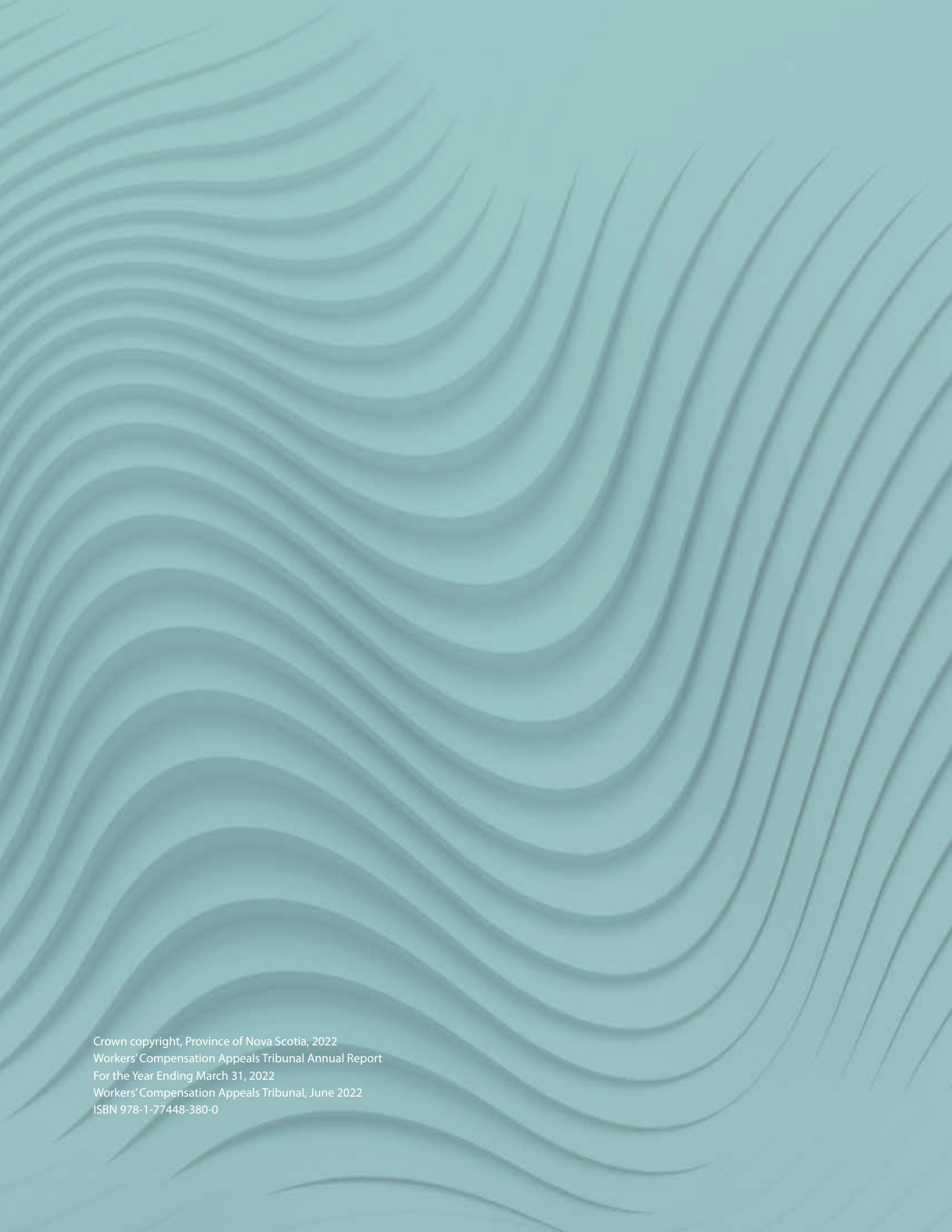


# Workers' Compensation Appeals Tribunal

ANNUAL REPORT  
FOR THE YEAR ENDING MARCH 31, 2022





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Workers' Compensation Appeals Tribunal Annual Report  
For the Year Ending March 31, 2022  
Workers' Compensation Appeals Tribunal, June 2022  
ISBN 978-1-77448-380-0



**Nova Scotia  
Workers' Compensation Appeals Tribunal**

Bradley H. Johns  
Minister of Justice

Dear Honourable Minister:

The Workers' Compensation Appeals Tribunal is pleased to present its Annual Report for the fiscal year ending March 31, 2022.

Respectfully submitted,

A handwritten signature in blue ink, consisting of a large loop followed by a series of horizontal strokes.

Sandy MacIntosh  
Chief Appeal Commissioner

# Tribunal Personnel

**Colleen Bennett**

Supervisor, Office Services

**Mary-Ann Arnold**

Clerk

**Tricia Chiasson**

Clerk/Scheduling Coordinator

**Charlene Downey**

Secretary/Receptionist

**Sandy MacIntosh**

Chief Appeal Commissioner

**Sharon Pierre Louis**

Executive Assistant to the  
Chief Appeal Commissioner

**Alison Hickey**

**Glen Johnson**

**Brent Levy**

**Andrew MacNeil**

**Diane Manara** (Registrar)

**Richard Pace-Ola**

**Valerie Paul** (Deputy Registrar)

**David Pearson**

**Brian Sharp**

**Andrea Smillie**

Appeal Commissioners

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# Executive Summary

**T**he Workers' Compensation Appeals Tribunal (the tribunal) resolves appeals from final decisions made by hearing officers of the Workers' Compensation Board of Nova Scotia (the board). We also decide whether the Workers' Compensation Act (the act) bars a right of action against employers.

We are legally, physically, and administratively separate from the board to ensure we are independent.

This report covers our fiscal year, which runs from April 1, 2021, to March 31, 2022.

Appeal volumes were lower than last year. In 2021/22, workers and employers filed 429 appeals. Appeal commissioners decided 442 appeals and a total of 564 appeals were resolved.

Our work is a team effort. Our registrar worked effectively to resolve preliminary appeal matters to keep appeals moving toward resolution. Our staff assisted workers and employers. Their work included answering inquiries, preparing correspondence, scheduling, and data management.

## Introduction

The act governs our operations and sets out the rules of compensation that govern appeal decisions. The act allows us to create our own procedures. However, we must follow the board's policies concerning compensation and assessments, provided they are consistent with the act.

We operate within the Workplace Safety and Insurance System (WSIS). The partner agencies comprising WSIS are the tribunal, the board, the Workers' Advisers Program (WAP), and the Occupational Health and Safety Division of the Department of Labour, Skills and Immigration.

## Tribunal Mandate and Performance Measures

We decide appeals and right-of-action applications. In consultation and co-operation with system partners and the community, including injured worker groups and the Office of the Employer Advisor, we continually improve our processes. At the same time, we are careful to ensure our independence is never compromised.

We strive to balance access to justice, efficiency, and fairness. Our work is informed by principles of natural justice within the context of the act. Our performance is shaped by, and measured against, several parameters drawn from the act and public expectations.

Our decisions are written. Appeal commissioners commonly release decisions within 30 days of an oral hearing or the closing of deadlines for written submissions (the act requires decisions be released within 60 days of a hearing).

