

Workplace Safety and Insurance Appeals Tribunal

QUARTERLY REPORT

Production and Activity

For the Period

October 1 through December 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, October through December 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

Temporary Benefits: There has been some discussion in Tribunal cases of when workers with a 0 FEL can receive temporary benefits. Decision No. 1113/02 stated that while workers receiving a FEL award are not generally eligible for temporary benefits, workers with a 0 FEL could receive temporary benefits for a recurrence, until they reach MMR. Once MMR is achieved, the condition is permanent and there is no longer entitlement to temporary benefits.

Time Limits for Filing a Claim For Benefits: The Tribunal released its first decision concerning the time limit for filing a claim in s.22 WSIA. The Board denied entitlement on the basis that the claim was not filed in time. As the claim involved an accident in the nature of a disablement, it was necessary to determine the date of accident. The Tribunal found this to be the date of the first physiotherapy treatment provided by the employer. There were exceptional circumstances present within the meaning of the relevant Board policy as the employer was aware of the injury on that date and that it was likely work-related, but failed to file a Form 7. The time for filing was extended (Decision No. 929/02).

Mental Stress: In Decision No. 215/98R the employer sought a reconsideration of Decision No. 215/98 which found that the worker had entitlement for stress and that the Board did not have a formal stress policy. The employer argued that the Panel was required to apply the new Board stress policy with a retroactive date of January 1, 1989, which the Board released after the hearing in Decision No. 215/98, but before the decision's release. The reconsideration was denied because the parties based their submissions, and the Panel made its decision, on the common understanding that existed at that time. The parties had an opportunity for a full hearing, and decisions were intended to be final.

GECA and Federal Employees: Diseases such as skin cancer arising from workplace exposure which do not qualify as “occupational diseases” may be disablements under the pre-1997 Act, and incorporated into GECA pursuant to s.4 (2) and the definition of accident in GECA. The worker therefore had entitlement for her skin cancer (Decision No. 1480/98).

Employer Issues: In Decision No.866/97R the Board sought a reconsideration of the cost relief granted to a Schedule 2 employer. The Panel considered the Board’s standing to request a reconsideration and concluded nothing in the Act prevented the Tribunal from entertaining such a request. The Panel expected that the Board would be very selective in making requests given its roles as adjudicator and administrator. Requests from the Board are subject to the usual threshold test. The Panel granted the reconsideration on the cost relief issue. Section 137(3) allowed for the establishment of a special fund to relieve costs for Schedule 2 employers, and for the provision of cost relief through access to the Fund. The Panel found that the cost relief aspect of the section was secondary to, or at least must be read in conjunction with, the establishment of the special fund. The Board had not established the special fund. Therefore the hearing Panel had no jurisdiction to order the cost relief, as this was a non-existent remedy.

Decision No.2275/00 held, based on the wording of s. 124(2) of WSIA and s.4 (4) of the pre-1997 Act, that the statutory benefit of doubt applies only to workers and not to an employer’s request for SIEF relief.

In Decision No. 2033/99, the employer applied for a retroactive adjustment of its VER account, arguing that the worker had dermatitis, an occupational disease that should be excluded from its cost record under Board policy. The Tribunal held that the Board was not required to exclude the costs as s.122 (8) of the pre-1989 Act was an assessment rate setting provision which did not preclude the Board from developing an experience rating policy which included the costs of certain diseases and excluded others. The Board policy permitting the exclusion of long-latency diseases did not apply to short-latency diseases like dermatitis. In addition, all exposure was with the accident employer and the employer did not pursue the adjustment within the time limits in Board policy.

NEL: In Decision No. 594/02, the Board used the combined values chart in the AMA Guides to determine the NEL award of a worker with separate knee and back injuries. While it seemed clear that it was the intent of the AMA Guides that the combined values chart be used when there was more than one impairment affecting the same body area, it was not clear that the chart should be used if there were impairments to different body areas. The Vice-Chair

interpreted Board policy as indicating that the chart is not to be applied where there are multiple impairments, unless the same body part is involved.

