

Workplace Safety and Insurance Appeals Tribunal

QUARTERLY REPORT

Production and Activity

For the Period

July 1 through September 30, 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, July through September 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

Loss of Earnings (LOE) under WSIA: Decision No. 609/02 is the first case to consider the Board's s.126 Direction concerning the requirement in Board policy that workers be notified of their non-cooperation and its possible consequences, prior to the reduction or suspension of benefits. The Board issued the Direction in response to Decision No.2474/0012's finding that the policy was inconsistent with the Act and the ensuing s.126 referral to the Board. Decision No.609/02 agreed with the Board's Direction that the notice provisions in the policy provide a fair procedure to the worker and are not inconsistent with the Act. In this case, the worker's intentional frustration of the return to work process prevented the employer from offering suitable work. Considering the merits and justice of the case, the Panel waived the usual notice requirement as it would be manifestly unfair to the employer to strictly apply the notice provisions.

What happens when the SEB cannot be completed within 72 months of the accident? In Decision No.784/021, a LMR service provider recommended a particular SEB, and the Board found it was not suitable. It appeared that the Board was concerned that since the worker would be in LMR at 72 months and therefore receiving full LOE, the Board would have to pay full LOE until the worker was 65 because of the limited review provisions. Submissions are being sought from the Board.

There has been one case concerning CPP and WSIA. Decision No.183/02 confirmed the Board's decision to deduct CPP benefits payable to a widow of a deceased worker and orphans benefits paid to his children when calculating survivor benefits payable to the widow for herself and her children under s.48(23) WSIA.

Future Economic Loss (FEL): Whether the Tribunal has jurisdiction over FEL commutations after the enactment of WSIA was discussed in Decision No.3490/00. The Panel held that the Tribunal does not have jurisdiction, contrary to what prior decisions have held.

There is developing caselaw on the duration of benefits that can be ordered by the Tribunal in light of the repeal of the FEL review periods and the more flexible reviews in WSIA. In Decision No.498/01R, an employer sought reconsideration, arguing that the hearing Panel exceeded its jurisdiction by awarding full FEL benefits beyond May 1999 until the worker reaches 65. The worker had appealed a Board decision granting FEL awards up to April, 1999. The hearing Panel had awarded the ongoing benefits on the basis that the worker's situation had not changed, and pursuant to ss. 44 and 107 WSIA, the benefits could continue. The reconsideration was denied. The Tribunal noted that the WSIA amendments effectively changed the issues on appeal by replacing the FEL reviews with more flexible reviews and preventing reviews after 60 months except in extremely limited circumstances only. Accordingly, the issue could be viewed as ongoing FEL entitlement. Since there was no change in circumstances, there was no issue to return to the Board, and no error by the hearing Panel.

How to calculate FEL at the R2 review continues to be addressed. Decision No.2632/01 noted that there is not a consensus in Tribunal decisions as to whether R2 FEL determinations should use a point-in-time approach or a projection approach to calculating a worker's earning potential. The Panel concluded that a point-in-time calculation is appropriate. The objective of a R2 determination is not to reflect a worker's earnings potential over the balance of his working life, but to calculate the difference between net average earnings before and after the injury. Pre-injury earnings, D1 and R1 are based on points in time, and there was no legislative basis to calculate R2 differently.

Right to Sue: Section 126, which requires the Tribunal to apply Board policy in appeals, does not apply to right to sue applications, as they are not appeals. However, Board policy should still be given weight, particularly where the plaintiff first claimed and was denied benefits. It is desirable to avoid different results on the same issues, whether they arise out of appeal or application (Decision No.755/02).

Employer Issues: In Decision No.197/01, the employer appealed the Board's refusal to reduce the accident frequency in its CAD-7 cost statement. The Vice-Chair held that the employer was implicitly arguing that there was something wrong with the CAD-7 rules. Any inequity was a feature of the design of the experience rating system, and the Tribunal did not have jurisdiction over this since January 1, 1998 under WSIA.

There are two interesting NEER cases. Decision No.1081/96 upheld the Board's refusal to remove all costs of an accident from an employer's NEER account where a worker was assaulted by a customer and both the worker and the employer were blameless with respect to the accident. Decision No.2284/01 discusses the application of SIEF relief to a NEER account where the original employer was purchased and continued as an amalgamated company.

