

Workplace Health, Safety and Compensation Review Division (WHSCRD)

Annual Performance
Report 2017 - 18

For additional copies of this document, please contact:

Workplace Health, Safety and Compensation Review Division
2nd Floor, Dorset Building
6 Mount Carson Avenue
Mount Pearl, Newfoundland Labrador A1N 3K4
Phone: 1-709-729-5542 Fax: 1-709-729-6956
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 2017-18. As Chief Review Commissioner of the WHSCRD, I am responsible for the preparation of this report and accountable for the results contained within.

I would like to welcome new Review Commissioners appointed to WHSCRD in 2017-18 and thank outgoing Review Commissioners for their commitment and professionalism. There is a highly technical and legal nature to Review Commissioners' work and a growing complexity to the cases coming forward for appeal. Review Commissioners are required to review voluminous workers' compensation files and provide well-written decisions that require in-depth analysis of complex material.

I would also like to thank the staff of the WHSCRD for their diligence, dedication and ongoing contribution to the delivery of services to injured workers and employers. On behalf of Review Commissioners and staff, we consider it a privilege to offer our clients a responsive appeal process.

The 2017-18 fiscal year also marks the beginning of WHSCRD's 2017-20 planning cycle. This new planning cycle will find WHSCRD building upon its work to ensure a fair review process and enhance hearing preparedness. Our continued efforts in these areas will uphold the principles of natural justice anchored in a culture of exceptional client service.

We look forward to working with you in 2018-19.

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

Marlene A. Hickey - Chief Review Commissioner

Table of Contents

WHSCRD OVERVIEW	1
REPORT ON PERFORMANCE	3
OPPORTUNITIES AND CHALLENGES AHEAD	9
NOTEWORTHY DECISIONS	10
Industrial Disease	
(Decision 17065)	10
Arising Out of and in the Course of Employment	
(Decision 17075)	12
Worker versus Independent Operator	
(Decision 17091)	13
Mental Stress	
(Decision 18009)	15
Arising Out of and in the Course of Employment	
(Decision 18040)	16
2017-18 CASELOAD ACTIVITY	18
2017-18 STATISTICAL OVERVIEW	19
FINANCIAL STATEMENT	23
REVIEW COMMISSIONERS FOR 2017-18	24

WHSCRD 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 at:

<https://www.gov.nl.ca/whscrd/division/index.html>.

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. WHSCRD's budgetary allocations are provided by the Government of Newfoundland and Labrador within the overall budget for Service NL as the Minister responsible for WorkplaceNL. Unaudited expenditures for WHSCRD in 2017-18 were \$1,072,310 as provided by the Department of Finance. Please refer to page 23 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.

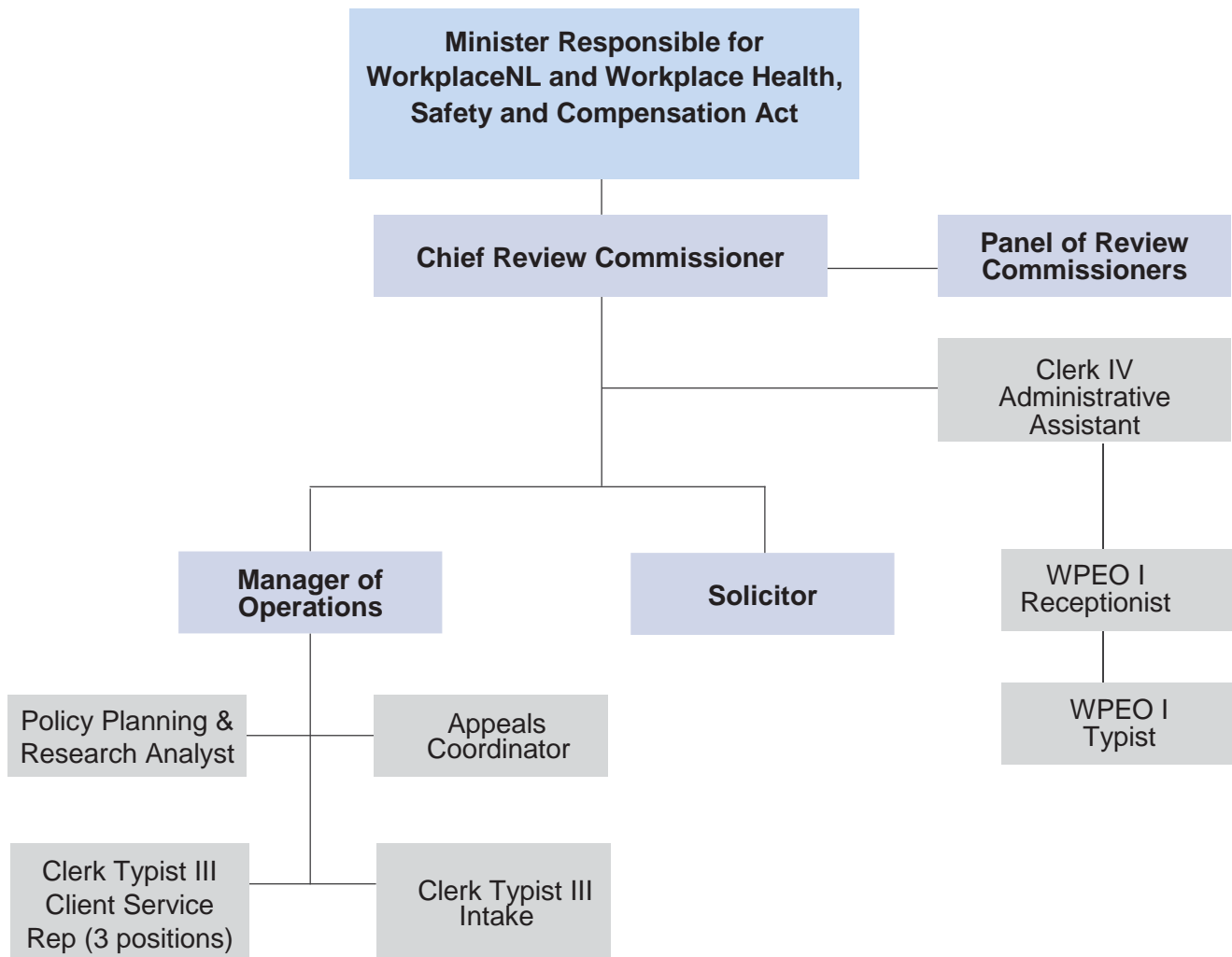
As of March 31, 2018, the WHSCRD's Panel of Review Commissioners consisted of Chief Review Commissioner, Marlene Hickey, with Erin Delaney, Evan Kipnis, Brenda Greenslade and Robert Noseworthy as Review Commissioners. In 2017-18, the appointment term of one Review Commissioner expired, and two Review Commissioners, who were appointed in July 2017, resigned. Please refer to page 24 for 2017-18 active Review Commissioner biographies.

