Workers' Compensation Appeals Tribunal

Annual Report
For the Year Ending March 31, 2020












NOVA SCOTIA

Workers' Compensation Appeals Tribunal Annual Report
For the Year Ending March 31, 2020
Workers' Compensation Appeals Tribunal, June 2020
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NOVA SCOTIA
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, 2020.

Respectfully submitted,

Sandy MacIntosh
Chief Appeal Commissioner

Tribunal Personnel

Colleen Bennett
Supervisor, Office Services

Tricia Chiasson
Clerk/Scheduling Coordinator

Charlene Downey
Secretary/Receptionist

Mary-Ann Arnold
Clerk

Sarah Couce
Secretary

Sandy MacIntosh
Chief Appeal Commissioner

Sharon Pierre Louis
Executive Assistant to the
Chief Appeal Commissioner

Leanne Rodwell Hayes
Alison Hickey
Glen Johnson
Christina Lazier
Brent Levy
Andrew MacNeil
Diane Manara (Registrar)
Valerie Paul (Deputy Registrar)
David Pearson
Brian Sharp
Andrea Smillie
Appeal Commissioners

Contents

Executive Summary

The 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 Board and Nova Scotia Utility and Review Board combined. We have court-like powers.

In 2019/20, 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 higher than last year. In 2019/20, workers and employers filed 563 appeals. Appeal commissioners decided 442 appeals and a total of 568 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

- moving away from the readiness model for some of our oldest appeals
- renovating to improve safety and allow for hearings by video
- revising our practice manual to improve timeliness
- working on diversity, inclusion, and the tribunal's team dynamics
- improving protection of privacy

The tribunal issued a decision finding that the exclusion of gradual onset stress from compensation under the act was unconstitutional. Neither the board nor the attorney general appealed this finding. We are waiting to learn what response the board and/or government will have to this decision.

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 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 opinion evidence

The Tribunal's Year in Review

OPERATIONS OVERVIEW

Our appeal volume increased from last year, while decision output decreased. However, we still managed to reduce our total number of appeals by year-end due to appeals withdrawn. The decrease in decision output primarily resulted from factors largely outside our control. Staffing issues at the WAP, with 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 the WAP and, on occasion, by employers.

The time to resolve appeals improved slightly from last year, changing a long-term trend.

We have historically operated on a readiness model. This means we generally wait until participants are ready to proceed before setting down appeals. Due to the trend of aging appeals, we have modified our readiness model. Starting around the end of 2019/20, we stopped applying the readiness model to some of the oldest appeals and set submission deadlines without consulting the participants.

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.

Eight of our decisions were appealed to the Court of Appeal. Other than two decisions 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 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.

She, 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 Diane and takes the lead role in privacy issues 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 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, which, together with the Department of Labour and Advanced Education'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, 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 2019/20, our total expenditures were within 90.2 per cent of the original authority and within 92.5 per cent of our revised forecast. Net expenditures totalled $2,033,518 – an increase from the previous year.

Sandy MacIntosh
Chief Appeal Commissioner

Introduction

The 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 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 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.

Relationship to the Board

We 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 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 that should be reviewed by the board of directors.

4. Board as IT sharer

Historically, the board gave the tribunal access to its file-tracking system, the AS400. It also gave the tribunal access to its electronic claim files though its e-file system. This saved the Accident Fund the expense of the tribunal duplicating a file-tracking system. It also gave the tribunal immediate up-to-date access to claim files.

The board's technology was old and in need of retirement. In 2019/20, the board moved to Guidewire as the replacement for both the AS400 and e-file. Guidewire is widely used in the insurance industry and has been adopted by several workers' compensation boards. The board gave the tribunal access to Guidewire.

The change has impacted the tribunal's operations. Limitations with Guidewire make it slower to use when reviewing larger claim files compared to the old e-file system. This impacts the tribunal more than the board as almost all the claim files reviewed by the tribunal are large. Also, the tribunal is presently tracking statistics manually.

5. 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.

Tribunal Mandate and Performance Measures

We 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 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.

Operations

Our appeal volume increased from last year. We received 563 appeals in 2019/20, compared to 521 in the previous year (see Figure 1).

Appeals were predominantly filed by workers (95 per cent). We resolved a total of 568 appeals this fiscal year, compared with 655 the previous year.

Our decision output decreased this year from 527 to 442 (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, 650 appeals remained to be resolved, compared to 655 last year (see Figure 3).

There are 100 appeals that have been with us for over two years, which is a decrease of 6 compared to the end of the last fiscal year. Of those, 88 are represented by the WAP and 43 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 the WAP and, on occasion, by employers.

Approximately 29 per cent of decisions were released within six months of the date the appeal was received. Approximately 49 per cent of decisions were released within nine months of the date the appeal was received, an increase from 42 per cent the previous year. About 43 per cent of appeals took more than eleven months to resolve, which is slightly shorter than the previous year (see Figure 4).

Please see Appendix (pages 26–28) containing specific data for the following figures.

