



WCAT *Workers' Compensation
Appeal Tribunal*

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2004 ANNUAL REPORT
OF THE
WORKERS' COMPENSATION APPEAL TRIBUNAL

For the year January 1 to December 31, 2004

Submitted by:
Jill Callan, Chair
March 15, 2005



March 15, 2005

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

Dear Minister:

RE: Workers' Compensation Appeal Tribunal 2004 Annual Report

I am pleased to forward the 2004 Annual Report of the Workers' Compensation Appeal Tribunal for the year ended December 31, 2004. 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	<i>Workers Compensation Act</i> , R.S.B.C. 1996, c. 492
<i>Administrative Tribunals Act</i>	<i>Administrative Tribunals Act</i> , S.B.C. 2004, c. 45 (Bill 56)
Appeal Division	Appeal Division of the Workers' Compensation Board
<i>Attorney General Statutes Amendment Act</i>	<i>Attorney General Statutes Amendment Act, 2004</i> , S.B.C. 2004, c. 57 (Bill 62)
BCCAT	British Columbia Council of Administrative Tribunals
<i>Miscellaneous Statutes Amendment Act</i>	<i>Miscellaneous Statutes Amendment Act, 2004</i> , S.B.C. 2004, c. 23 (Bill 18)
MRP	Medical Review Panel
MRPP	<i>Manual of Rules of Practice and Procedure</i>
Review Board	Workers' Compensation Review Board
Review Division	Review Division of the Workers' Compensation Board
RSCM I	<i>Rehabilitation Services and Claims Manual, Volume I</i>
RSCM II	<i>Rehabilitation Services and Claims Manual, Volume II</i>
WCAT	Workers' Compensation Appeal Tribunal
WCB	Workers' Compensation Board
<i>Workers Compensation Amendment Act (No.1)</i>	<i>Workers Compensation Amendment Act, 2002</i> S.B.C. 2002, c. 56. (Bill 49)
<i>Workers Compensation Amendment Act (No. 2)</i>	<i>Workers Compensation Amendment Act (No. 2), 2002</i> , S.B.C. 2002, c. 66 (Bill 63)

1. CHAIR'S MESSAGE

The Workers' Compensation Appeal Tribunal (WCAT) was established effective March 3, 2003 as an independent appellate tribunal in the workers' compensation system. Accordingly, 2004 was WCAT's first full calendar year of operations. As a result of the dedicated efforts of all staff, 2004 has been a successful year.

The Workers' Compensation Review Board (Review Board) and the Appeal Division of the Workers' Compensation Board (WCB) 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.

I am pleased to report that as of December 31, 2004, the backlog inherited from the Review Board and Appeal Division had been reduced to 5,939 appeals. This represented a reduction of 16,507 appeals or 73.5% of the backlog. As of February 28, 2005, the backlog had been reduced by 77.9% to 4,950.

In 2004, WCAT continued to face the challenge of completing backlog appeals while also deciding new appeals within the 180-day statutory time frame set out in section 253(4) of the *Workers Compensation Act* (Act). During the year, WCAT vice chairs completed merit decisions on 8,650 appeals. A further 3,968 appeals were withdrawn or disposed of through summary decisions. In total, WCAT disposed of 12,618 appeals in 2004.

In 2004, there was an increased volume of appeals involving the application of the new entitlement provisions arising out of the *Workers Compensation Amendment Act, 2002* (Bill 49) and the new policies in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). We anticipate that our body of decisions in which the current provisions have been applied will expand significantly in 2005.

WCAT is required to apply the applicable policy of the WCB Board of Directors in deciding appeals (see section 250(2) of the Act). Section 251 of the Act provides an exception "if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations". It also sets out a process by which vice chairs can refer policies to me for a determination of whether the policy is patently unreasonable. If I find a policy to be patently unreasonable, I am required to give notice to the Board of Directors and they will make a binding determination in that regard. Several policies have been referred to me for determinations under section 251. Accordingly, I will be releasing a number of determinations under that section in 2005.

Pursuant to section 234(7) of the Act, in 2004 I attended four meetings of the Board of Directors of the WCB “to exchange information on matters of common interest and importance to the workers’ compensation system”. 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 Vice President of the Policy and Research Division and the Chief Review Officer of the Review Division.

I recognize that 2004 was another busy and challenging year for the advocates in the worker and employer communities because they were dealing with new reviews and appeals 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 role in enabling WCAT to process a significant number of backlog appeals in 2004 and schedule them for oral hearings.

Finally, I would like to extend my appreciation to the executive and management team, vice chairs, and staff of WCAT, who have been extremely dedicated to providing fair and timely decisions to the workers and employers of British Columbia.

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 Part 4 of the *Workers Compensation Act*, sections 231 to 260. Part 4 came about as a result of the passage of the *Workers Compensation Amendment Act (No. 2), 2002* and came into force by regulation on March 3, 2003.

(a) Changes in 2004

In 2004, Part 4 of the Act was significantly amended by sections 174 to 188 of the provincial *Administrative Tribunals Act*.

The *Administrative Tribunals Act* added section 245.1 to Part 4 of the Act and provides that sections 1, 11, 13 to 15, 28 to 32, 35(1) to (3), 37, 38, 42, 44, 48, 49, 52, 55 to 58, 60(a) and (b) and 61 of the *Administrative Tribunals Act* apply to WCAT. Section 44 of the *Administrative Tribunals Act* was later amended in 2004 by the *Attorney General Statutes Amendment Act*. All of the amendments came into force for WCAT by regulation on December 3, 2004. There were also minor amendments made to Part 4 of the Act by the *Miscellaneous Statutes Amendment Act*.

Important changes brought about by the *Administrative Tribunals Act*, along with consequent amendments to the *WCAT Manual of Rules of Practice and Procedure (MRPP)*, include:

- WCAT will no longer have jurisdiction over constitutional questions, including the *Canadian Charter of Rights and Freedoms (Administrative Tribunals Act section 44, MRPP item 2.44)*
- WCAT will have the power to make orders related to its rules under section 11 or for any matter it considers necessary to control its own proceedings (*Administrative Tribunals Act section 14, MRPP item 1.10*)

-
- WCAT will have the power to dismiss an appeal or application if:
 - it is not within its jurisdiction;
 - it was filed out of time;
 - it is frivolous, vexatious or trivial or gives rise to an abuse of process;
 - it was made in bad faith or for an improper purpose;
 - the appellant failed to diligently pursue it or failed to comply with a WCAT order;
 - there is no reasonable prospect of success; or
 - the substance of the appeal has been appropriately dealt with in another proceeding.

(Administrative Tribunals Act section 31, MRPP item 5.11)

- There is a 60-day time limit for commencing a judicial review application of a final decision of WCAT. The court may extend this time if it is satisfied that there are serious grounds for relief, a reasonable explanation for the delay, and no substantial prejudice or hardship to a person affected by the delay (*Administrative Tribunals Act* section 57, MRPP items 15.31-15.32).
- WCAT still has the authority to reconsider its own decisions on common law grounds without any time limit for bringing the application. WCAT has adopted the same standards of review as applicable to the court (*Administrative Tribunals Act* section 58, MRPP item 15.24).
- A successful party to an appeal, or a person designated in the decision, may file a certified copy of it with the Supreme Court of British Columbia and, as a result, it will have the same force and effect as if it were a judgement of the Supreme Court (Act sections 255(4) and (5), MRPP item 14.50).
- WCAT has the power to amend a decision to correct clerical or typographical errors, accidental omissions, or arithmetical errors on its own initiative or on the application of a party. Unless WCAT determines otherwise, this amendment must not be made more than 90 days after the parties have been served with the decision. WCAT also has the power to clarify its decision on application of a party within 90 days. WCAT has no authority to extend this time (Act section 253.1, MRPP items 15.20-15.23).

(b) 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. vocational 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).

(c) 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).

(d) 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 WCB 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.

(e) 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.

(f) Practice and Procedure

The rules, practices and procedures to be followed by WCAT are established by the chair. WCAT's original 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. The MRPP was amended twice in 2004: once on March 29, 2004, and again on December 3, 2004.

In addition to the substantive changes made to the MRPP in 2004, the primary structural changes include:

- Establishing binding rules under section 11 of the *Administrative Tribunals Act*. WCAT may waive or modify its rules only in exceptional circumstances.
- Establishing non-binding practice directives under section 13 of the *Administrative Tribunals Act*.
- A practice directive has been developed regarding referrals to the chair under section 251 of the Act for lawfulness of policy questions (item 12.40).
- Where a permanent disability award has been made under the current section 23(1) of the Act, WCAT will not take jurisdiction over the wage rate (item 2.23(f)).

(g) 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>).

4. MINISTRY OF SKILLS DEVELOPMENT AND LABOUR SERVICE PLAN

The workers' compensation system is one of the core service areas covered by the Service Plan of the Ministry of Skills Development and Labour (Ministry). The three components of the workers' compensation system are the WCB, WCAT, and the Workers' and Employers' Advisers Offices. The costs of operating WCAT are reimbursed to the government from the WCB 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. To facilitate WCAT's achievement of that goal, WCAT has been provided with additional resources for the initial three years of operation.

