
**WORKPLACE HEALTH, SAFETY
AND COMPENSATION
REVIEW DIVISION
(WHSCRD)**

**Annual Performance Report
2014-15**

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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 2014-15. As Chief Review Commissioner of the WHSCRD, I am responsible for the preparation of this report and accountable for the results contained within it.

In 2014-15, the WHSCRD conducted 190 hearings and delivered 202 decisions which is a decrease from 304 hearings and 305 decisions in 2013-14. The decrease in hearings was primarily due to Review Commissioner unavailability due to a combination of health and personal issues, although it was also affected by the postponement of a significant number of scheduled hearings. Hopefully, that particular combination of circumstances will not re-emerge in the upcoming year. The wait time; however, from application to hearing did improve from eight months at the beginning of 2013-14 to six and a half months in 2014-15, and the WHSCRD is considering additional means to further reduce the wait time between application and hearing.

As the WHSCRD continued to process its caseload, it invested considerable resources in preparing for hearings and assisting parties in anticipation of the hearing. Notable in this reporting period was the extent to which the WHSCRD postponed cases at the requests of the parties. A total of 92 scheduled hearings were postponed, close to one-third of the hearings scheduled. Last moment postponements of hearings not only increase the wait times for the parties, but also have the effect of depriving the WHSCRD of the ability to advance the hearings of other applicants who are otherwise ready and could fill the slot upon adequate notice.

The WHSCRD is mindful of the need to carefully balance its processes to ensure the needs of its clients are met in an efficient manner without compromising fairness. The WHSCRD recognizes this represents a significant challenge; however, not one that cannot be overcome. Maintaining hearings on schedule, according to the applicable sections of the *Act* and Regulations will continue to be a point of emphasis in the upcoming year.

The WHSCRD will examine ways and means to find a solution that ensures fairness in the process while at the same time maximizes the use of its resources. We will engage in an internal review of our application and decision-making process to identify options allowing the WHSCRD to streamline certain issues and claims for the early resolution of certain issues and simplify our decision-making process in these cases. We look forward to advancing improvements in this area of our client service framework.

MESSAGE FROM THE CHIEF REVIEW COMMISSIONER

I would like to express thanks to those clients who have worked collaboratively with us in 2014-15, as this has contributed greatly to our caseload success. 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. As Commissioners and staff, we look forward to continuing to provide a high standard of client service and look forward to another productive year in 2015-16.



Marlene A. Hickey
Chief Review Commissioner

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 the Workplace Health, Safety and Compensation Commission (the 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 Workplace Health, Safety and Compensation. As per the *Report on the Program Expenditures and Revenues of the Consolidated Revenue Fund for the Year Ended 31 March 2015*, expenditures for the WHSCRD in 2014-15 were \$948,503. 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.

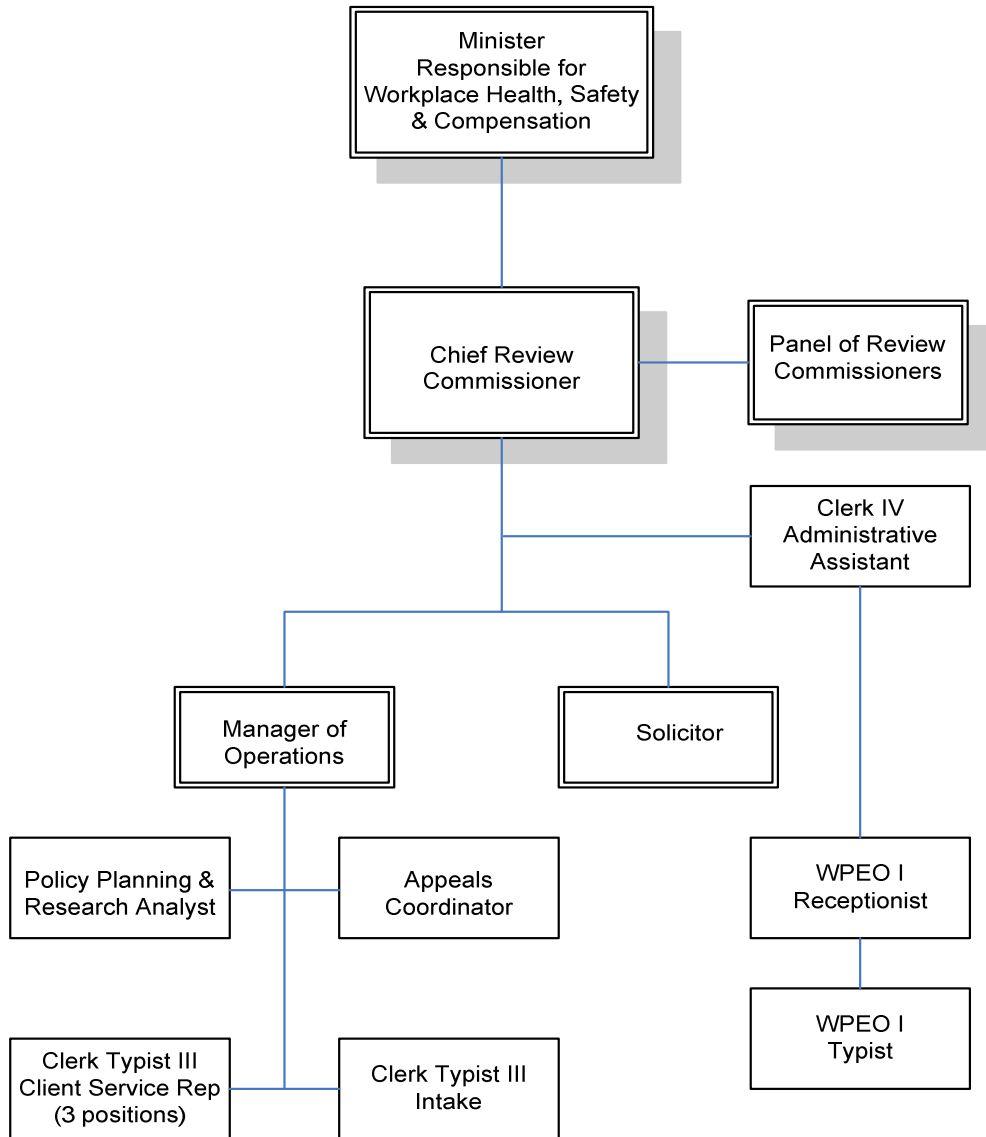
During 2014-15, the WHSCRD saw the reappointment of two Review Commissioners and the resignation of two other Review Commissioners. As of March 31, 2015, the WHSCRD's Review Commissioners consisted of Marlene Hickey as Chief Review Commissioner, with E. Bruce Peckford, Lloyd Piercey, Gordon Murphy and Keith Barry as Review Commissioners. Please refer to page 25 for additional Review Commissioner information.