FIGURE 1
Appeals Received

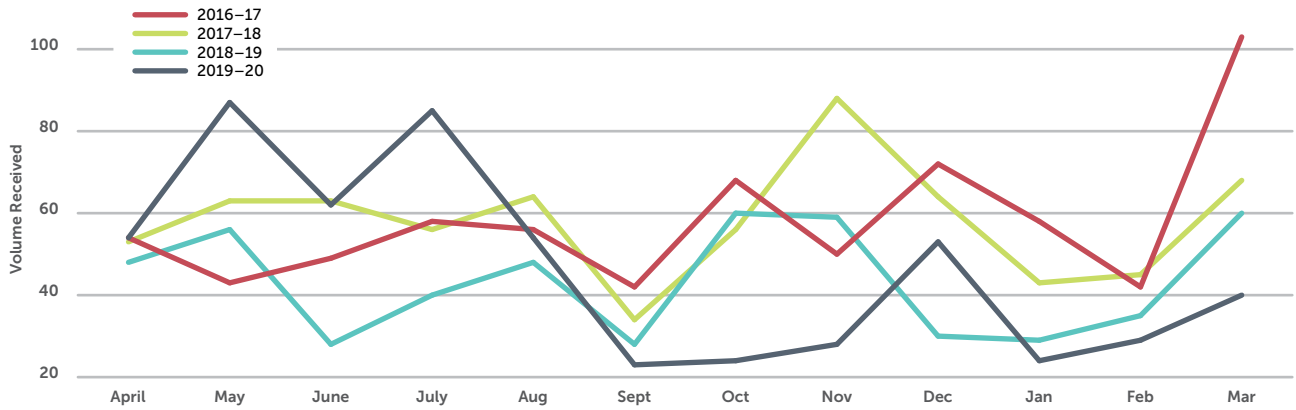


FIGURE 2
Decisions Rendered

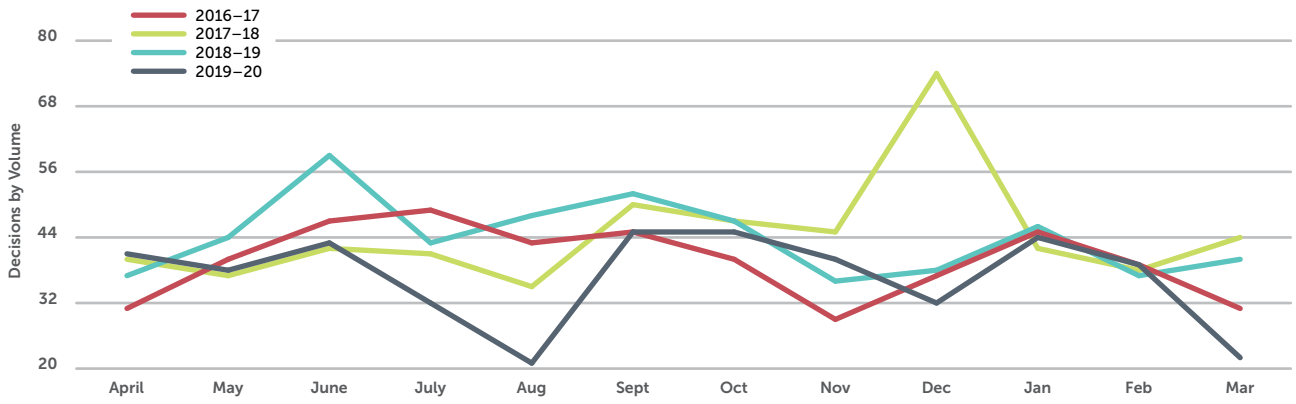


FIGURE 3
Appeals Outstanding at Year End

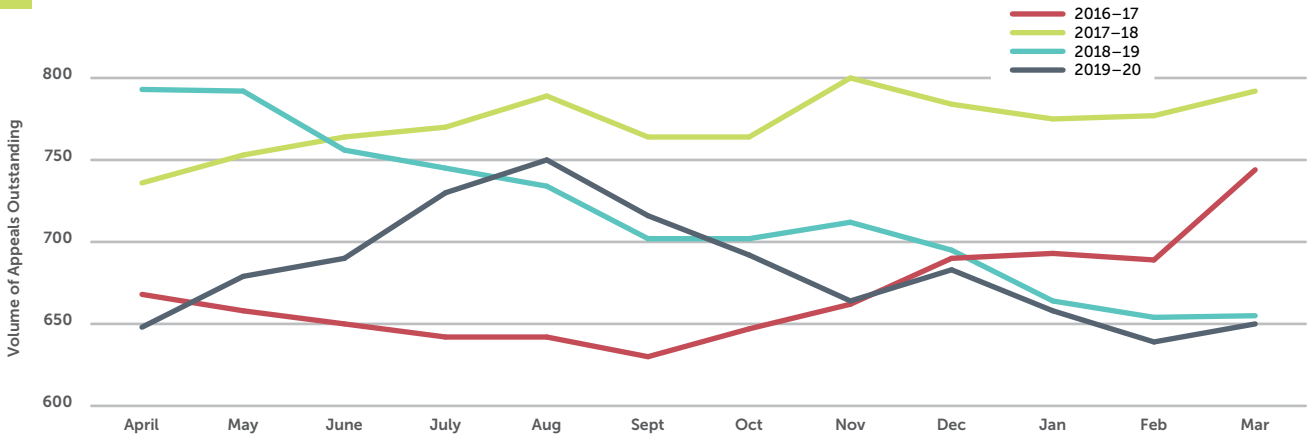
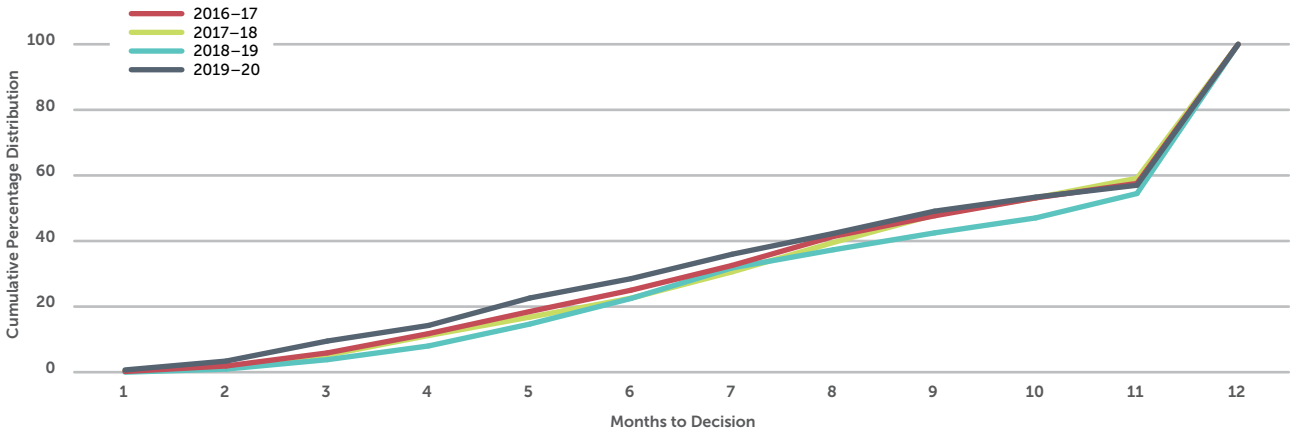