WHSCRD Overview continued

WHSCRD STAFF

WHSCRD currently employs 12 staff (11 female and one male) in its office located in the Dorset Building, at 6 Mount Carson Avenue in Mount Pearl, NL.

WHSCRD ORGANIZATIONAL CHART



Report on Performance

The 2017-18 fiscal year marks the beginning of the 2017-20 strategic planning cycle and WHSCRD's first opportunity to report on its performance with respect to the objectives outlined in its 2017-20 Activity Plan. WHSCRD identified two issues under its primary objectives: 1. ensuring a fair review process; and 2. enhancing hearing preparedness.

Issue 1: Ensuring a Fair Review Process

A fair review process is one which upholds the principles of natural justice by ensuring parties are heard by a decision maker who is free from bias and whose judgement is based upon the weight of evidence. A fair review process also includes informing clients and stakeholders to help them understand the overall review process.

WHSCRD is committed to promoting the principles of procedural fairness by ensuring its information services respond to the needs of clients and are aligned with our strategic direction to achieve workforce stability through responsive programs and services. As part of its commitment, WHSCRD's focus in 2017-18 was on developing an information presentation to increase client knowledge of the review process. WHSCRD is cognizant of the fact that not all clients are interested in, or able to access, information services through web-based technology, and require more personal contact.

WHSCRD's efforts to communicate the most recent and relevant information related to the review process are intended to increase client knowledge of the review process from the time of application through to the decision and reconsideration processes. Work completed in 2017-18 is outlined in this section.

Objective Results for 2017-18

Objective: By March 31, 2018, WHSCRD will have developed an information presentation to increase stakeholder knowledge of the review process.

Measure: Developed an information presentation.

Indicators:

- Consulted with Communications and Public Engagement Branch for guidance in stakeholder engagement.

Report on Performance continued

- Developed review process information session presentation.

Indicator	Progress and Accomplishments
<p>Consulted with Communications and Public Engagement Branch for guidance in stakeholder engagement.</p>	<ul style="list-style-type: none"> • Consulted with representatives of the Public Engagement Branch (PEB) for guidance in relation to stakeholder engagement options and best practice experiences. • Reviewed available material from OPE with a view to select suitable options for stakeholder engagement. Several online options were explored.
<p>Developed review process information session presentation.</p>	<ul style="list-style-type: none"> • Conducted informal interviews with WHSCRD staff and Review Commissioners to gather information on client engagement to ensure developed materials would address common concerns and questions. • Concluded an in-person presentation session utilizing MS PowerPoint slides, while engaging the content through discussion, was determined to be the most useful delivery method for the information session. • Developed a preliminary information session that focuses on the clear communication of the WHSCRD's review process from the time of application through to the decision and reconsideration processes. • Provided content from the information session to clients via telephone at least two weeks prior to hearings. • Initiated the process of hiring an information management technician to digitize and organize legacy files for improved public access. Decisions prior to 2013 will be prepared for upload to WHSCRD's existing Decision Search System (DSS), updating the database. This will provide users with a broader body of decisions to research prior to their hearing, making DSS a valuable hearing preparation tool. This process and tool will be incorporated into the information session.

Report on Performance continued

Objective for 2018-19

Objective: By March 31, 2019, WHSCRD will have conducted review process information sessions with stakeholder groups to increase stakeholder knowledge of review process.

Measure: Conducted review process information sessions with stakeholder groups.

Indicators:

- Updated the information session with DSS and website specific information;
- Identified stakeholders to which the information session will be delivered and/or provided;
- Scheduled and conducted information sessions for identified stakeholders; and
- Gathered informal feedback from stakeholder groups to ensure information is responsive to needs.

Report on Performance continued

Issue 2: Enhancing Hearing Preparedness

WHSCRD's main line of business is processing Request for Review applications made by injured workers, their dependents and employers and coordinating the review process, which includes a hearing before a Review Commissioner. For the hearing process, WHSCRD staff prepares the file in a format known as a case description.

