



THE APPEAL COMMISSION
THE WORKERS COMPENSATION ACT OF MANITOBA

2020 **ANNUAL REPORT**

APPEAL COMMISSION AND MEDICAL REVIEW PANEL

Letter to the Minister

The Honourable Scott Fielding
Minister of Finance
Legislative Building
450 Broadway
Winnipeg, MB R3C 0V8

Dear Minister:

I am pleased to present our 2020 Annual Report in accordance with the provisions of *The Workers Compensation Act*. This report covers the 12-month period from January 1, 2020 to December 31, 2020.

Respectfully submitted,

Karen Dyck,
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, 2020 to December 31, 2020 inclusive.

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

The Appeal Commission consists of full- and part-time appeal commissioners 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 2020. This is my second year in this role of Chief Appeal Commissioner and, as such, this is my second Annual Report to the Minister responsible for workers compensation since my appointment.

The Appeal Commission continues to function in a pivotal role in the workers compensation and administrative justice systems in Manitoba. As the final level of appeal under *The Workers Compensation Act* (the Act), the Appeal Commission serves as an independent forum for the resolution of concerns of workers and employers dissatisfied with the decisions of the Workers Compensation Board (WCB). The Appeal Commission 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* (Canada) for federal government employees working in Manitoba.

This report details the work of the Appeal Commission over the course of 2020 and demonstrates not only the effectiveness of the Appeal Commission in scheduling, hearing and determining cases that come before it, but also the Commission's ability to pivot and adapt to the changing circumstances that flowed from the arrival of COVID-19 in the province in the first quarter of the year. As in the past, we were uncompromising in the thoroughness of our review of appeal files in 2020. Our commitment to ensuring that all appeals receive full and fair consideration remains a priority as we understand this to be in the best interests of our stakeholders, Manitoba's workers and employers.

This was a year of significant upheaval as most Commission staff transitioned in March 2020 to working remotely, while our offices at the same time closed to the public. Consequently, in-person appeal hearings and file reviews transitioned at first to teleconference hearings, and then to a combination of teleconference and videoconference hearings, with appeal commissioners participating remotely as well as all the parties to each appeal. While there were some technological lessons to be learned, the transition was largely seamless and allowed the Appeal Commission to continue operation with little interruption.

The year also brought further transitions in our roster of commissioners. Full-time commissioner Paul Challoner, representative of employers, resigned in July. Although only in a full-time role for just over a year, he previously served in a part-time capacity. Part-time commissioner Dale Neal, representative of workers, also resigned in 2020. We are grateful to both Mr. Neal and to Mr. Challoner for their valuable contributions to the work of the Appeal Commission.

Also in 2020, Mark Kernaghan was reappointed as a full-time appeal commissioner representing workers, Renae Campbell and Jane MacKay were reappointed as part-time appeal commissioners representing employers, and Marc Payette and Shauna Briscoe were reappointed as part-time appeal commissioners representing workers.

The Appeal Commission depends on the dedication and hard work of the full-time and part-time appeal commissioners in helping to achieve our success. We greatly appreciate all our full-time and part-time appeal commissioners for their dedicated service and ability to shift to a new way of working in 2020.

Appreciation is also due to all the staff of the Appeal Commission who this past year quickly pivoted to doing their jobs in new ways, while still providing consistent support to one another, to commissioners, and to the workers and employers and their representatives involved in appeals. I am personally grateful to each staff member for their extraordinary adaptability in the face of uncertainty this year. I am particularly appreciative of the leadership provided by Peter Wiebe, Registrar, and Roger Lafrance, Assistant Registrar, over the course of an "unprecedented" year.

I am honoured to continue to serve as Chief Appeal Commissioner and to be entrusted with the responsibility for operations of this adjudicative body. The Appeal Commission's record of service in 2020, outlined in this report, demonstrates our effectiveness and commitment to our stated values. I look forward to what lies ahead for the Appeal Commission in 2021.

