

2021

Annual Report

**APPEAL COMMISSION
AND MEDICAL REVIEW PANEL**



THE APPEAL COMMISSION
THE WORKERS COMPENSATION ACT OF MANITOBA

Letter to the Minister

The Honourable Reg Hewler
Minister of Labour, Consumer Protection and Government Services
Legislative Building
450 Broadway
Winnipeg, MB R3C 0V8

Dear Minister:

I am pleased to present our 2021 Annual Report in accordance with the provisions of *The Workers Compensation Act*. This report covers the 12-month period from January 1, 2021 to December 31, 2021.

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, 2021 to December 31, 2021 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 2021.

The Appeal Commission provides an important function in Manitoba's workers compensation and administrative justice systems. As the final level of appeal from decisions made under *The Workers Compensation Act* (the Act), the Appeal Commission serves as an independent forum for resolution of concerns of both workers and employers dissatisfied with the decisions of the Workers Compensation Board (WCB). The Appeal Commission also serves as the final appeal body for decisions made under *The Victims' Bill of Rights* for victims of crime in Manitoba and under the *Government Employees Compensation Act* (Canada) for federal government employees working in Manitoba.

This report summarizes the work of the Appeal Commission over the course of 2021 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 continuing ability to pivot and adapt to the changing circumstances that flowed out of the Covid-19 pandemic. As in years past, the Appeal Commission was uncompromising and steadfast in our review of appeals in this year, demonstrating our stated commitment to ensuring that all appeals receive full and fair consideration. This remains our priority as we understand this approach to be in the best interests of our stakeholders, Manitoba's employers and workers.

The pandemic-related upheaval that began in 2020 continued through most of 2021, as most Commission staff worked remotely, while our offices remained closed to the public. Consequently, nearly all appeals were held remotely using videoconferencing tools, with appeal commissioners and all parties to each appeal participating from a range of locations across the province. Late in the year, as pandemic restrictions lifted, a few in-office hearings took place in the Appeal Commission hearing room with appropriate pandemic protocols. The continuing reliance on technology to facilitate remote hearing processes allowed the Appeal Commission to continue operations throughout the year with no interruption.

The Appeal Commission again experienced a number of transitions in the past year. Early in January, the Appeal Commission offices moved to a different location within the same building.

Our roster of commissioners changed with the addition of full-time commissioner Jason Peterson, representative of employers, and part-time commissioner Wally Skomoroh, representative of workers, both joining the Appeal Commission in January 2021. As well, part-time commissioners Karen Wittman, representative of the public interest, Phil Kraychuk and Bob Ripley, both representative of workers, were each reappointed to their roles in the year.

The success of the Appeal Commission depends on the dedication and commitment of the full-time and part-time appeal commissioners who carry out the work. We greatly appreciate all our full-time and part-time appeal commissioners for their dedicated service and adaptability to new ways of working throughout 2021.

Sincere appreciation is also due to all the staff of the Appeal Commission who continued to adapt to doing their jobs in new ways, all the while providing consistent support to each other, to the commissioners, and to the workers, employers and their representatives involved in appeals. I am deeply grateful to the Appeal Commission staff for their extraordinary flexibility and resilience in the face of compounding uncertainty through this past year. I am particularly appreciative of the leadership provided by Peter Wiebe, Registrar, and Roger Lafrance, Assistant Registrar, through the process of moving offices, onboarding new commissioners and pivoting to new ways of operating as circumstances and rules changed through the 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 2021, 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 2022.

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 the Appeal Commission's 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 written submissions by the parties with a direct interest.

Some examples of appeals commonly decided by file review include:

- most assessment appeals
- factual questions 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 appears in person before the panel through teleconference, videoconference or in-office. The appeal can also be supported by written submissions. Witnesses may appear if the Appeal Commission is advised in advance of their attendance.