WHSCRD case descriptions are prepared using claim files provided to WHSCRD by WorkplaceNL. The case description is the body of documentary evidence which represents the official record of WorkplaceNL concerning the application under review. This is the document that clients rely upon to present their case before a Review Commissioner. Case descriptions can range in size from 50 to thousands of pages in length and much of WHSCRD's preparation time is spent compiling the case description, placing the documents in chronological order and reviewing each document for the purposes of redacting irrelevant personal information.

Objective Results for 2017-18

Objective: By March 31, 2018, WHSCRD will have finalized a review of its hearing preparedness process to identify opportunities for more efficient file preparation and release of case descriptions in advance of a hearing.

Measure: Finalized a review of its hearing preparedness process and identified opportunities for more efficient file preparation and release of case descriptions in advance of hearing.

Indicator:

- Established more efficient internal processing mechanisms and performance measures to ensure expeditious release of case descriptions.

Report on Performance continued

Indicator	Progress and Accomplishments
<p>Established more efficient internal processing mechanisms and performance measures to ensure expeditious release of case descriptions.</p>	<ul style="list-style-type: none"> • Reviewed WHSCRD case description preparation process which identified inefficiency in its printing, copying and scanning capabilities related to its current technology. • Consulted with the Office of the Chief Information Officer regarding network and hardware capabilities. • Consulted with Xerox regarding potential options available with respect to multifunction printers, copiers and scanning machines. • Replaced former lower capacity copier with two new multifunction machines with additional options for higher capacity loads, increasing WHSCRD's page per minute capabilities by 36 per cent. • Reduced 'pauses' in print jobs for larger files and overall downtime in productivity associated with printer malfunctions. • Identified extraneous material for removal from case descriptions that was formerly included in the case description, which has improved upon the ease of access to relevant information within the case description. • Called all clients a minimum of two weeks prior to scheduled hearings to allow clients to address any concerns regarding their case description, or the hearing process in general, in an effort to decrease short notice hearing postponements. • Discussed case description release targets with staff for realistic timelines. • Informally monitored existing timelines. • Held regular meetings between the Manager of Operations and Client Service Representatives regarding the status of case descriptions and hearing readiness.

Report on Performance continued

Objective for 2018-19

Objective: By March 31, 2019, WHSCRD will have begun implementing new performance measures in relation to the preparation of case descriptions for hearing preparedness.

Measure: Implemented new performance measures.

Indicators:

- Monitored timelines for case description distribution; and
- Established achievable targets for case description distribution.

Opportunities and Challenges Ahead

Review Commissioner Recruitment and Retention

The WHSCRD Review Commissioner Panel may have up to seven Review Commissioners at a time including the Chief Review Commissioner. The remaining six positions are typically three year appointments of one full-time and five part-time positions, excluding the Chief Review Commissioner. The recruitment and retention of Review Commissioners has been an ongoing challenge since WHSCRD's inception.

Resignations and term expirations impact WHSCRD's timeframe for processing appeals. Since December 2016 seven new Review Commissioners have been appointed over two recruitment periods (December 2016 and July 2017); one full-time and six part-time. Three of the part-time Review Commissioners have since resigned. WHSCRD will continue to collaborate with the Independent Appointments Commission to identify solutions to the challenge of stability for positions.

Noteworthy Decisions

2017-18 NOTEWORTHY DECISIONS

The following WHSCRD decisions have been identified as noteworthy, as 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 17065 Industrial Disease (Dependent Application), Allowed

- Compensable Injury – Arising Out of and In the Course of Employment – Arising Out of – Material Contribution ss.43(1), 60(1), Policy EN-19, Policy EN-20
- Compensable Injury – Definition of Injury – Death Resulting From an Injury – Pancreatic Cancer ss.2(1)(o), 60(1), Policy EN-20
- Compensable Injury – Definition of Injury – Industrial Disease – Pancreatic Cancer ss. 2(1)(m), 2(1)(o), 60(1), 90(1), 90(3), 90(4), Policy EN-14, Policy EN-20
- Dependency Claims – Death of Worker Resulting From Injury – Pancreatic Cancer ss.43, 60(1), Policy EN-20
- Proof of Claim – Standard of Proof – Balance of Probabilities – Versus Scientific Certainty s.19(4), 60(1), Policy EN-20

A Worker was employed at an industrial worksite for 40 years and died at age 66 of pancreatic cancer. Three years later, the Worker's spouse filed a claim for Dependency Benefits, relating the Worker's cancer to certain chemical exposures which were said to exist at the site. WorkplaceNL's Medical Consultant reviewed the claim and was unable to relate pancreatic cancer to the reported exposures. At the hearing, the Dependent's representative referenced a report prepared by a physician on behalf of the families of deceased workers who were located at the same site. WorkplaceNL, in its decision, did not reference that report but relied on a study from Quebec relating to the specific industry in which the deceased Worker was employed. WorkplaceNL concluded the Dependent had not proven the Worker's cancer 'arose out of and in the course of' employment and dismissed the claim. The Dependent's Internal Review was denied.

Decision: The review was allowed. The Chief Review Commissioner (CRC) found the Worker's cancer arose out of and in the course of employment on an application of s.60 to the facts of the case. CRC found a claim-specific analysis of the evidence supported a connection between the Worker's cancer and the industrial exposures. CRC also ruled that while the medical report on behalf of the families was not forwarded to WorkplaceNL specifically for the purposes of the claim, WorkplaceNL was aware of it because it was a matter of public record. WorkplaceNL had

considered it several times for the purposes of adjudicating claims for the same industrial site. It was not scientifically certain there was an industrial cause of pancreatic cancer for Workers with similar exposures, but that was not fatal to the claim. In the absence of definitive scientific proof, the claim had to be resolved on the civil standard by looking at all the claim evidence.

