

Workers' Compensation Appeals Tribunal

Annual Report
For the Year Ending March 31, 2021



NOVA SCOTIA



**Nova Scotia
Workers' Compensation Appeals Tribunal**

Randy Delorey
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, 2021.

Respectfully submitted,

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

Sandy MacIntosh
Chief Appeal Commissioner

Tribunal Personnel

Colleen Bennett

Supervisor, Office Services

Mary-Ann Arnold

Clerk

Tricia Chiasson

Clerk/Scheduling Coordinator

Charlene Downey

Secretary/Receptionist

Sandy MacIntosh

Chief Appeal Commissioner

Sharon Pierre Louis

Executive Assistant to the
Chief Appeal Commissioner

Alison Hickey

Glen Johnson

Brent Levy

Andrew MacNeil

Diane Manara (Registrar)

Valerie Paul (Deputy Registrar)

David Pearson

Brian Sharp

Andrea Smillie

Appeal Commissioners

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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 have court-like powers.

This report covers our fiscal year, which runs from April 1, 2020, to March 31, 2021.

Appeal volumes were lower than last year. In 2020/21, workers and employers filed 522 appeals. Appeal commissioners decided 430 appeals and a total of 571 appeals were resolved.

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

Some key initiatives in the past year included

- changing practices to have a safe workplace during the pandemic
- working with the Workers' Advisers Program to resolve many of the oldest appeals
- moving to a new location
- implementing a pilot project to electronically redact files for disclosure in place of paper files

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

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

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

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

The Tribunal's Year in Review

OPERATIONS OVERVIEW

Our appeal volume decreased last year, and decision output decreased slightly. The decrease in decision output resulted from fewer appeals being scheduled by participants.

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

The time to resolve appeals increased this year. One reason for this was a decrease in the number of appeals scheduled by injured worker groups, who typically schedule appeals more quickly than the WAP. Also, print issues at the board slowed file disclosure to injured worker groups and self-represented workers. However, there was an effort by the WAP to resolve older appeals, resulting in a significant drop in the number of older appeals at the tribunal.

Historically, we operated on a readiness model. This means we waited until participants were ready to proceed before setting down appeals. Due to aging appeals, we 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 claim acceptance and entitlement to new or additional temporary benefits. Most appeals proceed by way of oral hearing. Almost all oral hearings were conducted by phone or video during 2020/21.

Interestingly, almost half of appeals were allowed, at least in part. This was an increase from the prior year. The move to fewer in-person hearings did not result in fewer appeals being allowed.

Six of our decisions were appealed to the Court of Appeal. 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.

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

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

We work closely with the WAP to track appeals and avoid delays. The WAP's process for new medical evidence continues to result in a significant number of appeals being resolved without a hearing. This process allows 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, and two senior board representatives.

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

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

Financial Operations

In 2020/21, our total expenditures were within 77 per cent of the original authority and final forecast. Net expenditures totalled \$1,971,958, a decrease 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. We also determine whether the Workers' Compensation Act (the act) bars a right of action against employers. We are legally and administratively separate from the board, which ensures an independent and impartial review of board decisions.

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

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

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

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

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

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

4. Board as IT sharer

The board shares claim files with the tribunal by giving us access to Guidewire, its new claims management system.

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 (IRWG).

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.



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 strive 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 often take longer to schedule. Disputes between participants concerning disclosure can slow the setting down of appeals for hearing.

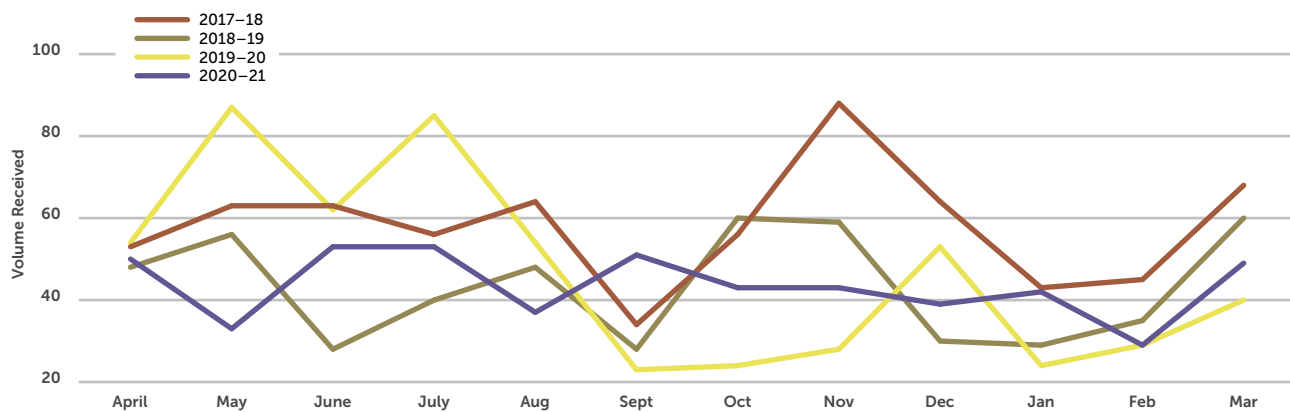
Operations

Our appeal volume decreased from last year. We received 522 appeals in 2020/21, compared to 563 in the previous year (see Figure 1).