Pensions: Decision No. 1075/00 considered whether a pension can be reduced to reflect an improvement in a worker's condition. The Panel held that since Board policy allowed for redetermination of MMR in situations where the worker's condition is likely to improve after treatment, then a pension can be confirmed or reduced after treatment. The power to reduce a pension is to be used sparingly and in a fair and non-arbitrary manner.

Occupational Disease: The Tribunal had to decide a number of complex occupational disease claims including whether a machinist's leukemia was due to work place exposure to varsol containing benzene (Decision No.357/00), whether a furnace worker's bilateral cataracts were due to infra-red light in a copper refinery (Decision No.1660/98), and whether lung cancer was due to exposure to hexavalent chromium at an aircraft parts manufacturer (Decision No.1724/98).

B) Judicial Review Activity

The past quarter has again been busy for applications for judicial review of Tribunal decisions. All the matters listed below were handled by lawyers in Tribunal Counsel Office.

1. 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 a knee 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 November.

2. In 2001 the Tribunal was served with an application for judicial review of the Tribunal *Decision 1105/99*. The worker was a co-owner of a trucking company, who had taken out personal coverage. The vice-chair denied the worker's appeal of a FEL sustainability award, finding the worker was still capable of earning the amount for which he had taken out personal coverage. based on the worker's earnings potential. The Tribunal filed its factum in late September. The Divisional Court is expected to hear the application in London in May 2003.

3. 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.

4. 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 was 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*.

5. 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 Tribunal has filed its factum and is currently awaiting a date for the judicial review application.

6. 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.

7. 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. The application failed to name the Tribunal as a respondent in the style of cause. The applicant's counsel has advised that he will be adding the Tribunal as a respondent, at which point the Tribunal will deliver its Appearance and Record. At the end of the review period the Tribunal was waiting for service of the amended application.

8. The same solicitor who represents 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.

9. An application for judicial review of Tribunal decisions 201/02 and 201/02R was received on August 30, 2002. The decisions denied entitlement to chronic pain disability. The Tribunal has filed an Appearance and once counsel for the applicant has ordered the transcript, the Tribunal will deliver its Record.

C) Administration

Following the evacuation of the basement premises at 505 University Avenue, the Tribunal's 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.

Training sessions for Order-in-Council appointees were provided in September. Topics included mild traumatic brain injury and Canada Pension Plan disability benefits.

D) Communications

Public Information Sessions – In September, the Tribunal conducted an information session in Timmins. Topics included process developments, the Notice of Appeal process and e-services, notably the publicly available decision search feature. Sessions in London, Burlington, Sault Ste. Marie and Toronto are planned for the remainder of 2002.

The Tribunal's newsletter, In Focus, was distributed to subscribers in August. Articles are available on the Tribunal's web site and include a message from the Tribunal's Director, information about the schedule of Public Information Sessions, new features on the web site, and an updated list of medical discussion papers.

In September, the Tribunal's General Counsel, Dan Revington, was invited to participate in a panel discussion at the Fall Conference of the Paralegal Society of Ontario. The panel discussed the proposed framework for regulating paralegals which is under consideration by the Law Society of Upper Canada. On September 12, David Beattie, the Tribunal's Resource Manager, and Martha Keil, Vice-Chair Registrar, participated in a training program for public agency support staff, "SOS", presented by the Society of Ontario Adjudicators and Regulators (SOAR).

E) WSIAT/WSIB Activities

Quality Loop meetings are planned for October 2002. The Tribunal is working with the Board to study the feasibility of an electronic exchange of Board file information. The kick-off meeting was held in early September 2002 and project activity has begun. It was originally planned that the project would be completed within the fiscal period of 2002; however, delays in setting meeting times may necessitate additional project days.

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 third quarter of 2002, the NOA inventory included 1834 dormant cases which previously would have been closed as inactive. There are 1566 cases in the NOA inventory which are proceeding to hearing ready status. At September 30, 2002 the resolution stream inventory numbered 2473 appeals.

The active inventory total used to monitor backlog reduction performance totalled 4039 for the third quarter of 2002.

Productivity in Relation to Case Management Objectives

The Tribunal's inventory at September 30, 2002, including the NOA inventory and the resolution stream cases, totalled 4039 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.

