

Workplace Health, Safety and Compensation Review Division (WHSCRD)

Annual Performance
Report 2018 - 19

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Message from the Chief Review Commissioner



In accordance with the reporting requirements of the **Transparency and Accountability Act** for a Category 3 entity and the **Workplace Health, Safety and Compensation Act** (the Act), I am pleased to present the Workplace Health, Safety and Compensation Review Division's (WHSCRD) Annual Performance Report for 2018-19. As Chief Review Commissioner of the WHSCRD, I am responsible for the preparation of this report and accountable for the results contained within.

In the 2018-19 fiscal year, we are very pleased to report WHSCRD worked with the Independent Appointments Commission to recruit three full-time Review Commissioners. This is a significant step forward in our ability to fulfill our mandate and address the complexity of cases coming forward with the in-depth analysis required to provide a timely and fair review process to clients and achieve WHSCRD's vision. It is also aligned with Government's strategic directions to achieve efficiencies in delivering and providing service excellence to the citizens of Newfoundland Labrador.

The nature of previous part-time appointments made it difficult to recruit and retain Review Commissioners and by extension, posed challenges to WHSCRD's service delivery with respect to hearing and decision timelines. As of March 2019, WHSCRD's Review Commissioner Panel consisted of one part-time Review Commissioner and four full-time Review Commissioners, including the Chief Review Commissioner. WHSCRD anticipates a reduction in wait times for hearings and decisions as the new Review Commissioners establish themselves in their roles.

I would also like to thank the staff of the WHSCRD for their ongoing professionalism in the delivery of services to injured workers and employers. We have achieved our objectives for the 2018-19 fiscal year due in large part to their ongoing commitment to offer our clients quality service and enhance our hearing preparedness.

On behalf of the Review Commissioners and staff we are honored to serve in our respective roles and provide our contribution in upholding the principles of natural justice. We look forward to working with you in 2019-20.

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

Marlene A. Hickey - Chief Review Commissioner

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WHSCRD Overview

INTRODUCTION

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

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

Additional information on WHSCRD's mandate and lines of business can be found at:

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

FINANCIAL INFORMATION

Funding for the operations of WHSCRD is recovered from the Injury Fund of WorkplaceNL pursuant to Section 25 of the **Workplace Health, Safety and Compensation Act**. WHSCRD's budgetary allocations are provided by the Government of Newfoundland and Labrador within the overall budget for Service NL as the Minister responsible for WorkplaceNL. Unaudited expenditures for WHSCRD in 2018-19 were \$933,160 as provided by the Department of Finance. Please refer to page 24 for more detailed financial information.

REVIEW COMMISSIONERS

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

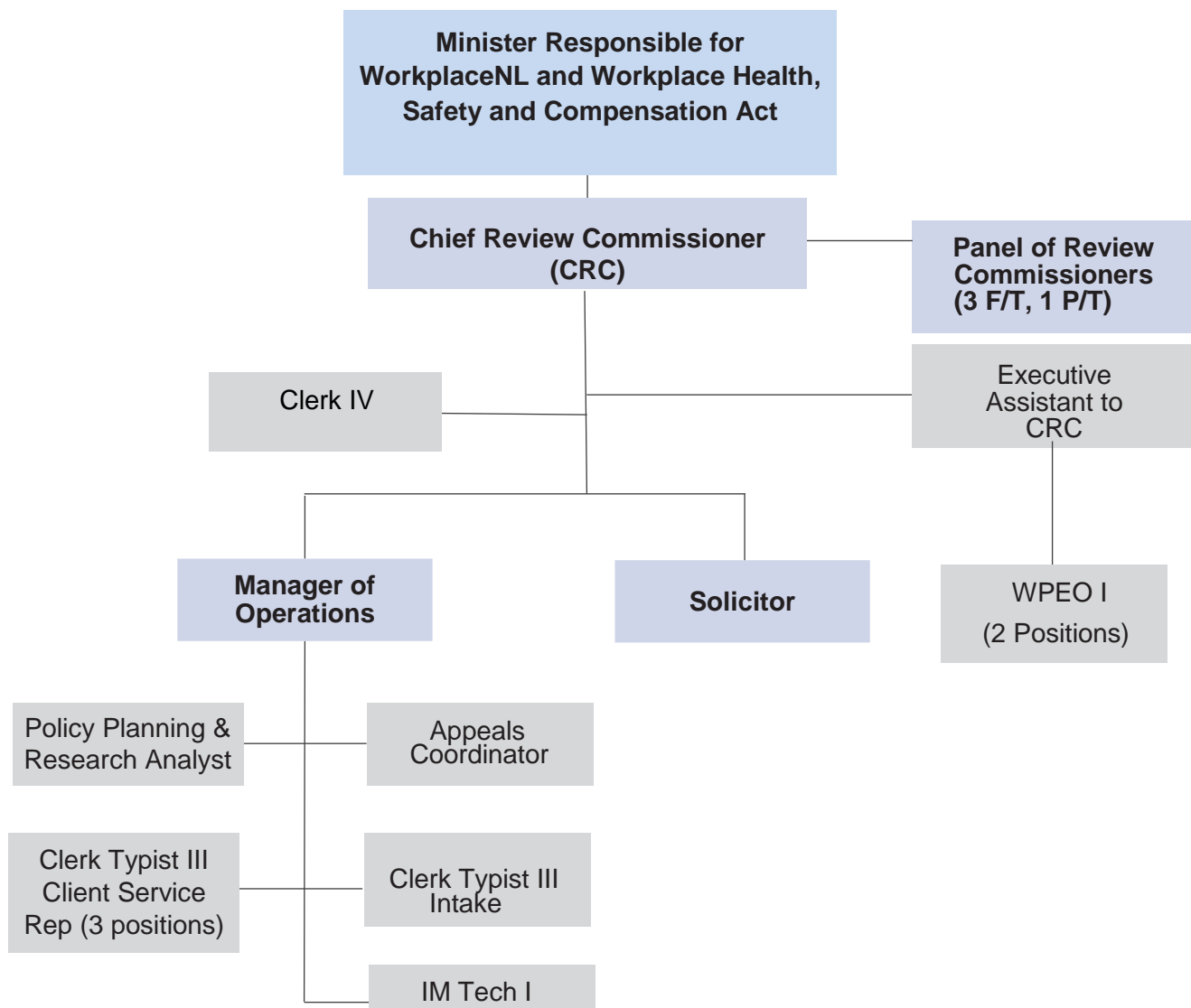
As of March 31, 2019, WHSCRD's Panel of Review Commissioners consisted of Chief Review Commissioner, Marlene Hickey, three full-time Review Commissioners appointed between January and March 2019 (Suzanne Hollett, Shane Hickey and Heather Dunford) and part-time Review Commissioner Evan Kipnis. Please refer to page 25 for biographies of Review Commissioners as of March 31, 2019.