B) Judicial Review Activity

The final quarter of 2002 again demonstrated an increase in judicial review activity at the Tribunal. Despite this increase, at the end of 2002 Tribunal staff and adjudicators were able to note that once again the Courts found no Tribunal decisions required judicial intervention.

The following is a list of the current status of judicial review applications at the end of 2002.

1. In August of 2001 the Tribunal was served with an application for judicial review in an application under s. 17 of the *pre-1997 Workers' Compensation Act*. The issue was whether a worker's right to sue had 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 as against 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*.

Following service of the Tribunal's factum, counsel for the doctor brought a counter-application for judicial review. It was the doctor's position that the right of action against the doctor should have been extinguished.

The application and counter-application were heard together on November 26, 2002. The Divisional Court released its decision on November 29th, unanimously dismissing both the application and counter-application.

Counsel for the doctor has served a notice of motion for leave to appeal to the Court of Appeal. At the end of the year the Tribunal was waiting for service of the leave materials.

2. A paralegal consultant who represents injured workers at the Tribunal was suspended from representing clients on any new appeals at the Tribunal. The decision to suspend was made by the Tribunal Chair, acting pursuant to the *Act*, the Tribunal's Code of Conduct for Representatives, and a related practice direction. Counsel for the consultant has brought an application for judicial review of the decision to suspend. The Workplace Safety and Insurance Board, which has also suspended this consultant from representing parties in its appeal process, is a co-respondent in the application. The Board and Tribunal are both preparing responding materials. It is expected this application will be heard in the spring of 2003, in Sudbury.
3. The application for judicial review of *Decisions 1095/01* and *1095/01R* is scheduled to be heard in April 2003. These Decisions denied a worker's appeal for entitlement for bilateral carpal tunnel syndrome.
4. 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.
5. *Decision 28/02* found that a worker had entitlement to compensation for a disc herniation on the grounds that it arose as a disablement from the work. The employer's application for judicial review of the Decision was adjourned on consent of the parties, to permit the employer to pursue a reconsideration application at the Tribunal.
6. Tribunal *Decision 1504/01* allowed an appeal of the employer's classification of its business activity. When the Board did not immediately implement the Tribunal decision, the employer brought an application for mandamus to compel the Board to implement the Tribunal's decision. Although the Tribunal was not a party it was served with the application. The employer's application for mandamus was adjourned pending the Board's application to reconsider *Decision 1504/01*, and the implementation of the result of *Decision 1504/01R*.
7. The Tribunal has been served with an application for judicial review of *Decision 2476/01*. This decision denied the worker entitlement for chest wall pain. Initially the worker's counsel had erroneously served a Notice of Appeal, which was subsequently withdrawn. The Tribunal is waiting for counsel for the applicant to amend his materials, before filing its record.

8. The same counsel as noted above filed an application for judicial review of *Decision 398/02*. In that Decision the Vice-Chair found a worker's compensable accident was not a significant causal factor in subsequent periods of alleged disability. As in the above case, when counsel for the applicant amends the materials, the Tribunal will deliver its record.

9. An application for judicial review of *Decisions 201/02* and *201/02R* has been received. These Decisions denied entitlement for chronic pain. Once counsel for the Applicant orders the transcript and serves the Attorney General, the Tribunal will file its record.

10. The Tribunal has received an Application for Judicial Review of *Decisions 466/01* and *466/01R*. The worker withdrew her appeal on the advice of her former representative at the hearing. She retained new counsel, and when her application to reconsider the withdrawal was denied, she brought a judicial review application. The Tribunal has filed its record and at the end of the year was awaiting the applicant's factum.

11. Tribunal *Decision 866/97* denied a Schedule 2 employer's appeal of a Board decision to pay a worker benefits for a specified period of time. However, the Panel also found that in the circumstances it was unfair for the employer to be fully liable for the cost of the benefits. The Panel directed the Board to credit the employer for the cost of some of the benefits.