WHSCRD STAFF

The WHSCRD currently employs 12 staff (10 female and two male) in its office located in the Dorset Building, at 6 Mount Carson Avenue in Mount Pearl, NL.

WHSCRD OVERVIEW (CONTINUED)

WHSCRD ORGANIZATIONAL CHART



WHSCRD OVERVIEW (CONTINUED)

MANDATE

The mandate of the WHSCRD is to review decisions of the Commission to ensure compliance with the *Workplace Health, Safety and Compensation Act* (the *Act*) and Regulations, as well as with the policies of the Commission. 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:

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 and supports government’s strategic direction of service excellence through enhanced program and service delivery:

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 Commission 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

In providing quality services to workers and employers of the province, and while continuing to improve its practices and procedures, the WHSCRD has completed the following initiatives in 2014-15:

➤ ***2014-17 Activity Plan***

The WHSCRD tabled its 2014-17 Activity Plan in June 2014 which continues to reflect a commitment to provide a quality review process for all participants. In addition to articulating the WHSCRD's vision and values, the Plan outlines the WHSCRD's objectives for the next three years towards developing recommendations for improvements to its governing legislation, enhancing online services and providing improved access to decisions. The 2014-17 Activity Plan may be accessed on the WHSCRD's website at: <http://www.gov.nl.ca/whscrd> or in hard copy upon request.

➤ ***Professional Development***

Ongoing professional development is necessary for Review Commissioners to remain current on evolving workers' compensation matters. In September 2014, Review Commissioners attended a professional development session focusing on workers' compensation legislation and policies. The session also provided an opportunity for Review Commissioners who act as single adjudicators to come together as a Panel and to discuss emerging issues in the appeals process.

Learning and development for staff is embraced in the WHSCRD's values and opportunities are sought to meet the learning needs of individual staff members as well as to improve the WHSCRD's overall competencies. During this reporting year, staff undertook in-house activities and attended a range of seminars and workshops on topics such as Access to Information and Protection of Privacy, Records Management, Client Service Delivery and Occupational Health and Safety.

➤ ***Records Management Project***

This reporting year the WHSCRD initiated a project to ensure its operational records are classified, maintained and disposed of according to government standards. The WHSCRD met with a representative of the Office of the Chief Information Officer (OCIO) in January 2015 who provided information on establishing and maintaining a records management program and advice on information management best practices. A Records Management Committee has been established to oversee the WHSCRD's records inventory requirements and work has begun work on classification and retention schedules.

HIGHLIGHTS AND ACCOMPLISHMENTS (CONTINUED)

➤ *Client Tracking System Project*

The WHSCRD manages the processing of Request for Review applications through in-house software referred to as the Client Tracking System (CTS). Originally developed in 1995, the CTS underwent a rewrite in 2006 to upgrade the system. In recent years, Requests for Review applications have become more complex with numerous parties involved and multiple issues to be reviewed. As a result, it became apparent that the CTS required a more refined means to monitor these applications. In January 2015, the WHSCRD, in conjunction with the OCIO, began a project to ensure the continued efficiency of the CTS. The project is currently directing its focus on upgrades to the internal reporting and automated correspondence systems of the CTS.

2014-15 REPORT ON PERFORMANCE

Issue 1: Enhanced Program and Service Delivery

Enhanced program and service delivery through streamlined operations and improved access has been recognized as a key priority in consideration of the strategic direction of government. As part of its drive to improve service delivery, the WHSCRD's focus in 2014-15 was on reviewing and improving the use of information technology to enhance clients' involvement in the review process. This included investigating opportunities regarding the use of e-services for online forms and applications, as well as a review of the WHSCRD's current website content and Decision Search System (DSS). By improving access to decisions and upgrading its online service delivery, the WHSCRD supports government's strategic direction through the identification and development of online service projects and improved client services.

