

# **Workplace Health, Safety and Compensation Review Division**

Annual Performance  
Report 2020 - 21

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# Message from the Chief Review Commissioner

In accordance with the reporting requirements of the **Transparency and Accountability Act** for a Category 3 entity and the **Workplace Health, Safety and Compensation Act** (the **Act**), I am pleased to present the Workplace Health, Safety and Compensation Review Division's (WHSCRD) Annual Performance Report for 2020-21. As Chief Review Commissioner of the WHSCRD, I am responsible for the preparation of this report and accountable for the results contained within.

This fiscal year saw the retirement of the former Chief Review Commissioner, Marlene Hickey, at the end of December. I would like to take this opportunity to thank Ms. Hickey for her significant contributions to WHSCRD and for her unwavering commitment to ensuring the spirit and intent of the **Workplace Health, Safety and Compensation Act** was always reflected in every WHSCRD decision.

There were challenges associated with the COVID-19 pandemic as the public health restrictions continued this past year. However, our doors stayed open throughout all levels of the pandemic and we were able to offer our clients continued quality service. I would like to thank the staff of WHSCRD for their exemplary professionalism and commitment to the delivery of services to injured workers and employers throughout these unprecedented times.

The 2020-21 fiscal year also marked the beginning of WHSCRD's 2020-23 planning cycle. This new planning cycle will find WHSCRD building upon its work to enhance client service through increased electronic content and digitization of administrative workflows.

WHSCRD strives to provide both a responsive appeal process which upholds the principles of natural justice and exceptional client service and we continue to look for ways to improve both. We look forward to working with you in 2021-22 as we evolve to meet the ever-changing landscape in which we work.



**Suzanne Hollett**

Chief Review Commissioner, Acting

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# Overview

## Introduction

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

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

Additional information on WHSCRD's mandate and lines of business can be found on its website at <http://www.gov.nl.ca>.

## Financial Information

Funding for the operations of WHSCRD is recovered from the Injury Fund of WorkplaceNL pursuant to Section 25 of the **Workplace Health, Safety and Compensation Act**. In the 2020-21 fiscal year, WHSCRD's budgetary allocations were administered by the Financial and General Operations Division under the Minister responsible for WorkplaceNL. Unaudited expenditures for WHSCRD in 2020-21 were \$1,217,882 as provided by the Department of Finance. Please refer to page 21 for more detailed financial information.

## Review Commissioners

WHSCRD has a Chief Review Commissioner and a Panel of Review Commissioners. Up to seven Review Commissioners, including the Chief Review Commissioner, may be appointed to WHSCRD. Review Commissioners historically conduct hearings in St. John's, Gander, Grand Falls-Windsor, Corner Brook, Happy Valley-Goose Bay, and Labrador City. Since the onset of the worldwide COVID-19 pandemic in March 2020, WHSCRD has been conducting all of its hearings via teleconference and videoconference.

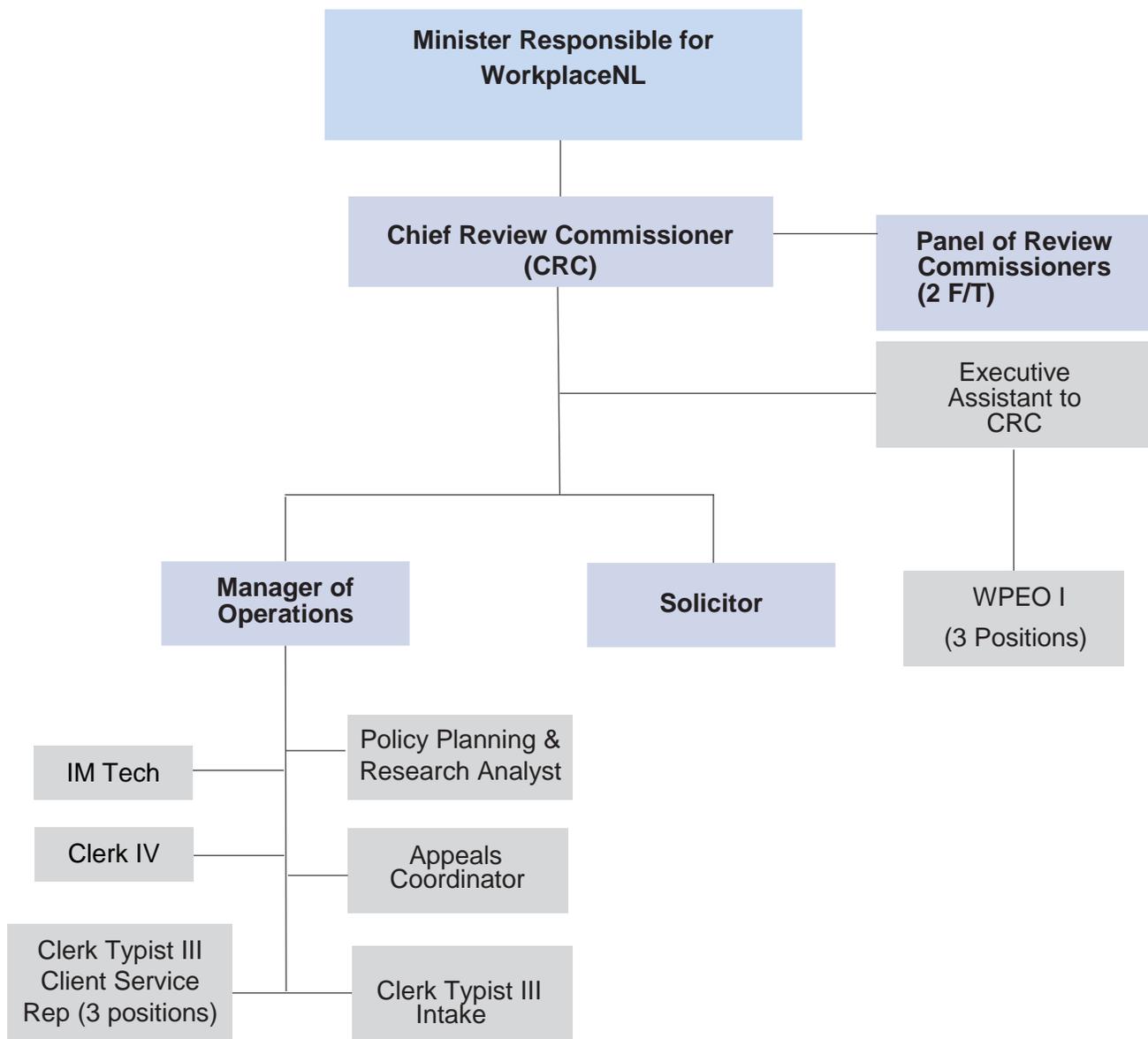
As of March 31, 2021, WHSCRD's Panel of Review Commissioners consisted of a Chief Review Commissioner and two full-time Review Commissioners. Recruitment for an additional full-time Review Commissioner also began this fiscal year and is anticipated to be completed in fiscal 2021-22. Please refer to page 22 for current Review Commissioner biographies.