The WSIB requested the Tribunal reconsider *Decision 866/97*. In *Decision 866/97R* a differently constituted Panel found the Tribunal had no jurisdiction to direct the Board to provide the Schedule 2 employer with relief from the costs of the claim.

The employer has brought an application for judicial review of *Decision 866/97R*. The Tribunal has filed an appearance, and when the employer obtains a copy of the transcript, the Tribunal will file its record with the Court.

12. An application for judicial review has been received for Tribunal *Decision 2185/01* and *2185/01R*. An employer's appeal that its operations were controlled by and ancillary to another firm, and thus should be classified in the same rate group as that other firm, was denied. The Tribunal has filed an appearance, and will be preparing and filing its record of proceedings in early 2003.

13. The Tribunal has been served with an application for judicial review of *Decision 770/98IR*, which denied the worker entitlement for traumatic vertebrobasilar ischemia (TVBI). The Tribunal has entered an appearance and is preparing its record of proceedings.

C) Administration

Following the evacuation of the basement premises at 505 University Avenue, the Tribunal's Records and Reproduction Departments are located in various areas throughout the Tribunal. The Tribunal acquired additional space in December 2002 at 505 University Avenue. This will provide a permanent space for the staff and equipment affected by the basement contamination.

A Tribunal training day for Order-in-Council appointees and staff was conducted in December. The topics were post-traumatic stress disorder and retroactivity of Board policy.

D) Communications

Public Information Sessions – In October and November, the Tribunal conducted information sessions in Burlington, Sault Ste. Marie, Toronto West, Toronto East and London. These sessions are attended by Tribunal staff, a Vice-Chair, a Member representative of workers, and a member representative of employers and organized in co-ordination with the Tribunal's regional hearing schedule. Topics included process developments, the Notice of Appeal process and e-services, notably the publicly available decision search feature. Sessions in downtown Toronto are planned for January 2003.

The Tribunal's newsletter, *In Focus*, was distributed to subscribers in November 2002. Topics included staff participation in conferences, an update on the outreach program and information about the Tribunal's ongoing

projects for inactive files. Two regular features were continued, one providing an update of new web site features and another regarding discussion papers available on the web site or generic reports available through the Library.

Ann Somerville, Associate Counsel to the Chair, is the President of the Ontario Bar Association's Workers' Compensation Section for 2002-3. Other Tribunal staff and OICs have continued to participate in educational and outreach programs with our stakeholders. On October 2, 2002, the Tribunal hosted a half-day orientation session for the Ontario Legal Clinics' Workers' Compensation Network. The program included information and orientation on Tribunal processes, a library tour, web site orientation, and an OIC discussion panel on hearing issues. The same week, Carole Prest, Counsel to the Chair, and Ann Somerville, Associate Counsel, spoke at a conference jointly sponsored by the Office of the Worker Advisor and the OFL. On November 21 and 22, a number of staff and vice-chairs participated in workshops and panel discussions held at the 14th Annual Conference of Ontario Boards and Agencies.

E) WSIAT/WSIB Activities

Representatives from the Board's appeals branch and legal branch met with Tribunal staff in October for a Quality Loop Meeting. Topics discussed included successor employer information, time limit cases, access objections and an update on the faxing of policy letters. The next meeting is planned for February 2003.

A Quality Loop (Decision Implementation) meeting with WSIB business unit managers took place in October. Those assembled discussed Tribunal decisions that Board staff found challenging to implement. The Board's Legal Policy Analysts have prepared an educational presentation about their group to provide to WSIB staff. They recently reminded managers that they are available to attend group meetings. The Tribunal will be advised of any meeting dates; where possible, Tribunal staff will attend the question period.

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. A focus group comprised of interested Board and Tribunal staff met with the consultant twice. A draft report was provided to the WSIB for comments in late December.

