

Report to the Minister
under Section 18.2 (c) of the
Workers' Compensation Act

Submitted by the
Appeal Tribunal
March 21, 2003

Introduction

The tribunal is a quasi-judicial body authorized to hear final appeals from both workers and employers on compensation claim matters. Unlike its predecessor, the “board appeal panel”, the tribunal is independent from the Yukon Workers’ Compensation Health and Safety Board. It was established on April 1, 2000 as a result of legislative amendments recommended by the Task Force review of 1999. Normally, there are six part-time members on the tribunal: a neutral chair and alternate chair, two members representative of employers and two members representative of workers. Cabinet appoints tribunal members after Ministerial consultation with employers, workers, and their representative organizations. The chair of the appeal tribunal sits as a non-voting member of the board and is responsible for the administration of the tribunal. Currently, the chair and one of the employer representative positions are vacant, awaiting Cabinet appointments.

The work of the tribunal is accomplished by three-person appeal committees established by the Chair for each appeal. Each committee must have both an employer and a worker representative who vote to decide the appeal. A decision requires two agreeing votes. In addition, the chair or alternate chair is the third, but non-voting, member of the committee and acts as the presiding officer on the appeal. Appeals only deal with compensation matters and are of two types: either (1) appeals of adjudicator’s decisions to suspend or reduce compensation under s. 7 of the *Act* or (2) appeals of hearing officer’s decisions on all other compensation matters under s. 17. In addition, a decision of the President with respect to employer access to a worker’s claim file may be dealt with during an appeal by the committee. The tribunal does not have jurisdiction over assessment or occupational health and safety matters.

One of the highlights of the 2002 year was the report of Canada’s Auditor General on her special examination of the Yukon workers’ compensation system. The tribunal is pleased that Ms. Fraser found that “the appeal process has been strengthened” as a result of the establishment of an independent appeal tribunal. The Auditor General also said that the tribunal has “enhanced the independence, objectivity, and rigour of the appeal process”. Her recommendations with respect to the tribunal are reviewed later in this report.

Reporting to the Minister

Under section 18.2 (c) of the *Act*, the appeal tribunal must report to the Minister no later than 90 days after the end of each calendar year with respect to:

- (i) the number of appeals heard, resolved* and pending before the appeal tribunal,
- (ii) the activities of the appeal tribunal generally, and
- (iii) such other matters as the Minister requests.

This report addresses (i) and (ii) for the period from January 1, 2002 to December 31, 2002.

Under Yukon's legislation, there are no time limits for commencing appeals, whereas other jurisdictions do have limitation periods. As a result, the majority of the appeals the tribunal heard in its first two years dealt with older claims going as far back as 1982. These claims were more lengthy and complex than later appeals that the tribunal began to hear in the latter part of 2001. Complex and longstanding claims take more time to prepare, to hear, and to resolve. For 2002, only four of the tribunal's 19 decisions dealt with claims filed in the past two years. Of the rest, five appeals dealt with claims 10 years or older, the oldest being one from 1983. All except one of the remaining appeals were of claims filed 5 to 10 years ago. Therefore, the bulk of the tribunal's appeal work in 2002 did not deal with recent claims. The Auditor General recommends that the Minister responsible for workers' compensation consider a legislative amendment to limit the time period for commencing appeals to reduce uncertainty currently in the system because decisions may be appealed at any time.

Number of Appeals Heard, Resolved* and Pending in 2002

The tribunal heard 23 appeals in 2002. Of these, 19 were "resolved" when decisions were reached in this reporting period. Four other appeals were "pending" at the end of 2002 -- that is, these appeals were in adjournment, awaiting further necessary information.

Outcome of Appeals Resolved in 2002

Appeals allowed - 14 out of 19
No jurisdiction - 1 out of 19
Appeals denied - 3 out of 19
Reconsideration requests by the board: 1 out of 19 (denied)
Appeals directed to be reheard by the board: 3
Percentage of decisions overturned on appeal: 73.7%

In addition, at the end of 2002, six appeals were scheduled for hearing in January and February of 2003.

Average Length of Time from Hearing to Decision: 37 working days

The tribunal is required by law to provide decisions with written reasons within 45 working days of the closing hearings. The average length of time from closure of the hearing or from receipt of the last document (on a documentary review) to release of the decision was 37 working days.

