Workers' Compensation Appeals Tribunal

Annual Report For the Year Ending March 31, 2019







Workers' Compensation Appeals Tribunal

Mark Furey 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, 2019.

Respectfully submitted,

Sandy MacIntosh Chief Appeal Commissioner

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Colleen Bennett

Supervisor, Office Services

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Clerk/Scheduling Coordinator

Charlene Downey

Secretary/Receptionist

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Sandy MacIntosh

Chief Appeal Commissioner

Sharon Pierre Louis

Executive Assistant to the Chief Appeal Commissioner

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Diane Manara (Registrar)

David Pearson

Brian Sharp

Andrea Smillie

Appeal Commissioners

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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. We release more decisions annually than the Nova Scotia Labour Relations Board and Nova Scotia Utility and Review Board combined. We have court-like powers.

In 2018/19, we provided timely, quality decision making consistent with the act, policy, and tribunal precedent. We continued to develop new procedures, both internally and with system partners, to improve the appeal process.

Appeal volumes were slightly lower than last year. In 2018/19, workers and employers filed 521 appeals. Appeal commissioners decided 527 appeals and a total of 655 appeals were resolved.

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

Some key initiatives in the past year included:

- involvement in the formation of a national association of workers' compensation appeals tribunals
- a review of our occupational health and safety processes
- a complete revision of the practice manual
- a focus on diversity and inclusion
- improvements in protection of privacy

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 and Advanced Education.

Tribunal Mandate and Performance Measures

We decide appeals and right-of-action applications. Opportunities exist for consultation and co-operation with system partners and the community, including injured worker groups and the Office of the Employer Advisor, in improving our processes. We work with our partner agencies to develop practices and procedures to improve the appeal process. At the same time, we are careful to ensure our independence is never compromised.

We strive to strike a balance between access to justice, efficiency, and fairness. Our work is directed 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 community expectations.

Our decisions are written. Appeal commissioners try to 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 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 the vast majority of appeals taking significantly longer than 30 days. The reasons why hearings may be delayed include:

- there is more than one participant involved
- · representatives' workloads
- the time it takes for 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 opinion evidence

The Tribunal's Year in Review

Operations Overview

Our appeal volume decreased slightly from last year, as did output. This resulted from factors largely outside our control. Staffing issues at the board, and the WAP setting down fewer appeals, were the major factors in these lower numbers.

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

The time to resolve appeals slowed from last year. We operate on a readiness model. This means we generally wait until participants are ready to proceed before setting down appeals. We continue to work with WAP to find efficiencies. There has been an increase in employer demand for disclosure of evidence from workers, which tends to prolong the appeal process. We may revisit the readiness model if this trend does not reverse.

The most common appeal issues are whether a claim should be accepted, and entitlement to permanent medical impairment rating reviews or increases. Most appeals proceed by way of oral hearing.

We allow, at least in part, over 40 per cent of appeals. A significant number of appeals are resolved prior to hearing.

Ten of our decisions were appealed to the Court of Appeal. Other than one decision being remitted back to us for a re-hearing by consent, no decisions were overturned by the Court of Appeal.

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

Appeal Management

Diane Manara is our registrar. She actively manages appeals from the time they are filed until they are ready to be scheduled.

She, or someone acting on her behalf, calls unrepresented participants and provides information about the appeal process. Where there is more than one participant to an appeal, she regularly conducts conference calls 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.

We work closely with WAP to track appeals and avoid delays. The "WAP new medical" process results in a significant number of appeals being resolved without a hearing. This process allows 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/Coordinating Committee, which 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, the manager of the board's internal appeals department, and a second senior board representative.

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.

The Appeal Issues Discussion Group, a subcommittee of IRWG, was also active this year.

The final interagency committee is the Appeal System Efficiency Committee. Its focus is also improving efficiency in the appeals system. In addition to senior membership from the three agencies, its membership includes an executive director from the Department of Labour and Advanced Education.

Financial Operations

In 2018/19, our total expenditures were within 83 per cent of the original authority and within 87 per cent of our revised forecast. Net expenditures totalled \$1,832,171, a slight increase from the previous year.

Sandy MacIntosh Chief Appeal Commissioner

Workers' Compensation Appeals Tribunal Annual Report 2019



he Workers' Compensation Appeals Tribunal (the tribunal) hears appeals from final decisions of Workers' Compensation Board of Nova Scotia (the board) hearing officers and determines 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.

