

Workplace Safety and Insurance Appeals Tribunal

QUARTERLY REPORT

Production and Activity

For the Period

October 1st through December 31st, 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, October 1st through December 31st, 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 fourth quarter of 2004.

- The active inventory totalled 5,194 (30% over the target of 4,000 cases).
- Incoming appeals numbered 1,130; of these, 965 were appeals from WSIB decisions and 165 appellants advised they were ready to proceed to hearing following a period of inactive status.
 - This compares to 861 new appeals and 194 reactivated appeals recorded in the third quarter of 2004.
 - In 2003, the weekly average of hearing ready appellants was 60. For Q4 2004, the weekly average of hearing ready appellants was 65. This figure excludes cases reactivated from the Inactive status.
- Dispositions numbered 1,122; this includes 474 dispositions in the pre-hearing areas resulting from dispute resolution efforts and 648 after hearing dispositions; of the after hearing dispositions, 611 followed from Tribunal decisions.
- The inactive inventory decreased by 59 cases to 4,134.
- 78% 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 fourth quarter of 2004, the notice inventory included 1,531 dormant cases, the active inventory totalled 5,194 cases, and the inactive inventory totalled 4,134 cases.

Productivity in Relation to Case Management Objectives

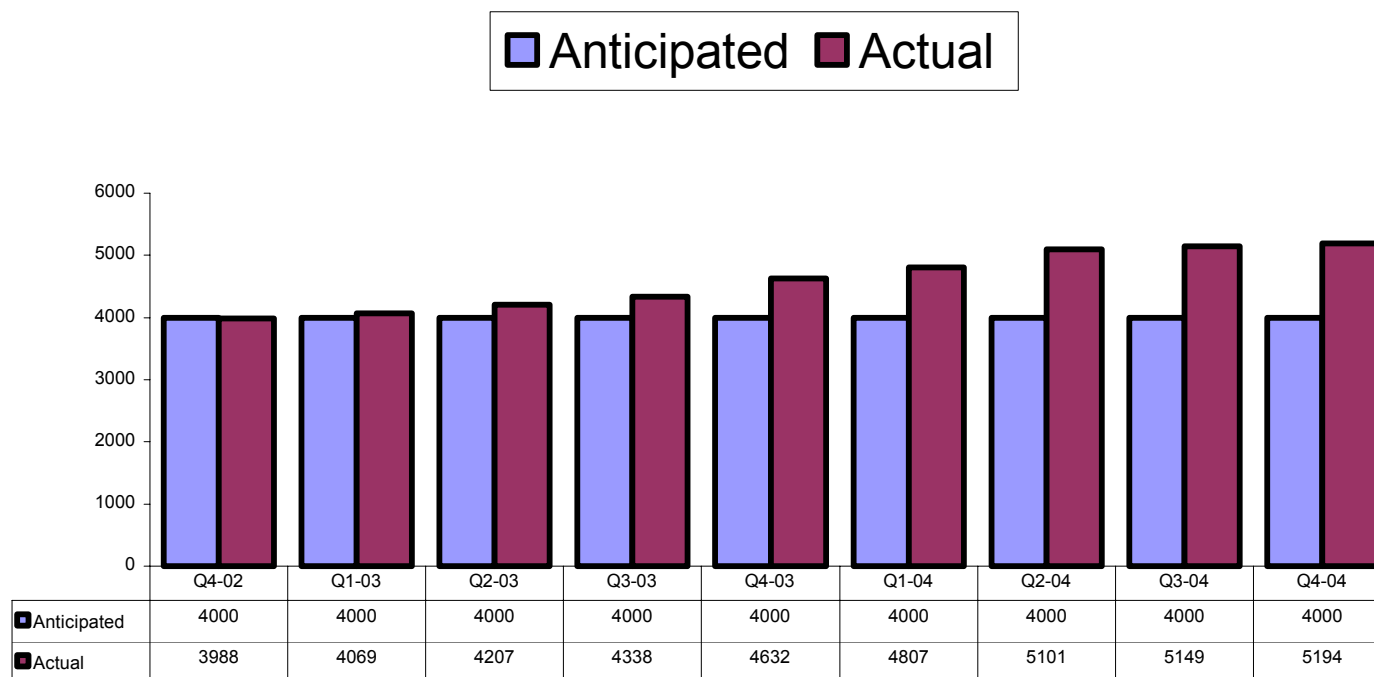


Figure 1. Appeals Inventory, Anticipated vs. Actual

The active inventory is likely to continue 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, in the third quarter the average was 80 and in the fourth quarter the average was 65. These factors combine to create a situation where appeals are waiting longer for resolution than the Tribunal has targeted. 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 fourth quarter of 2004, incoming appeals numbered 1,130; of these, 965 were new appeals from WSIB decisions and 165 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 fourth quarter of 2004, the weekly average was slightly higher, at 65 (this figure does not include re-activated appeals).

