

2016

APPEAL COMMISSION AND
MEDICAL REVIEW PANEL

ANNUAL REPORT



THE APPEAL COMMISSION

THE WORKERS COMPENSATION
ACT OF MANITOBA

Letter to the Minister

The Honourable Cliff Cullen
Minister of Growth, Enterprise and Trade
Legislative Building
450 Broadway
Winnipeg, MB R3C 0V8

Dear Minister:

I am pleased to present our 2016 Annual Report in accordance with the provisions of *The Workers Compensation Act*. This report covers the 12-month period from January 1, 2016 to December 31, 2016.

Respectfully submitted,



Alan Scramstad,
Chief Appeal Commissioner

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Introduction

This report outlines the activities and statistics for both the Appeal Commission and Medical Review Panels for the period January 1, 2016 to December 31, 2016 inclusive.

The Appeal Commission is the final level of appeal in the workers compensation system in Manitoba. The Appeal Commission has exclusive jurisdiction to hear and decide appeals that arise from decisions made by the Workers Compensation Board of Manitoba (WCB). The Appeal Commission is separate and independent from the WCB, ensuring that issues from workers and employers are heard by an impartial panel.

The Appeal Commission consists of full- and part-time appeal commissioners who are appointed by the Lieutenant Governor in Council for specific terms.

Medical Review Panels are established under *The Workers Compensation Act* (the *Act*) as a separate and independent process from the WCB and the Appeal Commission. Medical Review Panels allow questions to be asked of an independent panel of medical experts and an impartial medical opinion obtained on a worker's claim. The findings of a Medical Review Panel are considered evidentiary in nature and are not binding upon the WCB or Appeal Commission.

The Minister responsible for the *Act* appoints the Medical Review Panel Chair and Alternate Chair. The independence of the Chairs, and the ability of the employer and worker to select physicians who have not previously treated the worker to sit on a panel, allows for an impartial medical opinion.

The Office of the Registrar provides administrative support to both the Appeal Commission and Medical Review Panels.

MISSION STATEMENT

To ensure workers and employers continue to receive a full and impartial hearing of appeals in accordance with fairness and the rules of natural justice and that decisions of the Appeal Commission are a fair reflection of the facts of the case and the governing legislation.

VALUES

Quality Assurance

The Appeal Commission maintains a consistent and high level of professional conduct, knowledgeable decision-making and accountability, while respecting differing and shared values and perspectives.

Public Integrity

The Appeal Commission is, and is seen to be, an independent body with integrity and a rational decision-making process.

Responsive to Change

The Appeal Commission evolves in a proactive and creative manner by assuring a process of consultation and consensus around desired change.

Interdependence

All appeal commissioners are committed to a high standard of professionalism in their duties to conduct fair and impartial hearings under *The Workers Compensation Act* and its regulations. As well as their individual responsibilities to become knowledgeable in the matters before them, the commissioners have individual and collective responsibilities to one another to ensure an atmosphere of mutual respect, tolerance of individual differences and opinions, freedom from pre-determined bias and a commitment to look for objective truth and sound decision-making.

Respectful Work Environment

Appeal commissioners interact with staff and colleagues in a manner which promotes mutual respect as well as clarity and understanding of respective roles.



A Message from the Chief Appeal Commissioner

I am pleased to present the annual report of the Appeal Commission for the year 2016.

The Appeal Commission plays an important role in Manitoba's workers' compensation and administrative justice systems. The Appeal Commission is the final appeal body under *The Workers Compensation Act* (the Act). It provides an independent forum for the resolution of concerns for persons who are not satisfied with the decisions of the Workers Compensation Board (WCB). It also serves as the final appeal body under *The Victims Bill of Rights* for victims of crime in Manitoba and the *Government Employees Compensation Act* for federal government employees working in Manitoba.

This report contains statistics which detail the work of the Appeal Commission over the past year and demonstrate that the Appeal Commission is scheduling, hearing and deciding cases effectively.

Throughout 2016 we remained uncompromising in the thoroughness of our review of files. Our priority has been, and continues to be, a commitment to ensuring that all appeals receive full and fair consideration. We believe this approach is in the best interests of Manitoba's workers and employers.

I wish to welcome the new part-time appeal commissioners representative of employers, Paul Challoner and Ron Hambley. I also wish to express my gratitude to commissioners representative of employers, Ron Koslowsky and Margaret Bencharski, who have reached their term limits and to commissioner representative of the public interest, Denny Kells who has retired.

I also want to express my gratitude to our full-time and part-time commissioners for their dedicated service and to the staff in the Office of the Registrar for their continued support to parties and commissioners. In particular, I want to thank Registrar Peter Wiebe and Assistant Registrar Roger Lafrance for their support and guidance throughout 2016.

In 2016 the Appeal Commission succeeded in maintaining its commitment to providing full and impartial hearings of appeals and rendering fair and just decisions. We will continue this commitment in 2017 and beyond.

Sincerely,



Alan Scramstad

About the Appeal Commission

The Appeal Commission is the final level of appeal in the workers compensation system and operates separately and independently from the WCB. The Appeal Commission hears all appeals from workers and employers concerning WCB Review Office or Assessment Committee decisions. The Appeal Commission also acts as the final level of appeal under the *Government Employees Compensation Act* for federal employees working in Manitoba and for claims from victims of crime filed under *The Victims' Bill of Rights*.