5. COST OF OPERATION

CALENDAR YEAR 2004 FOR WCAT (JANUARY 1 - DECEMBER 31)	
CATEGORY	COST
Salaries	\$ 9,916,205
Supplementary Salary Costs	\$ 143,210
Employee Benefits	\$ 2,430,520
Per Diem - WCBs and Commissions	\$ 704,105
Travel	\$ 223,832
Centralized Management Support Services	\$ 190,506
Professional Services	\$ 57,031
Information Systems	\$ 987,741
Office and Business Expenses	\$ 562,287
Statutory Advertising & Publications	\$ 0
Amortization expenses	\$ 666,352
Building Occupancy	\$ 1,068,578
Other Expenses	\$ 7,500
TOTAL EXPENDITURES	\$ 16,957,867

6. APPOINTMENTS

EXECUTIVE AND MANAGEMENT AS OF DECEMBER 31, 2004				
NAME	POSITION	BY ORDER	TERM	
			FROM	TO
Jill Callan	Chair	OIC#105/03	March 3, 2003	March 2, 2006
Luningning Alcuitas-Imperial	Sr. Vice Chair & Registrar	MO#277/03	March 3, 2003	March 2, 2005
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
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
Isabel Otter	Team Leader	MO#277/03	March 3, 2003	March 2, 2005
Susan Polsky Shamash	Sr. Vice Chair & Tribunal Counsel	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
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, 2004			
NAME	BY ORDER	TERM	
		FROM	TO
Steven Adamson	MO#277/03	March 3, 2003	March 2, 2005
Cathy Agnew	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
W. J. (Bill) Baker	WCAT Chair Appointment*	March 1, 2004	February 28, 2006
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
Georgeann Glover	WCAT Chair Appointment*	March 1, 2004	February 28, 2006
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

NAME (cont'd)	BY ORDER	TERM	
		FROM	TO
Joanne Kembel	WCAT Chair Appointment*	March 1, 2004	February 28, 2006
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
Duncan H. MacArthur	MO#277/03	March 3, 2003	March 2, 2005
Ernest C. MacAulay	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
Julie C. Mantini	WCAT Chair Appointment*	March 1, 2004	February 28, 2006
Susan Marten	MO#277/03	March 3, 2003	March 2, 2005
Heather McDonald	MO#277/03	March 3, 2003	March 2, 2005
Cecil S. Memory	MO#277/03	March 3, 2003	March 2, 2005
Renee Miller	WCAT Chair Appointment*	March 1, 2004	February 28, 2006
Herb Morton	MO#277/03	March 3, 2003	March 2, 2005
Elaine Murray	WCAT Chair Appointment*	March 1, 2004	February 28, 2006
Debbie Nider	WCAT Chair Appointment*	March 1, 2004	February 28, 2006
P. Michael O'Brien	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
Michael Redmond	WCAT Chair Appointment*	March 1, 2004	February 28, 2006
Deirdre Rice	MO#278/03	April 1, 2003	March 31, 2005
Guy Riecken	WCAT Chair Appointment*	March 1, 2004	February 28, 2006

NAME (cont'd)	BY ORDER	TERM	
		FROM	TO
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
Anthony F. Stevens	MO#277/03	March 3, 2003	March 2, 2005
Don Sturrock	MO#277/03	March 3, 2003	March 2, 2005
Eric S. Sykes	MO#277/03	March 3, 2003	March 2, 2005
David Towill	WCAT Chair Appointment*	March 1, 2004	February 28, 2006
David Van Blarcom	MO#277/03	March 3, 2003	March 2, 2005
Deborah Vivian	MO#278/03	April 1, 2003	March 31, 2005
Andrew Waldichuk	WCAT Chair Appointment*	March 1, 2004	February 28, 2006
Kathryn P. Wellington	MO#277/03	March 3, 2003	March 2, 2005
Teresa White	WCAT Chair Appointment*	December 29, 2003	December 28, 2005
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 DEPARTURES IN 2004			
NAME	EFFECTIVE DATE	ORIGINAL TERM	
		FROM	TO
Sonja Hadley	June 30, 2004	March 3, 2003	March 2, 2005
Cassandra Kobayashi	June 30, 2004	March 3, 2003	March 2, 2005
Ralph D. McMillan	September 30, 2004	March 3, 2003	March 2, 2005
Carol Roberts	August 12, 2004	April 1, 2003	March 31, 2005
Kulwinder Sall	November 30, 2004	April 1, 2003	March 31, 2005
Mike Swetlikoff	August 31, 2004	March 3, 2003	March 2, 2005
Taryn Walsh	June 25, 2004	March 1, 2004	February 28, 2006

7. EDUCATION

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 is 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 2004, the WCAT education group organized over 30 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. In addition to addressing compensation, rehabilitation and assessment issues, the sessions addressed medical issues, decision making and decision writing, procedural issues, and information technology and systems.

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 including 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 2004, members of WCAT also played an active role in the British Columbia Council of Administrative Tribunals (BCCAT). They sat on various committees, taught courses, organized the BCCAT annual education conference, and presented educational workshops at the conference.

The following is a list of sessions organized by WCAT for vice chairs and staff during 2004:

1. January 21, 2004 Occupational Diseases:
Using Epidemiology Studies to Determine Causation
2. February 11, 2004 Subjective Pain Complaints under (former) item #39.01
3. February 19, 2004 Bill 63 - Reopenings and Reconsiderations
4. February 25, 2004 Work Required Motions under RSCM item #15.20
5. March 2, 2004 Indoor Air Quality, Exposure to Molds and Medical Outcomes

-
6. March 10, 2004 Cross-Examination of Witnesses by Opposing Representatives: Its Appropriateness and Limits
 7. March 10, 2004 New POP System Training
 8. March 11, 2004 Psychological Issues
 9. March 24, 2004 Surveillance Tapes
 10. March 1-26, 2004 New Hire Training
 11. April 1, 2004 Opioids and Their Use for Treating Chronic Non-Cancer Pain: A Panel Presentation
 12. April 6, 2004 Interorganizational Training: Medical Causation and Administrative Law
 13. April 7, 2004 Vice Chairs Questioning in Oral Hearings: A Panel Discussion
 14. April 21, 2004 Weighing Evidence
 15. May 6, 2004 Permanent Disability Awards – Bills 49 and 63
 16. May 13, 2004 How to Read and Understand the Case Management System
 17. May 27, 2004 Writing Concisely (continued)
 18. June 3, 2004 Data Driven Defendable Care Code
 19. July 8, 2004 Medical Review Panel Certificates
 20. August 19, 2004 Permanent Disability Awards: Jurisdictional Issues – A Roundtable Discussion
 21. September 2, 2004 Punctuation
 22. September 16, 2004 Subjective Pain Complaints under (former) item #39.01
 23. September 23, 2004 PDES and Additional Factors
 24. September 29 and 30, 2004 Decision-Writing Workshop
 25. October 4, 2004 Out-of-Town Hearings – How To's for New Chairs
 26. October 7, 2004 Intercultural Communications and Oral Hearings
 27. October 21, 2004 Stress Claims under the Current Provisions
 28. November 22-26, 2004 ASTD's for New Vice-Chairs

-
29. November 24, 2004 Interorganizational Training: Evidence – Fact or Fiction
 30. December 2 and 7, 2004 MRPP Revisions and the new ATA
 31. December 9, 2004 Ergonomic Assessments
 32. December 16, 2004 New POP System

8. PERFORMANCE EVALUATION

Section 234(2)(b) of the Act provides the WCAT “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”. Accordingly, the chair has established performance standards and a performance evaluation process. All vice chairs seeking reappointment went through the performance evaluation process in 2004. The performance of vice chairs will be regularly evaluated on an ongoing basis.

9. STATISTICS

9.1 OVERVIEW

At the commencement of operations on March 3, 2003, WCAT committed to complete the backlog of 22,446 appeals and applications inherited from the Review Board and the Appeal Division within three years.

This section contains two summary charts.

The first chart (Number of Active Appeals) shows WCAT's progress in reducing the inventory of backlog appeals. At December 31, 2003, the backlog had been reduced from 22,446 appeals to 13,205 appeals. At December 31, 2004 the backlog stood at 5,939 appeals. This represented a reduction of 74% of the backlog since WCAT's inception.

At December 31, 2004, WCAT's active inventory of new and transition appeals stood at 3,943 appeals.