Goal: By March 31, 2017, the WHSCRD will have improved online service delivery.

2014-15

Objective 1: By March 31, 2015, the WHSCRD will have reviewed its online service capacity and identified areas for improvement.

The WHSCRD provides information services to clients and stakeholders through the distribution of its final decisions. Once finalized, decisions become public documents and are a valuable research tool for clients, stakeholders and the legal community when preparing for hearings or reviewing workers' compensation issues. Previously, the WHSCRD published decisions in volumes for distribution. In 2002; however, the WHSCRD created the DSS a web-based information retrieval system where final decisions could be more easily accessed by WHSCRD's clients and the general public.

The WHSCRD often receives feedback from clients regarding the DSS's outdated and limited search functionality which makes researching decisions difficult. As a result of the feedback and a jurisdictional analysis of other workers' compensation appeal search systems, it was apparent that a more efficient system is necessary to improve access to decisions. Therefore, the requirement to update the DSS to bring its functionality in line with a more contemporary level of search systems was identified as a means to improve client service. Through discussions with representatives of the OCIO and the review of the website, an online service plan was developed that includes a proposal for enhancements to the DSS.

2014-15 REPORT ON PERFORMANCE (CONTINUED)

The following outlines the WHSCRD's progress and accomplishments achieved in 2014-15 towards improving the WHSCRD's online services:

INDICATORS	PROGRESS AND ACCOMPLISHMENTS
Consultation with the OCIO is conducted to identify areas for online service enhancements.	<ul style="list-style-type: none">• The OCIO was consulted to determine the focus of WHSCRD's online service enhancements, while taking into consideration the available resources of both the OCIO and the WHSCRD. It was determined that online service enhancements would first concentrate on upgrading the DSS.
A review of the DSS is completed to identify areas for improvement.	<ul style="list-style-type: none">• The DSS is available through the WHSCRD's website at http://www.gov.nl.ca/whscrd. Originally developed in 2002 and using the technology of the day, the DSS was designed to include all decisions made by Review Commissioners and uploaded to the site in PDF format. The result was an unorganized pool of data that could only be reviewed by keyword search results.• A review of the DSS and other search systems in similar jurisdictions was conducted to identify areas for improvements. The review highlighted that there is currently no functionality in the DSS to allow users to check the database for the most recent information, or to refine the search further. It was concluded that it is necessary to organize the system's data in a manner that brings the DSS functionality up to current technology standards.• A project scope document outlining the parameters for a decision search system that is more robust and easier to maintain was developed by OCIO and approved by WHSCRD in March 2015. The DSS upgrade project is scheduled to begin in the summer of 2015.
Online service plan is developed.	<ul style="list-style-type: none">• An online service plan has been developed based on consultations with OCIO, a review of the WHSCRD's website, and a review of the DSS. The online service plan focuses on enhancements to the WHSCRD's website content, the feasibility of WHSCRD access through online filing of applications, and the DSS upgrade project.

2014-15 REPORT ON PERFORMANCE (CONTINUED)

The WHSCRD recognizes that the use of information technology is a critical means of informing and interacting with its clients. In recent years, the WHSCRD has made significant inroads to the use of online services through the development of its website at www.gov.nl.ca/whscrd. The website provides information to clients and stakeholders regarding the various aspects of the review process, information brochures, annual reports and activity plans, statistical information, and a link to the DSS.

Continuing with its commitment of quality services and assistance to its clients, the WHSCRD provides the following objective for 2015-16. This objective is a central element of the WHSCRD's mission and supports government's strategic direction of enhanced program and service delivery.

2015-16

Objective: By March 31, 2016, the WHSCRD will have begun implementation of online service improvements.

Measure: The implementation of online service improvements has begun

Indicators:

- ✓ Decision Search System enhancements have begun.
- ✓ Consultation with OCIO on the feasibility and use of online forms is conducted.
- ✓ Enhancements of the WHSCRD's website content has begun.

2014-15 REPORT ON PERFORMANCE (CONTINUED)

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 the Commission to ensure that those decisions are compliant with the *Act* and Regulations, as well as Commission 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 190 hearings and rendering 202 decisions on workers' compensation appeals, many of which have complex issues and involve 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 two fiscal years. 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 the strategic direction of enhanced program and service delivery.

Objective: By March 31, 2015, 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.

The following table outlines the WHSCRD's progress and accomplishments in meeting its 2014-15 objective. For comparative purposes, additional information is also provided in the Statistical Overview section on page 20.

INDICATORS	PROGRESS AND ACCOMPLISHMENTS
Number of applications received.	<ul style="list-style-type: none">The WHSCRD received 274 Request for Review applications in 2014-15. In addition to the new applications received, 249 applications were carried forward from the previous year totaling in an overall annual caseload of 523 cases.
Number of applications in process.	<ul style="list-style-type: none">At the end of the reporting period, the WHSCRD's caseload was at 261 cases. This number consists of 253 active cases that are waiting for a hearing, waiting for a decision, or are temporarily on hold by request of the parties; plus eight inactive applications that are pending some other action from the parties or have not yet been accepted for a review.
Number of applications finalized.	<ul style="list-style-type: none">The WHSCRD finalized 262 cases in 2014-15. This includes 202 decisions rendered, 48 cases that were withdrawn by parties, and 12 cases that were rejected by the WHSCRD as they did not meet the criteria for a review.