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 and submissions concerning an appeal must be provided to the Appeal Commission at least five business days before the review or hearing.
- 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 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, 2021, there were four full-time commissioners:

Karen Dyck, Chief Appeal Commissioner (Public Interest)

Lynne Harrison, Presiding Officer (Public Interest)

Mark Kernaghan, Appeal Commissioner (Workers)

Jason Peterson, Appeal Commissioner (Employers)

Part-Time Appeal Commissioners

During 2021, 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

Marc Payette

Robert Ripley

Wally Skomoroh

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.
- Jason Peterson, Full-Time Appeal Commissioner Representing Employers was appointed in 2021.

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 2021 were:

Law Society of Manitoba:

- Trauma Informed Lawyering
- Commemorating 150 Years of Treaty 1 and Treaty 2
- Forms of Address and Pronouns

Canadian Bar Association:

- Ethics
- Mid-Winter Conference

Council of Canadian Administrative Tribunals:

- 36th Annual Symposium
- How to fix my access to justice problem

Bill 18, *The Workers Compensation Amendment Act*

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

There were no disclosures received in 2021.

Appeal Commission Statistics

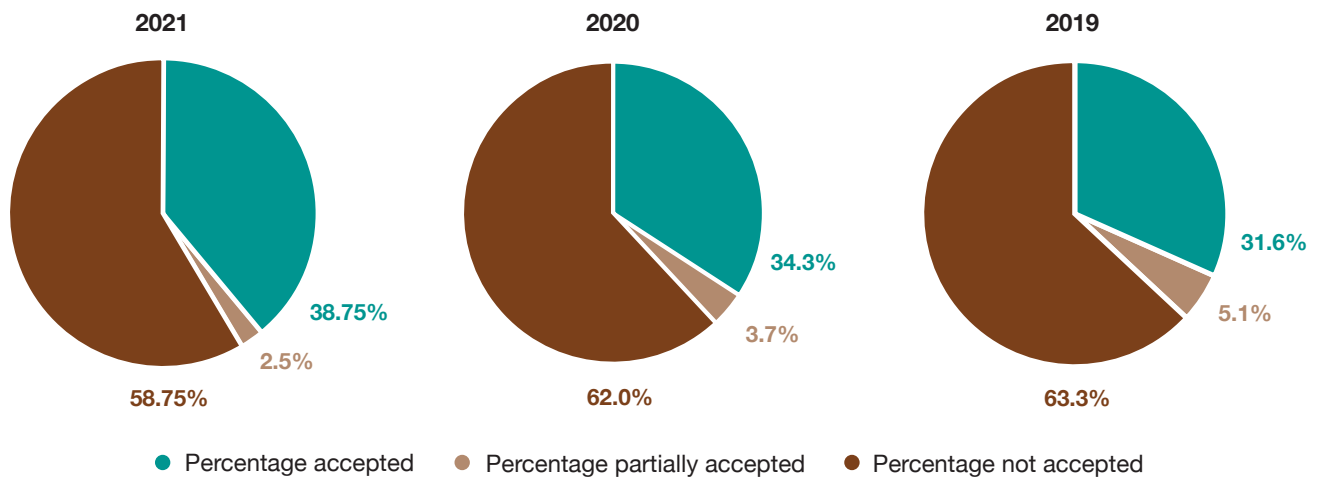
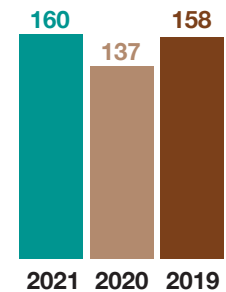
Workers Compensation Statistics

Total Appeals

	Year Ending 2021	Year Ending 2020	Year Ending 2019
Appeals carried forward from previous year	35	26	34
Hearings held (by appeal)	128	127	130
Reviews held (by appeal)	25	20	21
Cases in process	[26]	[35]	[26]
Cases adjourned	[2]	[1]	[1]