WHSCRD Overview continued

WHSCRD STAFF

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

WHSCRD ORGANIZATIONAL CHART



Highlights and Partnerships

Information Management Project

In cooperation with the Office of the Chief Information Officer (OCIO), WHSCRD made significant gains in its information management program during the 2018-19 fiscal year. Partnering with the Office of Employment Equity for Persons with Disabilities, WHSCRD was able to dedicate the required human resource time and expertise to finalize and implement its Record Retention and Disposal Schedule in accordance with the guidelines established by the Government Records Committee through the **Management of Information Act**.

Prior to the approval of this project, WHSCRD's legacy case files were retained in paper format. The move to digitize case files and store electronic copies versus paper freed valuable physical office space; increased the efficiency with which staff can access the files for their work and for clients; and decreased the risk of information being exposed to privacy concerns inherent in external, physical storage practices.

The gains realized in 2018-19 provides the foundation upon which WHSCRD will move its information management project forward as it transitions from a primarily paper-based record storage model to the implementation of an electronic records management program. This initiative is also aligned with Government's commitment to bring efficiencies to service delivery by reducing manual and paper-based processes.

Report on Performance

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

Issue 1: Ensuring a Fair Review Process

Building and supporting client and stakeholder knowledge of WHSCRD's review process is an important element in ensuring a fair review process. Knowledge of the review process helps alleviate potential issues for clients arising on or around the hearing day, particularly with regard to general and formal procedures of the review process such as the order of proceedings, the admittance of new evidence, etc. Delays in proceedings not only impacts the clients' right to a timely and fair review process, it also impacts WHSCRD's ability to move its scheduling list forward.

During the 2018-19 fiscal year, in its efforts to ensure a fair review process, WHSCRD updated its client information session presentation and inserted information specific to resources located on its website and Decision Search System (DSS).

Stakeholders to which the information session could be delivered were identified using WHSCRD's Client Tracking System, internal knowledge, and online searches into available advisory resources in the province. Identified stakeholder groups included independent worker and employer representatives, lawyers, MHAs, and members of formal worker and employer advisory organizations.

Throughout the 2018-19 reporting period, WHSCRD operations management and client service staff conducted a number of customized review process information sessions through a combination of in-person and telephone communications. The updated presentation was used for in-person sessions and made available by mail or email to those who participated by telephone.

Work completed in meeting WHSCRD's 2018-19 objective is outlined in the following section.

Report on Performance continued

Objective Results for 2018-19

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

Indicators:

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

Indicator	Progress and Accomplishments
Updated the information session with DSS and website specific information.	<ul style="list-style-type: none"> • Updated the information session with information specific to the Decision Search System (DSS) and online forms and applications. • Worked with OCIO to update the website format in general. This is currently moving through the necessary approvals and is anticipated to go live in early 2019-20.
Identified stakeholders to which the information session will be delivered and/or provided.	<ul style="list-style-type: none"> • Used Client Tracking System database and internal knowledge to identify stakeholders. • Identified stakeholders included independent worker and employer representatives, lawyers, MHAs, and members of formal worker and employer advisory organizations. • Conducted online searches to identify any additional potential stakeholders, which confirmed the existing stakeholder list.

Report on Performance continued

Indicator	Progress and Accomplishments
Scheduled and conducted information sessions for identified stakeholders.	<ul style="list-style-type: none"> • WHSCRD management conducted a combination of four in-person sessions with primary stakeholders and many informal telephone information sessions. The in-person sessions were less formal than originally anticipated as stakeholders preferred individualized meetings/information sessions specific to their organizational needs.
Gathered informal feedback from stakeholder groups to ensure information is responsive to needs.	<ul style="list-style-type: none"> • Feedback was formative and qualitative in nature at the end of each session. WHSCRD will be using this feedback to make additional improvements to our online information, forms and applications.

Objective for 2019-20

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

Indicators:

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

Report on Performance continued

Issue 2: Enhancing Hearing Preparedness

Case descriptions hold the entirety of a client's WorkplaceNL claim file in relation to the issue(s) before a Review Commissioner. They are prepared by Review Division staff in preparation of a hearing for Review Commissioners, workers, employers, dependents and their representatives who rely on the information in a case description to represent the body of evidence specific to each appeal issue accepted by the WHSCRD.