The full- and part-time appeal commissioners are appointed by the Lieutenant Governor in Council for specific terms. *The Workers Compensation Act* (the *Act*) requires that the Appeal Commission consist of one or more appeal commissioners representing the public interest, one of whom is designated as Chief Appeal Commissioner, and one or more appeal commissioners representing workers and employers covered under the *Act*.

The Appeal Commission's conduct is governed by Regulation 279/91, *Appeal Commission Rules of Procedure*. The Rules of Procedure establish the responsibilities of the Chief Appeal Commissioner, the Registrar and the appeal panels to ensure that the integrity and transparency of the appeal system is protected and maintained.

Appeals are heard by panels of three commissioners representing public, worker and employer interests respectively. The commissioner representing the public interest is the chair of the panel and is responsible for the conduct of the hearing/review.

Hearings and reviews are conducted in accordance with the rules of natural justice and procedural fairness. All parties to an appeal (i.e., the employer, worker and their representatives) are given an equal opportunity to present their case.

An appeal panel may hear witnesses from either or both parties and may subpoena witnesses or evidence that will assist the panel in reaching a decision. A party with a direct interest may appear before the panel to provide evidence or, in some cases, ask the panel to conduct a review of the file which would not require the attendance of any party.

The Appeal Commission is a non-adversarial enquiry forum where parties with a direct interest in a matter provide oral or written evidence. An appeal panel can ask questions or obtain additional evidence which ensures that the panel has all the information necessary to reach a fair decision.

Written decisions are provided to the parties to an appeal within 60 days of the hearing ending. Decisions are made based on the evidence on file, the evidence presented during the hearing/review and any additional evidence the appeal panel has requested.

The Appeal Commission also provides access to our decisions to all stakeholders. Decisions are publicly available in several ways, including through the Appeal Commission's website – www.appeal.mb.ca. Decisions made available to the public are written to protect the privacy of all parties, in compliance with the various pieces of privacy legislation in Manitoba.

Method of Appeal

Appellants can request a file review or oral hearing; however, the Chief Appeal Commissioner or an appeal panel addressing an appeal has the final authority to determine the most appropriate method for an appeal.

File Review

An appeal will be addressed by a file review if all the issues can be decided based on the file documents and written submissions. The panel reaches a decision after it conducts a full review of the file documentation and any evidence submitted in writing by the parties with a direct interest. If an appeal is decided by a file review, interested parties do not appear in person before the appeal panel.

Some examples of appeals commonly decided by file review include:

- most assessment appeals
- factual matters such as the level of average earnings
- applications for an increase in permanent partial impairment where no wage loss is involved
- payment of medical aid/travel expenses
- appeals where the facts of the case are not in dispute.

Oral Hearing

Oral hearings are the most common appeal forums, and they are where the more complex appeals are usually heard. The party requesting the hearing must appear in person to present the appeal to the panel verbally, although the appeal can be supported by a written submission. In some instances, a party may be allowed to participate via teleconference or video conference. Witnesses may attend in support of the appeal, so long as the Appeal Commission is advised in advance that they will be attending.

When an oral hearing takes place, everyone who participates is given an equal opportunity to present their case.

Some examples of appeals decided by an oral hearing are:

- where additional evidence is to be presented
- where there is a fatality
- where serious injury has occurred
- where an occupational disease is involved
- where the decision may have an important impact on how WCB policy is interpreted or applied
- where the facts are in dispute.

General Hearing/Review Information

- Hearings and reviews are scheduled as soon as the parties are ready to proceed.
- A worker's or an employer's access to file information is subject to certain restrictions contained in the *Act*. File access generally takes up to six weeks, but can be longer if objections to the release of information are received.
- Any evidence concerning an appeal must be provided to the Appeal Commission at least five business days before the review or hearing.
- By Regulation, a decision will be rendered within 60 days of the completion of the hearing or review.

After an Appeal

The Appeal Commission cannot clarify or change its decision once it has been made, except to correct typographical errors. The panel is unable to provide any further reasons or explanations for its decision and cannot consider further arguments or submissions by the parties.

Appeal Commission decisions are final. Once a decision has been made, there are limited remedies available to the parties under the *Act*. These remedies are:

1. Under Section 60.9 of the *Act*, if a party thinks the panel has acted outside its authority or has erred in applying the *Act*, regulations or WCB policy, the party can approach the Board of Directors of the WCB and ask them to review the decision. The party must identify the error made by the panel. Should the Board of Directors consider that an error has been made, they may order that the appeal be re-heard.
2. Under Section 60.10 of the *Act*, if a party has new evidence that is substantial and material to the decision, they may apply to the Chief Appeal Commissioner and request reconsideration of the decision. The information must not have existed at the time of the original hearing or been known to the applicant and also could not have been discovered through the exercise of due diligence. If the Chief Appeal Commissioner decides that the evidence meets the reconsideration provisions of the *Act*, a new hearing on the matter will be ordered. The Chief Appeal Commissioner is unable to consider further arguments about the evidence that was before the original panel.

The Appeal Commissioners

Full-Time Appeal Commissioners

The Chief Appeal Commissioner and full- and part-time commissioners representing workers, employers and the public interest are appointed by the Lieutenant Governor in Council.

