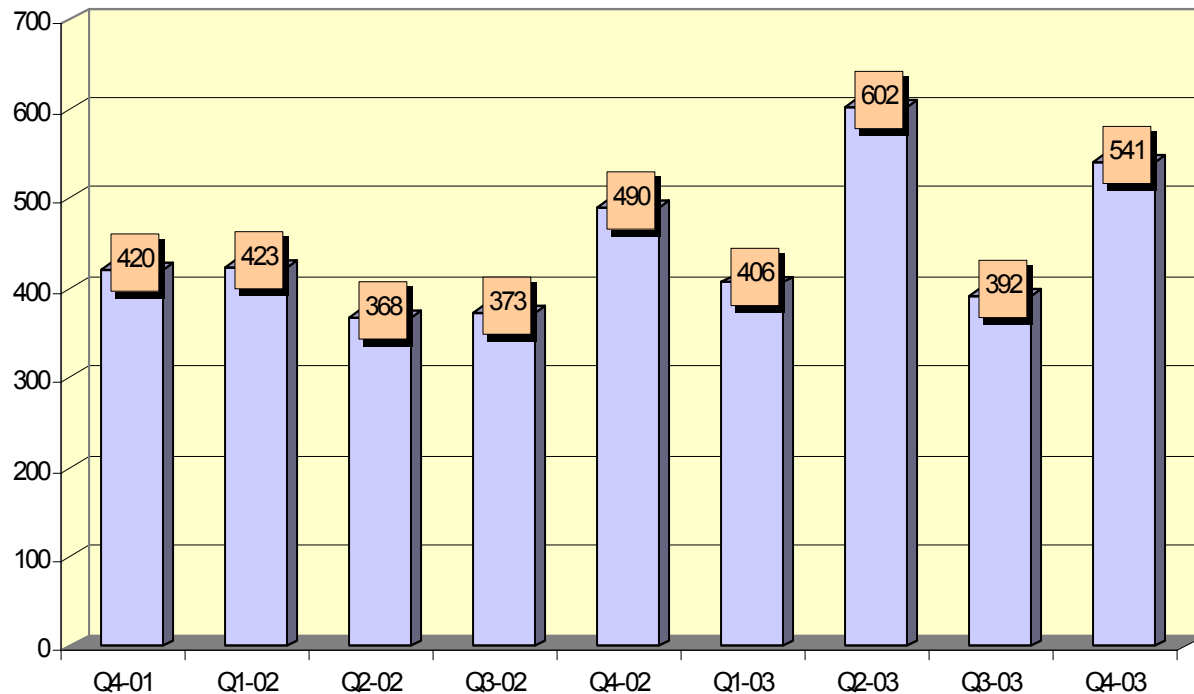


Figure 4. Dispositions from Pre-Hearing processes

After hearing dispositions totalled 639 and included 615 dispositions final decisions from Vice-Chairs and Panels, and 24 other dispositions typically achieved by making the appeals Inactive pursuant to interim decisions.

Vice-Chairs succeeded in releasing 615 final decisions in the fourth quarter of 2003. The Appeals Tribunal is extremely pleased with this achievement, as a number of experienced adjudicative appointments have not been renewed in the past 12 months. If additional Vice-Chairs had been available, further cases were available for hearing assignment.