F) Tribunal Production

The Tribunal's Production Plan for 2002 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 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, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory also includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" 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 fourth quarter of 2002, the NOA inventory included 2,010 dormant cases which previously would have been closed as inactive. There are 1,620 cases in the NOA inventory which are proceeding to hearing ready status. At December 31, 2002 the resolution stream inventory numbered 2,368 appeals.

The active inventory total used to monitor performance totalled 3,988 for the fourth quarter of 2002.

Productivity in Relation to Case Management Objectives

The Tribunal's inventory at December 31, 2002, including the NOA inventory and the resolution stream cases, totalled 3,988 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.

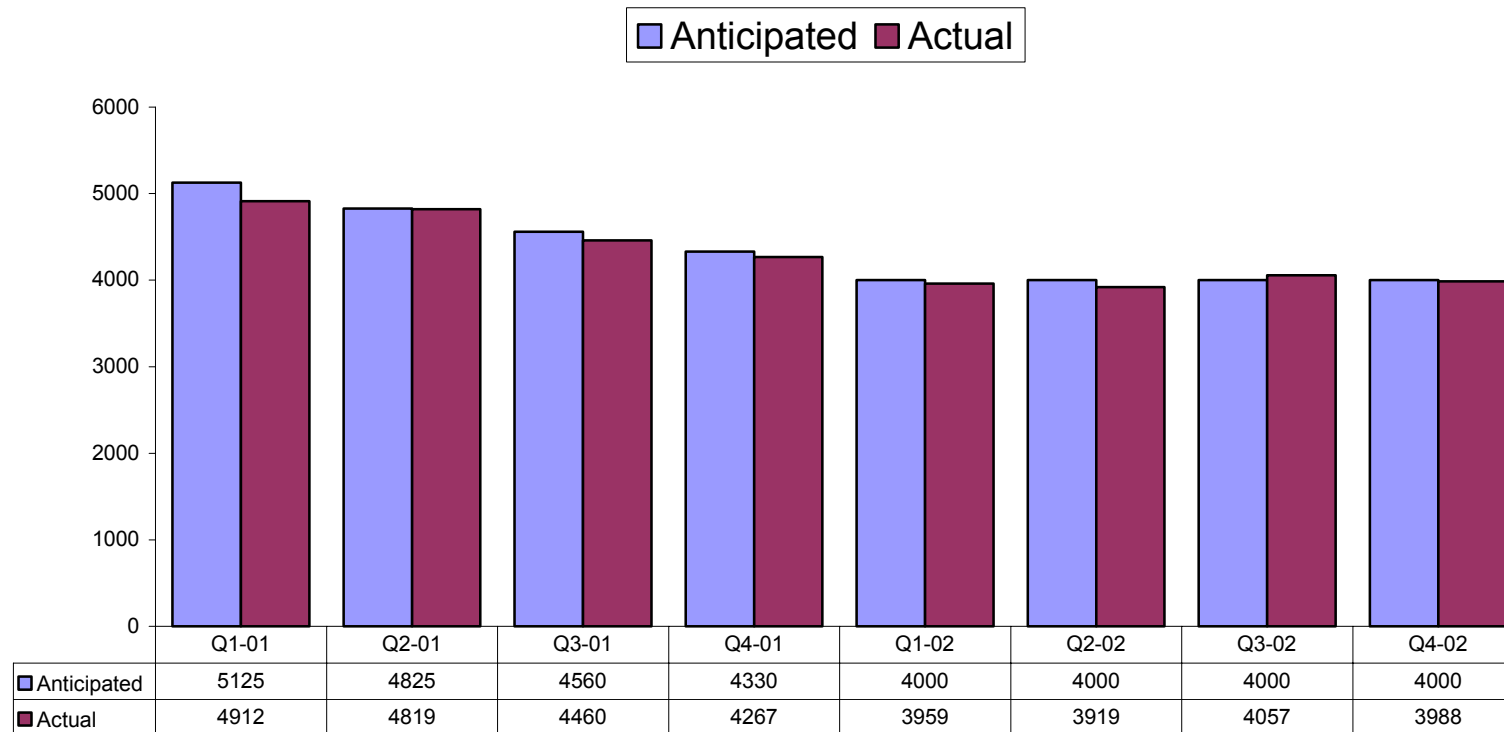


Figure 1. Appeals Inventory, Anticipated vs. Actual

For the period October 1 through December 31, 2002, the Tribunal’s incoming appeals numbered 1,326. As previously reported, the incoming inventory statistics include appeals that return or “reactivate” from the Tribunal’s inactive inventory; in this period, 371 files returned from the inactive inventory.

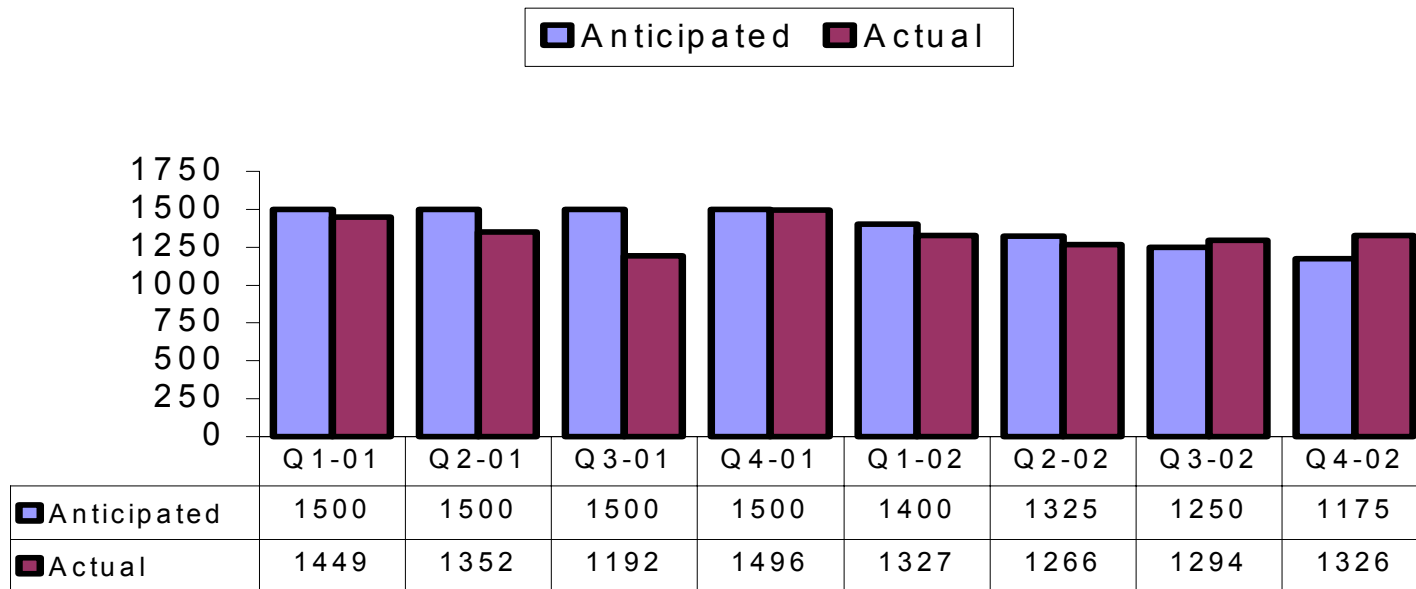


Figure 2. Incoming Appeals, Anticipated vs. Actual

During the fourth quarter of 2002, Tribunal pre-hearing and hearing dispositions totalled 1,240. The Tribunal actively monitors the disposition rate and the rate of incoming appeals to ensure that the inventory figure remains at the targeted level.

