

**Workplace Safety and Insurance Appeals Tribunal**

**QUARTERLY REPORT**

**Production and Activity**

**For the Period**

**January 1 through March 31, 2002**

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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 *Worker’s 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, January through March 2002. It includes information on recent decisions, judicial review activity, and Tribunal administration. The Report also provides an update on recent activities with the Workplace Safety & Insurance Board, the Tribunal’s community involvement of the past three months, and reports on commitments made to the Ombudsman to reduce the Tribunal’s active inventory by the end of March 2002.

The Appeals Tribunal is pleased to note that this report marks the final quarter of the inventory reduction commitment to the Ombudsman. The target of 4000 active cases was achieved. Quarterly reporting will continue, likely in a modified format, and reflect the 2002 business planning emphasis on the inactive inventory while at the same time focussing on quality and service standards particularly in the resolution stream cases.

# Key Tribunal Activities

## A) Highlights of Decided Cases

Highlights of Tribunal decisions released in the first quarter of 2002 are described below.

**Future Economic Loss (FEL):** Tribunal caselaw concerning FEL awards and the change of circumstances provisions in ss. 44 and 107(2) of WSIA continues to develop. Where a material change occurred in December, 1997, and persisted beyond January 1, 1998, this triggered a review of the worker's FEL award on the latter date, pursuant to s.44 of WSIA (Decision No. 1498/01). A material change of circumstance occurred where a worker turned 55 shortly after she was granted a FEL sustainability award because she met the criteria in s.43(8), and was entitled to elect benefits under that section as of that date (Decision No. 94/01).

**Loss of Earnings:** A number of Tribunal decisions have held that workers who refuse suitable work or fail to cooperate are disentitled to benefits in cases where they did not receive notice of non-cooperation from the Board (see for example, Decision No. 1900/00 and Decision No. 1646/01). Decision No. 2474/0012 took a different approach. It concluded that Operational Policy Manual Document Nos. 11-01-07 and 19-02-03, which require the Board to give written notice to a worker of the duty to cooperate prior to the suspension or reduction of benefits, were inconsistent with the Act. The matter was referred to the Board under s.126.

**Earnings Basis:** Decision No. 2727/01 concerns the calculation of earnings under WSIA for a student. The Board calculated her long term earnings basis using earnings in the two years prior to the accident, and denied LOE benefits after a certain date on the basis that she would be able to restore earnings in a SEB of a sports and recreation attendant. The Board relied on Document 4.1 of the Bill 99 Operational Policies Manual. The Vice-Chair did not follow a prior Tribunal decision, and concluded that Document 4.1 was not a policy in the absence of evidence that the Board of Directors approved the document. However, Document 4.1, if applicable, would still be a

guideline to be considered. The worker was a student within the meaning of the WSIA and her situation was analogous to that of a student working during the summer. Document No. 4.1 did not apply, as it did not have provisions regarding students, and on its face was directed to workers in general. The Vice-Chair concluded that LOE should have continued until the worker returned to university based on actual earnings at the time of the accident. While she was at university, benefits should be based on her full-time earnings during the summer and her part-time earnings during the school year.

**Right to Sue:** Under the Acts which precede WSIA, the Tribunal does not have the jurisdiction to take away rights of action of family members who are not dependants within the meaning of the Acts. Decision No. 2287/01 highlights the statutory change in s.27(2) of WSIA. This section states that if a worker's right of action is taken away under ss. 28 or 29, the worker's spouse, same-sex partner, child, dependant or survivors are not entitled to commence an action under s. 61 of the Family Law Act. In this case, as the worker's right of action was taken away, the rights of action of her family were also taken away, without the necessity of having to decide whether they were also dependants.

**Employer Issues:** In Decision No. 1005/01, a Panel had to consider the following constitutional question: Does the Board's Workwell program apply to a federally-regulated interprovincial busing company? It was not disputed that Workwell was constitutionally valid as it applied to provincial companies, nor was it disputed that WSIA applied to federal undertakings to the extent that it concerned compensation for injured workers. The test, as set out in Supreme Court of Canada cases, was whether Workwell intruded on a vital part of the management, working conditions, and labour relations of the federal undertaking. The Panel found that Workwell did intrude in this manner, as it affected all managers, workers and contractors in an ongoing way. The decision has binding application in this case only, as the Tribunal does not have jurisdiction to make a general declaration on a constitutional issue. Section 126 did not apply as there was no Board policy which addressed this issue.

