

1.10 Introduction

The rules, practices and procedures established by the chair in this *Manual* are subject to review and amendment by the chair, as the chair considers necessary. A current copy of this *Manual* is accessible on WCAT's internet website at: www.wcat.bc.ca

1.40 Composition of WCAT

The first vice chairs were appointed by the minister, after consultation with the first chair of WCAT [s. 35(1)]. Re-appointments are made by the chair.

Appointments of vice chairs are now made by the chair, after consultation with the minister, using a **[CHECK, Bill 68: merit/competency-]** based selection process established or approved by the chair [s. 232(6), s. 35(2)]. The chair may only appoint a person as a WCAT vice chair if the person demonstrates the following **[Workers Compensation Act Appeal Regulation, B.C. Reg. 321/02, s. 2(a) to (i)]**:

Vice chairs hold office in their first term for 2 years **[CHECK, Bill 68: 2 to 4 years]** and may be reappointed for one or more successive terms of up to 4 **[CHECK, Bill 68: 4 to be increased to 5]** years each [s. 232(4)].

WCAT members must take an oath of office, by oath or solemn affirmation, and must perform their duties and functions in a fair, impartial and expeditious manner [s. 232(7) and (8)]. The oath of office must take the following form **[Workers Compensation Act Appeal Regulation, B.C. Reg. 321/02, s. 3]**:

2.00 JURISDICTION

There are only two types of decisions by board officers which are appealable directly to WCAT (with a 90 day time limit). These concern:

- (a) a discriminatory action complaint under s. 153
- (b) an application for reopening of a claim under s. 96(2)

Note: The right of direct appeal to WCAT from a decision under section 96(2) is limited to situations where the decision concerned an application by the party rather than being made on the Board's own initiative. Such a direct appeal is limited to the issue as to whether or not grounds for a reopening are met. Once a claim has been reopened, any ensuing decision concerning entitlement is one which is subject to review by the Review Division.

In general, the Review Division has jurisdiction to review a Board decision in a specific case concerning [s. 96.2(1)]:

- (a) compensation **(including a decision, on the board's own initiative, to reopen or not to reopen a claim under section 96(2))**;
- (b) vocational rehabilitation;

2.33 Application for Reconsideration (see items 15.00 to 15.24)

A request for reconsideration of a prior Review Board finding, for which the 30 day appeal period has expired, will be treated as a request for an extension of time to appeal. The chair has authority to grant an extension of time to appeal a prior Review Board finding, where the chair is satisfied that [s. 243(3), **Workers Compensation Act Transitional Review and Appeal Regulation, B.C. Reg. 322/02, s. 2(2)**]:

- (a) special circumstances existed which precluded the filing of a notice of appeal within the time period required in subsection (1) or (2), and
- (b) an injustice would otherwise result.

2.41 Preliminary or procedural decisions not appealable to WCAT

The following classes of decisions respecting the conduct of a review by the Review Division are specified by regulation as not being appealable to WCAT [s. 224(2)(j), s. 239(2)(a), **Workers Compensation Act Appeal Regulation, B.C. Reg. 321/02, s. 4(a) to (e)**]:

3.40 How to Appeal

An appeal may be initiated in any form which produces a written record with WCAT of the appeal, within the time limit. This may be accomplished by delivering, mailing or sending by FAX a completed notice of appeal to WCAT, or by providing the required information in a letter. WCAT notice of appeal forms may be downloaded from the WCAT website at: www.wcat.bc.ca **WCAT will treat receipt of a written notice of appeal (or request for review) by the Review Division or any office of the WCB as receipt by WCAT (i.e. where the appellant files the notice to the wrong address).**

3.60 Canadian Charter of Rights and Freedoms

Where an appellant alleges a contravention or violation of the *Canadian Charter of Rights and Freedoms*, the appellant must provide notices to the Attorneys General of British Columbia and Canada pursuant to s. 8 of the *Constitutional Question Act*, R.S.B.C. 1996, Chapter 68. The appellant must provide WCAT with proof, such as a letter of acknowledgment from the federal and provincial Attorneys General or their representatives, that such notice was provided. **Such proof must be received by WCAT at least 30 days in advance of the hearing.** In the absence of such proof, the WCAT panel will normally proceed to issue its decision without considering the *Charter* argument(s).

4.00 REGISTRATION OF APPEALS OR APPLICATIONS: SCREENING AND STREAMING

4.10 Registration

The registrar's office will register appeals and other applications and screen them for compliance with preliminary requirements. This includes receiving telephone notifications of appeal. The registrar's office will determine whether:

- (g) the appeal or other matter should be handled in the "fast track", "regular", "**complex**", or "specialty" stream. The registrar's office will normally provide a preliminary determination as to whether the case should proceed by way of written submissions or an oral hearing. In specialty stream cases, the appeal will be assigned to a WCAT panel at the outset to provide direction concerning the preliminary handling of the case (see item 4.40), including whether the case should proceed by way of written submissions or an oral hearing.

4.40 Streaming: Regular or Specialty

The registrar's office will review each appeal or application and designate whether it should be in the regular, complex, or specialty stream. The **complex and** specialty streams will be used for cases which are likely to involve more complex preliminary handling.

