

Workplace Safety and Insurance Appeals Tribunal

QUARTERLY REPORT

Production and Activity

For the Period

April 1 through June 30, 2002

Table of Contents

The Quarterly Report.....	1
Key Tribunal Activities	2
A) Highlights of Decided Cases	2
B) Judicial Review Activity.....	4
C) Administration.....	7
D) Communications.....	7
E) WSIAT/WSIB Quality Loop Activities	8
F) Tribunal Production.....	9

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, April through June 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 caseload production.

Key Tribunal Activities

A) Highlights of Decided Cases

Entitlement: Decision No. 2094/00 contains an interesting discussion of epidemiological evidence about relative risk factors for lung cancer in patients with silica exposure, who have or do not have silicosis, and in those with smoking histories of various lengths. The worker had a substantial exposure to silica dust from a long career as a ceramic tile installer, and also smoked. He died of lung cancer, but did not have silicosis. The Panel concluded, on all the evidence, that his lung cancer resulted from smoking, not the workplace exposure. Decision No.383/97R3 concluded on the benefit of the doubt that the worker's diabetes worsened due to his use of NSAIDS for his compensable condition. There was conflicting medical evidence on this issue which was approximately equal in weight.

LOE: Under s.43 (1) of WSIA, co-operation in medical rehabilitation and return to work services is not a condition precedent to LOE benefits. There is entitlement when a worker has a loss of earnings due to a compensable injury, with co-operation being relevant to quantum of benefits (Decision No.349/02.) A worker was entitled to LOE benefits where his employer offered suitable work but he followed his doctor's advice not to accept it, and remained in contact with the Board and the employer (Decision No. 519/02)

FEL: In Decision No.108/02, the Board based the worker's R1 FEL award on the average of entry-level wages for the occupations of bookkeeper and loan officer. On appeal, the SEB of loan officer was found to be appropriate, but not the SEB of bookkeeper. The Vice-Chair noted that it is usual Board procedure to average two suitable jobs in the minor group. If there was only one suitable job, policy permits the decision-maker to identify more than one SEB based on the LMR assessment. The Vice-Chair reviewed the LMR assessment and identified customer service clerk as suitable. R1 was based on the average entry-level wages of a loan officer and clerk.

Employer Issues: Decision No. 900/97R granted an application for reconsideration by the Board of a decision which had accepted the parties' agreement that the appeal be withdrawn and that the Schedule 2 employer be relieved of the costs of the claim. The Hearing Panel had applied a fault test. This was inappropriate for an employer belonging to a Schedule 2 self-insured no-fault system where there is no statutory provision allowing for cost transfers based on fault. Given the responsibility to operate in a financially responsible and accountable way, financial relief for Schedule 2 employers should be dealt with by consultation and development of Board policy. Schedule 2 employers who want this type of relief could transfer to Schedule 1. Finally, there were particular concerns about providing this relief in the context of a mediated settlement between the parties.

Generally, Tribunal decisions have held that under Board policy, employers are not entitled to receive interest prior to January 1997. Decision No. 283/02 and Decision No. 422/02 describe exceptional circumstances where employers were granted interest prior to January, 1997. The former case involves interest payable due to a retroactive adjustment of an experience rating account, and the latter, due to a reclassification decision. Tribunal decisions have also held that changes in employer classifications are generally retroactive to the extent provided by Board policy, although there is some discretion as to the length of retroactivity. Decision No. 697/01 held that in the unique circumstances of that case, it would be manifestly unfair if the classification were to be made retroactive.

The Tribunal has released its first two cases concerning the penalty provisions in s.21 of WSIA for late filing of a notice of accident by an employer. Decision No.427/02 upheld the Board's assessment of a late filing penalty. Policy states that whether the employer has a pattern of late reporting is relevant when considering a penalty. The process adopted by this employer was likely to cause delay as the manager of the local office did not submit the form directly, but had to forward it to the corporate centre. Although there were no prior penalties, there were indications of prior delays, and the delay was excessive. Decision No. 428/02 held that there was no authority for a penalty to be imposed on an employer for late filing where the Board's ultimate denial of the worker's claim for mental stress under s.13 meant that there was no accident within the meaning of the Act. However, the Vice-Chair noted that if an employer fails to file a Form 7 on its own determination of whether an accident occurred, it runs the risk of a penalty if the claim is ultimately allowed.