**Occupational Disease:** Decision No.1558/98 found there was no causal link between the worker's acute myelomonocytic leukemia and his exposure to electromagnetic fields while working as an electrician. His exposure was considerably less than that experienced by hydro utility workers or linemen, and the epidemiological evidence concluded there was inadequate evidence of an association between this disease and exposure to electromagnetic fields. Decision No. 2061/01 contains an interesting review of the conditions for entitlement for lung cancer in gold miners in the Board policy.

**Time Limits:** If an appeal is withdrawn with prejudice, can it be reactivated later, and if so, under what circumstances? Decision No. 760/99F held that since a withdrawal is not a disposition or dismissal of the appeal, a worker may bring the appeal anew, subject to the time limits provisions. A reconsideration was not appropriate in this case as the worker had not alleged that the Tribunal's previous rulings were incorrect. An argument that the attempt to reactivate was not a new appeal, and therefore did not require a time limits extension, was rejected as this was not consistent with the intent of the Act that appeals be subject to considerations of timeliness. An application to extend the time limits was denied based on the circumstances of the case.

**Mental Stress:** The Tribunal is beginning to hear cases under s.13 of WSIA, which applies if the work events giving rise to the claim occurred after January 1,1998. In Decision No. 881/01, the worker claimed for depression that he alleged developed after an incident in 1998 when he was suspended for refusing to do work which the employer assigned to him. The Panel held that this type of claim was excluded under s.13 (5) of the WSIA as it related to the employer's decisions or actions relating to employment, including a decision to change the work to be performed, or working conditions, or to discipline the worker.

## B) Judicial Review Activity

In April of 2001 the Tribunal was served with an application for judicial review of Tribunal Decision 934/98, *Blue Line Taxi v. Samir Deek*. The Panel in that case found that a taxi driver was a "worker" within the meaning of the Act. The Applicant is challenging that finding, and also alleges that section 126 of the Workplace Safety & Insurance Act creates a new standard of review for Tribunal decisions.

A dispute about the appropriateness of some of the materials filed in Divisional Court by counsel for the Applicant was resolved on consent, and the Applicant served his amended Application Record and factum in March. The Judicial Review is scheduled for April 30<sup>th</sup>, in Ottawa.

In August of 2001 the Tribunal was served with an application for judicial review in *Peterborough Civic Hospital v. Chambers*. The case involves an application under s. 17 of the Workers' Compensation Act on whether the right to sue has been taken away. The worker had a compensable injury, and alleges that an operation subsequent to his

injury caused further damage. The Tribunal's decision took away the worker's right to sue the hospital, the nurse, and a student nurse, but not against the doctor or the college where the student nurse was attending. The worker brought the application for judicial review.

This application was unusual in that the Tribunal had not released a decision at the time it was served with the judicial review. The Tribunal subsequently released Decision 1902/01.

The Tribunal served its responding factum. Following service of the Tribunal's factum, counsel for the doctor and college indicated that they intended to bring a counter application for judicial review. At the end of the review period the Tribunal was waiting for service of the materials for this counter application, which will be heard with the original application.

Acting pursuant to the Tribunal's Code of Conduct for Representatives, the Chair of the Tribunal suspended the right of a paralegal worker's representative to appear before the Workplace Safety & Insurance Appeals. The paralegal brought an application for judicial review challenging the Chair's decision.

The Tribunal was served with the application in March. The application was brought pursuant to Rule 38 of the Ontario Civil Practice and section 6 of the Judicial Review Procedure Act, which is a procedure used in cases of urgency. Following discussions with the paralegal's solicitor, it was agreed that it would be more appropriate to bring the application to the Divisional Court under Rule 68. At the end of the review period the Tribunal was awaiting delivery of the Applicant's factum pursuant to the procedure outlined under Rule 68.