There is no deadline in the *Act* for setting down hearings or hearing appeals after the Notice of Appeal is filed with the tribunal. All tribunal appeals to date have been brought by workers. As the majority of workers are represented by the workers' advocate, the

tribunal must set its hearing schedule taking into consideration the availability of the workers' advocate office staff. Sometimes a lapse of two months occurs between the date that a Notice of Appeal is received to the day a hearing begins. Generally speaking, tribunal members have more available hearing dates than do workers' advocate staff. Nonetheless, most tribunal members are part-time appointees who hold regular full-time jobs or run their own businesses. The tribunal makes every effort to accommodate the availability of parties, particularly those travelling long distances, and for this reason has held a hearing on a weekend day.

Activities of the Appeal Tribunal

Special Examination

The board of directors of Yukon Workers' Compensation Health and Safety Board requested an examination in accordance with section 104 of the *Workers' Compensation Act*. It was performed by the Office of the Auditor General of Canada whose report was released on September 10, 2002 with recommendations for change.

The Auditor General recommends that the Minister consider removing the *Act's* requirement that the chair of the appeal tribunal sit as a non-voting member on the board of directors; instead representatives of the tribunal and board could meet regularly to discuss issues of common concern. There were two reasons for this recommendation: (1) the *Act* makes no distinction between the responsibility of a non-voting board member (tribunal chair) and voting board members; and (2) the participation of the tribunal chair in board discussions could create the perception that the tribunal is not independent. On this last point, the chair sought clarification from the special examination team (director, Eric Hellsten). He explained that the report did not recommend that the tribunal chair absent herself from board meetings without legislative amendment -- the Legislature has determined that the chair of the tribunal "shall sit" as a non-voting member of the board under current section 18.1(4) and imposes fiduciary duties on all members.

In another key recommendation, the Auditor General says the tribunal needs to develop performance measures and use them to report on its performance. The tribunal agrees with this recommendation, and, as the Auditor General noted had begun work on this project at the time the report was released. The tribunal expects to have performance measures in place by June 2003, using the tribunal's own resources and building on the work done in other jurisdictions on performance measures.

The report also notes that the tribunal's decisions in 2000 and 2001 were made within the required time limit (45 working days from the closure of the appeal hearing) and are usually written "clearly and comprehensively".

Although the Auditor General reports that there is a comprehensive and independent process in place to deal properly with workers' claims, she notes that appeals "remain inherently costly". Inherent costs include the Yukon law's requirement that all appeals be

heard by three person appeal committees (whereas in some other jurisdictions, the majority of appeals are heard by one decision-maker). In addition, in most cases, the tribunal provides oral hearings for the parties, which are more costly than documentary reviews routinely provided in some other jurisdictions. It is also worth noting that the tribunal assumes both fixed and variable costs. Variable costs such as honoraria, teleconference charges, and professional fees depend on the number of appeals heard in a calendar year; whereas line items such as rent and staff salary are fixed, regardless of the number of hearings which occur in the year. In other words, workload has a substantial effect on the tribunal's costs but the number of appeals is not under the tribunal's control.

New Appointments and Departures

Karen Waroway, member representative of workers, resigned from the appeal tribunal effective August 1, 2002. Brian Werlin was appointed on August 1, 2002 for a term of three years as a member representative of workers. Janet Wood, Alternate Chair and Joseph Radwanski, one of the members representative of workers, were both re-appointed effective August 29, 2002 for three-year terms. The other two members - Heather MacFadgen, Chair and Jan Stick, member representative of employers -- were initially appointed for three- year terms which expired on February 28, 2003. Training for tribunal members is dealt with in Appendix B to this report.

Costs for the Appeal Tribunal

The costs of the tribunal are paid out of the compensation fund. Since the tribunal came into existence in 2000, expenditures have been well below anticipated budget projections - 60% of what was projected in 2000, 67% of what was projected in 2001, and 73% for 2002. The tribunal sets its budget after consulting with the worker's advocate as to how many appeals his office expects to undertake in the coming year. For the first three years, the number of appeals the advocate projected did not materialize. In addition, every budget includes line items for judicial review and independent medical examinations (even though neither materialized as actual costs for the past three years).