## Overview continued

### WHSCRD Staff

WHSCRD currently employs 17 staff (14 female and 3 male) in its office located in the Dorset Building, at 6 Mount Carson Avenue in Mount Pearl, NL.

### Organizational Chart



## Highlights and Partnerships

### Videoconference Hearings

The onset of the COVID-19 pandemic demanded a timely and effective response from WHSCRD in order to continue the provision of hearings to workers, their dependents, and the employers of Newfoundland and Labrador while mitigating the health risks associated with the pandemic.

WHSCRD has historically provided in-person hearings in seven different locations across the province, as well as hearings by teleconference. In March 2020, public health directives related to the pandemic included the suspension of all in-person hearings leaving teleconference as the only available hearing type. While this allowed WHSCRD to continue to provide hearings, the ability to provide applicants with live, face-to-face hearing communications became a priority.

With the assistance of the Office of the Chief Information Officer, exploration into videoconference technology began and by August 2020 WHSCRD was able to offer a videoconference hearing option to all applicants, their representatives, and responding parties, enabling WHSCRD to maintain its service levels. While the majority of WHSCRD's applicants in 2020-21 chose to participate in their hearing by teleconference, the choice to participate by videoconference is continually rising.

Videoconference hearings have allowed WHSCRD to provide a high quality, virtual in-person hearing experience to those applicants who prefer a visual component to their hearing communications. This achievement aligns with WHSCRD's vision to create an environment where workers and employers participate in an independent, timely, and fair review process anchored in a culture of exceptional client service.

### Staffing and the Office of Employment Equity for Persons with Disabilities (OEEPD)

WHSCRD continued its partnership with the OEEPD in the 2020-21 fiscal year, by filling a position to assist with WHSCRD's administrative duties. Our partnership advances the work of WHSCRD and meets the OEEPD's goal to assist persons with disabilities attain employment in provincial government departments. The individual's time and work with WHSCRD was very successful and they have since moved on to a new full-time position within the Government of Newfoundland Labrador.

## Report on Performance

In this first year of the 2020-23 planning cycle, WHSCRD's commitment to the issue of enhancing client service through increased electronic content and digitization of administrative workflow began with the following objective and results:

### **Issue 1: Enhance client service through increased electronic content and digitization of administrative workflows.**

WHSCRD's reporting in this first year of the 2020-23 planning cycle focuses on the beginning of its efforts to meet its objective to digitize active intake and case management workflows using the Hewlett Packard Enterprise Records Manager (HPRM), and its progress in exploring client specific forms and applications for potential electronic submission.

WHSCRD successfully transitioned to the digitization of active case files during the intake process in the 2020-21 fiscal year. All of WHSCRD's 145 new case files in this year were digitized upon receipt and continued to move through administrative processes digitally, instead of by paper.

This move immediately added an efficiency to WHSCRD administrative processes and its responses to client inquiries, as client file contents are now available to staff at the press of a button when clients require information. The move from storing file information in paper files to digital also aligns with information management best practices in storing and accessing personal and sensitive client information.

In addition to the 145 active case files digitized into HPRM, WHSCRD was able to move a combination of active and legacy files between the years 2014 and 2020 to HPRM as per WHSCRD's Record Retention and Disposal Schedule.

Unfortunately, due to the onset of a second wave of the COVID-19 pandemic this fiscal year, planned staff training sessions in HPRM workflow were postponed and reporting on indicators dependent upon this training will be addressed in WHSCRD's 2021-22 fiscal report.

## Report on Performance continued

Work completed in meeting WHSCRD's 2020-21 objective is outlined in the following section.

### Objective Results for 2020-21

Objective: By March 31, 2021 WHSCRD will have begun to digitize its active intake and case management workflows through the Hewlett Packard Enterprise Records Manager (HPRM) system, and explored client-specific forms and applications for potential electronic submission.