- In the regular stream, an appeal liaison will provide ongoing contact with the parties. An appeal assessor will make a preliminary determination as to whether the matter should proceed on the basis of written submissions or an oral hearing, and the panel assignment will occur when written submissions are complete or an oral hearing is being scheduled.
- In the **complex** stream, an appeal coordinator will provide ongoing contact with the parties. An appeal assessor will normally make a preliminary determination as to whether the matter should proceed on the basis of written submissions or an oral hearing, and the panel assignment will occur when written submissions are complete or an oral hearing is being scheduled.
- **In specialty stream, the appeal will be assigned to a WCAT panel at the outset, and the panel will determine whether the appeal should be by way of written submissions or an oral hearing. Such early assignment of cases to panels to facilitate the panel's direct involvement in the preliminary handling of the case will normally be done in prevention and assessment appeals, and in applications for a certificate under section 257. It may also be done in any other case**

where the registrar's office considers this to be required by the procedural complexities of the case.

In determining whether a case should be assigned to the complex and specialty streams, the registrar's office may consider:

- (a) the nature of the dispute;
- (b) whether the issues are new or unusual;
- (c) the complexity of the issues, facts and evidence;
- (d) the likelihood of settlement by means of alternative dispute resolution;
- (e) the number of participants involved (parties and witnesses);
- (f) whether a pre-hearing conference may be appropriate;
- (g) the estimated duration of the hearing;
- (h) the remedies being sought;
- (i) the potential for a jurisdictional challenge;
- (j) the potential for a constitutional challenge;
- (k) whether there are multiple appeals with common or similar subject matter;
- (l) whether the appeal raises an issue of special interest or significance to the workers' compensation system as a whole;
- (m) whether the appeal raises a significant issue concerning the interpretation of the *Act* or policy,
- (n) whether the appeal raises a significant issue as to the lawfulness of policy under the *Act*;
- (o) whether the appeal concerns occupational disease causation;
- (p) whether the appeal involves a discriminatory action matter under s. 153;
- (q) whether the appeal involves an administrative penalty;
- (r) whether the appeal concerns an employer's assessment classification unit;
- (s) whether the appeal involves a sexual assault of a worker;
- (t) whether the appeal concerns a claim for compensation for mental stress, under s. 5.1 of the *Act*;
- (u) whether the application concerns a request for a certificate to the court under s. 257, in a legal action; or,
- (v) whether the application involves a request for reconsideration of an Appeal Division or WCAT decision on the basis of new evidence, or seeks to have a WCAT decision voided on the basis of an error of law going to jurisdiction.

4.50 Panel's Authority

WCAT panels have the same authority, whether in the **fast track**, regular, **complex**, or specialty stream. Panels have authority to consider:

- (a) whether the appeal should proceed by written submissions or an oral hearing, and whether teleconference or videoconference facilities should be used;
- (b) whether ADR is appropriate;
- (c) whether to convene a pre-hearing conference [s. 246(2)(e)];

- (d) whether to request medical advice under s. 249 and if so, whether findings of non-medical fact are required;
- (e) whether to require pre-hearing disclosure of evidence [s. 246(2)(f)];
- (f) who should participate [s. 246(2)(i)];
- (g) the requirements for any oral hearing (date, location, duration, interpreter);
- (h) whether other evidence should be requested [s. 246(2)(a), (b) and (c), s. 247];
- (i) whether the Board should be requested to investigate a matter further and report in writing to WCAT [s. 246(2)(d)];
- (j) whether there should be a pre-hearing examination of a party on oath or affirmation or by affidavit [s. 246(2)(f)];
- (k) whether to require an employer to post a notice to bring the prevention appeal to the attention of the employees [s. 246(2)(h)];
- (l) whether to deem the employer's adviser or an organized group of employers to be the employer [s. 248];
- (m) whether a matter should be referred back to the Board for determination with a suspension of the appeal pending the Board's determination [s. 246(3), s. 252];
- (n) whether a request should be made to the Board as to the policy of the board of directors that is applicable to the matter under appeal [s. 245(4)];
- (o) any other preliminary matters which would normally be addressed by the registrar's office.

5.20 Service of Decisions or Orders

Parties have a responsibility to keep WCAT informed of their current address. Under section 221:

- (a) a document that must be served on or sent to a person under the *Act* may be:
 - personally served on the person, or
 - sent by mail to the person's last known address,
 - transmitted electronically, by facsimile transmission (FAX) or otherwise (eg. email), to the address or number requested by the person.
- (b) If a document is sent by mail, the document is deemed to have been received on the 8th day after it was mailed.
- (c) A document transmitted electronically is deemed to have been received when the person transmitting the document receives an electronic acknowledgement of the transmission.

Where the decision by the board officer or review officer, **or WCAT notice**, is only sent by mail, in calculating the time period for appealing an additional 8 days are permitted for mailing of the decision [s. 221]. For this purpose, a decision **or**

WCAT notice may be served by being sent by regular mail to the person's last known address. Accordingly, it is a party's responsibility to ensure that WCAT is promptly informed of any change of address.

Where the party fails to notify the Board or WCAT of the party's change of address, evidence that a decision or notice did not reach a party because it was mailed to their last known address will not rebut its deemed delivery under section 221(2). The consequences of a failure to attend an oral hearing, or to provide a written submission, are set out in items 9.24 and 10.10.

A decision may also be served or sent to a person by personal service (delivery to the affected person), or by electronic transmission. In such cases, the time limit runs from the date service was effected. The 8 days for mailing does not apply to such cases.

Service by facsimile (FAX) transmission or by e-mail is only used where requested by the person ["to the address or number requested by the person", s. 221(1)(c)]. If a document is transmitted electronically, the document is deemed to have been received when the person transmitting the document receives an electronic acknowledgement of the transmission [s. 221(3)]. The page produced by the fax machine that shows the number dialed and that the fax was successfully sent, or a print-out of an e-mail which was sent, will suffice for this purpose. It is not a requirement that the party acknowledge receipt.