An appeal commissioner, or a panel of three appeal commissioners, decides an appeal according to the act, regulations, and board policies. We take 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 work with several partner agencies within the Workplace Safety and Insurance System (WSIS). Partner agencies are the board, the Workers' Advisers Program (WAP), and the Occupational Health and Safety Division of the Department of Labour and Advanced Education.



e are independent from the board. However, we interact with the board in four ways: funder, appeal participant, policy maker, and system partner.

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.

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.

Board as Policy Maker

The board's board of directors adopts policies that decision makers must follow, including appeal commissioners. 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. Similarly, we may ask the chair whether an appeal raises an issue of general law and policy which should be reviewed by the board of directors.

Board as System Partner

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

The Heads of Agencies 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.



n the management and adjudication of appeals, we strike a balance between efficiency and fairness. 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 try to 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 can take longer to schedule. Disputes between participants concerning disclosure can slow the setting down of appeals for hearing.

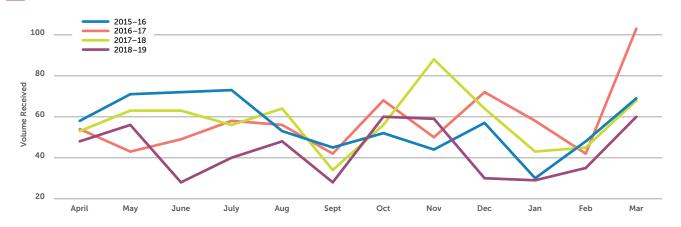


ur appeal volume decreased from last year. We received 521 appeals in 2018/19, compared to 697 in the previous year (see Figure 1). The decrease in appeals is primarily due to a backlog of appeals at the board's internal appeals department. This backlog occurred due to staffing issues and is being addressed by the board.

Appeals were predominantly filed by workers (93 per cent). We resolved a total of 655 appeals this fiscal year, compared with 644 the previous year.

Please see Appendix (pages 25–28) containing specific data for the following figures.

FIGURE 1 Appeals Received



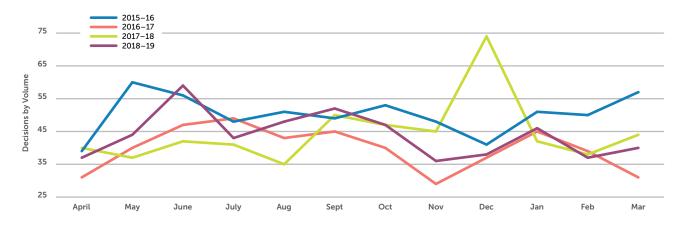
Our decision output decreased slightly this year from 535 to 527 (see Figure 2). The decrease in decision output was primarily due to the WAP setting down fewer appeals, decreasing the number of appeals available for decision. At year-end, 655 appeals remained to be resolved, compared to 792 last year (see Figure 3).

There are 106 appeals that have been with us for over two years, which is an increase of 25 compared to the end of the last fiscal year. Of those, 100 are represented by WAP and 44 of those involve an employer.

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 WAP and, on occasion, by employers. Also, employer demands for additional disclosure from workers increased, which tends to prolong the duration of an appeal.

Approximately 22 per cent of decisions were released within six months of the date the appeal was received. Approximately 42 per cent of decisions were released within nine months of the date the appeal was received, a decrease from 48 per cent the previous year. About 46 per cent of appeals took more than 11 months to resolve, which is slightly longer than the previous year (see Figure 4).







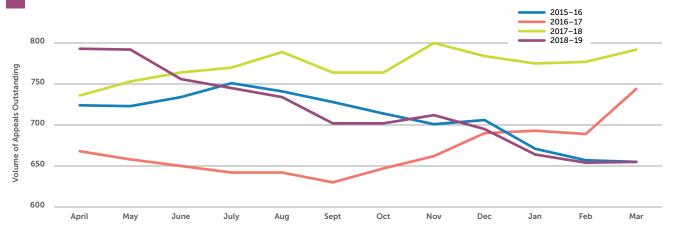
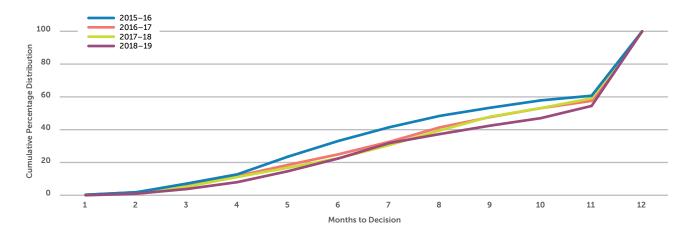