Indicators	Progress and Accomplishments
Digitized active administrative/intake forms, applications, and case file documents into HPRM.	<ul style="list-style-type: none"> <li>• Held meetings between WHSCRD management and administrative/intake staff to detail the digitization strategy for active cases.</li> <li>• Purchased desktop scanners for high volume users to digitize active administrative/intake case file documents into HPRM as applications were filed beginning in early 2020-21 fiscal year.</li> <li>• Conducted data quality audits on the digitization of active cases and addressed issues arising from the new process.</li> </ul>
Reported on number of digitized intake files in HPRM.	<ul style="list-style-type: none"> <li>• Conducted a fiscal 2020-21 year end count of digitized cases in HPRM.</li> <li>• Confirmed all 145 new cases filed in the 2020-21 fiscal year have been digitized in HPRM.</li> <li>• Confirmed all case files from the years 2014 to 2020 have also been digitized and stored in HPRM as per WHSCRD's Record Retention and Disposal Schedule.</li> </ul>
Developed testing for active case management workflow in development environment.	<ul style="list-style-type: none"> <li>• Met with managerial, administrative/intake, and policy/information management staff to begin mapping of existing and new workflow processes.</li> <li>• Initiated discussions with the Office of the Chief Information Officer (OCIO) on moving forward with workflow development.</li> <li>• Registered staff for HPRM workflow training between February and March 2021; however, due to the resurgence of COVID-19 cases in February, training was postponed.</li> <li>• HPRM Administrator participated in a one-on-one refresher for HPRM workflow through the OCIO.</li> <li>• Due to the delays in HPRM workflow training, a workflow testing environment in HPRM could not be established and will move to fiscal 2021-22.</li> </ul>

## Report on Performance continued

Indicators continued	Progress and Accomplishments continued
Conducted audits in development environment on digitization of workflow processes.	<ul style="list-style-type: none"> <li>• Due to the delays in HPRM workflow training, noted in the previous indicator, workflow process testing in the HPRM development environment are not complete and audits of same will move to fiscal 2021-22.</li> </ul>
Identified issues (if any) and implemented changes in development environment of digitization of active workflow processes, if required.	<ul style="list-style-type: none"> <li>• For the reasons noted above, reporting on this indicator will also move to fiscal 2021-22.</li> </ul>
Met with the Office of the Chief Information Officer with respect to online client specific forms and potential for online submission.	<ul style="list-style-type: none"> <li>• Met with OCIO with respect to online specific forms.</li> <li>• Created a new Request for Review application to streamline the application process by incorporating the Extension of Time and Authorized Representative forms into the new Request for Review application.</li> <li>• Submitted request to OCIO for development of an online submission option for the new Request for Review application.</li> </ul>

### Objective for 2021-22

Objective: By March 31, 2022 WHSCRD will have continued implementation of digitizing its active intake and case management workflows through the Hewlett Packard Enterprise Records Manager (HPRM) system, and identified client-specific forms and applications for electronic submission.

#### Indicators:

- Trained additional staff in HPRM Administrator Training as a required prerequisite for Workflow training as per direction from OCIO.
- Trained designated staff in HPRM Workflow.
- Developed testing for active case management workflow in development environment.
- Conducted audits in development environment on digitization of workflow processes.
- Identified issues (if any) and implemented changes in development environment of digitization of active workflow processes, if required.

## Opportunities and Challenges Ahead

### Advancing Client Service and Team Building with Technology

The operations of WHSCRD over the 2020-21 fiscal year were conducted within the parameters set by the public health directives of the Provincial Government in response to the COVID-19 pandemic. WHSCRD successfully faced the service challenges and turned them into opportunities to develop new ways of providing its service, while adhering to its mandate to review decisions of WorkplaceNL.

As referenced earlier in this report, over the 2020-21 fiscal year, WHSCRD began providing the option to hold hearings via videoconference. This new hearing modality has provided a way for WHSCRD to provide clients from all communities in the province with access to a fair hearing. Now, during the pandemic, and moving forward, we have an opportunity to increase client comfort with the videoconference platform as the delivery of WHSCRD's services change with the advent of new and improving technologies.

WHSCRD will continue to embrace new forms of technology in its ongoing efforts to provide fair and timely hearings, and exceptional client service.

Following the public health directive to have staff work from home, where fitting and possible, WHSCRD was able to successfully pivot and continue conducting its administrative duties, client service delivery, and hearing processes in a seamless manner.

The challenge to maintain the team-orientated environment within which WHSCRD staff conducts their work and delivers WHSCRD's services was and will continue to be met as an opportunity in the coming years. As work from home protocols may continue well into the future, or become "normal", it is important to WHSCRD to ensure its team of Review Commissioners, administrative, and managerial staff are able to conduct their work and provide WHSCRD's services in an environment that does not negatively impact the clients we serve. As technology helps us maintain the quality of client service, it will also serve to keep our team working together both efficiently and effectively.

## Noteworthy Decisions

The following WHSCRD decisions have been identified as noteworthy for 2020-21; they articulate the outcome of a particular issue or the issue may be of interest to the general public and stakeholders. Additional decisions may be viewed at: [www.gov.nl.ca/whscrd](http://www.gov.nl.ca/whscrd).