Sincerely,

Karen Dyck,
Chief Appeal Commissioner

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 decisions of the WCB Review Office or Assessment Committee. The Appeal Commission also acts as the final level of appeal under the *Government Employees Compensation Act* (Canada) 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, responsible for the conduct of the hearing or review.

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

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 functions as a non-adversarial enquiry forum where parties with a direct interest in a matter are able to 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.

Decisions are made and reasons provided within 60 days of the completion of the hearing. Appeal decisions are based on the evidence on file and the evidence presented during the hearing or review, as well as 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 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 may 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 considering 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.

Some examples of appeals commonly decided by file review include:

- most assessment appeals
- factual matters such as the level of average earnings
- appeals of permanent partial impairment awards
- 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 method of appeal. More complex appeals are usually determined by oral hearing. The party requesting the hearing must appear in person before the panel, although the appeal can also be supported by written submissions. To increase accessibility, in some instances, a party may participate via teleconference or videoconference. Witnesses may appear if the Appeal Commission is advised in advance of their attendance.

In an oral hearing, participating parties are provided equal opportunity to present their case.

Examples of appeals typically conducted by oral hearing include matters where:

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

General Appeal Information

- Hearings and reviews are scheduled as soon as the parties are ready to proceed.
- 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

Appeal Commission decisions are final. 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.

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, 2020, there were three full-time commissioners:

- **Karen Dyck**, Chief Appeal Commissioner (Public Interest)
- **Lynne Harrison**, Presiding Officer (Public Interest)
- **Mark Kernaghan**, Appeal Commissioner (Workers)

The full-time Appeal Commissioner (Employers) position was vacant on December 31, 2020.

Part-Time Appeal Commissioners

During 2020, 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

Kim Gilson
Barry Hartley
Christian Monnin
Karen Wittman

REPRESENTING WORKERS

Shauna Briscoe
Phil Kraychuk
Dale Neal
Marc Payette
Robert Ripley

REPRESENTING EMPLOYERS

Renae Campbell
Ron Hambley
Danielle Loewen
Jane MacKay
Jim Witiuk

Highlights

- Lynne Harrison, Presiding Officer, and Karen Dyck, Chief Appeal Commissioner, served as members of the Board of Directors of the Manitoba Council of Administrative Tribunals.
- Paul Challoner, Full-Time Appeal Commissioner Representing Employers, and Dale Neal, Part-Time Appeal Commissioner Representing Workers, resigned in 2020.

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 2020 were:

- Manitoba Council of Administrative Tribunals: National Inquiry MMIWG Truth Gathering Process: Practice and Procedure
- Canadian Bar Association: How to Conduct a Virtual Hearing
- Canadian Institute for Administration of Justice:
 - Will Covid-19 be the Catalyst we were waiting for to Modernize the Courts?
 - National Roundtable on Administrative Law
- Manitoba Bar Association: Midwinter Conference
- Council of Canadian Administrative Tribunals: Virtual Hearings 2.0
- 2020 Isaac Pitblado Lectures: Virtually Everything You Need to Know About Advocacy

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

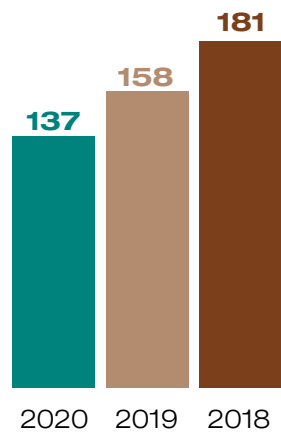
There were no disclosures received in 2020.