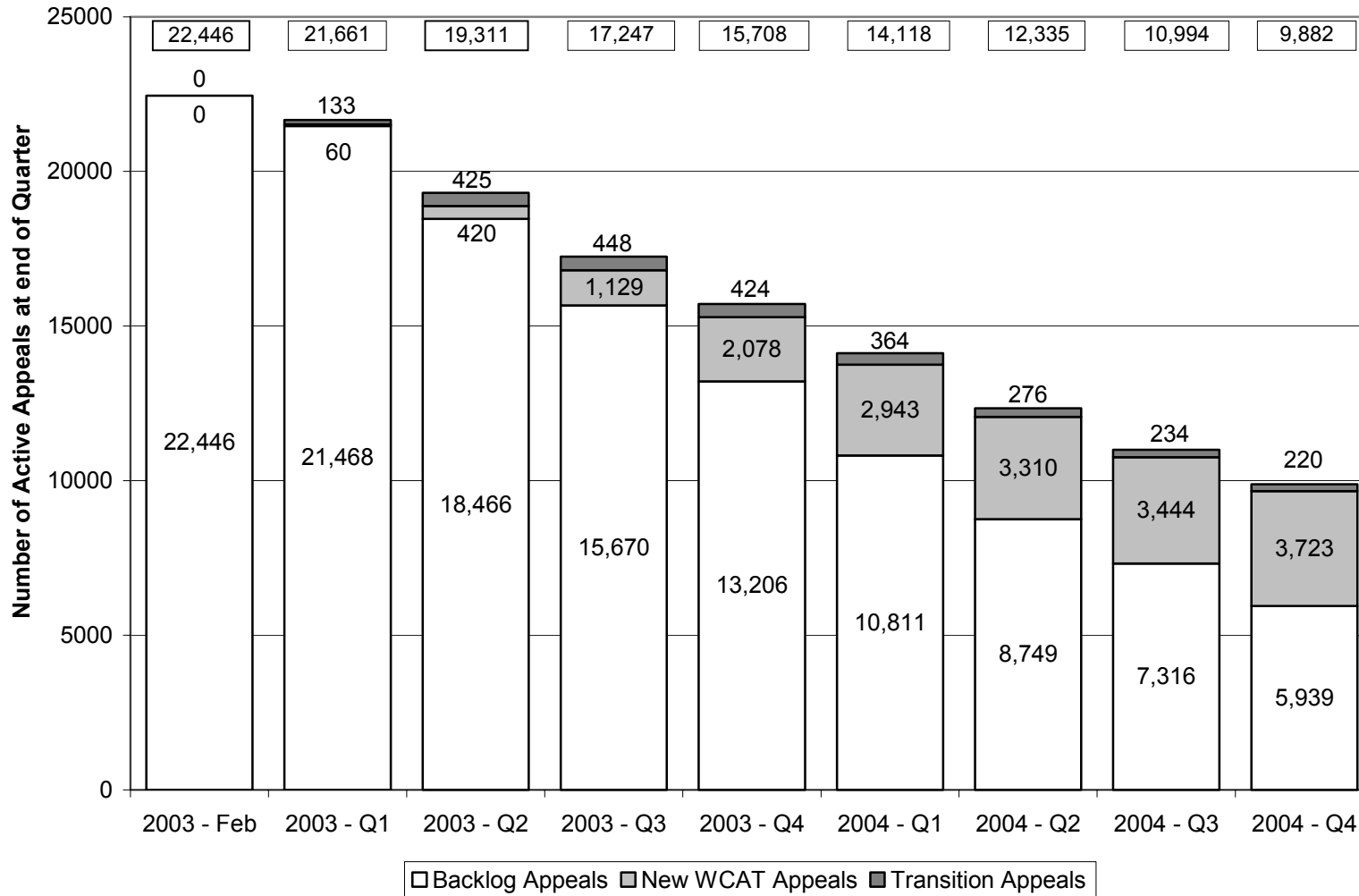
WCAT's total active inventory at year end was 9,882 appeals compared to 15,708 at the end of 2003. This represented a 37% reduction in the total appeals inventory during 2004.

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.

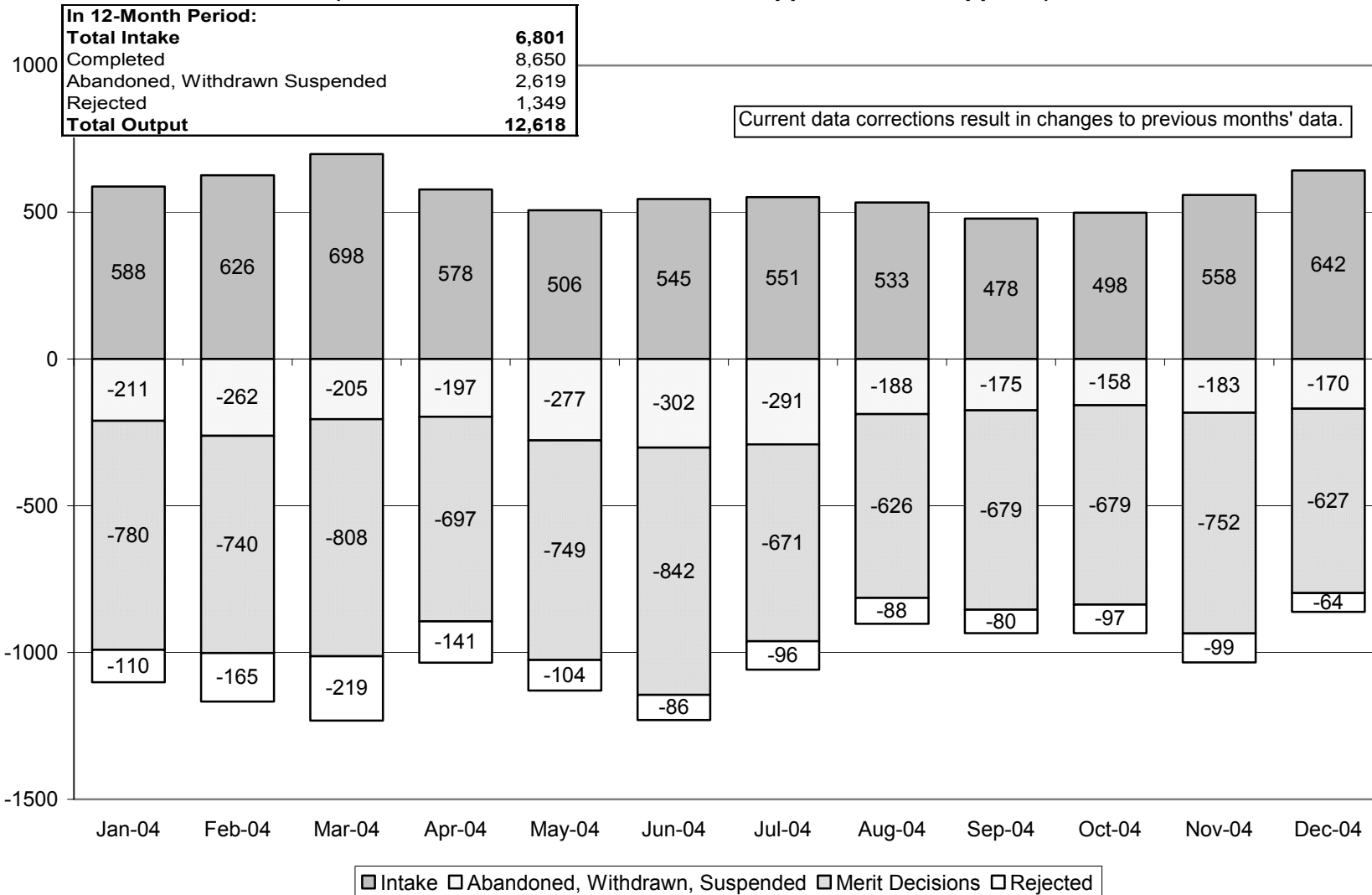
These charts include all appeals, including backlog appeals from the Review Board and the Appeal Division, new appeals, and transition appeals. WCAT records appeals by their date of origin. Where events occur which change the original type or status of an appeal, the adjusted data is restated in the statistics for that period.

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 IN INVENTORY
(Includes seized Review Board and Appeal Division appeals)**



**WORKERS' COMPENSATION APPEAL TRIBUNAL
TOTAL INTAKE AND OUTPUT IN PAST 12 MONTHS
(Includes seized Review Board and Appeal Division appeals)**



9.2 BACKLOG APPEALS

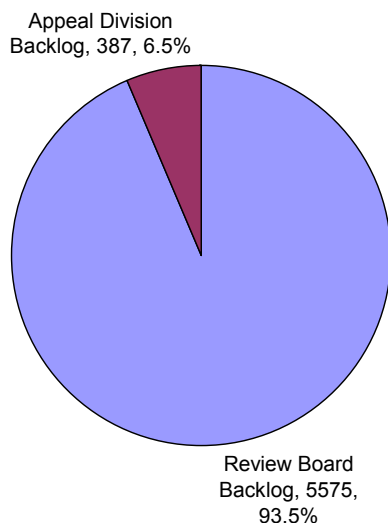
(a) Reactivated Backlog Appeals

In addition to the 22,446 appeals inherited from the Review Board and the Appeal Division, WCAT reactivated 347 eligible appeals in 2004 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 22,446 appeals, but are included as "intake" in the preceding summary chart (Intake and Output).

(b) Number of Merit Decisions

WCAT made 5,962 merit decisions on backlog appeals in 2004.

**CATEGORIES OF MERIT DECISIONS
ON BACKLOG APPEALS**



The 5,962 decided backlog appeals were comprised almost entirely of compensation appeals (5,869 or 98.4%). Other decided appeals and applications were in the categories of relief of costs (47), assessments (10), certificates for court actions (28), and prevention (8).

(c) Outcomes of Backlog Decisions

WCAT made 5,962 decisions on Review Board and Appeal Division backlog appeals. There were 5,575 merit decisions made on Review Board backlog appeals from decisions of WCB officers on compensation matters. WCAT confirmed the WCB's decisions in 58% of these cases.