### DECISION 2020045 (Worker Application), Denied

Compensable Injury – Exclusions – Stress ss. 2(1)(o), 43(1), 60(1), Policy EN-18

The Worker was employed as a Security Guard when a man in a waiting area made several hostile remarks to the Worker. The Worker sought medical attention 11 days later, reporting psychological distress. The Worker was later diagnosed with an adjustment disorder. The Worker then made an injury claim, stating the hostile remarks were a criminal act constituting an attack and a threat, resulting in shock and Post Traumatic Stress Disorder (PTSD). WorkplaceNL denied the claim on the basis the event described was not objectively traumatic as it did not involve violence or a threat of violence. The Worker filed for Internal Review, which was denied.

**Decision:** The review was denied. The decision complied with s.2(1)(o) and Policy EN-18. While the Worker had a stress-based diagnosis related to a specific “event” in the course of employment, the event was not objectively traumatic. The Review Commissioner found that the event may have been upsetting, but not all upsetting events meet the threshold of “traumatic” for the purposes of the **Act**, the Policy, and the interpretation in the **St. John’s Transportation** case. The event, viewed on the objective standard, was not a “severely emotionally disturbing event” which is “generally accepted as traumatic”. The Review Commissioner found the evidence supported the Worker and the hostile individual were not in close proximity to each other, there was no threat of violence or death uttered, and there was no violence involved. The interaction lasted 12-15 seconds and while the individual made a belligerent outburst, the situation de-escalated with the individual eventually leaving the worksite without further contact with the Worker. While the Worker had a subjectively “acute reaction” to the event, that did not suffice to characterize the event as traumatic on the objective standard. As there was no error in the decision, WorkplaceNL’s decision was upheld. **(Dunford)**

**DECISION 2020048 (Worker Application), Allowed**

Compensable Injury – Arising Out of and In the Course of Employment – In the Course of – Parking Lots ss. 43(1), Policy EN-19

Proof of Claim – Standard of Proof – Balance of Probabilities – ‘Balanced Analysis’ – Duty to Investigate ss. 59, 60(1), Policy EN-20

The Worker was injured after slipping on an ice-covered parking lot outside the workplace. The Worker filed an injury claim and the Employer did not object to the claim. WorkplaceNL initially allowed the claim but later determined the Employer was not the owner of the parking lot. Upon finding that the Employer was leasing the property, WorkplaceNL rescinded the acceptance of the claim, explaining that the parking lot did not form part of the “Employer’s Premises” for the purposes of Policy EN-19. The Worker filed for Internal Review but was denied.

**Decision:** The review was allowed. The decision did not comply with Policy EN-19. While the Employer did not own the premises, and did lease the lot, it had control over the entire building and the parking lot. It was also responsible for maintaining the property, but decided to enter into a contract with the Landlord, which also provided property maintenance services, to clear the parking lot. The Employer explained that it engaged the Landlord as contractor to provide snow-clearing, which the Employer otherwise was responsible for. It also admitted it was responsible for “maintenance and control” of the parking lot.

The Review Commissioner referenced the Parking Lot provisions of the Policy, which stated that parking lots form part of the “Employer’s Premises” when they are “owned, maintained, or controlled by the Employer”. WorkplaceNL erred by ending the inquiry upon the finding that the Employer did not own the property, and not proceeding to consider whether it controlled or maintained the property. The failure to fully consider the agreement resulted in a failure to fully investigate the claim under ss. 59 and 60, leading to an error under Policy EN-19. The Review Commissioner accepted the Landlord was not providing snow clearing services under the lease as an occupier, but doing so as a contractor engaged by the Employer, who occupied the entire premises. As the evidence confirmed the Employer controlled the lot and contracted out its ultimate responsibility to maintain the property, the parking lot constituted part of the “Employer’s Premises” for the purposes of the Policy, so the Worker was in the course of employment at the time of the injury on the parking lot. **(Hollett)**

**DECISION 2020139 (Worker Application), Allowed In Part**

Return to Work – Early and Safe Return to Work – Worker Co-operation ss. 60(1), 89(2), Policy RE-02

A Worker suffered a shoulder injury in 2018. The Worker performed modified duties until a scheduled shut down took place. When the site reopened in 2019, the Employer offered the Worker sedentary duties to accommodate the Worker. The Worker's health care providers supported the offer as suitable for the Worker. The Worker did not appear for the modified employment, claiming to have had a flare-up. WorkplaceNL advised the Worker of the co-operation requirements under the **Act** and directed the Worker to comply within a week. The Worker did not show up for the next shift and WorkplaceNL terminated earnings loss benefits. The Worker advised the Employer that the offer was not practical and the Worker would no longer report for work. The Worker then advised WorkplaceNL that driving was difficult and raised issues with the logistics of the Early and Safe Return to Work (ESRTW) Plan, given the distance between the home community and the worksite. WorkplaceNL maintained the Worker was in non-cooperation and denied the Internal Review.