When a client receives their case description well in advance of a hearing date, their hearing preparedness is enhanced by affording them time to review their file, address any concerns with the file content with WHSCRD, seek out representation and advisory services, or change how they would like to proceed with their case (e.g. withdraw application, seek clarification of issue, obtain new evidence, etc.). This also has to be balanced with providing a responsive and timely review process.

Using data captured in WHSCRD's Client Tracking System (CTS), WHSCRD created a new report showing the time between the distribution of a case description and the hearing date. This report captured the past five fiscal years to establish a historical baseline from which WHSCRD could establish an achievable target for case description distribution moving forward. The number of case descriptions distributed each year varies, but over the five-year period reviewed there was an average of close to 200 per year. Over the same five years, the percentage of case descriptions distributed at least six weeks in advance of a hearing date has steadily increased, with the two most recent years reporting 82 and 83 per cent respectively.

Based on the five-year historical data, WHSCRD's objective for 2019-20, to provide 90 per cent of its case descriptions within six weeks advance of a hearing date, is a target it anticipates being able to achieve as management continues to work closely with staff to communicate the goal and monitor expectations and progress.

It is important to note WHSCRD recognizes that as overall service timelines are shortened (that being the time between filing an application, holding a hearing, and issuing a decision) the amount of time available to distribute a case description prior to a hearing will also shorten. As such, WHSCRD's current goal to provide 90 per cent of case descriptions within six weeks advance of a hearing date, will have to be reevaluated to account for the positive impact of a decrease in overall timelines. For example, if the overall timeline between filing an application and issuing a decision is reduced to eight weeks, the amount of time WHSCRD will have to issue a case description prior to a hearing will naturally decrease, resulting in an overall benefit to clients and stakeholders through a decrease in service timelines.

Report on Performance continued

Objective Results for 2018-19

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

Indicators:

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

Indicator	Progress and Accomplishments
Monitored timelines for case description distribution.	<ul style="list-style-type: none"> • In cooperation with OCIO, WHSCRD used data captured in its Client Tracking System to create a new report which calculates the number of days between the dates a case description was distributed and a client's hearing. • Utilizing the new report, WHSCRD management conducted quarterly monitoring of case description distribution and met with staff to discuss performance goals and expectations in relation to achieving the objective of 90 per cent of case descriptions distributed within six weeks advance of a hearing date.
Established achievable targets for case description distribution.	<ul style="list-style-type: none"> • WHSCRD ran the new report across five fiscal years, including 2018-19, to establish a performance baseline. • The average number of case descriptions distributed per year was approximately 200. • The percentage of case descriptions distributed at least six weeks before the hearing was determined for each of the past five years, which has been steadily increasing to its current level of 82 per cent. • Management worked closely with WHSCRD staff to ensure its 2019-20 objective of distributing 90 per cent of its case descriptions within six weeks advance of a hearing date is achievable.

Report on Performance continued

Objective for 2019-20

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

Indicator:

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

Opportunities and Challenges Ahead

The 2018-19 fiscal year brought noteworthy legislative changes which will impact the work of Review Commissioners as they interpret and apply new policy and legislation to their decision writing process. The introduction, interpretation and application of new or amended legislation brings forward both opportunities and challenges to the work of WHSCRD. As legislation is developed or amended, there are consequences for any organization involved in the application or interpretation of same. This is certainly true for WHSCRD as it relates to workers compensation legislation or changes in other legislation that may have an indirect impact. The 2018-19 fiscal year included a few significant changes as outlined below.

Legalization of Cannabis

With respect to workers' compensation legislation and policy, in this province and across the country, the use of cannabis in the treatment and management of pain, anxiety, and other medical ailments, whether self or medically prescribed, is very challenging as its use in these ways falls outside current legislation. As marijuana use becomes more mainstream, the number of people requesting medical marijuana is anticipated to increase, as are the number of applications for review of decisions finalized on this issue. WHSCRD has already seen an increase in 2018-19. While federal legislation legalized the recreational use of cannabis, the creation, application and interpretation of legislation and policy specific to the medical uses of cannabis, remains complex.

New Retirement Benefit Legislation

WorkplaceNL introduced new retirement benefit legislation intended to make the benefit available to more injured workers in the province. The new benefit aims to simplify the former and more complex policy by adopting a one-time lump sum payment which will be paid to the worker when they reach the age of 65. This makes the calculation of the benefit easier to understand and is expected to shorten the time within which injured workers receive their benefit. As WorkplaceNL implements this new benefit, there may be an increase in applications related to retirement benefits for injured workers, as benefits are linked to other factors such as dates of injuries, types and amounts of wage loss benefits and age. This also brings into play a transition period whereby Review Commissioners will be reviewing cases under two versions of the legislation, depending on each individual situation.

Pending Presumptive Coverage for Post-Traumatic Stress Disorder (PTSD)

An amendment to the **Workplace Health, Safety and Compensation Act** will provide presumptive coverage to workers for work-related PTSD effective July 1, 2019. This may result in a percentage of WorkplaceNL PTSD claims coming forward to WHSCRD for review.