We can hear an uncontested appeal within 30 days of receipt. However, we generally do not set appeals down for decision until participants are ready. Waiting for participants to be ready results in almost all appeals taking significantly longer than 30 days. The reasons why appeals take longer include the following:



- there is more than one participant involved
- representatives' workloads
- the time it takes for the WAP to decide whether to represent a worker
- the failure of participants to request medical evidence or disclosure in a timely manner
- the time it takes for doctors to respond to requests for reports

## The Tribunal's Year in Review

### Operations Overview

Our appeal volume decreased last year, and decision output increased slightly. The decrease in appeals received at the tribunal is largely due to the board's internal appeals taking longer to decide appeals.

We continue to work with participants to resolve appeals more quickly. Most of the unscheduled appeals are awaiting additional medical evidence that has been requested by the WAP and, on occasion, by employers.

The time to resolve appeals improved this year. Appeal participants are setting down appeals more quickly.

Historically, we waited until participants were ready to proceed before setting down appeals. Due to aging appeals, we modified this approach. Starting around the end of 2020, we stopped applying the readiness model to some of the oldest appeals and set submission deadlines without consulting the participants. We also streamlined the process for appeals involving new evidence.

The most common appeal issues are claim acceptance and entitlement to new or additional temporary benefits. Most appeals proceed by way of oral hearing. Almost all oral hearings were conducted by phone or video due to the pandemic.

Almost half of appeals were allowed, at least in part. This is consistent with last year. The move to fewer in-person hearings has not resulted in fewer appeals being allowed.

Seventeen of our decisions were appealed to the Court of Appeal. By consent, three of our appealed decisions were sent back to the board for re-adjudication.

Appeal commissioners continue to produce well-reasoned decisions in the face of increasing issue complexity and volume of evidence.

## Appeal Management

Our registrar, Diane Manara, actively manages appeals from the time they are filed until they are ready to be scheduled.

The registrar, or someone acting on her behalf, calls unrepresented participants and provides information about the appeal process. She regularly conducts conference calls when there is more than one participant to an appeal to assist in getting appeals ready to be heard. We encourage participants to deal with disclosure issues early in an appeal to avoid delays. Some complex appeals are assigned to individual appeal commissioners for case management.

Valerie Paul, our deputy registrar, assists the registrar and takes the lead role in privacy matters at the tribunal. This includes vetting of files for employers so they can respond to worker appeals.

We work closely with the WAP to track appeals and avoid delays. The WAP's process for new medical evidence continues to result in a significant number of appeals being resolved without a hearing. This process allows board case managers to review significant new evidence generated as part of an appeal to determine whether it changes their original decision.



## Interagency Co-operation

The chief appeal commissioner is a member of the Heads of Agencies Committee, which, together with the Department of Labour, Skills and Immigration's coordinating committee, oversees implementation of the WSIS strategic plan.

The Issues Resolution Working Group (IRWG) is comprised of the chief appeal commissioner, the tribunal's registrar, the chief workers' adviser, the WAP's registrar, and four senior board representatives.

IRWG was formed to discuss issues arising from the adjudication of claims and appeals. The committee allows open communication and information sharing among agency partners. The committee's mandate is to develop and implement issue resolution initiatives to improve the overall efficiency of the workers' compensation system.

IRWG holds meetings every two months. During these meetings, appeal statistics from each agency are shared and methods to improve the appeal system are discussed. IRWG sometimes meets with key stakeholders in the appeal system, such as the Office of the Employer Advisor and injured worker groups.

## Financial Operations

Our total expenditures were within 73 per cent of the original authority and 91 per cent of the final forecast. Net expenditures totalled \$1,932,078, a slight decrease from the previous year.



Sandy MacIntosh  
Chief Appeal Commissioner

# Introduction

**T**he Workers' Compensation Appeals Tribunal (the tribunal) hears appeals from final decisions of Workers' Compensation Board of Nova Scotia (the board) hearing officers. We also determine whether the Workers' Compensation Act (the act) bars a right of action against employers. We are legally and administratively separate from the board, which ensures an independent and impartial review of board decisions.

Appeal commissioners decide appeals according to the act, regulations, and board policies. We take the following into consideration:

- the board claim file
- the decision under appeal
- additional evidence the participants may present
- submissions of the participants
- any other evidence we may request or obtain

All decisions are based on the real merits and justice of the case.

Once an appeal is assigned to an appeal commissioner, the chief appeal commissioner cannot intervene to influence the commissioner's judgment. In our adjudicative role, we are guided by the principles of independence, fairness, and consistency.

We are part of the Workplace Safety and Insurance System (WSIS). The larger system includes the board, the Workers' Advisers Program (WAP), and the Occupational Health and Safety Division of the Department of Labour, Skills and Immigration.



# Relationship to the Board

**W**e are independent from the board. However, we interact with the board in five ways: funder, appeal participant, policy maker, IT sharer, and system partner.

## 1. Board as funder

We are funded by the board-managed Accident Fund. Expenses are first paid by the province, then the province is reimbursed from the Accident Fund. The board has no financial influence over us. We are accountable to the legislature for budgetary matters through our reporting to the minister of justice.

## 2. Board as appeal participant

Workers, employers, and the board regularly participate in appeals. On occasion, the attorney general of Nova Scotia and any other interested parties may participate.

The board has the same rights and obligations as other participants. As a participant in every proceeding, the board's legal department is aware of the status of every appeal before us. In most cases, the board does not actively participate in appeals. Instead, the board maintains a watching brief.

## 3. Board as policy maker

The board's board of directors adopts policies that decision makers, including appeal commissioners,

must follow. However, we are not bound by board policy if we find a policy inconsistent with the act or the regulations.

The chair of the board may adjourn or postpone an appeal before us for policy development reasons. This can only occur where the appeal raises an issue of law and general policy. We can ask the chair whether an appeal raises an issue that should be reviewed for policy development reasons.

## 4. Board as IT sharer

The board gives us access to Guidewire, its claim management system. This gives us access to worker claim files and employer assessment information.

## 5. Board as system partner

We are a partner in WSIS and participate in joint committees, such as the Heads of Agencies Committee and the Issues Resolution Working Group (IRWG).

The Heads of Agencies/Coordinating Committee's mandate is to oversee the implementation of a strategic plan for the WSIS. The mandate recognizes that co-operation and communication between agencies is crucial for the implementation of the strategic plan.

We are careful to ensure that co-operation with partner agencies does not compromise, and must not be perceived to compromise, our independence.



# Tribunal Mandate and Performance Measures

**W**e strike a balance between efficiency and fairness in the management and adjudication of appeals. Our work is directed by statute and principles of natural justice.

Our performance is measured against several parameters drawn from the act and the expectations of participants.

Our decisions are written. The act requires decisions be released within 60 days of a hearing, or, if the appeal proceeded by written submissions, the date on which all submissions have been received. Appeal commissioners often release decisions within 30 days of an oral hearing or the closing of deadlines for written submissions.

New appeals are usually processed and acknowledged within four days of receipt. Optimally, we can hear an appeal within 30 days of receiving notice the participants are ready to proceed.

Most appeals take much longer to schedule. The biggest factor is participants seeking additional medical evidence, often from specialists. Representatives often limit how many hearings they wish to do in a month. Contested hearings often take longer to schedule. Disputes between participants concerning disclosure can slow the setting down of appeals for hearing.