FIGURE 4 Timeliness to Decision



The report on decisions by type of representation is based on the representative at the time decisions are released (see Figure 5). Of the 527 decisions issued this past year, 65 per cent of workers were represented by WAP. However, of the 655 outstanding appeals at year-end, 74 per cent of workers were represented by WAP.

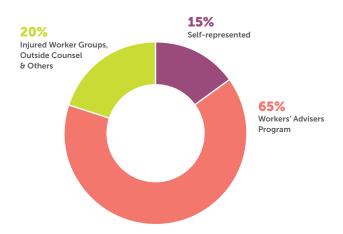
Employers participated in 26 per cent of resolved appeals, up from 21 per cent last fiscal year. Some unrepresented employers had assistance from the Office of the Employer Advisor to prepare for an appeal. Our staff speak directly with unrepresented workers and employers to provide them with information on appeal processes.

During 2018/19, recognition of a claim and new/increased benefits for permanent impairment were the issues most commonly appealed to us, each representing 22 per cent of appeals. Employers most often appealed acceptance of claim decisions (see Figures 6 and 7).

We heard approximately 61 per cent of appeals by way of oral hearing, an increase from last year's total of approximately 59 per cent (see Figure 8).

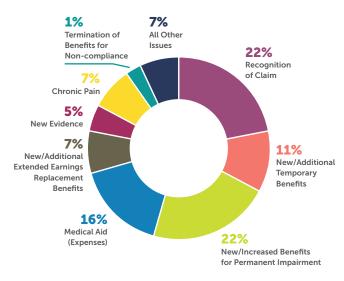
Outcomes on appeal for 2018/19 saw fewer decisions being overturned, but more referrals back to hearing officers for additional adjudication. The overturn rate (appeals allowed or allowed in part) decreased to 42 per cent from 47 per cent the previous year (see Figure 9). The number of appeals returned to hearing officers for reconsideration increased to 13.1 per cent from 8.8 per cent. A need for additional investigations is the most common reason for appeals being returned to hearing officers. The percentage of appeals denied remained steady at 44 per cent.











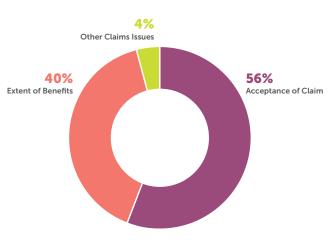
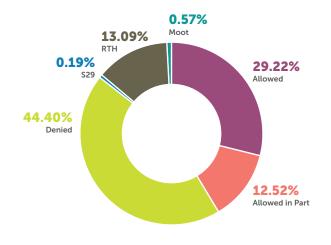


FIGURE 8 Decisions by Mode of Hearing







Ninety-six per cent of decisions resulted from worker appeals (see Figure 10). We resolved 128 appeals without the need for a hearing, an increase from last year's total of 109. 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 10 appeals to the Court of Appeal during 2018/19 (2 per cent of decisions were appealed), the same percentage as the previous year. At year-end, eight appeals remained at the Court of Appeal (see Figure 11).

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



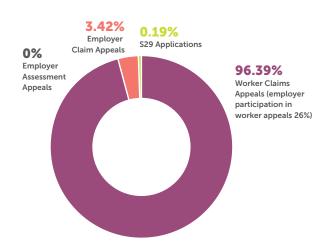
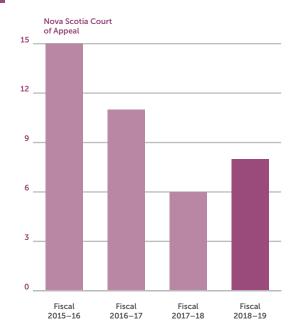


FIGURE 11 Appeals before the Courts at Year End





iane Manara is our registrar. She actively schedules and manages appeals as they are filed.