Noteworthy Decisions

The following WHSCRD decisions have been identified as noteworthy for 2018-19; 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 18064 Horseplay (Worker Application), Allowed

- Compensable Injury – Arising Out of and In the Course of Employment – In the Course of –Horseplay ss.2(1)(o), 19(1), 43(1), 60(1), 61, Policy EN-19 Arising Out Of and in the Course of Employment, Policy EN-20 Weighing Evidence
- Compensable Injury – Definition of Injury – Exclusions – Serious and Willful Misconduct ss.2(1)(o), 19(1), 43(1), 60(1), 61, Policy EN-19 Arising Out Of and in the Course of Employment, Policy EN-20 Weighing Evidence

The worker injured a shoulder and forearm at work after tripping over an object on the floor. The incident was originally described as a slip and fall. The employer conducted its own investigation into the incident, including a review of videotape footage which captured the events before and after the injury. It was later determined the worker was being chased by a fellow employee and tripped over the object while evading the co-worker. The employer concluded that the worker violated the company policy against horseplay and terminated the worker's employment. The employer then objected to the worker's compensation claim and provided WorkplaceNL with the results of its investigation. The worker also amended his claim, admitting the mechanism of injury was a combination of skylarking and tripping over the object. WorkplaceNL then denied the claim, finding the injury was the result of horseplay and did not arise out of and in the course of employment. The worker sought internal review, which was denied.

Decision: The review was allowed. The Review Commissioner found the injury arose out of and in the course of employment and was not otherwise barred by an exclusion in the Act or Policy EN-19. The Review Commissioner concluded employment materially contributed to the worker's injury and the worker did not leave the course of employment by virtue of being chased by the co-worker.

The Review Commissioner reviewed the provisions of Policy EN-19 relating to 'Horseplay' and 'Serious and Wilful Misconduct' and found it was not clear the 'Horseplay' section had any application. The worker did not initiate the horseplay, and while there was a suggestion the worker made a face at the other employee, the co-worker responded by charging after the worker. The

Review Commissioner found Policy 19 recognized situations in which horseplay 'is initially harmless and escalates into a dangerous activity and the worker is not a willing participant in the escalation' and confirmed injuries in those situations could be compensable. He also did not accept the worker's behavior was a "personal hazard or deviation" as it was a reaction to a hazard presented by the co-worker.

The Review Commissioner also reviewed the 'Serious and Wilful Misconduct' section of the Policy, which set out a number of factors to consider, including whether the employer permitted that type of activity in the workplace. The Review Commissioner observed provision had to be read consistently with Section 43(1) of the Act, which states a claim is barred when the injury is attributable "solely" to the serious and willful misconduct of the worker. He found the employment circumstances were still contributing to the injury, as the co-worker's actions presented a hazard, as did the location of the object on the floor. The causal connection between the injury and the employment was not broken by the worker's actions.

The Review Commissioner accepted the Worker initially 'lied and acted in collusion with others in the aftermath of the accident' but the workers' compensation system is a no-fault system based primarily on principles of cause. As the injury arose out of and in the course of employment, the worker's contribution to the injury did not disqualify the worker from compensation. He found the worker's termination for cause did not decide the question under the Act. The worker still had a compensable injury. (Noseworthy)

DECISION 18091 MVA During Commute (Worker Application), Denied

- Compensable Injury – Arising Out of and In the Course of Employment – In the Course of – Routine Commuting ss.2, 19(1), 43, 60(1), 74, Policy EN-19 Arising Out Of and in the Course of Employment

The worker was returning home from a worksite on a public highway and was injured when the worker's vehicle left the road due to accumulated snowfall. The worker presented an injury claim to WorkplaceNL. WorkplaceNL denied the claim on the basis the motor vehicle accident took place during the worker's commute and not in the course of employment. The worker objected, stating the employer was paying the worker a travel allowance and the travel was necessarily incidental to employment. As the worker was assigned to different locations within the region from day to day, and there was no one fixed worksite, the worker argued the provisions relating to commuting did not apply to the situation. The worker also argued the snowfall during the commute posed an additional hazard beyond the normal hazards of employment for the purposes of Policy EN-19, which brought the claim under the Policy. It was also argued the employer's act of refusing

to allow the workers to leave work early resulted in the accident, making it a work injury. WorkplaceNL denied an internal review and the worker proceeded to WHSCRD.

Decision: The review was denied. The injury did not take place in the course of employment for the purposes of s.43 or Policy EN-19. The Review Commissioner found the accident took place during routine commuting, as defined by the Policy, and the Policy clarified a payment of a travel allowance did not affect the consideration of whether the commute was ‘in the course of employment. Also, the Review Commissioner found the worker’s shift did not start until arrival at a designated marshalling point where the workers were assigned their duties and transported to work sites. She found the marshalling point was not a ‘normal place of employment’ in a conventional sense, but it was admitted the worker’s shift started upon reaching that location, and ended when the worker left it for the day. She ruled the commute consisted of the travel from the worker’s home to the marshalling point and from the marshalling point to the worker’s home. She also found the risks presented by the commute were no different than what would be experienced in winter or what would be faced by any member of the public on a public highway. She found the worker encountered the accumulated snowfall after the worker’s shift had already ended and ‘if there was a road maintenance or snow clearing issue that day that alone would not convert an accident into a work injury when the worker was no longer working at the time it occurred.’ WorkplaceNL’s decision followed the Act and the Policy. (Delaney)

DECISION 18119 Stress - Discipline (Worker Application), Denied

- Compensable Injury – Definition of Injury – Exclusions – Stress – Discharge/Discipline/Demotion ss.2(1)(o), 2(2), 5, 19(4), 43(1), 60(1), Policy EN-18 Mental Stress

The worker presented a stress injury claim to WorkplaceNL. The worker’s reporting to the treating physician and treating psychologist related the stress directly to an ongoing investigation by the employer into the worker’s conduct. In meetings and phone conversations with the intake adjudicator the worker verified the stress claim was based on the investigation and the outcome of the disciplinary process. WorkplaceNL denied the claim, finding a stress claim of that nature was excluded by the Act. The worker objected, maintaining there was an established diagnosis of PTSD which was related to the workplace. The internal review decision denied the claim on the basis there was no ‘sudden and unexpected traumatic event’ responsible for the stress, as required by the Act and explained in Policy EN-18. The worker proceeded to WHSCRD.