In another case which was noted in the last Quarterly Report, the Tribunal was served with an application for judicial review of the Tribunal Decision of *Malandruccolo v. Workplace Safety and Insurance Appeals Tribunal* (Tribunal Decision 1105/99). The vice-chair denied the worker's appeal of a FEL sustainability award based on the worker's earnings potential. It is not clear at this point what aspect of Decision 1105/99 the applicant will be challenging. The Tribunal has filed its Record of Proceedings, and is still awaiting service of the applicant's factum.

A lawyer representing an injured worker filed a Notice of Appeal of Tribunal Decision 2746/01. Since there is no provision in the legislation or Rules of Practice authorizing such an Appeal, the applicant's lawyer was persuaded that it would be more appropriate to pursue a reconsideration of the Tribunal's decision, and discontinued the Notice of Appeal.

The Tribunal was served with subpoena requiring a Tribunal mediator to attend a criminal trial scheduled for May 3. The worker has been charged in respect of two affidavits he submitted during a mediation at the Tribunal. It is alleged that the affidavits are forgeries. Although Tribunal employees are not compellable to testify or produce documents in any proceedings, it has been decided that certified copies of the affidavits will be turned over to the police on a voluntary basis, and the Tribunal will contest the subpoena.

A Tribunal employee has been sued in Small Claims Court concerning a standard letter she wrote to a worker concerning an appeal before the Tribunal. The worker (plaintiff) claims that the letter constitutes harassment. Tribunal Counsel brought a motion to dismiss the claim as disclosing no reasonable cause of action, based on the statutory immunity from such actions set out in section 179 of the WSI.A. The motion was successful, and the action has been dismissed.

## C) Administration

The Tribunal's public floor at 505 University Ave. closed in November 2001 for renovations. During this time, the Library moved to a temporary location. Construction was completed in late March 2002, and the Library opened to the public in new space on the 7<sup>th</sup> floor on April 16, 2002.

A Tribunal in-house training session occurred on February 4<sup>th</sup>, 2002. In the morning, staff presented adjudicators with information about the Tribunal's intranet features directed at OICs. The afternoon session was a medical topic relating to diabetes and stress.

In March, a training session for both adjudicators and staff offered information regarding occupationally induced cancers.

## D) Communications

**Web site** ([www.wsiat.on.ca](http://www.wsiat.on.ca)): In January 2002 the Tribunal's total page hits numbered 57,408. In February and March the total page hits numbered 60,657 and 57,815 respectively. The Tribunal's decision search feature receives the most interest.

**Public Information Sessions:** During the first quarter of 2002, Tribunal staff and adjudicators visited Sudbury to provide information about the Tribunal's inventory reduction, process changes and to hear about the community's recent experiences with the Tribunal.

For its first anniversary, a public consultation was launched for the Notice of Appeal process, to end in April 2002. The consultation notice was posted on the Tribunal's web site, and mentioned at information sessions across the province.

The Tribunal Chair, Ian J. Strachan, spoke at the WSIB Appeals Branch Annual Conference in January.

In March 2002, the Tribunal provided its 2001 Annual Report to the Minister of Labour for review and tabling in the Legislature.

## E) WSIAT/WSIB Activities

Tribunal staff met with WSIB Business Unit managers in March 2002, to discuss progress on facilitating the implementation of Tribunal decisions and to exchange information. This meeting was established as part of a Quality Loop initiative.

## F) Tribunal Production

The Tribunal's Action Plan (June 1999) and subsequent Production Plans, including November 2001, set targets and projections for caseload intake, production, and remaining caseload inventory.

The Tribunal implemented its Notice of Appeal (NOA) process on March 15, 2001. As a result of this implementation, the 'active' inventory, as defined in the Action Plan, is comprised of the NOA inventory, and the resolution stream inventory. The NOA process places responsibility in the hands of the parties and representatives to advance a case. The NOA inventory also includes cases that would previously have been closed as inactive by Tribunal intervention. These cases are currently being tracked as part of the Tribunal's case management, and are expected to close as abandoned at the end of the two year period parties are allowed to remain in the NOA stage.