Appeals were predominantly filed by workers (96 per cent). We resolved a total of 571 appeals this fiscal year, compared with 568 the previous year.

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

FIGURE 1
Appeals Received



Our decision output decreased this year from 442 to 430 (see Figure 2). The decrease in decision output was primarily due to participants setting down fewer appeals. At year-end, 603 appeals remained to be resolved, compared to 650 last year (see Figure 3).

There are 61 appeals that have been with us for over two years, which is a decrease of 39 compared to the end of the last fiscal year. Of those, 55 are represented by the WAP and 36 of those involve an employer. This is by far the lowest number of old appeals at the tribunal in many years. This decrease primarily resulted from the WAP giving priority to setting down its oldest appeals.

FIGURE 2
Decisions Rendered

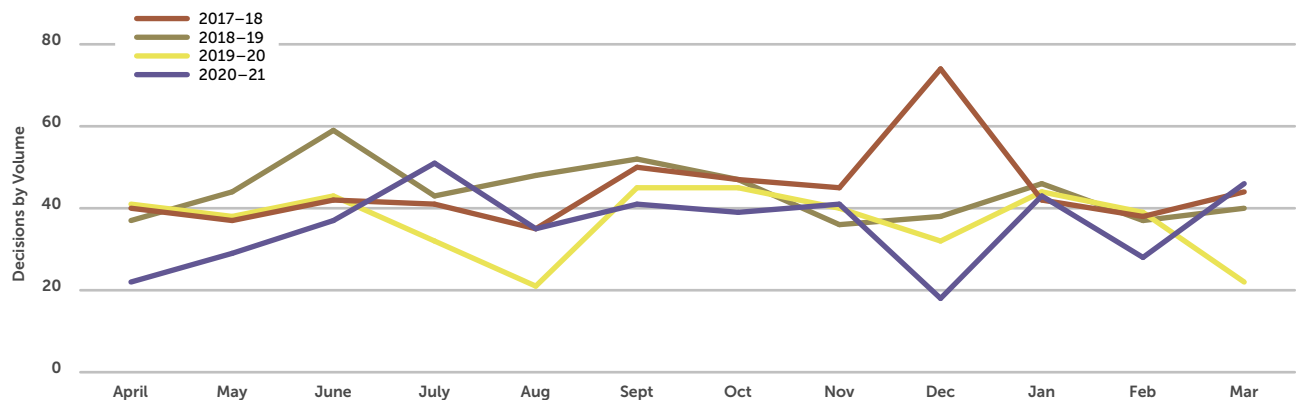
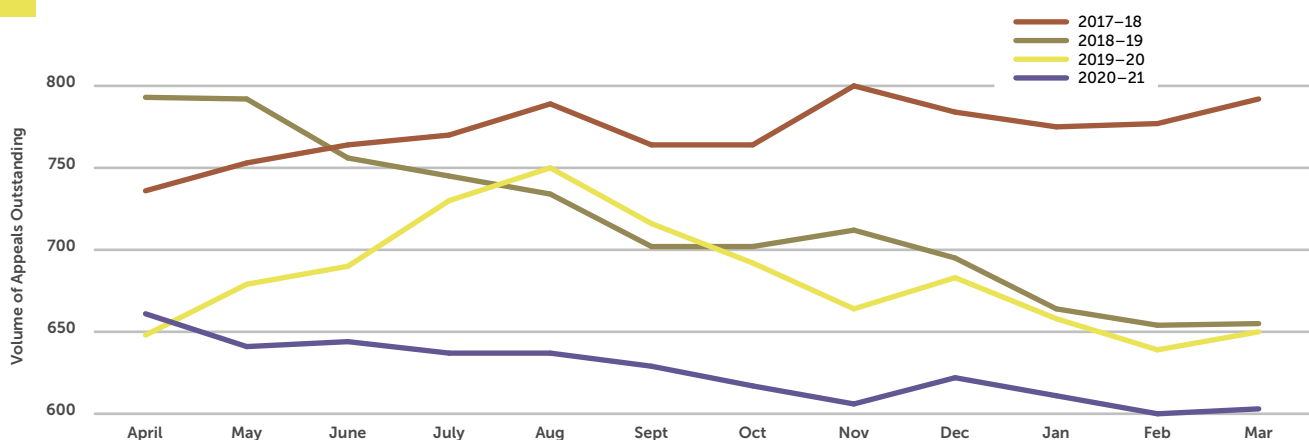