Appeal Commission Statistics

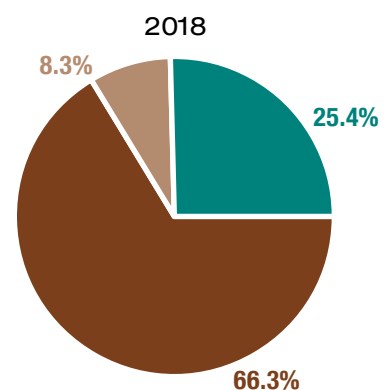
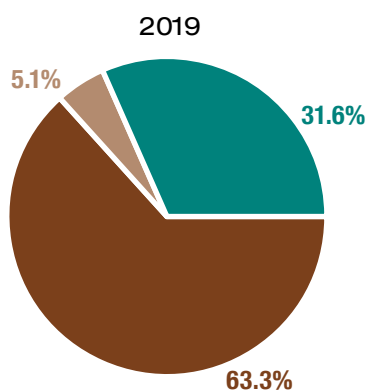
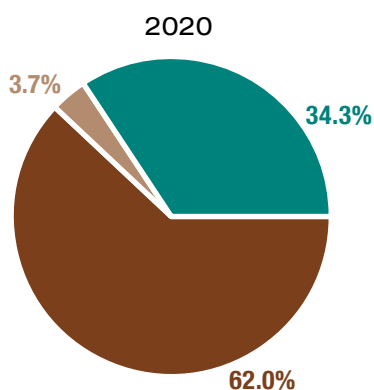
Workers Compensation Statistics

Total Appeals	Year Ending 2020	Year Ending 2019	Year Ending 2018
Appeals carried forward from previous year	26	34	36
Hearings held (by appeal)	127	130	151
Reviews held (by appeal)	20	21	31
Cases in process	[35]	[26]	[34]
Cases adjourned	[1]	[1]	[3]

Total Appeals Decided



Appeals accepted	47	50	46
Appeals partially accepted	5	8	15
Appeals not accepted	85	100	120



● Percentage accepted
 ● Percentage partially accepted
 ● Percentage not accepted

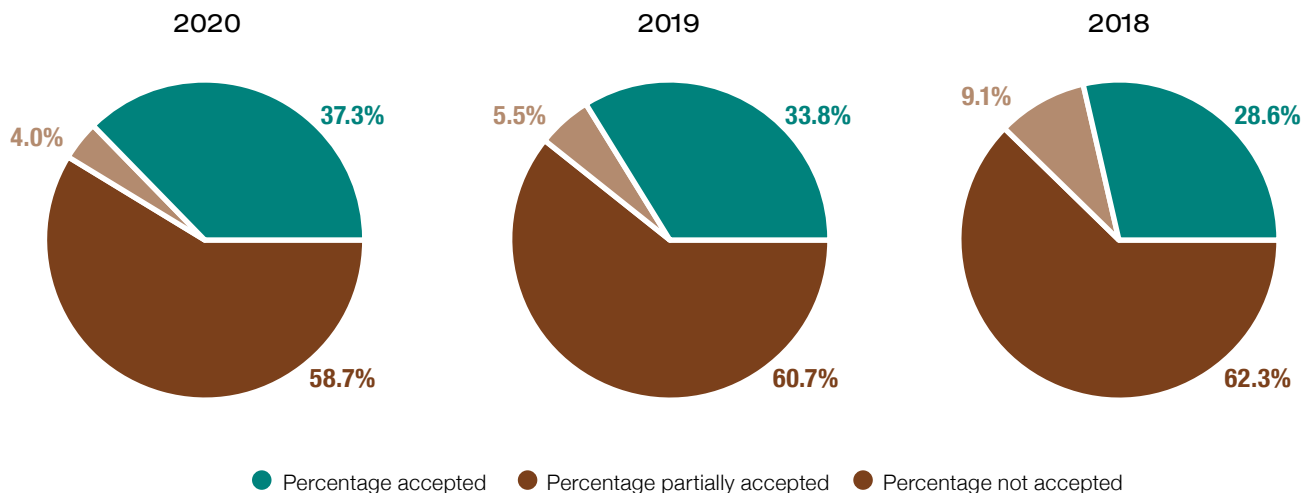
Post Hearing Activities (cases in process)

	Year Ending 2020	Year Ending 2019	Year Ending 2018
Cases awaiting further information requested by the panel	14	5	11
Cases awaiting decision	3	4	4
Decision writing	18	17	19
TOTAL	35	26	34

Total Worker Appeals

To Claim/Rehabilitation Issues

	Year Ending 2020	Year Ending 2019	Year Ending 2018
Appeals accepted	47	49	44
Appeals partially accepted	5	8	14
Appeals not accepted	74	88	96
TOTAL	126	145	154