CRC confirmed the need for a 'balanced analysis' and found the direction in s.60 "where the evidence is equally strong or equally weak on a certain point, or where the adjudicator has difficulty resolving the issue one way or the other." CRC provided the following excerpt in their decision;

- a. The medical literature does not definitively settle the causation question one way or the other on the scientific standard of proof;
- b. The case has to be decided on a 'claim specific' basis on the civil standard of proof;
- c. There were no direct opinions from treating providers for or against the claim;
- d. There was an opinion from the medical consultant, which while stated to be on the balance of probabilities, depended for its conclusions on the test results of other cases, and was based on other generalities. It effectively relied on medical literature for its application to the worker's claim. As a result, only so much weight could be placed on the report as a 'negative' opinion;
- e. There is support for at least an 'association' contained in the ISSRT report relied on by WorkplaceNL;
- f. There was considerable circumstantial evidence both for and against the claim, which I found to be at least equal in persuasiveness;
- g. As noted already, the only piece of indirect evidence that supported an inference of a non-compensable cause was the worker's father being diagnosed (albeit later in life) with the same disease. However, as I noted above, there is even some conflict in this evidence;
- h. The worker did not exhibit any of the other non-compensable risk factors, and in fact, differed sharply from an individual exhibiting those factors; and
- i. The exposure period on the claim was notably long and the exposures took place during significant periods of time when there was no personal protective equipment, and the worker likely experienced a concentrated exposure while working in an elevated position above the floor of the yard.

CRC observed that all the specifics relating to the worksite and the toxic exposures may never be known and the Employer no longer exists. As WorkplaceNL did not intend to investigate the worksite any further, CRC concluded "that leaves claims such as these to be determined on what little is known." CRC determined that remittal would likely serve no practical purpose, as the evidentiary record was not likely to be expanded. CRC made her own final order recognizing a

casual contribution between the cancer and the employment, and the Dependent was entitled to dependency benefits accordingly. (Hickey, CRC)

DECISION 17075 Arising Out of and in the Course of Employment (Employer Application), Denied

- Compensable Injury – Arising Out of and In the Course of Employment – Arising Out of – Material Contribution ss.43(1), 60(1), 61, Policy EN-19
- Compensable Injury – Arising Out of and In the Course of Employment – Presumption Clause s.61, Policy EN-19
- Compensable Injury – Definition of Injury – Exclusions – Serious and Wilful Misconduct of the Worker
- ss.2(1)(o), Policy EN-19
- Compensable Injury – Formalities – Notice of Injury ss.53, 54

A Worker filed a claim of injury eleven days after an incident in which the Worker claimed to have been injured while operating heavy equipment. The Worker claimed the rear end of a vehicle rose suddenly in the air when the bucket was raised, and the jarring motion caused the Worker to lurch forward and strike the windshield. The Worker left the site the same day, on a scheduled turn-around. Eight days later the Worker saw the on-site medic on returning to the workplace. The Worker then filed a Form 6: Worker's Report of Injury three days after that appointment. The Employer filed a Form 7: Employer's Report of Injury the following day, objecting to the claim.

The Employer contested the claim, stating it had terminated the Worker for a breach of company policy. The Employer found the Worker had breached mandatory safety protocols by keeping the bucket in the wrong position, and by failing to wear a seatbelt, both of which led to the injury. The Employer stated the Worker had been warned in the past, and failed to comply with the Employer's direction.

Three months later, WorkplaceNL accepted the Worker's claim. The Employer filed for Internal Review. WorkplaceNL suspended the Internal Review until it investigated additional evidence suggesting the Worker was being affected by a non-compensable condition. It eventually concluded the Worker's injuries were consistent with the type of incident reported, so the Internal Review proceeded on the Employer's objection. The Employer argued the Worker's own serious and willful misconduct had caused the injury and WorkplaceNL should not have accepted the claim because the Employer was not notified of the injury until the Worker returned to the site the following week, contrary to s.53 of the Act. The Internal Review Specialist confirmed the decision to accept the claim, and approve wage loss benefits, but directed that any ongoing entitlement be

reviewed further.

Decision: The review was denied. WorkplaceNL’s decision followed the Act. The injury took place in the course of employment and arose out of a hazard of employment, that being the operation of the heavy equipment. The Review Commissioner (RC) clarified that a claim was only barred under s.43(1) when the injury is “attributable solely to the serious and willful misconduct of the worker.” RC found the Worker’s conduct may have been careless, but the injury was a product of both the Worker’s conduct and the hazards presented by operating the equipment. RC found the employment was still a material contributor to the employment, and as the system was not fault-based, there was no reason for WorkplaceNL to deny the claim. The Worker’s conduct was not the sole cause of the injury. Once it was found the injury took place in the course of employment, a presumption was raised that the injury arose out of the employment and the presumption was not rebutted that employment caused the injury or contributed to it. The test prescribed by the Act applied to the issue, and the terms of the employment contract could not change the test under the Act.