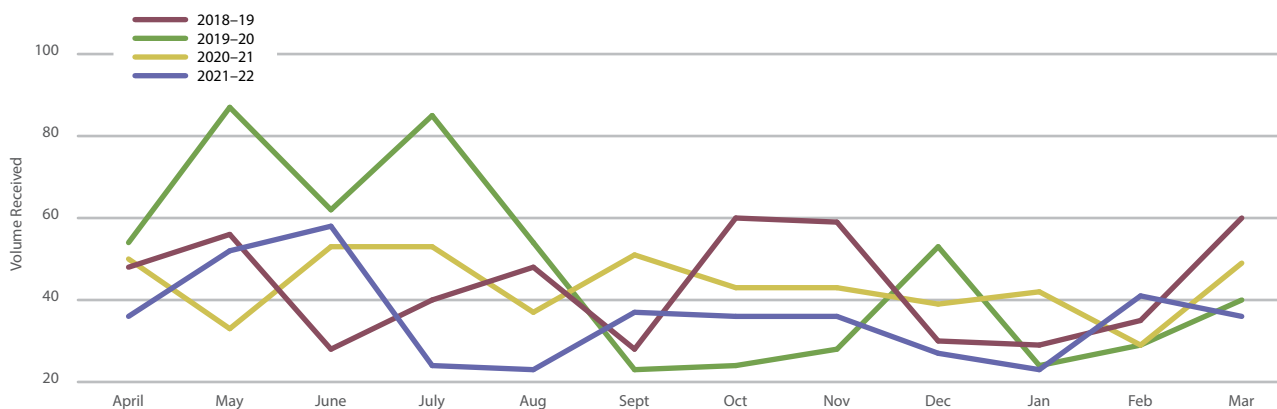




# Operations

Our appeal volume decreased from last year. We received 429 appeals in 2021/22, compared to 522 in the previous year (see Figure 1). A significant factor in this was the boards' internal appeals taking increased time to decide appeals. The inventory of appeals at internal appeals has increased.

**FIGURE 1**  
**Appeals Received**



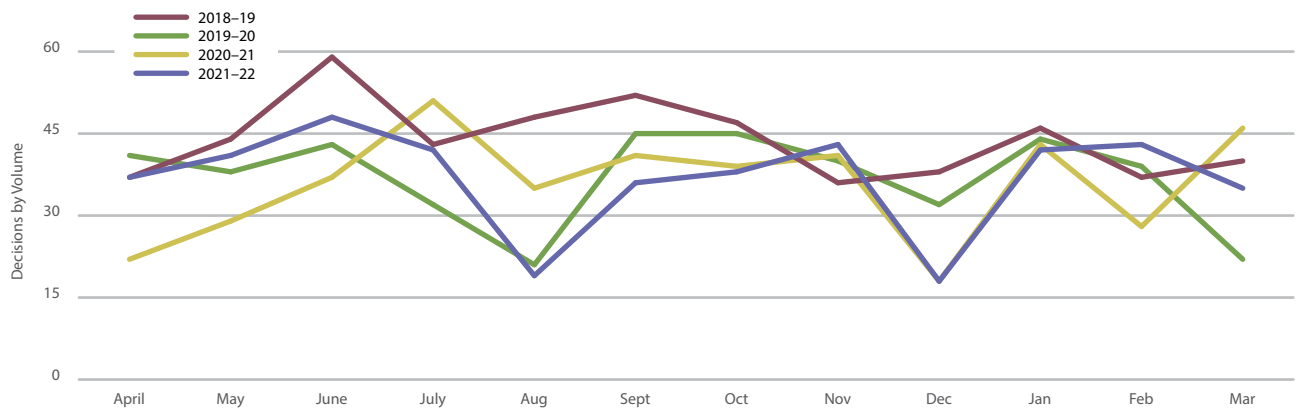
Please see Appendix (pages 25–27) containing specific data for the following figures.

Appeals were predominantly filed by workers (94 per cent). We resolved a total of 564 appeals this fiscal year, compared with 571 the previous year.

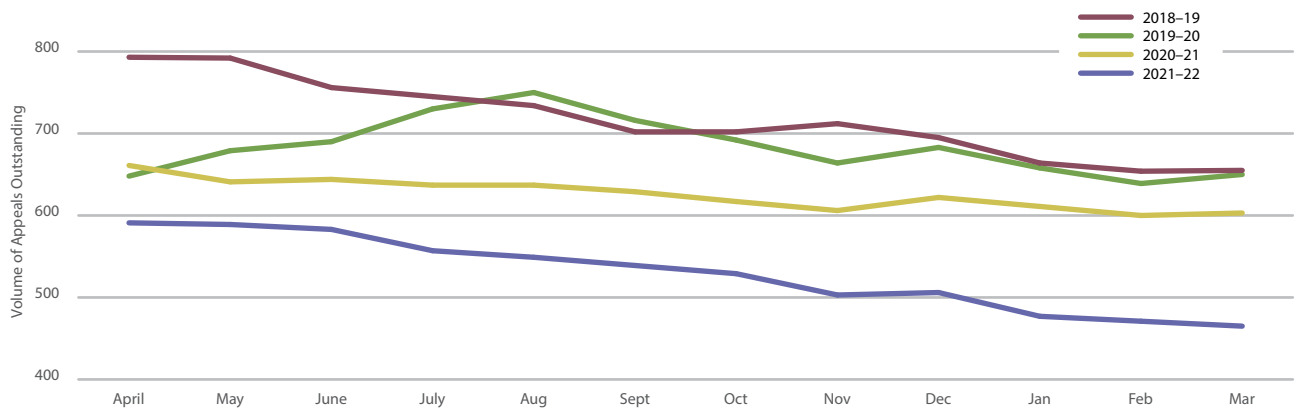
Our decision output increased this year from 430 to 442 (see Figure 2). The increase resulted from participants setting down more appeals. At year-end, 465 appeals remained to be resolved, compared to 603 last year (see Figure 3).

There are 42 appeals that have been with us for over two years, which is a decrease of 19 compared to the end of the last fiscal year. Of those, 38 are represented by the WAP and 24 of those involve an employer. The tribunal continues to have fewer older appeals at year end.