**Decision:** The review was allowed in part. The Review Commissioner found WorkplaceNL was correct to find the Worker in violation of the co-operation obligations under s.89 of the **Act** but erred in terminating the Worker's benefits outright. The Review Commissioner found the reasonable consequence to attach to the Worker's non-cooperation was to reduce the earnings loss benefits otherwise payable to the Worker by the amount the Worker would have earned in the modified employment. The Worker still had a degree of lost earnings capacity, and the Worker was entitled to benefits to the degree there would have been wage loss in the modified employment. The Review Commissioner rejected the Worker's argument that the refusal to attend the ESTRW was justified. While the Worker claimed to have difficulty driving and raised financial costs associated with the ESRTW Plan, the Worker had stayed in local accommodations near the worksite prior to the injury and was not commuting from the home community. There was no conflict in the evidence about the Worker's ability to complete the duties, and the Worker's General Practitioner later confirmed the Worker had no physical deficits that would prevent driving, and clarified the barrier was the Worker's apprehension about driving. The Review Commissioner found there was no legitimate reason for the non-cooperation and the Worker could not elect to refuse the ESRTW Plan under s.89(2) and expect to receive full benefits. To the extent the ESRTW would have made up any shortfall in the Worker's earnings, there was no longer a right to compensation. **(Hollett)**

<b>DECISION 2020148 (Dependent Application), Allowed</b>
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Compensable Injury – Arising Out of and In the Course of Employment – Arising Out of – Material Contribution ss. 43(1), 60(1)

Compensable Injury – Definition of Injury – Industrial Disease – Stomach Cancer ss. 2(1)(m), 2(1)(o), 90, Policy RE-14

Proof of Claim – Standard of Proof – Balance of Probabilities – Versus Scientific Certainty s.60(1), Policy EN-20

A Worker was diagnosed with stomach cancer in 2010. The Worker died in 2011 due to complications arising from the cancer surgery. In 2014 the Worker's surviving spouse filed a dependency claim, claiming the stomach cancer was due to asbestos exposure in the course of employment. The Pensions Adjudicator denied the claim in 2016. After reviewing the claim again to consider new evidence submitted by the Worker's representative, the Pensions Adjudicator maintained the claim denial in 2017. The Dependent sought Internal Review, which was denied.

**Decision:** The review was allowed and the dependency claim was accepted. WorkplaceNL erred under ss. 43 and 60(1) of the **Act**. The Review Commissioner found the claim-specific evidence supported the employment was one of the material causes of the cancer. WorkplaceNL's Policy EN-14: **Asbestos Related Claims** contemplates situations in which cancer of the GI tract could arise from asbestos exposure and directed that each claim had to be considered on its own merits. Further, the Medical Consultant who reviewed the file confirmed the Worker had two risk factors, which were smoking and asbestos exposure. He gave a claim-specific opinion advising it was "reasonable to consider the worker's cancer could have been related to his asbestos exposure." Also, an IARC report submitted by the Worker's representative stated that "a positive association has been observed between exposure to the agent and cancer." The Review Commissioner found that WorkplaceNL erred by relying on non-definitive scientific literature which neither confirmed nor precluded a causal relationship on the standard of certainty or near-certainty. As the scientific evidence was not definitive, the claim had to be decided on the claim-specific evidence. The Worker had ten years of exposure at a time when personal protective equipment was less prevalent, there was evidence of association between the exposure and the cancer, and direct opinion suggesting a causal relationship. As there was not a greater body of evidence to the contrary, the Review Commissioner found the claim succeeded on the civil standard under s. 60(1). As the asbestos materially contributed to the cancer and the Worker's death resulted from the cancer and the treatment for it, the Worker's spouse had a valid dependency claim under the **Act. (Hickey)**

### DECISION 2020152 (Employer Application), Allowed

Return to Work – Early and Safe Return to Work – Employer Co-operation ss. 89, Policy RE-01, Policy RE-02

Return to Work – Early and Safe Return to Work – Suitable and Available Employment – Duty to Resolve Disputes ss. 59, 60, 89, Policy RE-01, Policy RE-02

A Worker was injured in 2018 and by 2019 the Worker was found to have an eight hour workday at the 'light' level of strenuousness. A trial return to work was recommended at four (4) hours a day. The Employer expressed concerns about the return to work process on at least two occasions, stating it had not been provided functional abilities information in order to devise a return to work plan. WorkplaceNL responded by finding the Employer non-cooperative under s.89 of the **Act**. The Employer's Internal Review was denied.

**Decision:** The review was allowed. The Review Commissioner found “the employer was obstructed in meeting their obligations by a lack of information available in order to proceed.” While there were communication issues between the Employer and WorkplaceNL, the Employer did not have the required functional information because neither the Worker nor WorkplaceNL provided “the functional abilities information they had in their control.” The Review Commissioner explained that Policy RE-02 placed an obligation on WorkplaceNL to provide information “to assist in assessing the workplace in terms of the worker’s functional abilities... and fitness to work.” The Policy also placed an obligation on WorkplaceNL to assist in resolving disputes of that nature. He found WorkplaceNL should have resolved the “informational deficit” before expecting the Employer to proceed, as the Employer had not actually refused to implement Early and Safe Return to Work. The finding of non-cooperation was removed from the claim. **(Hickey)**

### DECISION 2020158 (Employer Application), Denied

Scope of the Act – Application – Independent Operators ss. 2(1)(z), 19(1), 41, 60(1), Interpretation Act, s. 16, Policy ES-01, Procedure 102.00

Scope of the Act – Application – Workers – Contract of Service ss. 2(1)(z), 19(1), 41, 60(1), Interpretation Act, s. 16, Policy ES-01, Procedure 102.00

An Employer operated a business premises and entered into an agreement with two Massage Therapists to offer services from the premises. In 2016, WorkplaceNL required the Massage Therapists to complete “Independent Operator Questionnaires” to determine their status. Two weeks later, the Employer entered into “Massage Therapy Independency Agreements” with the Massage

Therapists which declared the Massage Therapists to be independent contractors responsible to pay workers' compensation assessments. The Employer was described in the agreement as a "Lessor" and the Massage Therapists were referred to as "Lessees". WorkplaceNL reviewed the agreements but found the Massage Therapists were "workers" for the purposes of the **Act**. The Employer objected, maintaining the Massage Therapists were operating their own independent businesses. An Internal Review was denied.