FIGURE 3
Appeals Outstanding at Year End

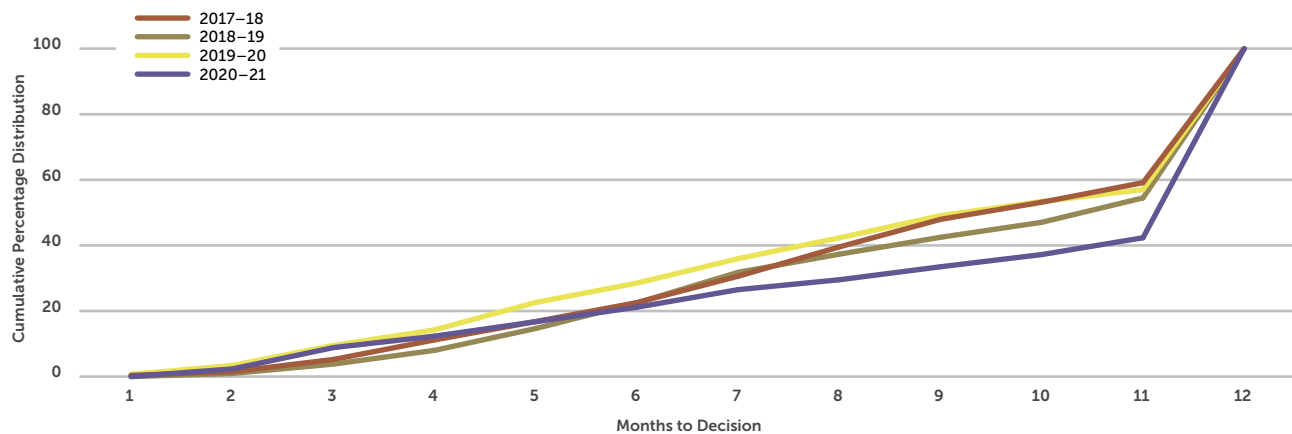


The oldest appeals remaining at the tribunal are ones that raise a charter challenge to the exclusion of gradual onset stress from being an acceptable claim. The tribunal has held gradual onset stress appeals in abeyance pending a leading case to address the legality of the stress exclusion. The leading case found that the stress exclusion was unlawful. However, the board did not appeal that decision, yet continues to view the stress exclusion as lawful. The failure of the board to either appeal or accept the decision is resulting in significant delay for the workers with gradual onset stress appeals. A new leading case is going forward at the tribunal.

We must strike a 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 21 per cent of decisions were released within six months of the date the appeal was received. Approximately 33 per cent of decisions were released within nine months of the date the appeal was received. About 58 per cent of appeals took more than eleven months to resolve, which was 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 430 decisions issued this past year, 72 per cent of workers were represented by the WAP, which is an increase from the prior year when it was 62 per cent.

Employers participated in 28 per cent of resolved appeals, an increase from last year. Some unrepresented employers had assistance from the Office of the Employer Advisor to prepare for an appeal. Our staff call unrepresented workers and employers to provide them with information on appeal processes.

During 2020/21, the issues most appealed to us by workers were recognition of a claim (23 per cent) and new/additional temporary benefits (20 per cent). Employers most often appealed acceptance of claim decisions or the extent of benefits (see Figures 6 and 7).

We heard approximately 63 per cent of appeals by way of oral hearing, a decrease from last year's total of approximately 65 per cent (see Figure 8). Almost all oral hearings were conducted by telephone or video hearing due to the pandemic.

Slightly more hearing officer decisions were overturned and there were fewer referrals back to hearing officers for additional adjudication. The overturn rate (appeals allowed or allowed in part) increased to 48 per cent compared to 43 per cent the previous year (see Figure 9).

The number of appeals returned to hearing officers for reconsideration decreased to 15.4 per cent from 17.9 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 36 per cent from 39 per cent the previous year.