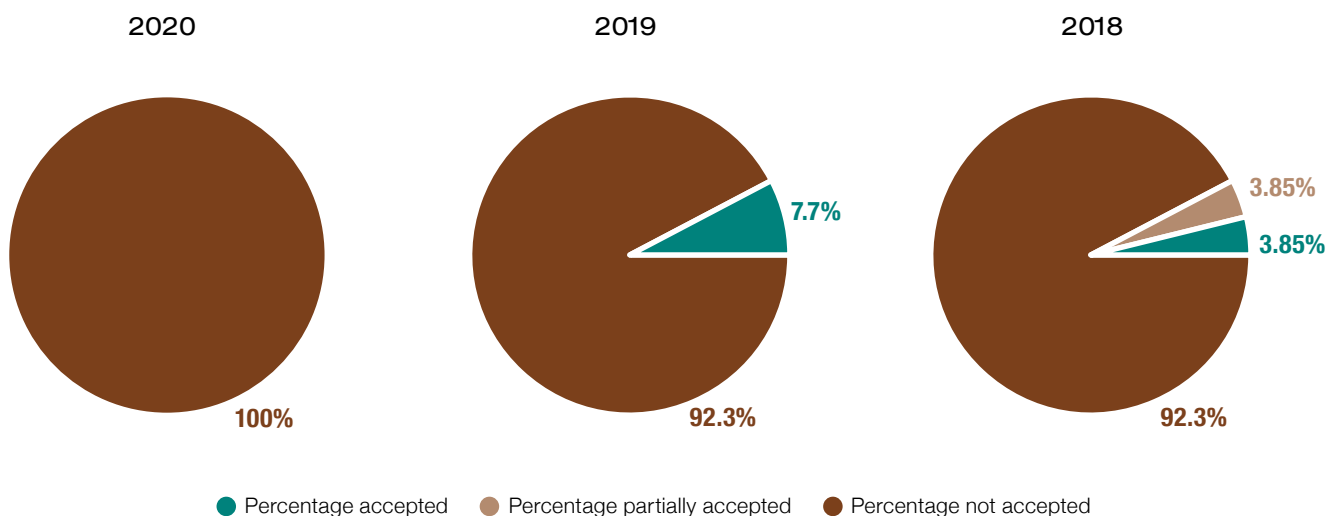


Number of workers represented by:

Legal Counsel	2	10	2
Union Representative	17	22	23
Worker Advisor	44	36	49
Advocate	4	9	8
Self Representation	55	61	67
Other	4	7	5

Total Employer Appeals

	Year Ending 2020	Year Ending 2019	Year Ending 2018
Appeals accepted	0	1	1
Appeals partially accepted	0	0	1
Appeals not accepted	11	12	24
TOTAL	11	13	26



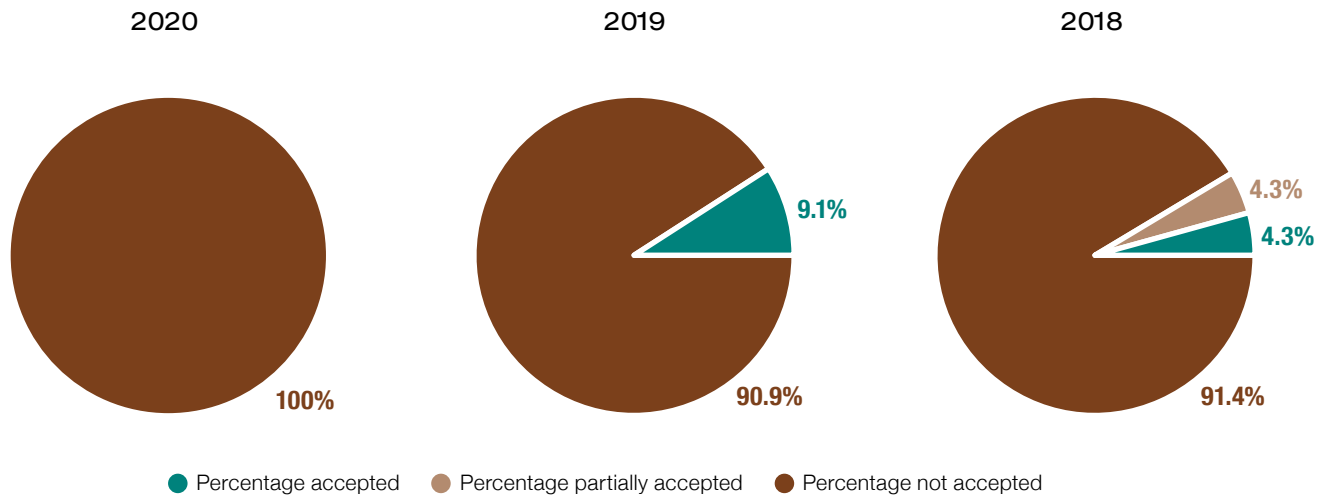
Number of employers represented by:

Legal Counsel	1	2	1
Advocate	4	4	13
Employer Agent	4	5	11
Self Representation	2	2	1

Employer Appeals

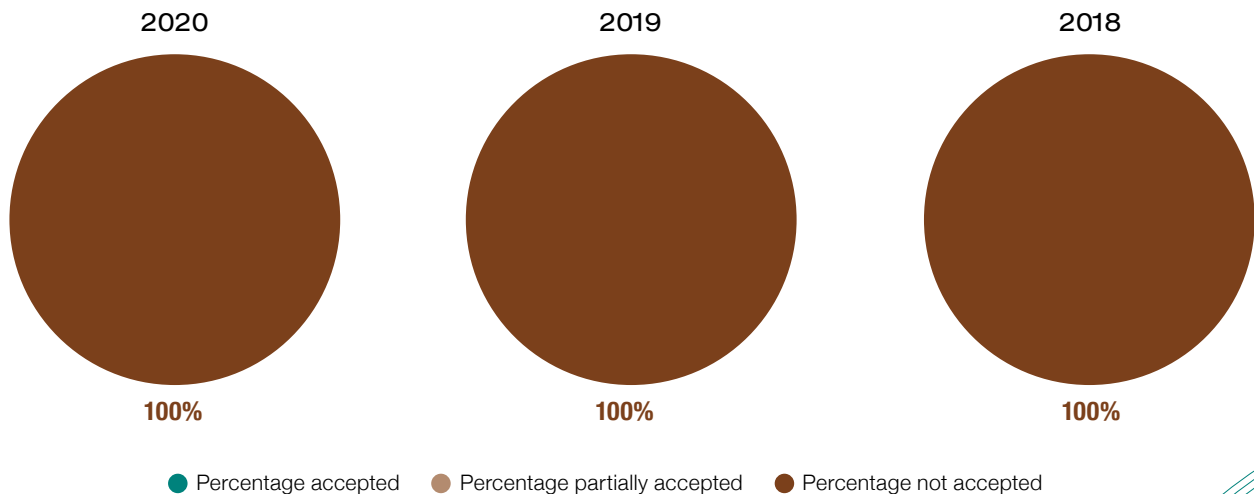
To Claim/Rehabilitation Issues

	Year Ending 2020	Year Ending 2019	Year Ending 2018
Appeals accepted	0	1	1
Appeals partially accepted	0	0	1
Appeals not accepted	9	10	21
TOTAL	9	11	23



To Assessment Issues

	Year Ending 2020	Year Ending 2019	Year Ending 2018
Appeals accepted	0	0	0
Appeals partially accepted	0	0	0
Appeals not accepted	2	2	3
TOTAL	2	2	3



Total Third Party Appeals*

	Year Ending 2020	Year Ending 2019	Year Ending 2018
Appeals accepted	0	0	1
Appeals partially accepted	0	0	0
Appeals not accepted	0	0	0
TOTAL	0	0	1