**Decision:** The review was denied. WorkplaceNL's decision complied with the **Act**, regulations, and policies. The Chief Review Commissioner found the Massage Therapists, in substance, were workers under the common law test. She found the Organization Test and Specific Result Test suggested a worker/employer relationship existed while the Control Test and the Economic Reality Test yielded equivocal results. Overall, she concluded there were more indicia of a worker/employer relationship and that classification was more consistent with the intent of the **Act**. She referenced the recent treatment of the common law test in **College of the North Atlantic v. McBrearity (2020)** which formed the basis of Procedure 102.00. The Chief Review Commissioner found the test could not be divorced from the statutory setting, which require a consideration of the "modern rule" of interpretation and the direction in the **Interpretation Act**. She also confirmed the characterization of the relationship in the agreement was not binding and WorkplaceNL retained the jurisdiction to determine the nature of the relationship, based on the facts and provisions of the **Act**. She accepted the Act was to be interpreted liberally so that coverage would be extended as broadly as possible. The claim evidence did not demonstrate the Massage Therapists were conducting their own businesses, merely leasing space from the Employer. The Massage Therapists were integrated into the organization of the Employer's business without being engaged for a specific result. She found they were "mainly devoted to delivering the core services of a line of business which was initiated by the employer at its premises, and to which they were integral" despite the provisions inserted into the subsequent agreements. **(Hickey, CRC)**

#### **DECISION 2020163 (Worker Application), Remitted**

Compensable Injury – Arising Out of and In the Course of Employment – In the Course Of ss. 43(1), 60(1), 61, Policy EN-19

Compensable Injury – Definition of Injury – Recurrence ss. 2(1)(o), 60(1), Policy EN-03, Policy EN-19, Policy EN-20

Compensable Injury – Scope of the Act – Volunteer Firefighters ss. 40(1), 43(1), Workplace Health, Safety and Compensation Regulations, ss. 14, 15.

The Worker, a Deputy Fire Chief in a Volunteer Fire Department, was acting as the Fire Chief in the

absence of the Chief when a fire broke out in the Worker's own home. The Worker initiated rescue operations and reported the fire, causing the other firefighters to come to the scene with equipment. Along with the other firefighters, the Worker started to fight the fire so as to prevent further spread. The Worker developed respiratory symptoms after the incident. The Worker had made a prior claim in 2013 based on an aggravation of pre-existing asthma by fire suppression activity. Following the fire at the Worker's residence, the Worker presented a recurrence claim based on a worsening of respiratory symptoms. WorkplaceNL rejected the most recent claim as the Worker was not "in the course of employment" as a volunteer firefighter according to the Regulations. The Intake Adjudicator found the Worker was not considered to be in the course of employment as a volunteer firefighter under the Regulation until leaving his or her own residence to respond to the incident. The Worker's recurrence claim of 2013 injury was also denied. The Worker proceeded to Internal Review on both issues but was unsuccessful.

**Decision:** The review was allowed and the claim remitted back to WorkplaceNL. WorkplaceNL erred under ss. 43(1) and 60(1), Policy EN-19 and Policy EN-20, as well as s. 15 of the Regulations on the question of whether the Worker was "in the course of employment" at the time of the smoke inhalation. The Review Commissioner found the Worker's rescue operations were in the course of employment because the Worker was the acting Chief at the time and would have had to take control of the scene in any case. The Review Commissioner found the Regulations were binding by nature, but the facts of the claim were not envisioned by the Regulations, which assume it is necessary for a firefighter to leave his or her own home to respond to a call. She was also not convinced the Regulation could be applied consistently with the intent of the **Act** if it was interpreted to mean a volunteer firefighter could only be covered if he or she first left his or her own residence. The Worker was performing core firefighting duties at all times, which he was otherwise required to perform, and it would be absurd to require a worker to leave the scene in such circumstances in order to bring himself or herself within the scope of the Regulations. She found the Regulation could not be interpreted in such a way to conflict with the intent of the **Act**, but should be read as speaking to those instances where a volunteer firefighter was required to leave a residence of a place of work in order to commence firefighting duties. She found the Worker was performing employment duties when the inhalation occurred, and the worker was "in the course of employment" at the time.

As to the Worker's recurrence claim, the Review Commissioner set that decision aside and remitted the issue to WorkplaceNL for a new decision. She found the issue had to be reviewed further because there was some evidence for and against the Worker's claim that the respiratory issues were due to employment. She found the Worker had multiple respiratory conditions, some of which were pre-existing, and there was some evidence suggesting the Worker appeared to stabilize after the second fire, with the deterioration not happening until some months later. She found WorkplaceNL erred in failing to complete the inquiry into whether the Worker's condition worsened

as a result of the workplace exposure, and “conflicts were left dangling” without resolution under s.60(1) of the **Act**. She found WorkplaceNL could not have denied the claim as a recurrence or otherwise, without an examination of all the relevant evidence. The issue was referred back for a new decision in light of the finding that the Worker was also “in the course of” employment during the second fire. **(Dunford)**

## 2020-21 Caseload Activity

The following highlights WHSCRD's caseload activity for 2020-21. For statistical tables and additional caseload information refer to the Statistical Overview section on page 17.

