

# **Workplace Health, Safety And Compensation Review Division (WHSCRD)**

**Annual Performance  
Report 2015 - 16**



## Message from the Chief Review Commissioner



In accordance with the *Transparency and Accountability Act* 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 2015-16. As Chief Review Commissioner of the WHSCRD, I am responsible for the preparation of this report and accountable for the results contained within it.

The year 2015-16 was a very productive year with respect to the WHSCRD's caseload. The total number of hearings increased; more decisions were finalized than in the previous year; the service delivery timeframes were reduced; and in relation to the number of hearings scheduled, the number of postponements dropped. The WHSCRD conducted 276 hearings and delivered 256 decisions which is an increase from 190 hearings and 202 decisions in 2014-15. Requests for postponements, relative to the number of hearings, dropped by 12 per cent. In addition, though the wait time from application to hearing remained at eight months in 2015-16, the time from hearing to decision decreased to an average of 50 days. As always, the WHSCRD continues to explore additional means to further reduce processing time for its clients.

This type of performance and service delivery is what we set out to accomplish at the beginning of the reporting period as the WHSCRD rebounded from some very challenging circumstances in the previous year. I wish to acknowledge the improvement in these performance indicators was due to the combined efforts of clients, staff and Review Commissioners. I want to extend my sincere thank-you to all who contributed to this successful outcome.

Given the progress in advancing our caseload, I am pleased to report the WHSCRD is no longer processing a backlog of cases. By March 31, 2016 the WHSCRD was operating within normal service levels with five Review Commissioners. In this circumstance, an applicant can expect the WHSCRD to be ready to conduct a hearing within six to eight weeks of application and a decision can be expected six to eight weeks following the hearing. It should be remembered when considering the timing data, the WHSCRD has little influence over the time frame from application to hearing. This period is, for the most part, up to the parties readiness. The period between hearing and decision, however, is within the control of the WHSCRD. A timeframe of six to eight weeks for a decision remains the shortest turnaround time in the country for appeal processing. Notwithstanding this, some cases, due to complexity, novelty or volume will take longer to review and finalize. This has to be expected in such circumstances. My colleagues and I place great emphasis on decision quality and always attempt, to the extent possible, to balance superior quality and expeditious resolution.

The objectives for 2016-17 have previously been identified in the WHSCRD Activity Plan which concludes in March, 2017. We will continue in 2016-17 to build upon the successes of this past year to ensure clients maintain continued access to a user-friendly appeal process by expanding upon our client service framework. We look forward to the challenges ahead and welcome your input and feedback.

## Message from the Chief Review Commissioner continued

I wish to also acknowledge and thank Review Commissioners and staff of the WHSCRD for their commitment, professionalism and ongoing contribution to the delivery of services to injured workers and employers. On behalf of Commissioners and staff, we consider it a privilege to offer our clients a prompt and responsive appeal process. We look forward to working with you in 2016-17.

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

**Marlene A. Hickey**  
Chief Review Commissioner

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# WHSCRD Overview

## INTRODUCTION

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

- Compensation and medical aid benefits;
- Rehabilitation and return to work services and benefits;
- Employers' assessments and industry classifications; and,
- The obligations of an employer and a worker with respect to early and safe return to work and re-employment efforts.

## FINANCIAL INFORMATION

Funding for the operations of the WHSCRD is recovered from the *Injury Fund* pursuant to s.25 of the *Act*. The WHSCRD's budgetary allocations are provided by the Government of Newfoundland and Labrador within the overall budget for Service NL and reports to the Minister responsible for WorkplaceNL. Unaudited expenditures for the WHSCRD in 2015-16 were \$1,161,138, as provided by the Department of Finance. Please refer to page 24 for more detailed financial information.

## REVIEW COMMISSIONERS

The 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 the WHSCRD. Review Commissioners conduct hearings in St. John's, Gander, Grand Falls-Windsor, Corner Brook, Happy Valley-Goose Bay and Labrador City.

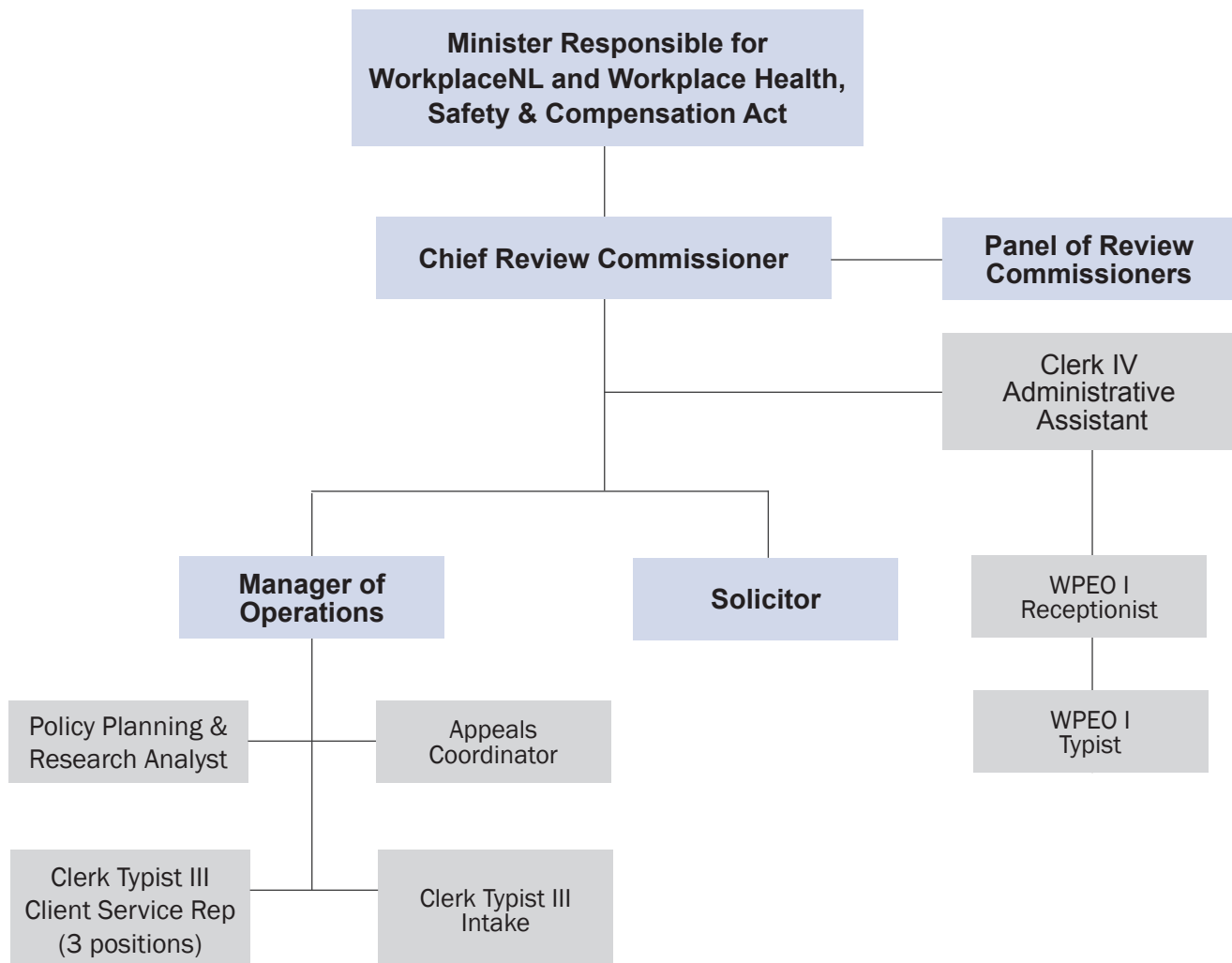
As of March 31, 2016, the WHSCRD's Review Commissioners consisted of Chief Review Commissioner, Marlene Hickey, with Lloyd Piercey, Gordon Murphy, Keith Barry and Chris Pike as Review Commissioners. Bruce Peckford's Review Commissioner appointment expired in February 2016. Please refer to page 25 for additional Review Commissioner information.