OPPORTUNITIES AND CHALLENGES AHEAD

The following areas of focus in the upcoming fiscal year are in keeping with WHSCRD's Mission of an expanded client service framework that is responsive to the needs of clients:

Case Processing

- ❖ The increasing complexity and novelty of workers' compensation issues under review and the number of multiple parties involved continues to keep the WHSCRD's caseload both interesting and challenging. At the end of this reporting period, 96 cases representing 38 per cent of the active caseload were not ready to proceed to a hearing, as they were either waiting on representation, gathering additional evidence, or were not available for the hearing dates that were offered. These cases are closely monitored by staff who are in constant contact with the parties to ensure the cases are expeditiously scheduled once the parties indicate they are ready to proceed. Through collaboration with all review participants, the WHSCRD will endeavor to process Request for Review applications in a timely fashion, while providing quality services to its clients.

Client Support

- ❖ Workers regularly appear before Review Commissioners alone or accompanied by friends or family. Often business owners will represent themselves or designate representation to other employees within the organization that may lack knowledge of the workers' compensation appeals system. The WHSCRD acknowledges the challenges facing self-represented workers and employers and is committed to ensuring that supports exist to assist these clients to effectively participate in the review process. Staff communicate directly with self-represented clients to answer their questions and provide as much information and assistance as possible regarding the review process. Recognizing that there exists a further opportunity to improve client support, front-line staff will participate in client service training this upcoming fiscal year to enhance their service delivery skills and to be better equipped to assist self-represented clients as well as all other review participants.

Access to Information and Protection of Privacy

- ❖ The WHSCRD utilizes information respecting workers' compensation claims for the purpose of processing Request for Review applications. Ensuring the integrity and protection of personal information surrounding an applicant's Request for Review is paramount to the review process. On June 1, 2015, government proclaimed new Access to Information and Protection of Privacy legislation. Under this new legislation, the WHSCRD will continue to interact with workers and employers to find a balance with respect to the protection of personal information and the release of relevant information for the hearing to ensure a fair review process for all parties.

2014-15 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.

DECISION 14103 (*Worker Application*)

Proportionment – Earnings Loss Benefits – Definition of Proportioning Factor – Obesity – Proportionment Rating

ss. 2(o), 19(4), 43, 43.1, 60, 64, 73, Policy EN-02: Proportionment, Policy EN-17: Interruptions and Delays in Work Injury Recovery, Policy EN-20: Weighing Evidence

A worker injured his back in 2009, 2011, and 2012. He was treated both for his compensable low back injury and also for a diagnosis of morbid obesity. The Commission then applied proportionment to the worker's claim, finding that his obesity was prolonging the worker's recovery from the compensable injury, and there was a 'proportioning factor' under Policy EN-02: *Proportionment*. The worker disagreed, stating that he was able to work three jobs prior to the work injury, that his high body mass was genetic, and that a significant portion of the population was obese. The worker argued that obesity alone was not an appropriate basis for a proportionment finding. The worker also argued that there was no proper analysis of whether the worker's obesity, not having been an impediment to his ability to work and earn prior to the work injury, would have satisfied the definitions and ratings table in Policy EN-02: *Proportionment*. The Commission dismissed the worker's internal review, finding that the worker's obesity compounded the effects of the compensable injury and was contributing to the extent of disability.

Decision: The review was allowed and the matter remitted to the Commission for a new decision in accordance with the *Act*, Regulations, and Policies. The Commission was not found to be in error for classifying the worker's obesity as a 'proportioning factor', but it was in error for applying a proportioning factor of 50 per cent without the proper analysis under the definitions and ratings table.

The Chief Review Commissioner found in this case, the worker's obesity did satisfy the concept of a "condition" under Section 43.1 of the *Act*. The worker's morbid obesity was medically diagnosed, as he was being treated for this, and was being considered as a candidate for gastric bypass surgery. The Chief Review Commissioner distinguished the worker's case from others where a worker's obesity was not diagnosed as a medical 'condition', but where the worker was merely overweight and could reduce his or her weight through reasonable efforts. In order to fall within Section 43.1, the non-compensable issue had to qualify as a 'condition', 'disease', or 'disability' and given the particular facts of this claim, the worker's morbid obesity did. The Chief Review Commissioner found that the worker's 'condition' was a 'proportioning factor' as defined in Policy EN-02: *Proportionment* and upheld the Commission's ruling on that point.