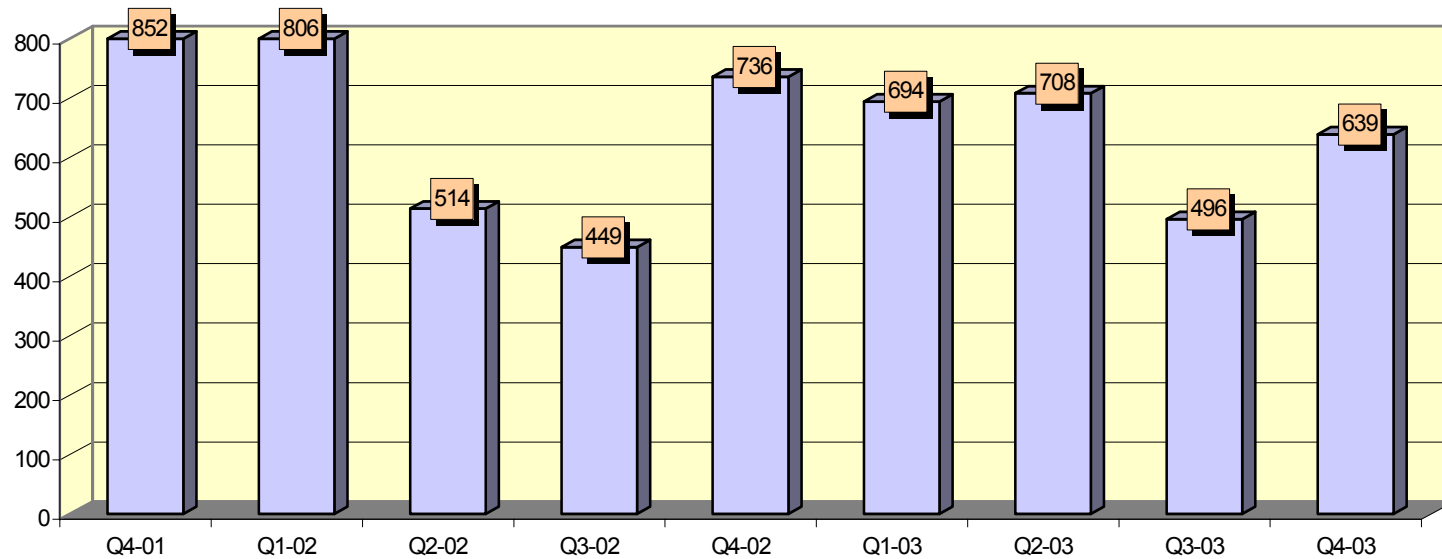


Figure 5. Dispositions from After Hearing processes.

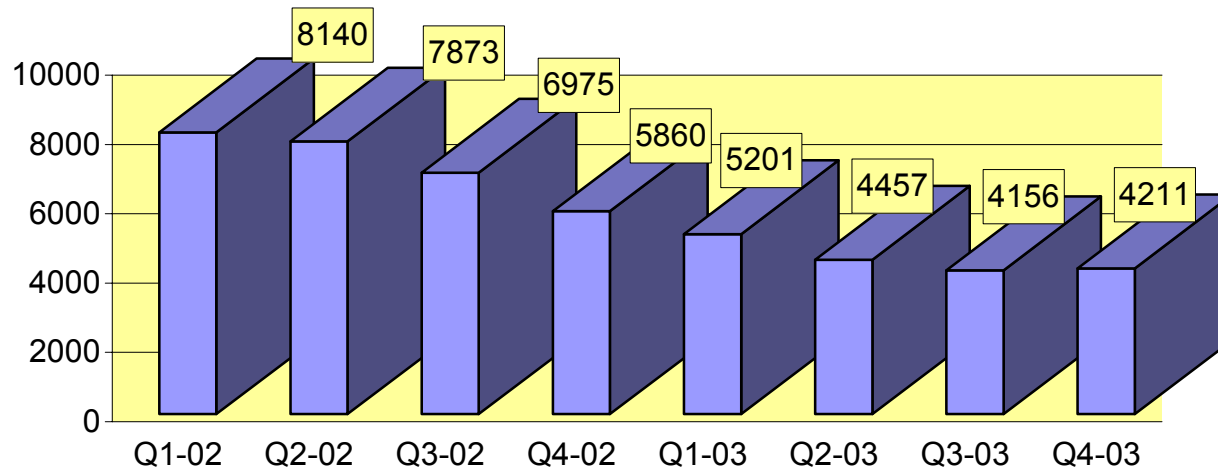
Inactive Inventory: At the close of the fourth quarter 2003, the Tribunal's inactive inventory numbered 4,211, an increase of 52 cases from the previous quarter.

During the 4th quarter, 136 appellants contacted the Tribunal to continue or re-activate their appeal, representing 3% of the previous quarter's inactive inventory of 4,159. In the fourth quarter of 2003 deactivations numbered 285 cases. These figures, in addition to file closures through the inactive inventory reduction project, resulted in a net inactive inventory increase of 52 cases.

During this quarter, 27 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.

Over 72% 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 Q4 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, 3,430 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.