FIGURE 4
Timeliness to Decision



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, 62 per cent of workers were represented by the WAP.

Employers participated in 25 per cent of resolved appeals, down slightly from 26 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 2019/20, the issues most appealed to us by workers were recognition of a claim (30 per cent) and new/increased benefits for permanent impairment (23 per cent). Employers most often appealed acceptance of claim decisions (see Figures 6 and 7).

We heard approximately 65 per cent of appeals by way of oral hearing, an increase from last year's total of approximately 61 per cent (see Figure 8).

Outcomes on appeal for 2019/20 saw slightly more decisions being overturned and more referrals back to hearing officers for additional adjudication. The overturn rate (appeals allowed or allowed in part) increased slightly to 43 per cent from 42 per cent the previous year (see Figure 9).

The number of appeals returned to hearing officers for reconsideration increased to 17.9 per cent from 13.1 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 38.9 per cent from 44 per cent the previous year.

FIGURE 5
Decisions by Representation

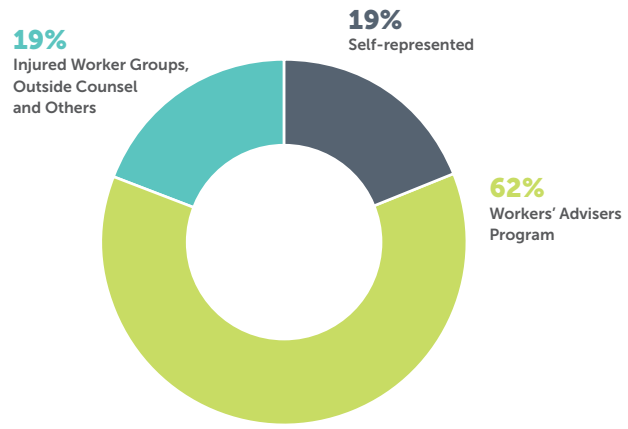


FIGURE 6
Decisions by Issue Categories – Worker

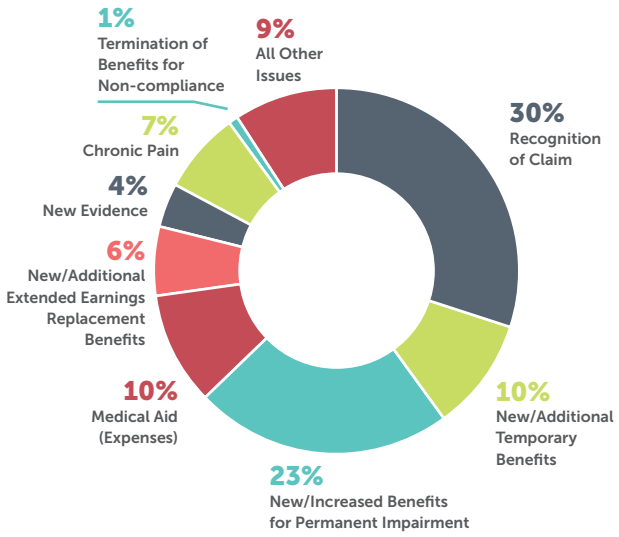


FIGURE 7
Decisions by Issue Categories – Employer

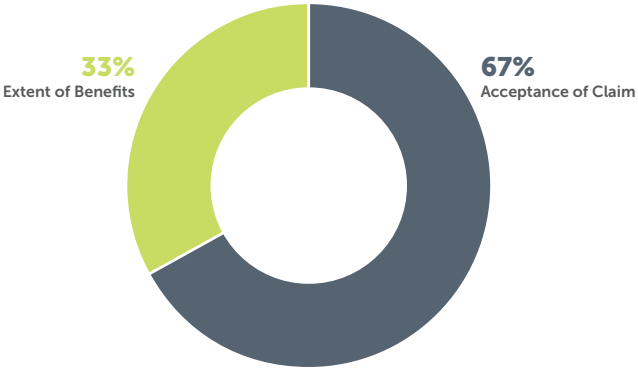


FIGURE 8
Decisions by Mode of Hearing

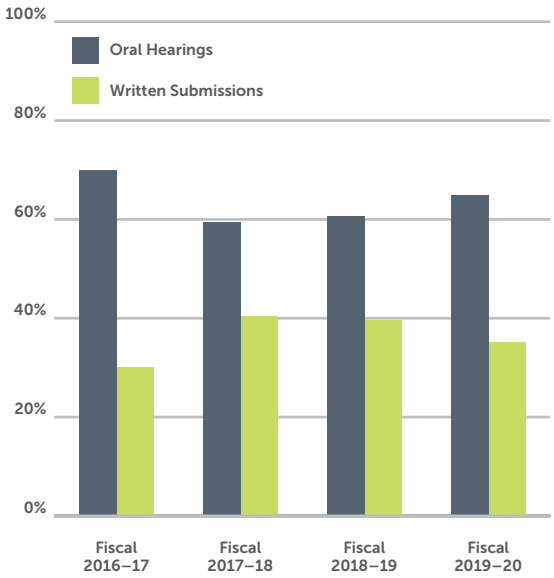
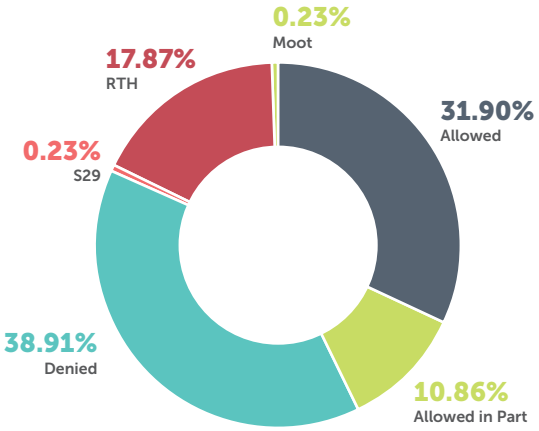


FIGURE 9
Decisions by Outcome



Ninety-six per cent of decisions resulted from worker appeals (see Figure 10). We resolved 126 appeals without the need for a hearing, a slight decrease from last year's total of 128. 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 eight appeals to the Court of Appeal during 2019/20. Two per cent of decisions were appealed, the same percentage as the previous year. At year-end, six appeals remained at the Court of Appeal (see Figure 11).

COVID-19 impacted operations at the end of the fiscal year. During March of 2020, the tribunal stopped offering in-person hearings. Instead, we offered telephone hearings and written submissions as an alternative. Appeal commissioners shifted to primarily working from home.

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

FIGURE 10
Decisions by Appellant Type

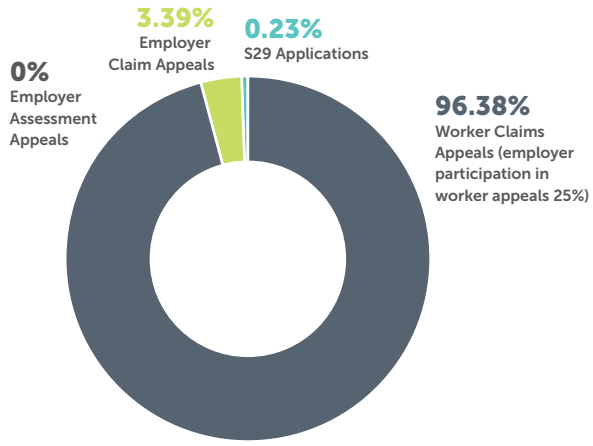
