BRITISH COLUMBIA **WCAT** *Workers' Compensation Appeal Tribunal*

150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
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2003 ANNUAL REPORT OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

For the period March 3 to December 31, 2003

Submitted by:
Jill Callan, Chair
March 25, 2004

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March 25, 2004

The Honourable Graham Bruce, MLA
Minister of Skills Development and Labour
Rm. 311
Parliament Buildings
Victoria, BC V8V 1X4

Dear Minister:

RE: Workers' Compensation Appeal Tribunal 2003 Annual Report

I am pleased to forward the 2003 Annual Report of the Workers' Compensation Appeal Tribunal for the year ended December 31, 2003. This report has been prepared for your review pursuant to section 234(8) of the *Workers Compensation Act*.

Yours truly,

Jill Callan
Chair

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GLOSSARY

Act	*Workers Compensation Act*
Appeal Division	Appeal Division of the Workers' Compensation Board
BCCAT	British Columbia Council of Administrative Tribunals
Bill 37	*Skills Development and Labour Statutes Amendment Act, 2003*
Bill 49	*Workers Compensation Amendment Act, 2002*
Bill 63	*Workers Compensation Amendment Act (No. 2)*
Bill 68	*Administrative Tribunals Appointment and Administration Act, 2003*
MRPP	*Manual of Rules, Practices and Procedures*
Review Board	Workers' Compensation Review Board
Review Division	Review Division of the Workers' Compensation Board
RSCM I	*Rehabilitation Services and Claims Manual, Volume I*
RSCM II	*Rehabilitation Services and Claims Manual, Volume II*
WCAT	Workers' Compensation Appeal Tribunal
WCB	Workers' Compensation Board

1. CHAIR'S MESSAGE

Effective March 3, 2003, the *Workers Compensation Amendment Act (No. 2)* (Bill 63), established the Workers' Compensation Appeal Tribunal (WCAT) as an independent appellate tribunal in the workers' compensation system. This annual report provides information for the ten-month period from March 3 to December 31, 2003.

The Workers' Compensation Review Board (Review Board) and the Appeal Division of the Workers' Compensation Board (Appeal Division) ceased operations on February 28, 2003. Over 22,400 outstanding appeals were transferred from them to WCAT on March 3, 2003. Approximately 10% of the transferred appeals were from the Appeal Division inventory and the balance of over 20,000 were from the backlog that had developed over a number of years at the Review Board. Our goal is to complete all of the backlog appeals by February 28, 2006, the end of our third year of operations.

In 2003, WCAT faced two major challenges. The first was dealing with the demands inherent in the startup of a new administrative tribunal. The second was the reduction of the appeals backlog to the extent possible while maintaining the quality standards set out in WCAT's Hallmarks of Quality Decision-Making (item #14.10 of WCAT's *Manual of Rules, Practices and Procedures* (MRPP)). Both challenges have required considerable effort from the executive and management team, as well as all vice chairs and staff of WCAT. While the challenges facing WCAT as at March 3, 2003 were very significant, as a result of the dedicated efforts of all staff, 2003 has been a successful year.

I am pleased to report that as of December 31, 2003, the backlog inherited from the Review Board and Appeal Division had been reduced to 13,183 appeals. This represented a reduction of 9,252 appeals or 41.2% of the backlog. As of March 25, 2004 (the date of this annual report), the backlog has been reduced by over 50**%**.

The 2004 year will bring significant new challenges to WCAT. In 2003, WCAT completed fewer than 150 new Bill 63 time frame appeals. Accordingly, nearly all of our resources were focussed on processing and completing backlog appeals. In 2004, we will be faced with the challenge of continuing to complete backlog appeals while also deciding new appeals within the time frames prescribed by Bill 63. In addition, in 2003 WCAT decided very few appeals affected by the statutory changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49) and the new policies in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). In 2004, WCAT will be deciding appeals under both the former and the current provisions, which will lead to new adjudicative challenges.

In 2003, I attended four meetings of the board of directors of the Workers' Compensation Board (WCB) "to exchange information on matters of common interest and importance to the workers' compensation system" as required by section 234(7) of the *Workers Compensation Act* (the Act). This language from section 234(7) underscores the importance of WCAT's role in identifying issues requiring the attention of the board of directors, the Policy & Regulation Development Bureau, and the operating divisions of the WCB. I have found my meetings with the chair and the board of directors to be informative and productive. I have also met regularly with the director general of the Policy & Regulation Development Bureau and the chief review officer of the Review Division of the WCB (Review Division). Our practice is to refer WCAT decisions that identify interpretive issues arising out of policies of the board of directors to the Policy & Regulation Development Bureau (now the Policy and Research Division) for consideration.

I recognize that 2003 was an extremely challenging year for the advocates in the worker and employer communities because they were faced with the challenges of dealing with new reviews and appeals under the statutory time frames introduced under Bill 63 while also assisting their clients to proceed with backlog appeals in a timely manner. I would like to take this opportunity to thank them for their cooperation in assisting us to schedule oral hearings and providing timely submissions on appeals proceeding by read and review.

Finally, I would like to extend my appreciation to the executive and management team, vice chairs, and staff of WCAT, who have worked very diligently and conscientiously during our very challenging first year of operations.

Jill Callan
Chair

2. WCAT'S ROLE WITHIN THE WORKERS' COMPENSATION SYSTEM

WCAT is an independent appeal tribunal external to the WCB. WCAT's mandate is to decide appeals brought by workers and employers from decisions of the WCB. WCAT receives compensation, assessment and prevention appeals from decisions of the Review Division. WCAT also receives direct appeals from WCB decisions regarding applications for reopening of compensation claims, complaints regarding discriminatory actions, and applications for certificates to the court.

3. STATUTORY FRAMEWORK

The statutory framework governing the operation of WCAT is found in a new Part 4 of the Act – Appeals, sections 231 to 260. Part 4 came about as a result of the passage of Bill 63 and came into force by regulation on March 3, 2003.

(a) Jurisdiction

WCAT deals with compensation, prevention and assessment decisions, as well as providing certificates for legal actions.

On some issues, the decision of the Review Division is final, and not subject to appeal to WCAT (i.e. rehabilitation, pension commutations, a pension decision concerning the percentage of disability where the range in the WCB's rating schedule is 5% or less, or an employer's assessment rate group or industry group).

(b) Timeliness

WCAT is required to decide new appeals within 180 days. This time frame may be extended by a maximum of 45 days at the request of the appellant. Corresponding additional time is then available to the respondent. The chair may also extend time on the basis of complexity. For example, additional time may be required where a WCAT panel finds it necessary to pursue further investigations.

The time limit for appealing a Review Division decision to WCAT is 30 days. A 90-day time limit applies to the limited matters for which there is a right of appeal directly to WCAT from a WCB officer's decision. An application for an extension of time to appeal will only be granted where the chair finds that special circumstances precluded the timely filing of the appeal, and an injustice would otherwise result.

In combination with the 90-day appeal period for filing a request for review by the Review Division, and the 150-day time frame for decision making by the Review Division, the overall time frame for a new matter to go through the review and

appeal bodies is 15 months (apart from the time required to obtain file disclosure and any extensions or suspensions on the limited grounds permitted by the Act).

(c) Consistency

WCAT must apply the policies of the WCB board of directors, unless the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. A new process has been established under the Act, by which issues concerning lawfulness of policy may be referred to the chair and the board of directors for resolution. This means that all decision makers within the workers' compensation system apply the same policy framework in making decisions.

As well, the chair has authority under section 238(6) of the Act to establish precedent panels consisting of three to seven members. A decision by a precedent panel must be followed by other WCAT panels (section 250(3)), unless the circumstances of the case are clearly distinguishable or unless, subsequent to the precedent panel's decision, a policy of the WCB board of directors relied upon by the precedent panel has been repealed, replaced or revised. The authority to establish precedent panels provides another means of promoting consistency in decision making within the workers' compensation system.

(d) Finality

WCAT decisions are final and conclusive. There is no further avenue of appeal. There is a limited avenue for reconsideration, on application by a party. WCAT may reconsider a decision on the basis of new evidence which is substantial and material, and which did not previously exist, or which previously existed but could not have been discovered through the exercise of reasonable diligence. WCAT may also set aside a decision involving an error of law going to jurisdiction, and provide a new decision.

(e) Practice and Procedure

The rules, practices and procedures to be followed by WCAT are established by the chair. The WCAT MRPP was posted on the WCAT website, effective March 3, 2003. Subsequent developments in practice and procedure have been addressed as amendments to the MRPP.

(f) Public Access

Decisions are publicly accessible on WCAT's website, in a manner which protects the privacy of the parties (see **http://www.wcat.bc.ca/research/appeal-search.htm**).

(g) Competency-Based Appointments

New WCAT vice chair appointments were made applying a competency-based selection process approved by the chair.

(h) Independent Health Professionals

The Act provides a new process for WCAT to obtain assistance and advice from Independent Health Professionals (IHP). Lists of specialists have been established for 19 medical specialties ranging from cardiology to orthopaedic surgery. Lists of psychologists and neuro-psychologists have also been established. IHP reports are disclosed to the parties for comment before WCAT makes its decision.

(i) Other Legislation

In addition to the legislation which created WCAT, other recent amendments to the Act affecting WCAT's operations include:

- *Workers Compensation Amendment Act, 2002* (Bill 49)
- *Skills Development and Labour Statutes Amendment Act, 2003* (Bill 37)
- *Administrative Tribunals Appointment and Administration Act, 2003* (Bill 68)

Bill 49 provided additional substantive amendments to the Act that were implemented in 2002. These changes impact the substantive law applied by WCAT in some appeals.

Bill 37 authorized the participation of lay representatives in the workers' compensation system. WCAT has established a "Code of Conduct for Representatives" (item 24.00 of the MRPP).

4. MINISTRY OF SKILLS DEVELOPMENT AND LABOUR SERVICE PLAN

The workers' compensation system of British Columbia is one of the three core service areas covered by the Service Plan of the Ministry of Skills Development and Labour. The three components of the workers' compensation system are the WCB, WCAT, and the Workers' and Employers' Advisers Offices.

The WCB is an independent statutory agency that is wholly funded by employer payroll assessments. The ministry is directly responsible for WCAT and it is funded directly by the government. However, the government is reimbursed by the WCB on request with monies paid out of the accident fund.

The government's intention in restructuring the appeal system was to simplify the process and enhance consistency, timeliness, and finality of decisions. The ministry has set as a goal the reduction and elimination of the appeals backlog inherited by WCAT from the Review Board and the Appeal Division by February 2006. WCAT has committed to achieving these objectives. To facilitate WCAT's achievement of those goals, WCAT has been provided with additional resources for the initial three years of operation.

5. COST OF OPERATION

CALENDAR YEAR 2003 FOR WCAT - MARCH 3 - DECEMBER 31	
CATEGORY	***COST***
Salaries	$ 7,719,300.00
Supplementary Salary Costs	$ 99,945.00
Employee Benefits	$ 1,841,195.00
Per Diem - Boards and Commissions	$ 601,018.00
Travel	$ 189,264.00
Professional Services	$ 341,443.00
Information Systems	$ 852,751.00
Operating Costs	$ 515,280.00
Statutory Advertising and Publications	-
Building Occupancy	$ 919,551.00
Other (amortization expenses)	$ 597,111.00
TOTAL EXPENDITURES	$ 13,676,858.00

6. APPOINTMENTS

EXECUTIVE AND MANAGEMENT AS OF DECEMBER 31, 2003				
			TERM	
NAME	***POSITION***	***BY ORDER***	***FROM***	***TO***
Jill Callan	Chair	OIC#105/03	March 3, 2003	March 2, 2006
Larry Campbell	Team Leader	MO#277/03	March 3, 2003	March 2, 2005
Norman J. Denney	Vice Chair & Deputy Registrar	MO#277/03	March 3, 2003	March 2, 2005
Daphne A. Dukelow	Team Leader	MO#277/03	March 3, 2003	March 2, 2005
William J. Duncan	Team Leader	MO#277/03	March 3, 2003	March 2, 2005
Michelle Gelfand	Vice Chair, Quality Assurance	MO#277/03	March 3, 2003	March 2, 2005
Kevin Johnson	Vice Chair & Deputy Registrar	MO#277/03	March 3, 2003	March 2, 2005
Cassandra Kobayashi	Sr. Vice Chair & Registrar	MO#277/03	March 3, 2003	March 2, 2005
Ernest C. MacAulay	Team Leader	MO#277/03	March 3, 2003	March 2, 2005
Herb Morton	Sr. Vice Chair & Tribunal Counsel	MO#277/03	March 3, 2003	March 2, 2005
Marguerite Mousseau	Team Leader	MO#277/03	March 3, 2003	March 2, 2005
Lorne Newton	Team Leader	MO#277/03	March 3, 2003	March 2, 2005
Susan Polsky Shamash	Vice Chair, Training & Development Team Leader	MO#277/03	March 3, 2003	March 2, 2005
Dale Reid	Vice Chair, Inventory Strategist	MO#277/03	March 3, 2003	March 2, 2005
Leigh Sheardown	Sr. Vice Chair & Chief Operating Officer	MO#277/03	March 3, 2003	March 2, 2005
Anthony F. Stevens	Team Leader	MO#277/03	March 3, 2003	March 2, 2005
Doug Strongitharm	Vice Chair & Deputy Registrar	MO#277/03	March 3, 2003	March 2, 2005
Lois J. Williams	Team Leader	MO#277/03	March 3, 2003	March 2, 2005