We are committed to moving appeals through to resolution as efficiently and expediently 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.

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. Where there is more than one participant to an appeal, conference calls are regularly held to keep participants informed on the appeal status, to ensure compliance with our deadlines and to streamline 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.

We made a major revision of our practice manual this year. The revised manual is more user friendly – it is shorter and uses plain language. The revisions are intended to encourage civility between appeal participants and the timely resolution of appeals.

We continue to work closely with WAP to track appeals and avoid any unnecessary delays. We actively support what has become known as the "WAP new medical" process. Additional evidence provided by WAP for an appeal is considered by a board case manager prior to a decision being made by us. This results in a significant number of appeals being resolved without a hearing, as the new evidence can change the decision under appeal. The WAP also withdraws a significant number of appeals where the additional evidence does not support continuing the appeal.



he chief appeal commissioner is a member of the Heads of Agencies Committee/
Coordinating Committee, which oversees implementation of the WSIS's strategic plan. It meets a few times a year to consider the overall direction of the compensation and safety system.

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, the manager of the board's internal appeals department, and a senior board representative.

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 also meets about every two months. Its focus is operational. Its membership includes appeal commissioners, hearing officers, and board managers.

The tribunal, the board, and WAP have formed an Appeal System Efficiency Committee. This committee usually meets every two months to explore the impact of appeal delays on claim costs and determines methods to decrease the number of appeals and the time it takes to resolve appeals.

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

Through the association, we intervened in December in a trio of court cases at the Supreme Court of Canada. These cases are considering how courts review tribunal decisions. The coalition argued that the historic compromise, which is the basis of workers' compensation systems, supports courts being respectful of the expertise of tribunals when a workers' compensation matter is before them. The Supreme Court of Canada is expected to rule on these appeals in 2019.



e rarely receive Freedom of Information and Protection of Privacy (FOIPOP) applications. There were no applications in 2018/19.

Applications regarding claim files are referred to the board as they remain the property of, and are held by, the board unless there is an active appeal. If there is an active appeal, 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 particular to 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 free public website (canlii.org). Decisions issued prior to January 2010 are available free to the public through the Department of Labour and Advanced Education website (novascotia.ca/lae/databases).

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 quality 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 not be 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.

Improving privacy protection has been a focus this year. We have created a second registrar position, whose primary focus will be the oversight of privacy. This position is expected to be filled soon.



e conducted a review of our occupational health and safety policies. This resulted in several new written policies.

Renovations are also planned for the coming year, which will incorporate findings from a safety assessment. In addition to addressing safety, these renovations will improve accessibility: for example, lowering the reception desk area to make it accessible to those who use wheelchairs.

We performed a review of our respectful workplace policies. This resulted in new written policies to ensure consistency in addressing inappropriate behaviour.

We have begun planning and developing initiatives to promote diversity and inclusion. This includes adopting the Department of Justice's Agencies, Boards, and Commissions Diversity Recruitment and Inclusion Strategy as a basis for recruiting to better reflect the community we serve.

For example, we now reach out to representative groups, such as the Canadian Association of Black Lawyers, to let them know their members are welcome to apply for appeal commissioner positions, when they become available. We have begun an initiative to reach out to First Nation communities in the coming year to make our processes more meaningful to the Indigenous community.



he following decisions, organized by topic area, are being described as readers of this report may find them interesting.

Acceptance of Claims

Decision 2018-209-AD (November 30, 2018, NSWCAT) considered the compensability of injuries resulting from a motor vehicle accident. The worker had an accepted hearing loss claim and it was a condition of his employment that he had functioning hearing aids.

The worker's hearing aid malfunctioned at work and he received approval from his supervisor to get it fixed. When returning to work, the worker was involved in a motor vehicle accident and filed a claim concerning the resulting injuries. The appeal commissioner characterized the issue as whether the worker was performing an activity directly or incidentally related to his employment.

It was significant that the worker was not receiving regular pay while he was away from work. The appeal commissioner concluded the worker left work to attend to a personal matter and was commuting back to work when the accident occurred. The appeal commissioner concluded the worker was not engaged in activities related to his employment and found the motor vehicle accident was not compensable.