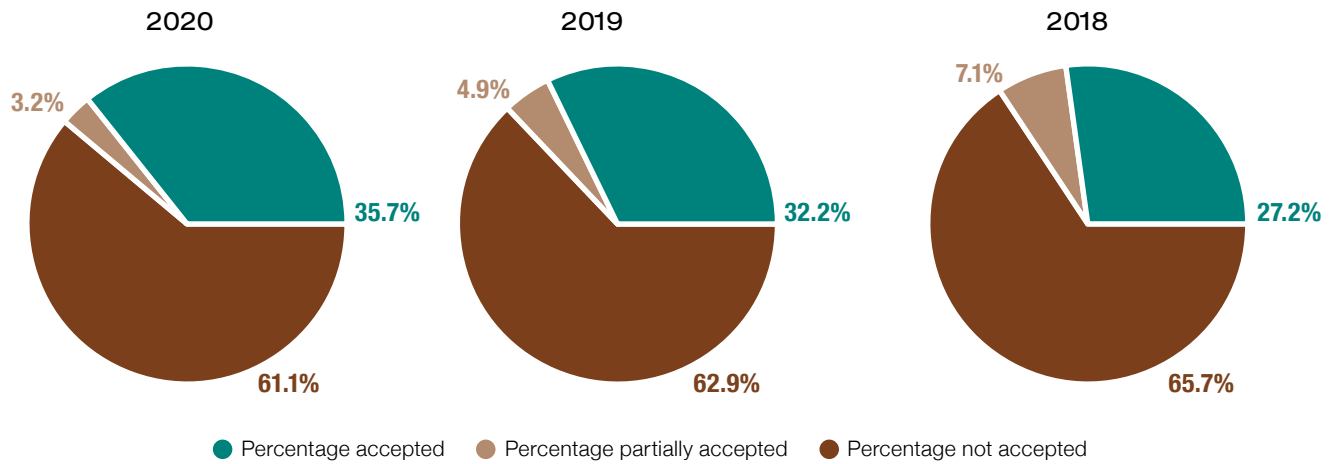
*Appeals by parties other than the worker or employer.

Number of third parties represented by:

Legal Counsel	0	0	1
Union Representative	0	0	0
Worker Advisor	0	0	0
Advocate	0	0	0
Self Representation	0	0	0
Other	0	0	0

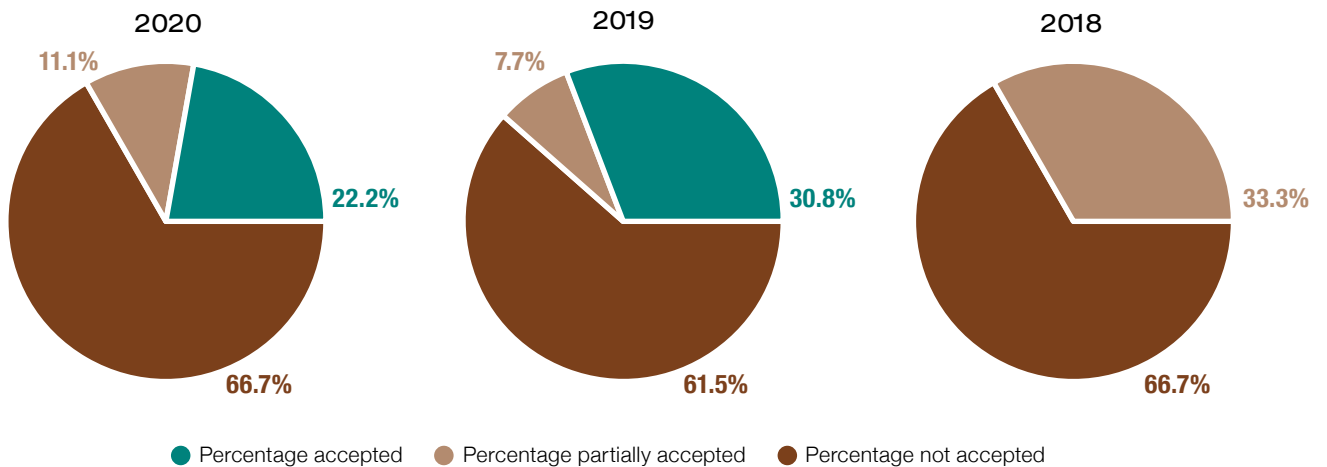
Appeal Type - Claim

	Year Ending 2020	Year Ending 2019	Year Ending 2018
Appeals accepted	45	46	46
Appeals partially accepted	4	7	12
Appeals not accepted	77	90	111
TOTAL	126	143	169