RC also found the Worker’s claim was not barred by s.53 of the Act. The Worker did not formally advise the employer “immediately” after the incident, as required by s.53(1)(a), but the incident was witnessed by another worker at the site and while the Employer claimed to have been prejudiced by its own inability to investigate the incident, the evidence did not demonstrate how that was the case. Also, the Worker insisted a notice was provided to the shift supervisor before the end of the scheduled turn-around, and repeated on return to the site the following week. The shift supervisor corroborated that the Worker reported the incident. The Employer was able to obtain statements from the witnesses involved notwithstanding the fact that the investigation was commenced after the turn-around had elapsed. RC concluded the Employer was able to obtain factual and medical information on the claim, finding “the time period was short and it was not shown how the elapsed time had a detrimental effect on the employer’s investigation.” WorkplaceNL was correct to process and accept the claim under ss.53 and 54 of the Act. (Delaney)

DECISION 17091 Worker versus Independent Operator (Employer Application), Denied

- Assessments – Liability – Payroll ss.2(1)(z), 19(1), 41, 60(1), Policy ES-01, Interpretation Act. RSNL, c.I-19, s.16
- Scope of the Act – Application – Independent Operators ss.2(1)(z), 41, 60(1), Policy ES-01
- Scope of the Act – Application – Workers – Contract of Service ss.2(1)(z), 60(1)

The Employer operated a counselling service and retained several counsellors who provided

services to the public. Each entered into an Agreement with the Employer which characterized the Therapist as an Independent Operator. The Therapists were also listed on Independent Operator Questionnaires. WorkplaceNL reviewed the Payroll Statement and Questionnaires and concluded that one of the Therapists was a “worker” for the purposes of the Act and the Employer was liable for assessments on that Therapist’s earnings. The Employer objected to the decision, maintaining the Therapist was an Independent Operator. The Employer sought Internal Review of the decision, which was denied. The Employer proceeded to the Review Division. In Decision 15209, the Review Commissioner concluded WorkplaceNL had failed to provide a transparent rationale for the classification of the Therapist as a Worker and remitted the matter back for a new decision. In 2015 WorkplaceNL conducted another review. It confirmed the Therapist was a Worker, for reasons as provided. A 2016 Internal Review decision upheld the ruling of the Assessment Services department and the Employer again proceeded to the Review Division.

Decision: The review was denied. The Chief Review Commissioner (CRC) found the new decision provided comprehensive reasoning for the finding, and was in accordance with the Act, regulations, and policies. CRC referenced the Meredith Principles which served as the foundation of the workers’ compensation system and found that a purposive interpretation was required. A purposive interpretation required an inclusive interpretation of the term “worker” rather than an exclusive one. CRC found the root issue was whether the Therapist was engaged by the Employer under a “contract of service” or was engaged to provide a service to the Employer as an Independent Operator. CRC confirmed the Act conferred exclusive jurisdiction on WorkplaceNL to determine whether the Therapist met the statutory interpretation, and was not bound by the parties’ Agreement to characterize the relationship as an independent operator relationship.

Considering the ‘four factor’ analysis used by WorkplaceNL in its Assessment Services Manual in approaching the ‘control test’ in the Montreal Locomotive case, CRC reviewed the relationship as it was in the Agreement, and as it was in practice. The overall weight of evidence suggested the Therapist was engaged under a contract of service despite the terms of the Agreement, as the Therapist more closely resembled a “worker” on each of the four tests.

Concluding the issue was “whether the Therapist is more like a staff therapist delivering the services of the company, as opposed to a self-employed individual delivering services to the company,” CRC found the Therapist was essentially a staff Therapist working only for the Employer, with the Employer controlling the Worker’s ability to compete, hours of work, and other key elements of the relationship. Finding that the purposes of the Act included the protection of employers from civil liability and the security of payment to injured workers, CRC concluded WorkplaceNL “should not be too ready to classify individuals as independent operators where that dubiously is the case.” WorkplaceNL’s decision followed the Act and Policies and was upheld.

(Hickey, CRC)

DECISION 18009 Mental Stress (Worker Application), Remitted

- Compensable Injury – Arising Out of and In the Course of Employment – Secondary Injury – Depression ss.43, 59, 60(1), Policy EN-19
- Compensable Injury – Definition of Injury – Exclusions – Stress ss.2(1)(o), 2(2), 60(1), Policy EN-18

The Worker was assaulted by a client in the course of employment as a behavioural aide. WorkplaceNL accepted the claim for the Worker's physical injury. The Worker's treating physician recorded the Worker was experiencing symptoms of stress and depression. The Worker became reluctant to return to the workplace following a change in the staffing arrangements, perceiving an increase in the risk of being injured. The Worker was then assaulted a second time by the same client. The Worker went off work with a diagnosis of increased blood pressure.

After the Worker returned to work, there was an exchange between the Worker and the Manager. Within days, the Worker was placed off work with a diagnosis of major depressive disorder and post-traumatic stress. The Worker filed a claim with WorkplaceNL, which was denied. WorkplaceNL rejected the claim on the basis it was excluded by s.2, as the Act does not recognize stress claims due to changes in workplace arrangements, and the type of "event" could not be considered "unexpected" for the purposes s.2(1)(o) because it was an inherent risk of the Worker's job environment. The Worker's Internal Review was denied.

Decision: The matter was remitted to WorkplaceNL for a new decision. WorkplaceNL erred under Policy EN-18 and s.2 of the Act in characterizing the "event" as one which could not satisfy the concept of "sudden, unexpected, and traumatic". The Review Commissioner (RC) confirmed that the concept of what is "sudden, unexpected, and traumatic" had to be determined objectively, according to how an ordinary person would find the event, regardless of if the individual worker had any greater or lesser sensitivity than an average person. RC found the first assault was unexpected as a matter of fact, and it had not been ruled out that the Worker experienced a delayed onset of the post-traumatic stress that was later diagnosed by the treating physician. RC acknowledged that the general provisions of Policy EN-18 only recognized as compensable those risks "which are uncommon with respect to inherent risks of the occupation" but it also specifically identified "being subjected to physical violence" as being an example of one of those risks recognized by the Policy. Therefore, WorkplaceNL's interpretation of the Policy was incorrect and did not provide a basis to exclude the claim. Also, RC was not convinced the Worker's anxiety about the change in job duties or employment conditions could be looked at in isolation from the

assault which had already occurred. Therefore, it was not clear the case came within the type of situation excluded by s.2(2) of the Act.

