

Workplace Health, Safety and Compensation Review Division

Annual Performance
Report 2019 - 20

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This document is available in alternate formats, upon request.

Message from the Chief Review Commissioner



In accordance with the reporting requirements of the **Transparency and Accountability Act** for a Category 3 entity and the **Workplace Health, Safety and Compensation Act** (the Act), I am pleased to present the Workplace Health, Safety and Compensation Review Division's (WHSCRD) Annual Performance Report for 2019-20. As Chief Review Commissioner of the WHSCRD, I am responsible for the preparation of this report and accountable for the results contained within.

We are pleased to report the appointment of full-time Review Commissioners in early 2019 resulted in an increase in the number of annual hearings scheduled and completed in the 2019-20 fiscal year. I am even more pleased to report a significant increase in the number of hearings held outside of the Avalon Peninsula.

WHSCRD also made significant gains in the area of records and information management as well as some improvements to our online tools and resources, as outlined in this report. This contributes to clients overall hearing preparedness and a fair hearing process for all parties involved in a review.

This work was achievable only through the diligence and dedication of our staff. This past year was more challenging than most, due to a winter weather event in early 2020 and the public health restrictions associated with the COVID-19 pandemic. WHSCRD staff demonstrated exemplary professionalism in the delivery of services to injured workers and employers as our doors stayed open throughout all levels of the global pandemic and we were able to pivot accordingly and offer our clients continued quality service.

On behalf of the Review Commissioners and staff we are honoured to serve in our respective roles and we look forward to working with you in 2020-21 as we move into the next planning cycle.

A handwritten signature in black ink that reads "Marlene Hickey". The signature is written in a cursive, flowing style.

Marlene A. Hickey - Chief Review Commissioner

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Overview

Introduction

The Workplace Health, Safety and Compensation Review Division (WHSCRD) is the final level of review within the workers' compensation system in Newfoundland and Labrador. WHSCRD is responsible for the review of decisions of WorkplaceNL. WHSCRD may review such issues as:

- Compensation and medical aid benefits;
- Rehabilitation and return to work services and benefits; and
- Employers' assessments and industry classifications.

Additional information on WHSCRD's mandate and lines of business can be found on its [website](#).

Financial Information

Funding for the operations of WHSCRD is recovered from the Injury Fund of WorkplaceNL pursuant to Section 25 of the **Workplace Health, Safety and Compensation Act**. In the 2019-20 fiscal year, WHSCRD's budgetary allocations were provided by the Government of Newfoundland and Labrador within the overall budget for Digital Government and ServiceNL as the Minister responsible for WorkplaceNL. Unaudited expenditures for WHSCRD in 2019-20 were \$1,167,348 as provided by the Department of Finance. Please refer to page 26 for more detailed financial information.

Review Commissioners

WHSCRD has a Chief Review Commissioner and a Panel of Review Commissioners. Up to seven Review Commissioners, including the Chief Review Commissioner, may be appointed to WHSCRD. Review Commissioners conduct hearings in St. John's, Gander, Grand Falls-Windsor, Corner Brook, Happy Valley-Goose Bay and Labrador City.

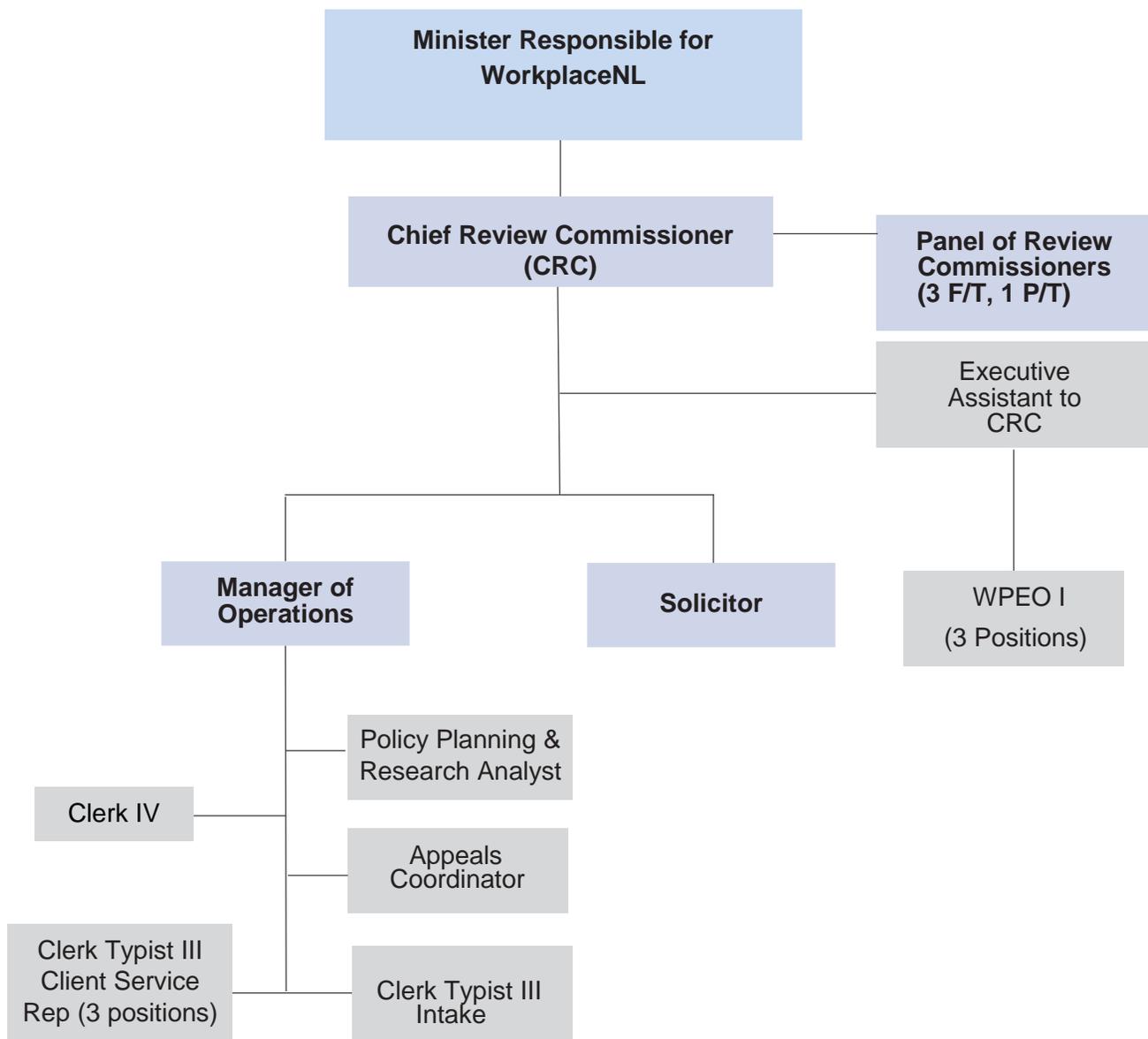
As of March 31, 2020, WHSCRD's Panel of Review Commissioners consisted of a Chief Review Commissioner and three full-time Review Commissioners. The appointment term for part-time Review Commissioner, Evan Kipnis ended in December 2019. Please refer to page 27 for Review Commissioner biographies.