There were 387 merit decisions made on Appeal Division backlog applications and appeals. Twenty-eight of these were decisions concerning applications for certificates for court action. The outcomes of the remaining 359 appeals were as follows:

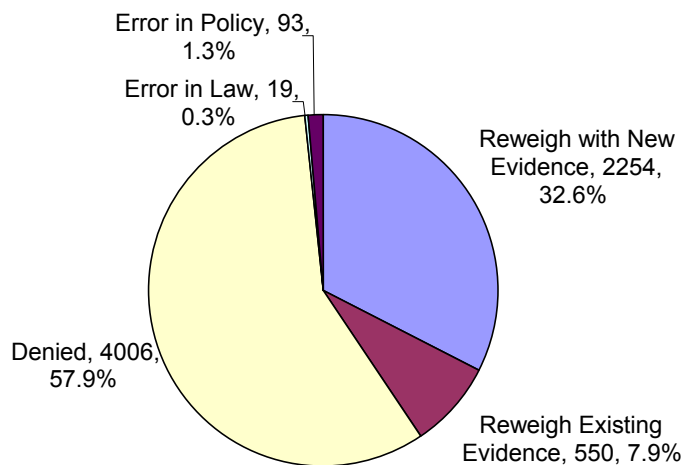
Appeal Type	Number of Decisions	Outcome	
		Confirmed	Varied
Compensation	294	61%	39%
Relief of Costs	47	49%	51%
Assessments	10	50%	50%
Prevention *	8	75%	12%

* One Prevention appeal (13%) resulted in the cancellation of a decision.

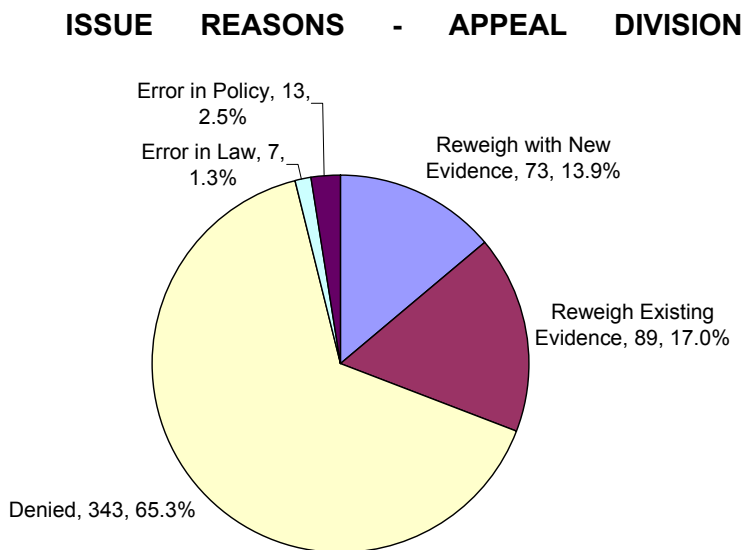
(d) Reasons for Issue Outcomes

There were 6,922 disputed issues decided in the appeal outcomes for the Review Board backlog. 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 WCB



There were 525 disputed issues decided in the appeal outcomes for the Appeal Division backlog. 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 on Backlog Appeals

WCAT made a total of 1,650 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 (1,458 - 88%) 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 153 appeals (9%) were initiated in error or did not arise from decisions that were appealable.

(f) 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	100	73	27
Reconsideration of Appeal Division decision	11	0	11

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 actions 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 2004, which were initiated under the transitional provisions set out in Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002*. 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 WCAT as Review Board appeals after that date.

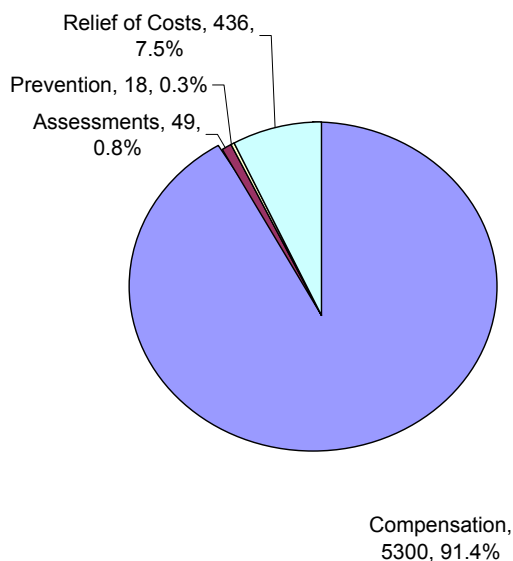
(a) Intake

WCAT received 6,454 new appeals and applications in 2004. Of these, 6,332 appeals (98%) were new appeals and applications arising from decisions made on or after March 3, 2003. The remaining 122 new appeals were transitional appeals.

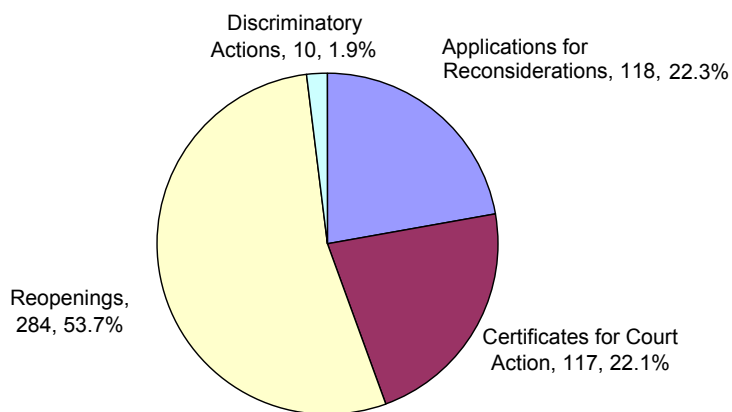
SOURCE	INTAKE
Review Division	5,803
Direct	529
Transitional	122
TOTAL	6,454

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

NEW APPEALS FROM REVIEW DIVISION BY



NEW DIRECT APPEALS BY TYPE



(b) Merit Decisions

WCAT made 2,688 merit decisions on new and transitional appeals and applications in 2004. These were comprised of 2,474 merit decisions on new appeals and 214 merit decisions on transitional appeals.

(c) Outcomes of Merit Decisions

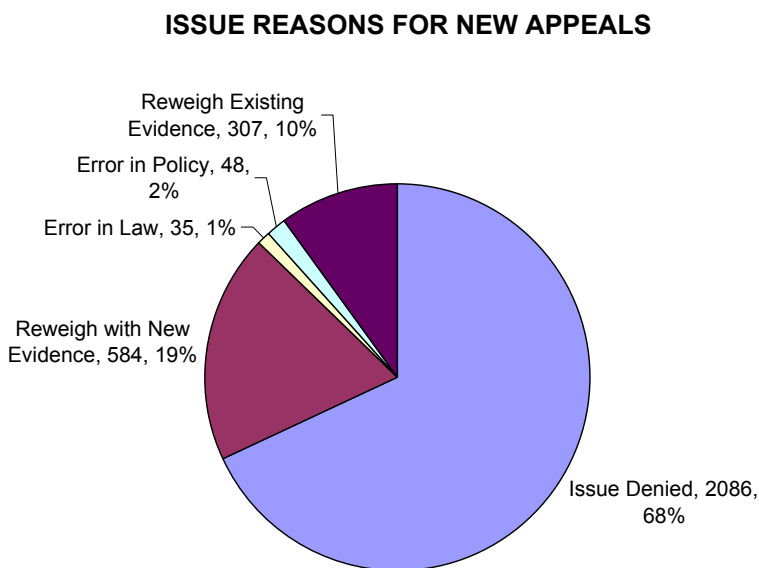
The table below shows the outcomes of WCAT's decisions on new and transitional matters. "Confirm" means that WCAT agreed with the previous decision maker. "Vary" means that WCAT varied the decision of the previous decision maker in whole or in part.

New Appeals		Outcome	
Appeal Type	Number of Decisions	Confirmed	Varied
Compensation	2,203	63%	37%
Relief of Costs	93	78%	22%
Assessments	24	88%	12%
Prevention *	2	0%	50%
Reopenings	118	76%	24%
Discriminatory Actions	14	64%	36%
Transition Appeals	214	62%	38%

* One Prevention decision was cancelled.

(d) Reasons for Issue Outcomes

There were 3,060 disputed issues decided in the 2,688 new 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 2,326 summary decisions on new and transitional appeals. Of these decisions, 1,106 (47.5%) confirmed that the appellant had abandoned or withdrawn the appeal. WCAT found that a further 1,036 appeals (44.5%) were initiated in error or did not arise from decisions that were appealable to WCAT. A further 63 summary decisions suspended appeals.

Of the remaining 121 summary decisions, 91 concerned requests for extensions of time to appeal, 29 were requests for reconsideration, and one was a referral back to the WCB.

(f) Requests for Extensions of Time

WCAT considered 172 requests for extensions of time to appeal decisions made on or after March 3, 2003. Eighty-one of these requests were allowed and 91 were denied.

(g) Top Five Issue Groups on New WCAT Appeals

Act	Merit Decisions	Percentage of Total Decisions	Denied	Allowed / Allowed in Part
Section 5 – Compensation for Personal Injury	711	23%	72%	28%
Section 23 – Permanent Partial Disability	574	19%	58%	42%
Section 29 – Temporary Total Disability	351	12%	71%	29%
Section 6 – Occupational Disease	305	10%	68%	32%
Section 96(2) – Reopenings / Reconsiderations	152	5%	68%	32%

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 4,034 appeals (46.6% of the total) using the read and review method. WCAT decided 4,616 appeals (53.4% of the total) after convening an oral hearing.

(b) Oral Hearing Weeks

In 2004, WCAT held oral hearings in 13 locations around the province. The following table shows the number of hearing weeks that WCAT held in each location.