VICE CHAIRS AS OF DECEMBER 31, 2003			
		TERM	
NAME	***BY ORDER***	***FROM***	***TO***
Steven Adamson	MO#277/03	March 3, 2003	March 2, 2005
Cathy Agnew	MO#277/03	March 3, 2003	March 2, 2005
Luningning Alcuitas-Imperial	MO#277/03	March 3, 2003	March 2, 2005
Beatrice K. Anderson	MO#277/03	March 3, 2003	March 2, 2005
Wallace I. Auerbach	MO#277/03	March 3, 2003	March 2, 2005
Hélène Beauchesne	MO#278/03	April 1, 2003	March 31, 2005
Frances G. Bickerstaff	MO#277/03	March 3, 2003	March 2, 2005
Sarwan Boal	MO#277/03	March 3, 2003	March 2, 2005
Julie A. Brassington	MO#277/03	March 3, 2003	March 2, 2005
Dana G. Brinley	MO#277/03	March 3, 2003	March 2, 2005
Dan Cahill	MO#277/03	March 3, 2003	March 2, 2005
Michael Carleton	MO#277/03	March 3, 2003	March 2, 2005
Baljinder Chahal	MO#277/03	March 3, 2003	March 2, 2005
Lesley A. Christensen	MO#277/03	March 3, 2003	March 2, 2005
David A. Cox	MO#277/03	March 3, 2003	March 2, 2005
Guy W. Downie	MO#277/03	March 3, 2003	March 2, 2005
Andrew J. M. Elliot	MO#277/03	March 3, 2003	March 2, 2005
Sonja Hadley	MO#277/03	March 3, 2003	March 2, 2005
Margaret C. Hamer	MO#277/03	March 3, 2003	March 2, 2005
S. Marlene Hill	MO#277/03	March 3, 2003	March 2, 2005
James Howell	MO#278/03	April 1, 2003	March 31, 2005
Inderjeet Hundal	MO#277/03	March 3, 2003	March 2, 2005
Nora Jackson	MO#277/03	March 3, 2003	March 2, 2005
Cynthia J. Katramadakis	MO#277/03	March 3, 2003	March 2, 2005
Brian King	MO#277/03	March 3, 2003	March 2, 2005
Rob Kyle	MO#277/03	March 3, 2003	March 2, 2005
Randy Lane	MO#277/03	March 3, 2003	March 2, 2005
Janice A. Leroy	MO#277/03	March 3, 2003	March 2, 2005

NAME (cont'd)	***BY ORDER***	***TERM***	
		FROM	***TO***
Duncan H. MacArthur	MO#277/03	March 3, 2003	March 2, 2005
Iain M. Macdonald	MO#277/03	March 3, 2003	March 2, 2005
Jane MacFadgen	MO#277/03	March 3, 2003	March 2, 2005
Susan Marten	MO#277/03	March 3, 2003	March 2, 2005
Heather McDonald	MO#277/03	March 3, 2003	March 2, 2005
Ralph D. McMillan	MO#277/03	March 3, 2003	March 2, 2005
Cecil S. Memory	MO#277/03	March 3, 2003	March 2, 2005
Chiara Montessori	MO#277/03	March 3, 2003	March 2, 2005
P. Michael O'Brien	MO#277/03	March 3, 2003	March 2, 2005
Isabel Otter	MO#277/03	March 3, 2003	March 2, 2005
Janet Patterson	MO#277/03	March 3, 2003	March 2, 2005
Paul Petrie	MO#277/03	March 3, 2003	March 2, 2005
Ian J. Puchlik	MO#277/03	March 3, 2003	March 2, 2005
Deirdre Rice	MO#278/03	April 1, 2003	March 31, 2005
Carol Roberts	MO#278/03	April 1, 2003	March 31, 2005
Kulwinder Sall	MO#278/03	April 1, 2003	March 31, 2005
James Sheppard	MO#277/03	March 3, 2003	March 2, 2005
Shelina Shivji	MO#277/03	March 3, 2003	March 2, 2005
Debbie Sigurdson	MO#278/03	April 1, 2003	March 31, 2005
Earl A. Simm	MO#277/03	March 3, 2003	March 2, 2005
Timothy B. Skagen	MO#277/03	March 3, 2003	March 2, 2005
Gail Starr	MO#277/03	March 3, 2003	March 2, 2005
Don Sturrock	MO#277/03	March 3, 2003	March 2, 2005
Mike Swetlikoff	MO#277/03	March 3, 2003	March 2, 2005
Eric S. Sykes	MO#277/03	March 3, 2003	March 2, 2005
David Van Blarcom	MO#277/03	March 3, 2003	March 2, 2005
Deborah Vivian	MO#278/03	April 1, 2003	March 31, 2005
Kathryn P. Wellington	MO#277/03	March 3, 2003	March 2, 2005
Teresa White	WCAT Chair Appointment *	December 29, 2003	December 28, 2005

NAME (cont'd)	*BY ORDER*	*TERM*	
		FROM	*TO*
Lynn M. Wilfert	MO#277/03	March 3, 2003	March 2, 2005
Judith Williamson	MO#277/03	March 3, 2003	March 2, 2005
Suzanne K. Wiltshire	MO#277/03	March 3, 2003	March 2, 2005
Erik W. Wood	MO#277/03	March 3, 2003	March 2, 2005
Sherryl Yeager	MO#277/03	March 3, 2003	March 2, 2005

* Appointed pursuant to section 232(2)(b) of the Act.

VICE CHAIR RESIGNATIONS IN 2003			
NAME	*RESIGNATION DATE*	*ORIGINAL TERM*	
		FROM	*TO*
Leeann I. King	October 3, 2003	March 3, 2003	March 2, 2005
Diane MacLean	August 29, 2003	April 1, 2003	March 31, 2005
JoAnn Murtagh	December 19, 2003	March 3, 2003	March 2, 2005
Abraham R. Okazaki	August 29, 2003	March 3, 2003	March 2, 2005

7. EDUCATION, TRAINING, AND DEVELOPMENT

WCAT is committed to excellence in decision making. Having adopted a competency-based recruitment process, WCAT has also recognized that continuing education, training, and development are essential to achieving and maintaining the expected standards of quality in decision making. Accordingly, WCAT has pursued an extensive program of education, training, and development, both in-house and, where resources permit, externally.

In 2003, the WCAT education group organized over 20 educational and training sessions. Members of WCAT have attended these sessions both as participants and as educators/facilitators.

The content of the educational and training sessions covered the full range of WCAT operations. Sessions addressed information technology and systems, decision making and decision writing, procedural issues, medical issues, and rehabilitation and compensation issues.

In addition to organizing in-house educational opportunities, WCAT is also represented on the Interorganizational Training Committee, which is composed of representatives from the various divisions of the WCB and the Review Division, WCAT, and the Workers' and Employers' Advisers Offices. The goal of the committee is to provide a forum for the various divisions and agencies to cooperate with each other, to share training ideas and materials, and to organize periodic interorganizational training sessions.

In 2003, members of WCAT also played an active role in the British Columbia Council of Administrative Tribunals (BCCAT). They sat on various committees, participated in teaching BCCAT educational material, assisted in organizing the BCCAT annual education conference, and acted as presenters of educational workshops at the conference.

The following is a list of sessions organized by WCAT for vice chairs and staff during 2003:

1.	February 24 and 25, 2003	Training on Bill 63 and the MRPP for Adjudicative Staff
2.	April 1 to May 9, 2003	Training for New Vice Chair Appointees
3.	April 7, 2003	Case Management Training for Executive
4.	April 14, 2003	Case Management Training for Team Leaders
5.	May 29 and June 26, 2003	Electronic File (E-File) Training for Vice Chairs
6.	June 12 and 26, 2003	Applied Rehabilitation Concepts (ARCON) Training
7.	June 16, 2003	Bill 49 Training for all Vice Chairs
8.	June 18 and 25, 2003	E-File Refresher for Vice Chairs
9.	July 9 and 23, 2003	Writing Concisely
10.	August 14 and 21, 2003	E-File Tips for WCAT
11.	September 4, 2003	Respiratory Diseases
12.	September 10, 2003	Reviewing a File Efficiently/Sufficiently

13.	September 24, 2003	When to Conduct a Further Investigation
14.	September 30, 2003	Dermatitis
15.	October 1, 9 and 21, 2003	Bill 49 – Average Earnings
16.	October 6, 2003	Assessments Software Training
17.	October 14, 2003	No Shows/Abandonments
18.	October 22, 29 and November 4, 2003	Bill 49 – Mental Stress, Pain and Chronic Pain, Changing Previous Decisions
19.	October 23, 2003	Crafting an Activity-Related Soft Tissue Disorder (ASTD) Decision
20.	November 3, 2003	Occupational Cancer Causation
21.	November 5, 2003	Drafting Decisions
22.	November 19, 2003	Payment of Interest
23.	December 3, 2003	Retroactive Vocational Rehabilitation Benefits
24.	December 4, 2003	Cardiovascular Diseases
25.	December 17, 2003	Framing the Issue(s)

8. PERFORMANCE EVALUATION

Section 234 of the Act provides that the chair is responsible for "establishing quality adjudication, performance and productivity standards for members of the appeal tribunal and regularly evaluating the members according to those standards." As a result of this requirement, the chair has established a performance evaluation process and decision quality, performance, and productivity standards for vice chairs. All vice chairs will go through the performance evaluation process during their current terms.

9. STATISTICS

9.1 Overview

At the commencement of operations on March 3, 2003, WCAT committed to complete the 22,435 undecided appeals and applications inherited from the Review Board and the Appeal Division within three years.

The major opportunity to make headway on these backlog appeals occurred in 2003 because the majority of decisions of WCB officers made on or after March 3, 2003 were reviewable by the Review Division before they could be appealed to WCAT.

This section contains two summary charts.

The first chart (Number of Active Appeals) shows WCAT's progress in reducing the inventory of backlog appeals in 2003. At December 31, 2003, the initial backlog had been reduced from 22,435 appeals to 13,183 appeals. This represented a reduction of 41.2% during WCAT's first ten months of operation.

During this period, WCAT's active inventory of new and transition appeals grew slowly from 194 appeals in March 2003 to 2,513 appeals by the end of the year.

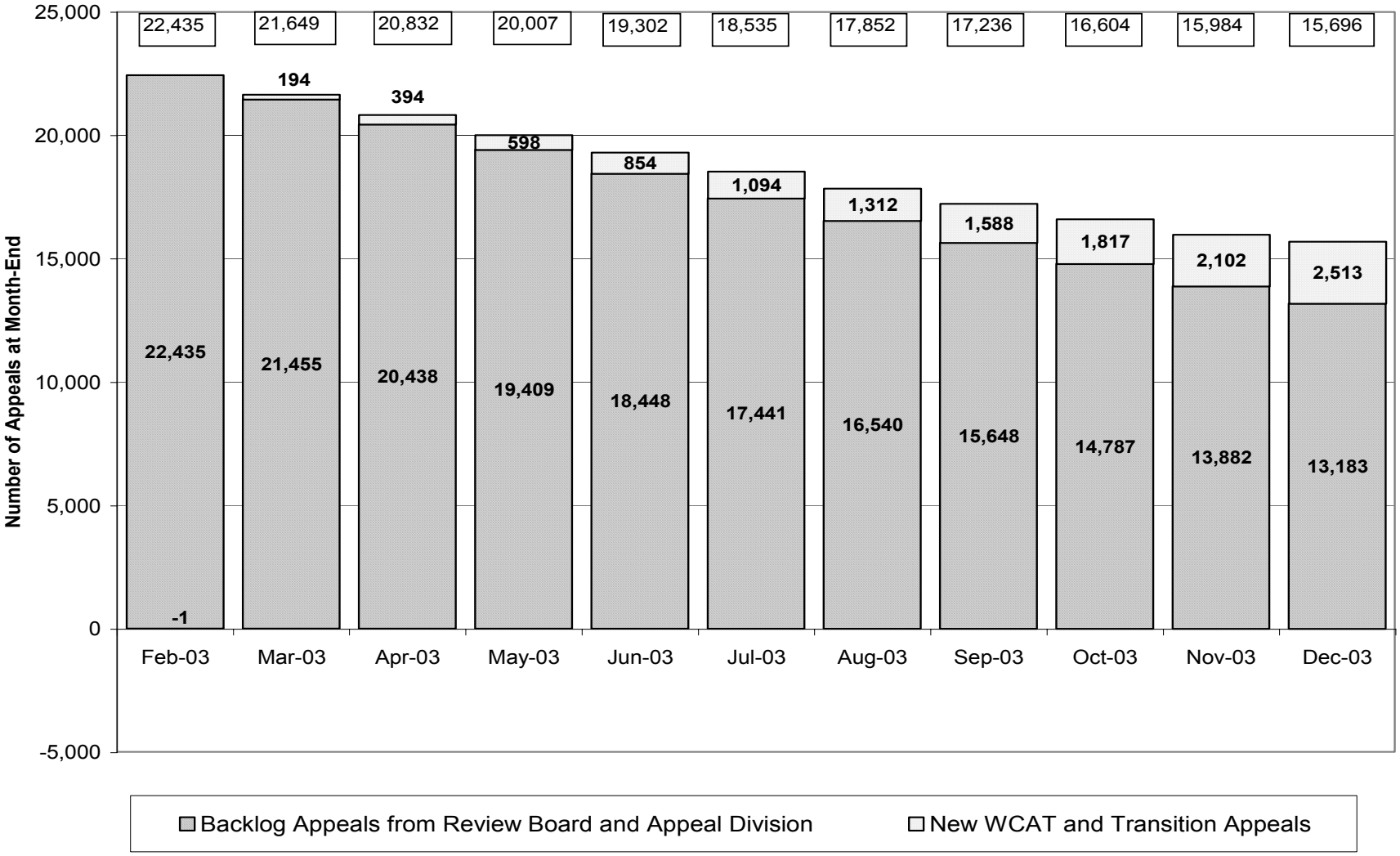
WCAT's total active inventory at year end was 15,696 appeals. Accordingly, the total appeals inventory was reduced by 6,739 or 30% during 2003.

The second chart (Total Intake and Output) shows a monthly summary of new appeals (including reactivated appeals), completed appeals, and appeals that were abandoned, withdrawn, or suspended during the year.