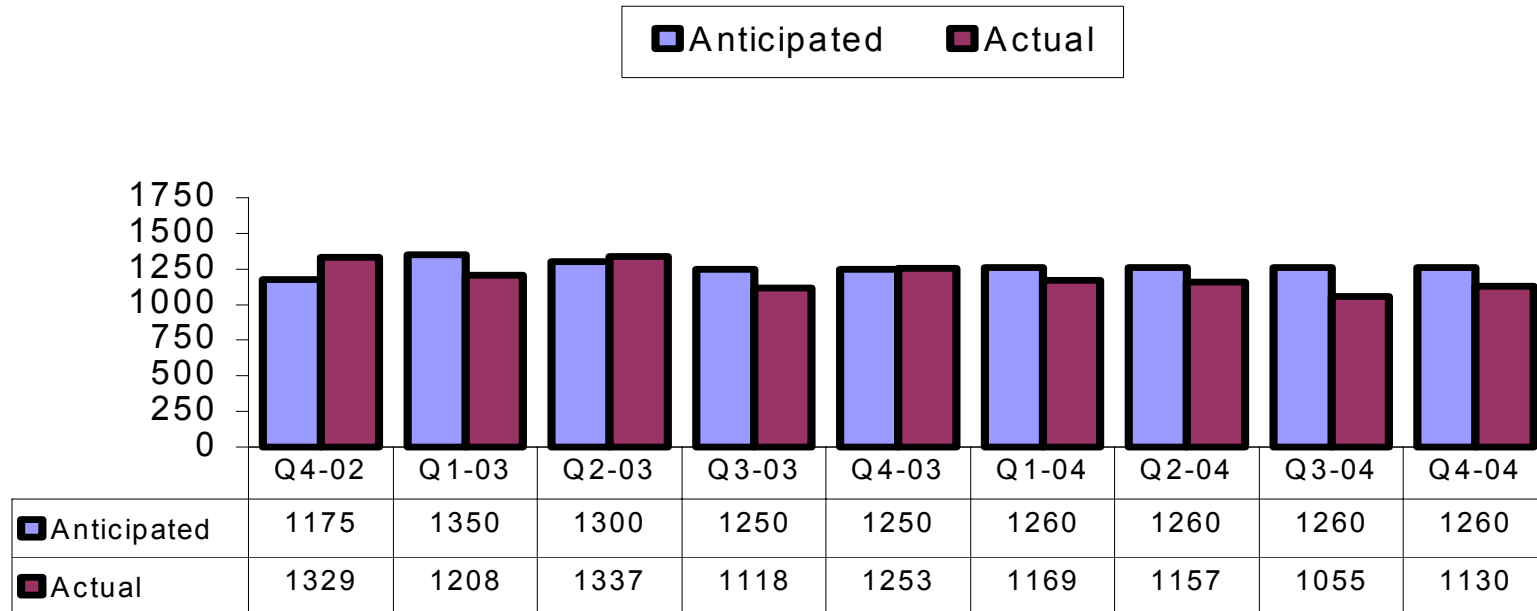


Figure 2. Incoming Appeals, Anticipated vs. Actual

During the fourth quarter of 2004, Tribunal dispositions totalled 1,122.