Location	Number of Hearing Weeks
Campbell River	3
Cranbrook	22
Castlegar	12
Courtenay	27
Fort St. John	11
Kamloops	32
Kelowna	47
Nanaimo	29
Prince George	22
Terrace	18
Victoria	29
Williams Lake	6
Total outside Richmond	258
Richmond	300
GRAND TOTAL	558

(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 during 2004. The table does not include assessment or relief of costs appeals as the appellant is always the employer in these types of appeals.

TYPE OF APPEAL	APPELLANT		
	Worker	Employer	Dependant
Compensation	89.7%	9.7%	0.6%
Discriminatory Action	75.0%	25.0%	0.0%
Direct Reopening	97.1%	2.9%	0.0%
Prevention	27.3%	72.7%	0.0%
Reconsiderations	90.4%	9.6%	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 during 2004.

TYPE OF APPEAL	PERCENT REPRESENTED WHERE APPELLANT IS:		
	Worker	Employer	Dependant
Assessment	NA	57.5%	NA
Compensation	74.3%	86.8%	63.6%
Relief of Costs	NA	94.5%	NA
Discriminatory Action	18.8%	100.0%	NA
Direct Reopening	56.0%	87.8%	NA
Prevention	50.0%	60.0%	NA
Reconsiderations	46.8%	90.0%	NA

10. PRECEDENT PANEL DECISIONS

Pursuant to section 238(6) of the Act, if the chair of WCAT determines that the matters in an appeal are of special interest or significance to the workers' compensation system as a whole, the chair may appoint a panel of up to seven members to hear the appeal (a "precedent panel").

Pursuant to section 250(3) of the Act, WCAT is bound by a decision of a precedent panel unless the specific circumstances of the matter under appeal are clearly distinguishable from the circumstances addressed in the precedent panel's decision or, subsequent to the precedent panel's decision, a policy of the board of directors of the WCB relied upon in the precedent panel's decision was repealed, replaced or revised.

WCAT did not issue any precedent panel decisions in 2004.

In 2004, the chair appointed a three-member precedent panel to hear an appeal involving an issue as to whether the panel of administrators' *Resolution 2001/10/15-03*, which provides that amended policy item #50.00 of RSCM II applies to "all decisions" to award or charge interest on or after November 1, 2001, applies to appellate decisions as well as to initial decisions.

11. WCAT RECONSIDERATIONS

WCAT decisions are "final and conclusive" pursuant to section 255 of the Act, but are subject to reconsideration based on two limited grounds:

- statutory grounds - new evidence not previously available (Act, section 256(2));
- common law grounds - an error of law going to jurisdiction.

If the reconsideration panel allows the reconsideration application and finds the decision void, in whole or in part, a new WCAT panel will hear the appeal afresh.

During 2004, WCAT received 118 applications for reconsideration and issued 44 reconsideration decisions. In total, 13 reconsideration applications were allowed. The outcomes of the reconsideration decisions were as follows:

Type of Reconsideration	Number of Reconsideration Decisions	Allowed	Denied
Statutory Grounds	9	3	6
Common Law Grounds	28	10	18
Both Grounds Alleged	7	0	7
TOTAL	44	13	31

11.1 RECONSIDERATION ON COMMON LAW GROUNDS

WCAT has limited authority to reconsider its decisions where there was an error of law going to jurisdiction.

There are three main types of errors of law going to jurisdiction:

- breaches of the rules of “natural justice” (procedural fairness);
- errors of law with respect to jurisdiction;
- patently unreasonable errors of fact, law, or exercise of discretion that do not involve jurisdiction.

WCAT must correctly apply and interpret statutory provisions related to its jurisdiction. This means that WCAT must not do something which it does not have the statutory authority or power to do. A jurisdictional error will be grounds for reconsideration.

In deciding whether there is an error of law going to jurisdiction regarding findings of fact, law, or the exercise of discretion, the test is whether the finding was “patently unreasonable”.

Decisions will not be set aside simply because they contain an error of fact, law, or the exercise of discretion, or because they are incomplete in some respect. In most cases, an error of law going to jurisdiction will not be established based on the way a panel has weighed the evidence, even if another panel would have reached a different conclusion. The error must be one that is “patently unreasonable” or not capable of being rationally supported. Examples of patently unreasonable findings of fact would be findings based on no evidence, or the rejection of undisputed evidence without explanation.

In deciding whether an exercise of discretion is patently unreasonable, WCAT will consider whether the discretion has been exercised arbitrarily or in bad faith, for an improper purpose, based entirely or predominantly on irrelevant factors, or fails to take statutory requirements into account (section 58(3), *Administrative Tribunals Act*).

11.2 RECONSIDERATION DECISIONS ON COMMON LAW GROUNDS

The following WCAT reconsideration decisions were allowed on common law grounds in 2004.

(a) Breach of Natural Justice

Decision: WCAT-2004-03571 **Reconsideration Panel:** H. Morton
Decision Date: July 5, 2004

The employer was not notified of the oral hearing. It had sent a letter expressing interest in participating in the appeal in lieu of the notice of appearance. The letter was

received beyond the 21 days allowed for a response. Proceeding with the oral hearing without providing notice to the employer was a breach of natural justice involving a denial of the respondent's right to be heard. Failure to strictly comply with the time limit was not a bar to the respondent's later participation in the appeal. (This decision is also summarized in the noteworthy decisions section of this annual report.)

Decision: *WCAT-2004-04865* **Reconsideration Panel:** H. Morton

Decision Date: September 17, 2004

The worker failed to appear for an oral hearing. The worker's appeals were considered to be abandoned because the WCAT panel was not aware of a doctor's letter documenting the worker's illness. However, that letter had been scanned into the WCB's electronic document system and was therefore accessible to WCAT. Fair procedures were not followed and there was an inadvertent breach of natural justice involving a denial of the worker's right to be heard.

Decision: *WCAT-2004-05062* **Reconsideration Panel:** H. Morton

Decision Date: September 28, 2004

There was an inadvertent error in the preliminary handling of the worker's appeal in the WCAT registry. The worker's representative was provided with a three-day extension of time for submissions. The WCAT panel was unaware of the second date and the submission when issuing the decision. This was a breach of natural justice involving a denial of the worker's right to be heard.

Decision: *WCAT-2004-05167* **Reconsideration Panel:** H. Morton

Decision Date: September 30, 2004

There was an inadvertent breach of procedural fairness with respect to the worker's right to be heard. The worker's appeal was deemed to be abandoned when the worker failed to attend an oral hearing at WCAT and failed to provide reasons for the failure to attend. On reconsideration, the worker established that the WCAT panel did not receive a letter that the worker's physician had sent to the panel explaining the worker's absence.

Decision: *WCAT-2004-05717* **Reconsideration Panel:** H. Morton

Decision Date: October 28, 2004

The WCAT panel did not receive the employer's notice of appearance and it did not provide an opportunity for the employer to participate in the appeal. This was a breach of natural justice involving a denial of the respondent's right to be heard.

Decision: *WCAT-2004-05944* **Reconsideration Panel:** H. Morton
Decision Date: November 12, 2004

The worker's appeal concerned a request for further wage loss benefits and a pension assessment. The WCAT panel took jurisdiction over the factual circumstances giving rise to the injury without notifying the worker. The mechanism of injury was implicit in the decisions appealed, however natural justice required that the worker be given specific notice of the WCAT panel's intention and an opportunity to provide a submission on the issue.

Decision: *WCAT-2004-06054* **Reconsideration Panel:** H. Morton
Decision Date: November 18, 2004

The worker's representative withdrew four appeals without consulting with or receiving instructions from the worker. The worker's signed authorization was three years old, the withdrawal request had not been copied to the worker, and WCAT had previously received communication from the worker that he wanted to proceed with these appeals. The decision to accept the representative's withdrawal involved a lack of procedural fairness. There was a breach of natural justice involving the worker's right to be heard because it was based on communication from someone who was no longer authorized to represent the worker.

(b) Error of Law with Respect to Jurisdiction

Decision: *WCAT-2004-05730* **Reconsideration Panel:** H. Morton
Decision Date: October 29, 2004

The WCAT panel's conclusion that portions of the American Thoracic Society guidelines were inconsistent with B.C. workers' compensation principles was based on no evidence, or at least no evidence referenced in the panel's decision.

Decision: *WCAT-2004-06482* **Reconsideration Panel:** H. Morton
Decision Date: December 7, 2004

The worker's appeal involved a determination of the worker's long-term wage rate. The WCAT panel failed to consider a key element of WCB policy concerning the possibility that the worker's low earnings were because of the worker's youth and that, but for the injury, the worker's earnings would have increased. Therefore, the worker was denied the benefit of a consideration which should have been provided under the Act.

(c) Patently Unreasonable Error**Decision:** WCAT-2004-04258 **Reconsideration Panel:** J. Callan**Decision Date:** August 12, 2004

The WCAT panel denied the worker an extension of time to appeal. This decision was patently unreasonable because the WCAT panel misunderstood the nature of the remedy the worker was seeking. The WCAT panel thought the worker was seeking post-surgery wage loss benefits when, in fact, the worker was seeking wage loss benefits for the period prior to the surgery. If the WCAT panel had understood the nature of the remedy sought, it would likely have decided the application on the basis of the criteria that were applied to such applications by the Appeal Division. Instead the WCAT panel found it unnecessary to apply those criteria because it denied the application on the basis that the remedy sought could not be granted on appeal.