**FIGURE 2**  
Decisions Rendered



**FIGURE 3**  
Appeals Outstanding at Year End

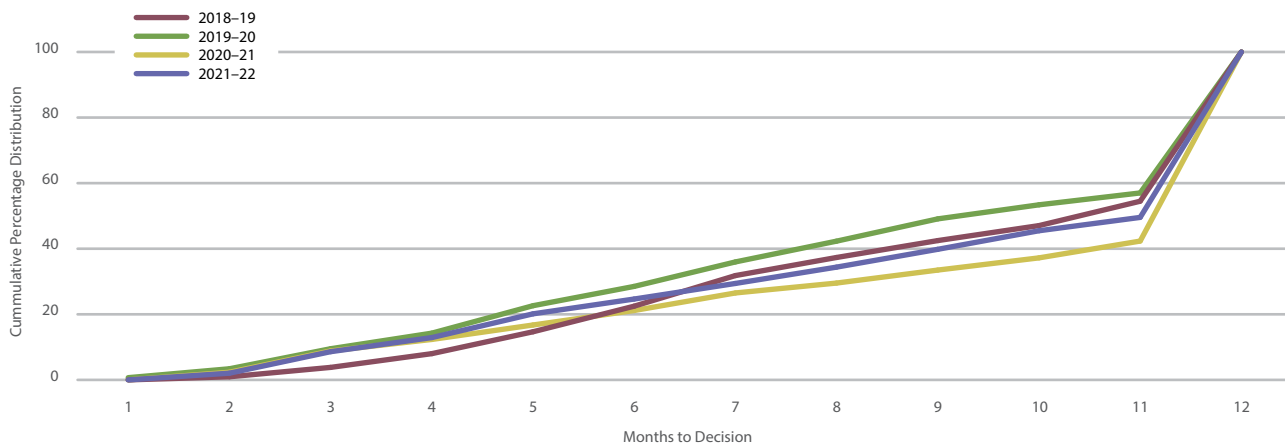


The oldest appeals at the tribunal are ones that raise a challenge under the Canadian Charter of Rights and Freedoms to the exclusion of gradual onset stress from being an acceptable claim. The deputy minister of Labour, Skills and Immigration announced at the last WSIS annual meeting that the stress exclusion is under review for statutory reform. There are 23 appeals on hold at the tribunal in anticipation of legislative reform.

We must balance between resolving appeals quickly and ensuring maximum fairness. A significant portion of the appeals are awaiting additional medical evidence that has been requested by the WAP and, on occasion, by employers.

Approximately 25 per cent of decisions were released within six months of the date the appeal was received. Approximately 40 per cent of decisions were released within nine months of the date the appeal was received. About 50 per cent of appeals took more than eleven months to resolve (see Figure 4). Appeals are being resolved at the tribunal more quickly than last year.

**FIGURE 4**  
Timeliness to Decision



The report on decisions by type of representation is based on the representative at the time decisions are released (see Figure 5). Of the 442 decisions issued this past year, 71 per cent of workers were represented by the WAP, which is consistent with the previous year when it was 72 per cent.

Employers participated in 30 per cent of resolved appeals, an increase from last year. Some unrepresented employers had assistance from the Office of the Employer Advisor to prepare for an appeal.

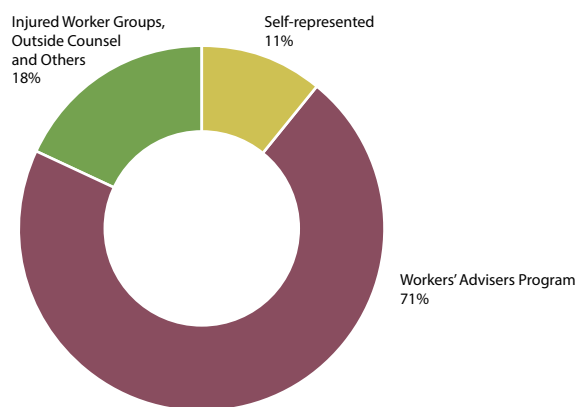
During 2021/22, the issues most appealed to us by workers were recognition of a claim (27 per cent) and new/additional temporary benefits (20 per cent). Employers most often appealed acceptance of claim decisions or the extent of benefits (see Figures 6 and 7).

We heard approximately 60 per cent of appeals by way of oral hearing, a decrease from last year's total of approximately 63 per cent (see Figure 8). Almost all oral hearings were conducted by telephone or video hearing due to the pandemic.

Slightly more hearing officer decisions were overturned and there was a slight decrease in the number of referrals back to hearing officers for additional adjudication. The overturn rate (appeals allowed or allowed in part) increased to 49 per cent compared to 48 per cent the previous year (see Figure 9).

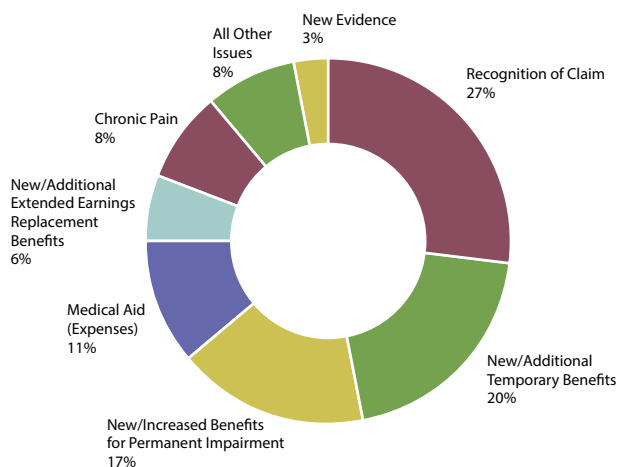
The number of appeals returned to hearing officers for reconsideration decreased to 15.2 per cent from 15.4 per cent. A need for additional investigations is the most common reason for appeals being returned to hearing officers. The percentage of appeals denied decreased to 35 per cent from 36 per cent the previous year.

FIGURE 5  
Decisions by Representation





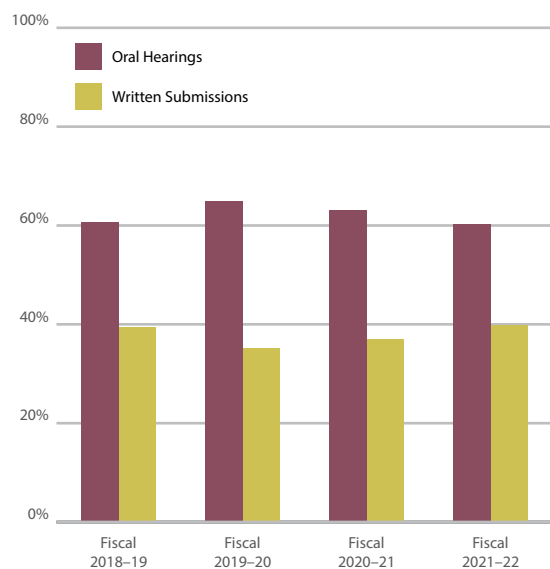
**FIGURE 6**  
Decisions by Issue Categories – Worker



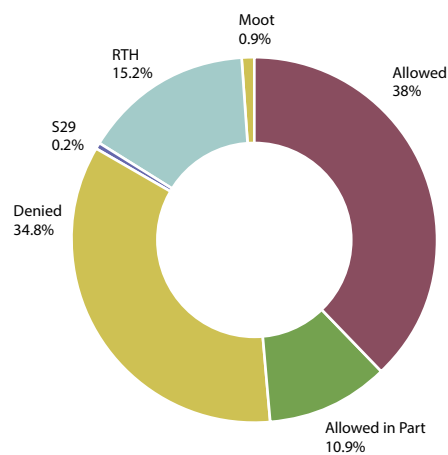
**FIGURE 7**  
Decisions by Issue Categories – Employer



**FIGURE 8**  
Decisions by Mode of Hearing



**FIGURE 9**  
Decisions by Outcome

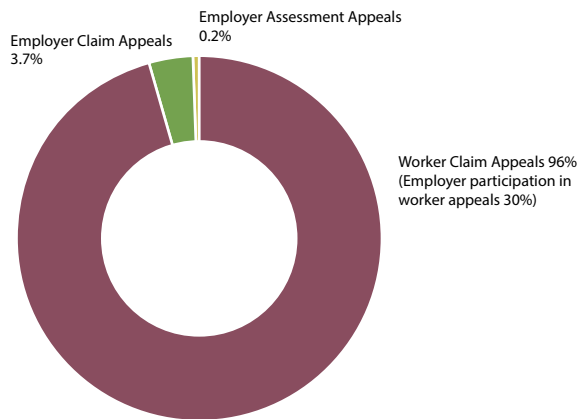


Ninety-six per cent of decisions resulted from worker appeals (see Figure 10). We resolved 122 appeals without the need for a hearing, a decrease from last year's total of 141. The resolution of appeals without a hearing is achieved primarily by the registrar, prior to the assignment of an appeal to an appeal commissioner.