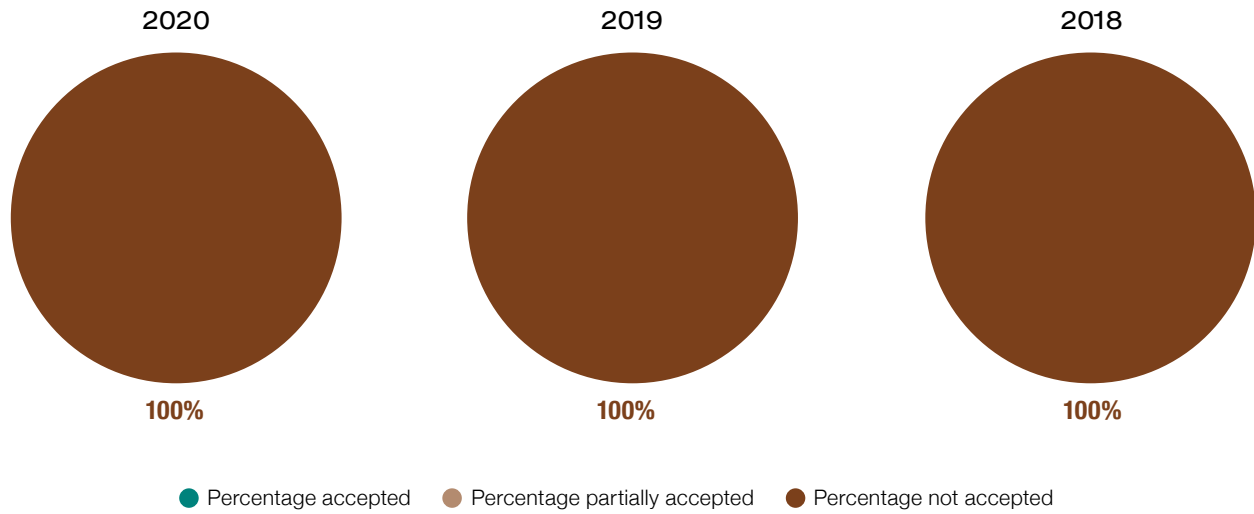
Appeal Type - Rehabilitation

	Year Ending 2020	Year Ending 2019	Year Ending 2018
Appeals accepted	2	4	0
Appeals partially accepted	1	1	3
Appeals not accepted	6	8	6
TOTAL	9	13	9

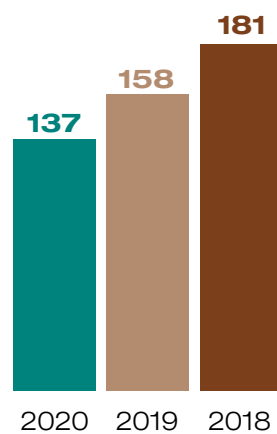


Appeal Type - Assessment

	Year Ending 2020	Year Ending 2019	Year Ending 2018
Appeals accepted	0	0	0
Appeals partially accepted	0	0	0
Appeals not accepted	2	2	3
TOTAL	2	2	3