If the last day for filing an appeal falls on a weekend or public holiday, time for filing the appeal is extended to the first business day when WCAT's offices are open [s. 25, *Interpretation Act*].

If mail to the appellant is returned to WCAT as undeliverable, WCAT will make some limited inquiries to attempt to contact the appellant. Where WCAT is unable to locate the appellant, the following will apply:

- (a) **If the matter has been scheduled for an oral hearing, the oral hearing will be cancelled;**
- (b) **If the appeal involves a transitional matter, the appeal will be transferred to the "parking lot" (see item 26.60) to await contact from the appellant until such time as WCAT is ready to proceed with the appeal;**
- (c) **If the appeal involves a statutory time frame for decision-making, or is one from the "parking lot" on which WCAT is ready to proceed, WCAT will send a final notice to the appellant's last known address, advising that in the absence of a response within 21 days WCAT will:**
 - **continue with the proceedings and make a decision based upon the evidence before it; or,**
 - **determine that the appeal has been abandoned.**

In such circumstances, WCAT will normally consider the appeal based on the evidence on file, the notice of appeal and any submissions on file. Where the panel considers an oral hearing is necessary, the panel may determine that the appeal has been abandoned.

5.30 Extension of Time to Appeal

There is a 30 day time limit for appealing a decision by a review officer to WCAT. There is a 90 day time limit for appealing a decision by a Board officer concerning a discriminatory action complaint (under s. 153), or concerning a reopening application (under s. 96(2)) to WCAT.

An application for an extension of time to appeal will normally be considered on the basis of written submissions. WCAT will invite the respondent to participate. Applicants should provide reasons for not appealing within the statutory time period, and also reasons for any further delay after the expiry of that period.

The chair has discretion to extend the time to appeal under section 243(3). There are three requirements for an application under section 243(3) to be successful:

- (a) the chair must be satisfied that special circumstances precluded the filing of the appeal on time;
- (b) the chair must be satisfied that an injustice would result if the extension were not granted; and
- (c) the chair must exercise the discretion to extend time in favour of the applicant.

Special Circumstances Precluded

Special circumstances must preclude the filing of the appeal on time. The definition of “special” includes “unusual”, “uncommon”, “exceptional” and “extraordinary”. In the context of section 243(3), “preclude” does not mean “absolutely prevent”. It may include “prevent”, “hinder”, “impede”, or “delay” (see WCAT decision #2003-01810). It is not possible to define in advance all the situations that might be recognized as special circumstances which precluded the filing of an application.

In the context of this requirement, no consideration will be given to the merits of the appeal.

The following factors may be considered in deciding whether special circumstances precluded the filing of an appeal on time:

- (a) the date on which the applicant actually received the decision under appeal,

- (b) if the decision was not received in a timely fashion, the reason for the delay (e.g. the fact that the envelope was inaccurately addressed by the Board),
- (c) whether the applicant was away when the decision was issued and did not return until after the appeal period had expired,
- (d) whether the decision that the applicant seeks to appeal advised the applicant of the right of appeal and the time limit for initiating the appeal,
- (e) whether, at the time the decision was issued, evidence to support the appeal either did not exist or existed but was not discovered and could not through the exercise of reasonable diligence have been discovered, and,
- (f) whether the applicant took all reasonable steps to ensure a timely appeal.

In future decisions, WCAT will consider the effect of a representative's failure to carry out the instructions of an appellant.

Injustice

In order to extend the time to appeal, an injustice must result from the refusal to grant the extension. "Injustice" means "unfairness", "lack of justice", "wrong".

In determining whether "an injustice would otherwise result", the chair will consider the significance of the matter under appeal (i.e. the magnitude or importance of the issues under appeal). In future decisions, WCAT will consider other factors which may be relevant to this requirement, including whether a refusal to extend the time where there is a clear error of law on the face of the decision would constitute an injustice.

Exercise of discretion

If the two criteria in section 243(3) are met, the chair must then decide whether to exercise the discretion to extend the time to appeal. The following factors will be considered in this context:

- (a) the length of the delay,
- (b) the reasons for any delay beyond the expiry of the appeal period,
- (c) whether the applicant acted promptly to initiate an appeal when he or she became aware of the decision, the time limit for appealing, or the significant new evidence that would support the appeal,
- (d) whether there is prejudice to the respondent resulting from the delay.

5.53 Suspension re Independent Health Professional Advice

Where WCAT retains an independent health professional to provide advice in respect of a specific appeal under s. 249, the appeal may be suspended during the period commencing with the provision of terms of reference **for** the health professional, until their report is provided to WCAT [s. 249(12)]. See item 11.00 to 11.60.

5.55 Suspension Pending a Board Decision on a Related Matter

Examples of situations in which an appeal might be suspended pending further adjudication by the Board **(or review by a review officer)** include:

- the effect of a review officer's decision is not clear or requires a further adjudicative decision before its effect will be apparent. The party is uncertain whether it is necessary to appeal a review officer's decision to WCAT. The party may file an appeal to WCAT, but request that the appeal be suspended pending a decision by a Board officer implementing the review officer's decision. **(This would not apply where the issue concerns the payment of retroactive benefits, which must be deferred under section 258(3)(b) until WCAT has made a final decision or the appeal has been withdrawn);**
- the Board may provide a decision as to whether a worker's problems are due to a new work injury, or provide grounds for reopening a prior claim. The decision as to whether or not a new claim should be established is subject to review by the Review Division, while the decision as to whether or not a prior claim should be reopened may be appealed directly to WCAT. In such cases, WCAT will normally suspend an appeal pending the Review Division decision.