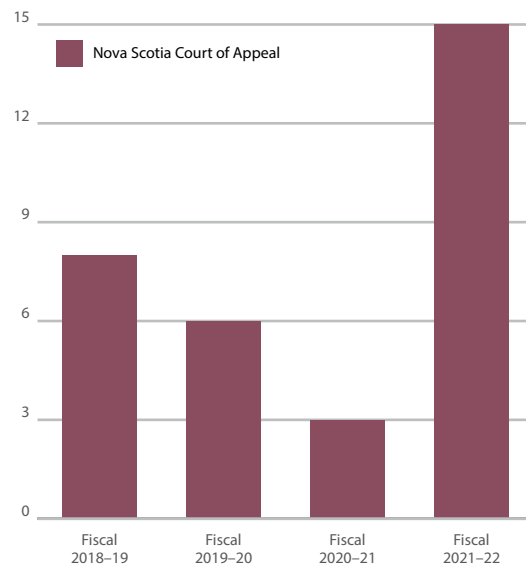
There were 17 appeals to the Court of Appeal during 2021/22. The percentage of decisions appealed was 3.8 per cent, an increase from the previous year. At year-end, 15 appeals remained at the Court of Appeal (see Figure 11).

Appeal commissioners continue to produce well-reasoned decisions in the face of complex issues and a high volume of evidence.

**FIGURE 10**  
Decisions by Appellant Type



**FIGURE 11**  
Appeals before the Courts at Year End



# Appeal Management

**D**iane Manara, our registrar, and Valerie Paul, our deputy registrar, actively schedule and manage appeals as they are filed.

We are committed to moving appeals through to resolution as efficiently as possible having regard to the rules of natural justice and procedural fairness. The collaborative practices put in place with our system partners are a useful tool in achieving the balance necessary for effective, fair, and timely adjudication of appeals.

Our registrar did a great job helping many participants familiarize themselves with using video to take part in hearings this year.

Communication with appeal participants by telephone is a significant aspect of the registrar's duties. Unrepresented participants are called and given information about the appeal process. We regularly hold conference calls when there is more than one participant to an appeal. This keeps participants informed on the appeal status, ensures compliance with our deadlines, and streamlines issues.

Early identification and resolution of disclosure issues is encouraged. We can refuse late disclosure requests. Some of the more complex files are assigned to individual appeal commissioners who take the necessary steps to move appeals toward a decision.

While the tribunal advises participants that it expects appeals to be completed within a year, the tribunal operated on a readiness model for many years. This meant appeals were generally not set down until participants indicated they were ready. Unfortunately, the duration of appeals tended to increase year after year as a result of the readiness

model. This was no longer sustainable as justice delayed is justice denied.

In early 2020, the tribunal began making changes. We continue with the readiness model for the first year of an appeal. After that time, the tribunal will be less likely to grant oral hearings and older appeals may be set down even if the participants wish more time. We also streamlined the process for appeals involving new evidence. These changes have resulted in two years of more timely appeal resolution for workers and employers.



# Interagency Co-operation

The chief appeal commissioner is a member of the Heads of Agencies Committee, which oversees implementation of the WSIS's strategic plan. It meets a few times a year with the Department of Labour, Skills and Immigration's coordinating committee to consider the overall direction of the compensation and safety system.

The tribunal is taking part in a review of the workers' compensation appeals system. The review is looking at all aspects of the appeals system (internal and external to the board). A consultant was hired to conduct this review. It is expected that the consultant will report to the tribunal and coordinating committee in 2022.

IRWG is comprised of the chief appeal commissioner, the tribunal's registrar, the chief workers' adviser, the WAP's registrar, and senior board representatives.

IRWG was formed to discuss issues arising from the adjudication of claims and appeals. The committee's mandate is to develop and implement issue resolution initiatives to improve the overall efficiency of the workers' compensation system. IRWG holds meetings every two months at which appeal statistics from each agency are shared and methods to improve the appeal system are discussed. The committee provides an open, frank exchange of ideas and information.

The Appeal Issues Resolution Group's focus is operational. Its membership includes appeal commissioners, hearing officers, and board managers.

We belong to a national association of workers' compensation appeals tribunals. This association allows for the exchange of best practices and new initiatives from across the country.





# Freedom of Information and Protection of Privacy

We rarely receive Freedom of Information and Protection of Privacy (FOIPOP) applications. There were no applications in 2021/22.

Applications regarding claim files are referred to the board as they remain the property of, and are held by, the board. No FOIPOP application needs to be made by an appeal participant because the act provides for disclosure of claim files to workers, and employers are entitled to relevant documents to respond to an appeal.

Most FOIPOP applications for generic information about us are addressed through our Routine Access Policy, which is posted on our website.

Our decisions contain personal (including medical) and business information. Our decisions are provided to appeal participants, including the worker, the board, and the employer.

Decisions from January 2010 to date are published on the Canadian Legal Information Institute's (CanLII) free public website ([canlii.org](https://canlii.org)).

All personal identifiers are removed from published versions of decisions. This includes removing all names of participants and board claim numbers. A small number of decisions are not published because they contain extremely sensitive information.

We have adopted a decision quality guide that outlines standards for decision making. It includes a section concerning privacy issues, which states that "decisions should be written in a manner that minimizes the release of personal information." However, as decisions must be transparent, they need to include a description of the relevant evidence supporting the findings in the decision.

Worker claim files are released to employers after we have vetted them for relevancy. We are concerned that personal information is not used for an improper purpose, improperly released, or made public by a third party. Our correspondence accompanying file copies reflects these requirements and refers to appropriate sanctions.



# Internal Developments

**R**ichard Pace-Ola joined us as an appeal commissioner in 2021. Richard worked in dispute resolution before joining the tribunal. He has a strong academic background including a master's degree in constitutional law.

Brian Sharp, a long-time appeal commissioner, retired in 2022.



# Noteworthy Decisions

Readers of this report may find the following decisions interesting (organized by topic).

## Assessment

*Decision 2020-466-AD (July 30, 2021, NSWCAT)* considered whether a firm's experience rating should be affected by claim costs for claims that happened before June of 2019. The firm's position was that it should not be responsible for claim costs for workers who were no longer its employees after June of 2019 because part of the firm, a non-profit agency, was taken over by a different agency.

The appeal commissioner considered factors such as ownership, management, and control in determining that there was not a real and substantial connection between the two agencies. The appeal commissioner accepted and followed the board's assessment guidelines and found that the firm was responsible for claim costs incurred while it was the employer but that it was not responsible for the ongoing management of these claims.

