

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

Submitted by the
Appeal Tribunal
March 11, 2002

Introduction

The Yukon's new workers' compensation Appeal Tribunal has been in operation for almost two years. It was established under Bill 83 amendments to the *Workers' Compensation Act* and came into existence on April 1, 2000. A special Task Force played an important role in the amendment process. It recommended that the final level of appeal on compensation claims be heard by an appeal body independent of the Board so that the governance and appellate (adjudicative functions) are separate. The Task Force said, "if the Board continues to have the dual role of adjudicating final claims of appeal and of ensuring that the compensation system remains financially solvent, concerns about conflict of interest, real or perceived, will never be effectively addressed. Separation of the two roles is the only way to make sure that concerns respecting bias are eliminated."

The tribunal is a quasi-judicial body authorized to hear final level 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. 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. The Minister responsible for the *Act* appoints tribunal members after consultation with employers, workers, and their representative organizations. The Chair of the Appeal Tribunal sits as a non-voting member of the board. The costs of the tribunal are paid out of the compensation fund.

The tribunal has a small office at 410 Range Road, a fully accessible building with excellent hearing facilities. The office is staffed by a full-time appeals officer.

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).

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.

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, 2001 to December 31, 2001.

Under our legislation in the Yukon there are no time limits for bringing appeals, as there are in other jurisdictions. 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 often more lengthy and complex than the more recent appeals we have begun to hear in the latter part of 2001. Complex and longstanding claims take more time to prepare to hear and resolve. In the tribunal's first year, they represented a significant challenge for a new appeal body where some members had to learn a complex area of the law very quickly. The tribunal's current workload for members is 2 –3 hearings a month. By law, each appeal requires a three person appeal committee.

All our decisions are public and available from the tribunal office, the public register at the board's office, and online at www.wcb.yk.ca.

Number of Appeals Heard, Resolved and Pending in 2001

1. Total Number of Appeals Heard: 20

Number of Appeals Directed to be Reheard by the Board: 5

Number of "reconsiderations" of decisions heard: 1

The appeal tribunal heard 20 appeals in 2001. In four of these, the tribunal found it had no jurisdiction to decide the appeal (see page 6 of this report for the steps the tribunal took to solve the jurisdiction problems.) In the remaining appeals decided in 2001, eight decisions on appeal of either the hearing officer or internal review committee were reversed and varied; 5 were reversed; and one was upheld. In addition to these 14 appeals, there were five "rehearings" of decisions previously dealt with by the appeal tribunal. In these cases, the Board stayed the original tribunal decision and directed the appeal tribunal to rehear the appeal under section 18.3 (8) of the *Workers' Compensation Act*. Rehearings proceeded, with the consent of the

parties, as document reviews (with written submissions) rather than as oral hearings. In three other instances, the workers withdrew all of their appeals commenced before March 31, 2000 to the Board. An appeal panel of the Board originally heard two of these appeals. The Board, on all occasions, motioned to rescind and set aside the appeal panel decision. In addition, at the request of the board, one appeal was reopened and varied to clarify the wording of the order to pay interest. Lastly, one appeal was set down for hearing on a CL-35 matter but was withdrawn when the Board rescinded the CL-35 Average Weekly Earnings Policy Statement Application document in August, 2001.

2. Number of Appeals *Resolved: 19

For the purpose of this report, “resolved” means a decision has been released. Two appeals were heard in November and December; decisions were released on these in 2002. As well, the Board stayed a decision in November and directed it be reheard. The decision is pending on this rehearing.

3. Number of Appeals to Date in 2002: 5

Since the beginning of 2002, the appeal tribunal has heard five appeals. There are two more appeals set down for hearing in the remainder of the month of March.

4. Outcome of Appeals Resolved in 2001

Appeals allowed – 13 out of 20

Reopened and varied – 1

No jurisdiction – 4

Appeals Denied – 5 out of 20 (in 4 of these 5, the tribunal decided it had no jurisdiction to deal with the appeal)

Withdrawn – 1

[Pending – 2]

5. Average Length of Time to Hearing and to Decision: 25 working days

The tribunal is required by law to provide decisions with written reasons within 45 working days of the closing hearings. In two of the 2001 appeals, the appeal committee adjourned the hearing to wait for further necessary information. The adjournments delayed the release of those decisions. 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 **25 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. In 2001, the average length of time for all hearings, (including documentary reviews and those returned to the tribunal on a Board direction to rehear) from the time the tribunal received the Notice of Appeal or direction to rehear to the opening of the hearing was 52 working days.

The average length of time for rehearings as directed by the Board from the time the letter from the board was received in the tribunal office until the opening of the hearing was 35 working days.

