

Report to the Minister
under Section 23(c) of the
Workers' Compensation Act
R.S.Y. 2002, ch. 231

Submitted by the
Appeal Tribunal
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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.

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. 8 of the *Act* or (2) appeals of hearing officer’s decisions on all other compensation matters under s. 20. 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.

Reporting to the Minister

Under section 23 (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, 2003 to December 31, 2003.

Under Yukon’s legislation, there are no time limits for commencing appeals, whereas other jurisdictions do have limitation periods. The Auditor General recommended 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 2003

The tribunal heard 24 appeals in 2003. Of these, 19 were “resolved” when decisions were reached in this reporting period. Five other appeals were “pending” at the end of 2003 -- three of five were in adjournment, awaiting further necessary information and the remaining two were heard late in December, with no decision rendered before the end of the year. Of the 24 appeals brought forward in 2003, 20 were represented by the workers’ advocate’s office.

Outcome of Appeals Resolved in 2003

Appeals allowed - 10 out of 19
No jurisdiction - 1 out of 19
Appeals denied - 6 out of 19
Appeals withdrawn - 2 out of 19

[Appeals directed to be reheard by the board: 3]
Percentage of decisions overturned on appeal: 58.82%

In addition, at the end of 2003, three appeals were scheduled for hearing in January of 2004.

Average Length of Time from Hearing to Decision 31 days

The tribunal is required to provide decisions with written reasons within 45 working days of the closing of 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 31 working days. In 2002 the average 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.

Previous to 2003, workers had brought all appeals forward to the tribunal. However, the tribunal received one appeal from an employer in 2003. As well, employers attended hearings more frequently in 2003 than in previous years. The tribunal makes every effort to accommodate the availability of parties for attendance at hearings.

Activities of the Appeal Tribunal

Special Examination

A special examination was performed by the Office of the Auditor General of Canada and their report was released on September 10, 2002 with recommendations for change.

The Auditor General recommended 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. As part of the tribunal's response to issues for the Act Review, they submitted that the chair be removed. To date, this has not happened.

In another key recommendation, the Auditor General stated that the tribunal needed to develop performance measures and use them to report on its performance. The tribunal agreed with this recommendation, and adopted two performance measures. These are as follows:

1. Time from receipt of Notice of Appeal to the opening of the hearing.

The intent of this measure is to monitor the period of time that a Notice of Appeal was received in the tribunal office to the opening of the appeal hearing. It is incumbent on the tribunal to ensure a party's appeal is heard in a "timely" manner.

The time frame for this was from 28 to 152 days, with an average of 59.5 days from the time the notice was received until the opening of the hearing. The tribunal's goal is to hear an appeal within 55 working days of the receipt of notice.

2. Time to release of decisions from the close of the hearing.

The intent of this measure is to ensure that tribunal decisions are released in a timely manner after the close of a hearing. OIC 1999/2000 requires that decisions be released no later than 45 working days from the close of the hearing.

Release of decisions from the close of the hearing has been from 5 to 48 working days with an average of 32.3 working days. The tribunal's goal is to release a decision from the close of the hearing to 30 days.

There are variables that may affect performance measures.

The tribunal has to be vigilant when scheduling hearings to ensure that all parties are available. Hearings require a three-member appeal committee. Sometimes members have a conflict of interest with either the worker or the employer. Most appeals are brought to the tribunal by the workers' advocate's office. Their availability must be taken into consideration when setting dates.

New Appointments and Departures

There were several changes to the tribunal in 2003. This led to delays in scheduling of hearings because of gaps in time when members resigned or their appointments ran out and new members were appointed. In one case, the newly appointed Chair indicated a conflict of interest with two appellants. Scheduling was delayed until an Alternate Chair was appointed and trained.

Heather MacFadgen's appointment as Chair expired on February 28, 2003. Ed Sumner, was appointed as Chair on March 31, 2003 for three years. Janet Wood, Alternate Chair tendered her resignation effective August 30, 2003. Hank Leenders was appointed as the Alternate Chair on October 22, 2003 for a period of three years.

One of the members representative of employers, Don Inverarity's appointment expired on July 9, 2003. Larry Watling was appointed as a member representative of employers on July 21, 2003 for a three-year term. Jan Stick, member representative of employers was re-appointed for a three-year term on April 8, 2003.

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, 73% for 2002 and 78% for 2003. The tribunal sets its budget after determining how many appeals it expects to undertake in the coming year. Expenses for legal services increased significantly this year. With three new members being appointed, the cost for training increased for 2003.

Budget 2003

The budget for the appeal tribunal from January 1, 2003 to December 31, 2003 was **\$240,431**. The budget was based on a **projection of 20 appeals** for 2003. In fact, the tribunal heard 24 appeals in this year.

Actual Costs for Appeal Tribunal 2003

According to variance reports and financial documents available from the board on February 23, 2004, the actual costs for the appeal tribunal up to the end of December 2003 were **\$186,701**, substantially below budget (approximately 78% of what was projected). In addition, the tribunal did more hearing work (heard 24) than it had projected it would in its budget (20). However, only 19 decisions were issued due to adjournments in some of the hearings and hearings being scheduled in December, with decisions rendered in the new year.