Overview continued

WHSCRD Staff

WHSCRD currently employs 18 staff (14 female and 4 male) in its office located in the Dorset Building, at 6 Mount Carson Avenue in Mount Pearl, NL.

Organizational Chart



Highlights and Partnerships

Increased Capacity

Early in 2019, three new full-time Review Commissioner appointments were made to WHSCRD. The move to appoint full-time versus part-time Review Commissioners was motivated by a number of factors, one of which was to increase Review Commissioner availability for hearings to improve upon service delivery. Part-time Review Commissioners often had competing employment and personal priorities, which posed a challenge to the number of hearings WHSCRD could schedule. With the appointment of full-time Review Commissioners, WHSCRD realized an increase in the number of annual hearings it could schedule and complete.

WHSCRD's total number of hearings held in fiscal 2019-20 increased by 78 per cent when compared to the previous fiscal reporting period. Even more significant is the number of hearings WHSCRD held outside of the Avalon Peninsula. The number of hearings held in regions outside the Avalon in fiscal 2019-20 increased by 158 per cent, or from 31 hearings in 2018-19 to 80 in 2019-20. WHSCRD anticipates this upward trend will continue under the full-time Review Commissioner model.

Partnering with the Office of Employment Equity for Persons with Disabilities, WHSCRD was also able to increase the required human resource time and expertise to provide administrative support through the decision-writing process.

Records and Information Management

During the 2019-20 fiscal year, WHSCRD's Information Management Project focused on the transition from a paper-based record storage model to an electronic records management program. This involved the digitization of paper documents in preparation for their move to an electronic records management system. As of March 2020, almost one million pages of material have been digitized.

In consultation with the Office of the Chief Information Officer (OCIO), WHSCRD completed the necessary planning, organization, and training to implement the Hewlett Packard Enterprise Records Manager (HPRM). WHSCRD increased Information Management capacity with two HPRM administrators on staff and the majority of staff completing HPRM End User training. This enabled WHSCRD to move ahead of schedule and begin moving the digitized legacy paper documents into the HPRM system. This project will continue as we move into our next strategic planning cycle.

Report on Performance

In this third and final year of the 2017-20 planning cycle, WHSCRD's commitment to the issues of ensuring a fair review process; and enhancing hearing preparedness continued with the following objectives and results:

Issue 1: Ensuring a Fair Review Process

WHSCRD's objectives in the 2017-20 planning cycle were focused on the collection, development and delivery of accessible information pertaining to its review process and the use of its Decision Search System (DSS) as an information resource. The provision of clear and accessible information to the public is considered integral to ensuring clients are subject to a fair review process.

WHSCRD proved successful in achieving its objectives over the 2017-20 planning years. Over the 2017-18 and 2018-19 fiscal years, WHSCRD developed and delivered a review process information session, gathered informal feedback from stakeholder groups on the review process and their engagement with the DSS and used that information to explore potential changes and improvements to its general review processes and DSS. WHSCRD's work in achieving its objectives in these areas was aligned with its own values and vision, and Government's strategic direction to ensure responsive programs and services.

During the 2019-20 fiscal year, in its efforts to ensure a fair review process, WHSCRD engaged internal and external users of the DSS for informal feedback on how they use the system and website in general, for suggested improvements. WHSCRD clients regularly communicate with our office prior to their hearing regarding how to best prepare for the hearing, and seeking information on how the hearing process works and how decisions are made.

During these communications, which happen primarily by telephone, WHSCRD promotes the DSS as a client and stakeholder resource to research existing decisions for issues, policy application and outcomes in previous decisions. This also provides a window of opportunity to engage users on the functionality of the DSS and hear about their general experience when using the system. Users include workers, employers, independent worker and employer representatives, lawyers, Members of the House of Assembly, and members of formal worker and employer advisory organizations.

Through the use of the DSS, parties to a hearing are able to search and find similar cases and decisions as they relate to subject matter, specific policy, legislation, and stated issues. This allows

Report on Performance continued

the user to research and review cases similar to their own, which may be beneficial in preparation for their own hearing, and in understanding the evidence they may present, or how errors are, or are not identified in the decision under review. The availability and uses of this system can increase client knowledge of the review process and can function to level the playing field for all parties, which in turn, promotes the rules of natural justice with a view to ensuring a fair review process. While the decision outcome will not be satisfactory for all parties, the process is fair and just.

Work completed in meeting WHSCRD's 2019-20 objective is outlined in the following section.

Objective Results for 2019-20

Objective: By March 31, 2020, WHSCRD will have explored ways to promote DSS as an information resource.

Indicators:

- Engaged internal and external users of the DSS for informal feedback on how they use the system and website in general for suggested improvements.
- Consulted with OCIO regarding prospective improvements to the DSS.
- Determined if changes and/or improvements to the DSS are necessary and/or practical.
- Determined next steps.

Report on Performance continued

Indicators	Progress and Accomplishments
<p>Engaged internal and external users of the DSS for informal feedback on how they use the system and website in general for suggested improvements.</p>	<ul style="list-style-type: none"> • Engaged users informally on a regular basis mainly through telephone communication. DSS users communicated their primary use of the system centered on the identification of issues under review, decision outcomes, the policies used in arriving at decision outcomes, and the name of the Review Commissioner who authored the decision. • Engaged users of WHSCRD's website primarily through telephone communication where they communicated their primary usage centered on accessing the DSS website link; and accessing WHSCRD forms and information pamphlets, confirming the importance of the DSS as a search tool. • Obtained feedback regarding the website which was generally positive. Determined users generally found WHSCRD's website informative and easy to navigate. • Determined the DSS is a useful tool which alleviates the need for Access to Information and Protection of Privacy requests related to this information which is publicly available. • Feedback regarding the DSS was predominantly positive, but a number of users suggested further improvements to the search function.

