

10 SECTION 251 REFERRAL TO THE CHAIR FOR LAWFULNESS OF POLICY

Section 251 states that WCAT may refuse to apply an applicable policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the WCA and its regulations.

WCAT panels have the authority to refuse to apply an applicable policy on their own motion and refer the matter to the chair. Generally however, a panel will not expressly address the question of the lawfulness of Board policy unless one of the parties to an appeal raises it (item 3.3). If a party believes a policy of the board of directors is patently unreasonable, the party should raise the issue during the appeal or reconsideration application, or WCAT may take the position on judicial review that the party failed to exhaust internal remedies.

If a panel considers that an applicable policy of the board of directors should not be applied, that issue must be referred to the chair and the particular appeal must be suspended until the chair or the board of directors, as the case may be, decides whether the policy should be applied [s. 251(2)].

As soon as practicable after the referral, the chair will decide whether the policy should be applied [s. 251(3)]. If the chair decides that the policy should be applied, the chair will refer the matter back to the panel and the panel is bound by the chair's determination [s. 251(4)]. If the chair decides that the policy should not be applied, the chair will [s. 251(5)]:

- (a) send a notice of this determination, including the chair's written reasons, to the board of directors, and
- (b) suspend any other appeal proceedings that are pending before the appeal tribunal and that the chair considers to be affected by the same policy until the board of directors makes a determination under section 251(6).

Where the chair believes there may be a reasonable apprehension of bias, the chair's authority under sections 251(3),(4), and (5) may be delegated to a vice chair or to a panel for the purposes of a specific appeal [s. 251(9)]. The chair cannot make a general delegation of the chair's authority under sections 251(3), (4) and (5).

10.1 Referral Process

Practice Directive

If a panel considers that an applicable policy of the board of directors should not be applied:

- (a) *the panel must provide written reasons in a numbered decision to explain its belief that a policy is so patently unreasonable that it is not capable of being supported by the WCA and its regulations;*
-

- (b) *the panel's decision will be forwarded to the chair to determine the appeal method that will be followed. Generally, the referral will be considered by written submissions;*
 - (c) *the panel's decision will be disclosed to the parties for submissions; at the same time, as a courtesy, the panel's decision will be disclosed to the Board, specifically, to the chair of the board of directors, the Vice President, Policy, Investigation & Review, the Director of the Policy and Research Division, and the Chief Review Officer; the decision will also be posted to WCAT's website;*
 - (d) *if there is no respondent or the respondent is not participating, the chair may invite a workers' or employers' adviser to participate [s. 246(2)(i)];*
 - (e) *when submissions from the parties are complete, the chair may invite submissions from representative groups, including Workers' Advisers, Employers' Advisers, Workers' Compensation Advocacy Group, Business Council of B.C., Coalition of B.C. Businesses, Employers' Forum to the Board, and B.C. Federation of Labour [s. 246(2)(i)]. No unsolicited submissions from other individuals or groups will be accepted;*
 - (f) *the parties will be provided the opportunity to respond to any submissions received from representative groups;*
 - (g) *if the chair has determined that an oral hearing is necessary, the oral hearing will be scheduled and held. The parties and the representative groups who were invited to provide written submissions will be invited to the oral hearing;*
 - (h) *the chair will then decide whether the policy should or should not be applied. The chair will notify the parties, the board of directors, and the other representative groups who were invited to participate of that determination along with written reasons. The chair's decision will also be posted on WCAT's website;*
 - (i) *if the chair decides that a policy should be applied, WCAT will reactivate the suspended appeal and request submissions from the parties regarding the effect of the chair's decision on the appeal. When submissions are complete, the appeal will be returned to the panel for completion;*
 - (j) *if the chair decides that a policy should not be applied, the chair will make reasonable efforts to identify other appeals affected by the same policy. The following steps may be taken to identify other affected appeals:*
 - (i) *sending a notice to all WCAT members, officers and staff of WCAT;*
 - (ii) *conducting a computer search using the WCAT case management system of current appeals at WCAT;*
 - (iii) *posting a notice on the WCAT website for 30 days;*
-

- (k) *the chair's decision, with written reasons, will be made accessible to the parties in all suspended appeal proceedings pending before WCAT which the chair considers to be affected by the same policy;*
- (l) *when WCAT sends the notice to the board of directors, a list of all suspended appeals, with names and addresses of the parties, will be provided to the board of directors. WCAT will provide a copy of the notice to the Board's Policy and Research Division and Legal Services Division at the same time;*
- (m) *within 90 days after notice from the chair, the board of directors must review the policy and determine whether WCAT may refuse to apply it [s. 251(6)]. The board of directors must provide the parties to the appeal, and the parties to any other suspended appeal affected by the same policy, with the opportunity to make written submissions on this review [s. 251(7)];*
- (n) *after the board of directors makes its determination, the board of directors must refer the matter back to WCAT and WCAT is bound by that determination. WCAT will reactivate the suspended appeals.*