B) Communications

Public Information Sessions – During the last quarter of 2003, the staff and OIC presenters at the Information Sessions visited Sault Ste. Marie on October 15th, Thunder Bay on November 18th and Burlington on December 9th. The first quarter of 2004 will focus on the Toronto area. Public Information Sessions provide the community with an opportunity to meet and question Tribunal staff and adjudicators in an informal setting.

A meeting of the Tribunal's Advisory Group was held November 5th. Tribunal staff organized a training day for staff and OICs in early December. The medical topic was heart disease and the afternoon session focussed on procedural issues, particularly pre-hearing procedures, ways to handle late receipt of materials and party requests for adjournment.

C) Judicial Review Activity

The year 2003 was the busiest ever for judicial review activity at the Tribunal. Lawyers from the Tribunal Counsel Office co-ordinate all responses to judicial review applications, and represent the Tribunal in most instances.

The final quarter of 2003 was particularly busy on the judicial review front. Developments in pending judicial review applications as of the end of 2003 are set out below. There are a number of other active judicial reviews not listed, as there was no action on them during this quarter.

The Tribunal may take pride in the fact that in the nineteen years it has been releasing decisions, there has never been a successful judicial review of a Tribunal decision.

1. Code of Conduct Suspension

A paralegal consultant who represents injured workers at the Tribunal was suspended from representing clients on new appeals at the Tribunal. The decision to suspend was made by the Tribunal Chair, acting pursuant to the Act, the Tribunal's Code of Conduct for Representatives and a related practice direction. The consultant brought an application for judicial review of the Chair's decision to suspend. The Workplace Safety and Insurance Board, which had also suspended this consultant from representing parties in its appeal process, was a co-respondent in the application.

The Tribunal filed responding materials, including a lengthy affidavit detailing the consultant's conduct. Counsel for the consultant removed himself from the record. In November 2003 the Divisional Court dismissed the application for judicial review for failure to perfect.

2. Decisions Nos. 2185/01 and 2185/01R

An employer's appeal that its operations were controlled by and ancillary to another firm, and thus should be classified in the same rate group as that other firm, was denied by the Tribunal in *Decisions Nos. 2185/01* (October 29, 2001) and *2185/01R* (August 2, 2002). The employer brought an application for judicial review.

The application was heard on November 10, 2003. The Divisional Court unanimously dismissed the judicial review, holding that the Tribunal's decision was not patently unreasonable.

3. Decisions Nos. 1480/98 and Decision 1480/98I

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* (July 27, 2001) as the Tribunal found 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 No. 1480/98* (September 25, 2002) 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 is not challenging the finding that the cancer was work-related, only that this type of accident is not incorporated by GECA. The application was heard on November 28, in Ottawa. At the end of 2003 the decision was still outstanding.

4. Decisions Nos. 1095/01 and 1095/01R

Decisions Nos. 1095/01 (April 30, 2001) and *1095/01R* (April 19, 2002) upheld the Board's denial of a worker's appeal for entitlement for bilateral carpal tunnel syndrome.

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. The appeal is scheduled to be heard on February 12, 2004.

5. Decisions Nos. 255/02 and 255/02R

In *Decision No. 255/02* (August 30, 2002) 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 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 No. 255/02R* (February 29, 2003).

The worker brought an application for judicial review of the Tribunal's decisions. It is expected this application will be heard in Hamilton in January or February 2004.

6. Decision No. 770/98IR

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

7. Decisions Nos. 18/88I and 18/88

The worker brought an application for judicial review to quash *Tribunal Decisions Nos. 18/88I* and *18/88*, made March 22, 1988 and October 27, 1988 respectively. 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, but this part of the motion was dismissed.

At the end of 2003 the Tribunal was waiting for the worker to amend his materials and serve the other respondents.

8. Decisions Nos. 28/02 and 28/02R

Decision No. 28/02 (February 11, 2002) found that a 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 (July 22, 2003) denied the application for reconsideration. The employer then elected to proceed with the judicial review. The employer filed its factum in late December 2003. The Tribunal will be preparing its materials early in the new year.

9. Decision No. 981/02

Tribunal Decision No. 981/02 (April 8, 2003) allowed an employer appeal reclassifying its business activity. When the WSIB did not immediately implement the Tribunal's decision, the employer brought an application for an order to compel the WSIB to implement the Tribunal's decision. Although the Tribunal was not a party it was served with the application.