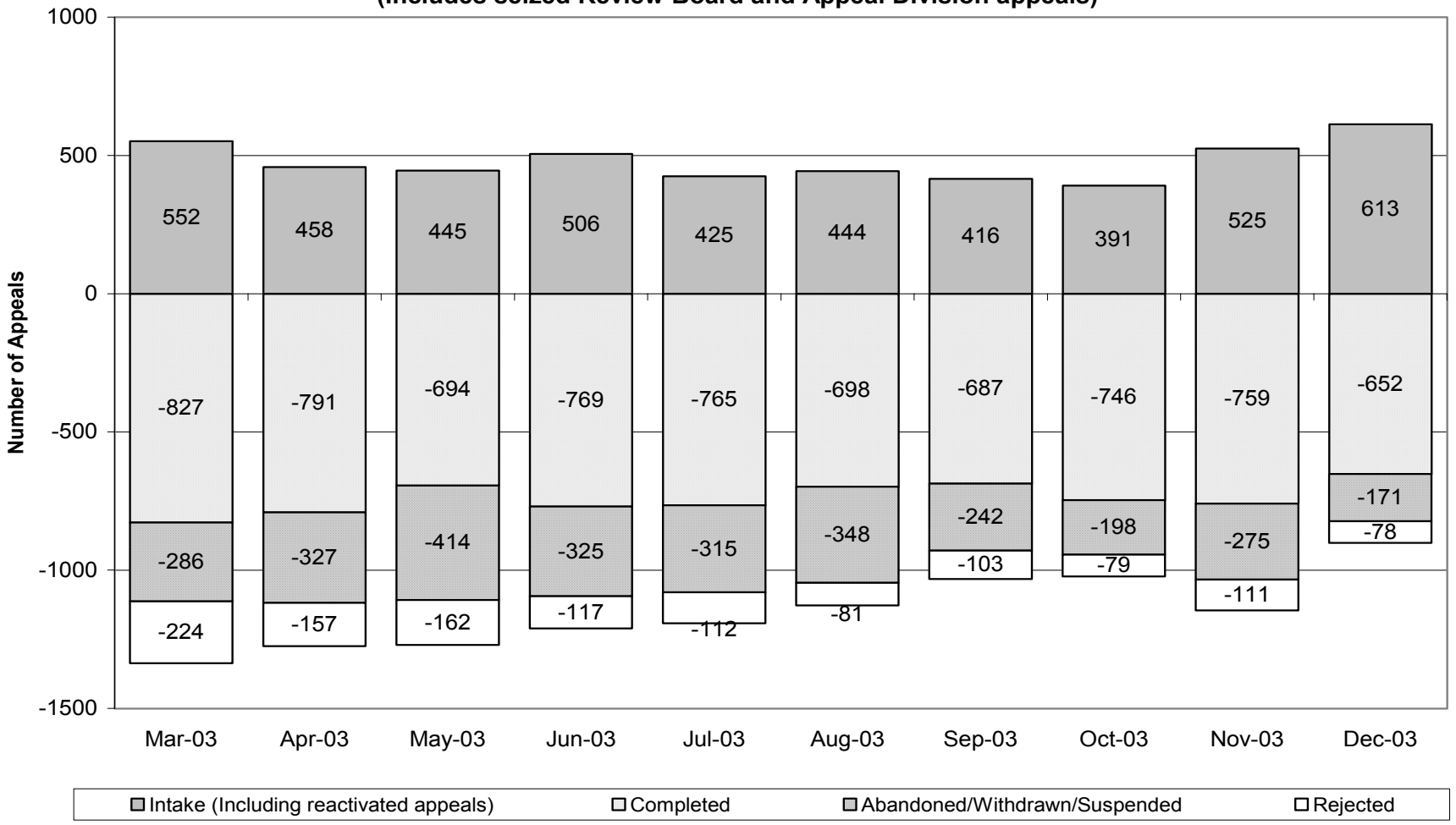
These charts include all appeals, including backlog appeals from the Review Board and the Appeal Division, new appeals, and transition appeals.

Further sections of this report provide supporting detail for these summary charts and other key statistical information.

WORKERS' COMPENSATION APPEAL TRIBUNAL
NUMBER OF ACTIVE APPEALS
(Includes seized Review Board and Appeal Division appeals)



WORKERS' COMPENSATION APPEAL TRIBUNAL
TOTAL INTAKE AND OUTPUT
(Includes seized Review Board and Appeal Division appeals)



Intake (Including reactivated appeals)	4,775
Completed	7,388
Abandoned/Withdrawn/Suspended	2,901
Rejected	1,224
Total Output	11,513

9.2 Backlog Appeals

(a) Reactivated Backlog Appeals

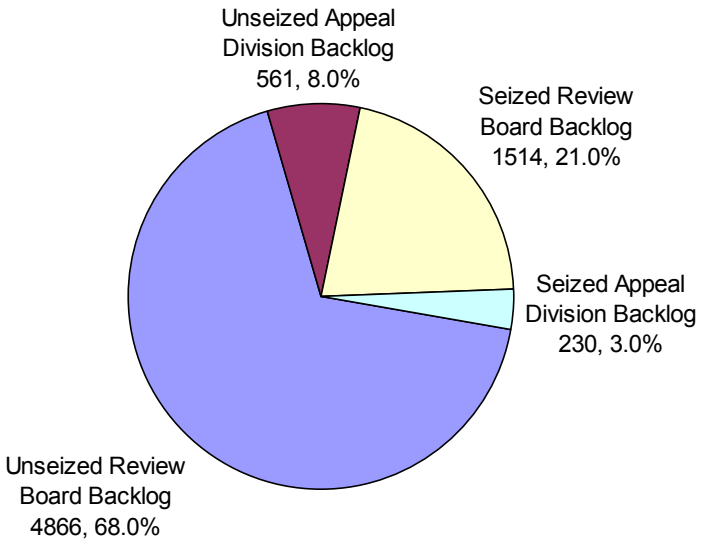
In addition to the 22,435 appeals inherited from the Review Board and the Appeal Division, WCAT reactivated 925 eligible appeals that had been suspended by the Review Board and the Appeal Division before the commencement of WCAT's operations. These were not included in the initial 22,435 appeals, but are included as "intake" in the preceding summary chart (Intake and Output).

(b) Number of Merit Decisions

WCAT made 7,171 merit decisions on backlog appeals.

Of the total decisions on backlog appeals, 1,744 (24%) were made on the "seized" portion of WCAT's backlog inventory. These are appeals that were seized by the Review Board and Appeal Division when those appeal tribunals ceased operations on February 28, 2003. These were decided by WCAT vice chairs who were appointed to WCAT from the Review Board and the Appeal Division and were issued as decisions of the Review Board and the Appeal Division. The remainder of the decided backlog appeals had not been seized on February 28, 2003 and were issued as WCAT decisions.

CATEGORIES OF MERIT DECISIONS ON BACKLOG APPEALS



The 7,171 decided backlog appeals were comprised almost entirely of compensation appeals (6,998 or 98%). Other decided appeals and applications were in the categories of relief of costs (102), assessments (34), certificates for court actions (25), prevention (10), discriminatory action (1), and criminal injury (1).

(c) Outcomes of Seized Appeals

In total there were 1,744 merit decisions made on seized appeals and applications.

There were 1,514 decisions made on seized Review Board appeals from compensation decisions. The Review Board denied 762 of these appeals (50%) and allowed, or allowed in part, 752 appeals (50%).

There were 230 decisions made on seized Appeal Division applications and appeals. Five of these were decisions concerning applications for certifications for court action. The outcomes of the remaining 225 appeals were as follows:

		Outcome	
Appeal Type	**Number of Decisions**	**Denied**	**Allowed**
Compensation	187	52%	48%
Relief of Costs	23	61%	39%
Assessments	8	38%	62%
Prevention	5	20%	80%
Discriminatory Action	1	100%	-
Criminal Injury	1	100%	-

(d) Outcomes of Unseized Backlog Decisions

WCAT made 5,427 decisions on Review Board and Appeal Division backlog appeals that were not seized by these appellate bodies on February 28, 2003.

There were 4,866 merit decisions made on non-seized Review Board backlog appeals from decisions of WCB officers on compensation matters. WCAT confirmed the WCB's decisions in 54% of these cases.

There were 561 merit decisions made on non-seized Appeal Division backlog applications and appeals. Twenty of these were decisions concerning applications for certificates for court action. The outcomes of the remaining 541 appeals were as follows:

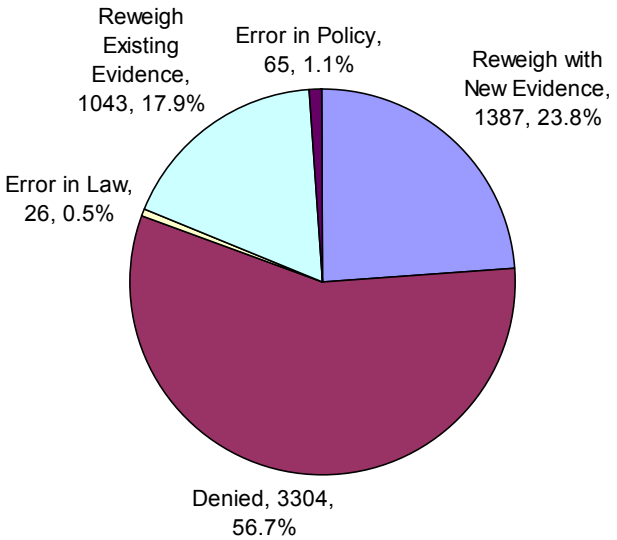
		Outcome	
Appeal Type	**Number of Decisions**	**Confirmed**	**Varied**
Compensation	431	64%	36%
Relief of Costs	79	53%	47%
Assessments*	26	65%	27%
Prevention	5	80%	20%

* Two assessment appeals (8%) resulted in the cancellation of a decision.

(e) Reasons for Issue Outcomes

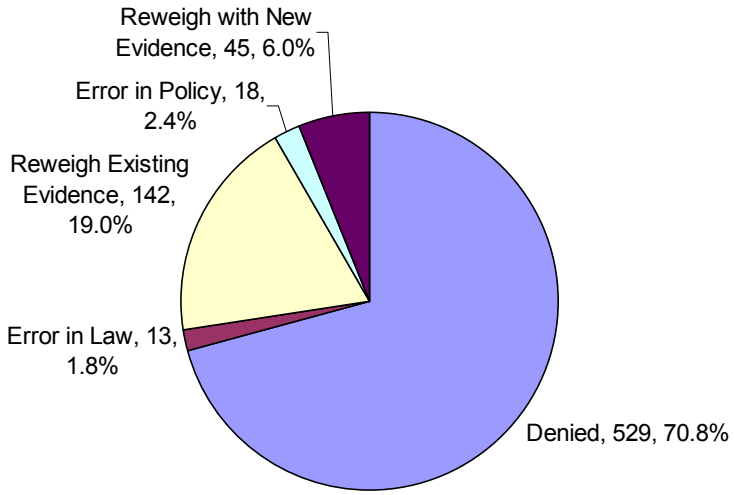
There were 5,825 disputed issues decided in the appeal outcomes for the unseized inventory inherited from the Review Board. The following chart shows the percentage of the issues that were denied and, if the issues were allowed or allowed in part, the reasons for allowing the issues.

ISSUE REASONS - REVIEW BOARD BACKLOG



There were 747 disputed issues decided in the appeal outcomes for the unseized inventory inherited from the Appeal Division. The following chart shows the percentage of the issues that were denied and, if the issues were allowed or allowed in part, the reasons for allowing the issues.

ISSUE REASONS - APPEAL DIVISION BACKLOG



(f) Summary Decisions on Backlog Appeals

WCAT made a total of 3,006 summary decisions on backlog appeals. These are decisions that determine an appeal before the issue or issues under appeal can be decided on their merits. The majority of these decisions (2,677 - 89%) confirmed that the appellant had abandoned or withdrawn the appeal or requests for suspension that were pending on March 3, 2003. WCAT found that a further 210 appeals (7%) were initiated in error or did not arise from decisions that were appealable to WCAT. WCAT made seven summary decisions that referred the appeal back to the WCB.

A total of 110 summary decisions were refusals to grant extensions of time to appeal and refusals to grant reconsideration requests.

The remaining two summary decisions were with respect to criminal injury applications that were part of the Appeal Division's seized inventory.

(g) Requests for Extensions of Time and Reconsideration

The table below shows the number of extension of time requests and reconsideration requests and their outcomes.

Type of Request	Number of Requests Considered	Allowed	Denied
Extension of time to appeal	382	292	90
Reconsideration of Appeal Division decision	24	4	20

9.3 New and Transitional Applications and Appeals

New applications and appeals are comprised of:

- appeals to WCAT from decisions made by WCB officers and review officers in the Review Division on or after March 3, 2003
- applications for certificates for court action received on or after March 3, 2003, and
- applications for reconsideration of Appeal Division and WCAT decisions.

The Act provides that parties may appeal to WCAT from compensation, assessment, and prevention decisions of review officers in the Review Division. The Act also provides that some WCB decisions are appealable directly to WCAT without being decided first at the Review Division, and that some other applications are made directly to WCAT. These direct appeals and applications include reopenings, discriminatory action complaints, requests for reconsideration of decisions of the Appeal Division and WCAT, and applications for certificates for court actions.

In addition, WCAT received transitional appeals in 2003. These appeals were largely comprised of appeals from findings on appeals that were seized by the Review Board on February 28, 2003 and completed by the Review Board after that date.

(a) Intake

WCAT received 3,850 new appeals and applications in 2003. Of these, 3,217 appeals (84%) were new appeals and applications arising from decisions made on or after March 3, 2003. The remaining 633 new appeals were transitional appeals.

The implementation of the new review and appeal structure on March 3, 2003 caused some initial confusion amongst appellants concerning where to direct their appeals. WCAT redirected a number of new appeals to the correct body which, in most cases, was the Revision Division. This decreased the net intake of new and transitional appeals to 2,947 (77% of total new appeals).