Also, the Worker's own "acute reaction" was characterized as being exclusively stress-related, even though there was a diagnosis of depression alongside post-traumatic stress. RC found s.2 of the Act was silent on the compensability of depression, and WorkplaceNL had to verify the Worker's diagnosis before characterizing it as "stress" for the purposes of s.2 and Policy EN-18. However, RC also concluded there were factual and medical issues which required further interpretation, including whether the Worker's stress diagnosis was actually an "acute reaction" to the assaults, versus job duties in general.

Subject to the finding that an event of being assaulted fell within the type of "event" recognized by the Policy and the Act, the issue was remitted back to WorkplaceNL to clarify the Worker's diagnosis and determine if the Worker's condition was an acute reaction to the events of physical violence. (Delaney)

DECISION 18040 Arising Out of and in the Course of Employment (Worker Application), Denied

- Compensable Injury – Arising Out of and In the Course of Employment – Arising Out Of – Hazard of Employment – Snowball ss.2(1)(o), 5, 43, 60(1), Policy EN-19
- Compensable Injury – Arising Out of and In the Course of Employment – In the Course Of –Coffee or Rest Break ss.2(1)(o), 5, 43, 60(1), Policy EN-19

The Worker left the Employer's premises on a coffee break. The Worker was near a coffee shop when struck in the ankle by a snowball thrown by a co-worker. The Worker made a claim for ligament injury as a result of the incident. WorkplaceNL denied the claim on the basis the injury did not arise out of and was not in the course of employment. The Worker appealed, arguing the majority of the indicators in Policy EN-19 supported the incident was a compensable injury, and that the injury was in the course of and arose out of employment. WorkplaceNL denied the Worker's Internal Review.

Decision: The review was denied. WorkplaceNL's decision followed the Policy and the Act. The injury did not take place in the course of employment because the injury took place off the employer's premises and the Worker was not performing an employment activity when and where the injury occurred. The Chief Review Commissioner (CRC) rejected that the coffee break was an employment activity for the benefit of the employer on the basis it promoted refreshment so as to

allow the Worker to be more productive. Also, while the Employer permitted the break under the employment contract, it did not direct the Worker to take the break or how and where the Worker must take it. CRC found the Worker was injured during a personal break or deviation from what otherwise was the course of the Worker's employment, but the injury itself was not in the course of the Worker's employment. CRC also found the injury did not arise out of the employment because it was not created by an employment hazard. The additional hazard of injury came about once the Worker left the Employer's premises and was the result of the Worker being off-site and the act of the co-worker throwing a snowball. There was no evidence the co-worker who threw the snowball was in the course of employment or that the act of the co-worker was directed or required by the Employer. The hazard which caused the injury was not an inherent hazard of the employment but was introduced by a combination of the Worker leaving the premises and the actions of the co-worker. WorkplaceNL's application of the Policy was consistent with the accepted interpretations of the Act. (Hickey, CRC)

2017-18 Caseload Activity

The following highlights WHSCRD's caseload activity for 2017-18. For statistical tables and additional caseload information refer to the Statistical Overview section on page 19.

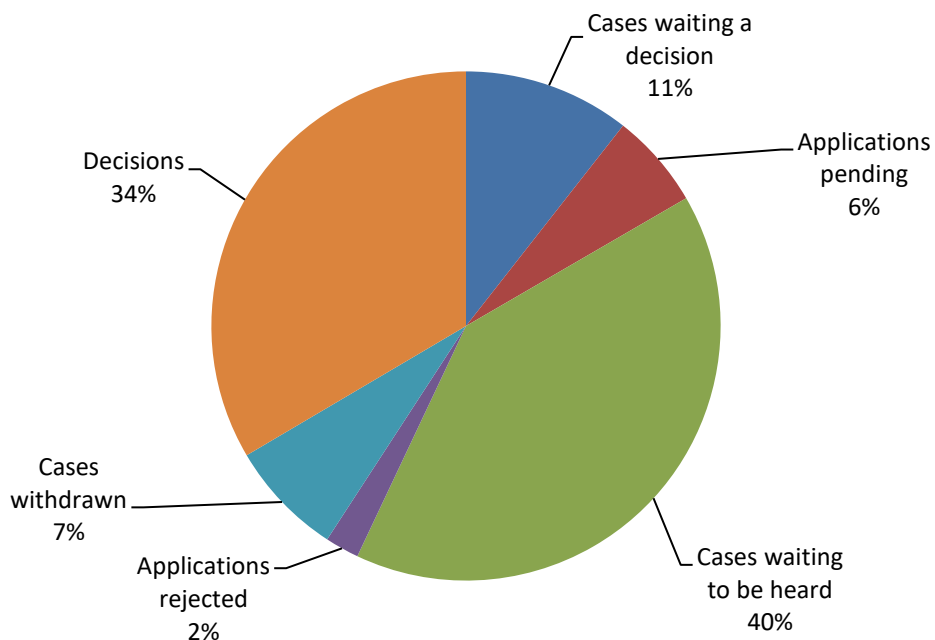
- WHSCRD's overall annual caseload, including cases finalized, consisted of 463 cases representing an increase of 5 per cent from the previous fiscal year (Table 1-page 19).
- There were 236 Request for Review applications filed in 2017-18, a decrease of 29 cases from the preceding year. The majority of these cases, 67 per cent, were filed within the Avalon region (Table 2-page 20).
- Workers and their dependents filed 205 Request for Review applications representing 87 per cent of the applications filed in 2017-18. Employers filed 31 Request for Review applications, or 13 per cent. (Table 3-page 20).
- There were 173 hearings conducted this fiscal year. The majority of hearings (70 per cent) took place at WHSCRD's office in Mount Pearl (Table 4-page 20). This aligns with the number of decisions by region with 70 per cent of decisions distributed in the Avalon region (Table 6-page 20).
- Review Commissioners found that 52 per cent of WorkplaceNL's decisions were compliant with the Act. However, 48 per cent of decisions subject to review were either not consistent with the Act, the Regulations and policies of WorkplaceNL, or required additional review by WorkplaceNL. In these cases, Review Commissioners allowed the appeals or referred the cases back to WorkplaceNL for further review or investigation (Table 5-page 20).
- Workers participated in 88 per cent of the cases under review based on 155 decisions rendered (Table 7-page 21). Approximately 40 per cent of workers were self-represented, 19 per cent were represented either by their Member of the House of Assembly (MHA) or by private legal counsel and; 40 per cent were represented by their union, consultant, or other friends or family members (Table 8-page 21).
- Employers participated in 8 per cent of the reviews (Table 7-page 21) and were self-represented in 31 per cent of the cases based on the 155 decisions rendered (Table 9-page 21).
- The top three issues under review for workers were: Health Care Services at 22 per cent, Extended Earnings Loss benefits at 16 per cent, and Claim Denied at 12 per cent (Table 11-page 22).