B) Judicial Review Activity

The past quarter has been a busy one for applications for judicial review of Tribunal decisions, and other court-related matters. All the matters listed below were handled by lawyers in Tribunal Counsel Office.

1. In April of 2001 the Tribunal was served with an application for judicial review of Tribunal *Decision 934/98*. The Panel in that case found that a taxi driver was a "worker", rather than an independent operator, within the meaning of the *Workplace Safety & Insurance Act*. The taxi company challenged that finding, and also alleged that section 126 of the *Act* created a new standard of review for Tribunal decisions.

The judicial review was heard on April 30th, in Ottawa. The Divisional Court unanimously dismissed the application with costs.

The taxi company served an application for leave to appeal the Divisional Court decision to the Court of Appeal. In June, the taxi company formally advised that it would not pursue the application for leave.

2. 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 alleged that an operation subsequent to his injury caused further disability. 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 cross-application for judicial review. At the end of the review period the Tribunal was waiting for service of the materials for this cross-application, which will be heard with the original application in the fall.

3. Last year the Tribunal was served with an application for judicial review of the 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 is challenging. The Tribunal filed its Record of Proceedings, and is still awaiting service of the applicant's factum. The Divisional Court Registrar in London has advised that if the applicant fails to perfect the application shortly, it will be dismissed.

4. Acting pursuant to the Tribunal's Code of Conduct for Representatives, the Chair of the Tribunal suspended a paralegal worker's representative from appearing as a representative at the Tribunal. In March of 2002 the paralegal served the Tribunal with an application for judicial review challenging the Chair's decision.

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.

5. In May the Tribunal was served with an application for judicial review of *Decision 28/02*. *Decision 28/02* allowed a worker entitlement for a herniated disc. The application is brought by the worker's employer. Counsel for the applicant, the Tribunal and the worker have consented to adjourn this application while the applicant requests a reconsideration of *Decision 28/02*.

6. In June the Tribunal was served with an application for judicial review of *Decisions 1095/01* and *1095/01R*. These decisions denied entitlement to a worker for carpal tunnel syndrome. The applicant has ordered a copy of the hearing transcript, and once the transcript has been produced the Tribunal will file its Record of Proceedings.

7. The Tribunal released *Decision 1504/01* on February 28, 2002. This decision allowed an employer's appeal for classification of its business activity into a different rate group. As the Workplace Safety & Insurance Board had not processed the Tribunal's decision by June, the employer brought an application for judicial review of the Board's alleged decision not to implement the decision, and requesting an order for mandamus. The employer provided the Tribunal with a copy of the application, and asked if the Tribunal wished to participate as amicus curiae.

Following service of the judicial review, the Board commenced an application at the Tribunal to reconsider *Decision 1504/01*. The applicant has decided not to pursue the application for judicial review, pending the outcome of the reconsideration request.

8. Late in 2001 a solicitor representing an injured worker filed a Notice of Appeal of Tribunal *Decision 2476/01*. *Decision 2476/01* found the worker did not suffer a work related injury. Since there is no provision in the legislation or Rules of Practice authorizing an appeal of a Tribunal decision, the applicant's lawyer was persuaded that it would be appropriate to withdraw the Notice of Appeal.

In June 2002, counsel for the worker served the Tribunal with an application for judicial review. As the application failed to name the Tribunal as a respondent in the style of cause, the Divisional Court has advised the solicitor that he must amend and re-serve the application. At the end of the review period the Tribunal was waiting for service of the amended application.

9. The same solicitor who represented the worker in the judicial review of *Decision 2476/01* also served the Tribunal with an application for judicial review of *Decision 398/02*. This Decision found a worker did not have entitlement to benefits for a compensable injury to the worker's lower back. This application was defective for the same reasons as the application in *Decision 2476/01*, and the Tribunal is waiting for service of an amended application for judicial review.

10. The Tribunal was served with a subpoena requiring a Tribunal mediator to attend a criminal trial scheduled in May 2002. An injured worker had been charged in respect of two affidavits he submitted during a mediation at the Tribunal. It was alleged that the affidavits were forgeries. Tribunal employees are not compellable to testify or to produce documents received by them in any proceedings while acting in the course of their employment. However, since *the Freedom of Information and Protection of Privacy Act* permits disclosure of personal information to aid in law enforcement proceedings, it was decided that certified copies of the affidavits would be turned over to the police on a voluntary basis.