As at December 31, 2016, there were four full-time commissioners:

- Allan Finkel, Appeal Commissioner (Employers)
- M. Lynne Harrison, Presiding Officer (Public Interest)
- Alan Scramstad, Chief Appeal Commissioner (Public Interest)
- Pete Walker, Appeal Commissioner (Workers)

The Part-Time Appeal Commissioners

During 2016, the Appeal Commission had a roster of part-time appeal commissioners representing the public interest, workers and employers. The services of the part-time commissioners are used when full-time commissioners are in conflict on a case, for vacation relief, when workloads increase and to maintain their level of expertise.

PUBLIC INTEREST

Karen Dyck
Denny Kells
Christian Monnin
Karen Wittman

REPRESENTING WORKERS

Shauna Briscoe
Mark Kernaghan
Dale Neal
Marc Payette
M. Susan Smerchanski

REPRESENTING EMPLOYERS

Margaret Bencharski
Renae Campbell
Paul Challoner
Christiane Devlin
Ron Hambley
Ron Koslowsky
Pam Marsden

Highlights

- Alan Scramstad, Chief Appeal Commissioner, M. Lynne Harrison, Presiding Officer, and Peter J. Wiebe, Registrar, served as members of the Board of Directors of the Manitoba Council of Administrative Tribunals (MCAT). Mr. Wiebe was Vice-President.
- Mr. Wiebe was a panelist on the workshop “Security Concerns for Tribunals” at MCAT’s 11th Annual Conference.
- Mr. Wiebe was a panelist on the workshop “Agencies, Boards, and Commissions outside of Court” at the Manitoba Bar Association’s Mid-Winter Conference.
- In 2016, the Appeal Commission introduced technology allowing for video conferencing of hearings. This service will be available in early 2017.
- In 2016, the Appeal Commission made arrangements to have its website updated. The new website will go live in the first quarter of 2017.

Commissioner Workshops (Continuing Education)

Full- and part-time appeal commissioners attend internal workshops and participate in external training throughout the year on topics related to workers compensation and administrative tribunals. Workshops and external training attended in 2016 were:

- Managing Unreasonable Complainant Conduct
- Skeletal Overview
- Common Spinal and Shoulder Injuries
- Manitoba Council of Administrative Tribunals sessions:
 - 11th Annual Conference
 - New Tribunal Member Training
- Canadian Bar Association session:
 - “Dealing With Difficult Clients: Practical Advice and Solutions”
- Council of Canadian Administrative Tribunals conference:
 - Back to the Future: Redefining Tribunal Excellence
- Law Society of Manitoba session:
 - Pitblado Lectures: Journey to Reconciliation
 - Plain Language Communication
 - Truth about Credit
- Ontario Bar Association session:
 - Mental Stress: Psychiatry and Psychology in Workplace Safety and Insurance Law

Disclosures under *The Public Interest Disclosure (Whistleblower Protection) Act*

There were no disclosures received in 2016.

Appeal Commission Statistics

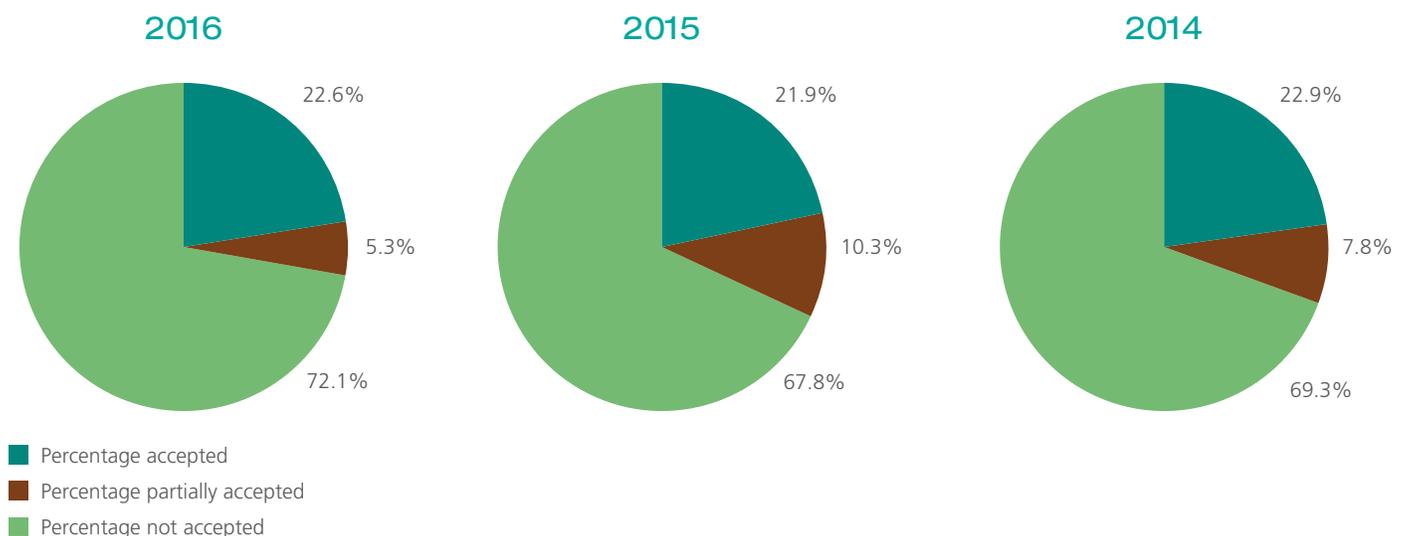
Workers Compensation Statistics

TOTAL APPEALS	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Appeals carried forward from previous year	30	17	22
Hearings held (by appeal)	147	150	130
Reviews held (by appeal)	39	19	34
Cases in process	[24]	[30]	[17]
Cases adjourned	[2]	[1]	[3]