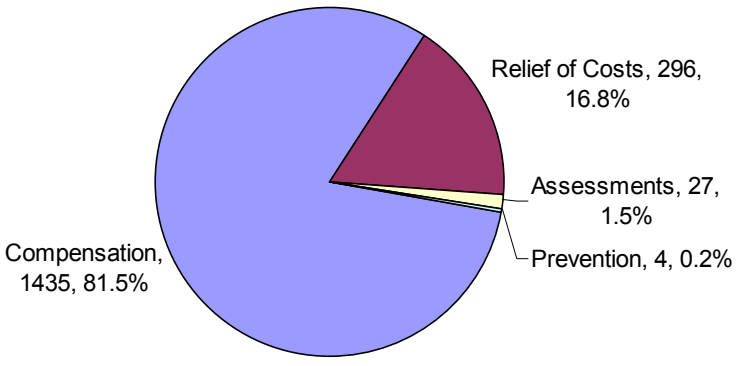
Because of the large number of appeals that were redirected to the correct body at the time of the transition to the new appeal structure, this report uses the "net intake" to provide further detail concerning the new appeals. However, the redirected appeals are shown as "intake" on the summary chart in section 9.1, and are shown as "rejected" on the same chart.

SOURCE	INTAKE	REDIRECTED	NET INTAKE
From Review Division	2,531	769	1,762
Direct	686	82	604
Transitional	633	52	581
TOTAL	3,850	903	2,947

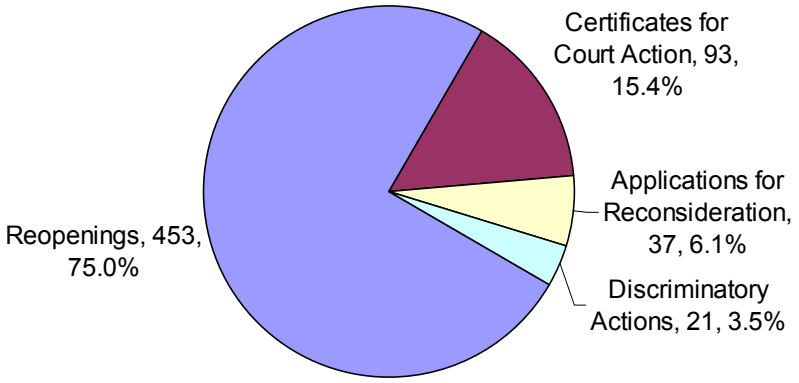
The majority of net transitional appeals (484 – 83%) were from findings of the Review Board on seized compensation appeals.

The following two charts show the breakdown of the types of claim matters and applications that comprise the net intake arising from new decisions of the Review Division and direct appeals and applications to WCAT.

NET NEW APPEALS FROM REVIEW DIVISION BY TYPE



NET NEW DIRECT APPEALS BY TYPE



(b) Merit Decisions

WCAT made 217 merit decisions on new and transitional appeals and applications in 2003. These were comprised of 146 merit decisions on new appeals and 71 merit decisions on transitional appeals. This low volume reflects the fact that the majority of new appeals were not received until the latter part of 2003.

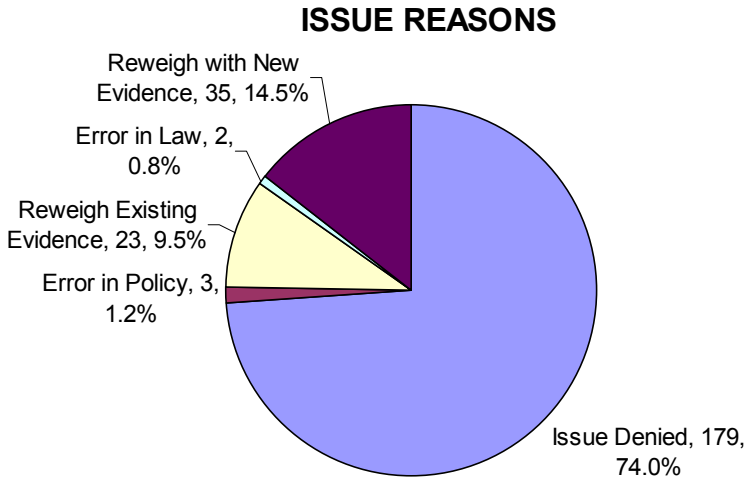
(c) Outcomes of Merit Decisions

The table below shows the outcomes of WCAT's decisions on new and transitional matters. "Confirm" means that WCAT agreed with the previous decision maker. "Vary" means that WCAT varied the decision of the previous decision maker in whole or in part.

SOURCE	Confirm	Vary
New Appeals	68%	32%
Transitional Appeals	80%	20%

(d) Reasons for Issue Outcomes

There were 242 disputed issues decided in the 217 new and transition appeal outcomes. The following chart shows the percentage of the issues that were denied and, if the issues were allowed, or allowed in part, the reasons for allowing the issues.



(e) Summary Decisions

WCAT made 217 summary decisions on the net new and transitional appeals. The majority of these decisions (205) confirmed that the appellant had abandoned or withdrawn the appeal.

A further seven summary decisions suspended an appeal.

The remaining five summary decisions concerned requests for extensions of time to appeal, and requests to reconsider an Appeal Division decision.

(f) Requests for Extensions of Time and Reconsideration

WCAT considered three requests for extensions of time to appeal decisions made on or after March 3, 2003. One of these requests was allowed and two were denied.

WCAT also considered 12 requests for extensions of time to appeal decisions made before March 3, 2003. WCAT allowed 11 of these requests and denied one request.

There were two requests for reconsideration of an Appeal Division decision and both of these requests were denied.

9.4 General

(a) Appeal Paths

WCAT decides appeals after an oral hearing or, if the appellant does not request an oral hearing or WCAT determines that an oral hearing is not necessary to decide an appeal, after reading and reviewing the WCB's records and the submissions of the parties.

WCAT decided 3,236 appeals (44% of the total) using the read and review method. WCAT decided 4,152 appeals (56% of the total) after convening an oral hearing.

(b) Oral Hearing Weeks

In 2003, WCAT held oral hearings in 15 locations around the province. The following table shows the number of hearing weeks that WCAT held in each location.

LOCATION	NUMBER OF HEARING WEEKS
Cranbrook	11
Castlegar	9
Courtenay	14
Fort St. John	6
Kitimat	1
Kamloops	29
Kelowna	30
Nanaimo	23
Prince George	24
Prince Rupert	1
Rossland	2
Terrace	10
Victoria	29
Williams Lake	6
Total outside Richmond	195
Richmond	224
GRAND TOTAL	**419**

(c) Appellants

The large majority of appeals that WCAT received were from workers. The following table shows the percentage distribution of appellants by the type of appeal. The percentages refer to appeals that were active at some time from March to December of 2003. The table does not include assessment or relief of costs appeals as the appellant is always the employer in these types of appeals.

	APPELLANT		
TYPE OF APPEAL	**Worker**	**Employer**	**Dependant**
Compensation	93.0%	6.6%	0.4%
Discriminatory Action	69.6%	30.4%	0.0%
Direct Reopening	95.7%	4.3%	0.0%
Prevention	8.3%	91.7%	0.0%
Reconsiderations	86.4%	13.6%	0.0%

(d) Representation

The following table shows the percentage of appeals for which the appellant had representation. These representatives may be Workers' or Employers' Advisers, lawyers, consultants, or family members. The percentages refer to appeals that were active at some time from March to December of 2003.

	PERCENT REPRESENTED WHERE APPELLANT IS:		
TYPE OF APPEAL	**Worker**	**Employer**	**Dependant**
Assessment	NA	67.4%	NA
Compensation	76.7%	87.2%	64.0%
Relief of Costs	NA	92.7%	NA
Discriminatory Action	58.4%	85.7%	NA
Direct Reopening	95.7%	77.8%	NA
Prevention	50.0%	65.4%	NA
Reconsiderations	64.6%	87.5%	NA

10. NOTEWORTHY DECISIONS

WCAT issued a number of noteworthy decisions in 2003. Summaries are included below for informational purposes only. The full text of each decision may be found on WCAT's website indexed as "noteworthy" decisions. All WCAT decisions from 2003 are publicly accessible on the WCAT website (see **http://www.wcat.bc.ca/research/appeal-search.htm**).

(a) Alternative Dispute Resolution

Decision: WCAT-2003-02559; ***Panel***: H. McDonald
Decision Date: September 18, 2003

Alternative Dispute Resolution – Section 246(2)(g) of the Act

The worker complained to the WCB under section 151 of the Act, alleging that her employer had unlawfully discriminated against her by terminating her employment because she had raised occupational health and safety concerns. The employer said it had dismissed the worker solely because she had engaged in insubordinate and disruptive behaviour at the workplace.

At the oral hearing of this matter the panel, pursuant to section 246(2)(g) of the Act, requested that the parties meet with a mediator. The parties agreed and came to a consensual resolution of their dispute. The panel held that the terms of the settlement agreement were not inconsistent with the Act and varied the earlier decision of the WCB to be consistent with the settlement agreement.

(b) Assessment

Decision: WCAT-2003-03419-AD; ***Panel***: H. McDonald
Decision Date: November 5, 2003

Assessment – Reclassification – WCB Error – 30:20:40 of the Assessment Operating Policy Manual – Section 96(6.1) of the Act

Under the former section 96(6.1) of the Act, the employer appealed a January 31, 2003 decision of the director of the WCB's Assessment Department. The director found that although the employer had registered with the WCB in 1988, it had misrepresented its operations in that until 1998 it had failed to accurately report or describe its operations to the WCB such that the WCB would be able to properly classify the employer. The employer was classified as "mixed farm" when it should have been "adult daycare/learning centre". The employer took the position that the reason for the reclassification was a WCB error, not inadvertent misrepresentation, because accurate

information about its operations had been provided to the WCB in its 1991 and 1992 payroll reports.

The panel found that the WCB erred in finding that there was misrepresentation within the meaning of item #30:20:40 of the *Assessment Operating Policy Manual*. The WCB had received the correct information in the payroll reports and failed to respond by, for example, making further inquiries of the employer. The onus was not on the employer to pursue the matter further in these circumstances, and thus there was no misrepresentation. The employer's appeal was allowed and the director's decision varied.

(c) Duration of Treatment

Decision: WCAT-2003-02217; ***Panel***: D. Van Blarcom
Decision Date: August 26, 2003

Duration of Treatment – Chiropractors – Policy Item #74.21 of the RSCM II

The worker strained her back and obtained treatment from a chiropractor. The worker appealed the decision that denied her compensation beyond eight weeks of treatment.

Policy item #74.21 of the RSCM II strongly encourages the WCB medical advisor to examine the worker in order to decide whether to extend treatment.

The panel found that in this case no such examination occurred. In addition, the medical advisor stated that there was no objective evidence of recovery with the chiropractic treatment. However, there was contrary evidence in this regard from the chiropractor and the general physician. The panel held the WCB medical advisor erred in the decision not to support a continuation of the chiropractor's treatments.

(d) Extension of Time to Appeal

Decision: WCAT-2003-01810; ***Panel***: J. Callan
Decision Date: July 31, 2003

Chair's Decision – Extension of Time to Appeal – Section 243(3) of Act

The worker sought an extension of the 30-day statutory time limit to appeal the finding of the Review Board. The worker informed WCAT of a change of address from Calgary to Kelowna. An unsigned copy of the Review Board finding was sent to the worker at the Kelowna address. The signed original Review Board finding, however, was mailed

to the worker's former address in Calgary. The worker filed an appeal ten days beyond the statutory time limit.

Under section 243(3) of the Act, the chair may extend the time to file a notice of appeal, even if time to file has expired, if the chair is satisfied that special circumstances existed which precluded the filing of a notice of appeal within the applicable time period, and an injustice would otherwise result.

The chair concluded that the failure to send the original finding to the worker's Kelowna address constituted special circumstances. The worker was precluded or hindered in initiating the appeal on time because the copy of the finding sent to his correct address did not include the dates that would enable him to calculate the time frame for initiating the appeal and misdirected him by stating that the finding was appealable to the Appeal Division. There would be an injustice if the worker were not granted an extension of time, as the issue before the Review Board, which was whether a particular occupation was a suitable occupation for the worker, had the potential to significantly impact his entitlement to benefits. Accordingly, the chair exercised her discretion to grant an extension of time.

Decision: WCAT-2003-03842; ***Panel:*** J. Callan
Decision Date: November 27, 2003

Chair's Decision – Extension of Time to Appeal – Section 243(3) of the Act – interpreting "deemed" in section 221(2) – whether deemed means deemed conclusively or deemed until the contrary is proved, i.e. a rebuttable presumption – chair finding deemed in section 221(2) establishes a rebuttable presumption, not a conclusive presumption

The worker sought an extension of the 30-day statutory time limit to appeal a finding of the Review Board. He notified WCAT of his intention to appeal in May 2003, nearly four months after the statutory time frame for appealing the Review Board finding had expired. The worker submitted that there were special circumstances that precluded the filing of the appeal on time because he had "just received" a copy of the decision. Also, he had been living with seven other people and the original that had been sent "must have been misplaced".

Under section 243(3) of the Act, the chair may extend the time to file a notice of appeal even where the time to appeal has expired if special circumstances existed which precluded the filing of a notice of appeal within the applicable time period, and an injustice would otherwise result. However, section 221(2) of the Act provides that a document is deemed to have been received on the eighth day after it was mailed. Consequently, the narrow issue in this case was whether the deeming provision in section 221(2) precluded the consideration of the reasons advanced by the worker for failing to file the appeal on time.

The word “deemed” may raise an irrebuttable or a rebuttable presumption depending on whether it means “deemed conclusively” or “deemed until the contrary is proved”. In deciding which meaning was intended in section 221(2) by the legislature, the chair considered two factors. First, where the statute provides that mail is “conclusively deemed” to have been received, the ordinary meaning of the phrase drives the conclusion that the legislature intended the presumption to be irrebuttable. The word “conclusively” does not appear in section 221(2). Second, the word “deemed” must be construed in the context of the statute as a whole. While the deeming provision supplies the certainty that is necessary to allow the time periods in the Act to function effectively, there must also be flexibility to accommodate those exceptional circumstances where it is established that a document was not received. This is necessary to ensure that access to WCAT, which is the final level of appeal, is not unfairly denied. Based on these two factors, the chair concluded that section 221(2) established a rebuttable presumption.