11. A Tribunal employee who was processing an appeal sent a standard form letter to an injured worker. The worker (plaintiff) claimed that the letter constituted harassment, and sued the Tribunal employee. Tribunal Counsel brought a motion to dismiss the claim as disclosing no reasonable cause of action, and also relied on the statutory immunity

from such actions as set out in section 179 of the *WSIA*. The motion was successful, and the action was dismissed with costs on the grounds there was no genuine issue for trial.

C) Administration

The Tribunal completed its evacuation of the basement area. The Records and Reproduction Departments are now located in various areas throughout the Tribunal. The Tribunal will acquire additional space in the Fall of 2002 at 505 University Avenue and this will provide a permanent space for the staff and equipment affected by the basement contamination.

The Tribunal's Library has re-opened on the 7th floor. Our library also houses the collection of the OLRB, BOI and PEHT. Hearing room space on the 7th floor continues toward readiness, and the majority of hearing rooms will be in use effective August 1, 2002.

Training sessions for Order-in-Council appointees were organized in April, May and June. Topics included the using the Tribunal decision search feature, thoracic outlet syndrome and employer topics.

D) Communications

Public Information Sessions - During the 2nd quarter of 2002, the Tribunal conducted information sessions in Windsor, Kitchener and Thunder Bay. Topics include process developments, the Notice of Appeal process and e-services, notably the publicly available decision search feature. The sessions were well attended. Dates scheduled for the Fall of 2002 will be posted on the Tribunal's web site.

In April, a number of Tribunal Vice-Chairs led discussion groups or participated as small group leaders for a joint Law Society of Upper Canada and Ontario Bar Association Continuing Education Day on Workers' Compensation. Daniel

Revington, Carole Prest and Zeynep Onen also spoke at this conference, which was attended by lawyers and lay advocates who regularly appear before the WSIB and the WSIAT.

Daniel S. Revington, General Counsel at the Workplace Safety and Insurance Appeals Tribunal, is this year's winner of the Ron Ellis Award. The award, which is jointly sponsored by LexisNexis TM Butterworths Publishing and the Ontario Bar Association, recognizes exceptional contributions to the field of workers' compensation.

The Tribunal Chair, Ian J. Strachan, Executive Director, Zeynep Onen and Linda Gehrke, Vice Chair, participated at the Canadian Council of Administrative Tribunals (CCAT) Conference in June.

E) WSIAT/WSIB Activities

The Appeals Tribunal and the Board's Legal/Policy Branch were invited to provide a presentation and answer questions at the Board pre-1990 section's educational teleconference.

WSIAT participated in a WSIB Quality Improvement initiative to reduce the amount of time for the Board to receive WSIAT decisions. Shortening this timeframe contributes to faster implementation of decisions and enables Board staff to efficiently answer phone calls regarding the decision's implementation status.

Tribunal and Board staff met on April 29th and May 28th to discuss various issues including file delivery, employer account status information, policy updates, posting the WSIB-WSIAT Quality Loop Framework and reviewed feedback from a revenue information training session held in February.

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 during the two year period parties are allowed to remain in the NOA stage.

At the end of the second quarter of 2002, the NOA inventory included 1484 dormant cases which previously would have been closed as inactive. There are 1649 cases in the NOA inventory which are proceeding to hearing ready status. At June 30, 2002 the resolution stream inventory numbered 2267 appeals.

The active inventory total used to monitor backlog reduction performance totalled 3916 for the second quarter of 2002.

Productivity in Relation to Case Management Objectives

The Tribunal's inventory at June 30, 2002, including the NOA inventory and the resolution stream cases, totalled 3916 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.