Total Appeals Decided

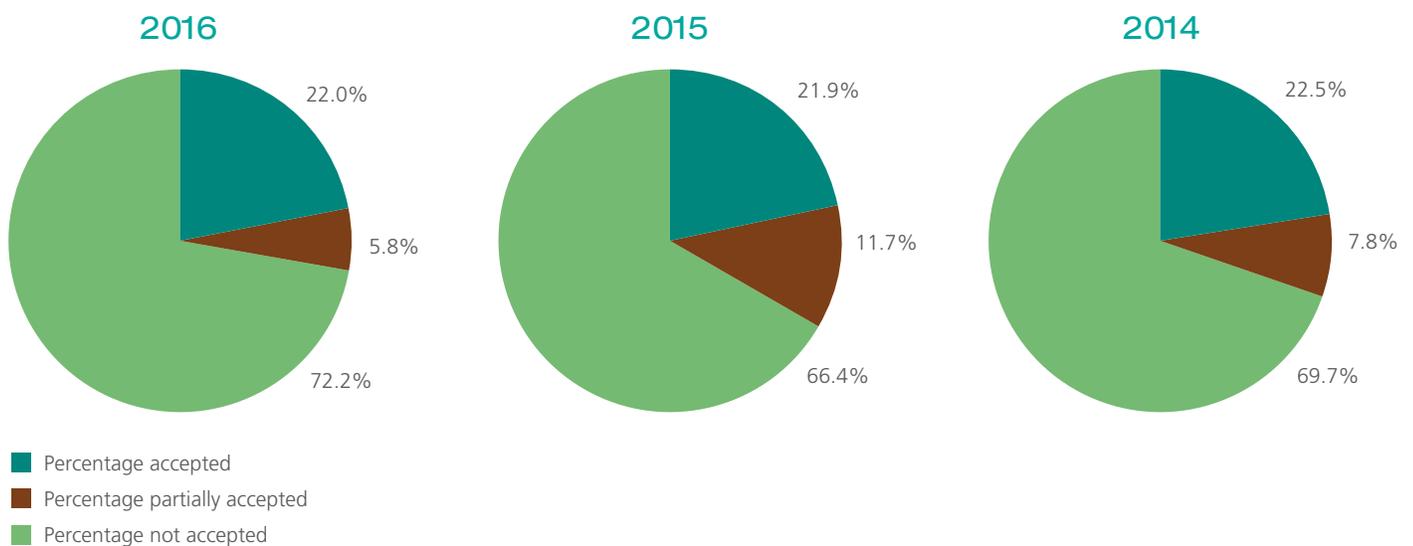


Appeals accepted	43	34	38
Appeals partially accepted	10	16	13
Appeals not accepted	137	105	115
TOTAL APPEALS DECIDED	190	155	166



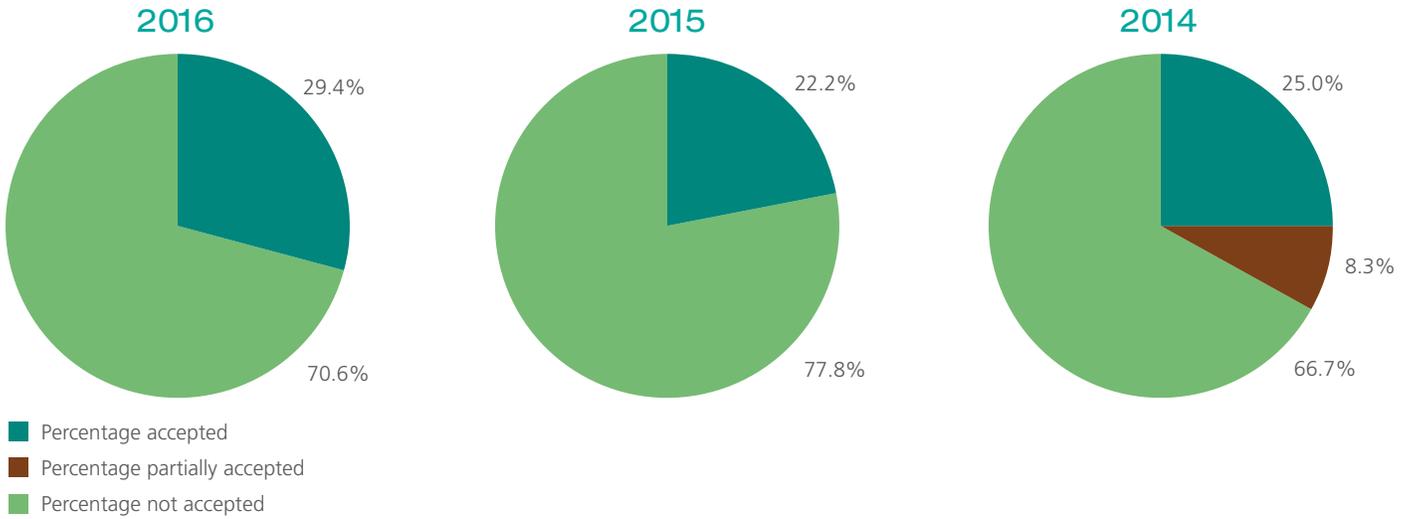
POST HEARING ACTIVITIES (CASES IN PROCESS)	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Cases awaiting further information requested by the panel	5	7	5
Cases awaiting decision	5	3	3
Decision writing	14	20	9
TOTAL	24	30	17