8.60 Subpoenas

A subpoena for the production of documents or things may be issued together with a subpoena compelling the attendance of a witness or it may be issued separately. A subpoena may be issued by the panel on its own initiative, or at the request of a party. Parties requesting a subpoena will be asked to provide the following information in writing:

- (a) the name and address of the witness or person in possession of the documents or things, and the exact documents or things requested;
- (b) the relevance of the evidence to the issue under appeal;
- (c) whether the witness is willing to attend, or the person is willing to produce the documents or things and, if not, why not.

The panel assigned to an appeal will decide whether to issue a subpoena. The panel will consider whether there are other means for obtaining the same evidence, the relevance of the evidence, and, if applicable, the reason for the

unwillingness of a witness to attend or to provide evidence voluntarily. A subpoena will be drafted in consultation with tribunal counsel or the registrar, and will be signed by the panel and forwarded to the requesting party for service where appropriate. Alternatively, WCAT may arrange for service.

A person served with a subpoena is entitled to conduct money payable by the requesting party at the time of service (*British Columbia Supreme Court Rule 40(38)*). A witness is not obligated to attend if the conduct money is not paid.

The decision as to whether or not to issue a subpoena rests with the WCAT panel. However, where the panel decides to grant a party's request that WCAT issue a subpoena, the panel may direct that the party requesting the subpoena be responsible for arranging for service of the subpoena, and for providing conduct money to the witness. In that event, the party may request reimbursement of these expenses in the appeal. Alternatively, WCAT may undertake service of the subpoena.

If the witness fails to attend, the onus is on the requesting party to take the necessary steps to enforce the subpoena through the Supreme Court. Alternatively, WCAT may take such steps. The panel may adjourn the hearing to allow for this.

8.70 Method of Hearing

For cases in the regular **and complex** streams, the registrar's office will determine at the outset whether the case will proceed by way of written submissions or an oral hearing. If the registrar's office refers the case to the specialty stream, the WCAT panel will determine the method of hearing.

9.00 ORAL HEARINGS

9.10 General

Delete (move to #13.00)

To ensure that parties are able to appear before WCAT where an oral hearing is granted:

- (a) an oral hearing will be scheduled near to the community in the Province where the appellant resides, or,*
- (b) where WCAT considers it appropriate to schedule an oral hearing at a location in the Province which is not near to the community where the appellant resides, the parties will be granted reimbursement of expenses for the purpose of travelling to that location regardless of the outcome of the appeal (unless the party is found to have engaged in fraud or misrepresentation).*

WCAT will not grant reimbursement out of province travel expenses.

9.20 Scheduling

If an oral hearing is requested, the appellant must be prepared to proceed with the hearing within one to three months of the request being granted. The parties will normally be given at least 4 weeks notice of the hearing date. Due to the large volume of appeals, the initial scheduling of oral hearings (**regular and complex streams**) will be done without consultation with the parties. However, the parties will be advised that they have 14 days to request a change of date. Oral hearings in the specialty stream (in which the case is assigned to the panel at the outset) will normally be scheduled on an individual basis, rather than as part of a block of hearings, and may involve consultation with the parties as to the date to be scheduled.

Where the oral hearing is rescheduled at the request of the parties (**regular or complex streams**), or where the parties were consulted in the initial scheduling of the hearing (**specialty stream**), a further change to the date will not be granted unless exceptional reasons are provided as to why this is necessary. Factors such as a representative's schedule, vacation dates, and convenience to the parties will normally only be considered in the initial rescheduling, and will generally not provide sufficient basis for granting a later postponement of a hearing date.

9.23 Late Appearance

An oral hearing will generally not proceed in the absence of the appellant unless the panel agreed to do so in advance of the hearing. If the appellant's representative appears at the hearing, with instructions from the appellant to proceed in the appellant's absence, the panel has the discretion to proceed or not proceed with the hearing.

If the appellant appears within 15 minutes of the scheduled hearing time, the panel will proceed with the hearing. If the appellant appears after 15 minutes, the panel may proceed with the hearing depending on availability, whether other hearings will be delayed, and whether any respondent or witnesses have left.

Where a respondent has filed a *Notice of Participation* but is not present at the scheduled time, the panel will wait five minutes before proceeding. A respondent (or the respondent's representative) will be allowed to participate if he or she arrives late.

9.24 Failure to Appear for a Hearing

Respondent

If a respondent fails to attend an oral hearing, they will be deemed to have waived their right to participate in the hearing. However, this may be rebutted by evidence that the respondent was unavoidably delayed or otherwise prevented from attending the hearing. In that case, WCAT will consider whether the respondent's right to participation may be met by means of disclosure of the voice recording of the hearing (if there is one), and an opportunity to file a written submission and new evidence, or whether the hearing needs to be rescheduled with a new panel.

Appellant

Section 246(5) states that, if a party fails to comply with a procedure, WCAT may, after giving notice to that party, either:

- (a) continue with the proceedings and make a decision based upon the evidence before it, or
- (b) determine that the appeal has been abandoned.

If an appellant fails to appear for an oral hearing, the registrar's office will invite the appellant to provide written reasons, within 14 days, for the failure to appear. Whether or not a response is provided by the appellant, comments will be invited from any participating respondent who appeared at the hearing. Any submission by the respondent will be disclosed to the appellant for rebuttal.