FIGURE 5
Decisions by Representation

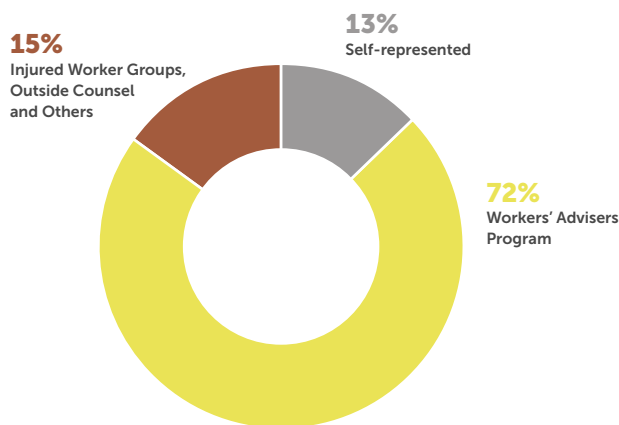


FIGURE 6
Decisions by Issue Categories – Worker

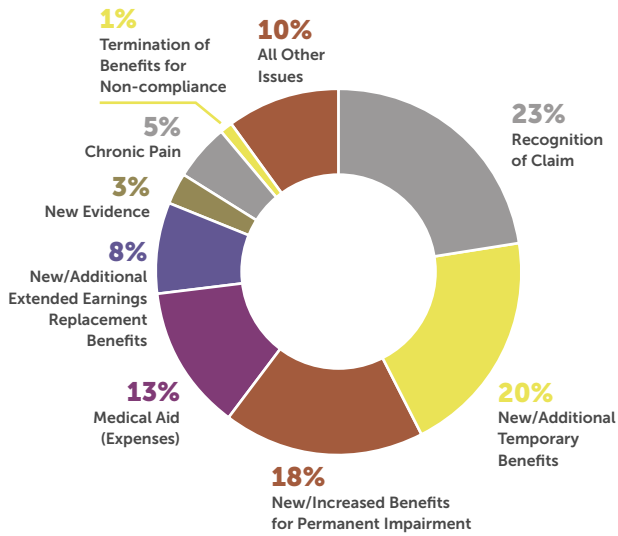


FIGURE 7
Decisions by Issue Categories – Employer

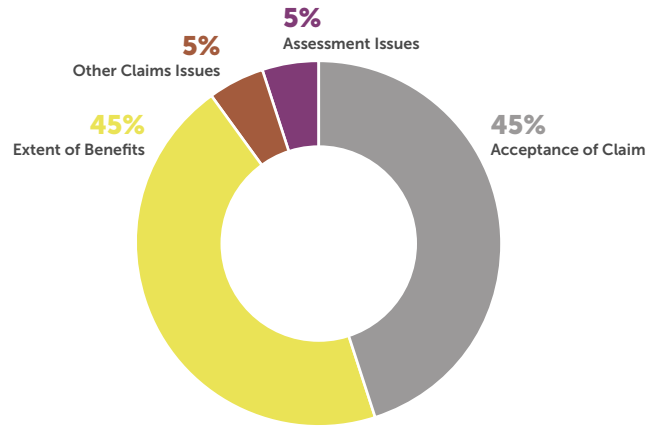


FIGURE 8
Decisions by Mode of Hearing

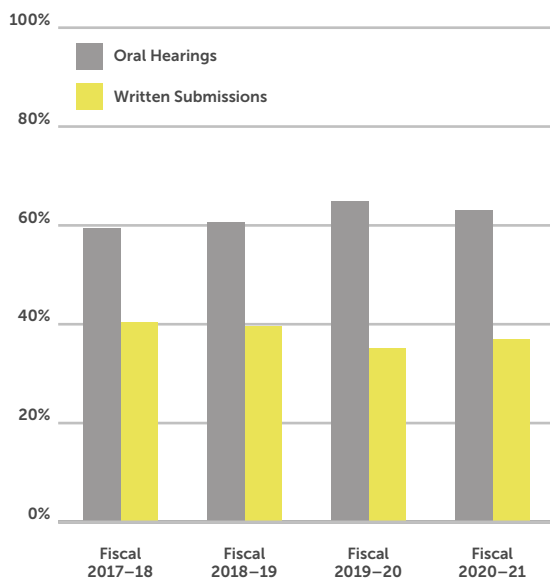
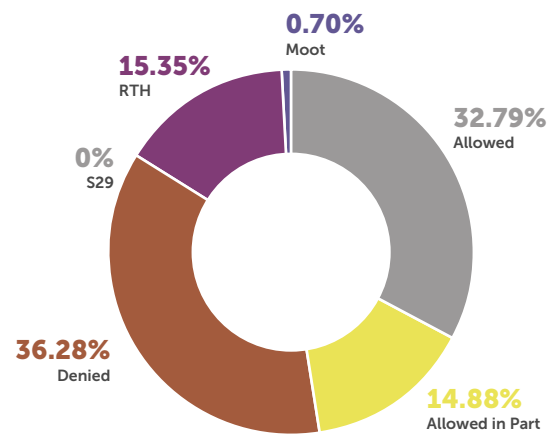


FIGURE 9
Decisions by Outcome



Ninety-six per cent of decisions resulted from worker appeals (see Figure 10). We resolved 141 appeals without the need for a hearing, an increase from last year's total of 126. 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 six appeals to the Court of Appeal during 2020/21; 1.4 per cent of decisions were appealed, a decrease from the previous year. At year-end, three appeals remained at the Court of Appeal (see Figure 11).

Appeal commissioners continue to produce well-reasoned decisions in the face of complex issues, high volumes of evidence, and the pandemic.

FIGURE 10
Decisions by Appellant Type

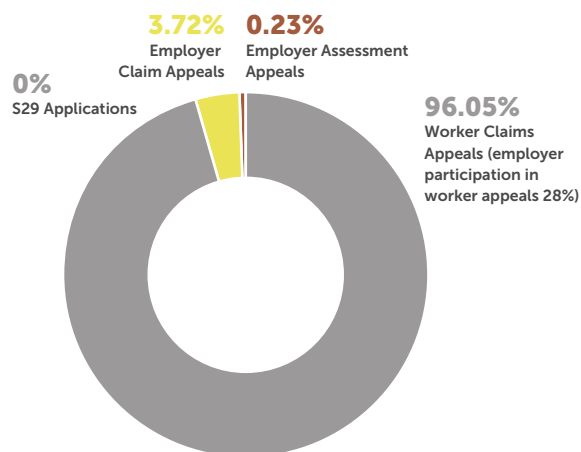
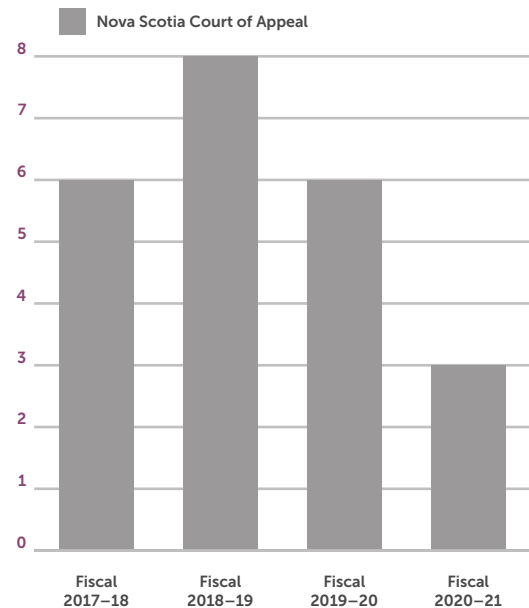


FIGURE 11
Appeals before the Courts at Year End





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


Our registrar did a great job helping many participants and representatives test using video to prepare them to take part in hearings this year.