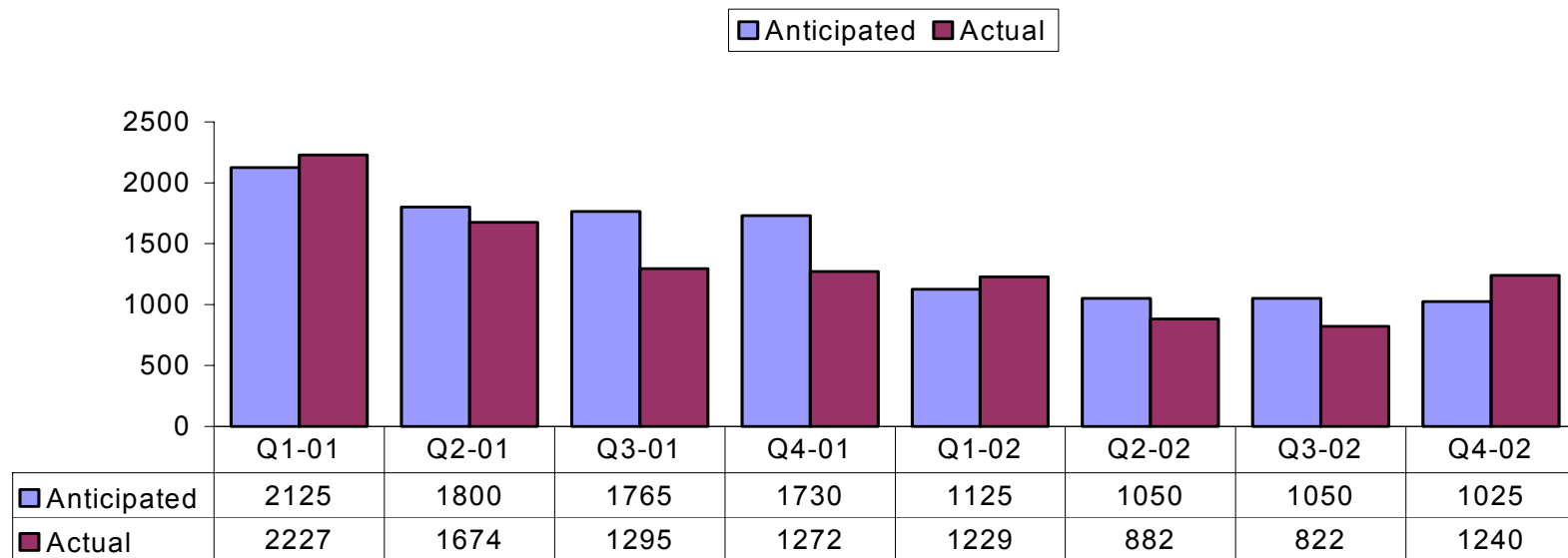


Figure 3. Dispositions, Anticipated vs. Actual

During October through December 2002, the Tribunal disposed of 505 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. This figure also demonstrates an increased focus on complex appeals, file review, hearing preparation and inactive inventory reduction projects.