Report on Performance continued

Indicators continued	Progress and Accomplishments continued
<p>Consulted with OCIO regarding prospective improvements to the DSS.</p>	<ul style="list-style-type: none"> • Consulted with OCIO regarding the use of Google Analytics. • Established a Google Analytics account through which access to valuable information on the use of the DSS can be collected and used to advise future DSS and website development projects.
<p>Determined if changes and/or improvements to the DSS are necessary and/or practical.</p>	<ul style="list-style-type: none"> • Based on user feedback, WHSCRD determined it would not make immediate changes to its DSS. The current DSS does not impede users from locating the information they need and it is not necessary or practical to initiate the resource-intensive process of changing it at this time. • Based on user feedback, WHSCRD implemented a new process for uploading the most recent decisions to ensure the timeliest information is available when clients or representatives are using the DSS to prepare for hearings.
<p>Determined next steps.</p>	<ul style="list-style-type: none"> • WHSCRD will continue to gather informal user feedback on the use of its webpage and DSS. • WHSCRD will seek additional training in the use of Google Analytics to further explore the applications capabilities in monitoring usage data for its webpage and DSS.

Report on Performance continued

Issue 2: Enhancing Hearing Preparedness

During the 2017-18 fiscal year WHSCRD concentrated its efforts on improving hearing preparedness by establishing more efficient internal processing mechanisms and performance measures to ensure expeditious release of case descriptions through a thorough review of existing processes and identifying opportunities for improvement.

In the 2018-19 fiscal year, WHSCRD established a historical baseline of its performance in the time it has taken between distributing case descriptions and holding a hearing. This information led to upgrades in WHSCRD's printing capabilities and increased capacity whereby we were able to project a goal of distributing 90 per cent of its case descriptions at least six weeks before a hearing was achievable.

In 2019-20, WHSCRD was successful in this goal from a client centered perspective. Cases where clients did not receive case descriptions six weeks prior to the hearing, were representative of specific instances whereby cases were expedited. This shortened the overall turnaround time for the client, which is always the intended result when striving to the advance the caseload.

WHSCRD does not see this as a negative outcome. In fact, WHSCRD is reevaluating this goal on a go forward basis as WHSCRD continues to advance its caseload with the addition of full-time Review Commissioners. While effective and efficient hearing preparedness will remain paramount, WHSCRD will constantly strive to decrease our **overall** service timelines from application through to hearing, and then to decision. A healthy balance of advanced preparation and timely scheduling will be important for an overall benefit to clients and stakeholders through a decrease in overall service timelines.

Report on Performance continued

Objective Results for 2019-20

Objective: By March 31, 2020, WHSCRD will be providing 90 per cent of case descriptions within six weeks advance of hearing dates.

Indicators:

- Distributed 90 per cent of case descriptions to clients within six weeks advance of hearing dates.
- Reevaluated targets to determine if the objective and indicators should remain at the same level moving forward, when balanced with overall service wait times.

Indicator	Progress and Accomplishments
Distributed 90 per cent of case descriptions to clients within six weeks advance of hearing dates.	<p>Distributed 84 per cent of case descriptions within six weeks advance of hearing date. This falls six percentage points short of WHSCRD's target of 90 per cent.</p> <ul style="list-style-type: none"> • While this is short of its projected achievable target of 90 per cent, in cases where clients did not receive their case description six weeks prior to the hearing, this was due to an overall decrease in the time from a file's acceptance to the hearing date, which decreased the overall turnaround time for the client. • Distributed 16 per cent of case descriptions in less than six weeks prior to the hearing. However, most of these cases were specific to either an expedited hearing, or a decrease in overall turnaround, which was in fact beneficial for the parties involved. • Determined less than four per cent of case descriptions that were not distributed within six weeks were related to either the January 2020 winter weather event or COVID-19 shut-down/restrictions.

Report on Performance continued

Indicators continued	Progress and Accomplishments continued
<p>Reevaluated targets to determine if the objective and indicators should remain at the same level moving forward, when balanced with overall wait times.</p>	<ul style="list-style-type: none"> • Determined during reevaluation, the following factors contributed to WHSCRD’s inability to meet its target: <ul style="list-style-type: none"> ○ Winter weather event in January 2020 closed office for one week, delaying mail and WHSCRD work progress. ○ Provincial COVID-19 pandemic response during last two weeks of fiscal year delayed mail service and temporarily shifted WHSCRD priorities to meeting new operation standards, while continuing service priorities. • Determined the existing objective does not align with WHSCRD’s overall goal of constantly striving to decrease our overall service timelines from application through to hearing, and then to decision. • Determined advanced case description distribution and timely scheduling of hearings needs to be balanced. • Determined six weeks advance distribution is not necessary or beneficial if the case in question is aiming to meet a shorter overall timeline.

Opportunities and Challenges Ahead

The end of the 2019-20 fiscal year also marks the end of the 2017-20 planning period. The onset of the COVID-19 pandemic in the last part of the 2019-20 fiscal year brought forth unique challenges in relation to WHSCRD's operational and service provision processes. WHSCRD prioritized the health and wellness of its staff, clients, and community, then quickly moved to address the challenge of how to conduct hearings during this unique and challenging time. Adhering to the public health directives of the Provincial Government, WHSCRD was able to continue to provide responsive and quality client service, while working within the challenges arising from the pandemic's impact on in-person service delivery.

Injured workers are a vulnerable group, and depending on the nature of their injury, may be deemed high risk. It is therefore paramount that we protect the health and safety of those involved in our hearing process as we continue to mitigate the risks associated with the COVID-19 pandemic.

In keeping with WHSCRD's vision to provide an environment where workers and employers participate in an independent, timely and fair review process anchored in a culture of exceptional client service, WHSCRD took the necessary steps to overcome the challenge posed to in-person hearings by rescheduling them to a teleconference platform, while working to develop a video conference hearing service for future hearings.

WHSCRD immediately sought and received assistance from OCIO on the technicalities of setting up a video conference system in its hearing room. Additional planning and purchasing of the necessary video and audio equipment allowed WHSCRD to ensure its clients could continue to avail of a fair and timely hearing service, and offer as close to an in-person hearing experience as possible. After extensive testing, WHSCRD expects to conduct its first video conference hearings in the first half of the 2020-21 fiscal year and looks forward to reporting on its anticipated success.

Noteworthy Decisions

The following WHSCRD decisions have been identified as noteworthy for 2019-20; they articulate the outcome of a particular issue or the issue may be of interest to the general public and stakeholders. Additional decisions may be viewed at www.gov.nl.ca/whscrd.