Decision 2018-359-AD (December 12, 2018, NSWCAT) considered whether hearing loss was attributable to head trauma. The onset of hearing loss was close in time to the head trauma. The appeal commissioner accepted the opinions of the worker's audiologist and otolaryngologist that the hearing loss was, as likely as not, attributable to the head trauma.

Annuity

Decision 2018-173-AD (September 4, 2018, NSWCAT) considered what happens to the funds reserved for an annuity when the worker passes away. The worker was awarded an extended earnings-replacement benefit (EERB). As contemplated by the act, the board reserved 5 per cent of the EERB, and permanent impairment benefit, to pay an annuity at age 65.

The worker passed away at age 63 and the board paid the funds reserved into the Accident Fund. The worker's sibling sought to have this paid out. The appeal commissioner concluded the legislation is clear that when a worker passes away before age 65, and does not have a surviving spouse or dependent children, the reserved funds are paid into the Accident Fund.

Apprehension of Bias

In *Decision 2018-318-AD (January 24, 2019, NSWCAT),* an appeal commissioner considered a worker's representative's pre-hearing assertion that there was a reasonable apprehension of bias because of the appeal commissioner's behaviour at prior hearings.

The appeal commissioner reviewed relevant case law and found that the test is whether there is a reasonable apprehension of bias, which involves assessing what an informed person would conclude viewing the matter realistically and practically. The appeal commissioner found the assertion reflected a subjective dissatisfaction with the arbitrator and did not satisfy the test for an apprehension of bias. The appeal commissioner did not recuse herself and considered the merits of the appeal.

Calculating Loss of Earnings

In *Decision 2017-54-AD* (*September 18, 2018, NSWCAT*), a worker's previously awarded EERB was reduced to take into account 50 per cent of Canada Pension Plan (CPP) disability benefits awarded for a non-compensable condition. The worker objected and asserted that most other provinces only include CPP benefits as part of post-injury earnings if they relate to the compensable injury.

The appeal commissioner concluded that section 38 of the act is unambiguous and does not exclude CPP benefits related to non-compensable injuries. The appeal commissioner noted that other jurisdictions deduct 100 per cent of the CPP disability benefits and considered the inclusion of 50 per cent in Nova Scotia to reflect a compromise.

Decision 2018-12-AD (December 10, 2018, NSWCAT) considered a worker's argument that the board's practice of indexing to reflect changes in the Consumer Price Index should be applied to his preinjury earnings. The appeal commissioner concluded that the act states indexing applies to benefits awarded, not the initial calculations.

Extended Earnings-Replacement Benefits

Decision 2016-33-AD, 2018-48-AD, and 2018-363-AD (January 30, 2019, NSWCAT) considered, in part, a worker's entitlement to have his EERB reviewed. The board had completed 36-month and 24-month reviews, so there had to be at least a 10 per cent change in the worker's impairment rating to trigger a review of the EERB.

In 2012, after the scheduled EERB reviews were completed, the worker's permanent medical impairment rating was increased by 5 per cent. The board also subsequently accepted that the worker had chronic pain, and the appeal commissioner increased the pain-related impairment rating to 6 per cent. The appeal commissioner accepted that the cumulative increase, totalling 11 per cent, satisfied the act's requirements and entitled the worker to a review of his EERB.

Extension of Time to File a Claim

Decision 2017-224-AD (May 31, 2018, NSWCAT) considered a worker's request that a late-filed claim be accepted. The appeal commissioner conducted a broad review of general case law and legislation concerning limitation periods and noted that legislative values have evolved to a stricter enforcement of limitation periods.

The appeal commissioner stated that if a participant, typically an employer, identifies the prejudice listed in section 83 of the act, the board loses its discretion to extend the time to file a claim. If such prejudice is not demonstrated, the board retains its discretion, but the worker has the onus of demonstrating the discretion should be exercised in their favour.

The appeal commissioner found the board's and employer's ability to investigate the claim was impeded by the delay in filing. The appeal commissioner noted the worker's lack of diligence in pursuing a claim was a relevant consideration. The appeal commissioner stated that our prior decisions reflect that the merits of the claim are also taken into consideration. The request for an extension of time to file a claim was denied.

Medical Aid

Decision 2017-551-AD (May 31, 2018, NSWCAT) considered a worker's request for chiropractic treatment on a maintenance basis. The board provided chiropractic treatment between 2004 and 2017 for a back injury the worker received in 2004. In 2017, the board decided to end its support for chiropractic care.