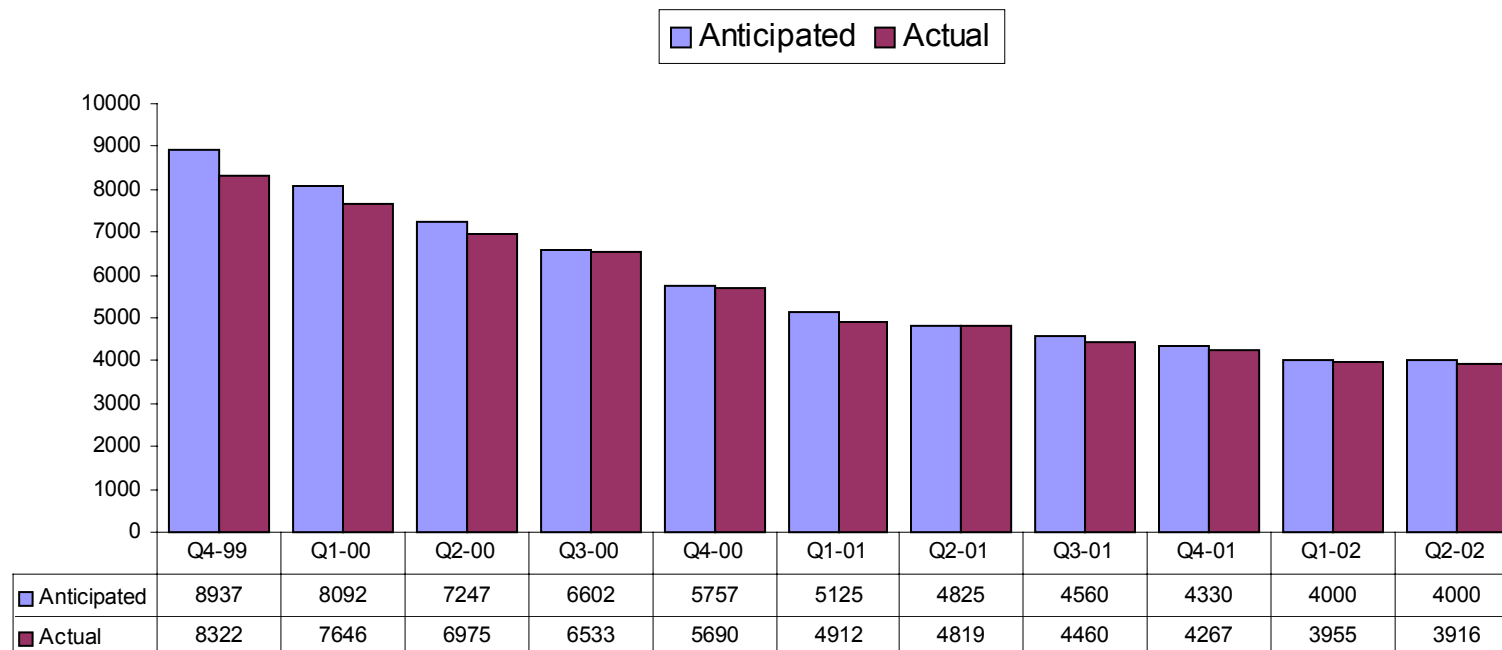


Figure 1. Appeals Inventory, Anticipated vs. Actual

For the period April 1 through June 30, 2002, the Tribunal’s incoming appeals numbered 1267. As previously reported, the incoming inventory statistics include appeals that return or “reactivate” from the Tribunal’s inactive inventory.

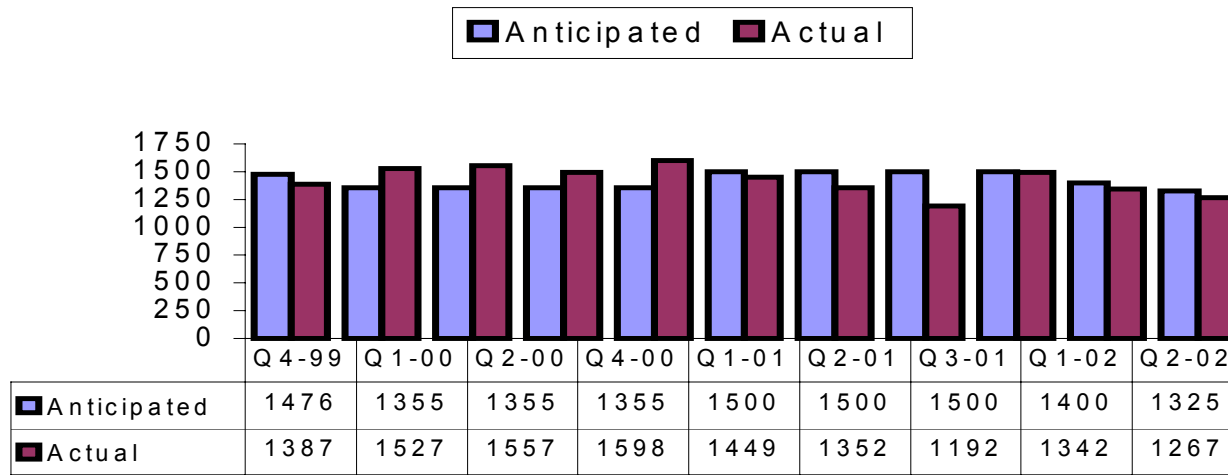


Figure 2. Incoming Appeals, Anticipated vs. Actual

During the second quarter of 2002, Tribunal pre-hearing and hearing dispositions totalled 884. 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.