2014-15 NOTEWORTHY DECISIONS (CONTINUED)

The Chief Review Commissioner found that the application of the 50 per cent proportionment factor was not in accordance with the *Act*, Regulations, and Policies. The non-compensable condition was interacting with the compensable injury to prolong disability and delay recovery, but this did not determine the question of whether a proportionment rating applied. The expected effects of the non-compensable condition, and the work injury on the worker's earning capacity had to be assessed separately, as per the methodology in the definitions and ratings table in order to arrive at an appropriate proportioning factor. The Commission's reasons did not demonstrate that the correct analysis was performed. The matter was remitted back to the Commission for a compliant decision. (*Hickey, CRC*)

DECISION 14113 (*Worker Application*)

Compensable Condition – Arising out of and in the Course of Employment – Compensable Injury – Definition of Injury Exclusions – Stress

ss.2(1), 2(2), 19(1), 43(1), 43.1, 60, 61, 64, Policy EN-18, Policy EN-19

In 2012, a worker filed a claim of injury for stress related symptoms. The Commission investigated the claim and found that the worker's treating physician placed the worker off work in 2011 for Post-Traumatic Stress Disorder (PTSD). The worker related the stress to his employment. Two incidents involving a co-worker were identified, one in which the co-worker had a conversation with the worker expressing a threat to shoot three of the claimant's other co-workers. That incident did not take place in the course of employment, but outside working hours in a parking lot. The worker then reported this conversation, with the result that legal proceedings evolved, involving the co-worker. The co-worker later initiated a civil proceeding against the worker. The worker was served with the process commencing the civil action, following which the worker experienced significant stress. The incident in which the worker was served with the civil process also did not take place in the course of employment.

The worker's treating physician reported that the stress of these incidents caused the worker to become incapacitated, and that following the service of the civil suit, the worker became disabled. The Commission denied the worker's claim, ruling that the claim was excluded under the *Act*. This ruling was upheld on Internal Review. The worker proceeded to the WHSCRD.

Decision: The review was denied. To be compensable under the *Act*, the injury had to arise out of and in the course of employment under s.43 of the *Act*, and it also had to satisfy the definition of "injury" under ss.2(1)(o) of the *Act*. Stress is generally excluded under the *Act* unless it meets a specific exception. In order to qualify under the *Act*, a stress claim has to be based on stress "that is an acute reaction to a sudden and unexpected traumatic event."

The Chief Review Commissioner reviewed the evidence relating to the two "events" and found that neither one of the events occurred in the course of employment, under s.43 of the *Act*.

2014-15 NOTEWORTHY DECISIONS (CONTINUED)

Also, while the Chief Review Commissioner did accept that the worker experienced a stress reaction from the events, this itself did not result in a finding that the stress was compensable. While the worker did experience an “*acute reaction*”, and was diagnosed with PTSD, it also had to be shown that the events themselves were “*sudden, unexpected, and traumatic*”. This is not determined by the worker’s subjective reaction to the events, but by an objective evaluation of the events themselves, as viewed by a reasonable person in the circumstances. The Chief Review Commissioner rejected that the events could be characterized as a “*sudden and unexpected traumatic event*” on the basis that they served as the ‘triggering event’ for disability due to the accumulated workplace stresses. The events had to be viewed as “*sudden, unexpected, and traumatic*” by their own nature. The Commission’s decision was reviewed for compliance with the *Act*, Regulations, and policies, and the Commission was correct to determine that the stress claim was of a nature that was excluded by the language in ss. 2(1)(o) of the *Act*. (*Hickey, CRC*)

DECISION 14127 (*Worker Application*)

Industrial Disease – Earnings Loss Benefits – Rate Calculation

ss. 90.1, 80, 19(4), Policy EL-01: Earnings Loss- Benefit Calculation

The Commission accepted the worker’s claim for industrial cancer. The worker had not worked between 2006, the date of his diagnosis, and 2012 when he submitted a claim for wage loss benefits. The worker had no earnings at the time of his earnings loss benefit claim and his most recent earnings were those from 2005, when he earned \$3,883.00 from seasonal employment. The Commission awarded the worker Extended Earnings Loss (EEL) benefits based on that seasonal income, effective from 2006 until 2008, the date the worker turned 65 years of age. The worker appealed, claiming that the earnings selected were not representative of the earnings in his last “*trade, occupation, profession, or calling prior to the date of his disablement*”. The worker claimed that earnings from his last employment as a miner should have been used as the basis for the calculation, as the industrial cancer was accepted as being caused by the toxins at that workplace.

Decision: The review was allowed and the matter remitted to the Commission. The employment earnings used by the Commission for the purposes of its calculation did not represent a reasonable base for the purposes of Section 90.1 of the *Act*. Policy EL-01: *Earnings Loss - Benefit Calculation* requires that the particulars of each individual case be considered very carefully, as many cases do not conform to typical circumstances. The object of the calculation under Policy EL-01: *Earnings Loss - Benefit Calculation* is to establish a rate which is fair and reasonable in all the circumstances. The worker’s last employment earnings were those in 2005, earned from seasonal employment. Those earnings were his last earnings before disablement, but Section 90.1 specifies that the worker need not have any earnings at the date of the disablement, as regard is had to the worker’s earnings in his last “*trade, occupation, profession, or calling prior to the date of his disablement*” for the purposes of the calculation in s.74.