Total Appeals Decided

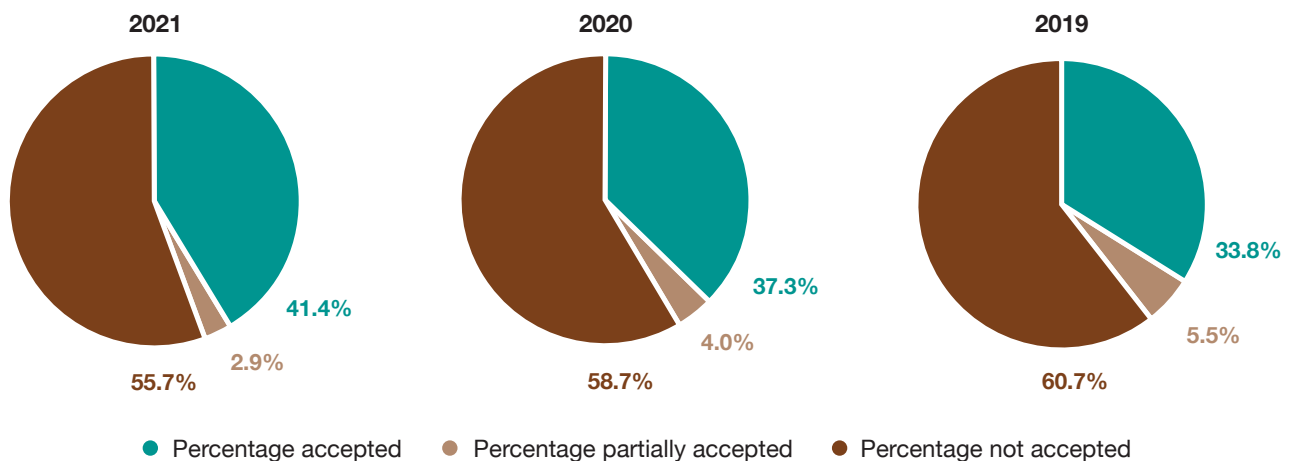
Appeals accepted	62	47	50
Appeals partially accepted	4	5	8
Appeals not accepted	94	85	100



Post Hearing Activities (cases in process)	Year Ending 2021	Year Ending 2020	Year Ending 2019
Cases awaiting further information requested by the panel	8	14	5
Cases awaiting decision	6	3	4
Decision writing	12	18	17
TOTAL	26	35	26

Total Worker Appeals

To Claim/Rehabilitation Issues	Year Ending 2021	Year Ending 2020	Year Ending 2019
Appeals accepted	58	47	49
Appeals partially accepted	4	5	8
Appeals not accepted	78	74	88
TOTAL	140	126	145