## WHSCRD Overview continued

### WHSCRD STAFF

The 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





### MANDATE

The mandate of the WHSCRD is to review decisions of WorkplaceNL to ensure compliance with the *Workplace Health, Safety and Compensation Act* (the *Act*) and *Regulations*, as well as with the policies of WorkplaceNL. The WHSCRD is also mandated to direct appropriate remedies where necessary.

The *Workplace Health, Safety and Compensation Act*, RSNL1990 CHAPTER W-11, Part II – Appeals, Sections 21 to 37 provide the legislative provisions for the WHSCRD.

### VISION

The WHSCRD's vision statement articulates its sense of purpose while defining its priorities. The following vision statement provides direction to the WHSCRD towards achieving its mandate:

#### Vision Statement

The vision of the WHSCRD is an environment where workers and employers participate in an independent, timely and fair review process anchored in a culture of exceptional client service.

### MISSION

The following mission statement identifies priorities of the WHSCRD for 2011-17.

#### Mission Statement

By 2017, the WHSCRD will have expanded its client service framework through the creation and implementation of service standards.

## WHSCRD Overview continued

### LINES OF BUSINESS

The WHSCRD offers the following services to its clients:

#### Review of WorkplaceNL Decisions

- The WHSCRD processes review applications submitted by injured workers, their dependents and employers in the province, as well as coordinates a review process that includes a hearing before a Review Commissioner concluding with a final written decision.

#### Information Services

- The WHSCRD provides information services to its clients by providing web-based distribution of its decisions accessed from its website at <http://www.gov.nl.ca/whscrd>, researching workers' compensation issues, and collecting and maintaining statistical information relative to the review process.

# Highlights And Accomplishments

While providing quality services to workers and employers of the province, and continuing to improve its practices and procedures, the WHSCRD has completed the following initiatives in 2015-16:

## Case Processing

The WHSCRD made substantial inroads in the number of cases waiting to be heard this fiscal year. This is largely due to the appointment of a full-time Review Commissioner in July 2015 which allowed more flexibility with respect to the scheduling of cases. The extensive efforts on the part of WHSCRD staff, who were in constant contact with the appeal parties to coordinate pre-hearing processes, also contributed greatly to the reduction of cases waiting for a hearing date. The WHSCRD is now meeting its current caseload demands and addressing older applications which have been outstanding from previous years.

## Information Workshops

The WHSCRD is committed to a fair appeal process for all participants. It seeks to inform, educate and assist all those participants in the system and, in particular, the unrepresented participant.

In this reporting year, WHSCRD management conducted five information sessions on representation before Members of the House of Assembly, their constituency assistants, and Appeals Officers of the Government Members' Office.

Informed representation improves the pre-hearing, hearing, and post-hearing experiences of all appeal participants and contributes to the quality and efficiency of the WHSCRD's service provision in all facets of these processes.

## Learning and Development

The WHSCRD recognizes learning development opportunities for staff is a fundamental component towards fulfilling the WHSCRD's objectives with respect to service standards. During this reporting year, all staff of the WHSCRD undertook in-house training regarding the *Access to Information and Protection of Privacy Act*, with regard to best practices and procedures, to ensure their knowledge is current in this area.

Additionally, Occupational Health and Safety (OH&S) committee members attended WorkplaceNL awareness sessions on records documentation and communicating OH&S recommendations. Client service training and testing was also successfully completed by the WHSCRD Appeals Coordinator through the Institute for Citizen-Centred Service as delivered by the Centre for Learning and Development.

## Highlights And Accomplishments continued

### Records Management Project

The WHSCRD continues to recognize the importance of information management as it pertains to the storage and disposal of its administrative/corporate and operational records.

Having successfully implemented its corporate records and information management standard (C-RIMS) over the last fiscal year, the WHSCRD is now focused on completing its record retention and disposal schedule (RRDS) in relation to its extensive body of operational records.

### Decision Search System Upgrade

The WHSCRD's Decision Search System (DSS) is a web-based information retrieval system where the public can access final decisions of the WHSCRD. The DSS is a valuable information service tool for clients and stakeholders as they prepare for hearings, or conduct research on workers' compensation issues.

The new DSS was launched on March 30, 2016. The upgrade improves the functional operation of the application and provides users with expanded search capabilities.

# 2015-16 Report on Performance

## Issue 1: Enhanced Program and Service Delivery

The WHSCRD is committed to ensuring a culture of continuous improvement to enhance the delivery of services and assistance to its clients. In this regard, the WHSCRD identified the implementation of online service improvements as its objective for 2015-16. By improving access to decisions and upgrading its online service delivery, the WHSCRD supports government's strategic direction of enhanced program and service delivery.