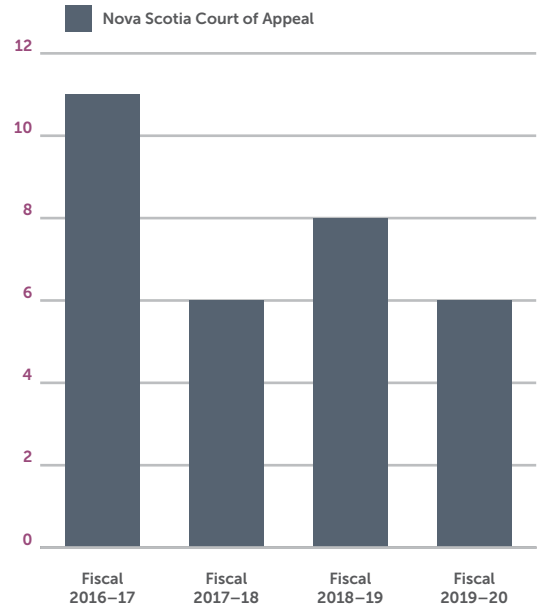


FIGURE 11
Appeals before the Courts at Year End



Appeal Management

Diane 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 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. 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 has advised participants that it expects appeals to be completed within a year, the tribunal has operated on a readiness model for many years. This means that appeals are generally not set down until participants indicate they are ready. An unfortunate impact of the readiness model has been a trend of the duration of appeals increasing year after year. This is no longer sustainable as justice delayed is justice denied.

The WAP has effectively built up a backlog of appeals. Near the end of 2019/20, the tribunal began making changes. We will 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.

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 and Advanced Education's coordinating committee 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 the 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.

The Appeal System Efficiency Committee had been working on coordinating a tribunal-led review of the entire workers' compensation appeals system. Unfortunately, this review has been put on hold due to COVID-19.

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 was one application in 2019/20 to correct a record.

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 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 have been published on the Canadian Legal Information Institute's (CanLII) free public website (canlii.org). Decisions issued prior to January 2010 are hosted on a Department of Labour and Advanced Education website. Due to the closure of this website, the tribunal plans to migrate the older decisions to CanLII.

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 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.

Our deputy registrar made process changes to improve the protection of privacy.

Internal Developments

Renovations took place this year that incorporated findings from a safety assessment. In addition to addressing safety, these renovations improved accessibility; for example, the reception desk area was lowered to make it accessible to those who use wheelchairs. A video system was also added to our main hearing room which will allow for some hearings to occur remotely. The tribunal also worked on improving internal team dynamics.