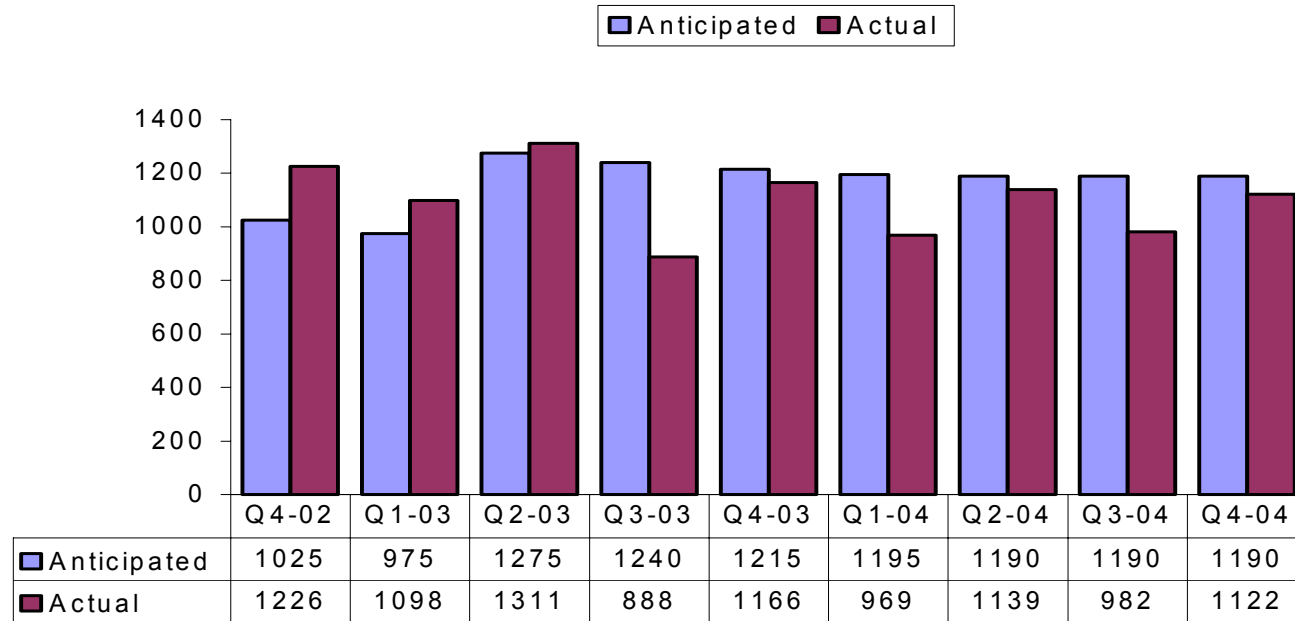


Figure 3. Dispositions, Anticipated vs. Actual

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.