## Claim Recognition

*Decision 2020-477-AD (May 24, 2021, NSWCAT)* considered whether a worker had suffered a compensable back injury. The worker had slipped in a washroom while performing a religious cleansing ceremony.

While the injury happened at work during the worker's shift, the appeal commissioner concluded that the presumption in ss. 10(4) of the act was rebutted. The appeal commissioner concluded that the worker's decision to enter the washroom and perform the cleansing ritual was not incidental to his employment. The appeal commissioner rejected the assertion that the employer's awareness of the practice constituted an accommodation.

The appeal commissioner found that the decision to enter the washroom was not a job requirement nor performed at the instruction of, or for the benefit of, the employer. The appeal commissioner concluded that the cleansing ritual was a substantial deviation from the employment duties and the appeal was denied.

*Decision 2020-203-AD (August 16, 2021, NSWCAT)* considered an employer's appeal of the board's decision to recognize an injury. The worker exited a jobsite through an emergency exit and fell on ice. The employer's position was that it was well-known that the emergency exit was not to be used and that this was serious and willful misconduct.

The appeal commissioner found that there was a causal connection between employment and the injury and that the use of the emergency exit did not rise to the level of serious and willful misconduct supporting a denial of benefits. The appeal was denied.

*Decision 2020-152-AD (August 27, 2021, NSWCAT)* considered whether a worker developed a compensable eye injury. The worker was engaged in prolonged lifting/straining, following which he developed vision problems diagnosed as posterior vitreous detachment.

There was evidence before the appeal commissioner that heavy lifting can cause pressure in the eye. The treating optometrist opined that although trauma is not the root cause of the condition, it induces detachment. The appeal commissioner accepted the optometrist's opinion and found that the eye condition was compensable.

*Decision 2019-430-AD (August 30, 2021, NSWCAT)* considered whether a fall at home was compensable. The worker had several compensable shoulder injuries and surgery but never made a full recovery. Several years later, the worker fell at home and sought acceptance that the resulting injuries to the same shoulder were partially compensable.

Medical evidence from the treating orthopaedic surgeon indicated that repeat tearing of the tendon was more likely following the compensable injury and surgery. The appeal commissioner accepted that the worker's injuries were more severe because of the compensable injuries and concluded that she should be compensated for the incremental damage attributable to the compensable shoulder problems.

*Decision 2021-149-AD (March 30, 2022, NSWCAT)* considered whether a worker's COVID-19 infection was a compensable injury. The board accepted that there was a compensable injury and the employer appealed.

The worker contracted COVID-19 in April 2020, the early stages of the pandemic, and before widespread mask wearing. The worker was employed as a nurse in the emergency room of a health facility. There was no known exposure to COVID-19 at work, but, at that point, the worker's only non-work activity was a weekly trip to the grocery store.

The appeal commissioner considered the relative risks of exposure and accepted that there was an elevated risk of exposure at work and relatively lower community risk. The appeal commissioner accepted that there was sufficient evidence to infer that the COVID-19 exposure happened at work and denied the appeal.

## Earnings-replacement Benefits

*Decision 2018-343-AD (August 16, 2021, NSWCAT)* considered whether deemed employment as a retail sales clerk was suitable and reasonably available. In upholding the decision, the appeal commissioner considered the impact of the pandemic on the ability to secure employment. The appeal commissioner concluded that COVID-19 had only a temporary and fluid impact on the availability of employment.

*Decision 2021-100-AD (October 25, 2021, NSWCAT)* considered whether a worker's temporary earnings-replacement benefits should be recalculated to account for retroactive wage increases, which were backdated to before the injury because of a new collective agreement. The board paid benefits based on the new wage rate going forward but not retroactively.

The board argued that retroactive wage increases are a legal fiction because the new, higher wage rate did not exist until the new collective agreement was signed. The board also raised concerns about resources if it had to recalculate wages for unionized workers when new collective agreements were negotiated.

The appeal commissioner rejected these arguments and found that once the new collective agreement was signed, the information previously relied on was no longer accurate. The appeal commissioner concluded that the real merits and justice of the appeal required recalculating the worker's temporary earnings-replacement benefits.

## Hearing Loss

*Decision 2020-268-AD (May 14, 2021, NSWCAT)* considered whether a worker had an acceptable claim. The worker had profound hearing loss in his right ear, which was not work-related, and a degree of hearing loss in his left ear due to occupational noise. The board determined impairment considering only the left ear and concluded there was insufficient hearing loss to amount to a permanent impairment.

The appeal commissioner concluded that this approach unreasonably discounted the worker's total hearing loss and found that the left-sided loss was more significant given his right-sided hearing loss. The appeal commissioner found that the worker had a 6 per cent permanent impairment rating and that the left-sided hearing loss significantly contributed to the worker's total impairment.

There were conflicting decisions as to whether a worker needs to have an accepted claim for hearing loss to have tinnitus accepted. *Decision 2019-143-AD (May 26, 2021, NSWCAT)* found this was unnecessary and the general entitlement policy, policy 1.3.7R, was applied.

The appeal commissioner accepted opinion evidence from a consulting audiologist that occupational noise can cause tinnitus in the absence of appreciable hearing loss. The appeal commissioner concluded that the worker had an acceptable claim for tinnitus under the general entitlement policy due, at least in part, to occupational noise exposure.

*Decision 2021-47-AD (October 12, 2021, NSWCAT)* also considered whether a worker had an acceptable claim for tinnitus due to occupational noise. The appeal commissioner concluded that the general entitlement policy does not apply to gradual onset tinnitus claims and expressly disagreed with the May 26, 2021, decision.

The appeal commissioner found that policy 1.2.5AR2 governs tinnitus claims related to noise exposure and that a valid claim for occupational noise-induced hearing loss must exist to support a tinnitus claim. This decision has been appealed to the Court of Appeal. The tribunal anticipates that the court will provide guidance concerning the adjudication of tinnitus claims.

## Jurisdiction

*Decision 2021-64-AD (October 25, 2021, NSWCAT)* considered the tribunal's jurisdiction to deal with a worker's representative's request that a hearing officer be directed to decide whether a case manager's delay in deciding breached the principles of natural justice, whether the case manager had fraudulently misrepresented the worker's pre-injury duties, and whether the physiotherapy consultant had fraudulently misrepresented the worker's abilities.

The appeal commissioner noted that there was no compensation being sought by the worker. The appeal commissioner found that the worker had raised a series of complaints about case management and that the appeal system was not the appropriate place for such complaints. The tribunal does not determine matters of board discipline or oversee performance management of board employees.

## Medical Aid

*Decision 2020-141-AD (April 29, 2021, NSWCAT)* considered a worker's request for medical cannabis, which was used to treat chronic back pain. The appeal commissioner considered the application of the board's medical cannabis guidelines (the guidelines).



The appeal commissioner acknowledged that before the adoption of the guidelines, some tribunal decisions accepted that medical cannabis was consistent with the standards of health-care practices in Canada for non-cancerous pain. The appeal commissioner accepted that the guidelines appropriately list the conditions required to qualify for medical cannabis.

The only condition applicable to the worker was whether he had refractory neuropathic pain. The appeal commissioner preferred the opinion of several specialists over that of the family physician and concluded that the worker did not have refractory neuropathic pain. The worker consequently did not meet the guidelines and medical cannabis was not considered appropriate for his injury or consistent with the standards of health-care practices in Canada.