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

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

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

In early 2020, the tribunal began making changes. We continue with the readiness model for the first year of an appeal. After that time, the tribunal will be less likely to grant oral hearings and older appeals may be set down even if the participants wish more time.



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

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

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

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



Freedom of Information and Protection of Privacy

We rarely receive Freedom of Information and Protection of Privacy (FOIPOP) applications. There was one application in 2020/21. It was not related to an appeal.

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).

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.

Decisions prior to January 2010 were briefly published on CanLII in May of 2020 before it was discovered that they contained identifying information. They were immediately removed, and the tribunal followed the Province of Nova Scotia's privacy breach protocol to address the breach.

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. This included documenting our privacy procedures.



Internal Developments

In-person hearings were infrequent, with oral hearings being conducted by telephone or video due to the pandemic. Appeal commissioners worked primarily from home.

The tribunal moved to a new office this year. Our supervisor of office services led the office move project, which went smoothly without disruption to appeal participants.

The tribunal conducted a workplace safety audit considering the pandemic and created a series of protocols to ensure a safe work environment.

The tribunal conducted a pilot project to electronically vet and transmit claim files for disclosure to employers. The pilot went well, and we hope to expand the use of electronically vetted files.

Leanne Rodwell Hayes, a long-time appeal commissioner, who was also our first registrar, retired at the end of 2020.



Noteworthy Decisions

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

Assessment

Decision 2019-533-AD (May 4, 2020, NSWCAT) considered the board's reclassification of a firm in 2015/16, which resulted in a considerably lower assessment rate effective as of January 1, 2014. The firm wanted the refund of premiums previously paid backdated as far as possible.

The appeal commissioner found that section 190 of the act, involving the extension of time limits, allowed for the one-year limitation on refunds to be extended. The appeal commissioner determined that the refund should be backdated to January 1, 2012.

Calculating Loss of Earnings

Decision 2018-109-AD-RTH (June 17, 2020, NSWCAT) considered, in part, the adequacy of a worker's long-term rate. The worker, an apprenticed tradesperson, was injured and the board accepted that he was a "learner" and deemed his earnings to be those of an entry-level person in his trade.

The appeal commissioner considered similar provisions concerning learners in other provinces. The appeal commissioner concluded that the board should not have used the wages of an entry-level

tradesperson and should, instead, have used the wages of a fully qualified tradesperson. The board was directed to recalculate the worker's earnings.

Decision 2019-480-AD (June 24, 2020, NSWCAT) considered the calculation of a worker's long-term rate. The board had advised the worker that employment insurance (EI) benefits were only taken into consideration for seasonal workers for whom EI benefits were part of a regular earnings pattern.

The appeal commissioner found that this was a misstatement of the law because the applicable policy does not restrict when EI benefits are included as part of a worker's earnings. The appeal commissioner directed the board to recalculate the worker's long-term rate taking into consideration the EI benefits paid.

Decision 2019-355-AD and 2019-486-AD (January 19, 2021, NSWCAT) considered, in part, whether a worker's vacation pay should have been included in the calculation of the initial rate. The worker's vacation pay was shown on pay stubs, but he could choose whether to have it paid out every pay period or held by the employer. The board excluded the vacation pay because the worker opted to receive it every six months.

The appeal commissioner noted that the applicable policy includes vacation pay and that the timing of payment did not alter its characterization as active employment remuneration. The appeal commissioner concluded that the vacation pay should have been considered when determining the initial rate.

Decision 2020-438-AD (March 9, 2021, NSWCAT) considered whether a worker was a “learner.” The worker was employed in one occupation but had undertaken considerable studies and training for another occupation he intended to pursue. The worker’s representative sought benefits based on the earnings of a fully qualified person in the alternate occupation.

The appeal commissioner rejected this argument and found that a worker needs to be employed in, and exposed to, the risks of the industry in which they are being trained.

The worker was not injured in the occupation he was training for, so he was not a learner and was not entitled to benefits based on the earnings of the prospective occupation.

Earnings-replacement Benefits

Decision 2019-221-AD (November 27, 2020, NSWCAT) considered whether a worker was entitled to earnings-replacement benefits during scheduled vacation. The worker argued that she struggled to work before and after her vacation and that her vacation was marred by symptoms of post-traumatic stress disorder (PTSD).

The worker remained at work following the injury until her scheduled vacation began and returned to work after her vacation. There was no evidence that the worker had been required to take the time off and the appeal commissioner concluded that the worker did not have an earnings loss.