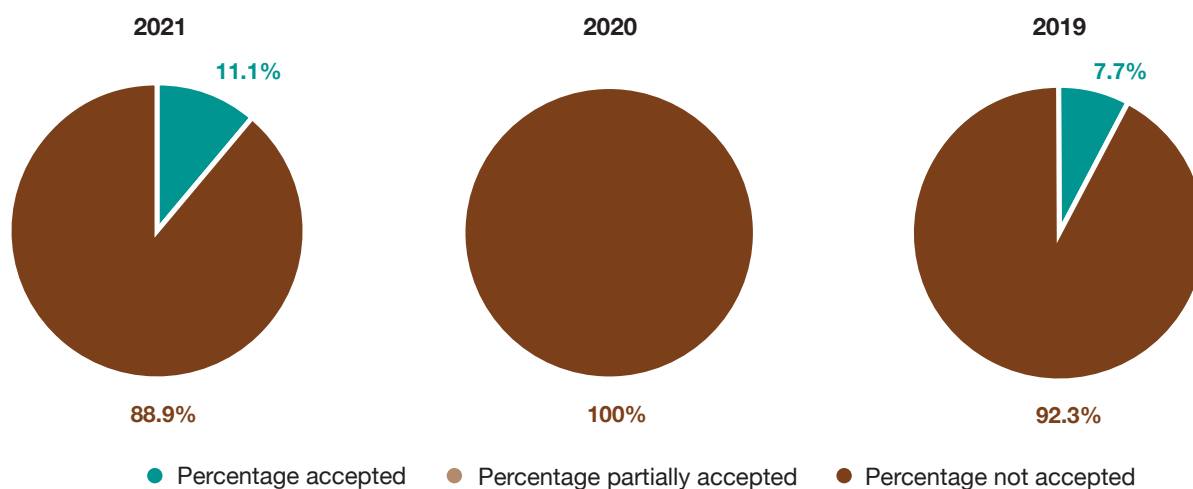


Number of workers represented by:

Legal Counsel	5	2	10
Union Representative	16	17	22
Worker Advisor	55	44	36
Advocate	1	4	9
Self Representation	61	55	61
Other	2	4	7

Total Employer Appeals

	Year Ending 2021	Year Ending 2020	Year Ending 2019
Appeals accepted	2	0	1
Appeals partially accepted	0	0	0
Appeals not accepted	16	11	12
TOTAL	18	11	13



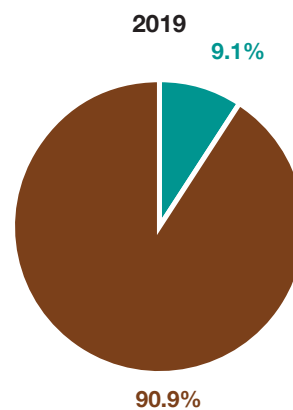
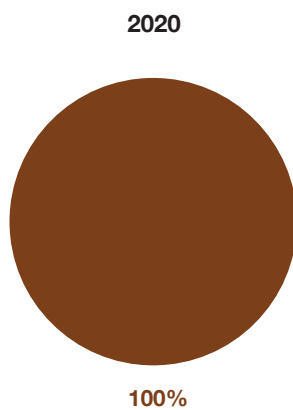
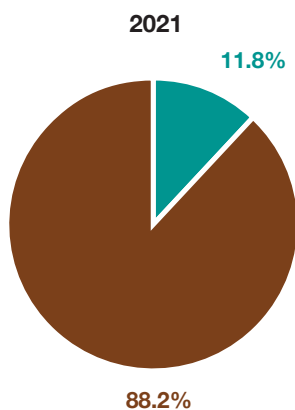
Number of employers represented by:

Legal Counsel	1	1	2
Advocate	10	4	4
Employer Agent	7	4	5
Self Representation	0	2	2

Employer Appeals

To Claim/Rehabilitation Issues

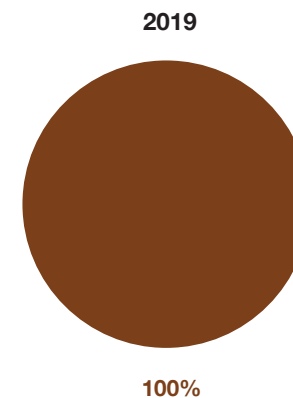
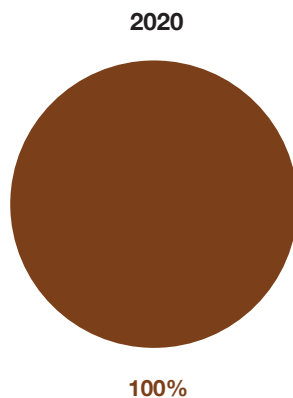
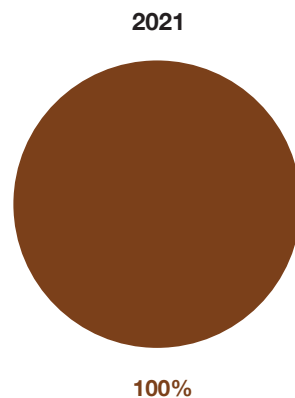
	Year Ending 2021	Year Ending 2020	Year Ending 2019
Appeals accepted	2	0	1
Appeals partially accepted	0	0	0
Appeals not accepted	15	9	10
TOTAL	17	9	11