Budget 2002

The budget for the appeal tribunal from January 1, 2002 to December 31, 2002 was **\$240,431** and included provision for participation in the special examination by the Auditor General of Canada [a once-only cost]. The budget was based on a **projection of 20 appeals** for 2002. In fact, the tribunal heard 23 appeals in this year.

Actual Costs for Appeal Tribunal 2002

According to variance reports and financial documents currently available from the board, the actual costs for the appeal tribunal up to the end of December 2002 were **\$174,375**, substantially below budget (approximately 73% of what was projected). In addition, the tribunal did more hearing work (heard 23) than it had projected it would in its budget (20). However, only 19 decisions were issued, due to adjournments in some of the hearings. Nonetheless, the tribunal also did other work, such as that related to the board's section 18.5(1) application to the Supreme Court that the tribunal had not predicted it would do at the time the 2002 budget was prepared.

It should also be pointed out that all the current tribunal members volunteer some of their time because the honoraria policy of the board and the tribunal's own rules with respect to honoraria limit the activities and hearing preparation time for which members may be paid.

Estimated Costs for 2003

The appeal tribunal's 2003 estimated costs are \$240,134, slightly lower than last year's. This figure is based on 20 hearings for the 2003 calendar year. In addition, the tribunal has made provision in its budget to deal with the *Act* review legislated to begin in January of 2003. The tribunal's estimates were prepared in October 2002 and submitted to the board at the December 12, 2002 Board Meeting. The board passed its budget (which included costs for the appeal tribunal) on February 11, 2003 after approving interim spending to 25% of total budget early in 2003.

Looking Ahead

Act Review

The Minister announced before the year-end that the Honourable Patrick Rouble, Member of the Legislature for Southern Lakes, will be responsible for the *Act* review required under section 105.(1) of the Yukon's legislation. This section requires that the review specifically consider eight topics including "deeming", indexing of benefits, and possible expansion of the definition of "disability". Section 105 also allows the Minister to direct that other matters be considered as well. This furnishes an opportunity to address recommendations made by the Auditor General in her special examination report of 2002.

Cases before the Courts

To date, there has been no judicial review of tribunal decisions although the *Act* expressly provides that parties can apply to the Supreme Court for judicial review. However, on December 4, 2002, the board filed a petition in Yukon's Supreme Court

with respect to two tribunal decisions -- #35 and #40. These two decisions deal with the difference between the terms “impairment” and “disability” in the 1986 *Act* as well as a rating schedule by board order (1987/003) and a board policy (No. 24) for rating impairment. This petition to the court was made under section 18.5(1) of the current *Act* which allows either the board or tribunal to apply for judicial determination as to whether a board policy is inconsistent with the *Act*. The tribunal looks forward to the court’s guidance with respect to the legality of policy No. 24: unlike tribunal decisions, the court’s ruling will set a precedent, clarifying and deciding this question for both the tribunal and board in all cases.

Another important decision expected in the coming year is the Supreme Court of Canada’s ruling on whether Nova Scotia workers’ compensation legislation limiting benefits for chronic pain is constitutional under the Canadian *Charter of Rights and Freedoms*. The Court will also decide whether the appeal tribunal had the jurisdiction it exercised to determine the constitutionality of the Nova Scotia legislation. This case was argued in the fall of 2002 and judgment was reserved but will likely be rendered in 2003. It will set an important precedent for the law as it relates to chronic pain in all jurisdictions in Canada. The Court’s decision may overturn the 2001 lower court decision by the Nova Scotia Court of Appeal.

Appendix A --

Objective for Appeals Under the Act and Tribunal's Goals

One of the objectives of the *Workers' Compensation Act* is that the appeals procedure be simple, fair, accessible, with minimal delays [section 1.1)(e)]. The work of the tribunal must meet these objectives. In addition, the tribunal has established the following goals:

- ensure that workers, dependents of deceased workers and employers are treated with compassion, respect, and fairness;
- set down appeals for hearing as soon as possible and with adequate time for the parties and appeal committees to be adequately prepared (such preparation includes (a) obtaining disclosure of the file; (b) preparing a file summary and book of documents, where necessary, for easy reference to relevant materials from the file during the hearing and (c) reviewing the entire record before the hearing);
- write good quality decisions in a timely manner;
- ensure that tribunal members have adequate training for hearing and deciding workers' compensation appeals; and,
- accomplish the tribunal's work as cost effectively as possible.