TOTAL WORKER APPEALS TO CLAIM/REHABILITATION ISSUES	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Appeals accepted	38	30	32
Appeals partially accepted	10	16	11
Appeals not accepted	125	91	99
TOTAL	173	137	142



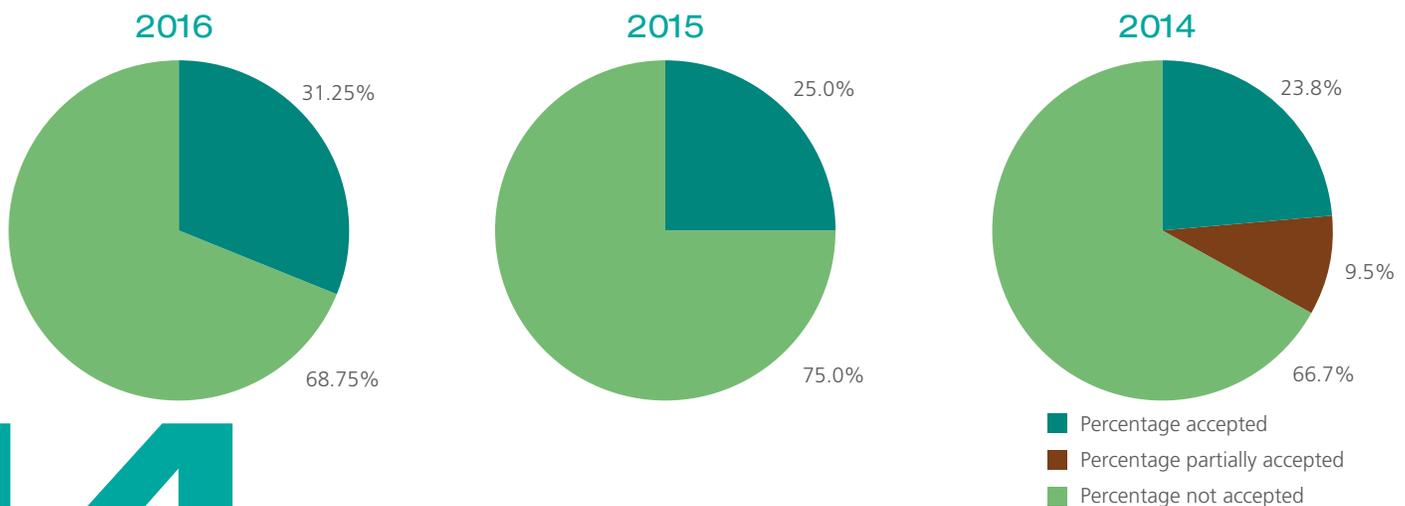
NUMBER OF WORKERS REPRESENTED BY:	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Legal Counsel	11	7	7
Union Representative	17	17	16
Worker Advisor	42	35	27
Advocate	9	1	10
Self Representation	92	75	78
Other	2	2	4

TOTAL EMPLOYER APPEALS	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Appeals accepted	5	4	6
Appeals partially accepted	0	0	2
Appeals not accepted	12	14	16
TOTAL	17	18	24