Evidentiary Record

Decision 2020-191-AD (August 27, 2020, NSWCAT) considered a worker’s argument that he was never compensated for the initial permanent impairment award in 1982 because he had returned the cheque and challenged the award. Other than documents in the claim file, the board’s historic records were destroyed according to its document retention policies.

The appeal commissioner considered section 23(3) of the Evidence Act concerning business records. This section states that where a record of something would usually be made, the absence of a record can be taken as proof that an event or act did not occur.

The appeal commissioner noted that the claim file documented other instances when cheques were returned and concluded that the absence of evidence that the 1982 cheque was returned was evidence that it was not returned. The appeal commissioner considered the worker’s evidence speculative and insufficient to conclude that the payment was not made in the usual course.

Hearing Loss

Decision 2019-555-AD (June 25, 2020, NSWCAT) considered the board’s determination that a worker exposed to hazardous levels of occupational noise did not have a pattern of hearing loss consistent with occupational noise-induced hearing loss. The appeal commissioner placed no weight on a screening audiogram and noted that a history of noise exposure is insufficient by itself to support a claim.

The appeal commissioner found that the pattern of hearing loss was inconsistent with many features of a noise-induced hearing loss and was more consistent with age-related hearing loss or other non-occupational causes.

Decision 2020-127-AD (January 15, 2021, NSWCAT) and *Decision 2020-224-AD (January 21, 2021, NSWCAT)* were distinct appeals that involved additional medical opinion evidence concerning the workers' hearing loss. The tribunal has long accepted that hearing loss does not progress after a worker's removal from the hazardous noise. An audiologist cited research, and additional language in the 2018 American College of Occupational and Environmental Medicine (ACOEM) guidance statement, which suggests that there may be delayed effects on hearing after removal from the noise source.

The appeal commissioner found that the 2018 ACOEM guidance statement maintained the consensus view that the effects of noise do not cause a deterioration in hearing loss after the noise exposure ends. The appeal commissioner concluded that the additional language about delayed effects reflected early research and was insufficient to vary from the long-accepted position.

New Evidence

Decision 2019-290-PAD (August 31, 2020, NSWCAT) considered a hearing officer's determination that there was new evidence but that it did not warrant reconsideration of a final decision of the board. The board decision maker had considered the opinion of a board medical advisor.

As a preliminary issue, the worker's representative objected to the board's consideration of the board medical advisor's opinion without applying the new evidence policy to it. The representative argued that the board medical advisor's opinion was not "derivative evidence" and should not form part of the evidence when weighing new evidence in the second stage of a new evidence reconsideration.

The appeal commissioner rejected this argument. The appeal commissioner found that the new evidence policy states that new evidence comes from workers or employers but not the board. The appeal commissioner concluded that a board medical advisor's opinion is not subject to analysis under the new evidence policy and simply forms part of the body of evidence against which new evidence should be applied.

Decision 2020-84-AD (September 29, 2020, NSWCAT) considered a hearing officer's decision accepting that additional evidence obtained warranted reconsideration of the prior decision accepting the worker's claim. The hearing officer accepted that the additional evidence warranted overturning acceptance of the claim.

The appeal commissioner rejected that the additional evidence satisfied the test for new evidence because it was not provided by the employer or worker, as contemplated by the new evidence policy. As a result of this determination, recognition of the claim was reinstituted.

Decision 2020-198-AD (October 26, 2020, NSWCAT) dealt with a new evidence reconsideration and whether a medical-legal report prepared by a new examining physician, and first filed with the tribunal, could be considered "derivative evidence." The appeal commissioner noted there was a breadth of opinions at the tribunal concerning the scope of derivative evidence.

The appeal commissioner accepted that the new report was derivative evidence because it tended to prove or disprove the case to be made with the new evidence. The appeal commissioner concluded that there was sufficient evidence to recognize that the worker's shoulder problems related to an earlier compensable shoulder injury.

Medical Aid

Decision 2020-90-AD (November 30, 2020, NSWCAT) considered a worker's request for cannabis and cannabidiol (CBD) oil. Provision of these products was endorsed by the treating physicians and psychiatrist. The appeal commissioner noted that forms of medical aid may meet the tests of necessity and expediency for a worker but still fail to meet the broader safety and policy concerns required by board policy.

The appeal commissioner reviewed the tribunal's application of the board's medical cannabis guidelines and accepted that they are a useful tool to adjudicate requests for cannabis. The appeal commissioner concluded that the worker did not satisfy the criteria set out in the guidelines, particularly the absence of refractory neuropathic pain, and denied the appeal.

Decision 2020-102-AD (February 22, 2021, NSWCAT) considered whether a worker was entitled to full reimbursement for hearing aids purchased in 2008 and 2016. The worker filed a claim in 2016 that was accepted as of May 2005. The board has a schedule of fees payable for hearing aids, one category of which is "special consideration" for which there is no limit on reimbursement.

The appeal commissioner found that the worker did not have an approved claim when the hearing aids were purchased because the board failed to adjudicate it in a timely fashion. The appeal commissioner considered this exceptional and found that the worker was entitled to full reimbursement for the hearing aids purchased in 2008 and 2016.