12. NOTEWORTHY WCAT DECISIONS

WCAT issued a large number of noteworthy decisions in 2004. This section provides summaries only of those noteworthy WCAT decisions published in the *Workers' Compensation Reporter* in 2004 or that were pending publication at the end of the year. The summaries are included below for informational purposes only.

All WCAT decisions from 2004, including noteworthy decisions and their summaries, are publicly accessible and searchable on the WCAT website (see www.wcat.bc.ca). The website also contains a document listing all noteworthy WCAT decisions, organized by subject. The subject categories are:

1. Substantive Issues
 - 1.1. Whether Employment Caused Injury or Disease
 - 1.2. Whether Injury Arose out of and in the Course of Employment
 - 1.3. Out-of-Province Injuries
 - 1.4. Chronic Pain
 - 1.5. Mental Stress/Section 5.1
 - 1.6. Compensation in Fatal Cases
 - 1.7. Entitlement to Temporary Disability Wage Loss Benefits
 - 1.8. Classification of Worker for Wage Rate Purposes
 - 1.9. Calculating Average Earnings/Wage Rate
 - 1.10. Permanent Disability Awards
 - 1.11. Vocational Rehabilitation (section 16)
 - 1.12. Payment of Health Care Benefits (section 21)
 - 1.13. Payment of Interest (Blatant Error)
 - 1.14. Recurrence of Injury
 - 1.15. Discriminatory Actions
 - 1.16. Who is an "Employer"
 - 1.17. Assessments: Assessable Payroll
 - 1.18. Assessments: Employer Classification
 - 1.19. Assessments: Change in Ownership
 - 1.20. Experience Ratings
2. WCB Procedural Issues
 - 2.1. What Constitutes a "Decision"
 - 2.2. Scope of Board's Duty to Consult when Creating Policy
 - 2.3. What Board Policies are Binding
 - 2.4. WCB Reconsiderations
 - 2.5. Reopenings
 - 2.6. Burden of Proof (section 250(4), section 99(3))
 - 2.7. Discriminatory Actions
 - 2.8. Failure to Provide Information to Board

3. WCAT Procedural Issues
 - 3.1. WCAT Jurisdiction
 - 3.2. Stay of Review Division Order Pending Appeal (section 244)
 - 3.3. Section 11/256 Certifications to Court
 - 3.4. WCAT Reconsiderations
 - 3.5. WCAT Extensions of Time
 - 3.6. Abandoning a WCAT Appeal
 - 3.7. Applications to WCAT to Stay an Appealed Decision (section 244)
 - 3.8. Withdrawing a WCAT Appeal
 - 3.9. Referrals Back to WCB
 - 3.10. Section 251 Lawfulness of Policy Determinations
 - 3.11. Transitional Appeals

12.1 SUBSTANTIVE ISSUES

(a) Chronic Pain

Decision: WCAT-2004-01842 **Panel:** N. Alcuitas-Imperial

Decision Date: April 14, 2004

Effective date of new chronic pain policy, #39.01 of RSCM I, formerly entitled “subjective complaints” – Definition of “initial adjudication” with regard to the effective date of chronic pain pensions – The phrase “initial adjudication” in the Panel of Administrators’ Resolution 2002/11/19-04, which amended the policy, means an initial adjudication with respect to entitlement for compensation for subjective, chronic pain, not initial adjudication of the claim

The WCB issued a pension decision on January 22, 2003 on a worker’s bilateral elbow claim, and, *inter alia*, awarded the worker a small percentage of total disability to recognize his subjective complaints. The worker sought a review and then an appeal of that decision, and the appeal was allowed in part.

On the issue of subjective complaints, an issue arose as to which version of policy #39.01 of the RSCM I applied. The WCB officer applied this previous version of the policy in reaching the decision under appeal. However, this policy was amended by the WCB’s panel of administrators by *Resolution 2002/11/19-04*. The new version of the policy is entitled “Chronic Pain” and sets out guidelines for assessment of section 23(1) awards for “workers who experience disproportionate disabling chronic pain as a compensable consequence of a physical or psychological work injury.” If the worker was found to have chronic pain that is disproportionate to the permanent impairment, an award of 2.5% of total disability will be granted. Point #3 of the resolution, which deals with the effective date of the policy change, states that: “This resolution applies to new claims received and all active claims that are currently awaiting an initial adjudication”. Point #4 of the resolution states that it is effective on

January 1, 2003. The term “initial adjudication” in the resolution is ambiguous and could be interpreted to mean the initial adjudication of the claim itself (i.e. whether there is a compensable condition), or the initial adjudication of the question of subjective, chronic pain as a compensable consequence (which may arise while the worker is still temporarily disabled or when the worker is undergoing assessment for a section 23(1) award). Although the WCB has issued a practice directive (Practice Directive #61 on “Pain and Chronic Pain”) on the new version of the policy, there was no further interpretative guidance on the effective date of the new policy. The question of which version of the policy applied in this case arose because the WCB’s pension decision of January 22, 2003 was issued after the effective date of the new policy.

The panel found that the phrase “initial adjudication” in the panel of administrators’ resolution means an initial adjudication with respect to entitlement for compensation for subjective, chronic pain. This means that all active claims awaiting an initial adjudication on subjective, chronic pain (whether the worker’s condition is still temporary or has become permanent) on and after January 1, 2003 should be considered in light of the new version of the policy. This was the most reasonable approach in light of the stated purposes behind the policy amendment to bring clarity to the consideration of the question of subjective, chronic pain in light of current scientific and medical knowledge. A similar conclusion was reached in *WCAT Decision #2004-00820*.

The WCB officer first dealt with the worker’s entitlement to compensation for subjective, chronic pain in the April 23, 2002 memo, but it wasn’t until January 2003 that he issued a decision letter formally awarding the pension award under appeal. What should be considered the initial adjudication of the worker’s entitlement to compensation for subjective, chronic pain in this case: the April 2002 memo or the January 2003 decision letter? The panel found that the initial adjudication of the worker’s entitlement to compensation for subjective, chronic pain occurred in January 2003. Although for purposes of registering appeals WCAT may take jurisdiction over memos or other forms of correspondence on a worker’s claim file, it interpreted the phrase “initial adjudication” to mean the formal communication of a decision to the worker. In reaching its conclusion, the panel noted policy item #99.20. Since the initial adjudication of the worker’s entitlement to compensation for subjective, chronic pain took place after January 1, 2003, the new version of the policy at item #39.01 of the RSCM I applied. On review of the evidence, the panel concluded that the worker was entitled to an additional award under section 23(1) for specific chronic pain that was disproportionate to his impairment.

(b) Mental Stress/Section 5.1**Decision:** WCAT-2004-02347 **Panel:** A. Stevens**Decision Date:** May 5, 2004***Mental stress claim under section 5.1 of the Act – Claim for mental stress denied because the events were not “sudden and traumatic” as contemplated in policy item #13.30 of RSCM II***

The worker, a receptionist, observed a female client ranting and raving in the waiting area for about ten minutes, and believed the client assaulted a co-worker upstairs, although she herself did not witness it or any other violent criminal act. She was behind the counter, was not herself threatened, nor did she witness an event that involved death or injury. She was off work for about two months. The issue was whether she was entitled to compensation for mental stress pursuant to section 5.1 of the Act.

The panel reviewed the definition of the terms “acute reaction” and “sudden and unexpected traumatic event” in policy item #13.30, and found the events were not of the type contemplated as being a “sudden and traumatic event” as required by that policy and section 5.1. In coming to its conclusion, the panel accepted that emotional reactions are individualized and differ between people, and the argument that neither the Act nor policy imparts an objective evaluation of the reaction with reference to the average worker. However, the events were not of the type to which a claim for mental stress ought to be accepted.

(c) Classification of Worker for Wage Rate Purposes**Decision:** WCAT-2004-02208 **Panel:** R. Lane**Decision Date:** April 29, 2004***Casual workers – Wage rate – Section 33.5 of the Act – Item #67.10 of the RSCM II***

The worker, then a flag person, suffered an injury while at work. The worker had worked for the employer for about three years. The claim was accepted by the WCB and the worker’s wage rate set using her earnings in the three-month period prior to the injury. The WCB concluded that the worker was a regular worker with part-time hours, not a casual worker under item #67.10 of the RSCM II. At issue is whether the worker’s initial wage rate has been properly set.

The panel concluded that the policy at item #67.10 of the RSCM II applies to the worker’s circumstances as she was a casual worker. The worker worked for no other employers from May 2002 onward, yet her employment with the accident employer was not consistent. She worked an average of about 30 hours a month with the accident employer from May 2002 to December 2002. She did not work again until February 2003. Those circumstances indicate that her on-call employment amounted to a few days a month and that fits with the example found in Practice Directive #33B of being a

casual worker on call with a single employer. Accordingly, the worker's initial wage rate should be set using her earnings in the 12-month period immediately preceding her injury.

Decision: WCAT-2004-02012-RB **Panel:** L. Campbell
Decision Date: April 22, 2004

Longshoreman – Casual workers – Wage rate – Section 33.5 of the Act – Item #67.10 of the RSCM II – Effective date of policy change.

The worker, a longshoreman, was injured at work on October 23, 2002. The WCB accepted the worker's claim and set the wage rate on the basis that the worker was a casual worker. The worker appeals this decision.