Once submissions are complete, or the time for submissions has passed, the panel will decide whether to:

- (a) reschedule the oral hearing;
- (b) proceed by telephone or video conference hearing;
- (c) proceed by read and review after providing an opportunity for submissions;
- (d) proceed by read and review based on the information currently before the panel, without providing an opportunity for further submissions;
- or,
- (e) determine that the appeal has been abandoned.

The panel may investigate the appellant's reasons by reviewing relevant records (e.g. when did the appellant first contact WCAT to explain why they could not attend the hearing; was a postponement requested for the same reason and refused); or by requesting documentary verification (e.g. medical letter, towing bill, letter from employer).

Under section 246(5)(b), the panel may determine, based on all the information before it, that the appeal has been abandoned despite a request from the appellant to proceed with the appeal.

The panel may issue a “no show” decision in letter or memo form where there is no apparent dispute about the outcome (e.g. the parties have not taken any position on the disposition of the appeal). In all other cases, panels will issue a numbered decision, which may or may not also include a decision on the merits of the appeal.

Valid Reasons

A failure to appear at an oral hearing without prior notice to WCAT would normally only be justified by a personal emergency or other serious and unforeseen circumstance which prevented the appellant both:

- (a) from attending the hearing, and
- (b) from providing advance notification to WCAT of the appellant’s inability to attend the hearing.

Acceptable reasons would include a personal or family emergency situation that could not have been predicted, or other compelling, unpredictable situations, which made it difficult or impossible for the appellant to notify WCAT in advance. Examples could include:

- (a) a motor vehicle accident on the way to the hearing,
- (b) admission to hospital for emergency health care,
- (c) acute physical or mental disability,
- (d) death of a family member on or immediately before the day of the hearing; or,
- (e) failure to receive notice of the hearing where the appellant had previously provided WCAT with their current address.

Inadequate Reasons

A variety of other reasons may be offered for failure to attend an oral hearing. These may include:

- (a) concern about jeopardizing current employment by taking time off for the hearing;
- (b) a non-emergency medical situation, such as a cold or flu;
- (c) misunderstanding the hearing letter;
- (d) forgetting about the hearing, or oversleeping on the day of hearing;
- (e) failure to receive the hearing notice, where this resulted from the appellant’s failure to notify WCAT of their change of address;
- (f) being engaged in important personal activities (preparations for a wedding, divorce or funeral, care of sick family members, administering an estate, etc.); or,
- (g) vacation.

These factors will generally not be acceptable explanations of an appellant’s failure to notify WCAT that they could not attend the hearing.

Panel Discretion

Despite the inadequacy of the reasons for not appearing or not notifying WCAT in advance, panels have the discretion to re-schedule the hearing where the panel considers that:

- (a) the appeal should be addressed on the merits despite the appellant's failure to appear at the oral hearing, and**
- (b) an oral hearing is essential to consideration of the appeal.**

A panel may exercise this discretion where, for example, the issue under appeal is very significant, and credibility is a central issue. In that case, the appellant will be notified that a failure to attend the re-scheduled hearing would likely result in the appeal being declared abandoned.

9.25 Continuations

Where a WCAT panel finds that the time scheduled for an oral hearing is insufficient, and it is not possible to continue the hearing to completion, the panel may adjourn the hearing and continue it at a later date.

9.72 Late Submissions

Where material is submitted after the designated period for written submissions has passed or where the panel has not allowed time for submissions subsequent to an oral hearing, the material will generally be excluded from consideration. **Unsolicited late evidence or submissions will generally be marked as having been excluded from consideration and kept separate from the appeal documentation until after the panel's decision has been issued, and then placed on the Board file. Alternatively, they may be returned to the party who sent the material.**

10.00 APPEALS PROCEEDING BY WRITTEN SUBMISSIONS

10.10 Time Frames For Written Submissions

Reasons for which additional time (up to 45 days) may be granted to an appellant include:

- (a) complexity of the issues under appeal;
- (b) appellant is seeking additional medical or other evidence [DELETE: (note: additional time will not be granted for this purpose where WCAT has obtained a report from a health professional under s. 249)]**
- (c) appellant needs to interview witnesses and provides adequate reasons for requiring more time to do so;
- (d) need to seek representation;

- (e) personal or family health problems, bereavement, or other emergencies;
- (f) pre-arranged vacation; or,
- (g) current labour relations dispute which severely limits opportunity of a person to participate.

Such reasons may involve the appellant, the representative or a key witness.

10.20 Provision of New Evidence

The appellant should provide any new evidence (such as new medical reports, witness statements, or other documents), together with any argument, at the time they provide their initial submission. This allows the other party an opportunity to respond to the new evidence. Following the respondent's submissions, the appellant is given the right of final reply or rebuttal. This is intended as an opportunity for the appellant to provide any final arguments in reply to the evidence and argument provided by the respondent, rather than to provide further new evidence. Otherwise, the respondent would not have the opportunity to comment on this new evidence.

Accordingly, an appellant should always provide any new evidence with their initial submissions, and should not attempt to provide new evidence when they are later asked for their rebuttal to the submissions by the other party. If an appellant submits new evidence as part of their rebuttal, the matter will be referred to a WCAT panel for consideration. **The WCAT panel may:**

- (a) **receive the new evidence, and allow the other party a further opportunity to comment; or,**
- (b) **direct that the material be marked as excluded from consideration and sealed, to be kept separate from the appeal documentation until after the panel's decision has been issued and then placed on the claim file, or return the new evidence to the appellant (as having been submitted too late in the process).**

In the latter event, the appellant will normally not be given a final opportunity to respond. In such circumstances, the panel could request additional time for its decision due to the complexity of the proceedings in the appeal.