Goal:	By March 31, 2017, the WHSCRD will have improved online service delivery.
2015-16 Objective:	By March 31, 2016, the WHSCRD will have begun implementation of online service improvements.
Measure:	Online service improvements are implemented.

The WHSCRD provides information services to clients and stakeholders through the distribution of its final decisions. The WHSCRD's online Decision Search System (DSS) is a web-based information retrieval system where final decisions can be accessed. The DSS is a valuable research tool for clients, stakeholders and the legal community when preparing for hearings or reviewing workers' compensation issues.

Originally developed in 2002, in recent years it became apparent a system upgrade was required. Specifically, users identified the limited document search capabilities of the DSS as its primary deficiency.

In conjunction with the Office of the Chief Information Officer (OCIO), the WHSCRD conducted a review of the existing DSS and outlined the parameters for a new search system. Development of the new search system began in early 2016 and the improved system was launched on March 30, 2016. This now brings the functionality of the DSS up to current technology standards and enables users to refine their search using more variable criteria.

The WHSCRD has further implemented online service improvements in 2015-16 by providing online fillable forms in PDF format on its website at <http://www.gov.nl.ca/whscrd>. This provides clients with the options to open, fill in, and save the forms to their computer, or to print the forms and fill them in by hand.

## Report on Performance continued

The following outlines the WHSCRD's progress and accomplishments achieved in 2015-16 towards improving the WHSCRD's online services:

Indicators	Progress And Accomplishments
<p>Decision Search System (DSS) enhancements have begun.</p>	<ul style="list-style-type: none"> <li>• In conjunction with the OCIO, the WHSCRD began enhancements to the DSS in 2015-16. A review was conducted to determine the requirements for a search system that would provide users with updated search functionality and access to the WHSCRD's most recent decisions.</li> <li>• An analysis of search systems currently in use by government entities and other similar jurisdictions was conducted. It was determined that a new decision search system similar to those used by the courts would be the best option for WHSCRD clients.</li> <li>• The new DSS system was launched on March 30, 2016. The system allows users to view the most recent decisions and provides enhanced search capabilities. Users now have the ability to search by keyword, date range, decision outcome, Review Commissioner, issue, or by WorkplaceNL policy and legislation. The DSS is available through the WHSCRD's website at: <a href="http://www.gov.nl.ca/whscrd">http://www.gov.nl.ca/whscrd</a>.</li> </ul>
<p>Consultation with OCIO on the feasibility and use of online forms is conducted.</p>	<ul style="list-style-type: none"> <li>• Consultations regarding the feasibility and use of online forms were conducted with OCIO. Discussions included the use of electronic services (e-services), ensuring the protection of clients' information, and the available resources of both the WHSCRD and OCIO. It was recommended by OCIO that using fillable PDF forms would offer the best range of user interactivity for clients while continuing to provide information security.</li> <li>• All WHSCRD forms have now been converted into fillable PDF format. Clients can easily open, fill in and save the forms to their computer and then print, fax, mail or hand-deliver them to the WHSCRD's office. A free version of Acrobat Reader is also available on the WHSCRD website for clients. The original option to print and handwrite information on the forms continues to be available for clients.</li> </ul>
<p>Enhancements to the WHSCRD's website content has begun.</p>	<ul style="list-style-type: none"> <li>• A review of the WHSCRD's website content to identify areas for improvement has begun. The review includes assessing and revising current website material such as the WHSCRD's brochures and Client Service Manual, and identifying areas for updating the website where necessary.</li> </ul>

## Report on Performance continued

Continuing with its commitment of quality services and assistance to its clients, the WHSCRD provides the following objective, measure and indicators for 2016-17. This objective is a central element of the WHSCRD's mission and supports government's strategic direction of enhanced program and service delivery.

### Objective for 2016-17

Objective:	By March 31, 2017, the WHSCRD will have implemented online service improvements.
Measure:	Online service improvements are implemented.
Indicators:	Enhancements added to the WHSCRD's website and Decision Search System (DSS) as required. Conducted ongoing monitoring of website and DSS as required.

### Issue 2: Processing Request for Review Applications

The WHSCRD's main line of business is the processing of Request for Review applications submitted by injured workers, their dependents and employers and the coordination of a review process that includes a hearing before a Review Commissioner. It is mandated to review final decisions of WorkplaceNL to ensure that those decisions are compliant with the *Act* and Regulations, as well as WorkplaceNL policies and to direct appropriate remedies where necessary.

During this reporting year, the WHSCRD carried out its activities to meet its objectives and duties under the *Act* and Regulations by conducting 276 hearings and rendering 256 decisions, many of which had complex issues and involved multiple parties. As the WHSCRD's mandate does not change from year to year, the same objective as outlined below will also be reported for the next fiscal year. The WHSCRD will continue to focus on the efficient processing of Request for Review applications to provide clients with a fair and proficient review process that supports enhanced program and service delivery.

2015-16 Objective:	By March 31, 2016, the WHSCRD will have commenced processing or finalized the processing of all Request for Review applications filed with the WHSCRD.
Measure:	All Request for Review applications have commenced processing or are finalized.

## Report on Performance continued

The following table outlines the WHSCRD's progress and accomplishments in meeting its 2015-16 objectives. For comparative purposes, additional information is also provided in the Caseload Activity section on page 19 and the Statistical Overview section on page 20.

Indicators	Progress And Accomplishments
Number of applications received.	<ul style="list-style-type: none"> <li>The WHSCRD received 243 Request for Review applications in 2015-16. In addition to the new applications, 261 applications were carried forward from the previous year totaling an overall annual caseload of 504 cases.</li> </ul>
Number of applications in process.	<ul style="list-style-type: none"> <li>At the end of the reporting period, the WHSCRD's caseload was 176 cases. This number consists of 165 active cases that are waiting for a hearing, waiting for a decision, or are temporarily on hold by request of the parties; plus 11 inactive applications that are pending some other action from the parties or have not yet been accepted for a review.</li> </ul>
Number of applications finalized.	<ul style="list-style-type: none"> <li>The WHSCRD finalized 328 cases in 2015-16. This includes: 256 decisions rendered, 62 cases that were withdrawn by parties, and 10 cases that were rejected by the WHSCRD as they did not meet the criteria for a review.</li> </ul>

The WHSCRD will report on the previous objective, measure and indicators again in 2016-17.