*Decision 2020-414-AD (June 24, 2021, NSWCAT)* considered a worker's entitlement to a brand name medication for gastroesophageal reflux disease. The board's policy is to provide a generic medication unless it can be medically demonstrated that a brand name product is required. The request was denied because the board sought objective evidence of a true allergic reaction.

The worker testified that his side effects to the generic medication included diarrhea, hives, and vomiting. The appeal commissioner accepted the worker's testimony and found that he credibly described an adverse reaction, if not a true allergy. The appeal commissioner found that the requirement to medically demonstrate the need for a brand name medication does not necessarily mean objective testing. The worker was awarded the brand name medication.

*Decision 2020-149-AD (August 30, 2021, NSWCAT)* considered a worker's entitlement to have an exit door and ramp installed in his primary bedroom as a fire safety measure. The worker was a quadriplegic because of a compensable injury. The appeal commissioner accepted that the worker would not be able to get out a bedroom window in an emergency and awarded the medical aid requested.

*Decision 2019-483-AD (September 28, 2021, NSWCAT)* considered a request for medical cannabis. It was unclear whether the worker had neuropathic pain. The worker's counsel argued that focusing on the presence of neuropathic pain was beside the point and detracted from determining whether cannabis was necessary and expedient for the worker's pain.

The appeal commissioner rejected this argument. The appeal commissioner directed that an opinion be obtained from a pain management specialist as to whether the worker had neuropathic pain and whether a trial of a non-synthetic cannabinoid was warranted.

*Decision 2019-551-AD (December 20, 2021, NSWCAT)* considered a worker's request that she be provided an increased daily dose of cannabis. The worker's counsel argued that the worker was entitled to a higher dosage than contemplated in the guidelines because she was making oil from the dried cannabis. The appeal commissioner followed the dosage limits set out in the guidelines of three grams per day, and concluded that the higher dosage sought was not consistent with the standards of health-care practices in Canada.

*Decision 2021-41-AD & 2021-66-AD (February 24, 2022, NSWCAT)* considered, in part, the worker's entitlement to medical cannabis. At issue was whether the worker had refractory neuropathic pain and the failure to try synthetic cannabinoids.

The worker was treated by an anesthesiologist whose practice was focused on pain management. The appeal commissioner accepted that his reports, and medical-legal report, adequately diagnosed the worker with refractory neuropathic pain.

The worker had not tried synthetic cannabinoids. The anesthesiologist opined that he did not recommend a trial of synthetic cannabinoids because in his experience they did not successfully treat neuropathic pain. The appeal commissioner noted that the requirement in the guidelines for a trial of a synthetic cannabinoid should not be dismissed but that the anesthesiologist provided an adequate explanation why synthetic cannabinoids were not tried. The worker was awarded medical cannabis.

## New Evidence

*Decision 2021-440-AD (March 31, 2022, NSWCAT)* dealt with a worker's request to have his claim for occupational noise-induced hearing loss reconsidered. The worker's claim was adjudicated and denied but the Court of Appeal subsequently overturned a portion of the policy which led to the denial of the worker's claim.

The worker's counsel argued that new evidence meeting the new evidence criteria is not required to merit reconsideration. The board participated in the appeal and took a contrary position. The appeal commissioner rejected the worker's argument and found that the only way to have a decision reconsidered under s. 185 is to submit new evidence satisfying the applicable criteria.

The appeal commissioner also considered the argument that the Court of Appeal's decision was itself new evidence. The appeal commissioner distinguished between changes in the law and changes in facts and found that a change in the law did not support reconsideration. The appeal commissioner also considered policy 10.3.2R, which addresses the retroactivity of policy changes, and found that it did not support that a final decision, issued before the effective date of an updated policy, was entitled to reconsideration under the new policy.

## Permanent Impairment Benefit

*Decision 2021-183-AD (January 28, 2022, NSWCAT)* considered whether a permanent impairment benefit was payable where the claim was only accepted after the worker's death.


The appeal commissioner applied principles of statutory interpretation to weigh competing arguments concerning the appropriate interpretation and application of s. 34 of the act, particularly ss. 34(6). The appeal commissioner disagreed with, and did not follow, a prior tribunal decision.

The appeal commissioner concluded that the ordinary and grammatical meaning of ss. 34(6) was clear and unambiguous and meant that s. 34, concerning the payment of a permanent impairment benefit, was not applicable if the permanent impairment benefit was not determined before the worker's death. The appeal commissioner concluded that no permanent impairment benefit was payable and denied the claim.

## Permanent Impairment Ratings

*Decision 2021-58-AD (April 30, 2021, NSWCAT)* considered a worker's entitlement to an earlier effective date for his permanent impairment rating for post-traumatic stress disorder (PTSD). A hearing officer awarded an effective date of November 2017, but the worker wanted the impairment rating backdated to 1992. In 1992, the worker was involved in recovery efforts following a workplace explosion that resulted in fatalities.

The worker contended that his challenges with alcohol, anxiety, depression, and relationship problems were indicative of trauma associated with the inciting event. The appeal commissioner acknowledged that there was medical evidence documenting such problems but concluded that none of the medical or psychiatric treatment providers connected these problems to the 1992 trauma.



The appeal commissioner concluded that there was insufficient evidence of a causal relationship between the worker's other conditions and PTSD or to use such conditions to support an earlier permanent impairment rating. The hearing officer set the effective date at the end of the employment which appeared to be the triggering event. The appeal commissioner concluded that safety concerns at such employment were the triggering event and backdated the impairment rating to the beginning of the employment.

### Procedural Matters

*Decision 2020-57-AD & 2020-451-AD (October 25, 2021, NSWCAT)* dealt with an appeal where written argument was filed after the hearing. The employer's counsel's argument introduced new email evidence. The appeal commissioner found that this breached the tribunal's procedures and was unfair to the worker and his counsel because he could not be examined on this evidence. The appeal commissioner disregarded this evidence and the argument based on it.

### Re-employment

*Decision 2020-293-AD & 2020-433-AD (March 23, 2022, NSWCAT)* considered whether an employer breached its obligations to re-employ an injured worker, and if so, whether the board had appropriately determined the fines applied. The board's position was that the worker could be accommodated at the pre-injury place of employment without undue hardship while the employer's position was that it was being asked to manufacture work to the point of undue hardship.

The appeal commissioner concluded that there was no legislative or policy requirement limiting re-employment to the pre-injury location. The appeal commissioner accepted that there was considerable operational impracticality in attempting to provide meaningful work in the pre-injury store and that it was reasonable to consider employment in the employer's other nearby location.

The appeal commissioner accepted that the proposed work in the alternate store most meaningfully reflected the worker's pre-injury employment and that it did not involve either an unreasonable distance or travel time from the worker's home. The appeal commissioner concluded that the employer had not breached its re-employment obligations and that no fines were warranted.



# Appeals from Tribunal Decisions

**W**e are the final decision maker in the workers' compensation system. The act permits appeals from our decisions to the Nova Scotia Court of Appeal.

The Court of Appeal can only allow an appeal of one of our decisions if it finds an error in law or an error of jurisdiction. The court does not re-determine facts or investigate a claim.