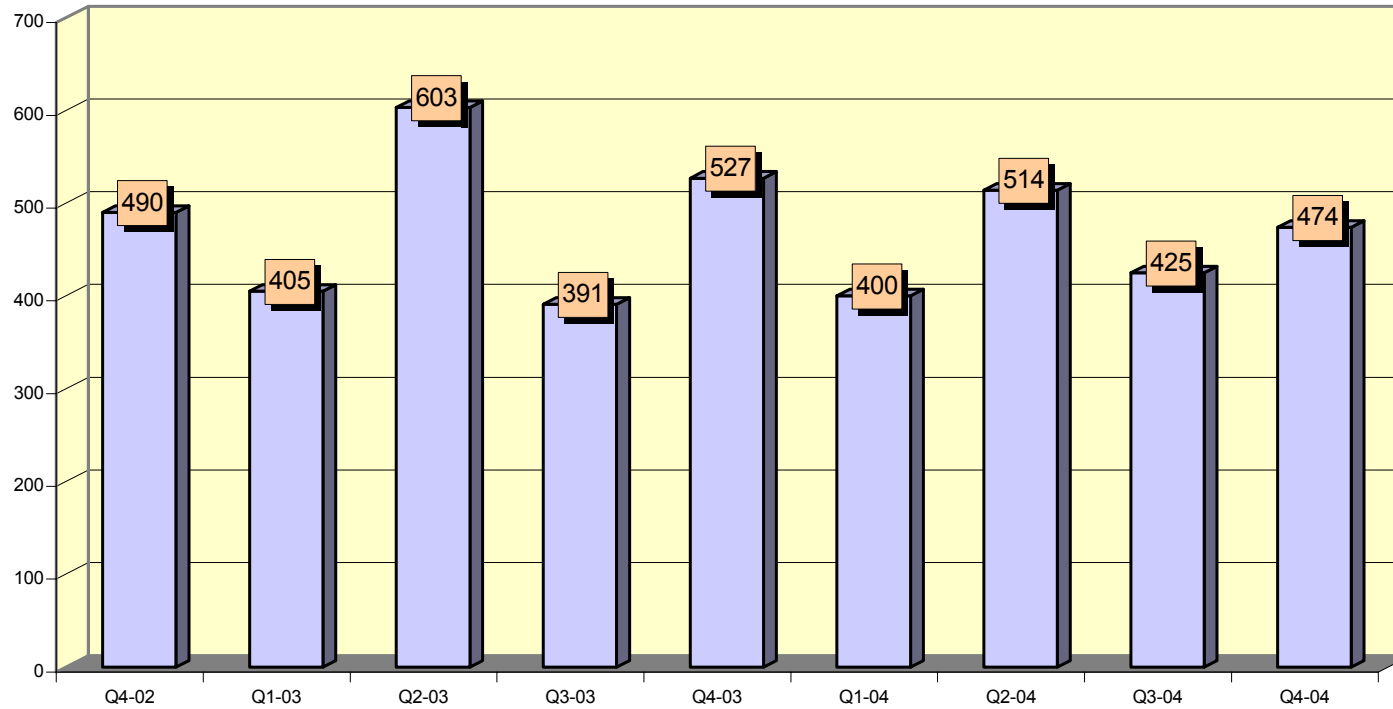


Figure 4. Dispositions from Pre-Hearing processes

After hearing dispositions included 611 dispositions from final decisions of Vice-Chairs and Panels, and 37 other dispositions typically achieved by making the appeals Inactive pursuant to interim decisions.

During the fourth quarter, 78% of final decisions were released in 120 days.