Misrepresentation

Decision 2019-340-AD and 2020-29-AD (March 1, 2021, NSWCAT) considered whether a report, surveillance videos, and photographs assembled by the board's special investigations unit supported that the worker breached his obligations as an injured worker and misrepresented his functional abilities.

The worker's representative argued that the special investigation report was not credible and was not an objective record of the investigator's observations. The representative characterized the report as a piece of advocacy intended to cast the worker in an unfavourable light.

The appeal commissioner stated that any lack of objectivity related to the investigator's comments. The videos and photographs were objective evidence. The appeal commissioner accepted that the report was a reliable account of the worker's behaviour based on the objective evidence.

The appeal commissioner concluded that the worker misrepresented his functional abilities in a way that overstated his earnings loss and that there was a recoverable overpayment.

Permanent Impairment Ratings

Decision 2018-452-AD (April 28, 2020, NSWCAT) considered the appropriateness of a permanent medical-impairment rating awarded for a compensable methicillin-resistant staphylococcus aureus (MRSA) infection. A judgment rating was applied solely considering the applicable guidelines concerning skin impairments.

The appeal commissioner found that the board medical advisor's opinion did not contain sufficient details to determine whether he considered all aspects of MRSA. The appeal commissioner concluded that there was no rational connection between the advisor's opinion and the evidence and applicable rules.

The appeal commissioner concluded that the worker should be in a higher class of impairment but left this determination to the board. The appeal commissioner directed the board to consider other conditions such as pruritus, hearing loss, disfigurement, and chronic pain as part of its reassessment.

Procedural Matters

Decision 2019-522-PAD (April 29, 2020, NSWCAT) considered an employer's request that the tribunal clarify whether it could consider recognition of a claim on its merits or only through a "new evidence" analysis. The claim had a complex and lengthy procedural history.

A hearing officer's decision recognized the claim, and the employer appealed this decision to the tribunal. While this appeal was ongoing, the employer filed additional evidence with the board, which led the board to overturn recognition of the claim. The worker appealed this decision, and the employer withdrew its appeal to the tribunal.

The board subsequently decided that the decision to overturn recognition was erroneous and that a new evidence analysis should have been used. The resulting series of decisions, which reinstated recognition of the claim, led to the appeal before the tribunal.

The appeal commissioner rejected the worker's argument that the employer's withdrawal of the appeal of the initial hearing officer's decision converted it into a final decision. The appeal commissioner noted that multiple proceedings should be avoided and that the board had the discretion to revisit recognition of the claim without requiring new evidence while the decision was under appeal. The appeal commissioner found that the initial recognition of the claim was before the tribunal on its merits.

Decision 2020-06-AD (May 29, 2020, NSWCAT) considered the board's authority when the tribunal makes a section 251 referral. The tribunal referred questions concerning the worker's permanent impairment rating for further consideration under section 251 of the act. The board's internal appeals department referred the tribunal's decision to its case management level for further adjudication. The worker's representative appealed this determination.

The representative accepted that the case management level of the board can be directed to conduct investigations but submitted that decision-making authority is reserved for the hearing officer. The representative's position was that section 251 does not give the board the authority to send appeals to the case management level. This argument was rejected. The appeal commissioner affirmed the board's authority to send a section 251 reconsideration decision to a case manager for further adjudication.

Recovery of Overpayment

Decision 2019-384-AD (August 10, 2020, NSWCAT) considered whether there was a recoverable overpayment of earnings-replacement benefits for approximately four months. The worker had received sick pay from the employer and earnings-replacement benefits from the board.

The appeal commissioner found that the overpayment was due to the board's failure to follow its normal procedure when workers have sick pay benefits that are used to top up earnings-replacement benefits. The appeal commissioner followed a prior Court of Appeal decision and found that the worker earned the sick pay benefits before the loss of earnings occurred and were not earnings. The appeal commissioner concluded that there was not an overpayment.

Special Protection Coverage

Decision 2019-576-AD (August 31, 2020, NSWCAT) considered whether an individual who purchased special protection coverage for many years was entitled to earnings-replacement benefits after an injury. The individual received a monthly draw from the business and his accountant indicated that at the end of the year a determination was made as to how much was interest, dividends, or a drawdown of a loan.

The worker's representative submitted that at least a portion of the monthly draw, subsequently declared as dividends, had characteristics of a regular salary. The appeal commissioner concluded that the determination of dividends at year-end was not consistent with regular salary or wages/normal weekly earnings.

Stress

Decision 2019-402-AD (May 27, 2020, NSWCAT) considered an employer's appeal of a finding that a worker's PTSD was compensable. The hearing officer found that the legislative presumption for front-line emergency response workers applied and was not rebutted.

The employer's position was that the PTSD was due to non-compensable stressors, including a motor vehicle accident and a criminal conviction leading to incarceration and the loss of employment. The appeal commissioner found that the worker was entitled to the presumption and relied on specialist opinion evidence to find that the presumption was not rebutted.



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 2020/21, six appeals were filed with the Court of Appeal:

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

During 2020/21, nine appeals were resolved as follows:

- two appeals were discontinued by the party who filed them
- leave to appeal was denied four times
- three appeals were dismissed by the court as the person bringing the appeal did not follow court rules after filing their appeal

At the beginning of 2020/21, there were six appeals before the Court of Appeal. At the end of 2020/21, three appeals remained.