At the end of the first quarter of 2002, the NOA inventory included 1,060 dormant cases which previously would have been closed as inactive. There are 1,699 cases in the NOA inventory which are proceeding to hearing ready status. At March 31, 2002 the resolution stream inventory numbered 2,256 appeals.

The active inventory for the purpose of reporting against the targets previously set to monitor backlog reduction performance totalled 3,955 for the first quarter of 2002.

## Productivity in Relation to Case Management Objectives

The Tribunal's inventory at March 31, 2002, including the NOA inventory and the resolution stream cases, totalled 3,955 appeals. Those cases in the NOA inventory that are considered dormant, where there has been no activity on the file toward hearing ready status, are excluded. The Tribunal began the new appeal application process, called the Notice of Appeal process, on March 15, 2001.

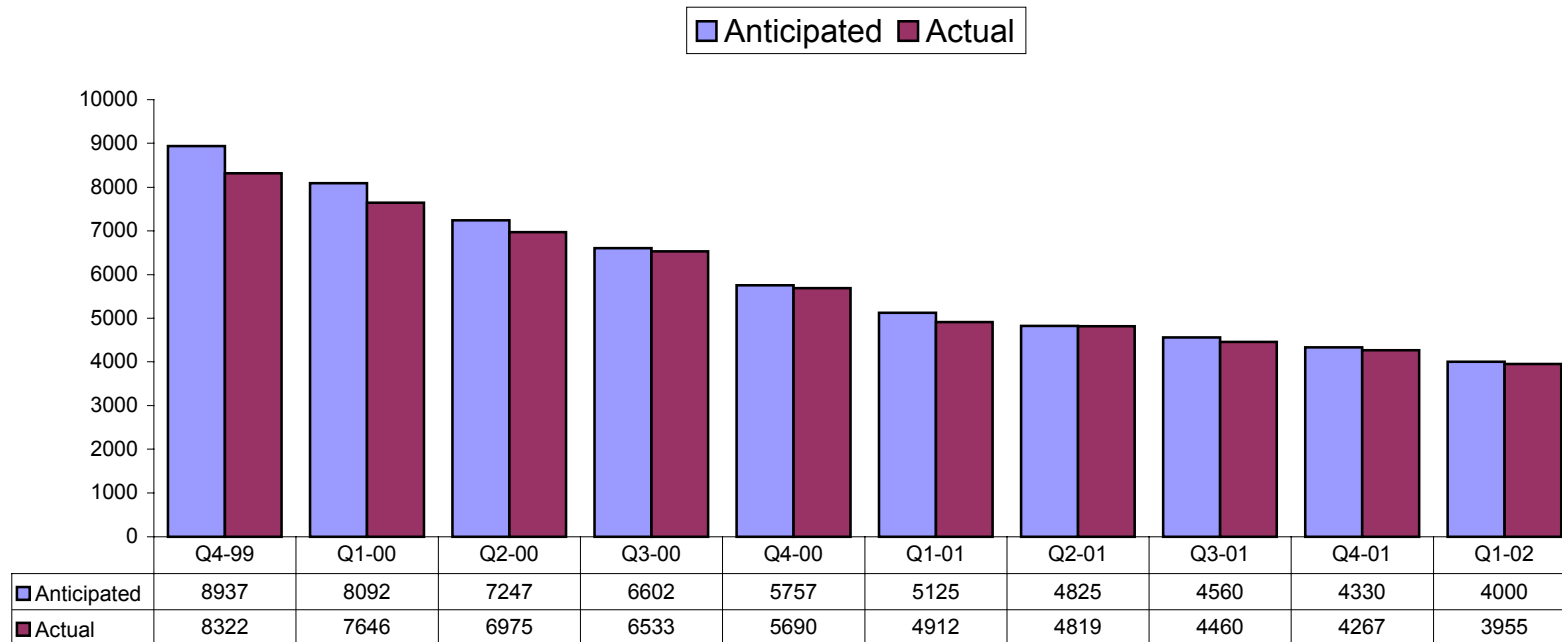


Figure 1. Appeals Inventory, Anticipated vs. Actual

For the period January 1 through March 31, 2002, the Tribunal’s incoming appeals numbered 1,342. As noted in previous quarterly reports and the WSI Caseload Inter-Agency chart, the incoming inventory statistics include appeals that “reactivate” from the Tribunal’s inactive inventory.