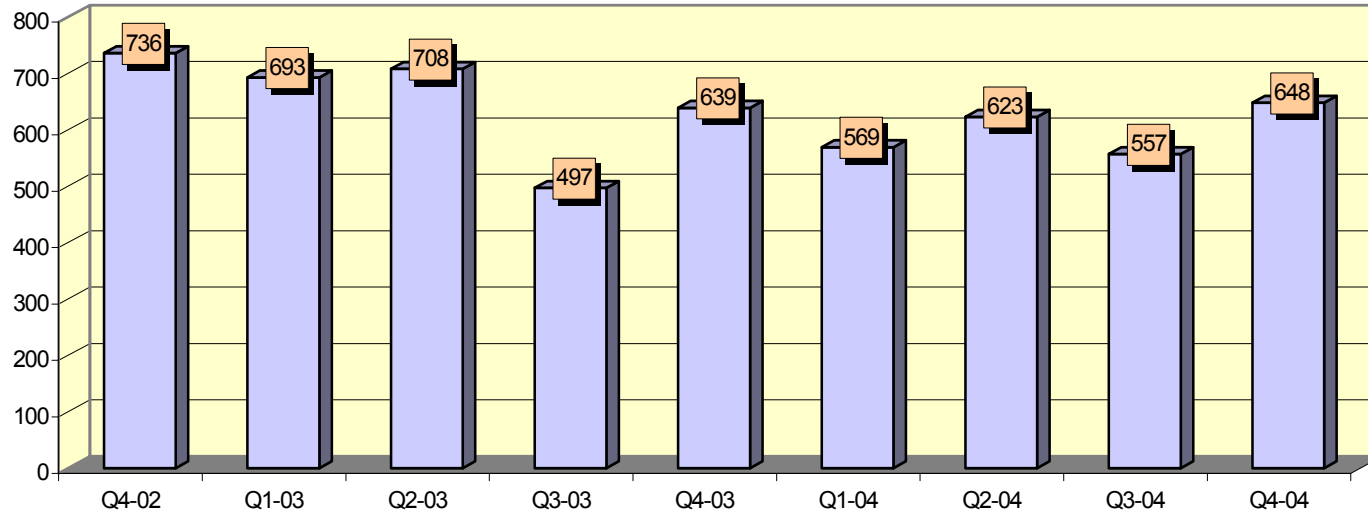


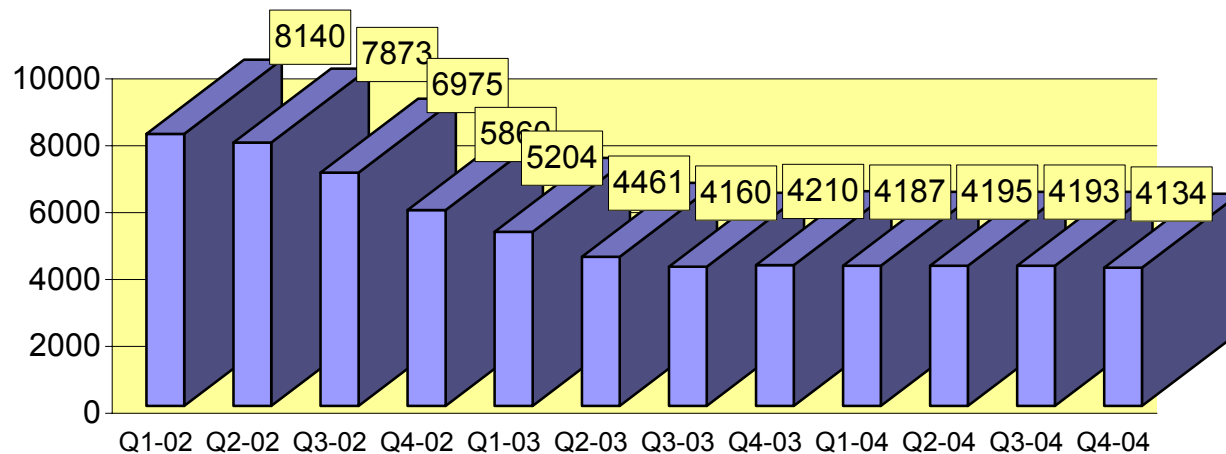
Figure 5. Dispositions from After Hearing processes.

Inactive Inventory: At the close of the fourth quarter 2004, the Tribunal's inactive inventory numbered 4,134, a decrease of 59 cases from the previous quarter.

During the fourth quarter, 165 appellants contacted the Tribunal to continue or re-activate their appeal, representing just 4% of the previous quarter's inactive inventory of 4,193. In the fourth quarter of 2004 deactivations numbered 256 cases. These figures, in addition to file closures, resulted in a net inactive inventory decrease of 59 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 Q4 2004

Inactive Inventory Reduction: In order to ensure that inactive cases were resolved in a timely fashion, in 2002, the Tribunal determined that it was necessary to adopt an active approach to the management of inactive appeals. Since April 1, 2002, 3,617 cases have been closed. Currently, work on the inactive inventory project has slowed considerably; however, reductions in the inactive inventory are achieved through reactivations, which are declining in number, and withdrawals as opportunities present.

Over 70% 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 presented an Information Session in Kingston on November 23, 2004. The program was largely revised over the summer of 2004 to focus the discussion on a Tribunal adjudicator's perspective. The program continues to provide a brief case volume update as well as the popular option to talk with a staff person from the Office of the Vice-Chair Registrar.

Annual Report 2003: The Tribunal's Annual Report for 2003 is now available on the web site at www.wsiat.on.ca.

Conference of Ontario Boards and Agencies (COBA): On November 4, 2004, the Tribunal's Director, Marsha Faubert, Co-Chaired the Conference of Ontario Boards and Agencies (COBA) this year with Lawrence Blackman, an arbitrator at the Financial Services Commission (FSCO). Mr. Justice Warren Winkler provided an entertaining keynote address about controlling the process in multi-party mediations. The day also featured a presentation on current initiatives in the administrative justice sector and six breakout sessions on diverse topics filled the middle of the day. Stephen Lewis, Former Canadian Ambassador to the United Nations, closed the event with a presentation discussing the challenge of public service.

The conference was well attended by over 240 members and staff of Ontario's boards and agencies. Carole Prest, Counsel to the Chair, participated on the conference planning committee and organized a session on video-conferencing and privacy issues. Susan Adams, Special Projects Counsel, also participated on the planning committee.

C) Judicial Review Activity

The status of applications for judicial review and other court matters involving the Tribunal as of the end of December 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.

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

In the last quarterly report, it was noted that the Court of Appeal had granted leave to appeal the only Divisional Court decision which had ever quashed a Tribunal decision on judicial review. The Court of Appeal is scheduled to hear the appeal in March, 2005.