Estimated Costs for 2004

Originally the appeal tribunal estimated their operating costs for 2004 at \$254,175, slightly higher than last year's. This figure is based on 20 hearings for the 2004 calendar year. Again, the tribunal allowed for higher legal services costs and the need for training of new members. The tribunal's estimates were prepared in early September 2003 and submitted to the board. At the November Board Meeting, the board requested that all

departments within the board as well as the workers' advocate and the tribunal reduce their budgets. Tribunal Members decided to reduce their budget projections for travel/training.

In November 2003 the tribunal resubmitted their 2004 estimated operating costs in the amount of \$243,953, a reduction of over \$10,000. The board passed its budget (which included costs for the appeal tribunal) on November 25, 2003.

Training for Tribunal Members

In May 2003, tribunal members and support staff attended a two-day in-house training seminar prepared and presented by Mr. Leigh Gower (since appointed to the Yukon Supreme Court). The first day of training was dedicated to basic information that included topics such as bias, independence, fairness, evidence, conducting a fair hearing, and writing decisions. On the second day of the session a mock hearing was conducted, with members drafting reasons for the decision.

Canadian Council of Administrative Tribunals (“CCAT”)

In June 2003, Ed Sumner, Chair of the Appeal Tribunal, and Janet Wood, Alternate Chair attended the 19th annual National Conference on Administrative Justice in Quebec. The theme of the conference was “Investing in Knowledge”. The conference was attended by all types of administrative tribunals, not just workers' compensation. Some of the sessions dealt with performance indicators, independence/objectivity, improving tribunals, unreasonable delay in hearings, unjust rulings, and retirement at age 65.

Conference Attendance

The Chair, Ed Sumner, and two members, Jan Stick and Larry Watling attended the 8th Annual Education Conference of the British Columbia Council of Administrative Tribunals (BCCAT) in October of 2003. The conference was titled “Surviving and Evolving through Administrative Justice Reform”. This conference was attended by all administrative tribunals; it was not specifically tailored to workers' compensation tribunals. Most of the attendees were lawyers. Mr. Sumner, Ms. Stick and Mr. Watling all agreed that this conference was not beneficial to the appeal tribunal. Also, Yukon tribunal members are only part-time compared to attendees from other tribunals that were employed on a full-time basis. Course titles were misleading and did not reflect what the session was geared to. Many of the sessions dealt with Human Rights issues.

Yukon College Training Program

Yukon College provided an “Advanced Decision Writing” course on September 10 and 11, 2003 for members of tribunals and other boards and commissions with quasi-judicial responsibilities. The focus of these sessions was to assist tribunal members to acquire and retain writing skills directly relevant to them. Individual feedback was provided on the tribunal's written decisions. The Chair, Ed Sumner, as well as tribunal members,

Jan Stick and Joe Radwanski attended.

Other Sessions

In October tribunal members and support staff joined an audio conference concerning the Supreme Court of Canada ruling on the Rights of Disabled Employees in the Martin Case. The Supreme Court ruled that Nova Scotia workers' compensation legislation that limited benefits for chronic pain was unconstitutional under the Canadian *Charter of Rights and Freedoms*.

Looking Ahead

Act Review

Phase 1 of the Act Review was created with the participation of key stakeholders and other interested parties. The review panel compiled issues mandated for review into a discussion document and invited stakeholders and other interested Yukoners to submit their comments on any and all of the topics listed. The appeal tribunal responded to five issues regarding the Act Review. These included: process of dealing with information, (board) administration's standing at appeal tribunal hearings, jurisdiction of the appeal tribunal, relationship between the appeal tribunal and the board, and annual reporting of the appeal tribunal.

Changes to the Act (Consolidated)

Changes in the numbering of the *Workers' Compensation Act* caused some confusion in the latter part of 2003. Although the board was aware of the changes, the tribunal and workers' advocate were not notified until November that the *Act* had been consolidated. On December 2, 2003 the Board approved Policy No. GC-12, "2002 Revised Statutes of the Yukon Transition Policy".

Justice and Merits Policy

In December, a draft Justice and Merits Policy was posted on WCB's website. As per the *Workers' Compensation Act*, consultation must be conducted, as the policy would affect claims for compensation. A year earlier, on December 3, 2002, the administration's Planning, Evaluation and Policy Branch (PEP) provided more specific Policy Options for a proposed "Decisions Based on Merit," Policy.

In January 2004 the appeal tribunal forwarded a letter to the board stating that rather than establishing the policy pursuant to section 108(a) of the *Workers' Compensation Act*, the board could accomplish its stated objectives by issuing a directive to its employees. The tribunal voiced their concerns that the enactment of a policy would be binding upon the tribunal pursuant to section 24(3) of the *Act*. The establishment of this policy would detract from both the perception of and the actual independence of the tribunal. As stated in a number of decisions, the tribunal's independence and arms length relationship with the board is fundamental to the discharge of their duties. Binding the tribunal to the proposed policy will certainly impact the tribunal's ability to determine decisions made

by the board's administrative arm. As well, any fettering of discretionary powers interferes with the tribunal's independence and its ability to decide its own procedures. The tribunal did not support the creation of this policy. However, the policy was approved by the Board of Directors and became effective on February 17, 2004.