2014-15 NOTEWORTHY DECISIONS (CONTINUED)

The use of the language “*trade, occupation, profession, or calling*” in Section 90.1 suggested that the earnings to be used in the calculation derived from more permanent or regular employment. The Commission was in error to confine itself to the earnings derived from the 2005 seasonal employment as a base. However, there was evidence that the worker was regularly employed between the closure of the mine in 1991, up until 2002. The particulars of that employment were unavailable. The matter was remitted to the Commission to explore the worker’s employment history further, so as to arrive at an equitable rate based on the worker’s last “*trade, occupation, profession, or calling*”. (*Blackmore*)

DECISION 14140 (*Worker Application*)

Return to Work – Worker Cooperation – Early and Safe Return to Work Plan *s. 89(2)(b), Policy RE-02: The Goal of Early & Safe and the Roles of the Parties*

A worker delivered notice to her employer on December 18, 2012, indicating that her last day of employment would be on December 27, 2012. On December 23, 2012, and during the notice period, the worker incurred a low back injury. The worker’s claim was accepted and wage loss benefits were also approved. By August 2013, the worker’s treating physician cleared the worker for an easeback at four hours per day. The employer confirmed the worker’s earlier resignation and confirmed that there were no positions available for the worker to return to, which the Commission accepted. The Commission then notified the worker that she had one week to demonstrate cooperation by returning to the pre-injury employer so as to participate in an Early and Safe Return to Work (ESRTW) Plan. When this did not occur, the Commission made a finding of non-cooperation against the worker and applied it to her claim.

Decision: The review was allowed. The worker was not shown to be in non-cooperation. The worker had already resigned her position for unrelated reasons and was injured during the notice period. When the Commission inquired as to whether a position was available, the employer advised that there was no longer a position available. As a result, there was no suitable employment available for the worker to accept under Subsections 89(2)(b) and (c). There was also no indication that the worker had acted or behaved unreasonably with respect to her cooperation requirements under s.89. The Commission erred in evaluating the worker’s cooperativeness on the basis of availability of work with the pre-injury employer rather than the worker’s own conduct in relation to her obligations under the *Act*. The Commission’s practical inability to implement an ESRTW Plan did not equate to non-cooperation on the part of the worker. (*Murphy*)

DECISION 14215 (*Worker Application*)

Pension Replacement Benefit – Entitlement – Employer Sponsored Pension Plan *s.75(1)*

The worker was injured in 1996 and received wage loss benefits following the injury. In 2000, the worker was found capable of suitable earnings and employment and by 2004 the Commission ruled that the worker had the capacity to earn in excess of his pre-injury wages.

2014-15 NOTEWORTHY DECISIONS (CONTINUED)

The worker's earnings loss benefits were terminated. The worker turned 65 in 2012 and applied for a Pension Replacement Benefit (PRB). The Commission denied the worker's application on the basis that he did not meet all the requirements of Section 75 of the *Act*. The worker appealed to the WHSCRD.

Decision: The worker's review was denied. The eligibility for a PRB depends on meeting the provisions of Section 75. One of the conditions is that the worker be "*receiving compensation*" at age 65. The Commission interpreted this to mean that the worker must be receiving earnings loss benefits at age 65, and the Chief Review Commissioner confirmed that interpretation. The Chief Review Commissioner reviewed the wording of the provision in the context of the *Act* as a whole and the legislative history, as well as a recent Newfoundland and Labrador Supreme Court decision, and concluded that the Commission's interpretation was not in error. The wording and context of Section 75 suggests a continuity between the receipt of earnings loss benefits at age 65 and the receipt of PRB commencing at age 65. (*Hickey, CRC*)

DECISION 15039 (*Worker Application*)

Medical Aid – Prescription Drugs – Drug Formulary – Opioids

ss. 19(4), 60, 84, 85, Policy HC-11: Drug Formulary, Policy HC-13: Health Care Entitlement, Policy HC-14: Use of Opioid Medication for Compensable Injuries

In 2005, a worker sustained a musculoskeletal injury in the course of his employment. The worker had surgery in 2006 for disc herniation and required pain medication and physiotherapy. The worker was placed on extended earnings loss benefits in 2010. In 2013, the worker's treating physician prescribed Oxycodone to the worker for pain management. The worker requested that the Commission cover the cost of the prescription. The Commission then consulted with its Medical Consultant. The Consultant advised that the drug was not covered under the Drug Formulary, and since the worker was not a cancer patient, or considered to be grandfathered due to a previous approval for the drug Oxycodone, the worker's claim could not be considered as an exceptional circumstance under the Policies.

Decision: The review was allowed and the matter remitted to the Commission. The Commission erred in not considering the provisions of Policy HC-13: *Health Care Entitlement* and did not demonstrate a full application of Policies HC-13 and Policy HC-14: *Use of Opioid Medication for Compensable Injuries*, which specifically allowed for approval in exceptional cases. The Commission did not perform an individualized consideration of the claim on its own merits, but relied on the Medical Consultant's opinion without further consideration of all the circumstances. The Commission confined the 'exceptional circumstances' analysis to a reliance on two general categories which were not contained in the *Act* and Policies. The Commission did not follow the Policy or otherwise reasonably exercise its discretion because it did not consider the merits of the individual case. (*Hickey, CRC*)

2014-15 CASELOAD ACTIVITY

The following highlights the WHSCRD's caseload activity for 2014-15. Refer to the Statistical Overview section on page 20 for statistical tables and additional caseload information.