The case involves worker who 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 in regards to 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.

At the end of the quarter the Tribunal had filed its factum, which argued that the Tribunal's decision was not patently unreasonable.

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

This is an application for judicial review to quash decisions made in 1988. The worker alleged the Board had improperly released his claim file to the employer. The worker argued that because of the Board's error, the Tribunal had lost jurisdiction to hear his appeal. The Tribunal Panel did not agree. Fifteen years later, the worker served an application for judicial review on the Tribunal and the WSIB. Subsequently the worker, who was self-represented, served nine Notices of Constitutional Question.

The WSIB retained outside counsel, and commenced a motion to quash the application. The Tribunal supported the motion. The worker then attempted to file further documents in Divisional Court, to in effect quash the Board's motion. At this point, staff in Divisional Court realized that the worker had been found to be a vexatious litigant by Lissaman J. in another action, pursuant to s.140 of the Courts of Justice Act. The Divisional Court refused to accept his materials unless he first obtained leave under s.140.

The Board and Tribunal then filed materials to request an order that the judicial review should not proceed due to the s.140 order. Justice Campell ordered that the judicial review be stayed until such time as the worker successfully appeals the s.140 order.

On November 26, 2004, the worker's motion for leave to appeal Justice Lissaman's order under s.140 was refused by Justice Horkin.

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

The worker and her sister were suspended for smoking at work. The sister reported an accident later that day, before the suspension took effect. The worker reported an accident within a few hours of returning after her suspension. The Panel reviewed the medical evidence and the testimony of the witnesses and denied initial entitlement to the worker. Both the worker and her sister (see *Decision 1509/02*, below) commenced separate applications for judicial review.

The Tribunal has filed its factum. At the end of the quarter the Tribunal was awaiting a date for the judicial review to be heard.

4. 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.

The Tribunal has filed the Record. Counsel for the worker has advised that a factum would be served shortly. At the end of the quarter the Tribunal was awaiting receipt of the worker's factum.

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

The worker, a car salesman, had a congenital lesion in his brain which was asymptomatic until 1993. In 1991 he suffered a head injury when the rear door on a van was accidentally shut on his head. The worker did not seek any medical attention for this injury. Eighteen months later the worker had a seizure, and alleged it was caused by head injury. The Panel denied the worker's appeal, finding there was no entitlement for the seizures.

The worker has brought an application for judicial review. At the end of the year the Tribunal was preparing its factum. It is anticipated that this judicial review will be heard in 2005.

6. Decisions Nos. 1022/02I (August 30, 2002), 1022/02 (December 9, 2003), and 1022/02R (August 18, 2004)

The Tribunal found the worker did not have entitlement for a bilateral left shoulder or left elbow condition. The worker retained new counsel who brought an application for reconsideration. The reconsideration was denied. The worker then commenced an application for judicial review.

After the Tribunal filed its record, counsel for the worker elected to adjourn the judicial review in order to bring a further application for reconsideration.

7. Decision No. 117/04 (September 27, 2004)

This right to sue application found the injured party was a worker, rather than an independent operator, and that the right of action was therefore taken away. Counsel for the worker has commenced an application for judicial review. The Tribunal has filed an appearance, and is waiting for the applicant to order the transcripts so the Record may be filed.

8. Decision No. 606/95 (June 23, 1997)

This application for judicial review included a number of complex factual issues involving entitlement for a worker. The Tribunal prepared a draft Record which was over nine thousand pages. However, counsel for the worker failed to perfect the application within the time set out in the Rules, and during this quarter the application was dismissed by the Divisional Court. The applicant now seems to have retained new counsel, who is considering whether to attempt to revive the judicial review.

Other Court Actions

Kohlhammer v. Workplace Safety & Insurance Appeals Tribunal et al

The Tribunal, the Ministry of Labour, and the WSIB were sued by a worker for \$500,000 in damages. The worker was self-represented. The reasons for the suit were not clear, but seemed related to the denial of his Tribunal appeal. The Attorney General agreed to represent the Tribunal and the MOL, and brought a motion to strike the action.

The motion was heard on December 4th, 2004. Justice Backhouse dismissed the worker's action. The endorsement states: "The plaintiff's claim for damages for "wage loss", "character assassination" and "intimidation" are not torts known to law. The statement of claim lacks the necessary elements for pleading fraud and false imprisonment as required under R.25.06(8) of the *Rules of Civil Procedure*. The statement of claim does not contain the material facts relied upon as required under Rule 25.16(1) of the *Rules*."