The appeal commissioner accepted there was evidence of chiropractic treatment's efficacy for the worker, such as pain relief and helping her remain employed. The appeal commissioner reviewed a number of our prior decisions concerning maintenance care. The appeal commissioner concluded there was inadequate evidence that maintenance chiropractic care was consistent with health-care standards in Canada, as required by board policy.

The appeal commissioner, however, awarded additional chiropractic care so the board could address the worker's dependence on such care and provide alternate pain relief that would allow her to remain employed.

Decision 2018-207-AD (December 14, 2018, NSWCAT) considered a request for medical cannabis to treat compensable post-traumatic stress disorder (PTSD). The appeal commissioner noted that adjudication of requests for medical cannabis is individualized.

The appeal commissioner accepted that the use of cannabis, along with other treatment and therapies, helped reduce the worker's PTSD symptoms. The appeal commissioner, however, concluded that the use of cannabis to treat PTSD was neither appropriate nor consistent with health-care practices in Canada and denied the appeal.

Decision 2018-168-AD (January 31, 2019, NSWCAT) considered a request for prism glasses, with tinted lenses, and neuro-visual postural therapy. The worker suffered from post-concussive symptoms following a compensable motor vehicle accident.

The appeal commissioner accepted expert opinion evidence from the worker's optometrist and sports medicine physician, who has expertise in the treatment of concussions. The appeal commissioner accepted that the provision of prism glasses with tinted lenses was consistent with the standards of health-care practices in Canada and awarded the medical aid requested.

Decision 2015-26-AD and 2017-560-AD (February 22, 2019, NSWCAT) considered a worker's request for reimbursement of the costs associated with platelet-rich plasma injections following bilateral shoulder surgery and the cost of renting a cold-therapy unit. The board's position statement characterized these injections as investigational. The appeal commissioner accepted the opinions of the worker's orthopaedic surgeon concerning the state of the research and awarded reimbursement of the costs for both injections.

The board accepted that cold-therapy devices were helpful but considered ice packs just as effective and more affordable. The appeal commissioner accepted the orthopaedic surgeon's opinion that ice packs cannot replicate the benefits of a cold-therapy device.

Decision 2018-539-AD (March 29, 2019, NSWCAT) considered a worker's request for cannabis oil, which she used to treat pain resulting from a compensable injury. The appeal commissioner placed significant weight on prescribing guidelines for medical cannabinoids issued by the College of Family Physicians of Canada.

Some of the factors the appeal commissioner considered included the absence of a risk/benefit assessment, the lack of a trial of synthetic cannabinoids, and the worker's history of depression. The appeal commissioner concluded the prescription of cannabis oil is not consistent with the standards of health-care practices in Canada and denied the appeal.

Recovery of Overpayment

Decision 2017-734-AD (June 14, 2018, NSWCAT) considered the board's ability to recover an overpayment made in 2006 but not discovered until 2017. When assessing recoverability, one of the considerations is whether discovery of the overpayment exceeded a reasonable period of time, which is defined as three years.

The appeal commissioner expressly diverged from several prior decisions' interpretation of this provision. The appeal commissioner found the three-year period applies to when the overpayment is discovered, not when it is recovered.

The appeal commissioner noted that the board discovered the overpayment 11 years later and concluded this was beyond the three-year period established under board policy. After considering all relevant criteria, the appeal commissioner concluded the overpayment was not recoverable.

Stress

Decision 2017-308-PAD (April 9, 2018, NSWCAT) considered the compensability of psychological problems. The worker claimed three events were traumatic and that he suffered an acute reaction. The appeal commissioner found only one of the three events was traumatic and there had not been an acute reaction to this event.

The worker also argued he suffered from gradual onset stress that would be compensable if such stress was not excluded from compensation in the act. The appeal commissioner accepted that board policy 1.3.6, although not binding, can be considered when assessing a stress claim.

The appeal commissioner concluded the worker's psychological problems were multi-factorial and accepted he suffered from gradual onset stress that was partially attributable to his employment. The appeal commissioner accepted the worker had a disablement that would be compensable if such stress was not excluded from compensability under the act. The worker's challenge of this exclusion under the Canadian Charter of Rights and Freedoms is on hold pending the outcome of similar arguments in another appeal.