Decision: The review was denied. The worker’s stress claim was barred by Section 2(2) of the Act

as it was admittedly the result of disciplinary action on the part of the employer. The Chief Review Commissioner also found the claim would not have satisfied the exception to the exclusion in Section 2(1)(o) because there was no acute reaction to a 'sudden and unexpected traumatic event'. The medical reports confirmed the 'injury' developed over time without a specific injury or incident, and was a type of gradual onset stress not recognized by the Act. The Chief Review Commissioner acknowledged the establishment of a PTSD diagnosis, but found the diagnosis alone did not establish entitlement under the Act, stating 'the source of the stress is the issue, not the diagnosis.' While the worker had a subjective stress reaction, it was not to a single 'event' which would be considered traumatic from an objective point of view. The claim was not compensable under the Act, or either the old or new versions of Policy EN-18. (Hickey, CRC)

DECISION 18127 Medical Aid – Cannabis Oil (Worker Application), Denied, Allowed

- Medical Aid – Fitness Program – Gym Membership ss. 2(1), 5, 19(1), 19(4), 60(1), 84(1), 85(1), Policy HC-13 Health Care Entitlement, Policy EN-20 Weighing Evidence, Procedure 58.00
- Medical Aid – Cannabis Oil ss. 2(1), 5, 19(1), 19(4), 60(1), 84(1), 85(1), Policy HC-11 Drug Formulary, Policy HC-13, Policy EN-20 Weighing Evidence

The worker had a low back injury in 1992. The worker returned to the workplace after retraining, suffered periodic recurrences, but continued to work. WorkplaceNL supported the worker with various forms of medical aid, including therapies and prescription drugs for symptom management. Formal chronic pain management was recommended for the worker at several points in the claim. In 2016, the worker approached WorkplaceNL, asking it to cover the cost of a gym-supervised exercise program to improve balance, health, and sleep. WorkplaceNL found there was no entitlement to costs associated with gym memberships and denied the request. The worker sought internal review on that issue but was denied. Two months later the worker advised WorkplaceNL that cannabis oil had been recommended to manage chronic pain and requested WorkplaceNL cover the cost of the cannabis oil as medical aid for the compensable injury. WorkplaceNL denied the request, advising that cannabis was not included on the Drug Formulary, was not accepted as medicinal within the health care community and was not recognized by Health Canada. The worker filed an internal review on that issue as well but was denied.

Decision: The review on the gym membership was denied. The review on the cannabis oil was allowed.

The Chief Review Commissioner found the decision on the gym membership complied with the Act, regulations, and policies. The medical aid provisions of the Act did not recognize fitness programs and the Health Care policies also did not make provision for an expense of that nature. Also, Procedure 58.00 stated that ‘general fitness equipment or programs for personal use by the worker, such as gym memberships, exercise equipment... are not covered by WorkplaceNL.’ The Chief Review Commissioner found while the Procedure was not binding, WorkplaceNL’s decision complied with the Act and Policy. She distinguished between a structured eight-week rehabilitation program administered by a physiotherapist, which should have been covered as medical aid, but upheld WorkplaceNL’s denial of the membership fee associated with the facility.

On the request for cannabis oil, the Chief Review Commissioner confirmed cannabis products are not generally covered by the Act and Policy, but could be considered as an exceptional circumstance. She found WorkplaceNL relied too heavily on the general state of medical opinion and the current state of the regulatory framework; failing to recognize the claim-specific evidence established the worker’s claim was an exceptional case, she found WorkplaceNL had erred in the decision to deny the worker’s request.

She confirmed that WorkplaceNL has the authority and discretion under the Act and Policies to determine what it considered ‘necessary’, based on considerations of appropriateness and effectiveness. As cannabis was not included on the Drug Formulary, Policy HC-11 did not apply to the facts of the case. Policy HC-11 did contain a form of ‘exceptional circumstance’ provision, which would have to be guided by the general directions in Policy HC-13. She referenced the Skinner decision from Nova Scotia filed by WorkplaceNL, which confirmed the policy-making functions were reserved to the Commission, and similar principles had already been established in Newfoundland and Labrador. She found it was not her role to review Policy HC-11, but rather whether there were exceptional features present which required a relaxation of policy requirements to the specific case.

The Chief Review Commissioner found the worker’s request was compelling, based on:

- the worker’s diagnosis and current reported symptoms,
- the medical treatment to date including failed spinal surgery,
- the duration of symptoms and the length of time post injury without improvement,
- the effects of medications tried to date for ongoing pain relief,
- the approval of acupuncture by WorkplaceNL on an ongoing basis, during times of employment and disability, in recognition of genuine pain symptoms;
- the recommendations of the family physician,
- the independent recommendations of the treating medical specialist,
- the worker’s experience to date with the use of marijuana oil, and
- the worker’s age and how that factors into the risk/benefit analysis.’