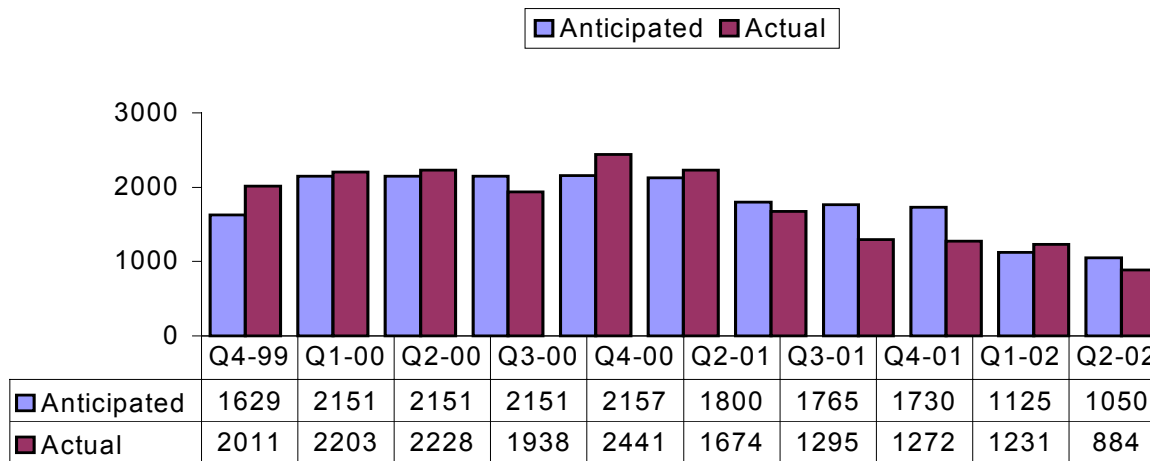


Figure 3. Dispositions, Anticipated vs. Actual

During April through June 2002, the Tribunal disposed of 370 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 process, introduced in March 2001. This figure also demonstrates an increased focus on complex appeals, file review, hearing preparation and inactive inventory reduction projects.