Decision 2013-65-AD (May 30, 2018, NSWCAT) was issued by a panel of three appeal commissioners. The appeal commissioners accepted there were many traumatic events and focused on whether there was an acute reaction to such events or a gradual onset of symptoms. The appeal commissioners concluded that exposure to traumatic events was a material cause of the post-traumatic stress disorder, even though it may have been impacted by labour-relations issues. The appeal commissioners accepted there was an acute reaction to a traumatic event and the worker had an acceptable claim for psychological injury.

Survivor Benefits

Decision 2017-326-AD (July 4, 2018, NSWCAT) dealt with an estate's entitlement to a one-time death benefit. The worker passed away and his wife passed away several weeks later. The board concluded the spouse's estate was not entitled to the death benefit and noted that a declaration had not been completed by the widow.

The appeal commissioner concluded that while completion of a declaration may be appropriate administratively, it is not a requirement under the act. The appeal commissioner concluded the widow satisfied the eligibility criteria, that she was a spouse who was a dependent, and found entitlement to the benefit took effect as of the worker's death. Once entitlement was triggered, the benefit became payable to the surviving spouse, or alternatively, the spouse's estate.



e are the final decision maker in the workers' compensation system. In limited circumstances, 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 2018/19, 10 appeals were filed with the Court of Appeal:

- nine were worker appeals
- one was brought by the board

During 2018/19, eight appeals were resolved as follows:

- two appeals were discontinued by the party who filed them
- leave to appeal was denied four times
- one appeal was resolved by consent
- one appeal was decided by the Court of Appeal the appeal was denied

At the beginning of 2018/19, there were six appeals before the Court of Appeal. At the end of 2018/19, eight appeals remained.



he Court of Appeal issued one appeal decision in 2018/19.

Henderson v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2018 NSCA 59

The act requires stress be due to traumatic events in order to be compensable.

Mr. Henderson was the shift supervisor at a police station when a citizen was taken into custody by the police for public intoxication early in the morning on August 28, 2009. The citizen fell asleep, but later suffered a stroke. Mr. Henderson attended the cell once and decided to leave the citizen on the floor when she could not be woken. He asked a commissionaire to let him know if there was any change and left for patrol.

Mr. Henderson was called back just as the citizen was placed on a stretcher to go to the hospital. The citizen later passed away due to her stroke. There were two high-profile investigations following the death, one of which was highly critical of Mr. Henderson.

Mr. Henderson filed a workers' compensation claim after being diagnosed with PTSD in 2012. A psychologist related the PTSD to the 2009 incident.

Mr. Henderson's claim was rejected by the board. On appeal, the appeal commissioner found that while Mr. Henderson had PTSD, it was not due to a traumatic event. The appeal commissioner noted Mr. Henderson had only limited involvement with the citizen, had no threat to his own person, and that the citizen died from natural causes. The appeal commissioner found that the PTSD was related to labour-relation issues—the investigations. The appeal commissioner found there was no need to deal with a charter challenge by Mr. Henderson because the stress was due to labour-relations issues.

The Court of Appeal denied Mr. Henderson's appeal. The court agreed that a diagnosis of PTSD does not necessarily mean the statutory definition of an acute reaction to a traumatic event occurred. The court found the appeal commissioner correctly applied a reasonable person test in determining whether a traumatic event occurred. As the investigations could lead to discipline, it was reasonable to categorize them as labour relations.



FIGURE 12

n 2018/19, our total expenditures were within 83 per cent of the original authority and within 87 per cent of our revised forecast (see Figure 12). Net expenditures totalled \$1,832,171, a slight increase from the previous year.