She referenced the worker's long history of injury, the worker's graduated attempts at other therapies and pharmaceutical options, the formal chronic pain referrals, WorkplaceNL's acceptance that the worker's chronic pain profile itself warranted medical aid intervention, and WorkplaceNL's earlier ruling to extend the provision of acupuncture as an exceptional circumstance. The origin of the worker's chronic pain condition was an objectively verified back injury and the worker's symptom reporting was treated as reliable both by the treating providers and by WorkplaceNL. There was also evidence that the cannabis oil provided relief where other strong pharmaceuticals had failed.

Acknowledging there were medically established risks for long-term use, she found WorkplaceNL erred by not taking into account the worker was already over 60 years of age. Also, the accepted hazards to the lungs were associated with smoking marijuana, but the worker's request was for the oil form of cannabis and not the dried form. She accepted WorkplaceNL's medical consultant had provided an assessment of the risks, but WorkplaceNL still had to consider whether the generally accepted risks were as prevalent in the individual fact situation.

Reviewing the facts of the case, she stated;

'127. As to what would make the worker's claim exceptional, I find the issues are as follows;

- 1) In spite of the general medical research and opinion about the appropriateness of marijuana for medical purposes, is it warranted in this specific case because;
 - a) There is medical evidence and opinion that other alternatives with fewer risks have been attempted but failed and;
 - b) The risks are no greater than the benefits, given the facts of the case?
- 2) Is there medical opinion supporting that it would be appropriate to treat the effects of the compensable injury, versus some other condition, and;
- 3) If the answer to both of these questions is 'yes', is there medical evidence it is effective because;
 - a) There is a cause and effect relationship between the use of the drug and improvement in the compensable condition, and;
 - b) That improvement results in the achievement of one of the objectives listed in Policy HC-13: Health Care Entitlement?'

She confirmed there was a long claim history of the worker having attempted other, less risky alternatives, which either did not work or had stopped working. The alternatives included Oxy-drugs and morphine. Also, the risks were not as great in the particular worker's case as would be the case for other, younger workers using the dried form, and it was not established the risks were any greater than the benefits in the circumstances. Also, a treating medical specialist directly endorsed the use of the cannabis oil, stating it was a 'reasonable treatment option' and supported it.

Finding there was no real conflict in the evidence the worker had a genuine chronic pain profile that developed from the compensable injury, she observed the worker had been referred for formal chronic pain intervention. WorkplaceNL recognized the pain condition was compensable, as it provided other forms of medical aid for it. WorkplaceNL extended the worker's acupuncture treatment for symptom relief as an exceptional case because the worker responded to it, and because acupuncture was 'one of the last ones' left to consider. There was also no evidence of the worker requiring cannabis for any other, non-compensable reason.

Finally, the worker's experience with the cannabis oil showed an improvement in the compensable condition, and that improvement furthered one of the four objectives of medical effectiveness in Policy HC-13 and/or Procedure 58.00. The cannabis oil obviated the use of other strong pharmaceuticals and promoted both pain relief and sleep. No other alternative had proven equally effective in promoting those objectives, which militated in favour of a finding the cannabis oil was "necessary" to achieve the objective. (Hickey, CRC)

DECISION 19013 Earnings Loss Benefits – Calculation (Worker Application), Denied

- Earnings Loss Benefits – Calculation – ss.73, 74, 80, Policy EL-01 Benefit Calculation

The worker was injured near the end of 2017. WorkplaceNL accepted the claim early in 2018 and simultaneously awarded the worker earnings loss benefits. The client service assistant initially based the worker's short-term earnings loss rate on selected pay periods listed in the Record of Employment with the pre-injury employer. She advised the worker she would be performing a long-term rate review under s.80(7) as the thirteen-week anniversary of the injury was approaching. The worker provided a five-year earnings history from the Canada Revenue Agency and a print-out documenting additional 2017 earnings from a second employer. The client service assistant concluded the worker's employment history consisted of impermanent and seasonal employment, supplemented by employment insurance. She determined that the best measure of the worker's pre-injury earnings was the worker's twelve-month earnings from all sources, as it was reflective of the worker's established earnings pattern. The worker's benefit rate decreased as a result. After the thirteen week period elapsed, the worker provided evidence of additional 2017 earnings from a third employer. The client service assistant added those earnings to the worker's 12-month earnings base and increased benefits accordingly. The worker appealed, claiming it would be more equitable to base the long-term rate on 'average annual earnings' under s.80(7) to take into account the higher earnings the worker had obtained in 2013 and 2014. The internal review specialist denied the review, finding the 12-month earnings base was more reflective of the earnings at the time of the injury and most accurately reflected the worker's typical income pattern.

Decision: The review was denied. The decision reflected the intent of ss.74, 80, and Policy EL-01. The Chief Review Commissioner identified that s.74 of the Act calculates earnings loss benefits based on a 'worker's average weekly net earnings at the commencement' of his lost earning capacity, so the earnings at the time the disability occurs are to be treated as reflective of pre-injury earnings capacity. Section 80(1) offers two alternatives to calculate 'average weekly earnings' for the purposes of the short-term rate, which are 1) earnings in the last twelve months, or 2) the rate of remuneration at the time of injury, whichever is 'more equitable' in the opinion of WorkplaceNL. The client service assistant, upon becoming aware the worker usually obtained seasonal work from multiple employers, and multiple sources, in a twelve-month period, changed the earnings base to reflect the worker's earnings in the last twelve months. While the client service assistant made that decision in the course of deciding the long-term rate and not the short-term rate, the Chief Review Commissioner found Policy EL-01 allowed intermediate adjustments of the short-term rate and all the worker's income information was not available until after the thirteen week period had elapsed. Finding the decision implicitly adjusted the short-term rate based on the new income information, and explicitly refused to change the base to incorporate 'average annual earnings' on the long-term review, the Chief Review Commissioner found WorkplaceNL's final decision did comply with the provisions even though the reasoning was condensed. She found the concept of 'more equitable' as explained in Policy EL-01 required an identification of the 'more accurate' earnings base, taking all the facts of the case into account. The purpose of the long-term rate review in s.80(7) was to ensure the worker's pre-injury earnings capacity was not overstated or understated by the use of the alternatives provided for calculating the short term rate, and she found the worker's earnings in the past twelve months represented the median between the worker's documented 2015 and 2016 earnings. Accepting the worker's twelve-month income information was reflective of the worker's pre-injury earnings, she found there was no reason for WorkplaceNL to depart from that base on the long-term rate review. (Hickey, CRC)