While it is true that some time is required to prepare for a hearing (obtaining the file from the board [takes up to 10 working days]; preparing a file summary and book of documents; arranging recorder/facilities and available dates for members of the appeal committee, the parties and their representatives; reviewing the entire record), the tribunal is concerned about the length of time on some appeals between the day a worker asked for a hearing until he or she obtained one. The reasons for delays in setting down hearings are varied: adjournments due to illness, lack of an alternative employer member for almost two months after Mr. Ambrose's resignation from the tribunal; and in one case, a member's involvement as a decision-maker in an earlier appeal which was discovered very close to the date of the hearing (remedying this problem required a new appeal committee be struck and a new hearing date be set – the tribunal has taken steps to ensure that this does not happen again). In addition, the tribunal has recently set timelines for appeals proceeding as documentary reviews.

Activities of the Appeal Tribunal

New Appointments

Hank Ambrose, member representative of employers, resigned from the appeal tribunal effective May 15, 2001. Don Inverarity was appointed on July 10, 2001 for a term of two years as a member representative of employers. Appointments held by Janet Wood, Alternate Chair and Joe Radwanski, one of the members representative of workers, are due to expire on August 28, 2002. The other three members – Heather MacFadgen, Chair; Jan Stick, member representative of employers; and Karen Waroway, member representative of workers – are appointed for three year terms which expire on February 28, 2003.

Training for Tribunal Members

The new member representative of employers, Don Inverarity, reviewed written training materials prepared by the Chair and attended several hearings as an observer. On July 30, 2001 he accompanied Karen Waroway, member representative of workers, to a meeting with Board Member Barb Evans regarding proposed legislative amendments. He also attended an orientation for new members to Yukon Workers' Compensation Health and

Safety Board. In addition, he attended two training workshops provided in the November BCCAT [British Columbia branch of Canadian Administrative of Appeal Tribunals] conference. The topics of these workshops were “Bias” and “Evaluating Witness Creditability”. As well, Mr. Inverarity, the Alternate Chair, Janet Wood, and Jan Stick, member representative of employers, received three full days of training in January and February of 2002 through Yukon College’s sponsorship of BCCAT’s course on “Introduction to Administrative Law and Decision Making”. This training was arranged in 2001.

It is worth noting that local training opportunities for Yukon administrative tribunals are very limited. For instance, Yukon College only offers the BCCAT program once every two years. Therefore, conferences can be an important source of ongoing training for tribunal members.

Work on Jurisdiction/Legislative Amendment Proposals

In the spring of last year the tribunal was very concerned about problems with respect to its jurisdiction to hear appeals, particularly with respect to longstanding claims in place before the new legislation came into effect on April 1, 2000. The jurisdiction problems took several forms and with Minister Roberts’ encouragement at a meeting with the tribunal in the spring of 2001, the tribunal began to draft proposals for *Act* amendments to ensure that those appellants who wished and expected to have their appeals heard by the tribunal could do so. Minister Roberts had said that it would be best if such amendment proposals also had the support of the board. Therefore, during the fall some members of the tribunal and the board met to review and discuss the amendment proposals developed by the tribunal. In the meantime, the tribunal was able to solve some of the jurisdiction problems (but not all) by using a liberal interpretation of “justice and merits” provision of the *Act* (section 19.5) coupled with the staying of any earlier board appeal panel decision as well as the appellant’s withdrawal of his or her appeal to the board. For an example of the result, see Decision #18.

As a result of these developments as well as the workload of the board in particular and the tribunal also, both the board and tribunal decided to defer consideration of legislative amendment proposals. In addition, the Auditor General will report on his special examination of the workers’ compensation system in June of this year and may very well address the topic of jurisdiction problems in the current *Act*. (The tribunal has provided the Auditor General with our amendment proposals, at his request.)

Work on Procedures

The tribunal adopted Rules of Procedure for Claimant and Witness Travel on May 11, 2001. This was done to conform to changes made by the Board to its policy for claimant and witness travel. However, the Board took the view that the tribunal had no authority to pass rules which included a direction with respect to payment from the compensation fund. This matter is under review by the tribunal which has decided that removing

references directing payment from the compensation fund for witness and claimant travel from its rules will not interfere with the tribunal's procedural rule making with respect to claimant and witness travel.

The tribunal uses the "Hallmarks of Quality Decisions" as guidelines to achieve high quality decisions. The Appeal Division of the Workers' Compensation Board ("WCB") of British Columbia originally developed and published these standards and they were kindly shared with the tribunal by the Chief Commissioner of the WCB Appeals Division, John Steeves. The standards set out seven essential components for a good decision. They are attached as Appendix A to this report.

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. The tribunal supports the Chair's involvement in this organization. CCAT provides a forum and acts as a catalyst for discussion, education, research, and policy development in the field of administrative justice. It is a national, non-profit organization consisting of members, lawyers and staff of federal, provincial and territorial tribunals, and other persons interested in administrative justice issues. The Chair is most interested in CCAT's role in providing education to members of administrative tribunals and would like to see more of a focus on part-time members. Her involvement will allow her to use it as a resource for the appeal tribunal and also for other tribunals in the Yukon.