We continue developing initiatives to promote diversity and inclusion. We have adopted 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. We have recently designated a vacant appeal commissioner position to be filled by a member of the Indigenous, racially visible, or persons with disability community. We hope to advertise this position as soon as the COVID-19 crisis eases.

Noteworthy Decisions

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

Acceptance of Claims

Decision 2018-443-AD (February 18, 2020, NSWCAT) considered the compensability of amyotrophic lateral sclerosis (ALS) as a result of occupational exposure to lead. The worker also challenged whether policy 1.2.14, concerning the adjudication of occupational disease claims, was inconsistent with the act on the basis it imposes a higher standard of proof.

The policy requires consideration of medical and scientific literature to determine the compensability of an occupational disease. The appeal commissioner found that the policy may require consideration of different evidence than other claims but does not impose a higher standard of proof. The appeal commissioner accepted that there was sufficient evidence of a causal relationship between the accepted occupational lead exposure and development of ALS.

Acceptance of Late-filed Claim

Decision 2019-126-AD (September 16, 2019, NSWCAT) considered whether a worker's claim was filed too late. The worker stopped working in 2006 because of a deterioration in their mental health. No claim was filed at that time.

The worker returned to different employment until 2016, but again stopped working because of psychological problems. The worker filed a claim in 2017.

The appeal commissioner noted that the tribunal had conducted a hearing concerning another matter in November of 2006, approximately five months after the worker stopped working. The tribunal decision following that hearing noted that the worker had suffered a nervous breakdown on the job and had been unable to work since June of 2006.

The appeal commissioner noted that the facts of the appeal were unique and found that the claim had not been filed late. The appeal commissioner found that the earlier tribunal decision served as notice to the board that the worker had a potential claim concerning a nervous breakdown.

Assessment

Decision 2018-376-AD (October 31, 2019, NSWCAT) considered an employer's appeal of a fatal injury penalty, which significantly increased its premiums payable to the board. A compensable motor vehicle accident caused head injuries. Approximately 10 months later, the worker committed suicide. The employer appealed the board's determination that the compensable injury worsened pre-existing psychological problems and contributed to the suicide.

The appeal commissioner accepted that the accident aggravated pre-existing psychological problems. He found that there was insufficient evidence that the aggravation elevated the risk of suicide. The appeal commissioner allowed the appeal finding that the compensable accident did not meaningfully contribute to the suicide. He found that the board should not have applied a fatal injury penalty to the assessment calculations.

Calculating Loss of Earnings

Decision 2018-361-AD (April 29, 2019, NSWCAT) considered whether a worker's initial rate to calculate earnings-replacement benefits should be based on earnings as of the date of injury, June 2017, or when the earnings loss began, October 2017. Section 38 of the act establishes the formula for calculating a loss of earnings while section 40 sets out the time period applicable to assess earnings.

The appeal commissioner noted an apparent conflict between these two sections of the act. The appeal commissioner concluded that the conflict could be resolved by relying on the earnings as of the date of injury and that this best represented the worker's loss of earnings.

Civil Action Barred

Decision 2018-407-TPA (June 12, 2019, NSWCAT) considered an application by a defendant employer to bar the civil action of the plaintiff worker. The worker had a recognized injury and began a graduated return-to-work program. The worker's employment was terminated because of shifts missed during the return-to-work program.

The worker sued the employer, claiming they were wrongfully dismissed and that they suffered emotional and mental harm due to working in pain. The appeal commissioner noted that psychological injuries flowing from a physical injury are compensable.

The appeal commissioner found that the action was barred because the worker alleged they were dismissed because of ongoing symptoms following the injury and circumstances related to the return-to-work process.

Chronic Pain

Decision 2018-338-AD (September 20, 2019, NSWCAT) considered a request for recognition of chronic pain for several older back injuries. One of the issues was the lack of medical evidence documenting back symptoms between 1982 and 1986. The worker attributed this gap to an opiate addiction, which masked the pain.

The appeal commissioner noted that the worker sought medical treatment for other complaints during this period and rejected the explanation for the gap in reported back problems. The appeal commissioner also noted other gaps in the medical evidence for which no explanation was offered.

Earnings-replacement Benefits

In *Decision 2019-96-AD (June 13, 2019, NSWCAT),* a worker sought earnings-replacement benefits although their employment had ended. The worker underwent surgery within a month of the injury. The board subsequently learned that the worker's employment ended before the surgery.

The appeal commissioner found that the dismissal was unrelated to the compensable injury. The appeal commissioner noted that this finding did not automatically disentitle the worker to earnings-replacement benefits. Such determinations are dependent on the facts of the appeal.

The appeal commissioner accepted that the worker's ability to seek alternate employment was adversely affected by the compensable surgery and recovery period. Earnings-replacement benefits were awarded from the date of surgery until the worker was capable of their pre-injury job demands.

Decision 2019-63-AD (July 11, 2019, NSWCAT) considered a worker's entitlement to earnings-replacement benefits. The worker had received earnings-replacement benefits and returned to work for several years. The worker then went off work for several years for non-compensable reasons. Although cleared by the employer's disability insurer to return to work, the worker retired.

The board denied the worker benefits based on a functional capacity assessment and on the basis that the resignation constituted a failure to participate in a return-to-work program. The appeal commissioner found that the functional assessment was of limited assistance because the complaints limiting the worker's ability to return to work, including phonophobia and headaches, were not considered by the functional assessment.