DECISION 19034 Medical Aid - Cannabis (Worker Application), Denied

- ss.19, 60(1), 84(1), 85(1), Policy HC-13 Health Care Entitlement, Health Care Services

The Worker had a soft tissue injury to the back and thigh and suffered a subsequent knee injury. Both claims were accepted by WorkplaceNL. The Worker was noted to have an elevated pain profile and was later thought to have a chronic pain syndrome. Certain medications produced side effects, leading the Worker to develop secondary conditions which were also recognized as compensable. In 2015 the Worker presented a claim to WorkplaceNL, requesting dried cannabis for pain symptoms. WorkplaceNL denied the claim on the basis that cannabis was not recognized by the Drug Formulary and the general medical consensus was that cannabis was not recommended to treat pain. Previously, in Decision 16105, the Chief Review Commissioner found WorkplaceNL maintained discretion to consider exceptional fact situations despite the exclusion of cannabis from the Drug Formulary. She remitted the claim back to WorkplaceNL to provide a rationale on the merits of the claim-specific evidence at that time. WorkplaceNL considered the claim again but found the use of cannabis was contraindicated in the Worker's case. The Worker's Internal Review was denied.

Decision: The review was denied. The Worker's claim was not an exceptional case which would warrant a departure from the application of Policies HC-13 and HC-11. While there were some factors which supported the basis of the Worker's claim, there were other factors which supported WorkplaceNL's decision. The Chief Review Commissioner found WorkplaceNL had not exercised its medical aid discretion unreasonably or arbitrarily and its decision complied with Policy HC-13.

The Chief Review Commissioner found the Worker had a chronic pain profile and there was evidence the Worker had adverse reactions to pharmaceutical drugs. The Worker had earlier availed of other alternatives but these were apparently unsuccessful. WorkplaceNL also seemed to accept the Worker was entitled to medical aid for symptom relief, in principle, without grounding the finding on any one criteria of "medical effectiveness" under Policy HC-13. While the treating physician did not directly endorse the use of cannabis, the physician arranged a referral to a cannabinoid clinic and the physician at the cannabinoid clinic also testified in the worker's favour.

However, the Chief Review Commissioner also found the diagnosis of the Worker's current physical injury remained elusive by the time of the request, and the Worker's response to cannabis was atypical. The physician from the cannabinoid clinic testified the CBD component of cannabis lacked psychoactive ingredients but was more effective for pain control. Despite this, the Worker related CBD was of "no benefit" for pain control and insisted on the dried form including THC, which does include psychoactive ingredients but is less effective for pain control. The Worker's anxiety and cardiac issues also contraindicated the use of cannabis, but the physician at the cannabinoid clinic did not address this despite personally observing the worker's anxiety upon screening. The Chief Review Commissioner found WorkplaceNL did not err in taking these contraindications into account when it considered the question of "medical appropriateness" under Policy HC-13. While the Worker presented a number of Ontario WSIAT decisions in argument, based on Ontario Decision 2691/16, she found the outcomes of those decisions were not binding on her, but if they had been, the claim would have failed under the Ontario 'test' due to the presence of the contraindications.

The Chief Review Commissioner found "it is not the Review Commissioner's role to exercise WorkplaceNL's medical aid discretion for it" and a Review Commissioner's role is to review "whether WorkplaceNL exercised its medical aid discretion reasonably." WorkplaceNL's current decision identified why the cannabis was specifically inappropriate in the Worker's case. She also noted the Worker was not participating in pain management and there was a "remarkable lack of claim documentation" addressing the Worker's medical condition in recent years. She stated "the subject of my review is how WorkplaceNL exercised its management discretion in covering a requested drug. As there is an obvious basis for WorkplaceNL's decision in the evidence and the current decision is neither arbitrary nor fetters WorkplaceNL's discretion, I have no basis to set it aside and exercise its discretion for it." The decision was upheld as compliant with ss.84, 85, and Policy HC-13. (Hickey, CRC)

DECISION 19072 Industrial Disease (Dependent Application), Denied

- Compensable Injury – Arising Out of and In the Course of Employment – Arising Out of – Cause and Effect Relationship ss.19(1), 19(4), 43(1), 60(1), 61, Policy EN-19 Arising Out of and In the Course of Employment, Policy EN-20 Weighing Evidence
- Compensable Injury – Arising Out of and In the Course of Employment – Arising Out Of – Hazard of Employment – Asbestos ss.43(1), 60(1), 90(3.1), Policy EN-14 Asbestos Related Claims
- Compensable Injury – Definition of Injury – Industrial Disease – Stomach Cancer ss.2(1)(m), 2(1)(o), 90, **Workplace Health Safety and Compensation Regulations**, s.23,

Policy EN-19 Arising Out of and In the Course of Employment

- Proof of Claim – Standard of Proof – Balance of Probabilities – Probability Versus Possibility s.60(1), Policy EN-20 Weighing Evidence
- Proof of Claim – Standard of Proof – Balance of Probabilities – Versus Scientific Certainty s.60(1), Policy EN-20 Weighing Evidence

A deceased Worker was employed in a lead mine outside Newfoundland and Labrador for 20 years and later employed in an asbestos mine within the Province for 10 years. The Worker developed stomach cancer. A family history of GI tract cancer was noted, as was a history of smoking and alcohol consumption. The Worker made a claim for compensation in 2007, relating the stomach cancer to employment exposures in the asbestos mine. After a series of reviews the claim was denied. The Worker later died of cancer and the spouse presented a dependency claim in 2016, again relating the stomach cancer to the employment. The Dependent's representative submitted new scientific and medical publications as well as details from the miner's registry created for the job site. WorkplaceNL reviewed the claim again, finding there was no new claim specific opinion relating the Worker's cancer to the job site. It interpreted the general scientific literature as non-definitive in terms of a causal relationship between the employment exposures and stomach cancer. It also found the general scientific literature did provide definitive evidence of a causal connection between smoking and alcohol consumption and stomach cancer, and both factors were present in the Worker's claim. The Dependent appealed, disputing the medical history which recorded the Worker's alcohol and tobacco use, and also submitting WorkplaceNL erred by not placing more weight on the evidence of a possible association between asbestos exposure and stomach cancer in the medical literature. The Internal Review was denied and the Dependent proceeded to the Review Division.

Decision: The review was denied. The decision followed ss.43(1) and 60(1) of the Act. The Chief Review Commissioner found the general scientific literature was definitive in establishing a causal connection between smoking and alcohol consumption, and rejected the argument that the contemporary medical records at the time of the Worker's medical treatment were inaccurate. While the general scientific literature did suggest an association between asbestos exposure and stomach cancer, and "all other things being equal" that could support a conclusion in the Worker's favour, the evidence was outweighed by the other evidence on the claim. The evidence of association was not scientifically definitive, unlike the definitive evidence of causation relating to the two non-compensable risk factors present in the Worker's medical history.