Following receipt of the court application, the WSIB filed an application to reconsider the Tribunal decision. The court application has been adjourned pending the outcome of the application to reconsider.

10. Decisions Nos. 866/97 and 866/97R

Tribunal Decision No. 866/97 (December 6, 1999) 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 WSIB to credit the employer for the cost of some of the benefits.

The WSIB requested the Tribunal reconsider *Decision No. 866/97*. In *Decision No. 866/97R* (September 6, 2002), 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 brought an application for judicial review of *Decision No. 866/97R*. However, the employer did not file further materials, and in November 2003 the Divisional Court dismissed the application for failure to perfect.

11. Decision No. 606/95

This application for judicial review of *Decision No. 606/95* (June 23, 1997) was served on the Tribunal late in 2003. It appears to involve a number of complex factual issues involving entitlement for a worker. The Tribunal will be preparing its Record, once counsel for the worker amends his materials to add two employers as respondents.

12. Decisions Nos. 433/99 and 433/99R

The worker served the Tribunal with an application for judicial review of *Decisions Nos. 433/99* (June 24, 1999) and *433/99R* (May 30, 2000). These decisions found that a worker's low back disability was not caused by a 1979 work injury. Counsel for the worker has agreed to amend the materials, following which the Tribunal will file an appearance. At the end of 2003 the Tribunal was still awaiting the amended materials.

D) Highlights of Decided Cases

FEL Reviews after the 60 Month Period:

The *Government Efficiency Act 2002* amended section 44 of WSIA. With respect to FEL reviews after the 60 month period, these amendments created the new subsections 44(2.1) through (2.6). Section 44(2.1) (Royal Assent, Nov. 26,2002) provides that a FEL award may be reviewed beyond the 60 month period where:

1. the worker is provided with an LMR plan that is not completed within the 60 month period
2. the worker suffers a significant deterioration in his condition resulting in a redetermination of the permanent impairment.

A number of Tribunal decisions have referred to these amendments. See *Decisions Nos.: 852/03, 1252/03, 1106/03 and 1550/03*.

Occupational Disease:

There have been a number of Tribunal decisions, which have addressed entitlement to benefits for occupational disease. The following decisions are of particular interest:

Decision No. 1537/02, in the context of a claim for benefits for Chronic Obstructive Pulmonary Disease (COPD), considered the status of a Board document titled “Adjudicative Advice, Chronic Obstructive Pulmonary Disease” dated April 2001, which was submitted by the Office of the Worker Adviser, the representative of the worker’s estate. The Vice Chair noted that the “Adjudicative Advice” document was extremely comprehensive, inviting adjudicators not only to look at such factors as the worker’s smoking habits but also the worker’s occupational history as well. On instruction from the Vice Chair, the Tribunal contacted the Board as to the status of this document. The Board confirmed that the document would have been used to adjudicate this claim, if it had been filed after the document came into effect. The Appeal Resolutions Officer decision on appeal in this case pre-dated the date of this document.

After finding the worker had entitlement to COPD, the Vice Chair remitted to the Board, the question of the apportionment of benefits with respect to the worker’s smoking history. The worker’s representative requested that no decision be made respecting apportionment. The Vice Chair, after referring to *Decision No. 303/02*, which provided a review of the law of apportionment, found that the apportionment issue was not before the Tribunal in this appeal.

Decision No. 600/97 considered a number of medical-legal issues that arise in claims for benefits for occupational disease, such as the meaning of the terms “statistically significant” and “standardized incidence ratio” (SIR) used in the medical literature as well as the use of Standardized Incidence Ratios as evidence in adjudicating causation issues.

This particular appeal concerned a claim for benefits for rectal cancer, which was argued to have arisen from the worker’s 31 year history as a nickel miner. At the hearing the Panel questioned two doctors who had co-authored a study prepared for the Ontario Occupational Disease Panel in January 1996, titled “A Study of Cancer Incidence in Ontario Nickel Workers”. The study provided risk estimates of colo-rectal cancer for underground miners working at certain mines, including the mine that the employed the worker.