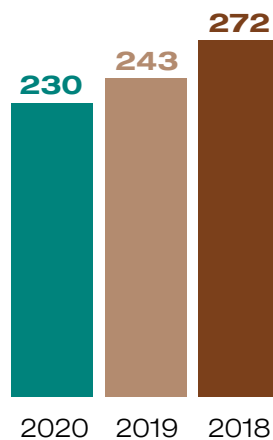
Total Appeals Decided



Most Common Issues Addressed

	Year Ending 2020	Year Ending 2019	Year Ending 2018
Entitlement to wage loss benefits (post-1992)	73	72	74
Entitlement to medical aid payment	56	56	62
Claim acceptance	43	47	59
Entitlement to an increase in the permanent partial impairment award	8	7	5
Is present condition related to the compensable injury	7	23	18
Has the permanent partial impairment award been correctly calculated	6	3	2
Is the worker entitled to payment for prescription medications	5	6	6
Was the vocational rehabilitation plan appropriate	4	2	2
Entitlement to a permanent partial impairment award	3	2	4
Is the worker capable of performing modified duties	2	0	2
Is the worker to reimburse the WCB for overpayment of benefits	2	0	2
Deeming process	2	4	4
Is the employer entitled to cost relief	2	3	4
Has the worker been overpaid benefits	2	2	3
Mitigation	2	4	0
Are the worker's physical restrictions related to the compensable injury	2	0	0
Should responsibility for surgery be accepted	2	2	2
Is the worker's death related to a compensable accident	1	1	0
Entitlement to a discretionary rehabilitation expense	1	0	2
Is the worker entitled to vocational rehabilitation services (retraining)	1	0	0
Effective date of the permanent partial impairment award	1	0	0
Other issues	5	9	21

Total Issues Addressed



Reconsiderations Under Section 60.10 of the Act

	Year Ending 2020	Year Ending 2019	Year Ending 2018
Number of requests decided	4	8	5
Reconsiderations granted	1	0	2
Referred back to the WCB to address new issues identified by the Chief Appeal Commissioner/designate	0	0	0

File Access Appeals

	Year Ending 2020	Year Ending 2019	Year Ending 2018
Worker appeals	4	3	11
Employer appeals	1	0	2
TOTAL FILE ACCESS APPEALS	0	3	13

Victims' Rights Statistics

Total Appeals	Year Ending 2020	Year Ending 2019	Year Ending 2018
Appeals accepted	3	0	0
Appeals partially accepted	1	1	0
Appeals not accepted	4	5	1
TOTAL	8	6	1

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, 2020)

	Year Ending 2020	Year Ending 2019	Year Ending 2018
Average time from date appeal received to date of hearing	24.91 wks	28.59 wks	27.45 wks
Average time from hearing date to decision published	10.80 wks	10.70 wks	10.40 wks
AVERAGE TIME FROM DATE APPEAL RECEIVED TO DECISION PUBLISHED*	35.71 wks	39.29 wks	37.85 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; and,
- where additional information was requested after the hearing/review.

About Medical Review Panels

We are pleased to welcome Dr. Susan Thompson as chair of Medical Review Panels. Dr. Thompson was appointed on April 1, 2020 for a two-year term.

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

Subsection 67(3) of the Act provides the WCB or Appeal Commission 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.

Medical Review Panel Statistics

Medical Review Panels (MRPs)	Year Ending 2020	Year Ending 2019	Year Ending 2018
Total MRPs convened	0	1	0
INITIATED BY:			
Primary Adjudication	0	1	0
Review Office	0	0	0
Appeal Commission	0	0	0
CONVENED UNDER:			
Subsection 67(3)	0	0	0
Subsection 67(4)	0	1	0
Subsection 67(4.1)	0	0	0

Medical Review Panels Convened by Area of Medical Specialty	Year Ending 2020	Year Ending 2019	Year Ending 2018
Orthopaedic Surgery	0	1	0
TOTAL:	0	1	0

Service Levels

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

Medical Review Panel

Service Level Statistics	Year Ending 2020	Year Ending 2019	Year Ending 2018
Average time from date of request to date MRP held	0 wks	186.00 wks	0 wks
Average time from date of MRP to date report is published	0 wks	6.43 wks	0 wks
AVERAGE TIME FROM DATE OF REQUEST TO DATE REPORT IS PUBLISHED	0 wks	192.43 wks	0 wks



2020 APPEAL COMMISSION AND MEDICAL REVIEW PANEL ANNUAL REPORT

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