She also found the claim-specific evidence did not support the Dependent's claim. There was no direct medical opinion by a treating provider suggesting a link between the occupational exposure

and the cancer, but there were direct opinions against the claim provided by the Medical Consultants. She found the indirect medical reporting was neutral because it only documented the Worker's history and treatment, without implying what the source of the cancer was. She also found the circumstantial evidence was neutral because there were no temporal inferences which could be drawn from the evidence which suggested a necessary contribution by the Newfoundland and Labrador employment, and there was no evidence of a "statistically significant cluster" of diagnoses in the workplace which would otherwise compel a conclusion in the Dependent's favour. While the Dependent's representative argued WorkplaceNL placed too much weight on the fact the Worker was earlier employed at another mine, the Chief Review Commissioner found that the presence of two industrial exposures was relevant. The presence of another exposure would have also weakened the inference that any employment contribution must have necessarily come from the Newfoundland and Labrador employment. Finding that the standard of proof under the Act was neither "scientific certainty" nor "mere possibility", the evidence had to be weighed on the probability standard. She concluded there was more evidence against the claim than in favour of it so WorkplaceNL's decision followed the Act, the Regulations, and Policies. (Hickey, CRC)

DECISION 19108 Adjustment Disorder (Employer Application), Denied

- Compensable Injury – Arising Out of and In the Course of Employment – Secondary Injury – Adjustment Disorder ss.43(1), 60, Policy EN-19 Arising Out of and In the Course of Employment
- Proof of Claim – Standard of Proof – Balance of Probabilities – 'Balanced Analysis' – Duty to Investigate ss.59, 60
- Return to Work – Early and Safe Return to Work – Worker Co-operation ss.89, Policy RE-02 The Goal of Early & Safe Return to Work and the Roles of the Parties

The Worker was injured in 2017. In 2018 the Worker was cleared for an Early and Safe Return to Work (ESRTW) program. The Worker then expressed dissatisfaction with the modified duties and expressed anxiety over not regaining full pre-injury earnings capacity. There were several absences from the ESRTW program, following which the Employer reported the Worker's attendance issues to WorkplaceNL, requesting a finding of non-cooperation. A medical report was received from the treating physician placing the Worker off work due to depression. The Worker was referred for psychological counselling. The Medical Consultant advised the treating physician's reporting was consistent with a diagnosis of adjustment disorder. WorkplaceNL accepted the Worker was suffering from an adjustment disorder, which was a secondary injury resulting from the primary work injury. The Employer appealed, submitting the Worker had a relevant pre-injury history of anxiety disorder, which was not caused by the work injury. The Internal Review Specialist found the Intake

Adjudicator was correct to rely on the diagnoses in the current medical reporting and conclude the Worker was disabled by a secondary injury. As a result, the Worker was not found to be non-cooperative for the purposes of the Act and Policy.

Decision: The review was denied. The Review Commissioner agreed the Worker's anxiety disorder was non-compensable because it was pre-existing and could not be considered a 'secondary' injury. However, she found the Worker did not suffer from depression prior to the work injury and had been able to remain employed with the pre-existing anxiety. She found the evidence supported that the Worker had both an anxiety disorder and a discrete adjustment disorder, and there was no evidence to the contrary. She confirmed that a Review Commissioner was not in a position to make a different diagnosis than the medical professionals, based on medical findings documented on claim, as that would require medical expertise and training.

She rejected the Employers' argument that any further investigation was required before making a decision because there was no conflict in the existing evidence which WorkplaceNL had before it at the time. She stated "while there was relatively little evidence available on the mental health condition at the time the decision was made, WorkplaceNL often has to make a decision based on what is known in early stages of investigating a claim. Although the evidence may be limited, if it is sufficient to make a decision, the only issue is whether the evidence is equally strong or equally weak, or weighs more in one direction than the other." She confirmed, however, that WorkplaceNL could revisit the basis of the Worker's diagnosis after the Worker had participated in counselling and was free to make a new decision at that time.

As WorkplaceNL was correct in finding the Worker was disabled by an adjustment disorder at the time of its decision, there was no basis to conclude the Worker was non-cooperative in the ESRTW process. She also made the factual finding that the Worker attempted the ESRTW plan and participated in the plan for some time, and not all the Worker's absences were unsupported, as argued by the Employer. (Hollett)

DECISION 19114 Earnings Loss Benefits - Calculation (Worker Application), Allowed

- Earnings Loss Benefits – Calculation – Rescue Work ss.2(1), 19(4), 64, 74, 79, Policy EL-01 Earnings Loss: Benefit Calculation

In 2016 the Worker filed a claim for a traumatic mental stress injury. The claim arose from the event of the Worker intervening in an attack on an inmate at a prison. WorkplaceNL accepted the claim, finding the Worker's stress was attributable to the event. The Worker's earnings loss claim rate was processed under the general provisions of the Act, which recognized entitlement on the basis of 80

per cent of net earnings. The Worker objected, claiming that the injury occurred in the course of performing “rescue work” within the meaning of s.79 of the Act and that the earnings loss benefit should have been based on 100 per cent of net earnings. WorkplaceNL found the Worker’s ordinary job duties included maintaining order in the prison, so riot suppression would not be an “unforeseen” event. Concluding that intervention in physical altercations was within the Worker’s regular job duties for the purposes of Policy EL-01, it found the Worker’s rate was payable at the general rate prescribed by s.74 of the Act. The Worker sought Internal Review but was unsuccessful.

Decision: The review was allowed. The Chief Review Commissioner reviewed the legislative history and the possible interpretations of s.79 and concluded the Worker was injured “by accident... while doing rescue work for the saving of human life” in an “industry... during or immediately after an... injury.” She found the definition of “industry” in s.2(1)(n) the Act was plenary, and was not limited in scope by the grouping of the term immediately after the phrase “in a mine” in s.79. Also, it was accepted the Worker was injured while rescuing another person from a serious assault, so that activity fit within the concept of “rescue work” for the purposes of s.79 and Policy EL-01.

While it was argued that the section addressed the events of “explosion, injury, fire” in the context of the phrase “other catastrophe”, and this suggested the rescue work had to take place in the setting of a more widespread calamity, the Chief Review Commissioner found it was unnecessary to accept the riot was a catastrophe because the plain language of the section confirmed that responding to an actual “injury” was considered to be on par with the other named events recognized as a ‘catastrophe’. As there was an actual injury to the person being rescued, the incident fell within the type of event caught by s.79.

The Chief Review Commissioner explained there was no requirement in s.79 that the “rescue work” represent a departure from a worker’s regular job duties. She found that criteria was introduced by the language of Policy EL-01 and she discussed the approach required where there was a possible inconsistency between the Act and a Policy. She concluded, however, that it was not necessary to resolve that issue because there was no actual inconsistency between the Act and Policy on the facts of the Worker’s case.