The appeal commissioner accepted that symptoms related to the compensable injury prevented the worker from working. The appeal commissioner found that retirement was not an intervening event disrupting entitlement to benefits. The appeal commissioner concluded that the worker had not breached their obligations as an injured worker because there was no return-to-work plan with which to comply and awarded earnings-replacement benefits.

Decision 2017-04-AD (December 19, 2019, NSWCAT) considered a worker with a compensable post-infectious irritable bowel syndrome (IBS). The worker was awarded a permanent impairment rating for IBS but continued working for a considerable period. The worker received devastating personal news following which they suffered worsening symptoms and an earnings loss.

There was medical opinion evidence that there was an exacerbation of the IBS before the personal news as well as evidence that the significant personal stressor worsened the compensable IBS. The appeal commissioner accepted that the IBS contributed to a material degree to the worker's inability to continue working and awarded earnings-replacement benefits.

Extension of Deadline

Decision 2019-169-AD (March 25, 2020, NSWCAT) considered whether an employer's re-employment obligations should be extended using s.190 of the act. After the employer's re-employment obligations expired, evidence suggested that the worker was able to return to work.

The appeal commissioner noted that the worker had been awarded a full extended earnings-replacement benefit and that an extension would not lead to any compensation not already awarded. The appeal commissioner concluded that denying the extension request would not lead to an injustice.

File Disclosure

Decision 2019-81-AD (November 8, 2019, NSWCAT) considered a worker's request for full disclosure of the board's special investigation unit's (SIU) file. The SIU often acts on confidential tips that a worker or employer may be committing fraud.

The worker received a redacted copy of the SIU file through a FOIPOP request. The worker sought full disclosure of the SIU file, which led to the appeal before the tribunal.

Section 193 of the act states that a worker may receive a copy of any document or record in the board's possession respecting the worker's claim. The appeal commissioner concluded that the phrase "may receive" meant that a worker did not have an absolute right to receive documents and that the board had some discretion concerning what documentation was released.

The appeal commissioner noted that policy 10.3.7R1, concerning fraud and misrepresentation, supported the interpretation of s.193. The appeal commissioner concluded that the worker did not have a right to an unredacted copy of the SIU claim file and that it was reasonable for the board to only disclose information relevant to the investigated worker's benefit entitlement.

Jurisdiction

Decision 2017-624-PAD (March 31, 2020, NSWCAT) considered a worker's representative's argument that the tribunal had jurisdiction to consider an issue that was not considered by the hearing officer in the decision under appeal nor raised in the appeal to the tribunal. The representative argued that the tribunal had jurisdiction over any issue the hearing officer had jurisdiction to address.

The appeal commissioner rejected this argument and noted that the tribunal's authority set out in s.252 of the act does not allow it to expand its jurisdiction to include issues that could have been, but were not, considered by the hearing officer. The appeal commissioner found that this was consistent with the tribunal's general position that it does not have jurisdiction to address issues not decided by the hearing officer in the decision under appeal.

Long-term Rate

Decision 2016-623-AD (September 16, 2019, NSWCAT) considered the calculation of a long-term rate. The issue was whether the earnings for each of the three years considered should be capped at the maximum insurable earnings and then averaged, or whether the earnings should be averaged and then capped by the maximum insurable earnings.

The appeal commissioner concluded that the act does not contemplate reducing earnings for individual years before averaging income. The appeal commissioner concluded that the long-term rate should be based on the average of the worker's income for the three years in question. If the resulting average exceeded the maximum allowable income for the year the earnings loss began, then the maximum allowable earnings should be used.

Decision 2018-345-AD (September 30, 2019, NSWCAT) considered whether earnings from multiple employers should be used when calculating a long-term rate. The worker held three casual positions before their injury.

The appeal commissioner concluded that the long-term earnings profile should comprehensively reflect the impact of the injury on the worker's earnings. This was best achieved by using the earnings from all three employers in determining the extent of the worker's earnings-loss.

The appeal commissioner acknowledged that a worker's initial rate (used for the first 26 weeks) is based solely on earnings from the injury employer. However, the appeal commissioner found that initial and long-term rates can take into account different considerations as directed by the act and policy.

Medical Aid

Decision 2018-272-AD (May 23, 2019, NSWCAT) considered a worker's request for chiropractic treatment by a non-approved service provider. The worker had received periodic treatment for flareups of back pain from this chiropractor. The board denied a recent request for coverage because the chiropractor was no longer an approved service provider.

The worker argued that section 2 of policy 2.3.5 provided discretion for medical aid to be provided by non-approved service providers. The appeal commissioner rejected this argument and affirmed the board's ability to establish standards for service.

Decision 2015-28-AD (August 27, 2019, NSWCAT) considered a request for a service dog. The worker had compensable post-traumatic stress disorder (PTSD) and had been awarded a permanent impairment rating. The evidence included testimony from an accredited service dog trainer and reports from health-care providers.

The appeal commissioner distinguished between pets as companions and trained service animals. The appeal commissioner noted that service dogs are regulated by Service Canada and that there is a provincial Service Dog Act.

The appeal commissioner accepted that there was enough evidence that service dogs are appropriate for those with PTSD. The appeal commissioner accepted that provision of a service dog was appropriate and consistent with health-care standards in Canada.

Decision 2019-468-AD (January 30, 2020, NSWCAT) considered a worker's entitlement to a neuro-optometric assessment after having suffered a concussion. The request had been denied, in part, based on a 2017 board position statement.

The tribunal received testimony from the worker's behavioural neuro-optometrist. This witness, accepted as an expert in their field, testified that the research underlying the position statement was outdated and that such treatment had been covered by the board in other instances.