## Opportunities And Challenges Ahead

The following area of focus is in keeping with the WHSCRD's Mission of an expanded client service framework that is responsive to the needs of clients. In the upcoming fiscal year, the challenge to efficiently deliver the service of the WHSCRD is expected to create opportunities for the WHSCRD to more accurately quantify and report on the timeliness of its service provision:

### Timeliness

The timeline between the receipt of an application and the rendering of a decision can be divided into two periods. The first period is comprised of the time between application and hearing. This period is often challenged by the WHSCRD's effort to accommodate parties who request delays while awaiting representation, a new WorkplaceNL decision and/or party availability before proceeding to a hearing.

The way in which the WHSCRD captures organizational performance information in this time period does not distinguish between the time required by WHSCRD to prepare for a hearing and the time required by the parties to proceed to a hearing. Therefore, the time measure does not accurately reflect the work of the WHSCRD. While the WHSCRD wishes to continue accommodating hearing participants and allowing them the time they require to prepare for a hearing, it would also like to more accurately report on its efficiency in preparing for cases to be heard.

The WHSCRD is addressing this challenge as an opportunity to work on the development of a performance measure which more accurately documents and reflects the timing of its readiness to schedule a hearing independent of the applicant's readiness to proceed to a hearing. To further improve the timeliness of this period, the WHSCRD is exploring new technologies to better serve staff in receiving the clients' files, organizing the information and conducting the privacy screening. Opportunities to create efficiencies in the receipt, organization and distribution of a client's file will allow the WHSCRD to decrease the time between the acceptance of an application and the provision of a hearing date.

The second period of the review timeline is comprised of the time between conducting the hearing and rendering a decision. This period is more within the control of the WHSCRD. In 2015-16, approximately 68 per cent of decisions were rendered within 60 days of the hearing. Another 20 per cent were rendered within 90 days of the hearing and all decisions were rendered within 180 days of the hearing. On average, decisions were rendered within 51 days of the hearing which represents a 42 per cent decrease in time from the previous year.

Improving the timelines within which cases are heard and decisions are rendered continues to be a priority for the WHSCRD. Through implementing technology solutions and continuous monitoring, the WHSCRD plans to build upon the success of timeline reductions of 2015-16.

# Noteworthy Decisions

## 2015-16 NOTEWORTHY DECISIONS

The following WHSCRD decisions have been selected 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](http://www.gov.nl.ca/whscrd).

### DECISION 15079 (Worker Application)

***Industrial Disease – Hearing Loss  
Medical Aid – Hearing Aids – Entitlement***  
*ss. 19(4), 43, 60, 90, Policy EN-12*

A Worker retired in 2009 and presented a claim for industrial hearing loss in 2014. Between 2007 and 2014, the Worker underwent five audiograms. The audiograms revealed asymmetrical hearing loss, with the hearing loss being greater in the left ear. The Worker's hearing loss in the other ear did not meet the 25db threshold, and the claim was dismissed because the Worker did not demonstrate bilateral hearing loss of 25db, as required by Policy EN-12. The Worker sought internal review, claiming that the nature of his employment in the telecommunications industry created the asymmetrical hearing loss pattern, and WorkplaceNL's Medical Consultant did not dispute that his hearing loss was industrial in nature. The Worker's internal review was denied and the Worker proceeded to the Review Division.

**Decision:** The decision was set aside and the matter referred back to WorkplaceNL. The nature of the Worker's employment involved wearing a headset on one ear, so as to measure signal frequency and tone signals, and involved exposure to varying amounts of noise. The Worker established that the industrial noise exposure was concentrated disproportionately in one ear due to his employment duties. The Chief Review Commissioner reviewed the provisions of Policy EN-12 and found that the rigid application of the Policy was inappropriate, as it did not contemplate or address the fact situation in this case. WorkplaceNL erred in not considering whether there were special or unusual features present, and did not consider the circumstances of individual claim. The matter was remitted back to WorkplaceNL for a new decision in accordance with the *Act*, regulations, and policies. (Hickey, CRC)

### DECISION 15197 (Worker Application)

#### ***Industrial Disease – Hearing Loss***

#### ***Industrial Disease - Tinnitus***

#### ***Medical Aid – Hearing Aids – Entitlement***

ss. 2(1)(g.1) (o), 5, 19(1), 19(4), 26.1, 43, 60, 61, 73, 84, 85, 90, Policy EN-12, Policy HC-13

A Worker with a 17 year history with the same Employer began to develop hearing loss. An audiogram conducted in 2015 revealed the Worker had bilateral losses of 17.5db and 23.75db, respectively. The Worker requested a hearing aid, but WorkplaceNL denied the Worker on the basis that his hearing loss did not reach the 25db threshold bilaterally. The Worker appealed, claiming that he required a hearing aid to return to his pre-injury employment, as it was a condition of the employment. The Worker was denied on Internal Review.

**Decision:** The review was allowed. The Chief Review Commissioner found the evidence established the hearing loss was compensable and, in the particular fact situation, the Worker was entitled to the hearing aid. The evidence was that the Worker was required to maintain a certain level of hearing ability to remain at the job site. Without the assistance of the hearing aid, he would experience a loss of pre-injury earning capacity regardless of whether the losses met the threshold set out in Policy EN-12: *Hearing Loss*.

The Chief Review Commissioner confirmed WorkplaceNL's exclusive jurisdiction over medical aid but also confirmed WorkplaceNL retained claim-specific discretion under ss.19(4), 84, and 85. The general policy provisions, while allowing for exceptional circumstances, do not recognize that hearing loss reaches an injurious level until there is at least a 25db loss. WorkplaceNL, upon identifying that the Worker's hearing losses did not reach the threshold, stopped any further inquiry. It acknowledged, without making a direct finding, that the Worker was exposed to industrial noise and the claim file documented the nature and extent of the exposure. Given the Worker's credible testimony and the documented 17 year employment history, the Chief Review Commissioner concluded, in the absence of evidence to the contrary, the Worker's hearing loss had to be accepted as arising out of and in the course of the employment. WorkplaceNL should have next moved to determining whether the medical aid was required on the basis that the existing degree of hearing loss should have been recognized as an "injury" despite the general requirements of the policy.