Applying this interpretation to the circumstances of this case, the chair found that the worker wrote to the Review Board in March 2003 asking whether a decision had been issued in his appeal and WCAT’s case management system recorded that a copy of the finding was mailed to the worker in April 2003. The chair was therefore satisfied that the worker had not received the copy originally mailed to him in December 2002 and, accordingly, found that the presumption was rebutted. The chair thus concluded that special circumstances existed which precluded his filing the appeal within the time period required. Given that the issue before the Review Board concerned the acceptance of a claim, a significant issue, the chair found an injustice would result from a denial of an extension of time. Moreover, the chair found that the employer would not be prejudiced by granting an extension. In the result, the chair granted the worker’s application.

Decision: WCAT-2003-04156; ***Panel:*** J. Callan
Decision Date: December 18, 2003

Chair’s Decision – Extension of Time under Section 243(3) of the Act – should time be extended where the delay is short

The worker was five days late in notifying WCAT of her intention to appeal two Review Division decisions. The issue was whether the worker should be granted extensions of time for filing her appeals of the Review Division decisions.

The worker contended that special circumstances precluded her from filing the appeals on time because she confused the process for appealing the Review Division decisions with the process for appealing a decision from a WCB case manager. Accordingly, she thought she had 90 days to appeal the Review Division decisions.

The worker's claim contains a decision from a case manager informing the worker she had 90 days to appeal the decision to the Review Division. The review officer's decisions were mailed to the worker with a cover letter attached informing her that the decisions could be appealed to WCAT within 30 days of the date of the decisions. The cover letter also indicated that WCAT's appeal pamphlet had been enclosed.

In these circumstances, the panel was not satisfied that special circumstances precluded the worker from initiating the appeals to WCAT within the statutory time frame. Although the worker indicated she became confused as a result of receiving the case manager's decision, the panel was satisfied that the information on the time frame and process for appealing to WCAT provided by the Review Division was sufficient to enable the worker to initiate her appeals to WCAT in a timely manner. Given that there were no special circumstances that precluded the initiation of the appeals on time, it was unnecessary for the panel to consider whether an injustice would result from the denial of the extensions of time. The worker's extension of time applications were denied.

(e) Injury Arising out of and in the Course of Employment

Decision: WCAT-2003-00254-AD; ***Panel***: M. Mousseau
Decision Date: April 25, 2003

Wasp Sting – Policy Item #17.00 of the RSCM I – Presumption under Section 5(4) of the Act

The worker, a forklift driver at a lumber store, was stung by a wasp when grasping some wood in a load of lumber. The Review Board concluded that the injury was compensable. The issue on this appeal is whether the sting sustained by the worker arose out of and in the course of his employment.

Since this accident occurred in the course of employment, it is presumed by operation of section 5(4) of the Act, unless the contrary is shown, that it arose out of the employment. Item #17.00 of the RSCM I sets out that an insect sting will be recognized as a hazard of employment and compensable where the job is of such a nature as to place the worker in a greater position of hazard as compared to the public at large.

The panel found that in this case the injury occurred as the worker was performing an employment activity which exposed him to certain specific risks associated with reaching into a load of wood where an insect might not be visible. Accordingly, the panel concluded that the evidence did not rebut the presumption in section 5(4) as it did not indicate that the worker was at equal or less risk than the general population. By virtue of the activity he was performing, the worker was at greater risk of injury by insect sting than the general population. The Review Board finding was confirmed.

Decision: WCAT-2003-01153-RB; ***Panel***: N. Jackson
Decision Date: June 25, 2003

Mental Stress – Section 5.1 of the Act – Item #13.30 of the RSCM II

The worker's sister died in an accident at work in September, 2002. The worker was employed by the same employer, but was not working at the time of the fatality. The worker did not go back to work after the accident until January 2003. The worker's application for compensation citing severe stress was denied by the WCB. The worker appealed that decision.

The Act was amended, effective June 30, 2002. On and after that date, a worker is entitled to compensation for mental stress under section 5.1 of the Act only if the mental stress "is an acute reaction to a sudden and traumatic event arising out of and in the course of the worker's employment", is diagnosed by a physician as one of the mental or physical conditions listed in the American Psychiatric Association's guide at the time the condition is diagnosed, and is not the result of a decision by the employer with regard to the worker's terms of employment. The WCB's policy with regard to mental stress is set out in item #13.30 of the RSCM II.

In this case, the worker did have an acute reaction to a sudden and unexpected traumatic event. The reaction did not, however, arise out of and in the course of the worker's employment since the worker was not a witness to the accident or on the employer's premises at the time of the accident, nor was the injury caused by the employer or her co-workers. The worker was also not diagnosed with a mental or physical condition that is described in the American Psychiatric Association's guide current at the time of the diagnosis.

(f) Lawfulness of WCB Policy

Decision: WCAT-2003-01800-AD; ***Panel***: J. Callan
Decision Date: July 30, 2003

Chair's Decision – Lawfulness of Policy – Sections 33(1) and 251 of the Act – Item #67.21 of the RSCM I

Pursuant to section 251(2) of the Act, a panel determined that item #67.21 of the RSCM I was patently unreasonable and should not be applied in the adjudication of the worker's appeal. Section 33(1) of the Act allows for the use of class averages for setting wage rates in certain cases where it would be inequitable to base the wage rate on historical earnings. Item #67.21 of the RSCM I provides that no change is "usually" made to a wage rate if the class average is equal to or greater than the worker's date of

injury earnings. However, the wage rate "may" be reduced if the class average is lower. The panel concluded that item #67.21 fettered the discretion of WCB officers granted by section 33(1) of the Act as it provided for the use of class averages only when it would result in a decrease in the worker's wage rate.

Under section 251(1) of the Act, WCAT may refuse to apply a policy of the WCB board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. The question whether a policy is patently unreasonable may be referred to the chair in accordance with section 251(3) of the Act for a final determination.

The chair held that item #67.21 of the RSCM I did not set out an inflexible rule that must be applied in every case. The use of the words "usually" and "may" in the policy allowed WCB officers the discretion to increase the wage rate to the class average in appropriate cases and leave the wage rate at the date of injury earnings rate in situations in which the class average would result in a lower wage rate. Pursuant to section 251(4), the chair determined that the policy should be applied as it did not involve an unlawful fettering of discretion and was not patently unreasonable.

(g) New Diagnosis

Decision: WCAT-2003-02677-RB; ***Panel***: K. Wellington;
Decision Date: September 25, 2003

Jurisdiction to Consider New Diagnosis on Appeal – Section 5(1) of the Act

The panel noted that, in the decision letter being appealed, the case manager dealt with only one of the diagnoses on file (bursitis/tendonitis), but failed to address the matter of cervical radiculopathy secondary to degenerative disc disease.

The panel found that it had the jurisdiction to consider both conditions since the worker initiated a claim for a symptom complex that could have been caused by either condition or both in combination, and the medical reports clearly identified both conditions. The panel concluded that the worker's right shoulder tendonitis/bursitis was not due to the nature of her employment and she was not entitled to establish a claim for that condition pursuant to sections 5(1), 6(1), or 6(3) of the Act. The worker did, however, suffer an aggravation of a pre-existing degenerative neck condition, and was entitled to establish a claim pursuant to section 5(1) of the Act on that ground.

(h) Occupational Disease

Decision: WCAT-2003-02212-AD; ***Panel***: R. Lane, D. Dukelow, P. Petrie
Decision Date: August 26, 2003

Occupational Disease – Firefighter – Cancer – Section 55 of the Act

The worker appealed the August 11, 2000 findings of the Review Board. The Review Board upheld the July 7, 1998 decision of the WCB denying his claim for colon cancer which he considered was related to his employment as a firefighter.

The worker initially lodged his claim in August 1991. It was denied by a claims adjudicator in September 1991. The worker appealed but then withdrew his appeal. In 1997, the worker's attempt to reactivate the appeal was denied by the Review Board. The Appeal Division upheld the Review Board's decision but referred the matter to the WCB to consider the impact of revisions to section 55 of the Act.

Section 55(3.2) of the Act provides that the WCB may pay compensation for death or disablement due to an occupational disease if sufficient medical or scientific evidence was not available within a year after the date of injury, death or disablement for the WCB to recognize the disease as an occupational disease and this evidence became available on a later date and the application is filed within three years after sufficient scientific or medical evidence became available.

The WCB considered whether there was sufficient new scientific or medical evidence since its last decision in September 1991 to recognize the worker's condition as an occupational disease and thus bring the worker within the scope of the amended section 55(3.2). The WCB concluded there was insufficient evidence to find that the worker's condition was an occupational disease. The Review Board upheld that conclusion.

WCAT determined that the proper time frame for considering the accumulation of medical and scientific evidence was from the first anniversary of the date of disablement. The worker's surgery for his cancer was in August 1988. At issue therefore was whether sufficient medical or scientific evidence has become available since August 1989 for the WCB to recognize the worker's colon cancer as an occupational disease.

The panel reviewed in great detail the literature on colon cancer and the general occupational risk for firefighters. The panel then considered the worker's particular risk factors and exposure. The majority found that while there was a significant amount of new evidence that had been produced since August 1989, it was not sufficient to find that the worker's cancer was an occupational disease. The amendments to section 55 of the Act do not allow the WCB to reconsider the claim and pay compensation benefits and subsection 55(3.2) does not advance the worker's claim.

The dissenting panel member took a different view of the weight to be given to the scientific evidence related to colon cancer and the worker's employment and the personal non-occupational factors. The dissenting panel member found that the evidence was sufficient to recognize the worker's rectosigmoid cancer as an occupational disease in this case because the new scientific evidence available satisfies the requirements of section 55(3.2) of the Act allowing the claim to be reconsidered.

(See also companion case: *Appeal Division Decision #2003-0599.*)

Decision: WCAT-2003-02227-RB; ***Panel***: R. Lane
Decision Date: August 27, 2003

Occupational Disease – Whole Body Vibration – Time Requirements for Filing Application – Section 55 of the Act

The worker, then a logging truck driver, suffered a 1989 injury for which the WCB paid compensation. Reopening of the claim was denied in a May 30, 1990 decision. In July 2001, the worker filed a claim for compensation for an occupational disease, namely a low back condition, which he linked to exposure to whole body vibrations while operating vehicles and eight compensable low back injuries. The worker sought an April 18, 1990 date of acceptance for the occupational disease claim.

Section 55(3.2) of the Act provides that the WCB may pay compensation for death or disablement due to an occupational disease if sufficient medical or scientific evidence was not available within a year after the date of injury, death or disablement for the WCB to recognize the disease as an occupational disease and this evidence became available on a later date and the application is filed within three years after sufficient scientific or medical evidence became available.

The panel held that the worker's 2001 application for an occupational disease claim was not an application for reconsideration of the 1990 decision denying reopening of his 1989 claim. The 2001 application sought the establishment of a new claim for an occupational disease and that issue was not raised by the 1989 claim or the 1990 attempt to reopen that claim. The application is not barred by section 55 of the Act as the application for compensation was made within three years after the date the Appeal Division recognized the disease as an occupational disease for this worker's kind of employment. However, the panel found it could not address the merits of the claim due to an absence of any prior consideration of the issue by the WCB. As a result, the file was referred to the WCB to adjudicate the merits of the worker's claim.

Decision: WCAT-2003-01110-AD; ***Panel:*** R. Lane
***Decision Date*:** June 24, 2003

Occupational Disease – Carbon Monoxide Exposure and Compensability for Heart Disease / Heart Attacks – whether an auto mechanic's coronary heart disease and subsequent heart attacks were related to exposure to carbon monoxide in the course of his employment

The worker, who had worked for the same car dealership as a mechanic/trimmer for 20 years until 1989, filed an application for compensation in 2000 alleging that his coronary artery disease and subsequent heart attacks were related to exposure of carbon monoxide in the course of his employment. His claim was denied and he appealed to WCAT.

The WCAT panel noted that three of the worker's nine brothers had heart problems. While blood tests done on the worker several days after exposure revealed carboxyhemoglobin determinations above the normal range, the tests did not establish toxic levels. Moreover, two physicians indicated that testing done several days after cessation of exposure did not reflect the levels measurable at the time of exposure and were of limited relevance. The panel also referred to a B.C. study of mortality rates among auto mechanics arising from arteriosclerotic heart disease which showed a proportional mortality ratio, or relative risk for auto mechanics, of 1.03. A relative risk of 2.00 is considered to be significant and often equated to a 50% likelihood that an exposed person's disease was caused by the agent. A relative risk of greater than 2.00 would permit an inference that an individual's disease was more likely than not caused by the implicated agent. A study done on tunnel workers reported a relative risk of 1.35, i.e. a 35% increase in mortality rate from coronary heart disease, but their exposure was likely well above the levels to which the worker was exposed. These studies only deal with deaths and not disease.

The panel found that the evidence did not support a conclusion that the worker's individual work circumstances were such that he had such a significantly different level of exposure to carbon monoxide as compared to other auto mechanics with the result that his individual relative risk was 2.00 or more. Cardiovascular disease is very common in males of the worker's age, and a relevant family history could not be ignored. The panel preferred the opinions of two of the physicians over the others, in part because their comments are informed by the two studies and the worker's family history. The panel found that the worker's coronary artery disease and subsequent heart attacks were not related to exposure to carbon monoxide in the course of his employment.

(i) Reconsideration - New Evidence

Decision: WCAT-2003-01116-AD; ***Panel***: J. Callan
Decision Date: June 25, 2003

Reconsideration on Grounds of New Evidence or Common Law Grounds – Due Diligence Requirement – Section 96.1 of the Act

The Appeal Division panel determined that the worker's back injury was not compensable. The worker sought reconsideration of the Appeal Division decision on the basis of new evidence under the former section 96.1 of the Act and on common law grounds. The evidence was a list of witnesses who the worker submits would have been available to provide statements related to her injury and a "Supervisor's Accident Investigation Report".

The reconsideration process is generally intended for extraordinary circumstances. It is not intended to be a vehicle by which appellants can re-argue the appeal and provide evidence that ought to have been provided to the original Appeal Division panel.