The appeal commissioner accepted that the worker was entitled to reimbursement of the cost of the neuro-optometric assessment and entitlement to the recommended treatment ought to be considered by the board.

Decision 2019-275-AD (February 13, 2020, NSWCAT) considered a worker's request for Nabilone, a synthetic cannabinoid, which they used to relieve pain and as a sleep aid. The worker was recognized as having chronic pain and had been awarded the highest impairment rating available for chronic pain. The worker's family physician prescribed and supported the use of Nabilone.

The appeal commissioner concluded that the worker was diagnosed with myofascial pain syndrome rather than neuropathic pain. The appeal commissioner considered the College of Family Physicians of Canada to be an expert authority and placed significant weight on its guidelines concerning the prescription of cannabinoids. The appeal commissioner concluded that treatment of the worker's chronic pain condition with a cannabinoid was not consistent with the standards of health-care practice in Canada.

Permanent Impairment Ratings

Decision 2018-471-AD (April 24, 2019, NSWCAT) considered whether a pain-related impairment rating for chronic pain should be added to a permanent medical-impairment rating or combined using the combined values table in the impairment assessment guidelines. The appeal commissioner noted that this question had only been considered by the tribunal on two occasions with opposite conclusions.

The appeal commissioner concluded that pain-related impairment and permanent medical-impairment ratings can be combined when calculating a permanent-impairment benefit. The appeal commissioner concluded that the ratings awarded form the basis of the benefit calculation and are not reduced when combined. The appeal commissioner found that using the combined values table respects the maximum rating of 100 per cent and the proportionality of ratings to the maximum rating available of 100 per cent.

Decision 2018-324-AD (April 30, 2019, NSWCAT) considered the retroactive determination of a permanent medical-impairment rating for a psychological injury. In July of 2017, the board accepted that the worker suffered from compensable PTSD stemming from a 1979 explosion. The board awarded a 50 per cent impairment rating as of March 26, 2000. The employer appealed this determination.

The worker was first diagnosed with PTSD in 2011, but there was earlier evidence of treatment for alcohol abuse and depression. The appeal commissioner accepted evidence from the treating psychiatrist that considerable delay can pass between trauma and the onset of PTSD symptoms and found that the worker's depression from 2000 onward was a sign or symptom of PTSD. The appeal commissioner concluded that the worker's impairment became permanent by March 26, 2000.

Recovery of Overpayment

Decision 2020-03-AD (March 11, 2020, NSWCAT) considered a worker's objection to the board's method of recovering an overpayment. The worker received their monthly benefit twice one month, so the board withheld payment the following month.

The appeal commissioner confirmed that there was a recoverable overpayment. Policy 10.2.2R states that the board's determination that there is an overpayment is appealable and that recovery efforts will cease until a final decision is made.

The appeal commissioner found that the board breached policy 10.2.2R by recovering the overpayment in the face of a likely or pending appeal. The board should have suspended recovery until the appeal was completed. The appeal commissioner found that there was no remedy for the worker other than this finding. The appeal commissioner concluded that the worker was not entitled to restoration of the overpayment so other payment methods could be considered.

Stress

In a preliminary decision issued in April of 2018, the tribunal found that the worker was disabled from gradual onset stress as a result of sexual harassment in the workplace. This disablement would be compensable if such stress was not excluded from compensability under the act.

Decision 2014-706-AD (September 11, 2019, NSWCAT) considered the constitutionality of the exclusion of gradual onset stress (the "stress exclusion") from the definition of accident. The worker argued that the stress exclusion infringed their equality rights under section 15 of the charter based on mental disability.

The appeal commissioner found the stress exclusion discriminatory. He found that the stress exclusion treated workers with gradual onset stress differently than workers with gradual onset physical conditions.

The appeal commissioner looked at evidence from when the stress exclusion was put into the act. He found there were stigmas and stereotypes associated with gradual onset stress. The appeal commissioner found that psychological injuries were not considered as legitimate as physical injuries.

The appeal commissioner rejected the argument that causation of gradual onset stress cannot be proven under the act. The appeal commissioner found that the availability of the court system as an alternative to workers' compensation did not make the exclusion constitutional.

The appeal commissioner found that s.1 of the charter could not save the discriminatory stress exclusion. He found that ensuring only work-related injuries were compensated was a pressing objective.

The appeal commissioner, however, found the total exclusion of gradual onset stress was excessive. He noted that a claimant must prove their case using the same rules which apply to those claiming a physical injury. The appeal commissioner also noted that, for several years, federal employees in Nova Scotia were able to claim gradual onset stress injuries without undue difficulty to the workers' compensation system.

The stress exclusion was not applied, and the worker's disablement recognized in the preliminary decision was found to be compensable.

This decision was not appealed by the board or the attorney general of Nova Scotia.

Willful Misconduct

Decision 2017-409-AD (May 14, 2019, NSWCAT) considered whether a worker's claim should be barred because of serious and willful misconduct. The worker had been riding on the back bumper of a service truck travelling between 40 and 50 kilometres per hour when they began to bounce and fell off.

The appeal commissioner first considered whether there was a compensable injury and found that there was. The appeal commissioner next considered whether there was "serious and willful misconduct." This term is not defined in the act or applicable policy and the appeal commissioner considered policies and cases from other provinces.

The appeal commissioner found that the worker had engaged in horseplay that was "stupid and dangerous." The appeal commissioner accepted that the worker's conduct was impulsive and not the result of a calculated decision-making process. This distinction led to a finding that the conduct was not "serious and willful misconduct" and that the claim should not be barred.