A participant who disagrees with one of our decisions can ask the Court of Appeal to hear an appeal of the decision. An appeal must be filed with the court within 30 days of the decision. Under special circumstances, the court can extend the time to file an appeal.

## **An appeal has two steps:**

First, the person bringing the appeal must seek the court's permission to hear the appeal. This is called seeking leave to appeal. Where it is clear to the court the appeal cannot succeed, it denies leave without giving reasons and no appeal takes place.

Second, if leave is granted, there is an appeal hearing and the court will allow or deny the appeal.

During 2021/22, 17 appeals were filed with the Court of Appeal:

- all were filed by workers

During 2021/22, five appeals were resolved as follows:

- leave to appeal was denied twice
- three appeals sent back to the board for re-adjudication by consent

At the beginning of 2021/22, there were three appeals before the Court of Appeal. At the end of 2021/22, 15 appeals remained.

## **Decisions of the Court of Appeal**

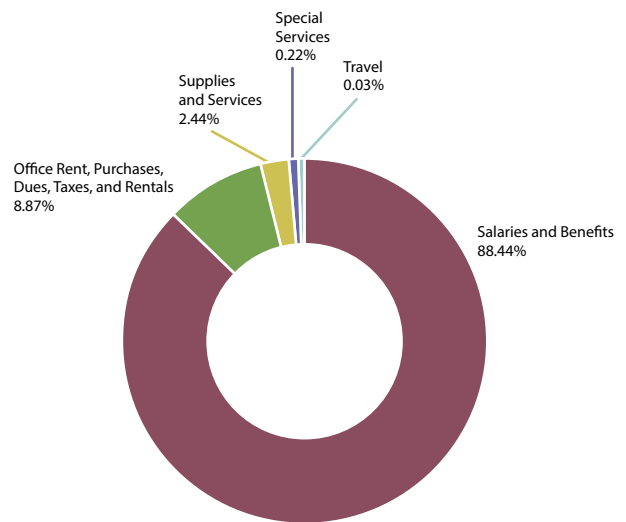
There were no court decisions discussing the merits of the appeal as all appeals were resolved either by leave being denied or by consent.



# Financial Operations

Our total expenditures were within 73 per cent of the original authority and 91 per cent of the final forecast (see Figure 12). Net expenditures totalled \$1,932,078, a slight decrease from the previous year.

**FIGURE 12**  
**Budget Expenditure**  
(for the Fiscal Year Ending March 31, 2022)



# Appendix

**FIGURE 1**  
Appeals Received

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 2018–19	48	56	28	40	48	28	60	59	30	29	35	60	521
Fiscal 2019–20	54	87	62	85	54	23	24	28	53	24	29	40	563
Fiscal 2020–21	50	33	53	53	37	51	43	43	39	42	29	49	522
Fiscal 2021–22	36	52	58	24	23	37	36	36	27	23	41	36	429

**FIGURE 2**  
Decisions Rendered

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 2018–19	37	44	59	43	48	52	47	36	38	46	37	40	527
Fiscal 2019–20	41	38	43	32	21	45	45	40	32	44	39	22	442
Fiscal 2020–21	22	29	37	51	35	41	39	41	18	43	28	46	430
Fiscal 2021–22	37	41	48	42	19	36	38	43	18	42	43	35	442

**FIGURE 3**  
Appeals Outstanding at Year End

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
Fiscal 2018–19	793	792	756	745	734	702	702	712	695	664	654	655
Fiscal 2019–20	648	679	690	730	750	716	692	664	683	658	639	650
Fiscal 2020–21	661	641	644	637	637	629	617	606	622	611	600	603
Fiscal 2021–22	591	589	583	557	549	539	529	503	506	477	471	465

**FIGURE 4**  
Timeliness to Decision (cumulative age by month)

Months	1	2	3	4	5	6	7	8	9	10	11	>11
Fiscal 2018–19	0.00	0.95	3.81	8.00	14.67	22.48	31.81	37.33	42.48	47.05	54.48	100
Fiscal 2019–20	0.68	3.39	9.50	14.25	22.62	28.51	35.97	42.31	49.10	53.39	57.01	100
Fiscal 2020–21	0.00	2.33	8.84	12.33	16.74	21.16	26.51	29.53	33.49	37.21	42.33	100
Fiscal 2021–22	0.00	2.04	8.60	12.90	20.14	24.66	29.41	34.39	39.82	45.48	49.55	100

**FIGURE 5**  
Decisions by Representation

Self-represented	47
Workers' Advisers Program	315
Injured Worker Groups, Outside Counsel and Others	80
<b>Total</b>	<b>442</b>

**FIGURE 6**  
Decisions by Issue Categories – Worker

Recognition of Claim	137
New/Additional Temporary Benefits	102
New/Increased Benefits for Permanent Impairment	86
Medical Aid (Expenses)	56
New/Additional Extended Earnings Replacement Benefits	32
New Evidence	19
Chronic Pain	40
All other issues	40
<b>Total</b>	<b>512</b>

**FIGURE 7**  
Decisions by Issue Categories – Employer

Acceptance of Claim	10
Extent of Benefits	5
Other Claims Issues	1
Assessment Issues	0
<b>Total</b>	<b>16</b>

**FIGURE 8**  
Decisions by Mode of Hearing

	Oral Hearings	Written Submissions	Total
Fiscal 2018–19	319	208	527
Fiscal 2019–20	287	155	442
Fiscal 2020–21	271	159	430
Fiscal 2021–22	266	176	442

**FIGURE 9**  
Decisions by Outcome

Allowed	168
Allowed in Part	48
Denied	154
S29	1
RTH	67
Moot	4
<b>Total Final Decisions</b>	<b>442</b>
Appeals Withdrawn	122
<b>Total Appeals Resolved</b>	<b>564</b>

**FIGURE 10**  
Decisions by Appellant Type

Worker Claim Appeals*	413
Employer Claim Appeals	16
Employer Assessment Appeals	1
Section 29 Applications	0
<b>Total</b>	<b>430</b>

\*Employer participation in worker appeals 30%

**FIGURE 11**  
Appeals Before the Courts at Year End

	Nova Scotia Court of Appeal	Supreme Court of Canada	Total
Fiscal 2018–19	8	0	8
Fiscal 2019–20	6	0	6
Fiscal 2020–21	3	0	3
Fiscal 2021–22	15	0	15

**FIGURE 12**  
Budget Expenditures  
(For the Fiscal Year Ending March 31, 2022)

	Authority	Final Forecast	Actual Expenditures
Salaries and Benefits	\$1,988,000	\$1,734,000	\$1,708,781
Travel	\$55,900	\$55,900	\$558
Special Services	\$296,500	\$32,500	\$4,278
Supplies and Services	\$64,000	\$70,000	\$47,072
Office Rent, Purchases, Dues, Taxes, and Rentals	\$241,600	\$241,600	\$171,389
<b>Sub Total</b>	<b>\$2,646,000</b>	<b>\$2,134,000</b>	<b>\$1,932,078</b>
Less Recoveries	\$0	\$0	\$0
<b>Totals</b>	<b>\$2,646,000</b>	<b>\$2,134,000</b>	<b>\$1,932,078</b>