The reconsideration panel found the supervisor's accident investigation report existed at the time of the hearing and thus did not meet the due diligence requirement. Such evidence was obviously germane to the question before the Appeal Division panel and a reasonable appellant would have provided all evidence related to the injury prior to the issuance of the Appeal Division decision. The reconsideration panel applied the same analysis to the witness statements. The reconsideration panel also found no error of law going to jurisdiction in respect of the manner in which the Appeal Division panel handled the evidence. The reconsideration panel concluded the worker failed to establish grounds for reconsideration of the Appeal Division decision. The Appeal Division decision stands as final and conclusive.

Decision: WCAT-2003-01120-AD; ***Panel***: J. Callan
Decision Date: June 25, 2003

Reconsideration on Grounds of New Evidence – Due Diligence Requirement – Section 96.1 of the Act

The Appeal Division concluded that the worker, who had claimed compensation for a left shoulder injury in 1996, had not sustained a compensable injury. The worker sought reconsideration of the Appeal Division decision under the former section 96.1 of the Act on the basis of new evidence. The new evidence was a statement by the worker's former common law spouse, which was not submitted to the Appeal Division because the worker had expected his representative to call his spouse as a witness, but this did not occur.

The information contained in the witness statement existed at the time of the Appeal Division hearing. The new evidence must therefore meet the due diligence requirement outlined in the former section 96.1(3)(b) of the Act.

The reconsideration panel found that given the numerous conflicts in the evidence, the concerns regarding the worker's credibility, and the history of the claim, a reasonable appellant would have marshalled all available evidence that supported the worker's assertion that he had sustained a compensable shoulder injury in 1996 and presented that evidence to the Appeal Division panel. The reconsideration panel concluded that the worker failed to meet the due diligence requirement and thus failed to establish grounds for reconsideration of the Appeal Division decision. The Appeal Division decision stands as final and conclusive.

(j) Referral to the WCB

Decision: WCAT-2003-01132-RB; ***Panel***: D. Sigurdson
Decision Date: June 24, 2003

Refer Matter Back to the WCB – Section 38(2) of Bill 63 – Section 253(1) of the Act

Instead of making a decision under section 253(1) of the Act, WCAT has discretion under section 38(2) of Bill 63 to refer a matter back to the WCB, with or without directions. This discretion applies only to an appeal that was before the Review Board or the Appeal Division on March 3, 2003 that was continued as a WCAT appeal. The WCB decision made under the referral may be reviewed by the Review Division.

In this appeal, WCAT determined that the matter of acceptance of the worker's claim should be referred back to the WCB, with direction to determine whether the worker's diagnosed carpal tunnel syndrome was caused by his employment activities. The information on the claim file indicates the original decision considered the initial diagnosis of bilateral wrist and elbow tendonitis. The decision as to whether the worker's carpal tunnel syndrome is compensable is best suited to the WCB's mandate as original decision maker.

Decision: WCAT-2003-04166-RB; ***Panel:*** A. Stevens
Decision Date: December 16, 2003

Refer Matter Back to the WCB – Section 246(3) of the Act – whether it was appropriate to refer a matter back to the WCB

The worker appealed four WCB decisions in relation to his 1996 work injury. The decisions concerned his entitlement to vocational rehabilitation benefits, wage loss benefits, health care benefits, and a permanent partial disability award. However, the

worker's entitlements were only considered in relation to his physical disability and had no regard to the fact that the WCB also accepted that the worker sustained a psychological injury as a compensable consequence of this claim. The preliminary issue in his appeal was whether there was a matter that should have been determined by the WCB, but was not, and should be referred back to the WCB for determination under section 246(3).

The worker was diagnosed under the DSM-IV with Pain Disorder Associated with Both Psychological Factors and a General Medical Condition. A case manager documented that the worker had a permanent psychological condition, arising as a consequence of his accepted condition and surgeries. The worker's representative agreed at the outset of the hearing that the four WCB decisions concerned the worker's potential entitlement in relation to his physical injury alone, and did not consider what entitlements might arise due to his accepted Pain Disorder.

The panel found that a section 246(3) referral was indicated in this case, and listed specific issues the referral was to address. The panel suspended the worker's WCAT appeals pending determinations of the WCB on the referred matters. It further noted that, pursuant to section 246(4), the WCB's determinations on the referral would become part of what is pending on appeal before WCAT and would not be reviewable by the Review Division.

(k) Reopenings

Decision: WCAT-2003-04322; ***Panel:*** J. Callan, M. Gelfand, H. Morton
Decision Date: December 24, 2003

Interpretation – "On Application" in Section 96(2) of the Act – whether WCAT has jurisdiction to consider the appeal from the case manager's decision not to reopen a worker's claim under section 96(2) where the decision letter said that the decision was appealable to WCAT (thereby implicitly indicating that the decision was being provided "on application") – where worker did not specify any of the section 96(2) grounds for reopening but made a general request to reopen his claim – whether the worker must refer specifically to section 96(2) or must use language substantially similar to that section

In a letter of June 2003, a WCB case manager refused to reopen the worker's claim under section 96(2) and advised the worker that he could appeal the decision directly to WCAT. The WCB implicitly interpreted the worker's request for further benefits as a reopening "application", for which a right of appeal directly to WCAT existed. In this case, the "application" consisted of a medical report submitted by the worker's doctor, and a telephone request by the worker for sponsorship of therapy for his back. The preliminary issue was whether WCAT had jurisdiction to consider the appeal.

Where the WCB considered a reopening "on its own initiative", the decision is reviewable by the Review Division (section 96.2(1)(a)); in contrast, if the WCB considered a reopening "on application", the decision is appealable directly to WCAT (section 240(2)) and is not reviewable by the Review Division (section 96.2(2)(g)).

Neither the legislation, which came into effect March 3, 2003, nor WCB policy (RSCM C14-102.01) defines the term "application". WCB *Practice Directive #58*, Reopenings, as amended on July 1, 2003, states that a reopening request will be considered "on application" only where a formal reopening request has been made by a worker or employer, and it must refer to at least one of the criteria in section 96(2). *Practice Directive #58* also lists situations in which the WCB's decision under section 96(2) will not be considered as being "on application", including where there has been a general request to "reopen" a claim by a worker.

Review Division Decision #2523, dated October 2, 2003, similarly addressed this issue and concluded that in order to be considered an "application", the worker must refer specifically to section 96(2) or must use language substantially similar to that section; a general request for benefits did not constitute an application within the meaning of section 96(2). Although this conclusion may seem technical, the review officer felt it best fit the intent of the system and the general way the WCB adjudicates claims. It was difficult in practice to identify if an "application" had been made, and it was important to have a clear definition of the term given that the jurisdiction of the Review Division and WCAT depended on the characterization. The review officer reasoned that there was no prejudice to either party in establishing this definition of "application", since any decision of the Review Division on a reopening issue is appealable to WCAT within 30 days.

Neither *Practice Directive #58* nor *Review Division Decision #2523* constitutes policy of the board of directors. The worker's request to the WCB would not be considered an "application" within the definition of that term contained in *Review Division Decision #2523* and *Practice Directive #58*, because he failed to specify any of the section 96(2) grounds for reopening, and made a general request to reopen his claim. Although WCAT must apply policy, policy was silent on the meaning of "on application" and "on its own initiative". Accordingly, this was an interpretative issue that had to be addressed by WCAT in order to determine whether the worker's appeal was properly before WCAT.

The panel acknowledged that both the case manager's interpretation and the Review Division's interpretation of "application" were reasonable and tenable. After considering a number of factors, including timeliness, the panel adopted the interpretation and reasoning in *Review Division Decision #2523.* The adoption of a narrow interpretation of "application" in section 96(2) gives rise to a more liberal approach by the Review Division of its jurisdiction, which has several advantages: (i) it permits a broader consideration of the complex and interrelated issues which often arise in connection with reopening decisions under section 96(2); (ii) it reduces the amount of

"procedural" complexity in having some issues under review by the Review Division while the reopening decision is under appeal to WCAT at the same time; and (iii) it supports the potential for resolution of issues at a lower level in the review and appeal structures.

Bearing in mind that in this case the case manager's decision of June 2003 was issued before the October 2, 2003 decision of the Review Division, the panel decided to give the appellant the opportunity to choose to either continue his appeal to WCAT, or request that his appeal be transferred to the Review Division. In the latter case, the Review Division decision could then be appealed to WCAT.

A copy of this decision was provided to WCAT's Registry to guide the handling of other appeals to WCAT from reopening decisions made before October 2, 2003 which have not yet been decided. The reasoning above concerns the situation where the WCB officer's decision letter stated that the decision was appealable to WCAT (thereby implicitly indicating that the decision was being provided "on application"). The opportunity to make an election to proceed with a review by the Review Division or an appeal to WCAT only applies if the decision provided under section 96(2) could be characterized as being provided on the WCB's own initiative. If the worker specifically refers to section 96(2), or used language substantially similar to that section, the reopening decision would properly be viewed as having been provided "on application" and the appeal would clearly be within WCAT's jurisdiction. A copy of this decision was also forwarded to the WCB's Policy Bureau for consideration of possible policy development concerning the meaning of the phrase "on its own initiative, or on application".

(l) Retroactive Rehabilitation Benefits

Decision: WCAT-2003-01744-RB; ***Panel***: I. Macdonald
Decision Date: July 28, 2003

Retroactive Rehabilitation Benefits – Section 16(1) of the Act – Item #85.30 of the RSCM I

The panel held that a worker is eligible for retroactive payment of rehabilitation assistance where there is evidence of meaningful and purposive rehabilitation efforts on the part of the worker during the period in question consistent with the principles of vocational rehabilitation as set out in item #85.30 of the RSCM I. The sufficiency of the worker's efforts must be assessed in the context of each case. Factors to be considered include the extent of effort exerted by the worker in the context of available resources, the nature of the effort expended, the duration of the effort, and whether the effort was undertaken in good faith.

In this case, the effort expended by the worker to secure suitable alternate employment, or to obtain retraining, was minimal and sporadic, and the evidence in support of the worker's efforts was largely anecdotal and unconfirmed. Accordingly, the panel found that the worker's effort was not sufficient to render him eligible to receive retroactive vocational rehabilitation benefits. The worker was, however, eligible for rehabilitation assistance on a preventative basis prospectively.

(m) Status under the Act

Decision: WCAT-2003-01170-RB; ***Panel:*** C. Memory
Decision Date: June 26, 2003

Injuries Occurring Outside the Province – worker was an independent operator with personal optional protection – worker's residence was in Alberta, but his main job functions were in B.C. – whether his injury was compensable – interpreting section 8(1)(b) of the Act, and applying item #112.20 RSCM I

The worker was self-employed, operating a mobile welding rig based at his residence in Alberta. He had purchased personal optional protection with the WCB. He sustained a ruptured tendon in his left knee in June 2002 while servicing his mobile welding rig following a week of working in a British Columbia town. Although he usually cleaned his rig at the work site because he was paid for that time, on this occasion he was under some time constraints and travelled back to his residence first. When he got home, he was doing maintenance work on the welding deck of the rig and, while getting down from the deck, stumbled forward and struck his left knee on a milk crate. The WCB disallowed his claim for compensation on the basis that he did not meet the requirements of section 8(1)(d) of the Act which the entitlement officer understood as requiring the worker to have a place of residence in B.C. The worker appealed.

WCB policy respecting section 8 of the Act is set out in item #112.00 of the RSCM I. Item #112.20 states that where there is an out-of-province injury, the first question that must be asked is where, at the time in question, the claimant was performing his main job functions. Although section 8(1), including its residence requirement, applies where the main job functions at the time are being performed out of province, it has no application if the main job functions are being performed within the province. In the latter scenario, a claimant only has to meet the requirements of section 5(1) of the Act.

At all material times, the worker's residence was in Alberta, approximately 400 yards from the B.C. border. Upon review of the invoices for 2001 and 2002, the panel observed that all his welding work in 2001 was done in B.C. and that, with the exception of three occasions, this pattern continued in 2002. The panel found that the vast majority of his welding work in 2001 and 2002 up to the date of injury in June 2002 was done in B.C.

The panel concluded that the main job function of the worker in June 2002 was being performed in B.C. and, accordingly, section 8(1) had no application. The WCB had accepted the worker's application for personal optional protection, which declared his Alberta residence, but did not make any enquiry as to where his main job function would be carried out. The WCB had also accepted premium payments from time to time. In the absence of any enquiry, and in the presence of the declaration and acceptance of premium payments, the WCB is obliged to go beyond the mere reliance on residence to deny coverage. The panel further found that the injury arose out of and in the course of the worker's employment; hence the requirements of section 5(1) were satisfied. Accordingly, it found that the worker was entitled to compensation in respect of his left knee injury.

Decision: WCAT-2003-00896-AD; ***Panel:*** M. Mousseau
Decision Date: June 11, 2003

Section 11 Determination – Travelling Employee – whether a part-time rehabilitation assistant, who was injured while travelling to a client's home, was a worker or independent operator, and whether the trip was covered under the Act – RSCM I items #6.10, #7.44, #18.32, #18.22, #18.40 – Assessment Policy Manual items #20:20:00, #20:10:30

The plaintiff, who did not have personal optional protection, was on her way to provide services to a client as a rehabilitation assistant when her vehicle was struck by the defendant's truck. The plaintiff commenced an action for damages against the defendant in B.C. Supreme Court. The defendant requested a determination under section 11.

Section 11 provides, among other things, that on application by a party to an action, the WCB must determine whether at the time the cause of action arose, a person was a worker within the meaning of the Act; the injury, disability or death of the worker arose out of, or in the course of, the worker's employment; an employer or employer's servant or agent was employed by another employer; and, whether the employer was engaged in industry within the meaning of the Act.

The plaintiff submitted that she was an independent operator and was therefore not covered by the Act. She worked part time as a rehabilitation assistant under an agreement between herself and a rehabilitation provider, but had a full-time job doing something else. As a rehabilitation assistant, she was paid an hourly rate which amounted to $300 to $400 per month, and $10 per hour for travel. Another major issue, which pertained to the statutory test in section 5(1), was whether travel was part of her employment. The defendant maintained she was an employee.