She found the Worker’s job description was never obtained and WorkplaceNL’s conclusion about the scope of the worker’s regular duties was based on the assumption that riot suppression was necessarily implicit within the Worker’s duties of maintaining order. She found, however, WorkplaceNL did not apply the wording of the Policy as it was written. The relevant provision of the Policy only disqualified a worker from the 100 per cent net benefit if the worker was “normally expected” to perform rescue work and “expected to perform rescue activities as part of (his) regular occupation.” There was no evidence that correctional officers were regularly expected to perform

rescue work, and the claim-specific evidence established the Worker's injury took place in the course of an atypical event. She found WorkplaceNL erred by disregarding the evidence and inferring that rescue work was "normally expected" because "there was an incidental risk of having to perform rescue work because it was a foreseeable hazard of the peacekeeping duties the worker was expected to perform." She found WorkplaceNL did not establish the rescue work itself was a normal or regular job requirement and misapplied by the Policy to the evidence. As the evidence supported that s.79 applied to the case and the exclusion in Policy EL-01 did not apply, the Worker was entitled to a rate based on 100 per cent of net pre-injury earnings. (Hickey, CRC)

DECISION 19157 Interest – Entitlement (Worker Application), Allowed In Part

- Interest – Entitlement – Circumstances in the Control of Commission s.43(3), 60(1), 64, 89.2, Policy EN-01

The Worker was injured in 1986. A number of recurrence claims followed. The Worker's earnings loss claim was then closed in 2012. In 2016 the Worker requested the issue of earnings loss entitlement be reviewed again. WorkplaceNL found there was no new evidence to warrant a reopening of the earnings loss benefit issue. Within that year, the Worker required back surgery as a result of the work injury. By 2018, it was determined the Worker was totally disabled, effective February 2016, when a Form 8/10 Report documented an increase in the Worker's symptoms. The Worker was advised no interest was payable on the retroactive payment. The Worker appealed, claiming interest should have been payable. The Internal Review was denied.

Decision: The review was allowed in part. The Chief Review Commissioner found that the Worker was entitled to interest, but only as far back as September 2016, which is when the weight of evidence in WorkplaceNL's possession shifted on the question of whether the still had the same level of earnings capacity. She found the evidence which had entered the file by that time should have resulted in a decision placing the Worker back on Temporary Earnings Loss (TEL) benefits following a reassessment of his condition following the surgery. WorkplaceNL declined to conduct a review of the Extended Earnings Loss (EEL) question until a year after the surgery even though it was obvious the surgery required for the injury had resulted in a change in the worker's condition and a reduction in the Worker's capacity. The Chief Review Commissioner explained that "WorkplaceNL had all the information it needed to make the correct determinations as the information was entered the claim in the fall of 2016. The subsequent delay was caused entirely by the failure to recognize this."

The Chief Review Commissioner rejected the Worker's argument that interest should have been payable back to the effective date of the retroactive payment, explaining that interest is only payable

when the delay is “caused by circumstances that are in the control of the commission.” She found that as of September 2016 the delay was the result of circumstances within the control of WorkplaceNL because the information was then before WorkplaceNL so as to allow it to make the correct decision at that time. She reviewed s.43(3) and Policy EN-10, explaining, “it is at the point when WorkplaceNL has the knowledge the balance of evidence has changed that triggers the interest entitlement. Interest is not payable because, in hindsight, the evidence began to favour the worker’s position at an earlier point in time. It is payable as of the point when WorkplaceNL obtains the information required to conclude the evidence now favours the worker’s position.” (Hickey, CRC)

DECISION 2020005 Medical Aid – Hearing Loss (Worker Application), Allowed

- Compensable Injury – Definition of Injury – Industrial Disease – Hearing Loss – Threshold ss.2(1)(g.1), 2(1)(o), 19(1), 19(4), 43, 60, Policy EN-12 Hearing Loss
- Medical Aid – Devices and Supplies – Hearing Aids ss.19(4), 73, 84, 85, Policy EN-12, Policy HC-13 Health Care Entitlement, Health Care Services

A Worker presented a claim for industrial hearing loss, relating a need for hearing aids to the Employer’s workplace requirements. The Worker and the Employer both confirmed that workers were required to maintain a certain minimum level of hearing in the workplace, failing which a worker would be required to obtain hearing aids. The Worker submitted a 2018 audiogram which showed the Worker’s hearing loss was 23.75db on the left side and 25db on the right side. WorkplaceNL ruled that the Worker’s hearing loss did not satisfy the minimum 25db bilateral threshold and denied the claim. The Worker sought Internal Review but was denied.

Decision: The review was allowed. The Review Commissioner found the Worker’s case was exceptional because Policy EN-12 did not fully address the situation. The Worker did have a sensorineural hearing loss consistent with noise exposure and worked in an inherently noisy environment, but the claim was denied on the basis the loss was less than 25db in both ears. The Review Commissioner found the Worker’s hearing loss likely arose out of employment and while it did not meet the general Policy requirements, the Worker did miss work upon failing a hearing test. The Review Commissioner explained that the Policy generally recognized entitlement to hearing aids on the basis a worker’s injury is the impaired ability to hear human speech. She stated the Worker’s claim was “not based on a claim he was unable to hear speech. It was based on the fact his level of hearing loss was beginning to affect his earnings capacity, in the sense it was interfering with his ability to perform his pre-injury job and exposing to him to wage loss.” She found “the strict application of the Policy did not fully grasp a claim on this nature” as the Worker’s inability to “comply with the employer’s employment requirements” created a loss that had no necessary relationship to the ability to hear speech at the levels designated by the Policy. The decision did not comply with

Sections 19(4) and 60(1) of the Act as well as Policy EN-12 and Policy HC-13. The review was allowed and the Worker was found entitled to hearing aids. (Dunford)

DECISION 2020013 Mental Stress (Worker Application), Denied

- Compensable Injury – Exclusions – Stress ss.2(1)(o), 43(1), 60(1), Policy EN-18 Traumatic Mental Stress

The Worker was a health care professional working at a hospital when confronted by an irate family member of a patient being treated on an emergency basis. The family member did not threaten the Worker with violence during the confrontation but made remarks about the professionalism of the staff. The family member was removed from the area and the situation de-escalated. The patient eventually died of the condition. Following the incident, the Worker had difficulty concentrating and experienced confidence issues. Four years after the incident, the Worker filed a mental stress claim with WorkplaceNL. The Worker was diagnosed with Post Traumatic Stress Disorder (PTSD) and a major depressive episode. Workplace found the event relied upon as the basis of the injury was not a sudden, unexpected, and traumatic event for the purposes of the Act and did not come within the list of examples provided by Policy EN-18. As the event did not meet the objective test for a sudden, unexpected, and traumatic event, the claim was denied. The Worker's Internal Review was also denied.