The WCB board of directors, on March 18, 2003, approved changes to item #67.10 of the RSCM II which deleted the reference to mandatory policy treatment of longshore workers as casual workers. The panel noted that the RSCM II states that the change in the policy applies to "adjudicative decision" on or after March 18, 2003, however, the directors' resolution stated that it was effective March 18, 2003 and applied to "all decisions made on or after that date". As the decision is being rendered after March 18, 2003, the panel found that the applicable policy is item #67.10 as it read after the revision on that date. The panel concluded that the worker was a regular worker for the purposes of section 33 of the Act, as he had a significant attachment to his employment as a longshore worker, he did not work outside of that employment, the employment was essentially with a single entity, and it lasted longer than three months.

(d) Calculating Average Earnings/Wage Rate

Decision: WCAT-2004-00222-RB **Panel:** J. Brassington
Decision Date: January 6, 2004

Employment Insurance payments – Section 33(3.2) of the Act – Item #68.40 of the RSCM II

The worker sustained a right knee injury on January 20, 1978. His claim was accepted and the injury and subsequent surgery were found to be compensable. One of two issues being appealed by the worker is the October 8, 2002 decision letter of a case manager in which the worker was advised that his earnings from his employment in the previous year would be used to set the long-term wage rate, but employment insurance benefits would not be counted. The worker appeals on the basis that golf course work in the area is seasonal and therefore his employment insurance benefits should have been included when calculating his average earnings.

The panel noted that both section 33(3.2) of the Act and policy item #68.40 of the RSCM II authorize the inclusion of employment insurance benefits if the worker's employment was in an occupation or industry that results in "recurring seasonal or recurring temporary interruptions of employment". The case manager did not count

employment insurance benefits in this case because the occupation was not on the list of seasonal industries set out in the policy. The panel found that as there may be factual circumstances which clearly fit the intent of section 33(3.2) of the Act, but which do not involve sufficient numbers of workers to have come to the attention of the WCB for consideration of listing, section 33(3.2) of the Act should not be read as stating that inclusion on the list is a prerequisite to consideration under section 33(3.2).

The panel concluded that, exercising the discretion contained in section 33(3.2) of the Act, the worker's employment insurance benefits should have been included in the calculation of his average earnings. Alternatively, if a "listing" is required for an industry or occupation to be considered seasonal, then Practice Directive #35 leaves open for consideration on a case by case basis whether there were recurring temporary interruptions in employment to support the inclusion of employment insurance benefits in the calculation of the worker's average earnings. In this case there were such recurring temporary interruptions so employment insurance benefits should be included in the calculation of the worker's average earnings.

(e) Permanent Disability Awards

Decision: WCAT-2004-01881-RB **Panel:** M. Carleton
Decision Date: April 16, 2004

Permanent partial disability – Sections 6(1) and 23(1) of the Act – Item #26.30 of the RSCM I

The worker appealed a decision by a disability awards officer in which she was advised that despite having a "judged degree of remaining permanent functional impairment" she was not entitled to an award for permanent partial disability because she had resumed her normal employment. In a memo which provided supporting reasons for the decision, the officer commented that the worker had been employed in the capacity of a legal secretary at the time she was diagnosed with bilateral carpal tunnel syndrome and, following treatment for that condition, she had returned to work in the same capacity. At issue is whether the worker is entitled to an award for permanent partial disability under section 23(1) of the Act.

The panel concluded that the worker is entitled to an award under section 23(1) of the Act. The worker was absent from work in order to recover from the disabling effects of her occupational disease. The panel noted that in *Appeal Division Decisions #00-1188* and *#00-1189* it was held that once the worker had established entitlement to receive temporary wage loss benefits from the WCB under section 6(1), there was no requirement for the worker to have to re-establish entitlement prior to receiving any pension award. The panel agreed with these findings and held that the policy in item #26.30 of the RSCM does not require a worker to re-establish entitlement under section 6(1) to be granted a permanent disability award, once it has already been established that the worker had received earlier wage loss benefits.

12.2 WCB PROCEDURE ISSUES

(a) What Constitutes a “Decision”

Decision: WCAT-2004-00638 **Panel:** J. Callan, M. Gelfand, H. Morton

Decision Date: February 5, 2004

Relief of claim costs – section 39(1)(e) of the Act – what constitutes a WCB decision – reviewable decision – sections 96.2(1)(a) and (b) of the Act – reconsideration – section 96(4) of the Act

The worker, who was employed as a nursing assistant at a hospital, on May 28, 2000 hurt her right arm and shoulder while assisting a patient. By decision letter dated August 28, 2000, the case manager advised the employer that relief of claim costs under section 39(1)(e) of the Act would not be granted. The employer did not appeal the August 28, 2000 decision. In reply to the employer’s later query the case manager, in a letter dated March 18, 2003, advised that relief of costs had not been applied by the August 28, 2000 decision, a copy of which was enclosed with the letter. On March 26, 2003, the employer submitted a request for review. By decision dated May 1, 2003, the review officer rejected the request for review on the ground that there was no decision made for the purpose of sections 96.2(1)(a) and (b) where a WCB officer simply communicates a previously rendered decision. The employer appealed the May 1, 2003 Review Division decision to reject the employer’s request for review.

The August 28, 2000 decision letter to the employer constitutes the WCB’s decision. The March 18, 2003 letter was merely an informational letter provided in response to the employer’s inquiry. The statutory limits on the WCB’s reconsideration authority are set out under sections 96(4) and (5) of the Act. One of the grounds for reconsideration, within 75 days, is that new evidence has been provided. The provision of new evidence does not by itself raise a new issue for adjudication, so as to give the WCB authority to further address the matter as a new issue. Thus, the WCB did not have the authority to accede to the employer’s request for further consideration of relief of costs. Further, as section 96(4) contemplates decisions to reconsider being made on the WCB’s own initiative, not “on application”, the WCB had no obligation to furnish a decision concerning the employer’s request for reconsideration.

Under section 96.2(b), an employer may request a review in a specific case of a “Board decision under Part 1 respecting an assessment or classification matter”. Applying the rules of statutory interpretation, the legislature did not intend to provide a right of review by the Review Division under section 96.2(b) with respect to the WCB’s failure to make a decision concerning an assessment matter. Accordingly, the May 1, 2003 decision by the review officer, which declined to conduct a review, was confirmed and the employer’s appeal was dismissed.

12.3 WCAT PROCEDURAL ISSUES

(a) WCAT Reconsiderations

Decision: WCAT-2004-04928 **Panel:** H. Morton

Decision Date: September 22, 2004

Reconsideration of Appeal Division Decision on common law grounds of an error of law going to jurisdiction

In this case the employer had applied for a reconsideration on the basis that the Appeal Division had applied the wrong criteria when it concluded that the worker's shoulder rotator cuff tear was an occupational disease. The panel concluded that WCAT has the jurisdiction to reconsider Appeal Division decisions on the common law ground of an error of law going to jurisdiction. This finding best ensures the attainment of the legislative objective that all Appeal Division proceedings be properly concluded. An error of law going to jurisdiction includes the application of the wrong criteria by a panel to the issue before it.

Although WCAT has the jurisdiction to reconsider its own decisions on common law grounds, as did the Appeal Division, the question of whether WCAT has the jurisdiction to reconsider Appeal Division decisions on common law grounds had not previously been considered by WCAT. In this decision, the panel said that although WCAT may be regarded as having replaced the Appeal Division, it cannot be assumed that WCAT inherited the Appeal Division's powers. Furthermore, there is a difference between a tribunal's authority to reconsider its own decisions and its authority to reconsider the decisions of a different body. However, after extensive consideration of many factors, WCAT concluded it had the jurisdiction to reconsider Appeal Division decisions on common law grounds. In this case, the panel denied the employer's application for reconsideration as it found no error of law going to jurisdiction.

Decision: WCAT-2004-03571 **Panel:** H. Morton

Decision Date: July 5, 2004

Reconsideration application – Whether there has been a breach of natural justice almost always depends on all of the circumstances, but on judicial review the test may be articulated as follows: would a reasonable person, reasonably knowledgeable about all the facts, reasonably perceive that the process is unfair?

An employer sought a reconsideration of an earlier decision, dated May 2003, alleging a breach of natural justice as a result of the failure to provide it with notice of the oral hearing. The employer had sent a letter expressing interest in participating in the appeal, in lieu of a notice of appearance form, and the letter was received beyond the 21 days specified.

Whether an alleged defect in procedure is sufficient to constitute a breach of natural justice almost always depends on all of the circumstances; it requires an assessment of the procedures and safeguards required in a particular situation. On judicial review the test for establishing whether a breach of natural justice had occurred is whether a reasonable person, reasonably knowledgeable about all the facts, would reasonably perceive that the process was unfair. Although not necessary to its decision, the panel further noted that section 58 of the *Administrative Tribunals Act, 2004*, stated that in a judicial review proceeding, questions about the application of the rules of natural justice must be decided having regard to whether, in all the circumstances, the tribunal acted fairly.

The panel found there was a breach of natural justice involving the respondent's right to be heard. It was not the general practice of the former Review Board to deny a respondent the right to participate, where the respondent expressed a wish to do so, even if this request was received late and contained in a letter rather than utilizing the notice of appearance form. Failure to strictly comply with section 5(6) of the *Workers Compensation Act (Review Board) Regulation* was not a bar to the respondent's later participation in the appeal. The decision was set aside as void and the worker's appeal must be considered afresh without reference to the prior decision.