2018-19 Caseload Activity

The following highlights WHSCRD's caseload activity for 2018-19. For statistical tables and additional caseload information refer to the Statistical Overview section on page 20.

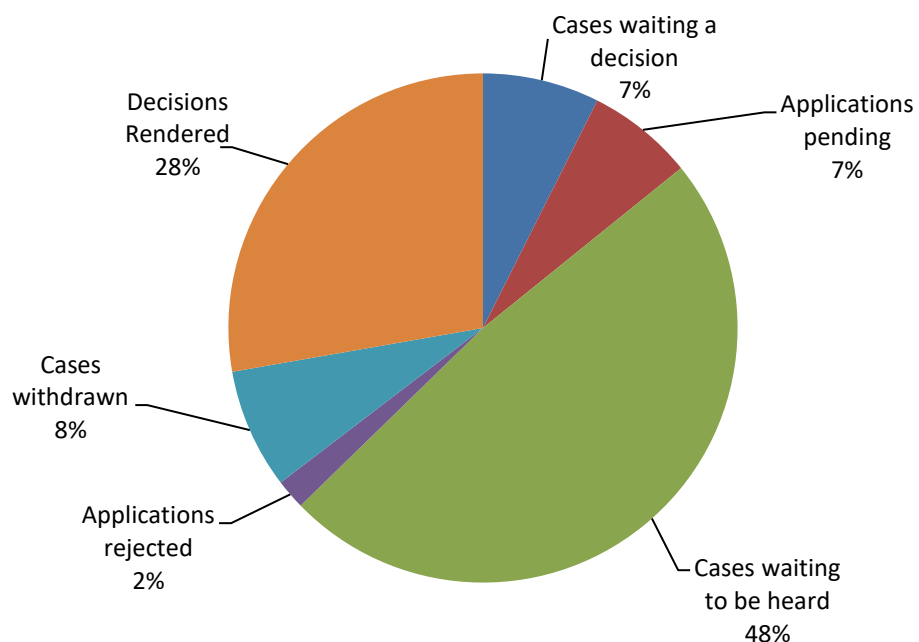
- WHSCRD's overall annual caseload (applications carried forward from previous year plus new applications) consisted of 472 cases representing an increase of two per cent from the previous fiscal year (Table 1-page 20).
- There were 208 new Requests for Review filed in 2018-19, a decrease of 28 cases from the preceding year. The majority of these cases, 68 per cent, were filed within the Avalon region (Table 2-page 21).
- Workers and their dependents filed 189 Requests for Review representing 91 per cent of the applications filed in 2018-19. Employers filed 19 Request for Review applications, or 9 per cent (Table 3-page 21).
- There were 114 hearings conducted this fiscal year. The majority of hearings (73 per cent) took place at WHSCRD's office in Mount Pearl (Table 4-page 21). This aligns with the number of decisions by region with 76 per cent of decisions distributed in the Avalon region (Table 6-page 21).
- Review Commissioners found 56 per cent of WorkplaceNL's decisions were compliant with the Act; 44 per cent of decisions were either not consistent with the Act, the Regulations and policies of WorkplaceNL and were allowed, or were referred back to WorkplaceNL for further review or investigation (Table 5-page 21).
- Workers participated in 93 per cent of the cases under review based on 131 decisions rendered (Table 7-page 22). Approximately 35 per cent of workers were self-represented, 19 per cent were represented either by their Member of the House of Assembly (MHA) or by private legal counsel and; 45 per cent were represented by their union, consultant, or other friends or family members (Table 8-page 22).
- Employers participated in 17 per cent of the cases under review based on 131 decisions rendered (Table 7-page 22). Approximately 9 per cent of employers were self-represented, and 91 per cent were represented by consultants (Table 9-page 22).
- The top three issues under review for workers were: Extended Earnings Loss benefits at 21 per cent, Health Care Services at 15 per cent, and Permanent Functional Impairment Award at 12 per cent (Table 11-page 23).