The Panel found that the study did not draw any definitive conclusions about whether nickel miners have an increased risk of developing colo-rectal cancer and decided that it had not been shown, on a balance of probabilities, that the worker’s cancer arose out of his employment.

Board “amicus curiae” submissions:

Decision No. 1161/03I found that there were valid reasons to use the pre-hearing process in complex cases in which it was expected that “amicus curiae” submissions might be helpful. The Panel noted that the process of obtaining Board submissions was at the Tribunal’s initiative in order to obtain further assistance to clarify the record in complex cases. Parties are given the opportunity prior to the hearing to object if these submissions go beyond the “amicus curiae” role. Also, there was no impropriety for an administrative body to take such an initiative and offer submissions “amicus curiae” which the Tribunal has the discretion to receive or dismiss.

In this case the Panel also commented on the role of the Tribunal Counsel Office, noting its role to provide the Tribunal Panel or Vice Chair with all relevant materials and submissions prior to the hearing. The Office of the Vice Chair had the related role of increasing the availability of material at the pre-hearing stage to avoid post-hearing delays. The consideration then of how and when amicus curiae submissions might be received in an individual case is appropriately considered in the context of the role of Tribunal staff in general in the pre-hearing preparation of a file.

Tribunal Jurisdiction to Take Away Rights of Action under section 267.8 of the *Insurance Act*:

In *Decision No. 234/03*, the worker had elected to receive benefits under the Act and his Schedule 2 employer was claiming rights of subrogation in the worker's civil action. The applicants in a right to sue application submitted that the employer could not subrogate the rights of an insured under section 267.8(17) of the *Insurance Act*. The applicants also noted Board policy, OPM Document# 11-01-15 which also provides that a Schedule 2 employer does not have a right to bring an action on behalf of a worker who has elected to receive benefits under the Act as a result of a motor vehicle accident occurring after October 31, 1996.

The Vice Chair reviewed court decisions submitted by the applicant in particular *Cohen v. Smith* and *Sutor v. Ont (WSIB)*, distinguishing them from the facts in this case, as the issue in this case was the effect of the reimbursement agreement with the Schedule 2 employer and not one of re-election.

The Vice Chair found that, unlike the courts, the Tribunal did not have jurisdiction to rule whether the *Insurance Act* took away the right of action of the plaintiff, relying on *145/95*, which found that the Tribunal did not have jurisdiction to limit rights of action under section 267 of the *Insurance Act*. While the Tribunal may interpret a statute, which is involved in the issues before it, it can only do so in the proper exercise of its own jurisdiction.

CPP Deductions to FEL Benefits and Board Policy:

In *Decision No. 1306/0212*, the Vice-Chair found that Board policy that allows for the deduction of CPP benefits from a partial FEL was not inconsistent with the Act.

In the prior decision, *Decision No. 1306/021*, the Vice-Chair reviewed the Board's policy on the calculation of "net average earnings" and questioned whether it was permitted by the Act. Section 43(3) of the pre-1997 Act provides that the FEL award is the difference between pre-injury and post-injury net average earnings that a worker is likely to earn in suitable and available employment. Section 43(7) provides that in setting the FEL award the Board is to have regard to CPP benefits received by the worker.

The Board *Operational Policy Manual*, Document #05-05-05 provides that where a worker does not have post-injury earnings:

- 1- pre-injury net average earnings are to be determined;
- 2- a vocational objective and the likely earnings in that employment are to be identified;
- 3- the likely post-injury net average earnings are to be calculated and
- 4- CPP benefits received by the worker are to be added to that sum.

This sum becomes the "deemed earnings" of the worker and is treated as the worker's post-injury net average earnings for the purposes of calculating the FEL award. Document #05-05-06 provides that "deemed earnings" are to be treated in the same manner as actual post-injury earnings for the purposes of section 43.

In the subsequent decision, 1306/0212, the Vice Chair received submissions from the Tribunal Counsel Office, which canvassed the two major lines of cases represented by *Decision No. 2792/00* and *Decision No. 199/00*. The submissions preferred the approach taken in *Decision No. 2792/00*, as more subsequent decisions followed that case. Also that case raised significant questions about the correctness of *Decision No. 199/00*.

The Vice Chair then found that the Board policy in Documents # 05-05-05 and 05-05-06 was consistent with the Act.