(b) WCAT Extensions of Time

Decision: *WCAT-2004-03138* **Panel:** M. Gelfand
Decision Date: June 16, 2004

The worker applied for an extension of the 30-day statutory time period to appeal a decision of a review officer. WCAT found that the absence of appeal information in the Review Division cover letter constituted special circumstances that precluded his timely appeal.

As the decision being appealed concerned the wage rate for pension purposes, it had ongoing significance to the worker. The panel found that an injustice would result if the appeal were not allowed to proceed. The panel therefore found it appropriate to exercise its discretion to grant the extension.

(c) Abandoning a WCAT Appeal

Decision: *WCAT-2004-01441-RB* **Panel:** C. Memory
Decision Date: March 23, 2004

No show – Abandonment – Section 246 of the Act – Item 9.23 of the MRPP

The worker filed an appeal and an oral hearing date was set. The worker failed to appear for the oral hearing. The registrar's office of WCAT invited the worker to provide reasons for his failure to attend the hearing. The worker responded that he had forgotten about the hearing because of family concerns.

The panel concluded that the appeal was deemed to have been abandoned by the worker. Item 9.23 of the MRPP sets out that a failure to appear at an oral hearing without prior notice will normally only be justified by a personal emergency. The apparent rationale for a 'personal emergency' as justification for rescheduling an oral hearing is that the emergency was not predictable by the appellant and not within the appellant's control. This worker's reasons for failing to appear were not outside of his control or unpredictable by him. There was no basis for rescheduling of a hearing by reason of a personal emergency or other justification as contemplated in item 9.23 of the MRPP.

13. JUDICIAL REVIEW OF WCAT DECISIONS

A party may apply to the British Columbia Supreme Court for judicial review of a WCAT decision. On judicial review, the court examines the decision to determine whether the decision, or the process used in making the decision, was outside of WCAT's jurisdiction. A judicial review is not an appeal and does not involve an investigation of the merits of the decision. It will therefore be granted only in limited circumstances.

Pursuant to section 57(1) of the *Administrative Tribunals Act*, an application for judicial review of a final decision of WCAT must be commenced within 60 days of the date the decision is issued. The effective date of the *Administrative Tribunals Act* for WCAT was December 3, 2004. Under certain circumstances, the court may extend the time for applying for judicial review.

13.1 JUDICIAL REVIEW APPLICATIONS

The following judicial review applications were filed in 2004 but did not result in court decisions in 2004:

(a) *Cathcart v. WCB & WCAT*, Vancouver Registry No. L020447

Decisions Under Review: *Appeal Division Decision #2000-1885*
WCAT-2003-01136-RB

The worker had argued that WCAT breached the rules of procedural fairness by failing to hold an oral hearing when there was a serious credibility issue to be decided. The worker withdrew the application after the judicial review hearing, so no decision was issued.

(b) *Viking Logistics v. WCB & WCAT*, Vancouver Registry No. L040502

Decisions Under Review: *Appeal Division Decision #2002-0711*
WCAT-2004-00411

The employer argues that because of a delay in processing the employer's reassessment application, the proceedings should be stayed and the initial assessment decision set aside. The hearing of this application has been adjourned generally.

(c) *Basura v. WCB & WCAT*, Vancouver Registry No. L041009

Decision Under Review: *WCAT-2003-03018*

The worker argues that WCAT's decision denying a loss of earnings pension on the basis that there was no objective medical evidence of a permanent functional impairment is patently unreasonable. The application was heard on March 2, 2005.

(d) *Philip Wu v. WCAT*, New Westminster Registry No. L89442

Decision Under Review: *WCAT-2004-00311-AD*

The worker argues that WCAT's decision denying retroactive rehabilitation benefits was made without evidence and is patently unreasonable. This application is pending. No hearing date has been set.

(e) *Stephen R. Srochenski v. WCAT*, Prince George Registry No. 042343

Decision Under Review: *WCAT-2004-05166-RB*

The worker argues that WCAT's decision denying the continuation of temporary wage loss benefits and failing to give due or any weight to the testimony of the worker, or the medical evidence submitted by the worker, is patently unreasonable. This application is pending. No hearing date has been set.

(f) *Linda L. Pipe v. WCAT*, Vancouver Registry No. L050026

Decision Under Review: *WCAT 2004-05925*

The worker argues: (1) that WCAT's decision denying compensation for mental stress on the basis that the worker's reaction was not an acute reaction to a sudden and unexpected traumatic event was patently unreasonable; and (2) that WCAT breached the rules of natural justice by deciding the appeal on grounds not advanced by the worker in its notice of appeal without affording the worker an opportunity to be heard. This application is pending. No hearing date has been scheduled.

13.2 JUDICIAL REVIEW DECISIONS

Only one judicial review application was decided in 2004:

- (a) ***Harris v. British Columbia (Workers' Compensation Appeal Tribunal)*, [2004] B.C.J. No. 2542, 2004 BCSC 1618**

Judicial review – Application for Determination under Section 257 of the Act – Jurisdiction of WCAT – Whether worker constitutionally in the Province – Whether worker a “worker” under the Act

The worker, Harris, applied under the *Judicial Review Procedure Act* to quash a ruling of WCAT which found that he was a worker under the Act. Harris was a salesman employed by an Ontario company who was in B.C. on a business trip. He was injured in the elevator of the hotel in which he was staying while on his way to meet a client for breakfast. Harris argued that his presence in the Province was transitory and therefore he did not fall within the constitutional ambit of the Act (*British Airways Board v. Workers' Compensation Board* (1985), 61 BCLR 1 (BCCA)). He also argued that his Ontario employer had no presence in B.C. and was not an employer under the Act. Therefore he could not be a worker under the Act.

The court dismissed the petition. The court held that *British Airways* was distinguishable on its facts. In *British Airways*, flight crews performed work only on aircraft which were not constitutionally in the province. Here, Harris performed work in the hotel in which he was injured and the hotel was constitutionally in the province. His presence was not transitory. WCAT therefore had not exceeded its constitutional jurisdiction in finding Harris to be a worker under the Act.

Further, the court agreed that WCAT was bound by WCB policy which had been continued in 1994 after the scope of coverage under the Act became universal. In continuing its policy, the WCB had expressly taken *British Airways* into account. Thus, in applying the WCB's policy, WCAT had not rendered a patently unreasonable decision. It was reasonable to find that Harris, by his presence or intended presence in the province, could sufficiently meet the policy criteria of establishing his employer's presence in the province and his own status as a worker within the province.

The worker has appealed this decision to the Court of Appeal. No hearing date has been set.

14. OTHER COURT DECISIONS

The following summaries concern court decisions of significance to WCAT and the workers' compensation system.

14.1 BRITISH COLUMBIA SUPREME COURT

Switzer v. British Columbia (Workers' Compensation Board) et al, 2004 B.C.S.C. 1616

Failure to raise issue at WCAT – No reasonable cause of action

This was an application by the WCB to strike the petition as it disclosed no reasonable claim and was an abuse of process. The petitioner had sought an order that items 2 and 6 of *Resolution 2001-10-15-3* of the panel of administrators which amended previous WCB policy respecting payments of interest contravened section 15 of the *Canadian Charter of Rights and Freedoms* and should be set aside. This petition predated the bringing into force of the *Administrative Tribunals Act* on December 3, 2004. Pursuant to section 44, WCAT has no jurisdiction over constitutional questions including the *Canadian Charter of Rights and Freedoms*.

Alternatively, the petitioner sought an order that the retrospective application of the resolution was *ultra vires* the statutory authority of the WCB. The petitioner had been told by the WCB that he was not entitled to interest under the amended policy. He appealed this decision to WCAT and WCAT found he was not entitled to interest under either the original or the amended policy. The petitioner then started this action attacking the validity of the WCB's policy without having raised this issue before WCAT and without attacking the WCAT decision itself.

The WCB's application to strike the claim was granted. The chambers judge found that the petitioner was asking the court to circumvent the statutory appeal process provided for in the Act. The proper route for the petitioner was to seek judicial review of the WCAT decision or to raise the issue of the validity of the policy before WCAT.

14.2 BRITISH COLUMBIA COURT OF APPEAL

N.W. Construction (1993) Ltd. v. British Columbia (WCB), 2003 B.C.S.C. 224; upheld, 2004 B.C.C.A 182

This was a judicial review of a decision of the Appeal Division approving a claim cost levy and reducing an administrative penalty by 30%. The petitioner argued that the Appeal Division was patently unreasonable in finding that the petitioner had not exercised due diligence and that the Appeal Division had denied the petitioner natural justice because the Appeal Division had excluded the presence of the president of the petitioner company during the testimony of several of its employees. Although the court had concerns about this, the court noted that the petitioner's counsel failed to object during the course of the hearing and the petitioner could show no prejudice from having been excluded from part of the hearing. The Appeal Division's finding with respect to due diligence was not patently unreasonable as there was evidence from which the Appeal Division could come to the conclusion it did. The application was dismissed.

The Court of Appeal dismissed the petitioner's appeal. One of the judges on the Appeal Court panel went further than the chambers judge and found that the decision to exclude the president was an exercise of discretion in a procedural matter which attracts a high degree of deference. The other two judges found that the petitioner waived its right to allege a breach of the rules of procedural fairness by not objecting to the exclusion of the president at the hearing before the Appeal Division.