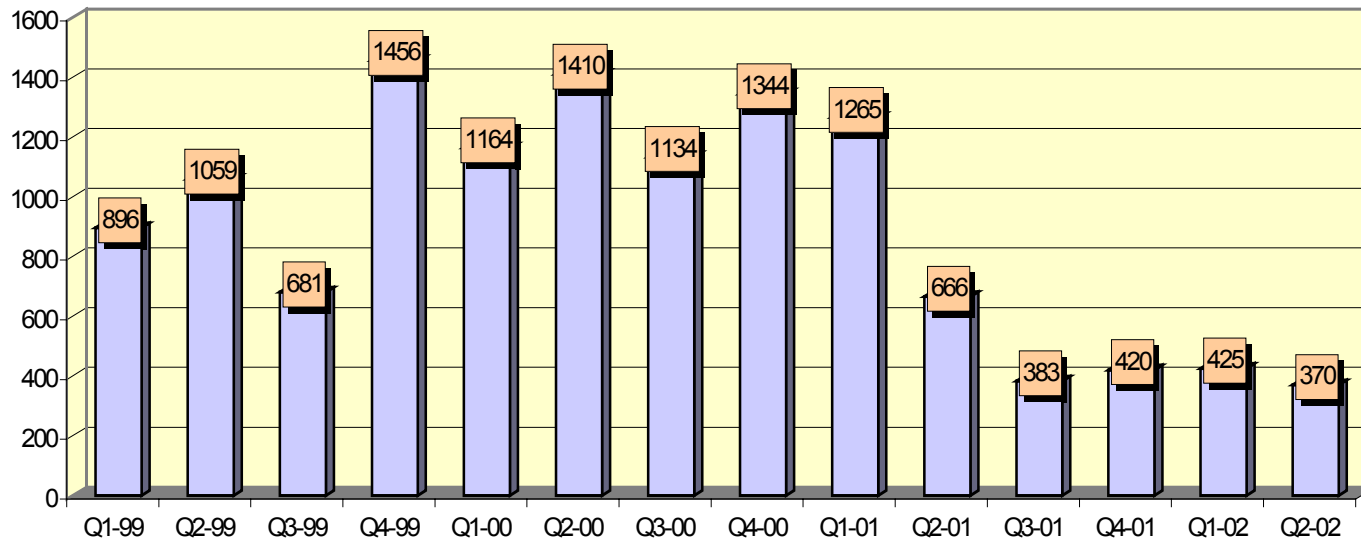


Figure 4. Dispositions from Pre-Hearing processes, including ADR

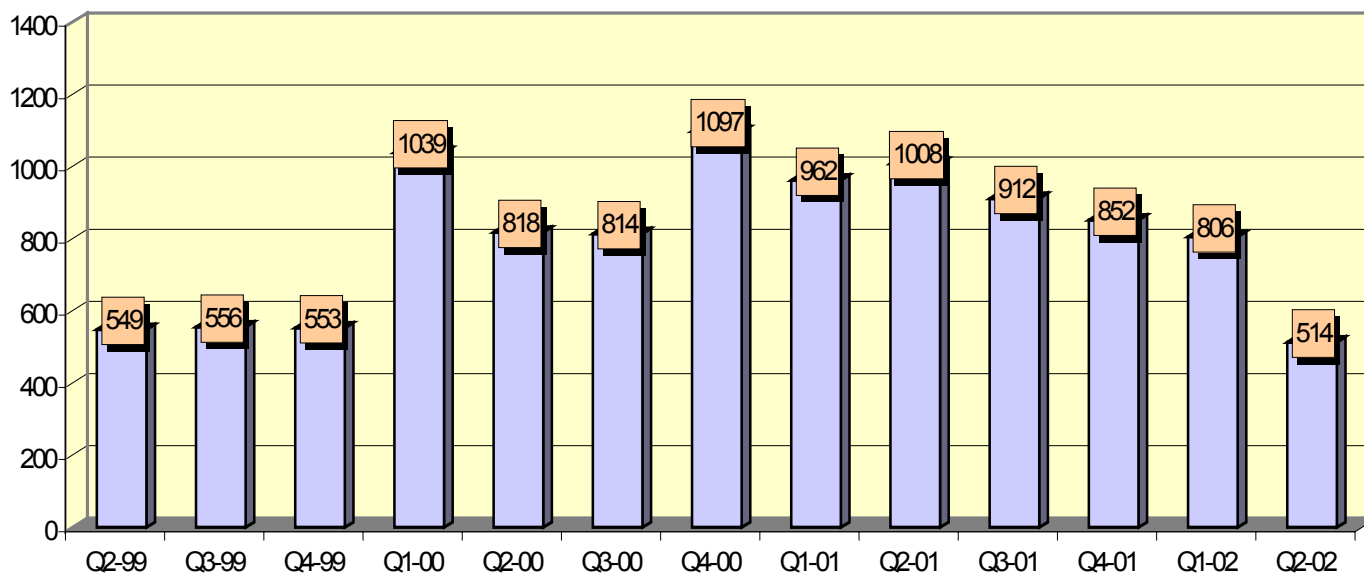


Figure 5. Dispositions from After Hearing processes.

In the second quarter 2002, after-hearing dispositions totalled 514. This included 476 Final Decisions from Vice-Chairs and Panels, and 38 other dispositions, typically achieved by being placed in the Inactive status following interim decisions. The OPS OPSEU labour disruption (March 13 to May 3, 2002) resulted in 70 adjourned hearings as OWA and OEA representatives attend approximately 25% of Tribunal hearings. If these hearings had proceeded, a number of final decisions would have resulted.

Inactive Inventory: At the close of the second quarter, 2002, the Tribunal's inactive inventory numbered 7872, a reduction of 266 from the previous quarter. This is the 4th quarter where the inactive inventory has reduced. Over 60% of the inactive cases are over 2 years old. It is unlikely that these appellants are planning to proceed with the appeal.

During the 2nd quarter, 318 appellants contacted the Tribunal to continue or re-activate their appeal, representing 4% of the previous quarter's inactive inventory of 8138. These reactivations accounted for 25% of the quarter's incoming appeals. Reactivations are taken into account in the Tribunal's business planning, and expected reactivations are included in its projections as incoming appeals.

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. The use of inactive status has declined significantly in comparison to previous reports, and in the second quarter of 2002 deactivations number only 233 cases.

Inactive Inventory Reduction Project: 800 cases have been selected into the reduction project and by June 30th, 192 were closed.