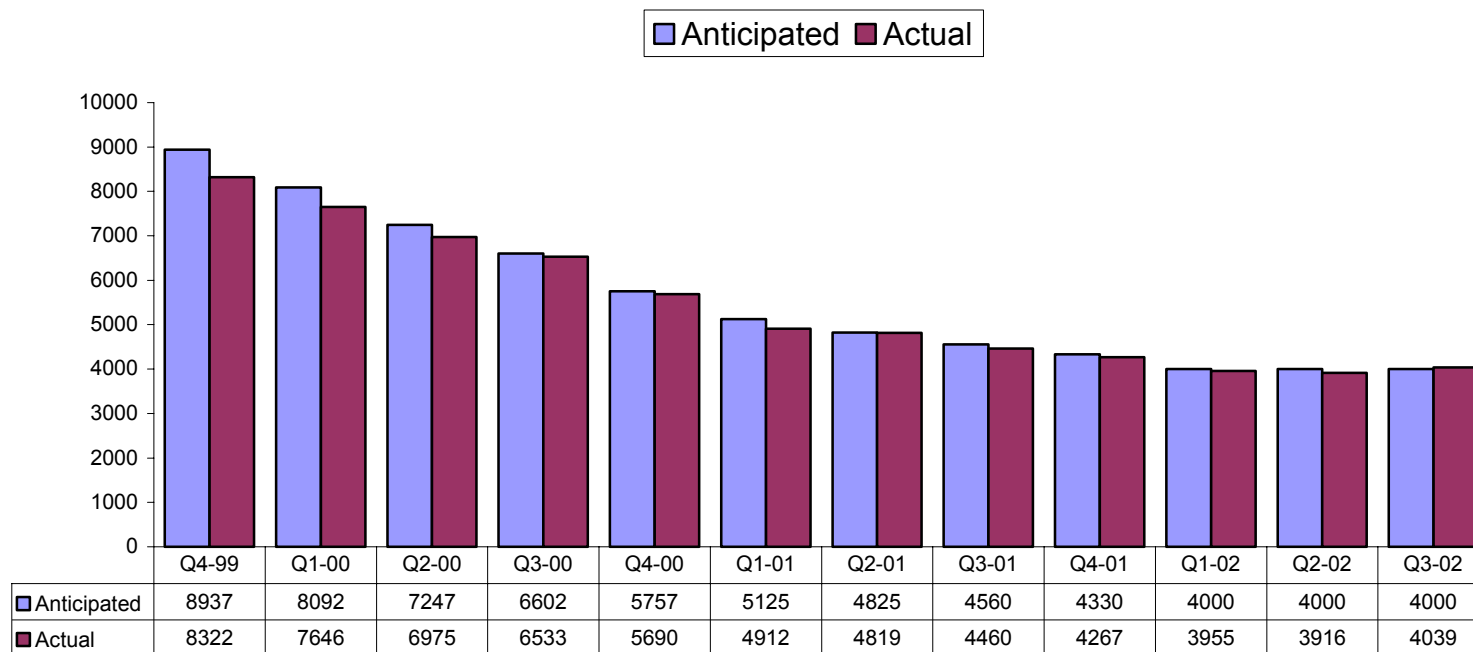


Figure 1. Appeals Inventory, Anticipated vs. Actual

For the period July 1 through September 30, 2002, the Tribunal's incoming appeals numbered 1292. As previously reported, the incoming inventory statistics include appeals that return or "reactivate" from the Tribunal's inactive inventory; in this period, 311 files returned from the inactive inventory.