Decisions of the Court of Appeal

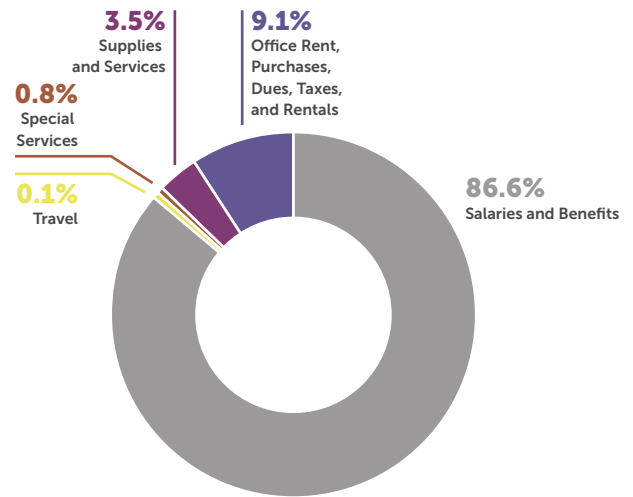
There were no court decisions discussing the merits of the appeal as all appeals were resolved either by leave being denied, dismissal, or discontinuance.

Financial Operations

In 2020/21, our total expenditures were within 77 per cent of the original authority and final forecast (see Figure 12). Net expenditures totalled \$1,971,958, a decrease from the previous year.

FIGURE 12
Budget Expenditure

(for the Fiscal Year Ending March 31, 2021)



Appendix

FIGURE 1
APPEALS RECEIVED

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
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
Fiscal 2020–21	50	33	53	53	37	51	43	43	39	42	29	49	522

FIGURE 2
DECISIONS RENDERED

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
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
Fiscal 2020–21	22	29	37	51	35	41	39	41	18	43	28	46	430

FIGURE 3
APPEALS OUTSTANDING AT YEAR END

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
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
Fiscal 2020–21	661	641	644	637	637	629	617	606	622	611	600	603

FIGURE 4
TIMELINESS TO DECISION (CUMULATIVE AGE BY MONTH)

Months	1	2	3	4	5	6	7	8	9	10	11	>11
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
Fiscal 2020–21	0.00	2.33	8.84	12.33	16.74	21.16	26.51	29.53	33.49	37.21	42.33	100

FIGURE 5
DECISIONS BY REPRESENTATION

Self-represented	58
Workers' Advisers Program	309
Injured Worker Groups, Outside Counsel & Others	63
Total	430

FIGURE 6
DECISIONS BY ISSUE CATEGORIES – WORKER

Recognition of Claim	119
New/Additional Temporary Benefits	99
New/Increased Benefits for Permanent Impairment	91
Medical Aid (Expenses)	68
New/Additional Extended Earnings Replacement Benefits	42
New Evidence	17
Chronic Pain	24
Termination of Benefits for Non-compliance	0
All other issues	48
Total	508

FIGURE 7
DECISIONS BY ISSUE CATEGORIES – EMPLOYER

Acceptance of Claim	9
Extent of Benefits	9
Other Claims Issues	1
Assessment Issues	1
Total	20

FIGURE 8
DECISIONS BY MODE OF HEARING

	Oral Hearings	Written Submissions	Total
Fiscal 2017–18	318	217	535
Fiscal 2018–19	319	208	527
Fiscal 2019–20	287	155	442
Fiscal 2020–21	271	159	430

FIGURE 9
DECISIONS BY OUTCOME

Allowed	141
Allowed in Part	64
Denied	156
S29	0
RTH	66
Moot	3
Total Final Decisions	430
Appeals Withdrawn	141
Total Appeals Resolved	571

FIGURE 10
DECISIONS BY APPELLANT TYPE

Worker Claim Appeals*	413
Employer Claim Appeals	16
Employer Assessment Appeals	1
Section 29 Applications	0
Total	430

*Employer participation in worker appeals 28%

FIGURE 11
APPEALS BEFORE THE COURTS AT YEAR END

	Nova Scotia Court of Appeal	Supreme Court of Canada	Total
Fiscal 2017–18	6	0	6
Fiscal 2018–19	8	0	8
Fiscal 2019–20	6	0	6
Fiscal 2020–21	3	0	3

FIGURE 12
BUDGET EXPENDITURES

(For the Fiscal Year Ending March 31, 2021)

	Authority	Final Forecast	Actual Expenditures
Salaries & Benefits	\$1,911,000	\$1,755,000	\$1,707,994
Travel	\$55,900	\$55,900	\$1,477
Special Services	\$305,500	\$310,500	\$14,876
Supplies & Services	\$62,000	\$69,000	\$68,915
Office Rent, Purchases, Dues, Taxes, and Rentals	\$234,600	\$378,600	\$178,696
Sub Total	\$2,569,000	\$2,569,000	\$1,971,958
Less Recoveries	\$0	\$0	\$0
Totals	\$2,569,000	\$2,569,000	\$1,971,958