Workload

Currently tribunal members work 4 to 5 full days a month. The chair works up to three days a week (inclusive of her duties as a non-voting member of the Board and other administrative work). The tribunal's current workload for members is 2 -3 hearings a month. By law, each appeal requires a three-person appeal committee.

Facilities and Staff

The tribunal has a small office at 419 Range Road, a fully accessible building with excellent hearing facilities. A full-time appeals officer staffs the office. All tribunal decisions are public and available from the tribunal office, the public register at the board's office, and online at www.wcb.yk.ca.

Appendix B

Training for Tribunal Members

The new member representative of workers, Brian Werlin, received in-house training on the *Workers' Compensation Act* and tribunal procedures from the Chair. In addition, he attended two hearings as an observer. He also attended training workshops on administrative law in October 2002 at BCCAT's annual conference in Vancouver. He requested orientation to the board's programs and staff, including a session with the Medical Consultant but this could not be arranged for 2002. Mr. Werlin has a background in administrative law as the former Director of Employment Standards Branch, Government of Yukon. Given this background, much of his training was based on written materials, and included reviewing all tribunal decisions and transcripts from earlier training sessions with Terence Ison (author of *Workers' Compensation Law in Canada*). He also reviewed an orientation binder prepared by tribunal staff.

Yukon College Training Program

Yukon College provided a training course on January 25, 26 and February 1, 2, 2002 for members of tribunals and other boards and commissions with quasi-judicial responsibilities. These sessions covered the foundations of administrative law and the conduct of fair hearings as well as a workshop on decision writing. The decision-writing component was presented by Mr. Justice Veale of the Yukon Supreme Court. The Alternate Chair, Janet Wood, as well as tribunal members, Jan Stick and Don Inverarity attended.

Conference Attendance

Both Mr. Radwanski and Mr. Werlin attended the 7th Annual Education Conference of the British Columbia Council of Administrative Tribunals (BCCAT) in October of 2002. This conference had sessions on decision-making and writing, expert evidence, weighing evidence, dispute resolution processes in administrative justice, as well as a session on privacy issues. Attempts to obtain orientation for the new member to Yukon Workers' Compensation Health and Safety Board have not been successful because of conflicts in scheduling. However, orientation to board departments and the claims adjudication process will occur in 2003.

Canadian Council of Administrative Tribunals ("CCAT")

In December 2001, Heather MacFadgen, Chair of the Appeal Tribunal, was elected to the national Board of Directors of CCAT. Ms. MacFadgen and Janet Wood, Alternate Chair attended the annual National Conference on Administrative Justice in Ottawa in June

2002. The theme of the conference was “The Maturing of Canada’s Administrative Law System - An Accessible and Effective Way to Deliver Justice” and was attended by over 325 participants. Ms. Wood and Ms. MacFadgen attended different sessions in order to maximize the training opportunity for the tribunal -- all information is routinely shared with the rest of the tribunal. For the first time, this conference included a sectoral workshop on workers’ compensation which Ms. MacFadgen organized and moderated. The topics for that workshop were: (1) Surviving and Making the Most of Change - Whether it Be Swift or Slow by Ms. Maryantonett Flumian, Associate Deputy Minister and Vice-Chairperson, Human Resources and Development Canada and (2) Tribunal’s Common Law and Statutory Powers to Reconsider - Why and When by Mr. John Steeves, then Chief Appeals Commissioner, WCB, Appeal Division, British Columbia with commentary by Ms. Katherine Carrigan, Chief Appeal Commissioner, Workers’ Compensation Appeals Tribunal, Nova Scotia.

Other Sessions

A local law firm, Miller Thomson, provided an administrative law seminar in Whitehorse on June 6, 2002. Topics covered were: bias and conflict of interest; role of a chair; conduct of a hearing; role of independent tribunal counsel; and use of experts. Three tribunal members and the appeals officer attended this seminar. In addition, the tribunal appeals officer received training in the computer software used for financial and statistical databases and programs.

It is worth noting that local training opportunities for Yukon administrative tribunals are very limited. For instance, Yukon College only offers the BCCAT program in “Foundations of Administrative Justice” -- the only introductory course of its kind in the Yukon -- once every two years. Therefore, conferences can be an important source of ongoing training for tribunal members.