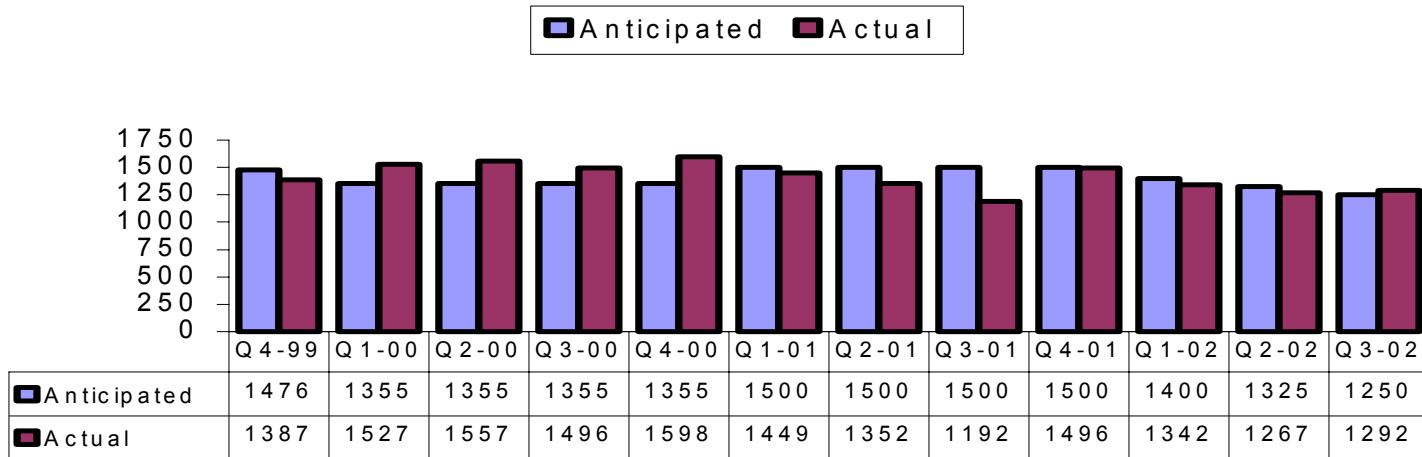


Figure 2. Incoming Appeals, Anticipated vs. Actual

During the third quarter of 2002, Tribunal pre-hearing and hearing dispositions totalled 820. The Tribunal actively monitors the disposition rate and the rate of incoming appeals to ensure that the inventory figure remains at the targeted level.

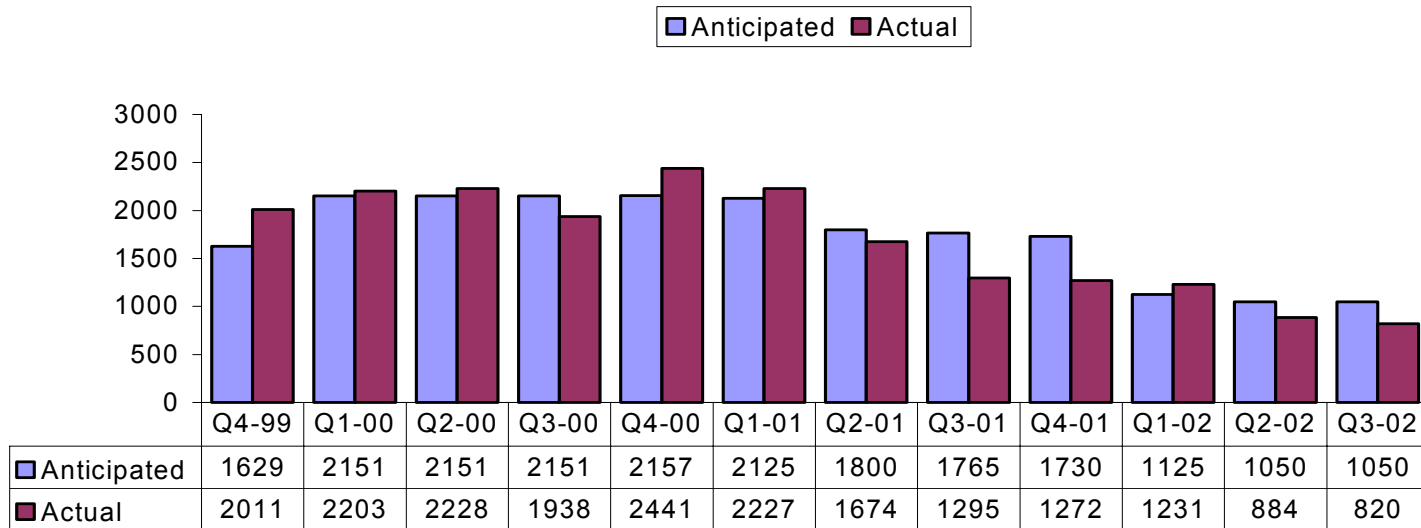


Figure 3. Dispositions, Anticipated vs. Actual

During July through September 2002, the Tribunal disposed of 371 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.