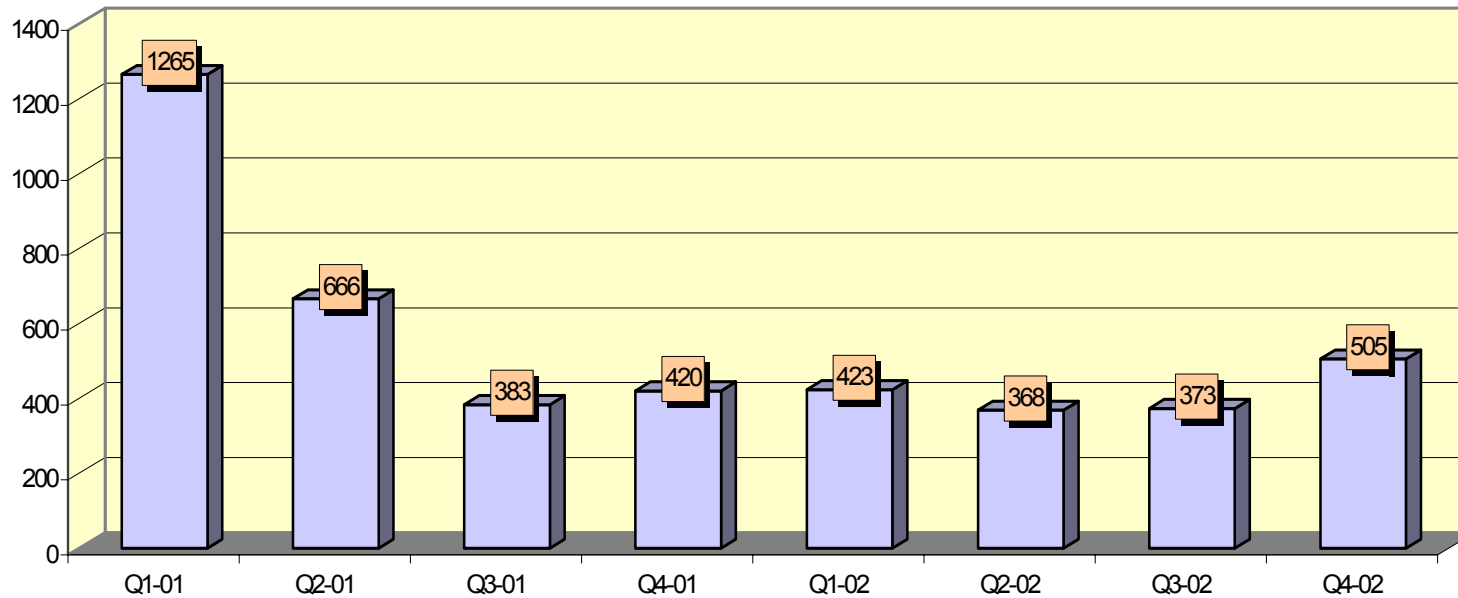


Figure 4. Dispositions from Pre-Hearing processes, including ADR

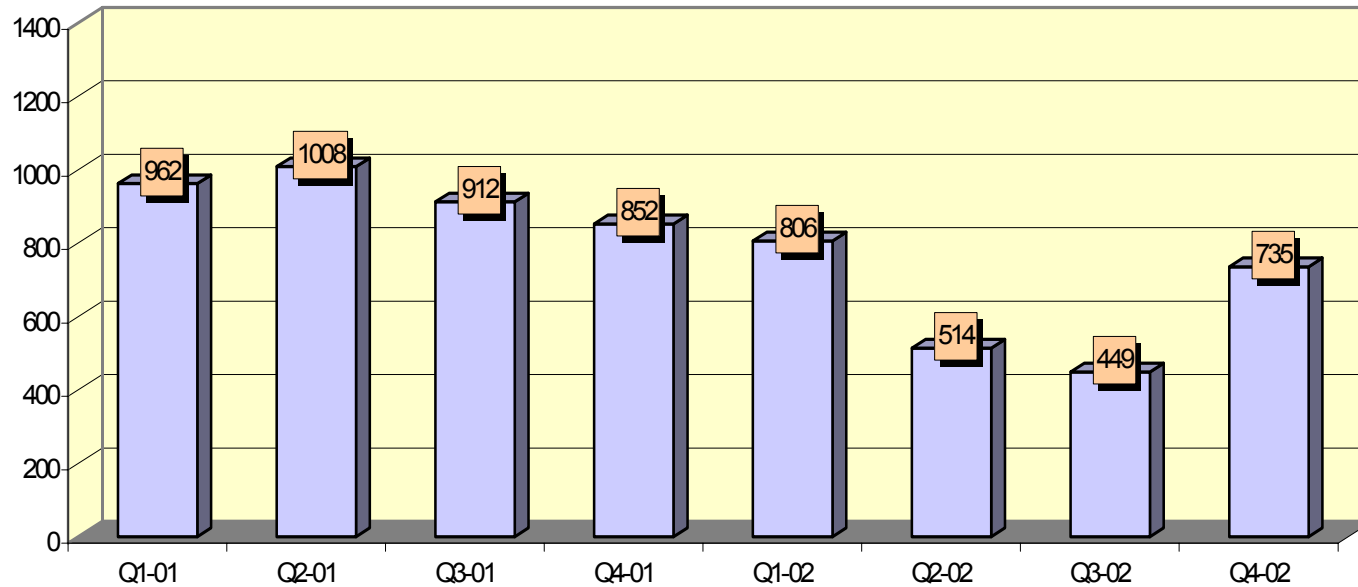


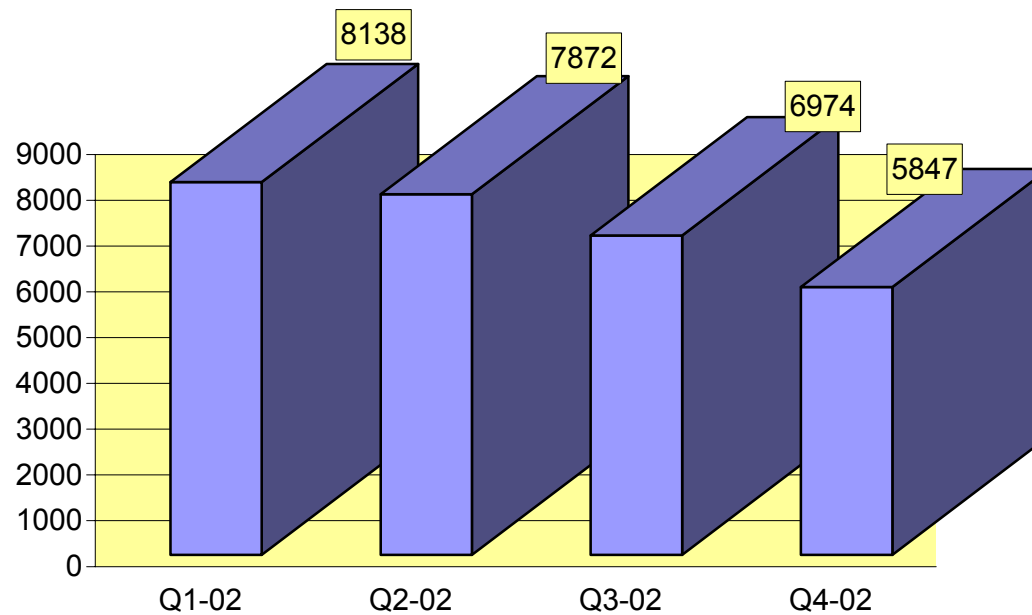
Figure 5. Dispositions from After Hearing processes.

In the fourth quarter 2002, after-hearing dispositions totalled 735. This included 702 Final Decisions from Vice-Chairs and Panels, and 33 other dispositions, typically achieved by being placed in the Inactive status following interim decisions. The Tribunal's median time to decision release is currently 35 days.

Inactive Inventory: At the close of the fourth quarter, 2002, the Tribunal's inactive inventory numbered 5,847, a reduction of 1,127 from the previous quarter. This is the 6th quarter where the inactive inventory has decreased. Over 66% of the inactive cases are over 2 years old. It is unlikely that these appellants are planning to proceed with their appeal.

During the 4th quarter, 371 appellants contacted the Tribunal to continue or re-activate their appeal, representing 5% of the previous quarter's inactive inventory of 6974. These reactivations accounted for 28% 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 fourth quarter of 2002 deactivations numbered only 196 cases.



Inactive Inventory Q1 to Q4 2002

Inactive Inventory Reduction Project: Since January 1, 2002, 3,057 cases have been selected into the reduction project and by December 31st, 1,813 Inactive Project cases were closed. Further reductions in the inactive inventory were achieved through re-activations and withdrawals.