2017-18 Statistical Overview

Table 1 - Annual Caseload

Caseload Breakdown	2016-17	2017-18
Appeals Carried Forward April 1st	176	227
New Applications	265	236
Annual Caseload	441	463
Less Finalized/Closed Cases:		
Decisions Rendered	172	155
Cases Withdrawn	26	34
Applications Rejected	16	10
Caseload March 31st	227	264
March 31st Caseload Consists of:		
Active Cases:	215	236
(cases waiting to be heard)	181	187
(cases heard and awaiting a decision)	34	49
Inactive Cases: (applications pending)	12	28

Figure 1 – Per cent of Annual Caseload by Disposition



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
	#	%	#	%	#	%	#	%	#	%	
2016-17	187	71	16	6	27	10	26	10	9	3	265
2017-18	157	67	24	10	18	8	34	14	3	1	236

Table 3 - Requests for Review by Claimant

Year	Worker		Employer		Dependent		Total
	#	%	#	%	#	%	
2016-17	220	83	38	14	7	3	265
2017-18	199	84	31	13	6	3	236

Table 4 - Hearings by Region

Year	Avalon (Mount Pearl)		Gander		Grand Falls - Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2016-17	113	68	10	6	13	8	24	15	5	3	165
2017-18	121	70	15	9	19	11	11	6	7	4	173

Table 5 - Decision Outcome

Year	Allowed		Denied		Referred Back to WorkplaceNL		Total
	#	%	#	%	#	%	
2016-17	24	14	106	62	42	24	172
2017-18	52	33	80	52	23	15	155

Table 6 - Decisions by Region

Year	Avalon		Gander		Grand Falls - Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2016-17	112	65	15	9	19	11	21	12	5	3	172
2017-18	109	70	14	9	16	10	12	8	4	3	155

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	
	#		#	%	#	%	#	%
2016-17	172		166	97	48	28	62	36
2017-18	155		136	88	13	8	22	14

Table 8 - Worker Participation by Representative Type

Year	Self		Consultant		Legal Counsel		MHA*		Union		Other		Total Worker
	#	%	#	%	#	%	#	%	#	%	#	%	
2016-17	40	24	19	11	5	3	42	25	49	30	11	7	166
2017-18	55	40	21	15	7	5	19	14	26	19	8	6	136

* Member of the House of Assembly.

Table 9 - Employer Participation by Representative Type

Year	Self		Consultant		Legal Counsel		Total
	#	%	#	%	#	%	
2016-17	28	58	15	31	5	10	48
2017-18	4	31	8	62	1	8	13

Table 10 - Requests for Reconsideration by Client

Year	Total Requests		Worker Requests		Employer Requests		WorkplaceNL Requests	
	#		#	%	#	%	#	%
2016-17	20		15	75	3	15	2	10
2017-18	11		7	64	2	18	2	18

Statistical Overview continued

Table 11 – 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
Claim Denied	21	8	8	5
Compensation Denied	2	1	1	0
Compensation Rate	1	1	0	0
Dependency Benefits	5	1	4	0
Extended Earnings Loss Benefits	28	9	16	3
Health Care Services	38	21	11	6
Industrial Disease	1	0	0	1
Industrial Hearing Loss	4	2	2	0
Interest Payments	2	2	0	0
Internal Review Denied	5	2	3	0
Pension Replacement Benefit	1	0	1	0
Permanent Functional Impairment	17	4	9	4
Permanent Partial Disability	1	0	1	0
Proportionment	9	5	3	1
Recurrence	9	4	4	1
Reinstatement of Benefits	3	2	0	1
Reopening	11	5	5	1
Temporary Earnings Loss Benefits	1	1	0	0
Wage Loss Benefits	14	3	8	3
Total	174	71 (41%)	77 (44%)	26 (15%)
Employer Appeals	Objections	Allowed	Denied	Referred to WorkplaceNL
Assessment Rate	1	0	0	1
Cost Relief	1	1	0	0
Independent Operator	1	0	1	0
Objection to a Worker's Claim	9	0	9	0
Total	12	1 (8%)	10 (83%)	1 (8%)
OVERALL TOTAL	186	72 (39%)	87 (47%)	27 (15%)

Note: Review applications may raise more than one issue 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 un-audited 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, 2018. WHSCRD is not required to provide a separate audited financial statement.