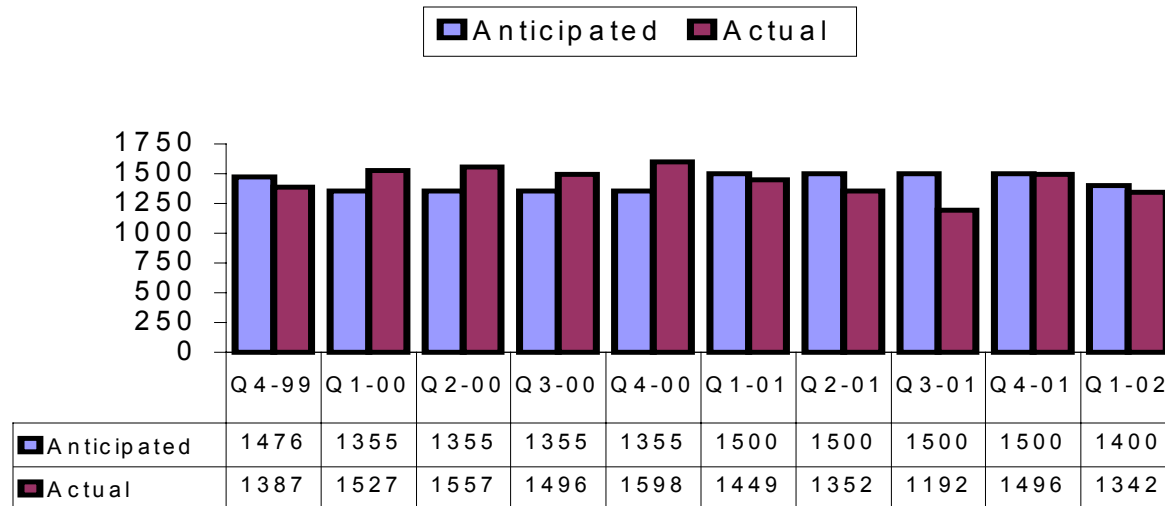


Figure 2. Incoming Appeals, Anticipated vs. Actual

During the first quarter of 2002, Tribunal pre-hearing and hearing dispositions totalled 1,231. The Tribunal actively monitors the disposition rate and the rate of incoming appeals to ensure that the inventory figure meets established targets. Cases in the NOA Inventory are not actively managed to seek case closures.