● Percentage accepted ● Percentage partially accepted ● Percentage not accepted

To Assessment Issues

	Year Ending 2021	Year Ending 2020	Year Ending 2019
Appeals accepted	0	0	0
Appeals partially accepted	0	0	0
Appeals not accepted	1	2	2
TOTAL	1	2	2



● Percentage accepted ● Percentage partially accepted ● Percentage not accepted

Total Third Party Appeals*

	Year Ending 2021	Year Ending 2020	Year Ending 2019
Appeals accepted	2	0	0
Appeals partially accepted	0	0	0
Appeals not accepted	0	0	0
TOTAL	2	0	0

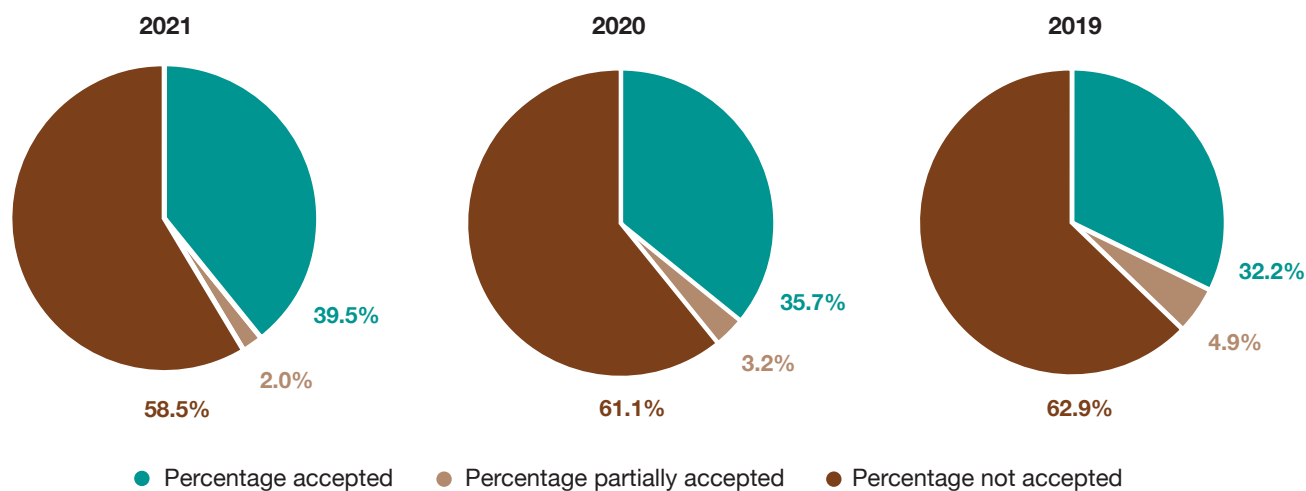
Number of third parties represented by:

Legal Counsel	2	0	0
Union Representative	0	0	0
Worker Advisor	0	0	0
Advocate	0	0	0
Self Representation	0	0	0
Other	0	0	0

*Appeals by parties other than the worker or employer.