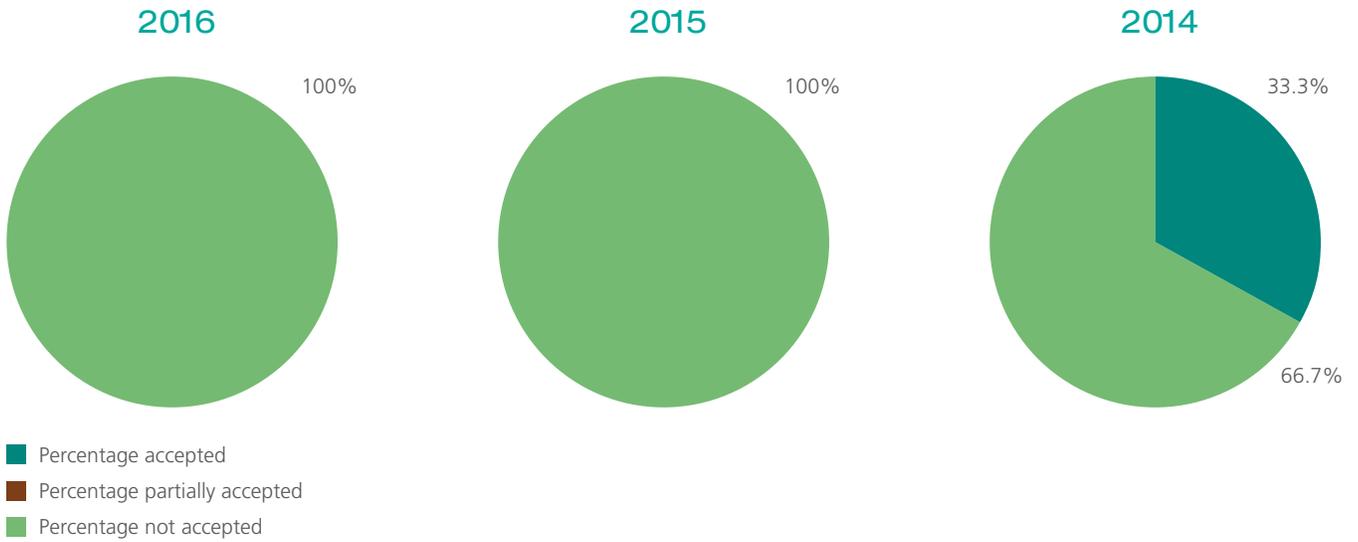


NUMBER OF EMPLOYERS REPRESENTED BY:	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Legal Counsel	0	1	0
Advocate	7	5	8
Employer Agent	10	11	14
Self-Representation	0	1	2

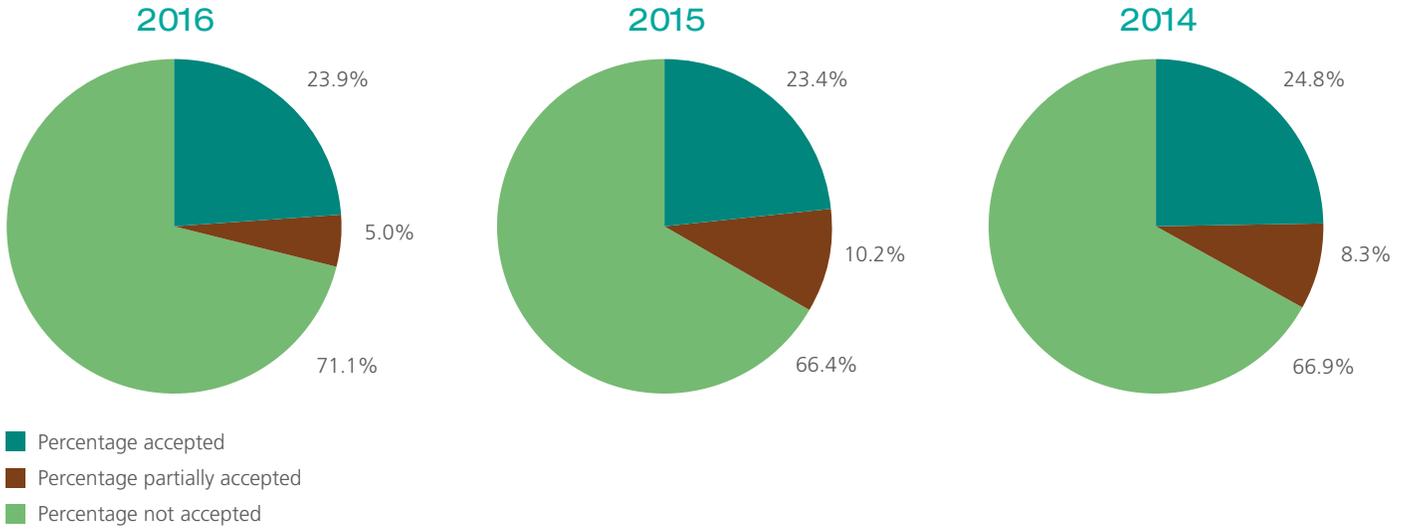
EMPLOYER APPEALS TO CLAIM/REHABILITATION ISSUES	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Appeals accepted	5	4	5
Appeals partially accepted	0	0	2
Appeals not accepted	11	12	14
TOTAL	16	16	21



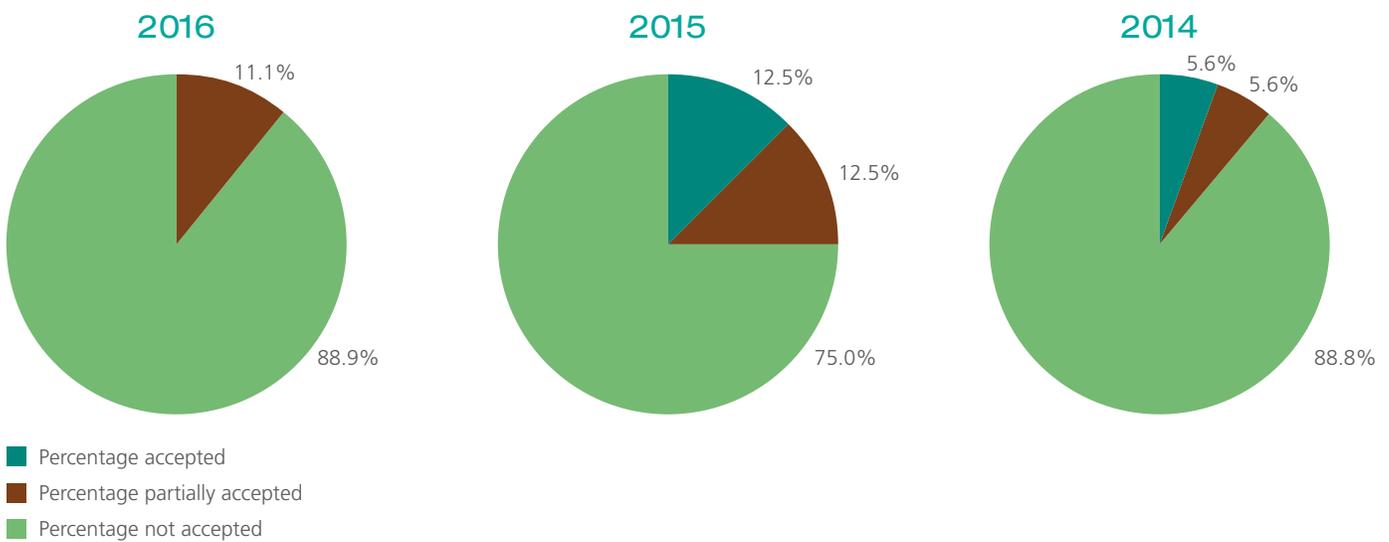
EMPLOYER APPEALS TO ASSESSMENT ISSUES	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Appeals accepted	0	0	1
Appeals partially accepted	0	0	0
Appeals not accepted	1	2	2
TOTAL	1	2	3