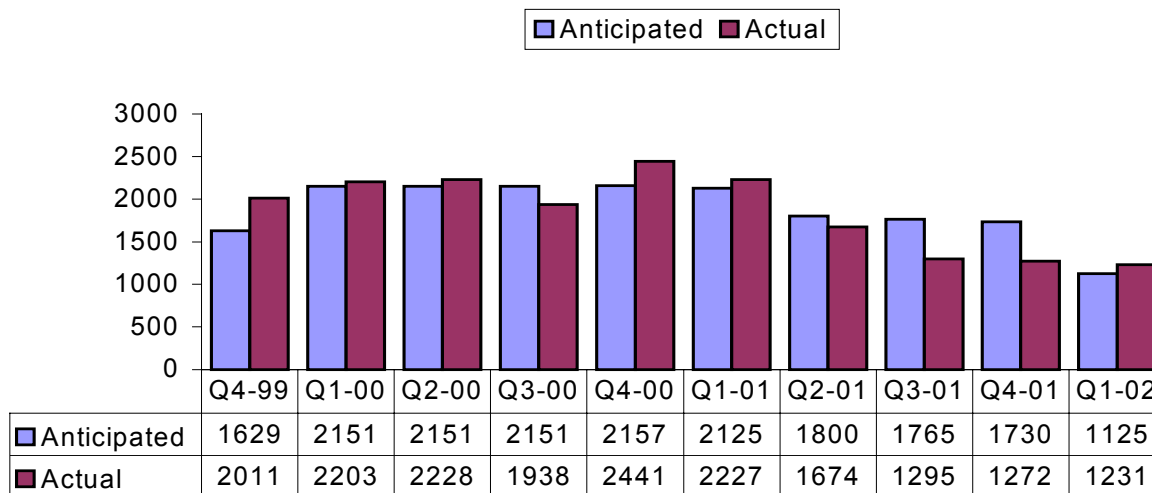


Figure 3. Dispositions, Anticipated vs. Actual

During January through March 2002, the Tribunal disposed of 425 appeals within its pre-hearing groups. This figure consists of appeals resolved through alternative dispute resolution, including mediation, early intervention and file review to confirm hearing-ready status. The comparatively low pre-hearing disposition count reflects the deactivation opportunities removed by the Notice of Appeal inventory. This figure also demonstrates an increased focus on complex appeals, file review and hearing preparation.