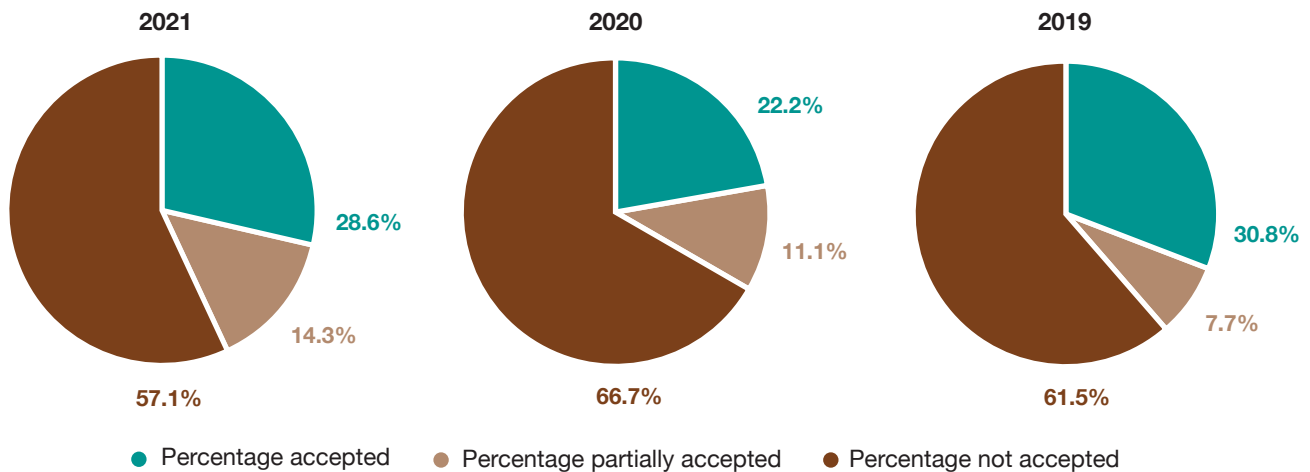
Appeal Type - Claim

	Year Ending 2021	Year Ending 2020	Year Ending 2019
Appeals accepted	60	45	46
Appeals partially accepted	3	4	7
Appeals not accepted	89	77	90
TOTAL	152	126	143



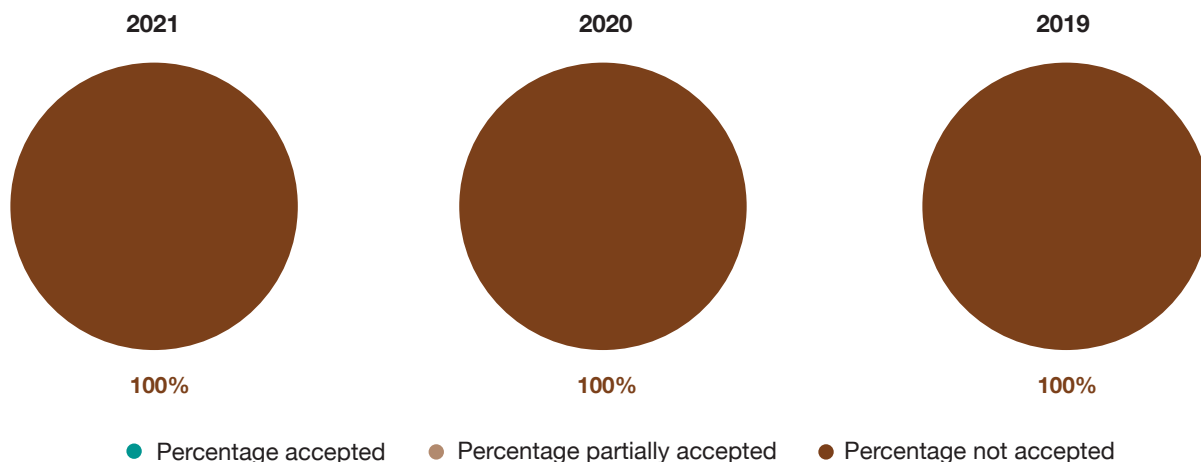
Appeal Type - Rehabilitation

	Year Ending 2021	Year Ending 2020	Year Ending 2019
Appeals accepted	2	2	4
Appeals partially accepted	1	1	1
Appeals not accepted	4	6	8
TOTAL	7	9	13