Stabryla v. Valli and Josefo

The worker had some slurry spilled on him at work in 1988. The worker subsequently claimed entitlement for psychotraumatic disability, which was denied by the WSIB. His appeal to the Tribunal was denied by a Panel of Josefo, Sherwood and Briggs in *Decision 583/02*.

The worker then commenced an action in Kirkland Lake Small Claims Court against an adjudicator of the WSIB in Sudbury and Tribunal Vice-Chair Jay Josefo. It appears the reason for the action is the worker's unhappiness with the denial of his appeal. The Tribunal and the WSIB have filed statements of defence.

D) Highlights of Decided Cases

Tribunal Jurisdiction (overpayment): Decision 2105 01 I2 considered the jurisdiction of the Tribunal to review Board overpayments to workers. This situation might arise where a worker is initially entitled to benefits and entitlement is subsequently reversed on appeal. Any benefits previously paid become overpayments. In these situations, the Board may forgive the overpayment, offset the overpayment against future benefits, or may pursue the overpayment in civil proceedings.

The Vice-Chair reviewed the judicial history and legislative history of the Tribunal's jurisdiction to review overpayments, under the *Workers' Compensation Act* and the WSIA. The Vice-chair found that the Tribunal retained its jurisdiction under the amended pre-1997 Act for pre-1998 injuries, including jurisdiction to review overpayments.

The Vice-Chair then reviewed Section 126 of the Workplace Safety and Insurance Act, which requires the Appeals Tribunal to apply applicable Board policy for appeals heard after January 1, 1998. Briefly stated, Board Operational Policy 05-01-09 provides that the Tribunal has no jurisdiction for overpayments after December 1995. At this point, the Vice-Chair decided to refer Board Policy 05-01-09 to the Workplace Safety and Insurance Board for review pursuant to section 126(4) as the Policy may be inconsistent with the Act or is not authorized by the Act,

Hepatitis C Entitlement: Decision 1386/03 considered entitlement for Hepatitis C and mental stress arising out of the worker's employment as a counsellor for mentally disabled adults. The worker's duties included cleaning up after residents and their "intimate personal care." The worker testified as to his exposure to vomit, feces and blood. He was also subjected to biting, scratching, and exposure to blood on his skin. The Panel noted that it could not be known with certainty how the worker was exposed to Hepatitis C. There was evidence supporting workplace exposure from personal and intimate care provided to clients with Hepatitis B, evidence of overlapping risk of Hepatitis B with Hepatitis C, and evidence of the exposure timeline. There was no evidence of non-work exposure. The medical evidence also established that the worker's Hepatitis C was a material or significant contributing factor to his emotional breakdown and psychological condition. The Panel allowed the appeal.

Tribunal Jurisdiction – Employer Premiums: Decision 2477 01 considered the Tribunal's jurisdiction regarding departure fees. In this case, the employer was a successor corporation to 2 companies that previously transferred from Schedule 1 to Schedule 2. At the time of transfer, the companies each paid exit fees or special assessments to cover their portion of the Board's unfunded liability. In 1998, the WSIA changed the indexing factor used to pay benefits for future time periods, such that the estimate of the employer's share of unfunded

liability is no longer accurate. The employers unsuccessfully requested a retroactive adjustment to the departure fee payments and appealed the issue to the Tribunal.

The Vice-Chair found that the Board's duty is to maintain the insurance fund so as not to burden unduly any class of Schedule 1 employers in future years (s. 96 WSIA); the duty is only that the effect on rates not be 'undue'. The Vice-Chair found that the issue before it was really one regarding the design of the Board's rate setting policies and departure fee scheme and not one attacking the particular rates of the employers. Under the WSIA, section 123(2), the Tribunal does not have jurisdiction to consider matters under Part VIII of the Act. While the Tribunal can consider the individual merits of the employer's appeals, it appeared that relevant Board policy is properly applied in accordance with its terms. The facts did not constitute exceptional circumstances, but rather illustrated the numerous, ongoing contingencies that may effect a business over time. The Vice-Chair dismissed the appeal.