She found that, in cases where the measure of 'injury' is established by a WorkplaceNL Policy, care must still be taken in individual fact situations where the effect of the loss has a different impact on one claimant versus another. Rigid application of policy where a case has special or unusual features is an error under the *Act*. The Worker's hearing loss arose out of and in the course of his employment, and had reached the point where it was jeopardizing his pre-injury employment. The Chief Review Commissioner found that if the hearing loss was affecting pre-injury earning capacity, it had to at least constitute an "injury" for the purposes of the *Act*, and should have been recognized as compensable in the particular context of this case. Under Policy *HC-13: Health Care*

## Noteworthy Decisions continued

*Entitlement*, one of the factors influencing the consideration of the medical effectiveness of a device or treatment was whether it would improve the likelihood of the Worker's early and safe return to work. That was a factor in this case and warranted a favourable exercise of WorkplaceNL's discretion. (Hickey, CRC)

### DECISION 15203 (Worker Application)

#### ***Extended Earnings Loss – Calculation – Industrial Diseases***

*ss.19(1), 74(1), 74(5), 80, 90, 90.1, Policy EL-01, Policy EN-20*

The Worker was employed in a mine when he developed symptoms later diagnosed as silicosis, scleroderma, and Raynaud's syndrome. His first Employer accommodated him by moving him into the control room so as to avoid continuing exposure to dust. The Worker was therefore able to continue working in the capacity of a Control Room Operator. He retired from his first employer in 2003 and then obtained employment as a Control Room Operator with another employer in 2005. He was laid off from that employment in 2008, and then obtained a third job with another employer, again as a Control Room Operator. He worked fewer hours with the third employer. Later in 2008, the Worker filed his claim with WorkplaceNL, which was accepted. The Worker continued to work as a Control Room Operator with the third employer following the acceptance of the claim, but his symptoms deteriorated to the point where he became disabled from employment in 2014.

WorkplaceNL accepted that the Worker's loss of earning capacity was due to the compensable conditions and accepted the wage loss claim. It based the Worker's pre-injury earnings on his last twelve months' wages prior to the wage loss claim in 2014. The Worker objected, claiming that this understated his loss of earning capacity. He claimed that his earnings with the first Employer should be used as the base, and that the calculation should take into account prospective earnings he could have earned as a welder, which he was prior to being accommodated in the Control Room Operator position. WorkplaceNL denied the Internal Review.

**Decision:** The decision was overturned and the matter was referred back to WorkplaceNL for a new decision. Several years had passed between the first emergence of the diseases which were accepted to be compensable injuries, and the Worker presenting a claim. Several more years had passed from the time of acceptance of the Worker's claim, and the time he lost the capacity to work. The Review Commissioner discussed the provisions in s.80 of the *Act*, which deemed the Worker's actual pre-injury earnings to be the measure of pre-injury earning capacity. However, the Worker's earnings in 2014 were not reflective of "pre-injury" earning capacity because the diseases had emerged years before and were already affecting his ability to work and earn in the first employment, where he had to be accommodated. The evidence was that the Worker continued to work and earn despite the steadily advancing nature of the condition.

The Review Commissioner discussed the nature of occupational diseases and the special provision in s.90.1 of the *Act* which required the use of a Worker's earnings from his "last trade, occupation, profession, or calling

## Noteworthy Decisions continued

prior to the date of disablement”. He also noted the provision in s.90.1(1) which did not require a Worker to be employed at the date of disablement. He concluded the intent of the Section was to create an exception to s.80, so that in the case of industrial diseases any emerging loss of earning capacity over time does not become “hard coded” into the earnings base. He concluded that this required consideration of both pre-injury and pre-disablement earnings in the calculation, otherwise the Worker’s entitlement might become deflated over time as the injury affects the ability to work and earn. He rejected that WorkplaceNL had to consider the Worker’s prospective earnings as a welder, but determined the matter had to be remitted to WorkplaceNL for it to consider all the facts of the case and arrive at a rate that reflected the Worker’s losses. (Barry)

### DECISION 15233 (Worker Application)

#### ***Extended Earnings Loss – Calculation – Offsets - Employer Sponsored Pension Plan***

*ss. 19, 60(1), 73, 74, 75, 80, 81(3.3), Policy EL-01*

Four Workers, all belonging to the same pension plan, sustained injuries in the course of their employment. All became entitled to earnings loss benefits as a result of their injuries. The Workers also drew benefits from their employment pensions. When WorkplaceNL became aware the Workers were in receipt of income from their pensions, WorkplaceNL applied an offset to the earnings loss entitlement to the extent the Workers were receiving pension income, finding that the pension benefits were from a “registered employer sponsored pension plan” as described in s.81(3.3). The Workers appealed the decision, claiming that while they were in receipt of pension income, the pension was not “employer sponsored” for the purposes of the section. The Workers argued that the pension was sponsored by a Board of Trustees created by the union and employer representatives, and was, in practice, administered by the union, subject to involvement by the employer representatives whose primary concern was confined to ensuring contributions would remain within the wage rate established under the collective agreement and would not enlarge it. After a series of decisions, including a subsequent ruling on an expert opinion provided by the Workers, WorkplaceNL maintained its denial of the Worker’s review request and ruled that the pension income could continue to be offset. After clarifying certain preliminary matters in Decision 14151P, the Chief Review Commissioner scheduled the four applications to be heard together with the consent of the parties.

**Decision:** The four reviews were denied and WorkplaceNL’s decisions were upheld. It was determined that WorkplaceNL did not err in its classification of the pension as a “registered employer sponsored pension plan” for the purposes of s.81(3.3). The offset of the benefits was appropriate.

The Chief Review Commissioner discussed the nature of her review jurisdiction, the role of the *Interpretation Act*, and the modern rule of statutory interpretation. She accepted that the *Interpretation Act* required her to discover the ‘mischief’ the provision was attempting to address and determined that the ‘modern rule’ required

## Noteworthy Decisions continued

her to consider the plain meaning or text of the disputed section as well as contextual factors such as the purpose of the legislation, the legislative history, the relationship of the section to the *Act* as a whole, as well as the consequences of the proposed interpretations. She also discussed special principles or rules relating to social legislation, the presumption against redundancy, and the presumption in favor of consistency of terms.

After hearing from the Worker's expert and WorkplaceNL's expert, she was not convinced that there was a 'plain meaning' in a pension law context which was clear enough to decide the issue without needing to consider the contextual factors or the special rules. She acknowledged that a credible argument could be made on either side of the issue regarding the plain meaning of the text. However, the contextual factors pointed toward WorkplaceNL's interpretation as best reflecting the true intent of the Section.