Appeal Type - Assessment

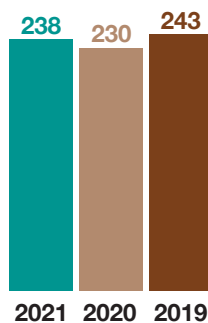
	Year Ending 2021	Year Ending 2020	Year Ending 2019
Appeals accepted	0	0	0
Appeals partially accepted	0	0	0
Appeals not accepted	1	2	2
TOTAL	1	2	2



Most Common Issues Addressed

	Year Ending 2021	Year Ending 2020	Year Ending 2019
Entitlement to wage loss benefits (post-1992)	67	73	72
Claim acceptance	52	43	47
Entitlement to medical aid payment	48	56	56
Is present condition related to the compensable injury	22	7	23
Is the employer entitled to cost relief	5	2	3
Entitlement to an increase in the permanent partial impairment award	5	8	7
Is the worker entitled to payment for prescription medications	4	5	6
Applications under subsection 68(4)	3	0	0
Entitlement to a permanent partial impairment award	3	3	2
Is the worker entitled to further physiotherapy treatment	3	0	2
Should responsibility for surgery be accepted	3	2	2
Is the worker capable of performing modified duties	2	2	0
Was the vocational rehabilitation plan appropriate	2	4	2
Administrative Penalties	1	0	0
Average Earnings Policy	1	0	1
Is the worker to reimburse the WCB for overpayment of benefits	1	2	0
Computer Purchase	1	0	0
Deeming Process	1	2	4
Is the worker entitled to special additional compensation benefits	1	0	0
Entitlement to temporary total disability benefits (pre-1992)	1	0	0
Has the worker been overpaid benefits	1	2	2
Other issues	11	19	14

Total Issues Addressed



Reconsiderations Under Section 60.10 of The Act

	Year Ending 2021	Year Ending 2020	Year Ending 2019
Number of requests decided	15	4	8
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 2021	Year Ending 2020	Year Ending 2019
Worker appeals	2	4	3
Employer appeals	0	1	0
TOTAL FILE ACCESS APPEALS	2	5	3

Victims' Rights Statistics

	Year Ending 2021	Year Ending 2020	Year Ending 2019
Appeals accepted	0	3	0
Appeals partially accepted	2	1	1
Appeals not accepted	4	4	5
TOTAL	6	8	6

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 the Appeal Commission's 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, 2021)	Year Ending 2021	Year Ending 2020	Year Ending 2019
Average time from date appeal received to date of hearing	27.63 wks	24.91 wks	28.59 wks
Average time from hearing date to decision published	11.08 wks	10.80 wks	10.70 wks
AVERAGE TIME FROM DATE APPEAL RECEIVED TO DECISION PUBLISHED*	38.71 wks	35.71 wks	39.29 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

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 Panel (MRPs)	Year Ending 2021	Year Ending 2020	Year Ending 2019
Total MRPs convened	1	0	1
INITIATED BY:			
Primary Adjudication	1	0	1
Review Office	0	0	0
Appeal Commission	0	0	0
CONVENED UNDER:			
Subsection 67(3)	0	0	0
Subsection 67(4)	1	0	1
Subsection 67(4.1)	0	0	0
Medical Review Panels Convened by Area of Medical Specialty			
	Year Ending 2021	Year Ending 2020	Year Ending 2019
Neurology	1	0	0
Orthopedic Surgery	0	0	1
TOTAL	1	0	1

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 2021	Year Ending 2020	Year Ending 2019
Average time from date of request to date MRP held	100.57 wks	0 wks	186.00 wks
Average time from hearing date to decision published	10.43 wks	0 wks	6.43 wks
AVERAGE TIME FROM DATE APPEAL RECEIVED TO DECISION PUBLISHED*	111.00 wks	0 wks	192.43 wks



2021 Appeal Commission and Medical Review Panel Annual Report

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THE APPEAL COMMISSION

THE WORKERS COMPENSATION ACT OF MANITOBA