Statement of Expenditures and Related Revenue UNAUDITED For Fiscal Year Ending March 31, 2018

	2017-18		
	Actual \$	Amended \$	Original \$
Workplace Health, Safety and Compensation Review Division			
01. Salaries	814,838	864,900	864,900
Operating Accounts:			
Employee Benefits	2,720	3,500	3,500
Transportation and Communication	31,301	41,200	41,200
Supplies	15,710	16,000	16,000
Professional Services	65,982	140,000	140,000
Purchased Services	138,913	163,400	163,400
Property, Furnishings and Equipment	2,846	3,400	3,400
	<u>\$1,072,310</u>	<u>\$1,232,400</u>	<u>\$1,232,400</u>
02. Revenue - Provincial	<u>(\$777,775)</u>	<u>(\$1,232,400)</u>	<u>(\$1,232,400)</u>
Total: Workplace Health, Safety and Compensation Review	(\$294,535)	-	-

Source: Department of Finance (unaudited)

Review Commissioners for 2017-18

Marlene Hickey, Full-time 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.

Erin Delaney, Full-time Review Commissioner (Appointed December 2016)

Erin Delaney holds a Bachelor of Arts from St. Mary's University and a Bachelor of Laws from the University of New Brunswick. She has appeared before the Supreme Court and Territorial Court of the Northwest Territories on behalf of the Territorial Government, and appeared in labour arbitrations, collective agreement negotiations and mediations related to employment matters for the territorial government. More recently Ms. Delaney served as a Formal Complaints Reviewer and a Complaints Resolution Officer with the Law Society of Alberta. Since moving to the province she has worked for the Newfoundland and Labrador Board of Commissioners of Public Utilities on the Order for the 2013 Newfoundland and Labrador Hydro Amended General Rate Application hearing.

Evan Kipnis, Part-time Review Commissioner (Appointed December 2016)

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.

Brenda Greenslade, Part-time Review Commissioner (Appointed July 2017)

Brenda Greenslade worked with the Workplace Health, Safety and Compensation Commission (WHSCC), now WorkplaceNL, between 1999 and 2014. Most recently she was the Executive Director of Employer Services between 2010 and 2014, following 10 years as the Director of Prevention Services and one year as the Manager of Prevention Services. Ms. Greenslade holds a Diploma in Nursing from the General Hospital School of Nursing, a Bachelor of Nursing from Memorial University of Newfoundland and Labrador and a Masters in Occupational Health from McGill University. She worked as a nurse between 1979 and 1998, before beginning her career with WHSCC.

Review Commissioners Continued

Robert Noseworthy, Part-time Review Commissioner (Appointed July 2017)

Robert Noseworthy has a long career in public service, having most recently held the position of Chair and CEO of the Public Utilities Board between 2001 and 2008. From 1997 to 2001 he was the deputy minister with the provincial Department of Municipal and Provincial Affairs, and between 1989 and 2001 he was the Chair and CEO of Newfoundland and Labrador Housing Corporation. Mr. Noseworthy retired from the public service in 2008 and has worked as a consultant since that time. He holds a Bachelor of Engineering from Dalhousie University and a Master's in Business Administration from the University of Western Ontario.

Keith Barry, Part-time Review Commissioner (Term expired June 2017)

Mr. Barry is a resident of St. John's. He is a retired provincial public servant, having served in various government departments over a 44-year career. Most recently, Mr. Barry served as Vice-Chair of the Public Service Commission. Prior to that he was the Director of Financial Administration for the Royal Newfoundland Constabulary and occupied various senior financial positions with the Fisheries Loan Board, Executive Council and other entities. Mr. Barry was honoured with a fellowship with the Society of Management Accountants of Canada in 2004, and in 2006 was named Gonzaga Alumnus of the year.

Gerald Thompson, Part-time Review Commissioner (Appointed July 2017; Resigned March 2018)

Gerald Thompson has been the Executive Director of the Exploits Regional Chamber of Commerce since 2011, where he oversees the affairs of the chamber's membership, promotion and recruitment of new members. He was President of the Chamber of Commerce in both 2001 and 2010. Mr. Thompson has experience in reviewing appeals, having worked as a referee for TAGS appeals with the federal Department of Fisheries and Oceans from 1992 to 1994, with the Canada Pension Plan/Old Age Security Review Tribunal between 2001 and 2008 and as a member of the Appeals Board with the provincial Department of Municipal Affairs in 1994, 1997, and 2011.

Contact Information

Workplace Health, Safety and Compensation

Review Division

2nd Floor, Dorset Building

6 Mount Carson Avenue

Mount Pearl, NL A1N 3K4

TEL: (709) 729-5542

FAX: (709) 729-6956

TOLL FREE: 1-888-336-1111

E-MAIL: whscrd@gov.nl.ca

WEBSITE: www.gov.nl.ca/whscrd