10.30 Avoidance of Third Party Identifiers

To protect workers' privacy, submissions should not contain identifying information such as names or file numbers concerning the workers' compensation claims of other workers (unless written consents from those other workers are attached). It is appropriate to cite decision numbers which are accessible on the internet.

If a submission is provided with such identifiers, the appeal liaison or appeal coordinator may accept the submission but remove the identifiers, and advise the parties this has been done. The edited copy would be disclosed to the parties. Alternatively, the appeal liaison or appeal coordinator may return the submission to the party with a request that they provide written consents from the other workers or provide an edited copy of the submission which does not contain personal identifiers concerning other workers.

11.20 Who may serve

The term “health professional” means a medical practitioner, a person entitled to practice medicine under the laws of another jurisdiction or any other person with prescribed qualifications [s. 249(1)].

Cabinet may prescribe the qualifications of health professionals by regulation [s. 224(2)(k.2)]. **Workers Compensation Act Appeal Regulation, B.C. Reg. 321/02, s. 5** defines health professionals to include:

11.30 Terms of Reference

The terms of reference provided by the panel for the health professional **will include determinations of non-medical facts. The opinion of the health professional will be requested based upon the background facts as determined by the WCAT panel.** The WCAT panel may invite submissions from the parties before making its determinations of non-medical facts. **These will generally involve concise factual details of the incident or accident giving rise to the claim for personal injury, or factual details with respect to the nature of the worker’s employment activities and exposure(s). They may also include any other specific points relevant to establishing the factual basis for the IHP’s medical opinion, such as incidents, accidents, activities or exposures outside the worker’s employment.**

13.00 COSTS AND EXPENSES

The Lieutenant Governor in Council may make regulations:

- respecting the awarding of costs by WCAT in an appeal under Part 4 [s. 224(2)(k.1)].
- prescribing the circumstances under which WCAT may order the Board to reimburse the expenses incurred by a party to an appeal [s. 224(2)(k.3)].

Section 6 of the Workers Compensation Act Appeal Regulation, B.C. Reg. 321/02 [the Appeal Regulation], provides that WCAT may only order one party to pay the costs of another party if:

- (a) another party caused costs to be incurred without reasonable cause, or caused costs to be wasted through delay, neglect or some other fault,
- (b) the conduct of another party has been vexatious, frivolous or abusive, or
- (c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.

Section 7(1) of the *Appeal Regulation* provides that WCAT may order the Board to reimburse a party to an appeal for any of the following kinds of expenses incurred by that party:

- (a) the expenses associated with attending an oral hearing or otherwise participating in a proceeding, if the party is required by WCAT to travel to the hearing or other proceeding;
- (b) the expenses associated with obtaining or producing evidence submitted to WCAT;
- (c) the expenses associated with attending an examination required by an independent health professional under section 249(8).

Party's attendance at an oral hearing (section 7(1)(a))

Where a party has requested an oral hearing, WCAT will generally order reimbursement of expenses for a party's own attendance at a hearing if that party was successful on the appeal. This is consistent with Board policy at #100.12 of the *Rehabilitation Services and Claims Manual*. If the appellant does not request an oral hearing, but WCAT decides that an oral hearing is necessary, WCAT will generally order reimbursement of expenses regardless of the outcome of the appeal (unless the party is found to have engaged in fraud or misrepresentation).

To ensure that parties are able to appear before WCAT where an oral hearing is granted, an oral hearing will normally be scheduled near to the community in the Province where the appellant resides. If WCAT chooses (i.e. not at the request of the appellant) to schedule a hearing at a location that is not the nearest hearing location to the appellant, WCAT will order reimbursement of the appellant's expenses regardless of the outcome of the appeal (unless the party is found to have engaged in fraud or misrepresentation).

Reimbursement of a party's travel expenses from outside the province will generally be limited to the portion of travel within British Columbia. However, if WCAT specifically asks the party or witness to attend a hearing, WCAT will order reimbursement for the full amount of the trip. This is consistent with Board policy at #100.15 of the *Rehabilitation Services and Claims Manual*.

A party will be considered to have been required by WCAT to travel to an oral hearing or other proceeding, even in the absence of a specific request from WCAT, where the nearest hearing location requires travel of 24 kilometres or more. Transportation expenses are not normally paid for the first 24 kilometres of the trip. This is consistent with Board policy at #82.10 of the *Rehabilitation Services and Claims Manual*.

Cost of obtaining evidence (section 7(1)(b))

WCAT will generally order reimbursement of expenses for attendance of witnesses or obtaining written evidence regardless of the outcome of the appeal, where the evidence was useful to the consideration of the appeal or where it was reasonable for the party to have presented the evidence.

General

Section 7(2) of the *Appeal Regulation* provides that WCAT may not order the Board to reimburse a party's expenses arising from a person representing the party, or the attendance of a representative of the party at a hearing or other proceeding related to the appeal.

Any request for reimbursement of expenses should be made in the party's submissions to the panel. However, WCAT will normally address this question even in the absence of a request.

In considering a party's claim for reimbursement of expenses, WCAT may order reimbursement both where the party or the party's representative has actually paid the account or where the party has incurred liability for the account but it remains outstanding. WCAT may order reimbursement of expenses for a witness, to be paid directly to the witness, even where this expense has not yet been paid by the party. Parties should submit receipts for amounts for which they are seeking direct reimbursement.