Decision: The review was denied. The decision followed the Act, the Regulations, and Policies. The Review Commissioner found the Worker had a diagnosed stress condition, and “while the worker’s reaction... is of utmost importance to the medical diagnosis, that comes into play when considering whether there was an ‘acute reaction’, i.e. the cause and effect relationship between the event and the reaction, not in the determination of whether the event was traumatic.” The Review Commissioner agreed that the event was likely upsetting but there was no objective basis to conclude the Worker was in danger, and the evidence was that the family member did not threaten the Worker. She agreed with WorkplaceNL that there was no actual violence nor a reasonable basis to conclude there was a threat of violence. The Review Commissioner also discussed the requirement that the stress injury has to result from an inherently traumatic event which would account for the Worker’s resulting condition and found the Worker’s treating psychiatrist, in the most recent report several years after the incident, described the Worker’s condition as being caused by “multiple psychological stressors”. She concluded WorkplaceNL was correct to find the event did not meet the requirements of the Act and Policy, and upheld WorkplaceNL’s decision. (Hollett)

2019-20 Caseload Activity

The following highlights WHSCRD's caseload activity for 2019-20. For statistical tables and additional caseload information refer to the Statistical Overview section on page 22.

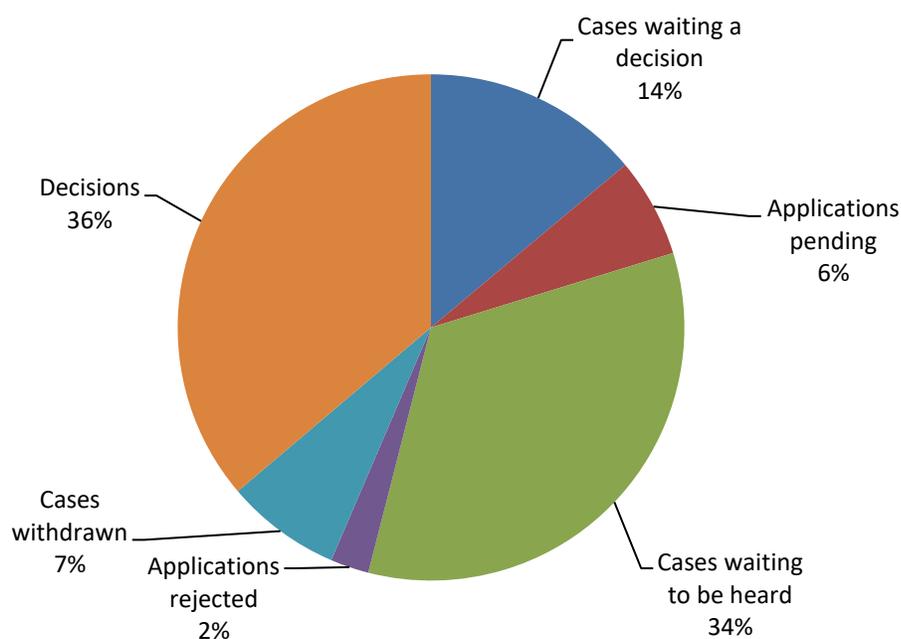
- WHSCRD's overall annual caseload (applications carried forward from previous year plus new applications) consisted of 489 cases representing an increase of 3.6 per cent from the previous fiscal year (Table 1-page 22).
- There were 193 new Requests for Review filed in 2019-20. The majority of these cases, 69 per cent, were filed within the Avalon region (Table 2-page 23). Please note 15 additional Request for Review applications were filed by clients with an existing case and are not counted as new applications for the purposes of this report.
- Workers and their dependents filed 174 Requests for Review representing 90 per cent of the applications filed in 2019-20. Employers filed 19 Request for Review applications, or 10 per cent (Table 3-page 23).
- There were 203 hearings conducted this fiscal year. The majority of hearings (61 per cent) took place at WHSCRD's office in Mount Pearl (Table 4-page 23). This aligns with the number of decisions by region with 60 per cent of decisions distributed in the Avalon region (Table 6-page 23).
- Review Commissioners found 69 per cent of WorkplaceNL's decisions were compliant with the Act; 31 per cent of decisions were either not consistent with the Act, the Regulations and policies of WorkplaceNL and were allowed, or were referred back to WorkplaceNL for further review or investigation (Table 5-page 23).
- Workers participated in 93 per cent of the cases under review based on 177 decisions rendered (Table 7-page 24). Approximately 27 per cent of workers were self-represented, 58 per cent were represented by their consultant, union, or other friends or family members; and 16 per cent were represented either by their Member of the House of Assembly (MHA) or by private legal counsel (Table 8-page 24).
- Employers participated in 16 per cent of the cases under review based on 177 decisions rendered (Table 7-page 24). Approximately 39 per cent of employers were self-represented, and 61 per cent were represented by consultants or legal counsel (Table 9-page 24).
- The top three issues under review were: Extended Earnings Loss benefits, Claim Denied, and Permanent Functional Impairment (Table 10-page 25).

2019-20 Statistical Overview

Table 1 - Annual Caseload

Caseload Breakdown	2018-19	2019-20
Appeals Carried Forward April 1st	264	296
New Applications	208	193
Annual Caseload	472	489
Less Finalized/Closed Cases:		
Decisions Rendered	131	177
Cases Withdrawn	36	36
Applications Rejected/Dismissed	9	12
Caseload March 31st	296	264
March 31st Caseload Consists of:		
Active Cases:	264	233
(cases waiting to be heard)	229	165
(cases heard and awaiting a decision)	35	68
Inactive Cases: (applications pending + awaiting exhaustion)	32	31

Figure 1 – Per cent of Annual Caseload by Disposition*



* Due to rounding, the total percentages may not equal 100 per cent.

Statistical Overview continued

Note: Due to rounding, the total percentages may not equal 100 per cent.