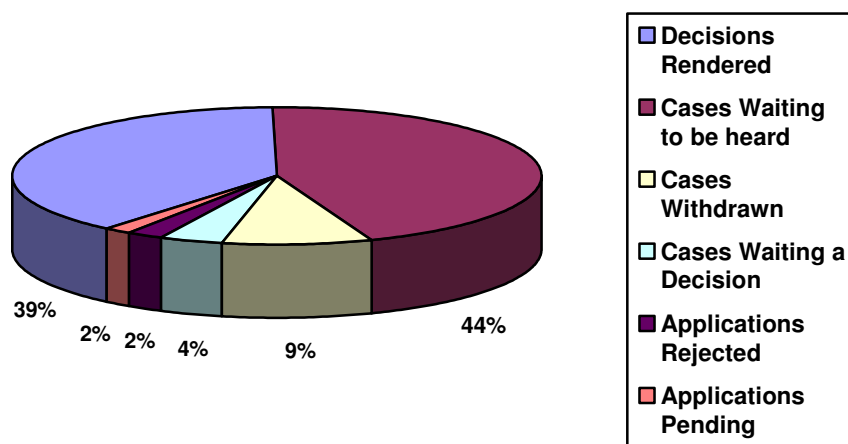
- The WHSCRD's overall annual caseload, including cases finalized, consisted of 523 cases which represents a decrease of 17 per cent from the previous fiscal year (Table 1-page 20).
- There were 274 Request for Review applications filed in 2014-15, representing a slight decrease from the preceding year by 26 cases. The majority of these cases, 64 per cent, were filed within the St. John's region (Table 2-page 21).
- Workers and their dependents filed 246 Request for Review applications representing 90 per cent of the applications filed in 2014-15. Employers filed 28 Request for Review applications, or 10 per cent (Table 3-page 21).
- There were 190 hearings conducted this fiscal year, Staff of the WHSCRD also coordinated work for an additional 92 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. There were no hearings conducted in the Labrador region this fiscal year, as parties were either unavailable for the proposed hearing dates or had requested a postponement (Table 4-page 21).
- Review Commissioners found that approximately 51 per cent of the Commission's decisions which were subject to review were either not consistent with the *Act*, the Regulations and policies of the Commission, or required additional review by the Commission. In these cases, Review Commissioners allowed the appeals or referred the cases back to the Commission for further review or investigation (Table 5-page 21).
- Workers participated in 91 per cent of the cases under review based on 202 decisions rendered (Table 7-page 22). Approximately 11 per cent of workers were self-represented, 54 per cent were represented either by their Member of the House of Assembly (MHA) or by a Government Members Hearings Officer, and; 34 per cent were represented by their union, consultant, or other friends or family members (Table 8-page 22).
- Employers participated in 16 per cent of the reviews (Table 7-page 22) and were self-represented in 44 per cent of the cases based on the 202 decisions rendered (Table 9-page 22).
- The top three issues under review for workers were: Extended Earnings Loss benefits at 21 per cent, Health Care Services - 12 per cent, and Permanent Functional Impairment awards at 12 per cent (Table 11-page 23).

2014-15 STATISTICAL OVERVIEW

Table 1 – Annual Caseload

Caseload Breakdown	2013-14	2014-15
Appeals Carried Forward April 1 st	327	249
New Applications	300	274
Annual Caseload	627	523
Less Finalized/Closed Cases:		
Decisions Rendered	305	202
Cases Withdrawn	52	48
Applications Rejected	21	12
Caseload March 31st	249	261
Caseload Consists of:		
Active Cases -	239	253
<i>Cases Waiting to be Heard</i>	207	232
<i>Cases Heard and Waiting a Decision</i>	32	21
Inactive Cases (Applications Pending)	10	8

Figure 1 – 2014-15 Caseload Breakdown by per cent



2014-15 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
	#	%	#	%	#	%	#	%	#	%	
2013-14	197	66%	33	11%	24	8%	42	14%	4	1%	300
2014-15	176	64%	27	10%	28	10%	41	15%	2	1%	274

Table 3 – Requests for Review by Claimant

Year	Worker		Employer		Dependent		Total
	#	%	#	%	#	%	
2013-14	274	91%	23	8%	3	1%	300
2014-15	241	88%	28	10%	5	2%	274

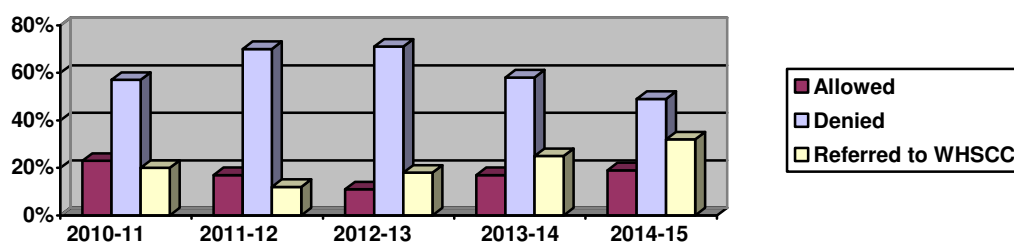
Table 4 – Hearings by Region

Year	St. John's		Gander		Grand Falls-Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2013-14	202	66%	29	10%	24	8%	49	16%	0	0%	304
2014-15	128	67%	13	7%	16	8%	33	17%	0	0%	190

Table 5 – Decision Outcome

Year	Allowed		Denied		Referred Back to Commission		Total
	#	%	#	%	#	%	
2013-14	52	17%	178	58%	75	25%	305
2014-15	38	19%	99	49%	65	32%	202

Figure 2 - Decision Breakdown by per cent



2014-15 STATISTICAL OVERVIEW (CONTINUED)

Table 6 – Decisions by Region

Year	St. John's		Gander		Grand Falls-Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2013-14	199	65%	34	11%	24	8%	48	16%	0	0%	305
2014-15	132	65%	16	8%	18	9%	36	18%	0	0%	202