She determined that the legislative history and relationship to the *Act* as a whole were persuasive in suggesting that the present wording of s.81(3.3) was selected to eliminate the previous requirement that a benefit had to be provided "wholly" at the expense of the employer in order to be offset. The experts established that the pension legislation was in the process of being amended in the 1980s and 1990s, in part to address the regulation of multi-employer pension plans, which the Workers' pension most likely was. However, she also accepted that the wording of s.81(3.3) did not fully anticipate the fact situation before her, and, therefore did not accept that the language choice was an attempt to distinguish between a multi-employer pension plan (MEPP) as a non-employer sponsored plan and a single employer pension plan as an 'employer sponsored' plan for the purposes of the offset under the Section.

It was found that it was more likely that the concept of employer sponsorship was linked to the registrability of the pension under the *Pension Benefits Act, 1997*, which requires a minimum 50 per cent employer contribution, regardless of whether there is any underwriting responsibility on the part of the employer for unfunded liabilities. If the pension was the type of pension which was registrable under the *Pension Benefits Act, 1997* or an equivalent *Act* in another province or under the federal jurisdiction and actually was registered one of these pieces of legislation, it met the concept of 'employer sponsored' for the purposes of s.81(3.3). Also, if the Workers' proposed interpretation was correct, the likely outcome would be that the Workers would not be eligible to claim a pension replacement benefit (PRB) under s.75 once they attained the age of 65, as the language in that section was in existence prior to the amendment of s.81(3.3) and the present version of s.81(3.3) mirrored the language in s.75 in describing the type of pension plans which WorkplaceNL may consider for the purposes of awarding a PRB. She concluded that WorkplaceNL's decision adopted the interpretation which was more harmonious with the legislative scheme and its overall intent. (Hickey, CRC)

### DECISION 16007 (Worker Application)

#### ***Pension Replacement Benefit – Employer Sponsored Pension Plan – Entitlement***

*ss.2(1)(o), 19(1), 60(1), 75(1), Policy EN-20*

A Worker was injured in 1966 and then suffered a recurrence in 2002. In 2004 WorkplaceNL accepted the Worker's recurrence claim. In 2011 the worker reached age 65 and applied for a Pension Replacement Benefit (PRB) for losses in his employer sponsored pension plan. WorkplaceNL denied the Worker's application. The Worker proceeded to the Review Division.

**Decision:** The review was denied. The Worker failed to demonstrate his pension losses resulted from his compensable injury. The Worker continued to work up until he took early retirement in 2001. His earnings and contribution experience up to that point determined the value of his pension. The Worker's recurrence did not take place until 2002, the year after he started to draw on the pension. The Worker argued that he could have chosen to reverse his retirement under the plan, and he could have gone back to work, and he could have contributed more to the plan, but this was precluded by 2002 recurrence. The Review Commissioner dismissed this as speculative, as the claim evidence to that point led to an inference the Worker was not intending to do so, and the Worker had recently declined to contribute to the plan which was the subject of the PRB claim. The Review Commissioner found the value of the employer sponsored plan the Worker was receiving at age 65 was established by the Worker's employment up to the date he took early retirement, and the timing of the pension going into pay, and not the recurrence of the compensable injury. (Murphy)

### DECISION 16053 (Worker Application)

#### ***Compensable Injury – Definition of Injury – Exclusions - Stress***

*ss. 2(1)(o), 43, 60, 61, Policy EN-06, Policy EN-18, Policy EN-19, Policy EN-20*

#### ***Reopening – New Evidence***

*s. 64*

A Worker was physically injured in an altercation with a client while employed as a youth care worker. The Worker immediately went to see the treating physician. The Worker attributed physical and psychological injuries to the incident. Initially, WorkplaceNL recognized the Worker's mental stress as an adjustment following physical injury, and temporarily extended benefits under Policy EN-06: *Mental Health Adjustment Following Physical Injury*. During the extension period, the Worker was diagnosed with Post-Traumatic Stress Disorder (PTSD). WorkplaceNL then accepted the worker had a compensable psychological "injury" under Section 2 of the Act

## Noteworthy Decisions continued

and Policy EN-18: *Mental Stress*. The Employer appealed and the Internal Review Specialist overturned the decision, remitting it back to the Case Manager. On further review, the Case Manager confirmed the Worker had a compensable stress claim. The Employer appealed again. It also submitted additional information for WorkplaceNL's review. Following this, the Case Manager concluded the Worker's claim was not compensable and terminated benefits. The Worker sought Internal Review but also forwarded additional information, including a report from the treating psychiatrist, which was contended to be new evidence which warranted a reopening of the claim regardless of the existing decision in place. The termination of benefits was upheld on Internal Review. WorkplaceNL also concluded the new information presented by the Worker did not justify a reopening under s.64 of the *Act*. The Worker appealed to the Review Division.

**Decision:** The decision was set aside and the matter remitted back to WorkplaceNL for a compliant decision. The Review Commissioner found the worker's stress arose out of and in the course of the employment for the purposes of Section 43. Also, the event itself was "sudden, unexpected, and traumatic", as it resembled the types of events recognized by WorkplaceNL's Policy.

The Review Commissioner rejected the suggestion that psychological injury, secondary to an assault and threat, could never be "unexpected" solely on the basis that there is an inherent risk of such an event in the job duties, or such events may occur in the workplace. The event is to be assessed objectively, according to what a reasonable person would find sudden, unexpected, and traumatic. If a Worker's unusual susceptibility to psychological injury cannot be taken into account to affect the characterization of the event, an allegation that the Worker should have developed an unusual tolerance for such occurrences also cannot be taken into account to characterize the event itself. The characterization of the event has to be determined without reference to the individual's actual reaction to it.

The Review Commissioner also found WorkplaceNL's conclusion that the Worker did not suffer an "acute reaction" to the event was in error because it was not supported by reasons. There was evidence the Worker may have suffered from some other mental health issues, but the worker also had a distinct PTSD diagnosis attributed to the event. The Review Commissioner found that, in the absence of evidence which established that both cannot co-exist, WorkplaceNL had to determine whether the PTSD diagnosis could be independently attributable to the incident notwithstanding the Worker's history, and if so, to what degree the PTSD condition was material to the Worker's present condition. The Review Commissioner found the record did not provide the answer to this question, and further professional opinion was required to properly answer that question. The claim was therefore remitted to WorkplaceNL for a new decision. (Pike)



## 2015-16 Caseload Activity

The following highlights the WHSCRD's caseload activity for 2015-16. For statistical tables and additional caseload information refer to the Statistical Overview section on page 20.