Table 2 - Requests for Review by Region

Year	Avalon		Gander		Grand Falls - Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2018-19	141	68	22	11	19	9	22	11	4	2	208
2019-20	134	69	18	9	16	8	23	12	2	1	193

Table 3 - Requests for Review by Claimant

Year	Worker		Employer		Dependent		Total
	#	%	#	%	#	%	
2018-19	181	87	19	9	8	4	208
2019-20	172	89	19	10	2	1	193

Table 4 - Hearings by Region

Year	Avalon (Mount Pearl)		Gander		Grand Falls - Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2018-19	83	73	12	11	5	4	14	12	0	0	114
2019-20	123	61	17	8	33	16	23	11	7	3	203

Table 5 - Decision Outcome

Year	Allowed		Denied		Referred Back to WorkplaceNL		Total
	#	%	#	%	#	%	
2018-19	34	26	74	56	23	18	131
2019-20	42	24	122	69	13	7	177

Table 6 - Decisions by Region

Year	Avalon		Gander		Grand Falls - Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2018-19	100	76	5	4	9	7	14	11	3	2	131
2019-20	107	60	24	14	30	17	13	7	3	2	177

Statistical Overview continued

Table 7 - Party Participation by Decisions Rendered - Note: More than one party may be involved in the review process; therefore, the number of parties may not correlate with the number of hearings held or decisions rendered.

Year	Total Decisions		Worker Participation		Employer Participation		WorkplaceNL Participation	
	#	%	#	%	#	%	#	%
2018-19	131		122	93	22	17	25	19
2019-20	177*		165	93	28	16	50	28

* Representative of 180 applications for review.

Table 8 - Worker Participation by Representative Type

Year	Self		Consultant		Legal Counsel		MHA*		Union		Other**		Total
	#	%	#	%	#	%	#	%	#	%	#	%	
2018-19	43	35	25	20	1	1	22	18	14	11	17	14	122
2019-20	44	27	34	21	5	3	21	13	36	22	25	15	165

* Member of the House of Assembly.

** Friend, Family Member, etc.

Table 9 - Employer Participation by Representative Type

Year	Self		Consultant		Legal Counsel		Total
	#	%	#	%	#	%	
2018-19	2	9	20	91	0	0	22
2019-20	11	39	16	57	1	4	28

Statistical Overview continued

Table 10 – Issues Reviewed by Decision

Issues	Outcome			
	Objections	Allowed	Denied	Referred Back to WorkplaceNL
Worker/Dependent Appeals				
Aggravation of Pre-existing Condition	1	0	1	0
Baie Verte Mines	2	0	2	0
Claim Denied	23	9	12	2
Compensation Denied	13	2	9	2
Compensation Rate	3	1	1	1
Dependency Benefits	2	0	2	0
Extended Earnings Loss Benefits	42	8	31	3
Health Care Services	18	3	15	0
Industrial Hearing Loss	8	1	7	0
Pension Replacement Benefit	1	0	1	0
Permanent Functional Impairment	23	3	18	2
Proportionment	4	2	2	0
Recurrence	14	4	8	2
Reinstatement of Benefits	11	8	2	1
Reopening	10	3	7	0
Retroactive Benefits	1	1	0	0
Wage Loss Benefits	10	5	5	0
Totals	186	50 (27%)	123 (66%)	13 (7%)
Employer Appeals	Objections	Allowed	Denied	Referred to
Cost Relief	1	0	1	0
Objection to a Worker's Claim	11	3	7	1
Totals	12	3 (25%)	8 (67%)	1 (8%)
OVERALL TOTALS	198	53 (27%)	131 (66%)	14 (7%)

Note: Review applications may raise more than one issue/decision for review; therefore, the above numbers may not correlate with the number of Review applications filed or Decisions rendered. Due to rounding the total percentages may not equal 100 per cent.

Financial Statement

Expenditures included in this document are unaudited and based on public information provided in the Report on the Program Expenditures and Revenues of the Consolidated Revenue Fund for the Year Ended March 31, 2020. WHSCRD is not required to provide a separate audited financial statement.

Statement of Expenditures and Related Revenue UNAUDITED For Fiscal Year Ending March 31, 2020

	2019-20		
	Actual \$	Amended \$	Original \$
Workplace Health, Safety and Compensation Review Division			
01. Salaries	1,093,925	1,158,000	1,158,000
Operating Accounts:			
Employee Benefits	3,156	3,600	3,600
Transportation and Communication	31,299	69,400	69,400
Supplies	11,987	15,700	15,700
Professional Services	13,135	75,000	75,000
Purchased Services	12,639	45,000	45,000
Property, Furnishings and Equipment	1,207	3,500	3,500
	<u>\$1,167,348</u>	<u>\$1,370,200</u>	<u>\$1,370,200</u>
02. Revenue - Provincial	<u>(\$1,149,524)</u>	<u>(\$1,370,200)</u>	<u>(\$1,370,200)</u>
Total: Workplace Health, Safety and Compensation Review	\$17,824	-	-

Source: Department of Finance (unaudited)

Active Review Commissioners 2019-20

Marlene Hickey, Chief Review Commissioner

Ms. Hickey is a resident of St. John's. She has been a member of the provincial public service since 1987. Ms. Hickey served as Director of the Workplace Health, Safety and Compensation Review Division since 1992 and also held the position of Director of Policy and Planning with the Labour Relations Agency from July 2005 to 2006. In 2006, she facilitated the efforts of the Statutory Review Committee on the **Workplace Health, Safety and Compensation Act**.

Shane Hickey, Review Commissioner (Appointed January 2019)

Shane Hickey graduated from the Dalhousie Faculty of Law in 2011 and was called to the bar in 2012. He has extensive experience in administrative decision making at the adjudication level as well as the review and appeals levels. Most recently, Mr. Hickey was employed as the Director of Employment Standards and Residential Tenancies in the Yukon.

Suzanne Hollett, Review Commissioner (Appointed January 2019)

Suzanne Hollett graduated from the University of New Brunswick with a Bachelor of Laws in 2003. Having worked as both a lawyer and an analyst responsible for legislation pertaining to protection of privacy, access to information and personal health information, she has a broad range of experience in legal analysis, interpretation and dispute resolution.

Heather Dunford, Review Commissioner (Appointed March 2019)

Heather Dunford graduated from Dalhousie University with a Bachelor of Science in Occupational Therapy in 1999. She has worked in both the private and public sector and has extensive experience in all areas of occupational rehabilitation including: functional capacity evaluation, adjudication assessment, clinic based rehabilitation, return to work consultation and disability case management.

Evan Kipnis, Part-time Review Commissioner (Term expired December 2019)

Evan Kipnis earned a Bachelor of Laws degree from Dalhousie University in 1978 and was admitted to the Newfoundland Bar in 1979. He has worked as General Counsel for Newfoundland Telephone, later NewTel Communications, subsequently known as Aliant Telecom and now Bell Aliant, including service as a Director of AMI Offshore, an Aliant subsidiary. Mr. Kipnis is a general practice lawyer with the law firm of Perry & Power and his education includes labour relations, employment law, negotiation and mediation, and training as a labour arbitrator.

Contact Information

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