Conference Attendance

Four of the six members attended the British Columbia Council of Administrative Tribunals ("BCCAT") Annual Conference, "Achieving the Goals of Administrative Justice: Practical Approaches" in November of 2001. Members agreed that this was a useful conference and dealt with issues that are facing tribunals in all jurisdictions. Sessions members attended were Enhanced Mediation Skills, Assessing Credibility, Decision Writing, New Developments in Administrative Law, Issues for Part-time Tribunal Members, Quality Assurance, Managing Difficult Hearings, and Case Management/Information Systems. There were also informal roundtables and keynote plenary sessions (e.g., How Stakeholders View Administrative Tribunals). Members provided written reports and copies of handouts from the workshop sessions which were shared with tribunal members, Board members, and staff who did not attend the conference.

The Chair attended the CCAT annual conference held in Quebec City in June of 2001. The conference was attended by 340 administrative decision makers from across Canada and from around the world. Madam Justice L'Heureux-Dube of the Supreme Court of Canada delivered the keynote address on "Universal Values and Administrative Justice". The tribunal Chair attended workshops dealing with ethical conduct for administrative decision-makers as well as core competencies and performance appraisals for tribunal members. She was also part of a sectoral meeting for chairs of workers' compensation

tribunals from other Canadian jurisdictions (10 out of 12 represented), which was planned in conjunction with the CCAT conference.

Costs for the Appeal Tribunal

Budget 2001

The budget for the appeal tribunal from January 1, 2001 to December 31, 2001 was **\$289,868**. This budget was based on a **projection** that the tribunal would hear **25 appeals** in the year 2001. This figure was chosen as a result of discussions with the workers' advocate office.

It is worth noting that the budget contains both fixed and variable costs. Variable costs such as honoraria, telephone 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.

Actual Costs for Appeal Tribunal 2001

According to variance reports and financial documents (received February 12, 2001) currently available from the board, the actual costs for the appeal tribunal in 2001 were **\$195, 433**, substantially below budget (approximately 67% of what was projected). The tribunal spent less than budgeted by approximately \$94,000. In part, this is explained by the fact that the tribunal did less hearing work (only 20) than it projected it would in its budget (25). Nonetheless, the tribunal also did other work (e.g., legislative amendment proposals) that it had not predicted it would do at the time the 2001 budget was prepared.

It should also be pointed out that all the current tribunal members volunteer some of their time, because of the way that 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 they may be paid.

Estimated Costs for 2002

The appeal tribunal's 2002 estimated costs are \$240,431. This figure is based on a projection of 20 hearings for the 2002 calendar year. As noted earlier, the tribunal projected it would hear 25 appeals in 2001 but in fact heard only 20. Based on the workload for 2001, the tribunal projects it will hear 20 appeals for 2002.

The estimates were prepared in October 2000 and submitted to the board in November. They were presented at the December 6th, 2000 board meeting; however, the board had not passed this budget (which included costs for the appeal tribunal) by the end of 2001.

Coverage for Tribunal Members under the *Act*

An order-in council designating appeal tribunal members as workers employed by the Government of Yukon was passed on January 16, 2002. The order is deemed to have come into force on May 1, 2001. This O.I.C. ensures that members are covered under workers' compensation law should they suffer a work-related disability while performing their duties as tribunal members. Similar coverage is in place for WCHSB Board members.

Tribunal Staff

The tribunal evaluated its staffing needs in 2001 and decided that a full-time appeals officer was required. Accordingly a job description was prepared and submitted to the Public Service Commission for classification (received in June 2001).

The appeals officer, Vernna Johanson, manages the office of the tribunal, coordinates the hearings (including scheduling, preparation of file summaries and books of documents), and provides full executive administrative support to the part-time tribunal members.

Hallmarks of Quality Decisions

A good decision:

- _ clearly identifies the issues at the outset;
- _ identifies a clear set of relevant findings of fact drawn from the evidence;
- _ where there is conflicting relevant evidence, explicitly identifies the findings of fact on which the conclusion is based and the reasons for the findings of fact;
- _ responds to the relevant submissions and arguments;
- _ uses plain language where possible and uses technical and legal terminology in a manner consistent with other decisions;
- _ makes the panel's reasoning clear and understandable and leads to a logical conclusion that resolves the issues.

Though conflicts may occur during periods of development, over the long term a good decision supports established positions on law, medicine, science, and the interpretation of legislation, regulations, and policy.

A good decision is consistent with previous published appeal tribunal decisions unless the conflict is identified and the reasons for the departure are articulated in a coherent manner.