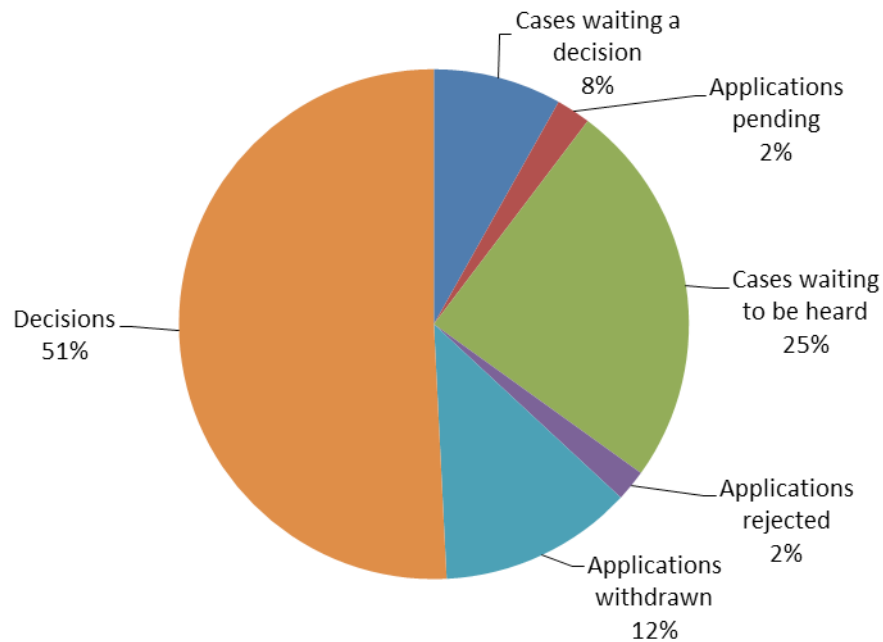
- The WHSCRD's overall annual caseload, including cases finalized, consisted of 504 cases representing a slight decrease of 3.6 per cent from the previous fiscal year (Table 1-page 20).
- There were 243 Request for Review applications filed in 2015-16, a decrease of 31 cases from the preceding year. The majority of these cases, 68 per cent, were filed within the St. John's region (Table 2-page 21).
- Workers and their dependents filed 224 Request for Review applications representing 92 per cent of the applications filed in 2015-16. Employers filed 19 Request for Review applications, or eight per cent (Table 3-page 21).
- There were 276 hearings conducted this fiscal year. Staff of the WHSCRD also coordinated work for an additional 101 hearings which were postponed, rescheduled, or subsequently withdrawn by the parties (Table 4-page 21).
- The majority of hearings (67 per cent) took place at the WHSCRD's office in Mount Pearl (Table 4-page 21).
- Review Commissioners found that approximately 39 per cent of WorkplaceNL decisions which were 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 21).
- Workers participated in 83 per cent of the cases under review based on 256 decisions rendered (Table 7-page 22). Approximately 29 per cent of workers were self-represented, 27 per cent were represented either by their Member of the House of Assembly (MHA) or by private legal counsel and; 45 per cent were represented by their union, consultant, or other friends or family members (Table 8-page 22).
- Employers participated in 20 per cent of the reviews (Table 7-page 22) and were self-represented in 54 per cent of the cases based on the 256 decisions rendered (Table 9-page 22).
- The top three issues under review for workers were: Extended Earnings Loss benefits at 16 per cent, Reopening - 13 per cent, and Permanent Functional Impairment awards at 12 per cent (Table 11-page 23).

# 2015-16 Statistical Overview

Table 1 - Annual Caseload

Caseload Breakdown	2014-15	2015-16
Appeals Carried Forward April 1st	249	261
New Applications	274	243
<b>Annual Caseload</b>	<b>523</b>	<b>504</b>
Less Finalized/Closed Cases:		
Decisions Rendered	202	256
Cases Withdrawn	48	62
Applications Rejected	12	10
<b>Caseload March 31st</b>	<b>261</b>	<b>176</b>
<b>March 31st Caseload Consists of:</b>		
<b>Active Cases:</b>	<b>253</b>	<b>165</b>
(cases waiting to be heard)	232	124
(cases heard and waiting a decision)	21	41
<b>Inactive Cases:</b> (Applications Pending)	<b>8</b>	<b>11</b>

Figure 1 - Percent of 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	St. John's		Gander		Grand Falls - Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2014-15	176	64	27	10	28	10	41	15	2	1	<b>274</b>
2015-16	165	68	14	6	22	9	32	13	10	4	<b>243</b>

**Table 3 - Requests for Review by Claimant**

Year	Worker		Employer		Dependent		Total
	#	%	#	%	#	%	
2014-15	241	88	28	10	5	2	<b>274</b>
2015-16	216	89	19	8	8	3	<b>243</b>

**Table 4 - Hearings by Region**

Year	St. John's		Gander		Grand Falls - Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2014-15	128	67	13	7	16	8	33	17	0	0	<b>190</b>
2015-16	185	67	27	10	29	11	34	12	1	0	<b>276</b>

**Table 5 - Decision Outcome**

Year	Allowed		Denied		Referred Back to WorkplaceNL		Total
	#	%	#	%	#	%	
2014-15	38	19	99	49	65	32	<b>202</b>
2015-16	51	20	155	61	50	19	<b>256</b>

## Statistical Overview continued

Table 6 - Decisions by Region

Year	St. John's		Gander		Grand Falls - Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2014-15	132	65	16	8	18	9	36	18	0	0	<b>202</b>
2015-16	177	69	22	9	23	9	33	13	1	0	<b>256</b>

**Table 7 - Party Participation by Decisions Rendered** - *Note: More than one party may be involved 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	
		#	%	#	%	#	%
2014-15	<b>202</b>	184	91	32	16	56	28
2015-16	<b>256</b>	213	83	50	20	103	40

Table 8 - Worker Participation by Representative Type

Year	Self		Consultant		Legal Counsel		MHA*		Union		Other		Total Worker
	#	%	#	%	#	%	#	%	#	%	#	%	
2014-15	21	11	7	4	6	3	99	54	39	21	12	7	<b>184</b>
2015-16	67	29	15	7	18	8	43	19	55	24	31	14	<b>229</b>

\*Includes representation by a Member of the House of Assembly (MHA) or a Government Members Hearings Officer.