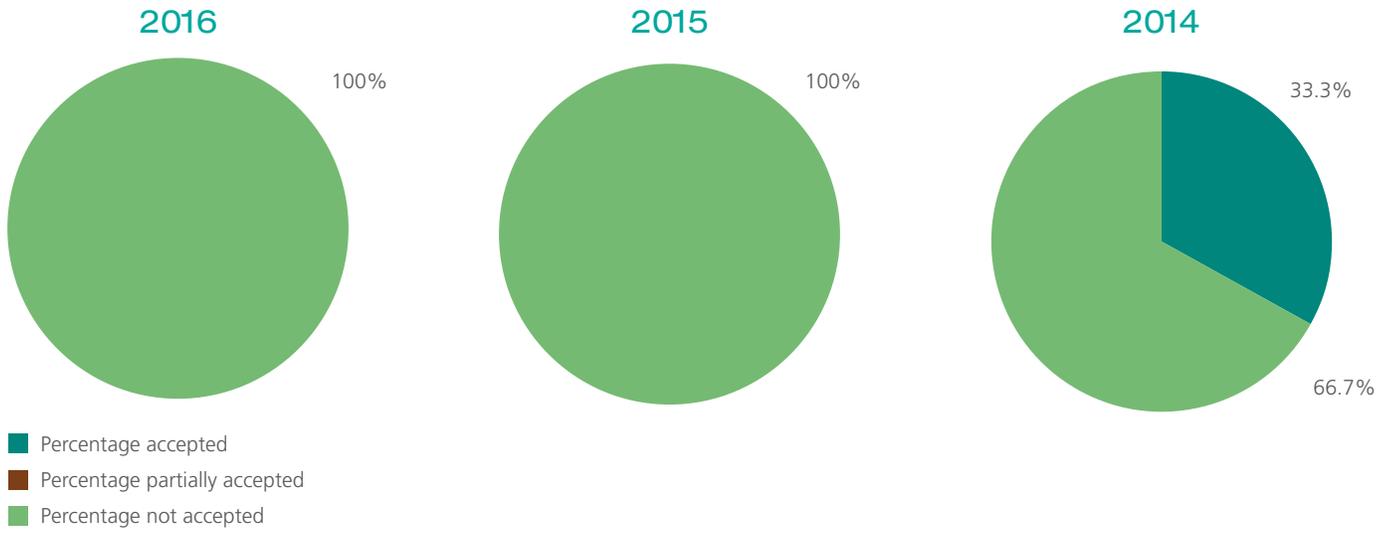
APPEAL TYPE - CLAIM	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Appeals accepted	43	32	36
Appeals partially accepted	9	14	12
Appeals not accepted	128	91	97
TOTAL	180	137	145



APPEAL TYPE - REHABILITATION	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Appeals accepted	0	2	1
Appeals partially accepted	1	2	1
Appeals not accepted	8	12	16
TOTAL	9	16	18



APPEAL TYPE - ASSESSMENT	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Appeals accepted	0	0	1
Appeals partially accepted	0	0	0
Appeals not accepted	1	2	2
TOTAL	1	2	3



TOTAL APPEALS DECIDED	190	155	166
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MOST COMMON ISSUES ADDRESSED	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Entitlement to wage loss benefits (post-1992)	77	68	57
Entitlement to medical aid payment	58	55	42
Claim acceptance	58	46	48
Is present condition related to the compensable injury	17	20	20
Entitlement to an increase in the permanent partial impairment award	11	7	6
Average earnings policy	6	3	3
Deeming process	6	4	4
Entitlement to a permanent partial impairment award	5	0	5
Should responsibility for surgery be accepted	5	3	1
Is worker entitled to further physiotherapy treatment	4	4	3
Is the worker to reimburse the WCB for overpayment of benefits	3	1	3
Is the employer entitled to cost relief	3	0	5
Has the permanent partial impairment award been correctly calculated	3	1	2
Was the vocational rehabilitation plan appropriate	3	5	3
Has the worker been overpaid benefits	2	2	0
Is worker entitled to payment for further chiropractic treatment	2	0	0
Is the worker entitled to payment for prescription medications	2	3	3
Request for Medical Review Panel	2	1	1
Is widow entitled to survivor benefits	1	0	0
Mitigation	1	1	3
Entitlement to a cosmetic permanent partial impairment	1	0	0
Is the worker's psychological condition related to the compensable injury	1	2	1
Other issues	7	17	23
TOTAL ISSUES ADDRESSED	278	243	233