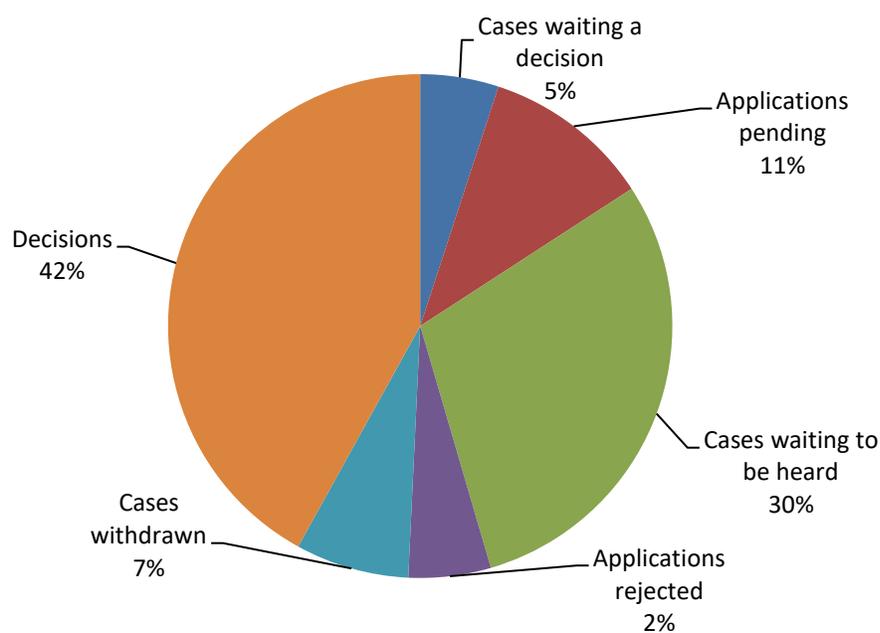
- WHSCRD's overall annual caseload consisted of 398 cases (Table 1-page 17).
- There were 145 new Requests for Review filed in 2020-21. The majority of these cases, 75 per cent, were filed within the Avalon region (Table 2-page 18). Please note six additional Request for Review applications were filed by clients with an existing case and are not counted as new applications for the purposes of this report.
- Workers and their dependents filed 116 Requests for Review representing 80 per cent of the applications filed in 2020-21. Employers filed 29 Request for Review applications, or 20 per cent (Table 3-page 18).
- There were 128 hearings conducted this fiscal year. The majority of hearings (78 per cent) were for applicants in the Avalon region (Table 4-page 18). This aligns with the number of decisions by region with 72 per cent of decisions distributed in the Avalon (Table 6-page 18).
- Of the 167 decisions rendered, Review Commissioners found 52 per cent of WorkplaceNL's decisions were compliant with the **Act**; 48 per cent of decisions were either not consistent with the **Act**, the **Regulations** and policies of WorkplaceNL and were allowed, or were referred back to WorkplaceNL for further review or investigation (Table 5-page 18).
- Workers participated in 91 per cent of the cases under review based on 167 decisions rendered (Table 7-page 19). Approximately 42 per cent of workers were self-represented; 42 per cent were represented by their consultant, union, or other friends or family members; and 16 per cent were represented either by their Member of the House of Assembly (MHA) or by private legal counsel (Table 8-page 19).
- Employers participated in 31 per cent of the cases under review based on 167 decisions rendered (Table 7-page 20). Approximately 42 per cent of employers were self-represented, and 58 per cent were represented by consultants or legal counsel (Table 9-page 19).
- The top three issues under review were: Extended Earnings Loss benefits, Claim Denied, and Health Care Services (Table 10-page 20).

## 2020-21 Statistical Overview

**Table 1 - Annual Caseload**

<b>Caseload Breakdown</b>	<b>2020-21</b>
Appeals Carried Forward April 1st	253
New Applications	145
<b>Annual Caseload</b>	<b>398</b>
Less Finalized/Closed Cases:	
Decisions Rendered	167
Cases Withdrawn	29
Applications Rejected/Dismissed	21
<b>Caseload March 31st</b>	<b>181</b>
<b>March 31<sup>st</sup> Caseload Consists of:</b>	
<b>Active Cases:</b>	<b>138</b>
(cases waiting to be heard)	118
(cases heard and awaiting a decision)	20
<b>Inactive Cases:</b> (applications pending + awaiting exhaustion)	<b>43</b>

**Figure 1 – Per cent of Annual Caseload by Disposition\***



\* Due to rounding, the total percentages may not equal 100 per cent.

## Statistical Overview continued

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

**Table 2 - Requests for Review by Region**

Year	Avalon		Gander		Grand Falls - Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2019-20	134	69	18	9	16	8	23	12	2	1	<b>193</b>
2020-21	109	75	7	5	13	9	15	10	1	1	<b>145</b>

**Table 3 - Requests for Review by Claimant**

Year	Worker		Employer		Dependent		Total
	#	%	#	%	#	%	
2019-20	172	89	19	10	2	1	<b>193</b>
2020-21	113	78	29	20	3	2	<b>145</b>

**Table 4 - Hearings by Region\***

Year	Avalon Region		Gander		Grand Falls - Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2019-20	123	61	17	8	33	16	23	11	7	3	<b>203</b>
2020-21	100	78	7	5	10	8	11	9	0	0	<b>128</b>

\*All hearings in the 2020-21 fiscal year were conducted via paper review, tele or videoconference due to the COVID-19 pandemic.