2018-19 Statistical Overview

Table 1 - Annual Caseload

Caseload Breakdown	2017-18	2018-19
Appeals Carried Forward April 1st	227	264
New Applications	236	208
Annual Caseload	463	472
Less Finalized/Closed Cases:		
Decisions Rendered	155	131
Cases Withdrawn	34	36
Applications Rejected	10	9
Caseload March 31st	264	296
March 31st Caseload Consists of:		
Active Cases:	236	264
(cases waiting to be heard)	187	229
(cases heard and awaiting a decision)	49	35
Inactive Cases: (applications pending)	28	32

Figure 1 – Per cent of Annual Caseload by Disposition



Statistical Overview continued

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

Table 2 - Requests for Review by Region

Year	Avalon		Gander		Grand Falls - Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2017-18	157	67	24	10	18	8	34	14	3	1	236
2018-19	141	68	22	11	19	9	22	11	4	2	208

Table 3 - Requests for Review by Claimant

Year	Worker		Employer		Dependent		Total
	#	%	#	%	#	%	
2017-18	199	84	31	13	6	3	236
2018-19	181	87	19	9	8	4	208

Table 4 - Hearings by Region

Year	Avalon (Mount Pearl)		Gander		Grand Falls - Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2017-18	121	70	15	9	19	11	11	6	7	4	173
2018-19	83	73	12	11	5	4	14	12	0	0	114

Table 5 - Decision Outcome

Year	Allowed		Denied		Referred Back to WorkplaceNL		Total
	#	%	#	%	#	%	
2017-18	52	33	80	52	23	15	155
2018-19	34	26	74	56	23	18	131

Table 6 - Decisions by Region

Year	Avalon		Gander		Grand Falls - Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2017-18	109	70	14	9	16	10	12	8	4	3	155
2018-19	100	76	5	4	9	7	14	11	3	2	131

Statistical Overview continued

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

Year	Total Decisions		Worker Participation		Employer Participation		WorkplaceNL Participation	
	#	%	#	%	#	%	#	%
2017-18	155		136	88	13	8	22	14
2018-19	131		122	93	22	17	25	19

Table 8 - Worker Participation by Representative Type

Year	Self		Consultant		Legal Counsel		MHA*		Union		Other		Total
	#	%	#	%	#	%	#	%	#	%	#	%	
2017-18	55	40	21	15	7	5	19	14	26	19	8	6	136
2018-19	43	35	25	20	1	1	22	18	14	11	17	14	122

* Member of the House of Assembly.

Table 9 - Employer Participation by Representative Type

Year	Self		Consultant		Legal Counsel		Total
	#	%	#	%	#	%	
2017-18	4	31	8	61	1	8	13
2018-19	2	9	20	91	0	0	22

Table 10 - Requests for Reconsideration by Client

Year	Total Requests		Worker Requests		Employer Requests		WorkplaceNL Requests	
	#	%	#	%	#	%	#	%
2017-18	11		7	64	2	18	2	18
2018-19	13		10	77	0	0	3	23

Statistical Overview continued

Table 11 – Issues Reviewed by Decision

Issues	Outcome			
	Objections	Allowed	Denied	Referred Back to WorkplaceNL
Worker/Dependent Appeals				
Aggravation of Pre-existing Condition	1	0	0	1
Canada Pension Plan	1	0	1	0
Claim Denied	15	3	8	4
Compensation Denied	2	1	0	1
Compensation Rate	2	0	2	0
Dependency Benefits	3	1	2	0
Early & Safe Return to Work	2	1	1	0
Extended Earnings Loss Benefits	30	10	10	10
Health Care Services	21	10	10	1
Industrial Hearing Loss	9	1	7	1
Interest Payments	2	0	2	0
Internal Review Denied	1	1	0	0
Overpayment	1	1	0	0
Pension Replacement Benefit	3	1	2	0
Permanent Functional Impairment	17	2	11	4
Permanent Partial Disability	1	0	1	0
Proportionment	5	1	3	1
Re-employment Obligation	1	1	0	0
Recurrence	4	2	1	1
Reinstatement of Benefits	3	0	2	1
Reopening	11	2	8	1
Retroactive Benefits	1	1	0	0
Wage Loss Benefits	5	0	4	1
Totals	141	39 (28%)	75 (53%)	27 (19%)
Employer Appeals	Objections	Allowed	Denied	Referred to WorkplaceNL
Cost Relief	6	2	2	2
Objection to a Worker's Claim	10	1	5	4
Totals	16	3 (19%)	7 (44%)	6 (38%)
OVERALL TOTAL	157	42 (27%)	82 (52%)	33 (21%)

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

Financial Statement

Expenditures included in this document are un-audited and based on public information provided in the Report on the Program Expenditures and Revenues of the Consolidated Revenue Fund for the Year Ended March 31, 2019. WHSCRD is not required to provide a separate audited financial statement.

Statement of Expenditures and Related Revenue UNAUDITED For Fiscal Year Ending March 31, 2019

	2018-19		
	Actual \$	Amended \$	Original \$
Workplace Health, Safety and Compensation Review Division			
01. Salaries	807,386	922,600	922,600
Operating Accounts:			
Employee Benefits	1,860	3,700	3,700
Transportation and Communication	21,556	42,000	42,000
Supplies	12,796	15,800	15,800
Professional Services	38,568	139,800	139,800
Purchased Services	41,679	30,900	30,900
Property, Furnishings and Equipment	9,319	3,300	3,300
	<u>\$933,164</u>	<u>\$1,158,100</u>	<u>\$1,158,100</u>
02. Revenue - Provincial	<u>(\$1,224,204)</u>	<u>(\$1,158,100)</u>	<u>(\$1,158,100)</u>
Total: Workplace Health, Safety and Compensation Review	(\$291,040)	-	-

Source: Department of Finance (unaudited)

Active Review Commissioners 2018-19

Marlene Hickey, Full-time Chief Review Commissioner

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

Shane Hickey, Review Commissioner (Appointed January 2019)

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

Suzanne Hollett, Review Commissioner (Appointed January 2019)

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

Heather Dunford, Review Commissioner (Appointed March 2019)

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

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

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

Contact Information

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