Appeals from Tribunal Decisions

We 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 2019/20, eight appeals were filed with the Court of Appeal:

- seven were worker appeals
- one was brought by an employer

During 2019/20, ten appeals were resolved as follows:

- one appeal was discontinued by the party who filed it
- leave to appeal was denied six times
- one appeal was resolved by consent
- one appeal was dismissed by the court for a failure to follow rules
- one appeal was in part resolved by consent and in part was denied leave

At the beginning of 2019/20, there were eight appeals before the Court of Appeal. At the end of 2019/20, six appeals remained.

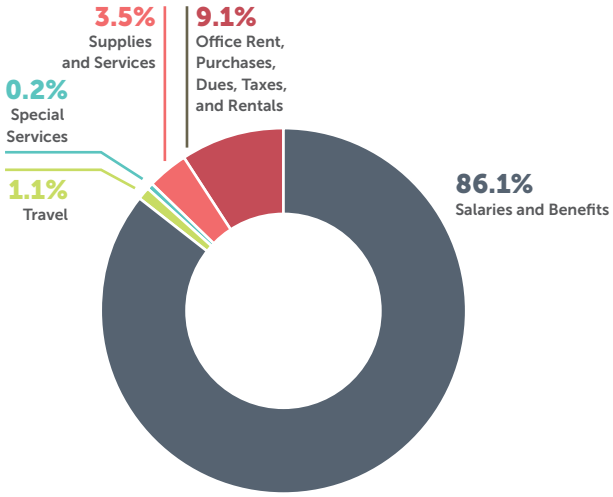
Decisions of the Court of Appeal

There were no decisions with reasons from the Court of Appeal as all appeals were resolved either by leave being denied, dismissal, discontinuance, or consent.

Financial Operations

In 2019/20, our total expenditures were within 90.2 per cent of the original authority and within 92.5 per cent of our revised forecast (see Figure 12). Net expenditures totalled $2,033,518 – an increase from the previous year.

FIGURE 12
Budget Expenditure
(for the Fiscal Year Ending March 31, 2020)



Appendix

FIGURE 1
APPEALS RECEIVED

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	**Total**
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**
Fiscal 2019–20	54	87	62	85	54	23	24	28	53	24	29	40	**563**

FIGURE 2
DECISIONS RENDERED

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	**Total**
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**
Fiscal 2019–20	41	38	43	32	21	45	45	40	32	44	39	22	**442**

FIGURE 3
APPEALS OUTSTANDING AT YEAR END

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
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
Fiscal 2019–20	648	679	690	730	750	716	692	664	683	658	639	650

FIGURE 4
TIMELINESS TO DECISION (CUMULATIVE AGE BY MONTH)

Months	1	2	3	4	5	6	7	8	9	10	11	**>11**
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**
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**

FIGURE 5
DECISIONS BY REPRESENTATION

Self-represented	83
Workers' Advisers Program	274
Injured Worker Groups, Outside Counsel & Others	85

FIGURE 6
DECISIONS BY ISSUE CATEGORIES – WORKER

Recognition of Claim	156
New/Additional Temporary Benefits	52
New/Increased Benefits for Permanent Impairment	118
Medical Aid (Expenses)	49
New/Additional Extended Earnings Replacement Benefits	30
New Evidence	23
Chronic Pain	38
Termination of Benefits for Non-compliance	4
All other issues	44
Total	**514**

FIGURE 7
DECISIONS BY ISSUE CATEGORIES – EMPLOYER

Acceptance of Claim	10
Extent of Benefits	5
Assessment Classification	0
Assessment Penalties	0
Other Claims Issues	0
Other Assessment Issues	0
Total	**15**

FIGURE 8
DECISIONS BY MODE OF HEARING

	Oral Hearings	Written Submissions	**Total**
Fiscal 2016–17	333	143	**476**
Fiscal 2017–18	318	217	**535**
Fiscal 2018–19	319	208	**527**
Fiscal 2019–20	287	155	**442**

FIGURE 9
DECISIONS BY OUTCOME

Allowed	141
Allowed in Part	48
Denied	172
S29	1
RTH	79
Moot	1
Total Final Decisions	**442**
Appeals Withdrawn	126
Total Appeals Resolved	**568**

FIGURE 10
DECISIONS BY APPELLANT TYPE

Worker Claim Appeals*	426
Employer Claim Appeals	15
Employer Assessment Appeals	0
Section 29 Applications	1
Total	**442**

*Employer participation in Worker appeals 25%

FIGURE 11
APPEALS BEFORE THE COURTS AT YEAR END

	Nova Scotia Court of Appeal	Supreme Court of Canada	**Total**
Fiscal 2016–17	11	0	**11**
Fiscal 2017–18	6	0	**6**
Fiscal 2018–19	8	0	**8**
Fiscal 2019–20	6	0	**6**

FIGURE 12
BUDGET EXPENDITURES
(For the Fiscal Year Ending March 31, 2020)

	Authority	Final Forecast	Actual Expenditures
Salaries & Benefits	$1,818,000.00	$1,761,000.00	$1,750,719
Travel	$55,900.00	$55,900.00	$22,642
Special Services	$95,500.00	$59,500.00	$4,609
Supplies & Services	$62,000.00	$84,500.00	$71,466
Office Rent, Purchases, Dues, Taxes, and Rentals	$222,600.00	$238,100.00	$184,082
Sub Total	**$2,254,000.00**	**$2,199,000.00**	**$2,033,518**
Less Recoveries	$0	$0	$0
Totals	**$2,254,000.00**	**$2,199,000.00**	**$2,033,518**