The WCAT panel weighed the factors summarized in the former item #7.44 and concluded that she was a worker at the time of the accident. In reaching this conclusion, it relied on the fact that she did not have a vendor licence to bill ICBC or the WCB and relied on the rehabilitation provider's licence; that she was paid on an hourly basis, could not bill clients directly, and provided reports to the rehabilitation provider as to how her time was spent; and that she did not acquire clients outside of those referred by the rehabilitation provider. The panel considered the fact the rehabilitation provider did not make deductions for taxes, EI or CPP as a reflection of the rehabilitation provider's intentions not to treat the plaintiff as an employee, but found that not to be determinative. The panel concluded that the plaintiff was a worker.

As to whether the worker's injuries arose out of and in the course of her employment, the panel noted that the capacity to provide rehabilitation assistance to clients in various locations was integral to the service provided by the rehabilitation provider. It found that in view of the nature of the service provided and the rate of pay for travel, travel was a substantial aspect of the plaintiff's employment, and as a result, she was a travelling employee. Accordingly, the panel found her injuries arose out of and in the course of her employment.

Decision: WCAT-2003-01006-AD; ***Panel:*** M. Mousseau
Decision Date: June 18, 2003

Section 11 Determination – whether a strata corporation that was registered with the WCB and had an assessment payroll of $1,500 but provided no evidence as to who received this remuneration, was an employer – Assessment Policy Manual Items #20:30:20 and #20:20:00 – Sections 10 and 11 of the Act

The claimant, a courier with personal optional protection, slipped on the outside stairs of a building which is owned by a numbered company. The numbered company was registered with the WCB and had one employee, a caretaker. The defendant, a strata corporation, was also registered with the WCB as an employer; it had an assessment payroll of $1,500. In its reply filed in Small Claims Court the defendant claimed protection from civil liability under section 10 of the Act. The defendant also requested a determination under section 11 regarding its status and that of the claimant.

Section 11 provides, among other things, that on application by a party to an action, the WCB must determine whether at the time the cause of action arose, a person was a worker within the meaning of the Act; the injury, disability or death of the worker arose out of, or in the course of, the worker's employment; an employer or employer's servant or agent was employed by another employer; and whether the employer was engaged in industry within the meaning of the Act.

The claimant questioned whether the defendant was, in fact, an employer and thereby entitled to protection from civil liability under section 10(1). The claimant submitted that the strata corporation was not in fact an employer because it did not have any employees and did not pay remuneration to any party. The caretaker was simply an employee of the numbered company, and the strata corporation was a separate legal entity. There was no evidence as to who received the remuneration which was the basis of the strata corporation's payroll report to the WCB. It was clear from item #20:20:00 that registration as an employer requires the existence of workers. However, mere acceptance by the WCB of the strata corporation's registration as an employer is insufficient to establish the strata corporation was an employer for the purpose of section 10. This is because the WCB relies on information provided by the strata corporation, including payroll amounts submitted each year, to determine its status. Item #20:30:20 states that incorrect information may jeopardize a claim or the protection provided to employers by the Act. Although it seemed unlikely that a corporation would make payroll reports if it did not, in fact, pay remuneration to someone, the claimant was entitled to question whether the defendant was, in fact, an employer. Once the validity of registration is raised, the onus was on the defendant to provide the evidence that would support a *bona fide* registration because only it had access to the records to substantiate its claim. The defendant did not provide that evidence. Accordingly, the panel found the strata corporation was not an employer engaged in an industry within Part 1. It also found that the claimant was a worker within the meaning of Part 1 and that his injuries arose out of and in the course of employment.

(n) Stay of Decision

Decision: WCAT-2003-00697; ***Panel***: H. McDonald
Decision Date: May 28, 2003

Stay of Decision or Order under Appeal – Section 244 of the Act – Item 5.40 of WCAT's MRPP

The worker brought a complaint alleging that he was terminated by the employer for informing military police at the work site that he was being threatened by a co-worker. The case officer concluded that the employer had contravened section 151 of the Act by engaging in discriminatory action against the complainant. The employer was ordered to reinstate the complainant to his former job and compensate the complainant for any loss of income suffered as a result of the discrimination. The employer is appealing that order. This decision deals with the employer's request for a stay of the case officer's order pending a decision on the appeal.

The jurisdiction to grant a stay pending an appeal is provided in section 244 of the Act. The factors to be considered on an application for a stay in a section 153 appeal are set out in item 5.40 of WCAT's MRPP. Applying those criteria and the common law, the panel found that on balance a stay should be granted. The panel considered the following factors:

(a) the appeal did appear to have merit in light of the fact that the employer's claim that the complainant voluntarily terminated his employment, if successful, would be a strong defence to the complaint;

(b) statements by the employer that it would be subject to "undue financial hardship" and would have a difficult time recovering damages if successful on appeal were not, without further evidence, sufficient to find that the employer would suffer serious irreparable harm;

(c) as between the parties the employer would suffer the greater harm if a stay were denied as, among other reasons, the complainant was receiving other employment income and was not destitute;

(d) worker safety and work site safety would not be compromised by granting a stay as the complainant was not working for the employer at present and there was no evidence that the co-worker posed a threat to anyone else; and,

(e) the case officer's decision was made without the benefit of evidence from the employer due to procedural difficulties with the delivery of notice of the proceedings to the employer.

Decision: WCAT-2003-02653-AD; ***Panel***: H. McDonald
Decision Date: September 24, 2003

Stay of WCB Decision – Section 244 of the Act – Item 5.40 of WCAT's MRPP

The corporation appealed a January 28, 2003 decision by an assessment officer in the Assessment Department of the WCB. The assessment officer had decided that the appellant was correctly classified as "Commercial Cleaning or Janitorial Services", and that all payments made by the appellant to persons working as janitors under a franchise agreement should be included in the appellant's assessable payroll. This resulted in an increase in the appellant's assessment for the year 2001 and an under-remitting penalty. The appellant submitted that the assessment officer's decision was wrong in law and in fact and requested a stay of the decision on the ground that it could become insolvent if it had to make the payments.

The panel considered the factors described in item 5.40 of WCAT's MRPP and the fact that the granting of a stay is an extraordinary remedy. The panel concluded that it was not persuaded that the appellant would become insolvent if it had to pay the WCB in

that it would be unable to find the funds to meet its employee payroll obligations. The request for a stay was denied.

(o) Termination of Wage Loss Benefits

Decision: WCAT-2003-04102; ***Panel:*** R. Lane
Decision Date: December 11, 2003

Termination of Temporary Wage Loss Benefits – when is a worker's condition stabilized – item #34.54 RSCM I – whether the worker was entitled to temporary wage loss benefits to October 2002 from October 2001, the date his last period of temporary disability ended, because he required surgery in October 2002

The worker suffered a coccyx injury when he slipped and landed on his tailbone at work in January 2000. The WCB paid him temporary total disability wage loss benefits for the period July 2000 to October 2001. His claim was then reopened for temporary disability wage loss benefits effective October 2002 when he underwent a coccygectomy. The worker appealed.

The issues on appeal included (1) whether he was entitled to temporary disability wage loss benefits for the period from October 2001 to October 2002; and (2) whether his temporary disability wage loss benefits as of October 2002 were properly calculated using 90 percent of his average net pre-injury earnings rather than 75 percent of gross earnings.

Having considered item #34.54 of the RSCM I, the panel found that the evidence as of October 2001 did not indicate a likelihood of significant change in the worker's condition. A specialist who examined the worker expressly indicated in October 2001 that the worker's condition had plateaued, and this was consistent with reports from the worker's family physician around the same time indicating there was no change in the worker's clinical examination results. Although the worker eventually underwent surgery in October 2002 and gross mobility of a coccyx segment was discovered at surgery, that discovery did not alter the fact that as of October 2001 surgical intervention was not considered medically appropriate and there was no expectation of a change in his condition. That the worker was again seen as temporarily disabled as of October 2002 did not mean that he had a temporary disability between October 2001, the date his previous period of temporary disability ended, and October 2002. The panel did not doubt that the worker had a disability after October 2001; the WCB awarded a pension to recognize that disability. However, it considered that the disability as of October 2001 was permanent. Given the worker's plateau in October 2001, he was not entitled to temporary disability wage loss benefits from October 2001 to October 2002.

In respect of the second issue, the panel found that item #1.03(b)(4) of the RSCM II applied, and hence the worker's entitlement to temporary disability wage loss benefits for the October 2002 reopening should be 90 percent of his net earnings rather than 75 percent of gross earnings.

(p) Wage Rate

Decision: WCAT-2003-02711-RB; ***Panel***: D. Sigurdson
Decision Date: September 26, 2003

Wage Rate – Banked Overtime Wages – Section 33 of the Act

The purpose of section 33(1) of the Act is to determine the average earnings that most accurately reflect the worker's loss. The panel found that the inclusion of overtime hours in the year that those hours were worked best reflected the actual loss to the worker as there was evidence that the worker had consistently worked overtime during the course of the year and for several previous years. Had the worker opted to receive the overtime wages at the time he performed the work, the overtime wages would have been included in the calculation of his long-term wage rate. To not include the overtime wages when the worker elected to defer that payment does not negate the fact the worker had worked the hours and had earned the wages, and penalizes the worker for deferring the payment. WCB practice of accepting overtime earnings only when they are actually received by the worker would produce absurd results. The worker's appeal was allowed and the WCB's decision varied accordingly.

(q) Withdrawal of Appeal

Decision: WCAT-2003-02715-RB; ***Panel***: S. Yeager
Decision Date: September 26, 2003

Request to Withdraw Appeal – Item 5.60 of WCAT's MRPP

Item 5.60 of WCAT's MRPP establishes that WCAT has the discretion to decline to grant a withdrawal once it has begun its consideration of the evidence. This may occur in situations where there is evidence of fraud or misrepresentation by the appellant, or where an error in law or policy will result in a favourable decision for the appellant. At the outset of the oral hearing, the worker's representative requested that the appeal of an October 16, 2001 decision letter be withdrawn. The worker's position was that there was only one incident, that of July 13, 2001, and the other application for compensation was in fact related to that incident, not a separate incident.

The panel declined to grant a withdrawal, finding that the totality of the evidence must be considered in this case as the evidence in the two claim files had substantive differences. The panel considered the evidence and concluded that it was insufficient to find that the worker sustained injury that led to his disabling symptoms. The worker's appeal was denied.

11. COURT DECISIONS

There were no petitions for judicial review of WCAT decisions filed in 2003. The following summaries concern court decisions of significance to the workers' compensation system. These primarily involve judicial reviews of decisions of the former Appeal Division.

11.1 Judicial Review, British Columbia Supreme Court

N.W. Construction (1993) Ltd. v. B.C. (W.C.B.) **(2003), 1 Admin. L.R. (4th) 77 (B.C.S.C.), 2003 BCSC 224**

Administrative Penalty and Claim Cost Levy – administrative tribunal procedures – whether exclusion of principal during hearing violated the principles of natural justice

The employer applied for judicial review to quash a decision of the Appeal Division, based in part on an allegation that the Appeal Division breached the rules of natural justice. An employee fell from a beam. The WCB officer determined that the distance from the beam to the floor was a half inch greater than the minimum distance for which fall protection was required. The employer was assessed an administrative penalty and a claim cost levy. The matter went before the Appeal Division. During an oral hearing the president of the employer was excluded while two employees gave evidence. The Appeal Division decision approved the claim cost levy but reduced the administrative penalty by 30%.

The petition was dismissed. The court acknowledged the Appeal Division's authority to establish its own procedure but stated that this authority did not allow it to exclude the employer's principal without some justification. In this case, there was no suggestion that intimidation by the president was a concern. The court noted that counsel takes instruction from its client and, in the ordinary course, for a fair hearing to occur and absent any apprehension of intimidation, the client or its principal should have been allowed to remain during the whole of the hearing. The court found that although the Appeal Division's procedure in excluding the principal was unjustified, it was not an error that required a return of the matter to the Appeal Division for further consideration as the employer was not prejudiced.

***Davidson v. B.C. (W.C.B.)* (2003), 17 B.C.L.R. (4th) 372 (S.C.), 2003 BCSC 1147**

Application for Determination under Section 11 of the Act after Trial – whether application after trial an abuse of process

The petitioner, Davidson, applied under the *Judicial Review Procedure Act* to quash a ruling of the Appeal Division which found that he was a worker whose injury arose out of and in the course of his employment, and a ruling of a reconsideration panel that denied an application for review of the Appeal Division decision. The unusual aspect of this case was that the ruling of the Appeal Division was delivered after a jury trial awarded Mr. Davidson approximately $463,390 for the very injuries he originally claimed for workers' compensation benefits under the Act. The petitioner asserts that the Appeal Division made a jurisdictional error in declining to apply abuse of process doctrines to the proceedings and that its decision was patently unreasonable.

The petition was dismissed. The change in position of the employer and the lateness of its request are unfortunate. However, they do not alter the conclusion that the WCB has the exclusive jurisdiction to make section 11 determinations. It is clear that the forum for determining the status of the parties in a personal injury action, where there is a question as to the status of the plaintiff at the time of injury, is through a determination by the Appeal Division under section 11. Seeking such a certification was an option that was also open to the petitioner at all relevant times, but not pursued. Overall, there was a rational basis for the findings of the Appeal Division and the reconsideration panel and they have not been shown to be patently unreasonable, nor that there was an error of law going to jurisdiction in the refusal to apply the abuse of process doctrine.

***Speckling v. B.C. (W.C.B.),* [2003] B.C.J. No. 2244 (QL), 2003 BCSC 1487**

Credibility of Worker – whether decision that injury did not arise out of and in the course of employment was patently unreasonable

Speckling, a worker, sought judicial review of two Appeal Division decisions. The first decision upheld the WCB's denial of the worker's claim for compensation. The Appeal Division heard witnesses, considered the evidence, and found the worker was not a credible witness. The preponderance of the evidence led to the conclusion that the worker did not suffer an injury arising out of and in the course of his employment. The second decision upheld the denial of a referral to the Medical Review Panel (MRP) on the basis that the first decision was not a "medical decision."