14.00 DECISION ³/₄ GENERAL

14.10 HALLMARKS OF QUALITY DECISION-MAKING

A good decision:

- (a) clearly identifies the issues at the outset;
- (b) identifies a clear set of relevant findings of fact fairly drawn from the evidence;
- (c) where there is conflicting relevant evidence, explicitly identifies the findings of fact on which the conclusion is based and the reasons for the findings of fact;
- (d) responds to the relevant submissions and arguments;

- (e) identifies and applies relevant law, policy, and WCAT precedent panel decisions;
- (f) **is consistent with previous (non-precedent) WCAT decisions published in the *Workers' Compensation Reporter* unless the inconsistency is identified and the reasons for the departure articulated in a coherent manner.**
- (g) uses plain language where possible and uses technical and legal terminology in a manner consistent with other decisions;
- (h) makes the panel's reasoning clear and understandable and leads to a logical conclusion that resolves the issues; and,
- (i) **supports established positions on law, medicine, science, and the interpretation of legislation, regulations and policy.**

WCAT seeks to provide a decision-making process which is demonstrably fair, efficient, and accessible. WCAT aims to provide well-reasoned and high quality decisions which clearly explain the basis for the conclusion reached. Clarity, consistency and predictability will be key values of WCAT.

It is important that both the procedures followed by a WCAT panel in hearing a case, and the reasons provided by the panel to explain its decision, are seen to be fair and independent. Even where a party does not obtain the result they sought, it should be evident to the party that the panel, in reaching its decision, followed a fair process in which the parties were heard, and that the panel provided reasons which explain the basis on which the decision was made (including reasons for any dissent).

WCAT decisions will be written in clear terms, using plain direct language where possible. Short and concise decisions will be provided when possible. A decision will focus on the issue(s) under appeal, and need not recite the background evidence in detail.

As an independent appellate body, and the final level of appeal for the workers' compensation system, WCAT also has a responsibility to provide guidance to the workers' compensation system on complex issues concerning the interpretation of law and policy which arise in cases coming before WCAT. Where necessary, lengthier reasons will be provided to address a complex issue involving the interpretation of law or policy, or evaluation of the evidence.

Where the decision under appeal is varied or cancelled, the reasons should clearly explain, particularly for the benefit of the respondent and the prior decision-maker(s), the basis for this result. Where the decision under appeal is confirmed, the reasons should clearly explain, particularly for the benefit of the appellant, why the appeal was unsuccessful. In the short term, such reasons will be of benefit to the parties or other persons with an interest in the appeal. In the long term, such reasons will also assist representatives, and other decision-makers, in dealing with other cases.

In taking into account individual circumstances, WCAT would err if it improperly fettered a discretion conferred on it under the *Act* and policy. However, providing a decision according to the merits and justice of the case under s. 250 does not mean that the panel's focus is solely on the individual case. A decision must also be consistent with the *Act*, policy and WCAT precedent decisions. **As well, a good decision should be consistent with previous (non-precedent) WCAT decisions published in the *Workers' Compensation Reporter* unless the conflict is identified and the reasons for the departure articulated in a coherent manner.**

An important component of "the merits and justice of the case" [s. 99(2), s. 250(2)] involves ensuring that like cases are decided in a like manner. If different panels render inconsistent decisions, without drawing meaningful distinctions or adequately explaining why the cases are being decided differently, it creates a sense that the decision-making process is arbitrary or unfair. The credibility of the tribunal is undermined by such a result. If appellate decision-making is viewed as unpredictable, this also makes more difficult the task of a representative attempting to advise a client as to whether an appeal is warranted.

In the absence of a binding policy or WCAT precedent decision, panels may on occasion have good reasons which lead them to different conclusions on similar issues. These different approaches may both be viable under the *Act*. However, the reasons for such differences must be clearly articulated in a meaningful fashion. It must be made clear whether the circumstances are so different as to be distinguishable, or a different outcome was found to be otherwise warranted. Such tensions may be necessary and helpful in the initial development of the understanding of an issue, but cannot be left unresolved indefinitely. **Although conflicts may occur during periods of development, over the long term WCAT decisions will support established positions on law, medicine, science, and the interpretation of legislation, regulations and policy.**

The legislature has taken specific measures in Bill 63 to promote consistency and predictability. These include sections 250(2) and 251 concerning the binding nature of policies of the board of directors, and s. 250(3) concerning the binding nature of WCAT precedent panel decisions. Having regard to this legislative intent, WCAT will recognize consistency and predictability as important values in adjudication.

In sum, WCAT will make its decision based on the merits and justice of the case pursuant to s. 250(2) of the *Act*. Consistency and predictability, and respect for the policy of the board of directors, and for WCAT precedent panel decisions, will also be key to WCAT decision-making.

15.23 New Evidence Not Previously Available (Section 256)

Any WCAT action or decision, **whether a summary decision (such as one concerning an application for an extension of time to appeal or a deemed abandonment) or a decision on the merits**, is final and conclusive and is not open to question or review in any court [s. 255(1)]. There are two grounds on which a WCAT decision may be further considered or reconsidered.

A party to a completed appeal may apply to the chair for reconsideration of a decision if new evidence has become available or been discovered. The chair may refer the decision for reconsideration if the chair is satisfied that the new evidence referred to in the application [s. 256(3)(a) and (b)]:

- (a) is substantial and material to the decision, and
- (b) did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

A party to a completed appeal may apply for reconsideration of a decision on the basis of new evidence on one occasion only [s. 256(4)]. Caution should be exercised in bringing an application for reconsideration on the basis of new evidence: if unsuccessful, it bars any further application on the basis of new evidence which might become available in the future.