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

Year	Total Decisions	Worker Participation		Employer Participation		Commission Participation	
	#	#	%	#	%	#	%
2013-14	305	285	93%	80	26%	108	35%
2014-15	202	184	91%	32	16%	56	28%

Table 8 - Worker Participation by Representative Type

Year	Self		Consultant		Legal Counsel		MHA*		Union		Other		Total Worker
	#	%	#	%	#	%	#	%	#	%	#	%	
2013-14	35	12%	12	4%	5	2%	160	56%	55	19%	18	6%	285
2014-15	21	11%	7	4%	6	3%	99	54%	39	21%	12	7%	184

* 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
	#	%	#	%	#	%	
2013-14	29	36%	49	61%	2	3%	80
2014-15	14	44%	15	47%	3	9%	32

Table 10 - Requests for Reconsideration by Client

Year	Total Requests	Worker Requests		Employer Requests		Commission Requests	
	#	#	%	#	%	#	%
2013-14	37	18	49%	4	11%	15	40%
2014-15	20	13	65%	2	10%	5	25%

2014-15 STATISTICAL OVERVIEW (CONTINUED)

Table 11 – Issues Reviewed by Decision

Issues	Outcome			
	Worker/Dependent Appeals	Objections	Allowed	Denied
Aggravation of a Pre-existing Condition	3	0	3	0
Canada Pension Plan	3	1	2	0
Charter of Rights and Freedoms	1	1	0	0
Claim Denied	22	6	13	3
Compensation Denied	2	0	2	0
Compensation Rate	5	2	1	2
Dependency Benefits	4	0	1	3
Early and Safe Return to Work	6	2	2	2
Extended Earnings Loss Benefits	46	8	21	17
Health Care Services	26	5	8	13
Industrial Disease	2	0	2	0
Industrial Hearing Loss	5	0	3	2
Internal Review Denied	1	1	0	0
Overpayment	1	0	0	1
Pension Replacement Benefit	4	1	2	1
Permanent Functional Impairment	27	3	16	8
Proportionment	21	4	5	12
Recurrence	5	0	2	3
Reinstatement of Benefits	13	8	3	2
Reopening	17	4	8	5
Wage Loss Benefits	4	1	1	2
Total	218	47(21%)	95(44%)	76(35%)
Employer Appeals				
Assessment Rate	2	0	2	0
Cost Relief	4	0	4	0
Objection to a Worker's Claim	10	0	9	1
PRIME	2	0	2	0
Total	18	0(0%)	17(94%)	1(6%)
OVERALL TOTALS	236	47(20%)	111(47%)	79(33%)

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.

Summary of Expenditures and Related Revenue for fiscal year ending March 31, 2015 (UNAUDITED)

	2014-15	2014-15	
	Actual	Estimates	
	\$	Amended	Original
	\$	\$	\$
5.1.01. Workplace Health, Safety and Compensation Review			
01. Salaries	654,656	743,100	743,100
02. Operating Accounts:			
Employee Benefits	3,892	2,500	2,500
Transportation and Communications	32,413	30,200	30,200
Supplies	15,517	22,500	22,500
Professional Services	122,714	200,000	200,000
Purchased Services	118,180	167,500	167,500
Property, Furnishings and Equipment	1,131	4,000	4,000
	<u>948,503</u>	<u>1,169,800</u>	<u>1,169,800</u>
02. Revenue - Provincial	(708,359)	(1,169,800)	(1,169,800)
Total: Workplace Health, Safety and Compensation Review	<u>240,144</u>	<u>-</u>	<u>-</u>

Source: Report on the Program Expenditures and Revenues of the Consolidated Revenue Fund for the year ended March 31, 2015.

REVIEW COMMISSIONERS FOR 2014-15

Marlene Hickey, Chief Review Commissioner

Ms. Hickey is a resident of Mount Pearl. 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*.

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.

Margaret Blackmore, Review Commissioner

Margaret Blackmore is a resident of Grand Falls-Windsor. Margaret attended Saint Francis Xavier University in Nova Scotia where she completed a Bachelor of Arts. She also attended the University of New Brunswick in Fredericton where she obtained a law degree. Margaret practiced law for a period of time in Halifax with the firm of Stewart McKelvey before returning to Newfoundland and Labrador in 2007. Ms. Blackmore was appointed to the WHSCRD Panel of Review Commissioners in June 2013 and resigned the position of Review Commissioner in March 2015.

Judy Manning, Review Commissioner

Ms. Manning is a resident of St. John's and maintains strong ties to her hometown of St. Bride's. Having obtained a Bachelor of Commerce (Co-op) degree from Memorial University of Newfoundland in 2001 and a Bachelor of Laws degree from Dalhousie University in 2004, she was called to the Newfoundland and Labrador Bar in 2005 and to the Ontario Bar in 2008. Ms. Manning left private practice in Toronto in 2011 to pursue graduate studies in Natural Resources, Energy & Environmental Law at the University of Calgary. Ms. Manning was appointed to the WHSCRD Panel of Review Commissioners in April 2014 and resigned the position of Review Commissioner in September 2014.

REVIEW COMMISSIONERS FOR 2014-15 (CONTINUED)

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.

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.

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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