The petition was denied. Determining whether a worker was injured in the course of his employment and whether a decision of the WCB is a "medical decision" requiring referral to an MRP are matters within the WCB's exclusive jurisdiction and expertise. The patent unreasonableness standard of review applies to Appeal Division decisions. The court found there was ample evidence to support the Appeal Division's decisions even though a contrary view was open to the Appeal Division on that evidence. The

worker also argued that the Appeal Division "shifted the burden of proof with respect to credibility" when it asked him if he could offer any motive for another witness offering untruthful evidence. While this would be an improper question in the criminal context, the court found there was no basis to suggest the Appeal Division used this evidence improperly or wrongly shifted the burden of proof.

***Brosseau v. B.C. (W.C.B.)*, [2003] B.C.J. No. 1216 (QL), 2003 BCSC 825**

Refusal to Reconvene MRP – whether required to exhaust appeal process before seeking judicial review

Brosseau applied for judicial review of two decisions of the registrar of the MRP. Brosseau worked for the Canadian National Railway Company. During Expo '86, he was required to work very long hours and suffered exhaustion and eventual collapse. He retired in 1988 on a pension and has not worked since. In 1993, he applied for a permanent disability pension and his claim was referred to an MRP of psychiatrists for assessment.

The MRP certified that Brosseau had suffered a work-related disability for a period of six months. As a result, his claim to a permanent disability pension was denied. Brosseau was of the view that he should have received a permanent disability pension.

He appealed the implementation decision of the WCB to the Review Board and to the Appeal Division. His appeals were dismissed. He did not seek judicial review of the Appeal Division decision. Rather, Brosseau asked the registrar of the MRP to review the MRP certificate on the basis of a fundamental mistake and then reconstitute the MRP for reconsideration. The registrar reviewed the certificate and refused to reconstitute the MRP. Brosseau then asked the registrar to reconsider. The registrar refused to reconsider. As a result, Brosseau sought to review the two refusals of the registrar to reconstitute the panel alleging that the MRP certificate was based upon a fundamental mistake.

The petition was dismissed. The B.C. Supreme Court found that the applicant had not exhausted his appeals with respect to the registrar's decisions within the statutory framework before seeking judicial review and had not sought judicial review of the relevant Appeal Division decision. Therefore, the court held this was not an appropriate case in which it should interfere by way of judicial review.

11.2 British Columbia Court of Appeal Decisions

***Powell Estate v. B.C. (W.C.B.)*, [2003] B.C.J. No. 1985 (QL), 2003 BCCA 470 [Also referred to as *Atchison v. B.C. (W.C.B.)*]**

Appeal Division Jurisdiction – whether Appeal Division could reconsider its own decisions – whether Appeal Division could reconsider decisions of the Workmen's Compensation Board made in the 1950s

James Atchison fell from a spar tree in 1937 and sustained serious injuries, for which he received a permanent partial disability pension from the WCB. In 1944, Atchison stopped working and was granted a full permanent disability pension. In 1955 Atchison died. His widow (Mrs. Powell) was denied a widow's pension on the basis that her husband's death was not related to his 1937 workplace accident. That decision was upheld by the commissioners of the WCB in 1956, and again in 1957 on an application for reconsideration.

In February 2000, a panel of the Appeal Division heard an application for reconsideration and concluded that Atchison's death was related to his workplace injury. The Council of Forest Industries immediately sought a reconsideration of the February 2000 decision. The Appeal Division reconsidered the February 2000 ruling and on April 24, 2001 a panel held that the Appeal Division had erred in holding in February 2000 that it had jurisdiction to reconsider the 1956 and 1957 decisions.

Duncan Atchison, the son of the deceased, applied for judicial review, arguing that the Appeal Division had no jurisdiction to reconsider its own decision, and had jurisdiction to reconsider the earlier 1957 decision of the Commissioners. The B.C. Supreme Court dismissed the application for judicial review: *Atchison v. Workers' Compensation Board,* [2001] B.C.J. No. 2509, 2001 BCSC 1661. Atchison appealed.

At issue was whether a panel of the Appeal Division had jurisdiction to: (a) reconsider a previous decision of a different panel of the Appeal Division, and (b) reconsider decisions of the WCB made in 1956 and 1957.

The appeal was dismissed. The B.C. Court of Appeal held that the Appeal Division was able to reconsider a decision of another panel of the Appeal Division and correct its own jurisdictional error. The court also held the Appeal Division was correct in finding it lacked jurisdiction to reconsider the 1956 and 1957 decisions of the WCB.

***Seime v. B.C. (W.C.B.)*, [2003] B.C.J. No. 106 (QL), 2003 BCCA 41**

Moving and Living Expenses – question about the decision that these expenses were not reasonably necessary

An MRP issued a certificate that the worker had a psychological condition triggered by an occupational exposure which featured a perception of dry irritated eyes. The worker was awarded compensation. The worker's doctor had reported that he may be better off in a moist climate so he moved to the west coast. The worker's claim for the move and higher living expenses was denied by the WCB. The appeal to the Appeal Division was dismissed. On judicial review, the Supreme Court justice allowed the application on this issue remitting the worker's claim for moving expenses and increased living expenses to the WCB for reconsideration.

The WCB appealed. The B.C. Court of Appeal allowed the appeal, set aside the order of the B.C. Supreme Court and dismissed the judicial review application. The Court of Appeal found that the Appeal Division did not err in its analysis. The Appeal Division found that the WCB was not wrong in determining that the expenses were not reasonably necessary and that it did not err in refusing this discretionary payment. The Appeal Division did not limit its examination to the objective medical necessity of the move. It recognized that the move would, in fact, be of some comfort to the worker, but found that the WCB was not wrong in finding that, in spite of the increased comfort, it was not reasonably necessary to the health of the worker.

***Jones v. B.C. (W.C.B.)*, [2003] B.C.J. No. 2556 (QL), 2003 BCCA 598**

Availability of Internal Remedies – Jurisdiction of MRP – whether MRP decision was patently unreasonable

Jones sustained injury to his lower back in 1981 and was awarded a permanent partial disability pension and a loss of earnings pension by the Appeal Division. The employer challenged the Appeal Division's conclusions regarding Jones' medical condition and the WCB referred that issue to an MRP. The MRP was directed to answer specific questions put to it, the answers to which constitute a certificate that is protected by a privative clause. As a result of the MRP certificate, the loss of earnings pension award was terminated by the WCB. In issuing its certificate, the MRP said, in part based on an earlier opinion of a psychologist, that Jones tended to exaggerate his disability and that in its view he was capable of returning to his pre-injury employment. Jones appealed that conclusion to the Review Board which in a majority decision held the MRP was unresponsive to the questions posed when it issued its certificate. That decision was overturned on appeal by the Appeal Division.

Jones applied for judicial review, challenging both the MRP certificate and the decision by the Appeal Division, which had found that there was no jurisdictional error in the manner in which the MRP answered the questions put to it when it issued its certificate. The trial judge dismissed the petition finding that since Jones had an adequate alternate remedy by arguing for a narrow reading of the MRP certificate at the implementation stage, a course which he actually followed, he could not now seek to quash the certificate by way of judicial review. Regarding the Appeal Division decision, the judge said Jones could have sought a review of that decision by an MRP and not having done so he failed to exhaust an internal remedy.

The Court of Appeal allowed Jones' appeal and remitted the petition back to the Supreme Court for a new hearing on the merits. The trial judge erred in that Jones was not precluded from seeking judicial review by exercising his internal appeal rights, rather exhausting those rights was a prerequisite to applying for judicial review. In addition, an appeal to an MRP from the Appeal Division decision was not available as an adequate alternate remedy as suggested by the trial judge since the Appeal Division decision did not contain medical findings. The court ordered a new hearing in the Supreme Court where the merits could be examined on a proper basis. At the same time the court noted that on the merits, a reasonable argument could be made that the MRP exceeded its jurisdiction by purporting to decide Mr. Jones' employability. The decision may also have been patently unreasonable in failing to reconcile the finding that Jones had a 12.5% permanent functional impairment with the opinion that he could return to moderate to heavy pre-injury employment. If the MRP decision exceeded its jurisdiction or was patently unreasonable, the subsequent Appeal Division decision may have been without foundation.

***Burnett v. B.C. (W.C.B)* (2003), 16 B.C.L.R. (4th) 203 (C.A.), [2003] 10 W.W.R. 1, 2003 BCCA 394**

Discrimination – Section 17 Survivors' Benefits – whether the treatment of younger spouses in the Act violates section 15(1) of the Charter of Rights and Freedoms (Charter)

At issue in the appeal was whether section 17 of the Act that provides for the different economic treatment of younger, as compared with older, widowed spouses when their children cease to be dependent, amounts to "discrimination" on the ground of age for the purposes of section 15(1) of the Charter. The worker was killed in a work-related accident in 1980. Under the provisions of the Act, the surviving spouse received a lump sum payment and was no longer entitled to a monthly pension because she was less than 40 years of age when her son ceased to be dependent. Had she been 40 or older when her child ceased to be dependent, she would have been entitled to the monthly pension for the rest of her life.

The respondent appealed to the Review Board and the Appeal Division, both of which denied her appeal. She then applied to the Supreme Court for judicial review of the

decision of the Appeal Division. The chambers judge decided the provisions that terminated her monthly pension and provided a capital sum violated section 15(1) of the Charter. The WCB appealed from that decision.

The appeal by the WCB was allowed. The legislative scheme does have a significant disadvantageous economic impact on younger spouses. However, the differential treatment does not amount to discrimination or a violation of section 15(1) of the Charter. The Supreme Court of Canada has been at pains to limit the application of section 15(1) to cases where the individuals affected by the impugned legislation suffer more than economic detriment or disadvantage. Something more is required to find that economic disadvantage is constitutionally significant. Younger spouses do not suffer from a "pre-existing disadvantage", within the meaning of section 15(1), because of previous child-care responsibilities. Their disadvantage is economic, and has no roots in stereotypes, prejudices or systemic vulnerability.

NOTE: Leave to appeal to the Supreme Court of Canada was refused February 26, 2004.

11.3 Supreme Court of Canada

***Martin v. Nova Scotia (W.C.B.)* (2003), 4 Admin. L.R. (4th) 1, 28 C.C.E.L. (3d) 1, 2003 SCC 54**
[Companion Case*: Paul v. British Columbia (Forest Appeals Commission),* [2003] 11 W.W.R. 1, 18 B.C.L.R. 4th 207, 2003 SCC 55

Administrative Tribunal's Jurisdiction to Apply the Charter – Section 15(1) of the Charter – discrimination based on physical disability – chronic pain

The *Functional Restoration (Multi-Faceted Pain Services) Program Regulations* (the Regulations) and portions of section 10B of the Nova Scotia *Workers Compensation Act* (NS Act) exclude chronic pain from the purview of the regular workers' compensation system. They provide, in lieu of the benefits normally available to injured workers, a four-week functional restoration program beyond which no further benefits are available. The appellants, who suffer from chronic pain attributable to a work-related injury, argue that the Regulations and portions of section 10B of the NS Act infringe section 15(1) of the Charter. Also at issue is whether the Appeals Tribunal has the jurisdiction to address the Charter argument.

The Supreme Court of Canada held the Appeals Tribunal does have jurisdiction to consider the constitutionality of the challenged provisions. Administrative tribunals which have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. At the same time, there are some limitations on

administrative tribunals as decisions of administrative tribunals based on the Charter are subject to judicial review on a correctness standard and the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. (The court refrained from expressing any opinion as to the constitutionality of a provision that would, for instance, remove Charter jurisdiction from a tribunal without providing an effective alternative administrative route for Charter claims.)

The court went on to find that portions of section 10B of the NS Act and the Regulations infringe section 15(1) of the Charter and the infringement is not justified under section 1 of the Charter. By entirely excluding chronic pain from the application of the general compensation provisions of the NS Act and limiting the applicable benefits to a four-week Functional Restoration Program for workers injured after February 1, 1996, the NS Act and the Regulations clearly impose differential treatment upon injured workers suffering from chronic pain on the basis of the nature of their physical disability. The differential treatment is discriminatory because such workers are subject to uniform, limited benefits based on their presumed characteristics as a group. The denial of the reality of the pain suffered by the affected workers reinforces widespread negative assumptions thereby demeaning the dignity of chronic pain sufferers.

11.4 Other Court Decisions

Laboucane v. Brooks, [2003] B.C.J. No. 1886 (QL), 2003 BCSC 1247

A worker was injured while performing a welding job on a fishing boat moored in a harbour used by marine vessels. The worker applied for and received compensation under the Act. Under section 11 of the Act, the WCB certified that the worker was injured in the course of employment, that the welding company which employed him was engaged in an industry covered by the Act, and that the owner/operator of the boat was also a worker for the purposes of the Act.

The injured worker commenced a civil action against the owner/operator alleging various negligent acts. The owner/operator served the worker's employer with a third party notice and applied for an order dismissing the action. Both the owner/operator and the employer argued that the injured worker's suit was barred by section 10(1) of the Act in light of the WCB's findings. The injured worker argued that section 10(1) did not apply as the accident occurred on a vessel docked in navigable waters. He asserted that by virtue of the doctrine of inter-jurisdictional immunity, the legislation should be read down so as not to apply to an activity falling within exclusive federal jurisdiction under section 91(10) of the *Constitution Act, 1967*.

The application was granted. Legislation providing a statutory right to no fault compensation for workers as a substitute for rights of action in tort or contract fell within provincial authority to legislate regarding property and civil rights under section 92(13) of the *Constitution Act*. Accordingly, section 10 of the Act was valid and applied even though the worker was injured on a vessel located in navigable waters. The work being

performed was so far removed from navigation and shipping that the application of the legislation did not in any way encroach on the federal power relating to these subjects. Even if it did somehow encroach on this federal power, it did not affect the core of the federal power or impair a federal undertaking. Accordingly, the doctrine of inter-jurisdictional immunity did not apply.