15.24 Incomplete or Void Decisions

WCAT may set aside or "void" one of its decisions on the basis of certain common law grounds or principles. These consist of clerical mistakes or omissions, fraud, or an error of law "going to jurisdiction" (including a breach of the rules of natural justice). Where an applicant is successful in impugning a WCAT decision, and the purported decision is found to be incomplete or void, WCAT has a responsibility to complete its task of providing a valid decision.

A tribunal's authority at common law to void its own decision (and to then address the matter anew so as to complete its task of providing a valid decision) on the basis of an error of law going to jurisdiction, was confirmed in a decision of the British Columbia Supreme Court in *Duncan Leslie Atchison v. WCB*, Victoria Registry No. 01 2685, November 29, 2001. The Court rejected the argument that the Appeal Division's authority to review its own decisions was limited to the new evidence grounds of s. 96.1. Mr. Justice Vickers reasoned:

[18] There is no doubt the courts have the power of review. However, this does not mean that administrative tribunals lack the power to reconsider a decision, particularly where the decision is made without jurisdiction. The doctrine of *functus officio* applies to administrative tribunals based, however, "on the policy ground which favours finality of proceedings, rather than the rule which was developed with respect to formal judgments of a court whose

decision was subject to a full appeal.” *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at 849. The application of the principle is more flexible and tribunals are able to reopen decisions in order to discharge the function committed to them by the enabling legislation. In particular, where a tribunal has made an error of jurisdiction, it is entitled to correct such an error: *Chandler, supra*; *Right to Rediscover [sic] Appeal Division Decisions* (1993), 10 W.C.[R]. 127 (A.D.); *Re Trizak Equities Ltd. v. Area Assessor Burnaby New Westminster* (1983) 147 D.L.R. (3d) 637 (B.C.S.C.).

[emphasis added]

An appeal from this decision was denied by the British Columbia Court of Appeal on August 27, 2003 (*Powell Estate v. Workers' Compensation Board*, 2003 BCCA 470). The BCCA reasoned:

[17] The first question is whether a panel of the Appeal Division has jurisdiction to determine that a decision of another panel of the Appeal Division was a nullity as being made beyond its jurisdiction: *Chandler v. Alta. Assoc. of Architects*, [1989] 2 S.C.R. 848, citing with approval *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637 (B.C.S.C.).

[18] On those authorities, the answer must be, in my view, as found by Mr. Justice Vickers. The Appeal Division was able to reconsider the matter and correct its own jurisdictional error.

An application for reconsideration of a WCAT decision should be addressed to the attention of WCAT’s tribunal counsel office.

The authority to consider an application on the common law grounds is discretionary in nature. WCAT will hear an application for reconsideration on the basis of the common law grounds on one occasion only. WCAT will not hear a further application for reconsideration of a WCAT decision provided in response to an application for reconsideration on the common law grounds, unless a new breach of natural justice is alleged in relation to the second decision.

An application on the basis of the common law grounds concerns the validity of the initial decision. Accordingly, such applications are often made soon after the decision. However, new evidence to support an application under section 256 may not arise until a few years after the decision. For that reason, separate applications may be made on the basis of the common law grounds, or on the basis of new evidence under section

256, but each type of application is limited to one occasion only. It is also open to a party to seek reconsideration on both grounds at the same time.

19.00 ASSESSMENT APPEALS

An employer or an independent operator who is directly affected by a decision of the review officer may appeal a decision respecting an assessment or classification matter, including personal optional protection coverage [s. 241(2)].

An employer may request review by a review officer of their classification unit, but not their rate group or industry group [s. 96.2(2)(c) **and (d)**]. (The complex wording of s. 96.2(2)(c) stems from the different terminology used in the current assessment classification structure, as it relates to the framework in the *Act* involving classes and subclasses.) The decision by a review officer concerning an employer's classification unit is appealable to WCAT.

21.25 File Numbers

WCB file numbers (worker's claim file number, or employer's registration number) will not be included in the body of a decision. **Similarly, WCAT, Appeal Division or Review Board appeal numbers will not be used in the body of a decision.**

22.00 Code of Conduct for WCAT Employees

Section 235 provides that employees necessary to exercise the powers and perform the duties of WCAT may be appointed under the *Public Service Act*. WCAT may also engage or retain consultants or contractors that WCAT considers necessary. All WCAT employees, officers, consultants or contractors engaged or retained by WCAT, are bound by, and must agree to be bound by, the Province of British Columbia *Standards of Conduct for Public Service Employees*. This is accessible on the internet at:

<http://www.bcpublicservice.ca/policies/Directives/5-8/05-4soc.htm>

23.00 CODE OF CONDUCT FOR WCAT MEMBERS

23.56 Oral Hearings

- (a) **WCAT members will approach every hearing with an open mind on every issue, and will avoid doing or saying anything that could cause any person to think otherwise.**
- (b) **WCAT members will treat all participants in the hearing process with courtesy and respect.**

- (c) **WCAT members will make every effort to ensure that all participants treat each other with courtesy and respect**
- (d) **WCAT members will allow parties reasonable latitude to present their case without interruption, subject to the presiding member's obligation to control the hearing for relevance and to ensure that the procedure is fair.**
- (e) **WCAT members will explain the hearing procedure and the issues to be decided. The explanation will be consistent with the expertise of the participants.**