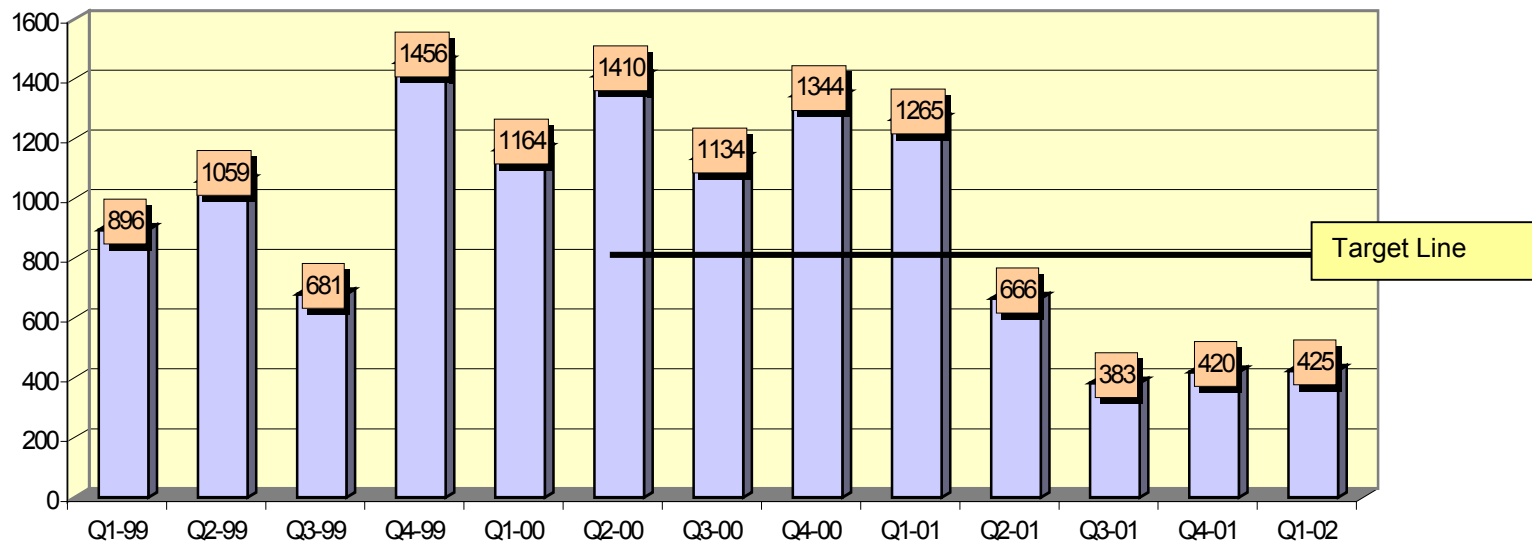


Figure 4. Dispositions from Pre-Hearing processes, including ADR

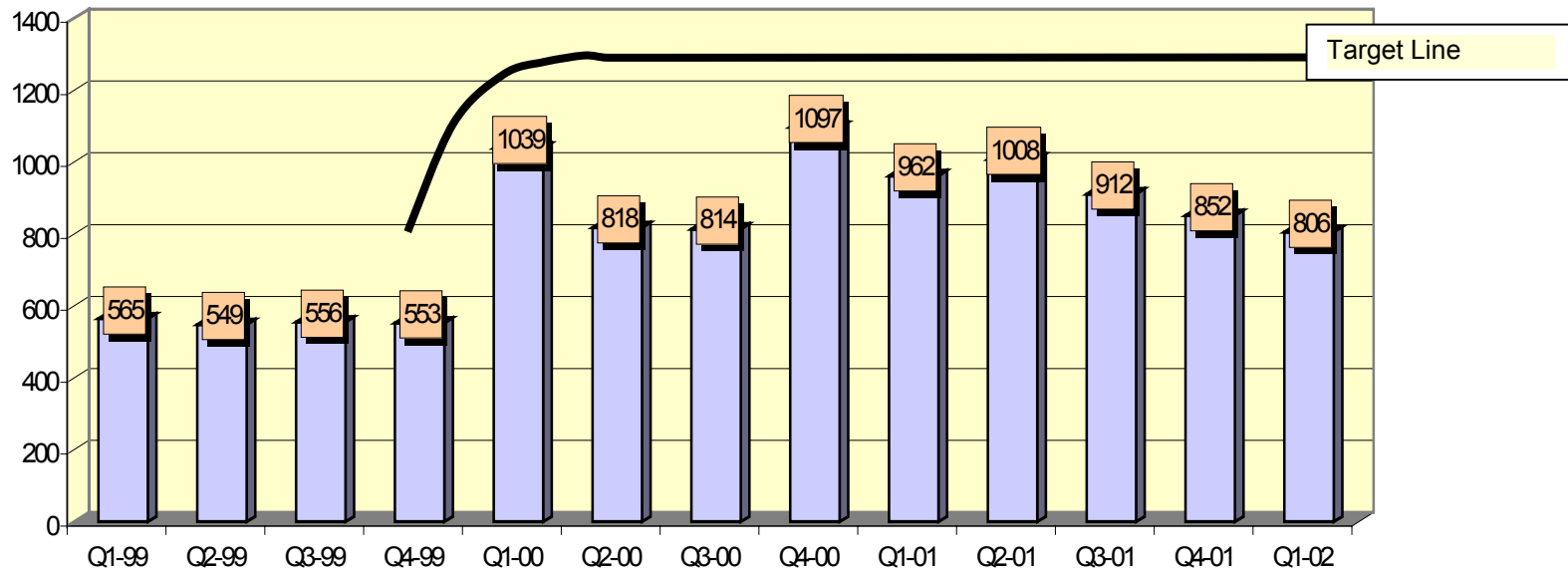


Figure 5. Dispositions from After Hearing processes.

In the first quarter 2002, after-hearing dispositions totalled 806. This included 762 Final Decisions from Vice-Chairs and Panels, and 44 other dispositions, typically achieved by being placed in the Inactive status following interim decisions. This continues to reflect consistent training efforts for newer adjudicators. Beginning on March 13, 2002 the Tribunal started to receive adjournment requests for the OWA and OEA due to the OPS OPSEU strike. OWA and OEA representatives attend approximately 25% of Tribunal hearings. This service disruption will continue to have an impact as Advisors prioritize their caseload to resume hearings.

Inactive Inventory: At the close of the first quarter, 2002, the Tribunal's inactive inventory numbered 8,140, a reduction of 96 from the previous quarter.

Inactive status was created in 1997 as a case management approach to remove dormant cases from active inventory. This process is subject to the Tribunal's Practice Direction On Inactive Files.

These figures are taken into account in the Tribunal's business planning, and expected reactivations are included in its projections as incoming appeals.

The Tribunal's assessments of the inactive inventory reveal that approximately 39% of the appeals entering the inactive inventory reactivate. The median age from the date an appeal was made inactive to the date it was re-activated is 125 days.