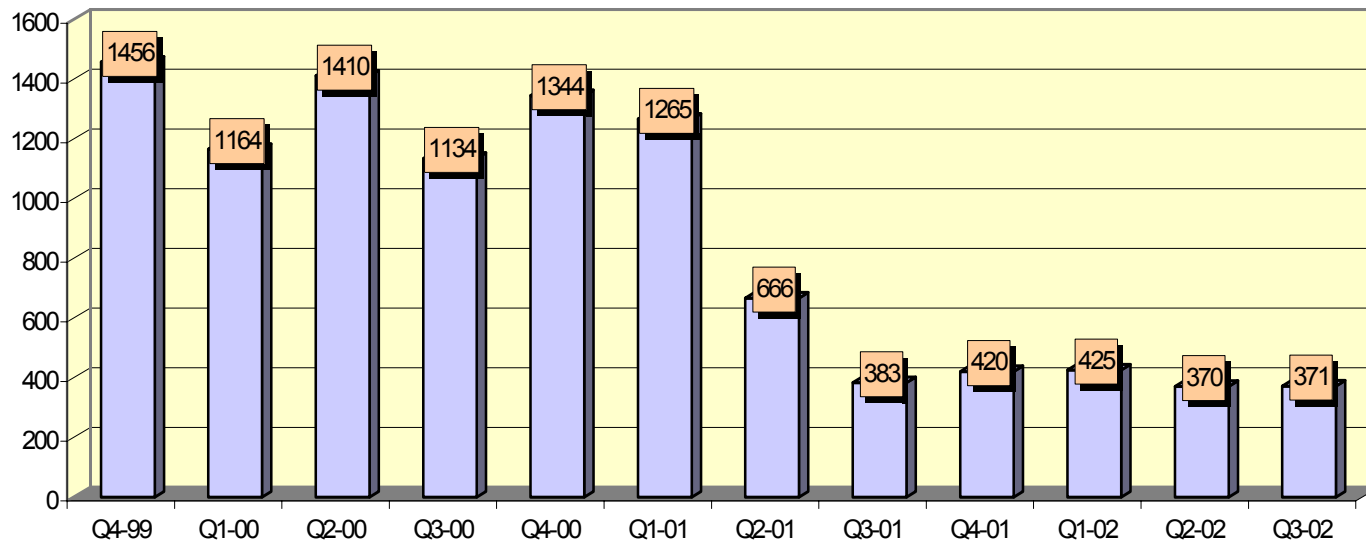


Figure 4. Dispositions from Pre-Hearing processes, including ADR

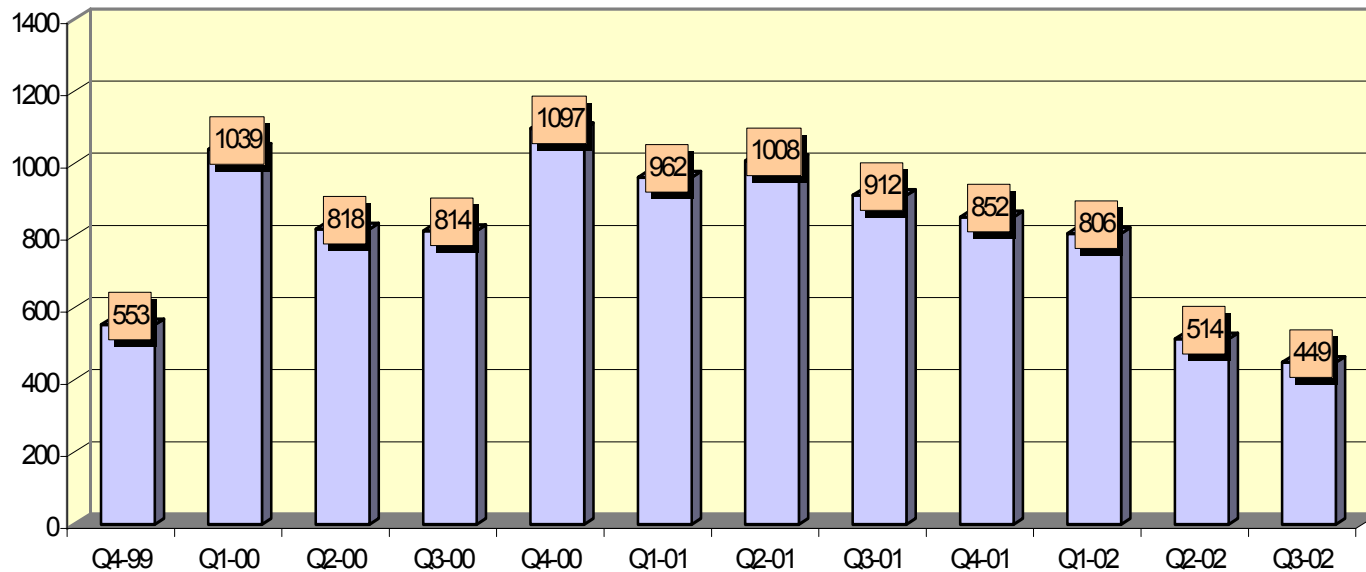


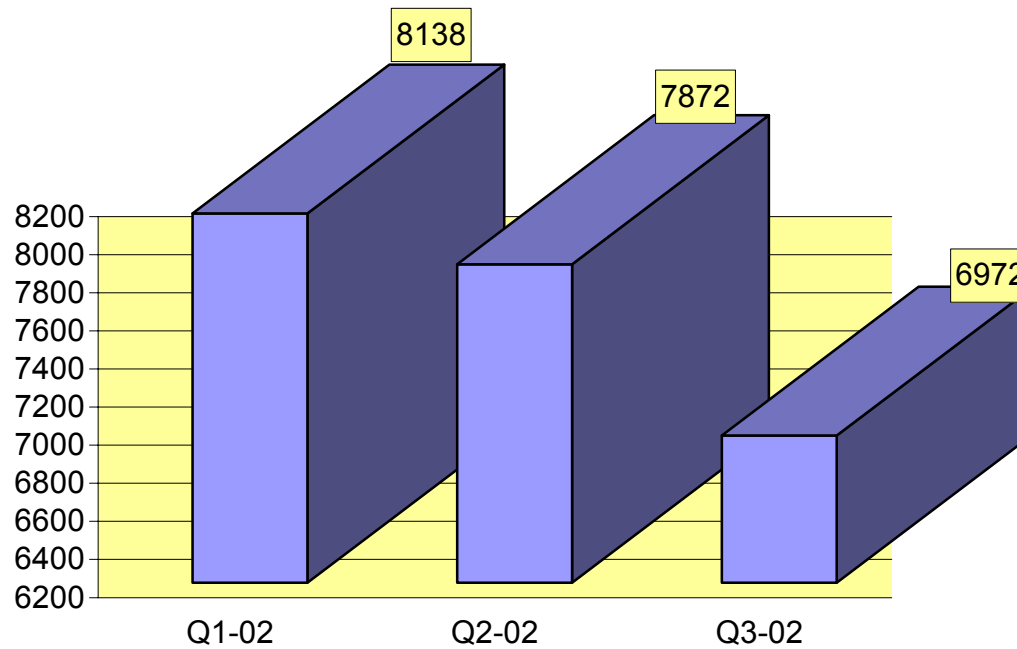
Figure 5. Dispositions from After Hearing processes.

In the third quarter 2002, after-hearing dispositions totalled 449. This included 430 Final Decisions from Vice-Chairs and Panels, and 19 other dispositions, typically achieved by being placed in the Inactive status following interim decisions. This result is lower than targeted and is a symptom of representatives not proceeding to hearing promptly after initial filing of an appeal application and of the Tribunal's focus on dispositions during the first quarter of 2002. The Tribunal's median time to decision release is currently 38 days.

Inactive Inventory: At the close of the third quarter, 2002, the Tribunal's inactive inventory numbered 6972, a reduction of 900 from the previous quarter. This is the 5th quarter where the inactive inventory has decreased. Over 67% of the inactive cases are over 2 years old. It is unlikely that these appellants are planning to proceed with their appeal.

During the 3rd quarter, 311 appellants contacted the Tribunal to continue or re-activate their appeal, representing 4% of the previous quarter's inactive inventory of 7872. These reactivations accounted for 24% 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 third quarter of 2002 deactivations numbered only 191 cases.



Inactive Inventory Q1 to Q3 2002

Inactive Inventory Reduction Project: Since January 1, 2002, 1738 cases have been selected into the reduction project and by September 30th, 953 were closed.