**Table 5 - Decision Outcome**

Year	Allowed and/or Allowed in Part		Denied		Referred Back to WorkplaceNL		Total
	#	%	#	%	#	%	
2019-20	42	24	122	69	13	7	<b>177</b>
2020-21	55	33	87	52	25	15	<b>167</b>

**Table 6 - Decisions by Region**

Year	Avalon		Gander		Grand Falls - Windsor		Corner Brook		Labrador		Total
	#	%	#	%	#	%	#	%	#	%	
2019-20	107	60	24	14	30	17	13	7	3	2	<b>177</b>
2020-21	120	72	9	5	12	7	22	13	4	2	<b>167</b>

## Statistical Overview continued

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

Year	Total Decisions		Worker Participation		Employer Participation		WorkplaceNL Participation	
	#	%	#	%	#	%	#	%
2019-20	177		165	93	28	16	50	28
2020-21	167*		152	91	52	31	60	36

\* Representative of 173 applications for review.

**Table 8 - Worker Participation by Representative Type**

Year	Self		Consultant		Legal Counsel		MHA*		Union		Other**		Total
	#	%	#	%	#	%	#	%	#	%	#	%	
2019-20	44	27	34	21	5	3	21	13	36	22	25	15	165
2020-21	64	42	15	10	6	4	18	12	25	16	24	16	152

\* Member of the House of Assembly.

\*\* Friend, Family Member, etc.

**Table 9 - Employer Participation by Representative Type**

Year	Self		Consultant		Legal Counsel		Total
	#	%	#	%	#	%	
2019-20	11	39	16	57	1	4	28
2020-21	22	42	22	42	8	15	52

## Statistical Overview continued

**Table 10 – Issues Reviewed by Decision**

Issues	Outcome			
	Objections	Allowed	Denied	Referred Back to WorkplaceNL
<b>Worker/Dependent Appeals</b>				
Aggravation of Pre-existing Condition	3	1	2	0
Baie Verte Mines	2	0	2	0
Claim Denied	23	11	8	4
Classification Reassessment	1	0	0	1
Compensation Denied	7	4	1	2
Compensation Rate	3	1	2	0
Dependency Benefits	1	1	0	0
Early & Safe Return to Work	1	1	0	0
Extended Earnings Loss Benefits	30	12	11	7
Health Care Services	21	7	11	3
Industrial Hearing Loss	7	0	5	2
Overpayment	2	1	0	1
Pension Replacement Benefit	3	1	2	0
Permanent Functional Impairment	17	0	14	3
Proportionment	8	7	1	0
Re-employment Obligation	3	2	1	0
Recurrence	9	4	3	2
Reinstatement of Benefits	5	2	3	0
Reopening	12	1	10	1
Wage Loss Benefits	15	8	6	1
<b>Totals</b>	<b>173</b>	<b>64 (37%)</b>	<b>82 (47%)</b>	<b>27 (16%)</b>
<b>Employer Appeals</b>	<b>Objections</b>	<b>Allowed</b>	<b>Denied</b>	<b>Referred to</b>
Cost Relief	2	0	1	1
Independent Operator	4	1	3	0
Objection to a Worker's Claim	16	0	14	2
PRIME Rebate	1	0	1	0
Re-employment Obligation	1	1	0	0
<b>Totals</b>	<b>24</b>	<b>2 (8%)</b>	<b>19 (79%)</b>	<b>3 (13%)</b>
<b>OVERALL TOTALS</b>	<b>197</b>	<b>66 (34%)</b>	<b>101 (51%)</b>	<b>30 (15%)</b>

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

## Financial Statement

Expenditures included in this document are unaudited and based on public information provided in the Report on the Program Expenditures and Revenues of the Consolidated Revenue Fund for the Year Ended March 31, 2021. WHSCRD is not required to provide a separate audited financial statement.

### Statement of Expenditures and Related Revenue UNAUDITED For Fiscal Year Ending March 31, 2021

	2020-21		
	Actual \$	Amended \$	Original \$
<b>Workplace Health, Safety and Compensation Review Division</b>			
01. Salaries	1,160,523	1,202,500	1,202,500
Operating Accounts:			
Employee Benefits	11,145	4,300	4,300
Transportation and Communication	12,932	69,300	69,300
Supplies	9,320	15,500	15,500
Professional Services	4,385	75,100	75,100
Purchased Services	10,449	44,000	44,000
Property, Furnishings and Equipment	9,128	4,000	4,000
	<u>\$1,217,882</u>	<u>\$212,200</u>	<u>\$212,200</u>
02. Revenue - Provincial	<u>(\$1,159,124)</u>	<u>(\$1,414,700)</u>	<u>(\$1,414,700)</u>
<b>Total: Workplace Health, Safety and Compensation Review</b>	<b><u>\$58,758</u></b>	<b>-</b>	<b>-</b>

Source: Department of Finance (unaudited)

## Active Review Commissioners 2020-21

### **Marlene Hickey, Chief Review Commissioner (Retired, December 2020)**

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

### **Suzanne Hollett, Chief Review Commissioner, Acting (Appointed to role, January 2021)**

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

### **Shane Hickey, Review Commissioner (Appointed January 2019)**

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

### **Heather Dunford, Review Commissioner (Appointed March 2019)**

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

## Contact Information

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