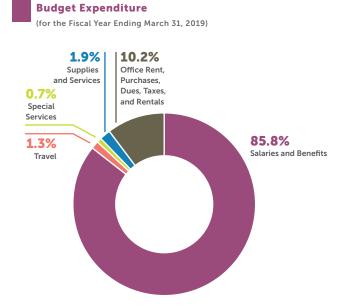




FIGURE 1
Appeals Received

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 2015–16	58	71	72	73	53	45	52	44	57	30	48	69	672
Fiscal 2016–17	54	43	49	58	56	42	68	50	72	58	42	103	695
Fiscal 2017–18	53	63	63	56	64	34	56	88	64	43	45	68	697
Fiscal 2018–19	48	56	28	40	48	28	60	59	30	29	35	60	521

FIGURE 2 Decisions Rendered

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 2015–16	39	60	56	48	51	49	53	48	41	51	50	57	603
Fiscal 2016–17	31	40	47	49	43	45	40	29	37	45	39	31	476
Fiscal 2017–18	40	37	42	41	35	50	47	45	74	42	38	44	535
Fiscal 2018-19	37	44	59	43	48	52	47	36	38	46	37	40	527

FIGURE 3 Appeals Outstanding at Year End

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
Fiscal 2015–16	724	723	734	751	741	728	714	701	706	671	657	655
Fiscal 2016–17	668	658	650	642	642	630	647	662	690	693	689	744
Fiscal 2017–18	736	753	764	770	789	764	764	800	784	775	777	792
Fiscal 2018-19	793	792	756	745	734	702	702	712	695	664	654	655

FIGURE 4 Timeliness to Decision (cumulative age by month)

Months	1	2	3	4	5	6	7	8	9	10	11	>11
Fiscal 2015–16	0.33	1.82	7.13	12.77	23.55	33.17	41.46	48.42	53.40	57.88	60.70	100
Fiscal 2016–17	0.21	1.89	5.88	11.76	18.49	25.00	32.56	41.39	47.69	53.15	57.56	100
Fiscal 2017–18	0.37	1.49	5.22	11.19	16.79	22.57	30.60	39.55	47.95	53.17	59.14	100
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

FIGURE 5 **Decisions by Representation**

Self-represented	80
Workers' Advisers Program	342
Injured Worker Groups, Outside Counsel and Others	105

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

Recognition of Claim	150
Recognition of Claim	150
New/Additional Temporary Benefits	75
New/Increased Benefits for Permanent	147
Impairment	
Medical Aid (Expenses)	111
New/Additional Extended Earnings	50
Replacement Benefits	
New Evidence	33
Chronic Pain	51
Termination of Benefits	18
for Non-compliance	
All other issues	47
Total	682

FIGURE 7
Decisions by Issue Categories — Employer

Acceptance of Claim	14
Extent of Benefits	10
Assessment Classification	0
Assessment Penalties	0
Other Claims Issues	1
Other Assessment Issues	0
Total	25

FIGURE 8

Decisions by Mode of Hearing

Total	Written Submissions	Oral Hearings	
iotat	Written Submissions	Oral Hearings	
603	166	437	Fiscal 2015–16
476	143	333	Fiscal 2016-17
535	217	318	Fiscal 2017–18
527	208	319	Fiscal 2018–19

FIGURE 9

Decisions by Outcome

Total Appeals Resolved	655
Appeals Withdrawn	128
Total Final Decisions	527
Moot	3
RTH	69
S29	1
Denied	234
Allowed in Part	66
Allowed	154

FIGURE 10

Decisions by Appellant Type

Worker Claim Appeals*	508
Employer Claim Appeals	18
Employer Assessment Appeals	0
Section 29 Applications	1
Total	527

^{*}Employer participation in Worker appeals 26%

FIGURE 11 Appeals Before the Courts at Year End

	Nova Scotia Court of Appeal	Supreme Court of Canada	Total
Fiscal 2015–16	15	0	15
Fiscal 2016–17	11	0	11
Fiscal 2017–18	6	0	6
Fiscal 2018–19	8	0	8

FIGURE 12

Budget Expenditures

(For the Fiscal Year Ending March 31, 2019)

	Authority	Final Forecast	Actual Expenditures
Salaries and Benefits	\$ 1,784,000	\$ 1,656,000	\$ 1,572,300
Travel	\$ 55,900	\$ 55,900	\$ 24,578
Special Services	\$ 95,500	\$ 85,500	\$ 12,860
Supplies and Services	\$ 62,000	\$ 63,000	\$ 34,889
Office Rent, Purchases, Dues, Taxes, and Rentals	\$ 222,600	\$ 236,600	\$ 187,544
Sub-total	\$ 2,220,000	\$ 2,097,000	\$ 1,832,171
Less Recoveries	\$0	\$0	\$0
Totals	\$ 2,220,000	\$ 2,097,000	\$ 1,832,171