RECONSIDERATIONS UNDER SECTION 60.10 OF THE ACT	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Number of requests decided	6	6	9
Reconsiderations granted	0	1	0
Referred back to the WCB to address new issues identified by the Chief Appeal Commissioner/designate	0	0	0

FILE ACCESS APPEALS	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Worker appeals	6	6	8
Employer appeals	1	1	3
TOTAL FILE ACCESS APPEALS	7	7	11

Victims' Rights Statistics

TOTAL APPEALS	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Appeals accepted	0	0	0
Appeals partially accepted	0	0	0
Appeals not accepted	0	0	0
TOTAL APPEALS	0	0	0

Service Levels

The Appeal Commission tracks the time it takes an appeal to move through the appeal process. Service levels are reviewed at various stages of the appeal process to identify delays and to determine if administrative improvements can be made.

Appeal Commission staff personally contact all interested parties when scheduling hearings to ensure that the parties are provided sufficient time to fully prepare.

According to Regulation 279/91, *Appeal Commission Rules of Procedure*, an appeal panel must publish its decision within 60 days following the conclusion of a hearing. A hearing is considered to have concluded once the panel obtains the necessary information to allow it to make a decision.

SERVICE LEVEL STATISTICS (Based on decisions published as at December 31, 2016)	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Average time from date appeal received to date of hearing	22.42 wks	19.41 wks	14.65 wks
Average time from hearing date to decision published	8.62 wks	7.03 wks	8.25 wks
AVERAGE TIME FROM DATE APPEAL RECEIVED TO DECISION PUBLISHED*	31.04 wks	26.44 wks	22.90 wks

*Includes all appeals:

- that awaited the selection of an acceptable hearing/review date
- that awaited file access and other information sharing
- where there was an adjournment at the request of the worker or employer
- where additional information was requested after the hearing/review.

About Medical Review Panels

Medical Review Panels enable the WCB or Appeal Commission to obtain impartial, independent advice on medical matters that affect a worker's right to compensation.

Subsection 67(3) of the *Act* allows the WCB or Appeal Commission the discretion to refer a medical matter to a Medical Review Panel for an independent opinion. This may occur when a claim is fairly complex and an independent expert opinion is desired.

Subsection 67(4) of the *Act* establishes the right of an injured worker to a Medical Review Panel if there is a difference of opinion on a medical matter between the worker's physician and a WCB medical advisor and this difference affects the worker's entitlement to compensation. A Medical Review Panel must be convened if a difference of opinion, as defined by subsection 67(1) of the *Act*, exists.

Subsection 67(4.1) of the *Act* provides that an employer may request that the WCB refer a medical matter to a Medical Review Panel for its opinion. The medical matter must be real and substantial and affect entitlement to compensation.

A Medical Review Panel is comprised of a Chairperson and two panel members. The Minister responsible for the *Act* appoints the Chairperson and the Alternate Chairperson. The worker and employer select the other two panel members from a list of physicians, provided by the College of Physicians and Surgeons, who specialize in the matter under consideration. In addition, specialist consultants in other fields may be invited to attend and assist the panel.

Physicians who have treated the worker, who examine workers on behalf of the employer or who have acted as consultants in the treatment of the worker are not eligible to serve on the Medical Review Panel.

The independent nature of the Medical Review Panel process ensures that the medical advice obtained is impartial and is based upon the facts of the case as documented on file and as discovered through the process.

The findings of a Medical Review Panel are considered evidentiary in nature and are not binding upon the WCB or the Appeal Commission.

Dr. Mallory Fast retired as Medical Review Panel Chairperson effective December 31, 2016.

Medical Review Panel Statistics

MEDICAL REVIEW PANELS (MRPs)	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Total MRPs convened	0	3	1
INITIATED BY:			
Primary Adjudication	0	3	1
Review Office	0	0	0
Appeal Commission	0	0	0
CONVENED UNDER:			
Subsection 67(3)	0	0	0
Subsection 67(4)	0	3	1
Subsection 67(4.1)	0	0	0
MEDICAL REVIEW PANELS CONVENED BY AREA OF MEDICAL SPECIALTY			
	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Physical Medicine & Rehabilitation	0	3	0
Orthopaedic Surgery	0	0	1
TOTAL	0	3	1

Service Levels

The convening of a Medical Review Panel is a complex process where a panel of specialists and consultants are brought together on a specific day to meet, examine a worker and answer questions placed to them. This involves arranging a time convenient to all parties, preparing documents and publishing the Medical Review Panel findings.

MEDICAL REVIEW PANEL SERVICE LEVEL STATISTICS	YEAR ENDING 2016	YEAR ENDING 2015	YEAR ENDING 2014
Average time from date of request to date MRP held	0 wks	32.10 wks	24.15 wks
Average time from date of MRP to date report is published	0 wks	19.14 wks	13.14 wks
AVERAGE TIME FROM DATE OF REQUEST TO DATE REPORT IS PUBLISHED	0 wks	51.24 wks	37.29 wks

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THE APPEAL COMMISSION

THE WORKERS COMPENSATION
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