Table 9 - Employer Participation by Representative Type

Year	Self		Consultant		Legal Counsel		Total Employer
	#	%	#	%	#	%	
2014-15	14	44	15	47	3	9	<b>32</b>
2015-16	27	54	18	36	5	10	<b>50</b>

Table 10 - Requests for Reconsideration by Client

Year	Total Requests	Worker Requests		Employer Requests		WorkplaceNL Requests	
		#	%	#	%	#	%
2014-15	<b>20</b>	13	65	2	10	5	25
2015-16	<b>17</b>	12	71	1	5	4	24

## Statistical Overview continued

Table 11 – Issues Reviewed by Decision

Issues	Outcome			
	Objections	Allowed	Denied	Referred Back to WorkplaceNL
<b>Worker/Dependent Appeals</b>				
Aggravation of a Pre-existing Condition	1	1	0	0
Claim Denied	26	7	13	6
Compensation Denied	1	0	1	0
Compensation Rate	2	1	1	0
Dependency Benefits	3	0	2	1
Early and Safe Return to Work	5	1	4	0
Extended Earnings Loss Benefits	44	5	27	12
Health Care Services	27	8	15	4
Independent Operator	1	0	1	0
Industrial Disease	3	0	2	1
Industrial Hearing Loss	20	3	13	4
Internal Review Denied	1	0	1	0
Overpayment	6	2	4	0
Pension Replacement Benefit	9	0	6	3
Permanent Functional Impairment	33	2	22	9
Permanent Partial Disability Benefits	2	0	1	1
Proportionment	16	5	4	7
Recurrence	10	1	7	2
Reinstatement of Benefits	5	3	2	0
Reopening	36	9	24	3
Temporary Earnings Loss	3	0	2	1
Wage Loss Benefits	14	4	8	2
<b>Total</b>	<b>268</b>	<b>52 (19%)</b>	<b>160 (60%)</b>	<b>56 (21%)</b>
<b>Employer Appeals</b>				
Assessment Rate	2	0	2	0
Cost Relief	4	1	3	0
Independent Operator	4	2	1	1
Objection to a Worker's Claim	12	4	7	1
PRIME	1	1	0	0
Reopening	2	0	2	0
<b>Total</b>	<b>25</b>	<b>8 (32%)</b>	<b>15 (60%)</b>	<b>2 (8%)</b>
<b>OVERALL TOTAL</b>	<b>293</b>	<b>60 (20%)</b>	<b>175 (60%)</b>	<b>58 (20%)</b>

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

There is no regulatory requirement for the WHSCRD to submit a separate, audited financial statement.

## Statement of Expenditures and Related Revenue UNAUDITED For Fiscal Year Ending March 31, 2016

	2015-16		
	Actual \$	Amended \$	Original \$
<b>5.1.01. Workplace Health, Safety and Compensation Review</b>			
01. Salaries	785,825	839,900	860,400
02. Operating Accounts:			
Employee Benefits	3,635	2,500	2,500
Transportation and Communication	41,780	30,200	30,200
Supplies	16,122	22,500	22,500
Professional Services	132,847	142,500	142,500
Purchased Services	173,451	192,500	167,500
Property, Furnishings and Equipment	7,478	4,000	4,000
	<u>\$1,161,138</u>	<u>\$1,234,100</u>	<u>\$1,176,900</u>
02. Revenue - Provincial	<u>(\$1,401,320)</u>	<u>(\$1,229,600)</u>	<u>(\$1,229,600)</u>
<b>Total: Workplace Health, Safety and Compensation Review Division</b>	<b>(\$240,182)</b>	<b>-</b>	<b>-</b>

Source: Department of Finance (UNAUDITED).

# Review Commissioners for 2015-16

## **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.

## **Christopher Pike, Review Commissioner**

Mr. Pike is a resident of St. John's. Prior to his appointment as a Review Commissioner, he practiced insurance and personal injury law for 25 years. Mr. Pike graduated from the Faculty of Law at the University of New Brunswick in 1988. He is also a trained mediator and completed the Council of Canadian Administrative Tribunals course on adjudication in 2013. Mr. Pike is a past president of the Canadian Bar Association's (CBA) Newfoundland and Labrador Branch and has been active in community organizations including the Heart and Stroke Foundation of Newfoundland and Labrador and Scouts Canada. In 2012, the CBA (Newfoundland and Labrador Branch) presented him with its Distinguished Public Service Award. He was awarded the City of St. John's Building Healthy Communities Award in 2013 and received the Queen Elizabeth II Diamond Jubilee Medal that same year.

## **Keith Barry, Review Commissioner**

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, etc. 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.

## **Gordon Murphy, Review Commissioner**

Gordon Murphy is a resident of St. John's. He is a retired career provincial public servant, having served all his 36 years with the provincial Department of Transportation and Works (and its various derivatives). He has held a number of positions in the department, most recently as Director of Human Resources and as a member of the department's Executive Committee. He has served as a member or as Chair of multiple Committees and Boards, most recently as Chair of the Management Classification Appeal Board. He has also worked as a consultant in human resources and labour relations within the province.

## **Review Commissioners continued**

### **E. Bruce Peckford, Review Commissioner**

Mr. Peckford is a resident of St. John's. He is a retired provincial public servant who has held several senior positions with the public service, concluding with Deputy Minister of Social Services. He also held the position of Executive Director of Finance and Administration with the Workplace Health, Safety and Compensation Commission. In 2005, Mr. Peckford served as Chair of the Statutory Review Committee on the *Workplace Health, Safety and Compensation Act*. Mr. Peckford is the past Chair of the Eastern School District and the past Chair of the Historic Sites Association of Newfoundland and Labrador and a former Board member of the Canadian Cancer Society, Newfoundland and Labrador Division. Mr. Peckford's term as Review Commissioner was completed in February 2016.

### **Lloyd Piercey, Review Commissioner**

Mr. Piercey is a resident of Fortune, NL. He has a Bachelor of Arts and Bachelor of Education with Memorial University of NL. Most recently he served as Special Assistant to the former Member of Parliament for Random-Burin-St. George's. Mr. Piercey is a past Academic Department Chairperson for Eastern College, Burin Campus and facilitated the exploration of training and work options for displaced fishery workers following the cod moratorium. He has also worked as an Adult Basic Education Instructor, Continuing Education Coordinator, at Eastern College and as Coordinator for Job Corp. Program. Mr. Piercey has served on various committees with Eastern College and has served in various executive positions for groups and committees within the community.



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